JUDICIAL COLLEGE

CIVIL RECORDER INDUCTION FEBRUARY 2017

POSSESSION CLAIMS

1. Secure tenancies

2. Assured tenancies

3. Mortgages

In view of the quantity of material in these notes and the relatively short length of the lecture, delegates are likely to find it helpful to have read these notes in advance and to be reasonably familiar with their contents.

Legislation passed by the Welsh Assembly in recent years has created significant differences between Welsh housing law and English housing law (see e.g. the Housing (Wales) Act 2014 and the Renting Homes (Wales) Act. These notes do not deal with recent Welsh Acts.

1. S E C U R E T E N A N C I E S

Tenants in the public sector who enjoy security of tenure have secure tenancies – see Housing Act 1985 Part IV. Secure tenants can only be evicted if

a) the landlord serves a notice seeking possession (or persuades the court that it is just and equitable to dispense with such a notice);
b) the landlord proves a ground for possession; and
c) (in most cases) the landlord satisfies the court that it is reasonable to make a possession order.

Secure tenants also enjoy other important rights, such as the right to buy (often at a discount) the right of spouses, civil partners and other family members to succeed to the tenancy after death of the tenant, rights to mutual exchange etc.

A secure tenancy exists at any time when

a) the property is a "**dwelling-house**" - see s112;
b) it is let as a "**separate dwelling**" ;
c) the "**landlord condition**" is satisfied - see s80;
d) the "**tenant condition**" is satisfied - see s81; and
e) none of the **exceptions** in Sched 1, ss89(3) and (4), 90(3) and (4) and 91(2) and (3) applies.

Licensees may enjoy the same rights as secure tenants, provided that the licence was not granted as a temporary expedient to someone who entered the premises as a trespasser. See s79(3) and (4).

The landlord condition

Housing Act 1985 s80 lists the types of landlord who can be secure landlords.

It includes

a) **local authorities** - see s4.

b) **housing action trusts** - see s4.

c) **urban development corporations** - see s4.

d) **housing co-operatives** - see s5.

Note that if a **housing association** granted a tenancy before 15 January 1989, and

all the other requirements of a secure tenancy exist, that tenancy remains a secure tenancy - see s80(1) prior to amendment by Housing Act 1988 and Housing Act 1988 s35. Tenancies granted by housing associations on or after 15 January 1989 are likely to be assured or assured shorthold tenancies within the meaning of Housing Act 1988.

The Court of Appeal has held that the landlord condition is not satisfied if there are joint landlords and only one of the joint landlords comes within the list of bodies specified in s80(1) - see **R v Council of City of Plymouth and Cornwall CC ex p Freeman** (1987) 19 HLR 328, CA.

The tenant condition

Housing Act 1985 s81

In order to gain and retain public sector security of tenure, tenants must occupy premises as their 'only or principal home' (cf Housing Act 1988 s1(1)(b) ("as his only or principal home"), Leasehold Reform Act 1967 s1 ("as his residence") and Rent Act 1977 s2 ("as his residence"). Security of tenure and associated rights, such as the right to buy, are lost if secure tenants cease to occupy premises as their only or principal home (**Sutton LBC v Swann** (1986) 18 HLR 140, CA) or if they sublet or part with possession of the whole (Housing Act 1985 s93). However, it is possible for tenants or licensees to have two or more homes in the public rented sector, but only the one which is the 'principal' home can be secure. However, ceasing to occupy does not normally terminate the tenancy – it merely stops it from being secure.

In order to maintain a 'home' a tenant need not be physically resident, so long as there is an intention to return after a temporary absence and some physical sign of continued occupation (e.g., furniture and possessions in the property). Two houses can be occupied as a home at the same time - **Crawley BC v Sawyer** (1988) 20 HLR 98, CA where a council tenant went to live with his 'girlfriend' for a period of approximately one and a half years during which time the gas and electricity supplies to the premises which he rented from the council were cut off. It was held that the rented premises remained his principal home throughout the period. See too **Islington LBC v Boyle and Collier** [2011] EWCA Civ 1450, [2012] HLR 18 where Etherton LJ said

> First, absence … may be sufficiently continuous or lengthy or combined with other circumstances as to compel the inference that, on the face of it, the tenant has ceased to occupy the dwelling as his or her home. In every case, the question is one of fact and degree. Secondly, assuming the circumstances of absence are such as to give rise to that inference: (1) the onus is on the tenant to rebut the presumption that his or her occupation of the dwelling as a home has ceased; (2) in order to rebut the presumption the tenant must have an intention to return; (3) while there is no set limit to the length of absence and no requirement that the intention must be to return by a specific date or within a finite period, the tenant must be able to demonstrate a 'practical possibility' or 'a real possibility' of the fulfilment of the intention to return within a reasonable time; (4) the tenant must also show that his or her inward intention is accompanied by some formal, outward and visible sign of the intention to return, which sign must be

> sufficiently substantial and permanent and otherwise such that in all the circumstances it is adequate to rebut the presumption that the tenant, by being physically absent from the premises, has ceased to be in occupation of it. Thirdly, two homes cases … must be viewed with particular care … Fourthly, whether or not a tenant has ceased to occupy premises as his or her home is a question of fact. In the absence of an error of law, the trial judge's findings of primary fact cannot be overturned on appeal unless they were perverse, in the sense that they exceeded the generous ambit within which reasonable disagreement about the conclusions to be drawn from the evidence is possible; but the appeal court may in an appropriate case substitute its own inferences drawn from those primary facts (para 55).

It is possible for a tenant to lose security of tenure by reason of non–occupation but to regain it by re–occupying the property before service of a notice to quit - see **Hussey v Camden LBC** (1995) 27 HLR 5, CA where, as the tenant was occupying the property as his only or principal home at the time of service of the notice to quit, the Court of Appeal held that the earlier loss of security was irrelevant.

Sub-letting of the whole of premises means that any tenancy ceases to be secure - see s93 and **Jennings v Epping Forest DC** (1993) 25 HLR 241, CA, **Muir Group Housing Association Ltd v Thornley**, (1993) 25 HLR 89, CA and **Brent LBC v Cronin** (1997) 30 HLR 43, CA, cf **Merton LBC v Salama** (1989) CAT No 89/169; June 1989 Legal Action 25, CA (parting with possession of part of premises). Parting with possession is not to be inferred simply from the fact that another person has been allowed to use and occupy a tenant's home during his temporary absence - **Lam Kee Ying v Lam Shes Tong** [1975] AC 247, PC.

Excepted categories

See Sched 1 which provides that the following cannot be secure tenancies;

a) long lessees;
b) introductory tenancies;
c) premises occupied in connection with employment;
d) land acquired for development;
e) accommodation for homeless persons;
f) temporary accommodation for persons taking up employment;
g) private sector leasing;
h) temporary accommodation during works;
i) agricultural holdings;
j) licensed premises;
k) student lettings;
l) business tenancies under Landlord and Tenant Act 1954 Part II; and
m) almshouses;
n) demoted tenancies; and
o) family intervention tenancies (Sched 1, para 4ZA, as inserted by Housing and Regeneration Act 2008 s297).

Security of tenure

A secure tenancy cannot be brought to an end by a *landlord* except by obtaining an order of the court (s82). This principle does *not* apply where the tenancy has ceased to be secure (e.g. as a result of the tenant ceasing to occupy as his or her only or principal home - see s81, but N.B. the need for a court order under Protection from Eviction Act 1977) or where the termination is brought about by the action of a tenant by serving a notice to quit on the landlord (see eg **Hammersmith and Fulham LBC v Monk** [1992] 1 AC 478; [1991] 3 WLR 1144; [1992] 1 All ER 1, HL, **Harrow LBC v Johnstone** [1997] 1 All ER 929, [1997] 1 WLR 459, HL; **Greenwich LBC v McGrady** (1983) 6 HLR 361; (1982) 267 EG 515, CA); **Newham LBC v Kibata** [2003] EWCA Civ 1785; [2004] HLR 28; and **Bradney v Birmingham CC; Birmingham CC v McCann** [2003] EWCA Civ 1783; [2004] HLR 27.

Notice of proceedings

Housing Act 1985 s83 (as introduced by Housing Act 1996 s147) provides that **the court shall not entertain possession proceedings against a secure tenant unless the landlord has served a s83 notice or the court considers it just and equitable to dispense with the requirement**.

A s83 notice must state the ground for possession and give 'particulars' of the ground (s83(2)(c)).

As to **service** see **Wandsworth LBC v Attwell** (1995) 27 HLR 536, CA and **Enfield LBC v Devonish** (1997) 29 HLR 691, CA. If there are joint tenants, it should be addressed to all of them - **Newham LBC v Okotoro** March 1993 Legal Action 11, Bow County Court.

Notices must specify a date after which proceedings may be brought which must not be earlier than the date on which the tenancy could otherwise be brought to an end by a notice to quit served by the landlord. (Normally 28 days - see also Protection from Eviction Act 1977 s5.) However, a notice may state that proceedings under Ground 2 (nuisance or anti-social behaviour) may be begun immediately. In that case, the notice should specify the date sought by the landlord as the date on which the tenant is to give up possession.

Notices cease to be in force 12 months after the date specified in the notice. If that date passes, a new notice should be served (s83(3)(b) and s83A).

Particulars of the ground

In rent arrears cases, the particulars given must at least show the amount claimed, and in all cases the notice must be sufficiently particularised to "tell the tenant what he had to do to put matters right before proceedings are commenced" - **Torridge DC v Jones** (1986) 18 HLR 107 at 114; (1985) 276 EG 1253, CA. ("The reasons for taking this action are non–payment of rent" not sufficient - notice invalid.) See too **East Devon DC v Williams and Mills** December 1996 Legal Action 13, Exeter County Court (possession claimed under Sched 2 Ground 1 (breach of the terms of the tenancy). The notice set out the relevant terms but in the section marked

'Particulars' merely repeated the terms in full, without indicating the conduct relied upon - possession claim struck out); **Slough BC v Robbins** [1996] 12 CL 353, Slough County Court (notice seeking possession giving as particulars: "Numerous complaints have been received over a period of time that annoyance and nuisance is being caused to your neighbours by noise and disruptive behaviour. This nuisance and annoyance has been investigated by my staff and I believe the complaints to be substantiated" held to be defective, proceedings struck out); and **South Buckinghamshire CC v Frances** [1985] 11 CL 152; [1985] CLY 1900, Slough County Court (where it was held that Housing Act 1980 s33(2) (now Housing Act 1985 s83(2)(c)) required detailed particulars which should be similar to those required under Law of Property Act 1925 s146. It must be obvious to tenants what they must do. Although there was discretion to allow amendment of the notice (now contained in Housing Act 1985 s84(3)), the council would not be permitted 'at a late stage' in the proceedings to amend the notice to include a schedule of dilapidations and particulars of nuisance which ought to have been included in the original notice).

However, in **Dudley MBC v Bailey** [1991] 10 EG 140; (1990) 22 HLR 424, CA Ralph Gibson LJ stated that

> "The question is whether, at the date of the notice, the landlord has in good faith stated the ground and has given the particulars of that ground. The requirement of particulars is satisfied, in my judgment, if the landlord has stated in summary form the facts which he then intends to prove in support of the stated ground for possession. Error in the particulars does not, in my judgment, invalidate the notice, although it may well affect the decision of the court on the merits". (22 HLR at p431)

See too **Marath v MacGillivray** (1996) 28 HLR 484, CA under Housing Act 1988 s8.

Section 83 expressly enables a court to give leave for a landlord to add to or alter the 'grounds' on which possession is claimed (s83(4)), but is silent about the addition or alteration of the 'particulars' required by the notice. In **Camden LBC v Oppong** (1996) 28 HLR 701, CA, the Court of Appeal held that s83(4) allows courts to add to or alter the particulars. The court stated that such leave would be granted only in circumstances where it would be just do so and that the nature and extent of the addition or alteration would always be a critical factor.

The form of notice is prescribed by the Secure Tenancies (Notices) Regulations 1987 SI No.775 (as amended). Paragraph 2(1) of the Regulations states that the notice should be "substantially to the same effect" as that contained in the Regulations. Minor variations are unlikely to invalidate a notice - see **Dudley MBC v Bailey** (1990) 22 HLR 424, CA where Ralph Gibson LJ held that a notice, although not precisely in the prescribed form, was 'substantially to the same effect'. In **City of London v Devlin** (1995) 29 HLR 58, CA, the Court of Appeal held that a notice seeking possession which had not been signed by the Director of Housing above that description which appeared on the printed form was "substantially to the same effect" as that prescribed and accordingly valid. Simon Brown LJ stated that "The reality here is that a series of aridly technical points raised by the applicant at trial were defeated by a series of creative, largely procedural rulings" which were not even

arguably impermissible.

The court considers it just and equitable to dispense with the requirement of such a notice (s83(1)(b)). This provision brings secure tenancies into line with assured tenancies (cf Housing Act 1988 s8(1)(b)). There have been few Court of Appeal decisions involving cases where landlords have completely failed to serve any notice under s83 or Housing Act 1988 s8. It is "obviously only in relatively exceptional cases where the court should be prepared to dispense with a section 83 notice". (**Braintree DC v Vincent** [2004] EWCA Civ 415; 9 March 2004 - a case where the Court of Appeal held that a judge was entitled to dispense with the notice on unusual facts.) In **Kelsey HA v King** (1995) 28 HLR 270, CA it was held that it was just and equitable to dispense with the notice requirement where a notice served was found to be invalid because it had not given adequate particulars of the complaints of nuisance. The court had regard, inter alia, to (a) developments since the commencement of proceedings; and (b) the late stage in the proceedings at which any point about the deficiency in the notice was taken.

Grounds for possession

See s84 and Schedule 2.

The most common grounds for possession are Grounds 1 (rent arrears or breach of an obligation of the tenancy) and Ground 2 (nuisance of annoyance). The burden of proof lies upon the landlord to satisfy the court that the ground for possession is made out.

Grounds on which Court may Order Possession if it Considers it Reasonable

Ground 1

Rent lawfully due from the tenant has not been paid or an obligation of the tenancy has been broken or not performed.

Ground 2

The tenant or a person residing in or visiting the dwelling-house has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality, or has been guilty of conduct causing or likely to cause a nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions,

or has been convicted of—

(i) using the dwelling-house of allowing it to be used for immoral or illegal purposes, or

(ii) an indictable offence committed in, or in the locality of, the dwelling-house.

Ground 2ZA

The tenant or an adult residing in the dwelling-house has been convicted of an indictable offence which took place during, and at the scene of, a riot in the

United Kingdom.

Ground 2A
The dwelling-house was occupied by a couple (married or otherwise) and one partner has left because of violence or threats of violence by the other towards that partner, or a member of the family of that partner who was residing with that partner immediately before the partner left, and the court is satisfied that the partner who has left is unlikely to return.

Ground 3
The condition of the dwelling-house or of any of the common parts has deteriorated owing to acts of waste by, or the neglect or default of, the tenant or a person residing in the dwelling-house.

Ground 4
The condition of furniture provided by the landlord for use under the tenancy has deteriorated owing to ill-treatment by the tenant or a person residing in the dwelling-house.

Ground 5
The tenant is the person, or one of the persons, to whom the tenancy was granted and the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by the tenant, or a person acting at the tenant's instigation.

Ground 6
The tenancy was assigned to the tenant, or to a predecessor in title of his who is a member of his family and is residing in the dwelling-house, by an assignment made by virtue of section 92 (assignments by way of exchange) and a premium was paid either in connection with that assignment or the assignment which the tenant or predecessor himself made by virtue of that section.

Ground 7
This ground relates to tenants in the employment of the landlord.

Ground 8
The dwelling-house was made available for occupation by the tenant while works were carried out on the tenant's dwelling-house and those works have been completed.

Part II
Grounds on which the Court May Order Possession if Suitable Alternative Accommodation is Available
Ground 9
The dwelling-house is overcrowded, within the meaning of Part X, in such circumstances as to render the occupier guilty of an offence.

Ground 10
The landlord intends, within a reasonable time of obtaining possession of the dwelling-house to demolish or reconstruct the building or part of the building comprising the dwelling-house, or to carry out work on that building or on land let together with, and thus treated as part of, the dwelling-house and cannot reasonably do so without obtaining possession of the dwelling-house.

Ground 10A
The dwelling-house is in an area which is the subject of a redevelopment scheme and the landlord intends within a reasonable time of obtaining possession to dispose of the dwelling-house in accordance with the scheme.

Ground 11
The landlord is a charity and the tenant's continued occupation of the dwelling-house would conflict with the objects of the charity.

Part III
Grounds on which the Court May Order Possession if it Considers it Reasonable and Suitable Alternative Accommodation is Available
See Grounds 12 to 16.

Note also the mandatory grounds for possession;
(i) against secure tenants for serious anti-social behaviour contained in Housing Act 1985 s84A where a tenant, or a person residing in or visiting the dwelling-house,

- has been convicted of a serious offence, in the locality or against the landlord or a person employed in connection with the exercise of the landlord's housing management functions etc;
- has breached a provision of an injunction under section 1 of the Anti-social Behaviour, Crime and Policing Act 2014 etc;
- has been convicted of an offence under section 30 of the Anti-social Behaviour, Crime and Policing Act 2014 consisting of breach of a provision of a criminal behaviour order committed in the locality of the dwelling-house etc
- has been convicted of an offence under the Environmental Protection Act 1990 (breach of abatement notice in relation to statutory nuisance etc); or
- the dwelling-house is or has been subject to a closure order under section 80 of the Anti-social Behaviour, Crime and Policing Act 2014 etc.

(ii) against fixed term secure flexible tenancies created by Localism Act 2011 ss154 – 166.

Reasonableness
Housing Act 1985 s84 provides that in relation to the discretionary grounds (Grounds 1 to 8) the court shall not make an order for possession unless it considers it reasonable to do so. Section provides for the making of suspended possession orders.

Housing Act 1985 s84
The court shall not make an order for possession [of a dwelling-house let under a

secure tenancy] . . . on the grounds of [e.g. arrears of rent] unless it considers it reasonable to make the order.

Housing Act 1985 s85(2)

On the making of an order for possession of such a dwelling-house on any of those [discretionary] grounds, or at any time before the execution of the order, the court may (a) stay or suspend the execution of the order.

If one of grounds 1 to 8 is proved, the court may;

a) make an outright order for possession;
b) make a suspended possession order (see N28) – an order for possession in (normally) 28 days, suspended on condition that the defendant do pay current rent and £x per week off arrears of £yyyy, the next payment to be made by 4 p.m. on [date].
c) make a postponed order (see N28A) - an order for possession which provides that the date on which the defendant is to give up possession of the property is postponed to a date to be fixed by the court on an application by the claimant. … The claimant shall not be entitled to make an application for a date to be fixed for the giving up of possession and the termination of the defendant's tenancy so long as the defendant pays the claimant the current rent together with instalments of £[_____] per week towards the judgment debt.
d) adjourn the proceedings, either to a fixed date, or more normally generally, with liberty to restore, often on condition that the defendant do pay current rent and £x per week off arrears of £yyyy, the next payment to be made by 4 p.m. on [date]
e) (rarely) dismiss the claim for possession.

In a public sector possession list, the most common questions one has to consider are "Is it reasonable to make a possession order? If it is, is it reasonable to suspend the order?"

The question of reasonableness is an 'overriding requirement' - **Smith v McGoldrick** (1976) 242 EG 1047, CA. Proof of reasonableness is a separate and distinct requirement in addition to proof of the ground for possession.

Failure to consider reasonableness means that a judgment for possession is a nullity - **Shrimpton v Rabbits** (1924) 131 LT 478.

See too **R v Bloomsbury and Marylebone County Court ex p Blackburne** (1985) 275 EG 1273, CA - consent order whereby Mr Blackburne was paid £11,000 in return for him consenting to possession. He subsequently changed his mind and instructed new solicitors to apply for judicial review to quash the possession order. The Court of Appeal granted his application, approving Glidewell J's conclusion that:

". . . if there is before the court a claim that the defendant is entitled to the benefit of the Rent Acts, the court may not make an order for possession unless it is satisfied, either by evidence or by admission by or on behalf of the defendant, that he is not entitled to that protection." ((1984) HLR 56 at 67)

Exactly the same principles apply to secure tenancies.

Hounslow LBC v McBride (1999) 31 HLR 143, CA - possession proceedings relying on Housing Act 1985 Sch 2 Grounds 1 (non-payment of rent) and 2 (conduct causing nuisance or annoyance). Before the hearing of the claim the parties agreed that a suspended possession order should be made. At a brief hearing, attended by solicitors, a district judge made the order sought, without hearing any evidence. Later Ms McBride applied to have both the possession order and the warrant set aside, claiming that the district judge had not had sufficient material before her to enable her to reach the conclusion that it was reasonable to make the order. The circuit judge allowed the defendant's application. The Court of Appeal agreed that the order should be set aside. Nothing in the order itself or in the circumstances surrounding the making of the order indicated that Ms McBride had admitted that it was reasonable to make the order. Nor had the district judge taken sufficient steps to satisfy herself of the reasonableness of making the order.

See too **R v Birmingham CC ex p Foley** March 2001 Legal Action 29, (2000) 14 December, QBD and **Baygreen Properties Ltd v Gil** [2002] EWCA Civ 1340; [2003] HLR 12.

The burden of proving that it is reasonable to make a possession order (whether suspended or absolute) lies upon the claimant landlord.

In **Cumming v Danson** [1942] 2 All ER 653 at 655, Lord Greene MR said:

> "in considering reasonableness . . . it is, in my opinion, perfectly clear that the duty of the Judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad common-sense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which he ought to take into account."

The requirement of reasonableness "gives the court a very wide discretion" - **Bell London and Provincial Properties Ltd v Reuben** [1946] 2 All ER 547, CA.

In considering reasonableness, courts should not be concerned with the propriety or impropriety of a landlord's policy or rules, but rather with "the reasonableness in the particular case of ordering possession". **Barking and Dagenham LBC v Hyatt** (1992) 24 HLR 406, CA.

See **the Pre-Action Protocol for Possession Claims based on Rent Arrears.** (*White Book, Vol. 1,* C11-001) which applies to possession claims brought by social landlords. It aims to encourage more pre-action contact between landlords and tenants and sets out various steps which landlords should take before and after issuing possession claims.

Three examples

Woodspring DC v Taylor (1982) 4 HLR 95, CA

The defendants, were in their mid-fifties, had been tenants of the council for 24 years and had a good rent record. Mr Taylor was made redundant and received a large tax demand. His wife became ill. They owed £557 at the start of possession proceedings and £700 at the date of the hearing. By this time, they were receiving benefit and the DHSS was paying current rent plus £1 per week off the arrears. In the county court, a registrar made an absolute possession order. The Court of Appeal set aside the order, finding that no reasonable registrar could have found that it was reasonable to make the order. Waller LJ stated that it was 'hard to understand a conclusion that it was reasonable to make an order turning them out of their house' (at 99).

Second WRVS Housing Society v Blair (1987) 19 HLR 104, CA
The defendant, a secure tenant, had lived in property for seven years when he became affected by a psychiatric illness. His life 'fell apart' and rent arrears mounted. He received supplementary benefit towards the housing costs but spent it on food. A county court judge, finding that there were arrears of £1,198 and that the tenant was still on supplementary benefit, ordered possession suspended for two months in case the debt could be cleared in that time. The Court of Appeal set aside the order, because the judge had failed to consider in detail the question of reasonableness and, in particular, the available welfare benefits. The case was sent back for reconsideration to ascertain 'more fully the benefits which could be obtained from DHSS in relation to arrears and more generally in relation to [the tenant's] condition'. Dillon LJ stated,

> "It is well known that arrangements can be made with the DHSS when housing benefit is payable to see that the rent is paid direct to the landlord and I feel that is a matter which should have been taken into account."

Brent LBC v Marks (1999) 31 HLR 343, CA
In 1993 the tenant was granted a secure tenancy. Arrears of rent for temporary accommodation were transferred to the rent account. Housing benefit was then credited weekly to the rent account from 1996 to meet current rent. Deductions were made by the DSS from income support and paid to the council in respect of (a) the charges which were ineligible for housing benefit and (b) £2.50 per week towards the arrears. These payments were made quarterly in arrears and so the pattern of the rent account was of regularly accruing arrears which were only reduced four times a year. The council served a notice of intention to seek possession in 1997. Legal aid was not granted to the tenant, but her solicitors wrote to the court drawing attention to the pattern of payment and the reasonableness condition. A circuit judge granted a possession order, suspended on terms that the tenant pay current rent and £2.50. The Court of Appeal allowed the tenant's appeal and remitted the case to the county court. The judge ought to have had more regard to the fact that current rent was being paid and that the benefit system was both causing and then dealing with the arrears. Looking at the overall position this was a responsible tenant whose position had stabilized. On a new exercise of the court's discretion, a possession order might not be made.

The effect of breach of a suspended or postponed possession order

Until the implementation of the Housing and Regeneration Act 2008 Sch.11 on May 19, 2009, the effect of suspended (Form N28) or postponed possession orders (Form N28A) (e.g. with conditions that tenants pay current rent and a specified sum each week or month towards the arrears) was complex and depended on the changing

forms of N28 and, more recently N28A. The position was analysed in detail in *Civil Procedure 2009 vol 2, para 3A-385.* Many secure tenants became tolerated trespassers – sometimes immediately on breach of a suspended possession order; sometimes simply because of the wording of what was intended to be a suspended possession order (see e.g. **Thompson v Elmbridge BC** (1987) 19 H.L.R. 526, CA, **Burrows v Brent LBC** [1996] 1 W.L.R. 1448; [1996] 4 All E.R. 577 HL and **Harlow DC v Hall** ([2006] EWCA Civ 156; [2006] 1 W.L.R. 2116). As a result of these difficulties, in **Bristol CC v Hassan; Bristol CC v Glastonbury** [2006] EWCA Civ 656; [2006] 1W.L.R. 2582, the Court of Appeal sanctioned a form of postponed order - now adopted as Form N28A.

The law has since been amended by Housing and Regeneration Act 2008 Schedule 11 which prevents the creation of tolerated trespassers (by providing that secure and assured tenancies continue until any warrant for possession is executed); and restores tenancy status to former tolerated trespassers (by providing that a new "replacement tenancy" is deemed to arise provided that the former tenant continues to occupy the dwelling as his or her home).

Part 1 of Sch.11 amends the Housing Act 1985 to provide that where a possession order is made against a secure tenant, the tenancy ends on the date the tenant is evicted (unless the tenant ends the tenancy before that date). Part 2 of Sch. 11 deals with replacement tenancies.

An alternative?

Housing Act 1985 s85(1)

Where proceedings are brought for possession of a dwelling-house let under a secure tenancy on any of the grounds set out in Part I or Part III . . . the court may adjourn the proceedings for such period or periods as it thinks fit.

Just as I always ask myself whether or not it is reasonable to make an absolute order, I also ask myself whether or not it is reasonable to make a suspended or postponed order (see **Laimond Properties Ltd v Raeuchle** (2001) 33 HLR 113, CA). If I do not consider it reasonable I adjourn on terms. If the tenant fails to comply with the terms, the local authority/housing association restores the action and, unless there are good reasons for the breach of terms, obtain a possession order. Although I have no set rules, I am far more likely to adjourn on terms if the Defendant is in receipt of income support or other state benefits - in such circumstances the Benefits Agency credit the weekly payment towards the rent arrears quarterly in arrears with the result that the tenant automatically breaches the suspended possession order and becomes a trespasser.

Other points on reasonableness

If a defendant counterclaims unsuccessfully for breach of repairing obligations, in ordinary circumstances, it is not reasonable to make a possession order if the tenant has made arrangements, in the event of the failure of his counterclaim, for the early discharge of the arrears. However, in exceptional circumstances where there has been a bad history of persistent delay in paying rent, it may be reasonable to make an absolute order for possession - **Haringey LBC v Stewart** (1991) 23 HLR 557;

[1991] 2 EGLR 252, CA

The proper approach in a case of the commission of "a most serious breach" of the tenancy agreement is that it will be reasonable to order possession in the absence of some exceptional circumstance - **Bristol CC v Mousah** (1997) 30 HLR 32, CA, (serious drug dealing); **Sandwell MBC v Hensley** [2007] EWCA 1425; [2008] HLR 22 (outright possession order substituted on appeal for suspended possession order where tenant had pleaded guilty to a charge of being knowingly concerned with the cultivation of cannabis. It was said that where an individual commits a criminal offence, a possession order should only be suspended in exceptional circumstances where there is cogent evidence to demonstrate that the offender's particular conduct had ceased. 'The more serious the offence, the more serious the breach. Convictions of several offences will obviously be even more serious. In such circumstances … the court should only suspend the order if there is cogent evidence which demonstrates … a sound basis for the hope that the previous conduct will cease'; and **City West Housing Trust v Massey; Manchester & District Housing Association v Roberts** [2016] EWCA Civ 704,7 July 2016
(cases where cannabis was grown on premises in breach of the terms of the tenancy agreement); but cf e.g. **North Devon Homes Ltd v Batchelor** [2008] EWCA Civ 840; 22 July 2008.

The fact that anti-social behaviour was caused by the tenant's children or other members of the family does not prevent the court from making an outright possession order (**Kensington & Chelsea RLBC v Simmonds** (1997) 29 HLR 507, CA, **Northampton BC v Lovatt** [1998] 07 EG 142, CA, **Darlington BC v Sterling** (1996) 29 HLR 309, CA, **Portsmouth City Council v Bryant** (2000) 32 HLR 906, CA (claimant does not have to establish fault or even knowledge on part of tenant, but the extent of personal fault is relevant when considering reasonableness.), **Manchester City Council v Higgins** [2005] EWCA Civ 1423; [2006] HLR 14; **Knowsley Housing Trust v McMullen** [2006] EWCA Civ 539; [2006] HLR 43; and **Greenwich LBC v Tuitt** [2014] EWCA Civ 1669, 25 November 2014. However, an outright possession order may not be appropriate where the anti social behaviour was not caused by the tenant, but by a member of the tenant's family who has since left the premises, with the result that the chances of recurrence are reduced. (**Castle Vale Housing Action Trust v Gallagher** [2001] EWCA Civ 944, (2001) 33 HLR 810).

Where there is an admitted breach of covenant and an intention to continue with the breach, a landlord should only be refused possession in a 'very special case' - **Sheffield CC v Green** (1994) 26 HLR 349, CA; cf **Bell London & Provincial Properties Ltd v Rueben** [1947] KB 157, CA). It is in the public interest that necessary and reasonable conditions in tenancy agreements are enforced fairly and effectively **Sheffield CC v Jepson** (1993) 25 HLR 299, CA (tenant keeping a dog in breach of an express term of the tenancy agreement. Although there was little evidence about the defendant's dog in particular, it was reasonable to make a suspended possession order). The availability of the power to grant an injunction restraining breach of the terms of a tenancy agreement is not a reason to make a suspended possession order rather than an outright order (**Canterbury City Council v Lowe** (2001) 33 HLR 583, CA. In a case involving the parking of a caravan in a

front garden in breach of the terms of a tenancy agreement, the Court of Appeal held that the propriety of the council's policy was not a factor relevant to the exercise of discretion. The judge should not have been concerned with the propriety or impropriety of the policy rule. His concern should have been with the reasonableness in the particular case of ordering possession - **Barking and Dagenham LBC v Hyatt and Hyatt** (1992) 24 HLR 406, CA. cf **Wandsworth LBC v Hargreaves** (1994) 27 HLR 142, CA (in breach of a term of the tenancy a visitor brought petrol into the flat to make petrol bombs, which were thrown from the window. A fire started in the flat from spilt petrol, causing £14,000 worth of damage. The Court of Appeal dismissed the council's appeal against a refusal of the county court judge to order possession.)

In nuisance cases, the authority's obligations towards other tenants should be borne in mind - **Woking BC v Bystram** (1995) 27 HLR 1, CA (nuisance continuing - appropriate course was to make a suspended order for possession on terms that any further nuisance would lead to repossession in 28 days).

A local authority's housing obligations towards the defendant if made homeless, and in particular the question of whether re-housing is likely to be refused as a result of intentional homelessness may have greater or lesser weight when considering reasonableness, depending on the circumstances - cf **Rushcliffe BC v Watson** (1992) 24 HLR 123, CA (the prospect that, if evicted, the tenant would probably be found to be intentionally homeless a very real consideration); **Bristol CC v Mousah** (1997) 30 HLR 32, CA (whether the tenant would be rehoused as homeless was a matter for the council and not for the court); **Darlington BC v Sterling** (1996) 29 HLR 309, CA (a decision by a Circuit Judge that as a District Judge had formed the view that the tenant ought not to be roofless he should not have ordered possession unless the council could show it would provide suitable alternative accommodation overturned by the Court of Appeal); and **Shrewsbury and Atcham BC v Evans** (1997) 30 HLR 123, CA. (The judge had not needed to consider how a tenant who had 'flagrantly and deliberately lied about her circumstances' in order to obtain council housing would be rehoused.)

Anti-Social Behaviour Act 2003 s16 introduced new

Housing Act 1985 s85A

Housing Act 1988 s9A

If the court is considering whether it is reasonable to make an order for possession on Ground 2 or Ground 14,

the court must consider, in particular-

(a) the effect that the nuisance or annoyance has had on persons other than the person against whom the order is sought;

(b) any continuing effect the nuisance or annoyance is likely to have on such persons;

(c) the effect that the nuisance or annoyance would be likely to have on such persons if the conduct is repeated.

It is essential to refer to these provisions in every judgment when deciding whether or not it is reasonable to make a possession order based upon anti-social behaviour.

For an example of the Court of Appeal's approach to reasonableness and

suspension of possession orders, see **Birmingham City Council v Ashton** [2012] EWCA Civ 1557, [2013] HLR 8

Further suspension

The court's power to stay or suspend execution or postpone the date of possession may be exercised when making an order for possession "or at any time before the execution of the order" (s85(2)).

When exercising its powers under s85 the court shall impose conditions with respect to the repayment of arrears of rent and mesne profits unless it considers that to do so would cause exceptional hardship (s85(3)). There have been no reported Court of Appeal decisions as to what might constitute "exceptional hardship".

Where there is a substantial dispute about the amount claimed and the tenant's compliance with the order, the up-to-date position has to be clearly and accurately established before considering an application to suspend under s85 - **Haringey LBC v Powell** (1996) 28 HLR 798, CA.

The court, exercising its discretion on an application to suspend a warrant under s85, may take account of matters (e.g. breaches of the terms of the tenancy agreement or anti-social behavior) other than those relied upon as grounds for making the original possession order – although it is not always right to do so. (**Sheffield City Council v Hopkins** [2001] EWCA Civ 1023, [2002] HLR 12)

A tenant against whom an outright order has been made under a discretionary ground is entitled to make a fresh application to a district judge to stay or suspend execution. Such an application “is not in any way affected or fettered by the reasons given by [the district judge who heard the possession claim] . . . on such an application the district judge can take all relevant circumstances into account as they appear at the time of the application. Those will include any medical evidence which is before the court, any evidence as to the defendant’s behaviour since the original order and the effect of an immediate order for possession which is not suspended upon the likelihood of the applicant being re-housed under the Housing Act 1996.” “There is a continuing remedy in the county court.” (**Plymouth CC v Hoskin** [2002] EWCA Civ 684, 1 May 2002)

There is no power under s85(2) to stay or postpone the date for giving up possession under an existing possession order if tenants have already given up possession without the need for execution of the order. The words 'at any time before the execution of the order' in s85(2) have to be read subject to the qualification 'and for so long as execution is required to give effect to that order'. (**Dunn v Bradford MDC, Marston v Leeds City Council** [2002] EWCA Civ 1137; [2003] HLR 15)

After the warrant has been executed

The court's power to stay or suspend execution or postpone the date of possession only applies before the execution of the order - **Hammersmith and Fulham LBC v Hill** (1995) 27 HLR 368, CA. **After execution an occupier can only be restored to possession if either the possession order is set aside** (see e.g.

Governors of Peabody Donation Fund v Hay (1987) 19 HLR 145, CA; **Hackney LBC v White** (1995) 28 HLR 219, CA; and **Tower Hamlets LBC v Abadie** (1990) 22 HLR 264, CA) **or the warrant has been obtained by fraud, abuse of process or oppression** (**Hammersmith and Fulham LBC v Hill** (1995) 27 HLR 368, CA - arguable that the council had behaved 'oppressively' where the tenant claimed that after issue of the warrant, but before execution, council officers had said that the defendant would have no chance of having the warrant suspended unless she was able to pay £1,000 within 24 hours.

In **Southwark LBC v Sarfo** (2000) 32 HLR 602, CA, Roch LJ said

> "[O]ppression may be very difficult if not impossible to define, but it is not difficult to recognise. It is the insistence by a public authority on its strict rights in circumstances which make that insistence manifestly unfair. The categories of oppression are not closed because no-one can envisage all the sets of circumstances which could make the execution of a warrant oppressive."

"Oppression" is not limited to acts by the landlord. Misleading information from a court office, depriving a tenant of taking steps to have execution of a warrant for possession stayed prior to execution, may amount to oppression (**Hammersmith & Fulham LBC v Lemeh** (2001) 33 HLR 231, and **Lambeth LBC v Hughes** (2001) 33 HLR 350, CA). However, it has also been held that (1) a possession warrant obtained and executed against a secure tenant without fault on anyone's part cannot properly be set aside as oppressive or an abuse of process; (2) oppression cannot exist without the unfair use of court procedures; and (3) something more than the mere use of the eviction process - some action on someone's part which was open to criticism - is required before the court's procedures can be said to have been unfairly used (**Jephson Homes HA v Moisejevs** [2001] 2 All ER 901, CA). See too **Circle 33 Housing Trust v Ellis** [2005] EWCA Civ 1233; [2006] HLR 7.

The Court of Appeal has held that the procedure which allows the issue of a warrant of possession and the arrangements for execution following breach of a suspended possession order do not infringe tenants' rights under ECHR Arts 6, 8 or 14. (**Southwark LBC v St. Brice** [2001] EWCA Civ 1138, [2002] 1 WLR 1537) but N.B. as a result of HRA concerns, bailiffs should now deliver Form N54 (Notice of Eviction) to all addresses where evictions are due to take place and hand it to the defendant personally or leave it at the property in an envelope addressed to the defendant(s) by name and "any other occupiers".

Enforcement

Apart from applications to set aside possession orders and applications to suspend warrants, Circuit Judges and Recorders are rarely concerned with the enforcement of possession orders. A county court possession order should normally be enforced by means of a warrant for possession in the county court – see CPR r.83.26. Form N325 may be used to request a warrant. This is essentially an administrative act. However, if the order for possession is conditional, an application must be made to the court for a warrant – see **Cardiff CC v Lee** [2016] EWCA Civ 1034; 19 October 2016 (a case where the failure to make the application was treated as a procedural defect which the court was empowered to cure under CPR r.3.10 by dispensing with

the need for a prior permission application and proceeding to validate the warrant where the circumstances justified that course).
However, the Court of Appeal stated “CPR 83.2 contains an important protection for tenants … [A]ll landlords should in the case of conditional orders for possession have to establish that the condition entitl[ing] them to the possession has been fulfilled before the tenant become[s] embroiled in an eviction from his home.”

An order for possession may also be enforced by a High Court Writ of Possession (see CPR r83.13). See and the **Practice Note relating to Possession Claims Against Trespassers** issued by the Chief Master and Senior Master on 30 September 2016 which is reproduced at 55APN.1 in *The White Book* and **Birmingham City Council v Mondhlani and Mondhlani**; County Court at Birmingham, 6 November 2015 which address issues relating to transfer to the High Court for enforcement.

Introductory Tenancies

Introductory tenancies are a form of probationary tenancy introduced by Housing Act 1996 and granted by some local authorities. They lack security of tenure within the first year of the tenancy. Housing Act 1985 Sched 1 Para 1A provides that introductory tenancies cannot be secure tenancies (HA 1996 Sched 14, para 5).

Housing Act 1996 s124 provides that "a local housing authority or housing action trust (HAT) may elect to operate an introductory tenancy regime." Where such an election is made, all new periodic tenancies and licences (HA 1996 s126) which would otherwise be secure tenancies will be introductory tenancies or licences unless immediately before the new tenancy, one or more of the tenants was either a secure tenant or an assured tenant of a private registered provider of social housing. Tenancies remain introductory tenancies until the end of the "trial period" which lasts for one year after the date on which the tenancy was entered into, or the date on which the tenant was first entitled to possession, whichever is later. Earlier periods where the tenant had another introductory tenancy or had an assured shorthold tenancy granted by a private registered provider of social housing count towards the trial period provided that there is no gap between them.

Tenancies cease to be introductory tenancies if;

- the circumstances are such that the tenancy could not be secure; or
- a person or body other than a local housing authority or HAT becomes the landlord; or
- the election is revoked; or
- the tenant dies and there is no-one qualified to succeed (HA 1996 ss125 and 133(3)).

Landlords may only bring introductory tenancies to an end by obtaining a possession order in court (HA 1996 s127). **Before bringing proceedings landlords must serve notices giving reasons for the decision to seek a possession order**

and specifying a date after which court proceedings may be begun. The period of notice given must be equivalent to that which would otherwise be needed to terminate the tenancy by notice to quit (i.e. normally 28 days). It must also inform tenants of their right to "request a review of the landlord's decision" and that they may seek advice from a CAB, housing aid centre, law centre or solicitor (HA 1996 s128).

"The precise way in which a landlord chooses to conduct . . . a review is for each landlord to determine." (DoE Circular, para 22). However, the Introductory Tenants (Review) Regulations 1997 SI No. 72 set out certain basic requirements to be followed on reviews. Reviews are not to be by way of a hearing unless tenants inform their landlords that they wish to have an oral hearing (para 2). A request for an oral hearing must be made within 14 days after receipt of the notice seeking possession. Reviews must be carried out by a person who was not involved in the original decision to seek possession (para 3). If the review is not to be conducted by an oral hearing, the tenant may make written representations (para 4). If there is an oral hearing, the tenant has a right to:

(a) be heard and accompanied or represented by another person;

(b) call persons to give evidence;

(c) put questions to anyone who gives evidence; and

(d) make representations in writing (para 5).

The tenant must be notified of the time, date and place of any hearing. It must take place not less than five days after the request for a hearing (para 6). The Regulations do not however specify a minimum period between notification of the date of the hearing and the hearing itself.

The review must be carried out and the tenant notified of the result before the date specified as the date after which proceedings may be begun.

If a landlord serves a notice which expires and then brings proceedings against an introductory tenant, the court must make a possession order. It is not necessary for the landlord to give evidence about the reason for seeking possession (but see below). All that is necessary is to prove that notice was served and that any review has been determined or that the period specified in the notice has expired (s127). "Suspended possession orders . . . are not appropriate for introductory tenancies. Applications to court for possession must lead to eviction." (DoE Circular, para 20). **However, s127 must now be read by implying into the section the phrase 'provided that Article 8 is not infringed". (Hounslow LBC v Powell; Leeds CC v Hall; Birmingham CC v Frisby** [2011] UKSC 8; [2011] 2 WLR 287; **Manchester City Council v Pinnock** [2010] UKSC 45, [2010] 3 WLR 1441; and **Corby BC v Scott; West Kent Housing Association Ltd v Haycraft** [2012] EWCA Civ 276, [2012] HLR 23 where Lord Neuberger MR said that in relation to demoted and introductory tenancies, 'it will only be in "very highly exceptional cases" that it will be appropriate for the court to consider a proportionality argument', although 'exceptionality is an outcome and not a guide' (para 18). '… a judge (i) should be rigorous in ensuring that only

relevant matters are taken into account on the proportionality issue, and (ii) should not let understandable sympathy for a particular tenant have the effect of lowering the threshold identified by Lord Hope in [Hounslow LBC v Powell] Lord Neuberger emphasised: … the desirability of a judge considering at an early stage (normally on the basis of the tenant's pleaded case on the issue) whether the tenant has an arguable case on Article 8 proportionality, before the issue is ordered to be heard. If it is a case which cannot succeed, then it should not be allowed to take up further court time and expense to the parties, and should not be allowed to delay the landlord's right to possession (para 39).)

The Act is silent as to the methods by which tenants may challenge review decisions. This is not dealt with either in the Introductory Tenancies (Review) Regulations. Tenants who are dissatisfied with a review decision may apply for judicial review, or, in the light of **Powell** and **Pinnock** raise any administrative law or Article 8/proportionality issues as a defence to the possession claim.

If the "trial period" ends before determination of the possession proceedings, the tenancy remains an introductory tenancy until the determination of proceedings or the date on which possession is to be given up, whichever is later (s130(2)).

Although introductory tenants lack security of tenure, the Act gives them some rights which are equivalent to those of secure tenants, e.g. succession (HA 1996 ss131-133 and 140) and information and consultation (ss136-137). The right to repair scheme (HA 1985 s96) has been extended to introductory tenancies by the Secure Tenancies (Right to Repair)(Amendment) Regulations 1997 SI No. 73). Assignment of introductory tenancies is in general prohibited although they may be transferred by orders made under Matrimonial Causes Act 1973 s24, Matrimonial and Family Proceedings Act 1984, Children Act 1989 Sched 1 and to a person who would be qualified to succeed the tenant if the tenant died immediately before the assignment. (HA 1996 s134).

Demoted tenancies

Under Anti-Social Behaviour Act 2003 county courts have power to change secure or assured tenancies into demoted tenancies, lacking the rights that are associated with secure and assured tenancies. Procedure relating to demoted tenancies is contained in CPR Parts 55 and 65 and PD 65.

Under Housing Act 1985 s82A local housing authorities, housing action trusts and registered social landlords (private registered providers of social housing) may apply to a county court for a demotion order. The court can only grant a demotion order if;

(a) a notice seeking a demotion order has been served or it is just and equitable to dispense with that requirement (Housing Act 1985 s83 as amended);
(b) it is satisfied that the tenant or a person residing in or visiting the dwelling-house has engaged or has threatened to engage in conduct to which section 153A or 153B of the Housing Act 1996 (anti-social behaviour or use of premises for unlawful purposes) applies, and
(c) it is reasonable to make the order.

A demotion order -

(a) terminates the secure tenancy with effect from the date specified in the order;
(b) if the tenant remains in occupation, creates a demoted tenancy - see Housing Act 1996 ss143A to 143P. (If the landlord is a private registered provider of social housing, the tenancy becomes a demoted assured shorthold tenancy.);
(c) makes it a term of the demoted tenancy that any arrears of rent payable at the termination of the secure tenancy become payable under the demoted tenancy;
(d) lacks security of tenure but (s143E) before bringing a possession claim, a landlord of a demoted tenant must serve on the tenant a notice of proceedings which

- states that the court will be asked to make a possession order;
- sets out the reasons for the landlord's decision to apply for the order; and
- specifies the date after which proceedings for the possession of the dwelling-house may be begun.

Section 143F provides a procedure for an internal review of the decision to seek possession.

If this procedure is followed, the court must make a possession order (s143D). However, s143D must now be read by implying into the section the phrase 'provided that Article 8 is not infringed". **(Hounslow LBC v Powell; Leeds CC v Hall; Birmingham CC v Frisby** [2011] UKSC 8; [2011] 2 WLR 287 and **Manchester City Council v Pinnock** [2010] UKSC 45, 3 November 2010, [2010] 3 WLR 1441.)

In the absence of a possession claim, if the tenant remains in occupation, s143B provides that (in most circumstances), a demoted tenancy becomes a secure tenancy at the end of the period of one year (the demotion period) starting with the day the demotion order takes effect.

Tenants of public bodies lacking security of tenure

The inter-relationship between landlords' common law or statutory rights to possession against occupants lacking security of tenure and ECHR Article 8 has been considered in a significant number of English and Welsh and Strasbourg cases in recent years. The position has been clarified by the Supreme Court decisions of **Hounslow LBC v Powell; Leeds CC v Hall; Birmingham CC v Frisby** [2011] UKSC 8; [2011] 2 WLR 287 and **Manchester City Council v Pinnock** [2010] UKSC 45, 3 November 2010, [2010] 3 WLR 1441. In summary, Article 8 requires courts asked to make possession orders under Housing Act 1996 s143D(2) against demoted tenants to have the power to consider whether the order would be necessary in a democratic society. That proposition applies to all cases where a local authority seeks possession in respect of a property that constitutes a person's home for the purposes of Article 8. However, the obligation to consider proportionality only arises if the property constitutes the occupant's home – the individual has to show sufficient and continuing links with a place to show that it is his or her home for the purposes of Article 8, but in most cases it can be taken for granted that a claim by a person who is in lawful occupation to remain in possession will attract the protection of Article 8. However, the court only has to consider whether the making of a possession order is proportionate if the issue has been raised by the occupier and it has crossed the high threshold of being seriously arguable. The question will then be whether making an order for the occupier's eviction is a proportionate means

of achieving a legitimate aim. A court should initially consider that question summarily and if it is satisfied that, even if the facts relied upon are made out, the point would not succeed, it should be dismissed. The threshold for raising an arguable case on proportionality is a high one which would succeed in only a small proportion of cases. There is no need, in the overwhelming majority of cases, for the local authority to explain and justify its reasons for seeking a possession order. If it is not proportionate, the court may dismiss the possession claim. See too **Birmingham City Council v Lloyd** [2012] EWCA Civ 969, [2012] HLR 44 (if it is only in very highly exceptional circumstances that it would be appropriate for the court to consider a proportionality argument on behalf of a tenant, 'it must be at least as true, indeed … even more true, in the case of someone who entered the property as a trespasser and has remained a trespasser' (para 12). It would … be wrong to say that it could never be right for the court to permit a person, who had never been more than a trespasser, to invoke article 8 as a defence against an order for possession. But such a person seeking to raise an article 8 argument would face a very uphill task indeed, and, while exceptionality is rarely a helpful test, it seems to me that it would require the most extraordinarily exceptional circumstances (para 18)). See too **Thurrock BC v West** [2012] EWCA Civ 1435, [2013] HLR 5

These comments do not apply to tenants with security of tenure facing possession claims based on a discretionary ground for possession. The "reasonableness" requirement fulfils Article 8 requirements. (**Castle Vale Housing Action Trust v Gallagher** [2001] EWCA Civ 944, (2001) 33 HLR 810).

For what is meant by "public body" see **R (Weaver) v London & Quadrant Housing Trust** [2009] EWCA Civ 587, 18 June 2009; [2010] 1 WLR 363 and R (Macleod) v Governors of Peabody Trust [2016] EWHC 737 (Admin), 8 April 2016.

2. ASSURED TENANCIES

Most private sector landlords let on **assured shorthold** tenancies (see below). Most **assured** tenancies are granted by housing associations or other private registered providers of social housing. (If granted before 15 January 1989, they would have been secure tenancies under Housing Act 1985, but see Housing Act 1988 s35.) Sometimes, though registered social landlords also let on assured shorthold tenancies.

1. Requirements for an assured tenancy

There can only be an assured tenancy if there is a tenancy. There can be no such thing as an "assured licence".

Street v Mountford [1985] 2 WLR 877, HL.
AG Securities v Vaughan [1988] 2 WLR 689, HL.

Housing Act 1988 s1 contains **four pre-requisites for the creation of an assured tenancy**:-

(a) The dwelling house must be let as a separate dwelling. This is the well known phrase which appears in the Rent Act 1977 section 1. The word "dwelling" is not a term of art with a specialised legal meaning. It is "the place where [an occupier] lives and to which he returns and which forms the centre of his existence . . . No doubt he will sleep there and usually eat there; he will often prepare at least some of his meals there." However, there is no legislative requirement that cooking facilities must be available for premises to qualify as a dwelling. In deciding whether an occupant has security of tenure

> "The first step is to identify the subject-matter of the tenancy agreement. If this is a house or part of a house of which the tenant has exclusive possession with no element of sharing, the only question is whether, at the date when proceedings were brought, it was the tenant's home. If so, it was his dwelling... . The presence or absence of cooking facilities in the part of the premises of which the tenant has exclusive occupation is not relevant."

(**Uratemp Ventures Ltd v Collins** [2001] UKHL 43, [2002] 1 AC 301, [2001] 3 WLR 806)

Section 3 provides that if a tenant enjoys exclusive occupation of some rented accommodation with a right to share other accommodation with other people, apart from the landlord, the mere fact that the other accommodation is shared, does not prevent the tenant from occupying the accommodation which is not shared as a separate dwelling (compare Rent Act 1977 s22 and Housing Act 1985 s79).

(b) The tenant, or if there are joint tenants, each of the joint tenants, must be individuals. A genuine letting to a company can never be an assured tenancy **(Hiller v United Dairies** [1934] 1 KB 575, **Hilton v Plustitle Limited**

[1988] 3 All ER 1051 and **Kaye v Massbetter Ltd** [1991] 39 EG 129. In such cases, the tenancy is unprotected and may be terminated either by effluxion of time or by service of a notice to quit. If this is done, a landlord who brings possession proceedings is automatically entitled to possession without having to prove any ground for possession.

(c) The tenant, or if there are joint tenants, at least one of them, must occupy the premises as his or her only or principal home. This is the same wording as Housing Act 1985 section 81, the "tenant condition" which applies to secure tenancies. It is a more restrictive definition than the comparable provisions in Rent Act 1977 s2(1)(a). It is not possible for assured tenants to maintain assured tenancies in more than one home at the same time, although there is no reason why assured tenants should not be temporarily absent from the premises in question provided that they remain his or her only or main home.

Crawley BC v Sawyer (1987) 20 HLR 98
London Borough of Sutton v Swann (1985) HLR 140
Notting Hill Housing Trust v Etoria April 1989 Legal Action 22.

(d) A tenancy cannot be an assured tenancy if any of the exceptions listed in Schedule I applies. Many of these exceptions are similar to those set out in Rent Act 1977 Part I. These are :-

1. A tenancy which is entered into before or pursuant to a contract made before 15th January l989.

2. Tenancies of dwelling houses with high ratable values - i.e. over £1500 in Greater London, over £750 elsewhere (compare Rent Act 1977 section 4). NB References to Rating (Housing) Regulations 1990 SI 434 provide that where tenancies are granted after 1st April 1990, they cannot be assured if the **rent** is more than £25,000 per annum. "Rent" does not include sums paid in respect of services, repairs, maintenance or insurance.

3. Tenancies at a low rent - either where no rent is payable or where the rent is less than two thirds of the ratable value. NB The References to Rating (Housing) Regulations provide that tenancies granted after 1st April 1990 cannot be assured if the **rent** is less than £1,000 per annum in London or less than £250 per annum outside London.

4. Business tenancies - see Part II of the Landlord & Tenant Act 1954 (compare Rent Act 1977 sections 2 and 24).

5. Tenancies under which dwelling-houses consist of or comprise premises licensed for the sale of intoxicating liquors for consumption on the premises (compare Rent Act 1977 section 11).

6 & 7.

Tenancies under which agricultural land, exceeding two acres is let together with the dwelling-house and agricultural holdings within the meaning of the Agricultural Holdings Act 1986 (compare Rent Act 1977 section 10).

8 Lettings to students by specified educational institutions. See the Assured and Protected Tenancies (Lettings to Students) Regulations Regulations 1998 SI No. 1967, which define SEIs - basically any institution which provides higher or further education which is publicly funded and various other named institutions and lettings by private registered providers of social housing cannot be assured tenancies. (compare Rent Act 1977 section 8).

9. Holiday lettings - where the purpose of the tenancy is to confer on the tenant the right to occupy the dwelling-house for a holiday (compare Rent Act 1977 s9).

Buchmann v May [1978] 2 All ER 993

R v Camden Rent Officer ex parte Plant (1981) 257 EG 713

10. Resident landlords:

(i) The dwelling house let forms only part of a building and the building is not a purpose built block of flats;

(ii) The tenancy was granted by an individual who at the time when the tenancy was granted occupied as his or her only or principal home another dwelling house which is either part of the same flat or part of the same building (see Housing Act 1988 section 1(1)(b)).

(iii) At all times since the tenancy was granted the interest of the landlord under the tenancy has belonged to an individual who has occupied as his only or principal home another dwelling in the same flat or building.

(iv) The tenant was not prior to the grant of the tenancy an assured tenant of accommodation elsewhere in the same building.

There are periods of disregard after the sale of premises or the death of a landlord when the fact that there is no resident landlord living in the building does not mean that the "resident landlord" exception ceases to apply (see Part III of Schedule 1).

Compare Rent Act 1977 section 12 and schedule 2.

This is essentially a question of fact for the trial judge to consider and the Court of Appeal will generally be reluctant to overturn such findings - see eg **Lewis-Graham v Conacher** [1992] 02 EG 171, CA.

11. Crown tenancies - but not premises managed by the Crown Estates Commissioners.

12. Premises let by local authorities, new towns residuary bodies, Urban Development Corporations, Development Corporations, Waste Disposal Authorities, Residuary Bodies, Fully Mutual Housing Associations, Housing Action Trusts etc.

13 Demoted tenancies.

14 Family intervention tenancies.

The provision of "Board" is not an exception (compare Rent Act 1977 section 7).

If one of the exceptions in Schedule 1 applies, the tenant has no security of tenure. Once a notice to quit has been served and has expired the tenant has no statutory protection, except, in some cases, for Protection from Eviction Act 1977 s3 which provides that it is unlawful for a landlord to evict such a tenant without taking court proceedings. The landlord need only prove that the contractual tenancy has been terminated. Note the form of notice to quit prescribed by the Notice to Quit (Prescribed Information) Regulations 1988 SI No.2201, although old forms of notice to quit may still be valid - **Swansea City Council v Hearn** (1991) 23 HLR 284 and, in another context **Tadema Holdings v Ferguson** (2000) 32 HLR 866, CA.

2. Security of Tenure

Section 5 provides that a periodic assured tenancy can only be brought to an end by a landlord by obtaining an order of the court or by surrender. [N.B. Housing and Regeneration Act 2008 s299 and Sched. 11 provide that assured tenancies only come to an end on execution of a warrant for possession.] Section 5(1)) makes it clear that notices to quit served by landlords have no effect upon periodic assured tenancies. **Service of a notice to quit by a tenant may terminate an assured tenancy (Greenwich LBC v McGrady** (1982) 6 HLR 36 and **Hammersmith LBC v Monk** [1992] AC 478). This rule does not breach Article 8 **Muema v Muema** [2013] EWHC 3864 (Fam); 10 June 2013.

If a contractual fixed term assured tenancy is brought to an end, other than by an order of a court or by surrender, a periodic assured tenancy (called a "statutory periodic tenancy") normally comes into existence immediately after the fixed term tenancy has come to an end. The basic rule is that the terms of the new statutory periodic tenancy are the same as for the former contractual assured tenancy (section 5(3)(e)). However, section 6 provides a mechanism by which landlords and tenants may propose new terms.

3. Possession Proceedings against assured tenants

Housing Act 1988 s5(1) (as amended by the Housing and Regeneration Act 2008 and ignoring demotion) provides
"An assured tenancy cannot be brought to an end by the landlord except by obtaining—

(i) an order of the court for possession of the dwelling-house under section 7 or 21, and

(ii) the execution of the order,

A. Notices of intention to bring proceedings

A landlord wishing to bring possession proceedings against an assured tenant should first serve a notice in the prescribed form informing the tenant that it is the landlord's intention to bring proceedings on one or more grounds specified in the notice. The form of notice is prescribed Form 3 in the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997 SI No. 194, as amended by The Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment) Regulations 2016 SI No 443. Para 2 of the 1997 Regulations states "any reference to a numbered form is a reference to the form bearing that number in the schedule to these Regulations, or to a form substantially to the same effect." A notice which complies with an old version of the (Forms) Regulations, but not the current version, is likely to be valid (**Tadema Holdings v Ferguson** (2000) 32 HLR 866, CA).

The notice must include:

(a) the text of the grounds for possession relied upon

A notice which under the heading "Ground 8" simply states "At least [two] months rent is unpaid." is not valid - **Mountain v Hastings** (1993) 25 HLR 427, CA. Although the full text of the ground as set out in Housing Act 1988 Schedule 2 may not have to be repeated verbatim,

> "the words used [must] set out fully the substance of the ground so that the notice is adequate to achieve the legislative purpose of the provision. That purpose . . . is to give . . . information . . . to enable the tenant to consider what she should do and, with or without advice, to do that which is in her power and which will best protect her against the loss of her home." (per Ralph Gibson LJ)

(cf **Masih v Yousaf** [2014] EWCA Civ 234, 6 February 2014 - 'The tenant owes £1,680 which represents three months' rent.' good enough)

and

(b) particulars of the grounds relied upon.

For example, if proceedings are to be issued under Ground 11, it is not enough for the notice merely to state "persistent rent arrears", without giving any figures of arrears or dates of late payment.

Kelsey HA v King (1995) 28 HLR 270, CA. (notice invalid due to insufficient particulars, but just and equitable to dispense with notice)

Marath v MacGillivray (1996) 28 HLR 484, CA (Section 8 notice stating as particulars of the arrears "At a meeting between the landlord and tenant on 24 July 1994 the arrears were agreed at £103.29 . . . Since that date no payments of

rent have been made." No figure for the arrears as at the date of the notice was given. The Court of Appeal held that a notice from a landlord to a tenant complies with Housing Act 1988 s8 provided that "it is made clear . . . that more than [two] months rent is at the date of that notice unpaid and due and provided also that in some way or other that notice makes it clear either how much, or how the tenant can ascertain how much, is alleged to be due." It is not necessary for the notice to contain a schedule of the arrears.
Torridge DC v Jones (1985) 18 HLR 107, CA
South Bucks DC v Francis (1985) 11 CL 152, cc
but cf **Dudley MBC v Bailey** (1990) 22 HLR 424, CA.

The court has power to alter or add to the grounds specified in the notice (s8(2)). However, this power can only be exercised if there is a valid notice - it is solely directed to the possibility of adding to or deleting grounds, not to correcting an invalid notice (**Mountain v Hastings** (1993) 25 HLR 427, CA).

Under s8(2) the court may allow particulars to be added if they have not been given earlier (**Marath v MacGillivray** - see above).

Schedule 2, Part IV makes it clear that it is sufficient if just one out of two or more joint landlords gives notice.

The required <u>length of notices</u> of intention to bring possession proceedings against assured tenants depends upon the ground for possession:
(a) Grounds 1 (owner-occupiers), 2 (mortgagees), 5 (ministers of religion), 6 (demolition, reconstruction), 7 (devolved under will), 9 (suitable alternative accommodation) and 16 (let as a consequence of employment) - **<u>two months notice</u>** or notice equivalent to the contractual period of the tenancy, whichever is longer, has to be given (section 8(4));

(b) Grounds 3 (“out of season holiday let”), 4 (“out of term student let”, 8 (two months rent arrears), 10 (rent arrears), 11 (persistent rent arrears), 12 (breach of obligation), 13 (waste or neglect), 14A (domestic violence) and 15 (ill treatment of furniture) - at least **<u>two weeks notice</u>** required (section 8(3)(b).

(c) If the landlord relies upon Ground 14 (nuisance or annoyance) **<u>proceedings may be begun immediately after service of the notice</u>**.

If a tenancy agreement provides for a longer period of notice, it appears that the landlord is bound by that longer period unless it is just and equitable to dispense with service of the notice (**Northern British Housing Association v Sheridan** (2000) 32 HLR 346, CA and see below).

<u>Service of s8 notices</u>
Enfield BC v Devonish and Sutton (1997) 29 HLR 691, CA.
Wandsworth LBC v Attwell (1995) 27 HLR 536, CA .

Proceedings must be begun within 12 months of <u>service</u> of the notice, otherwise a new notice must be served.

There is no need for a landlord of an assured tenant to serve a notice to quit as well as a notice of intention to bring proceedings (section 5(1)).

The court has **power to dispense with service of a notice** prior to the institution of possession proceedings if it considers it "just and equitable" to do so (s8(1)(b)) - **but not in proceedings brought under Ground 8** - i.e. 8 weeks' arrears (s8(5)).

In deciding whether it is just and equitable to dispense with service a court should "weigh all the factors before it" and "take all the circumstances into account, both from the view of the landlord and the tenant" - **Kelsey HA v King** (see above) (full particulars attached to summons, delay on part of tenant in applying to strike out possession proceedings).

See too **Knowsley Housing Trust v Revell; Helena Housing Ltd v Curtis** [2003] EWCA Civ 496; [2003] HLR 63.

See too **McShane v William Sutton Trust** (1997) 1 L&T Review D67, December 1997 Legal Action 13, (county court) where it was held that (1) although there is nothing to prevent a landlord from serving a s8 notice on the same day as proceedings are commenced; and (2) there is nothing in the rules preventing a landlord from applying ex parte to dispense with service of a s8 notice; (3) following **Kelsey HA v King** (1995) 28 HLR 270, CA it is not possible for a judge deciding whether or not to dispense with service to weigh up all factors from both points of view without the tenant being in court.

B. Grounds for possession

As well as serving a notice of intention to bring proceedings for possession, or persuading the court to dispense with such a notice, a landlord must satisfy the court that one of the grounds for possession set out in Schedule 2 exists. Some grounds for possession are mandatory, whereas others are discretionary, with a requirement that the landlord must convince the court that it is reasonable to make an order for possession as well as satisfying the ground for possession.

Note that some of these grounds for possession may also be relied upon by landlords during the fixed term of an assured shorthold tenancy - see below.

1. Mandatory Grounds

Ground 1 - Returning Owner Occupier

A landlord must prove that:

(a) at, or before, the grant of the tenancy the landlord gave notice in writing that possession might be recovered on this ground. The notice need not be in any particular form and may be included as a recital in any tenancy agreement provided that the agreement does not operate retrospectively.

The court has power to dispense with such a notice if it considers it just and equitable.

Boyle v Verrall [1997] 04 EG 145, 29 HLR 436, CA. (In determining whether it is just and equitable to dispense with notice, the court should look at all the circumstances of the case. If oral notice was given when a tenancy was granted, it may be an important factor favouring dispensation. However, it does not follow that oral notice is a prerequisite for such a decision. On the other hand, absence of oral notice is not a reason for restricting dispensation to circumstances where there is an "exceptional case". A tenant's persistent late payment of rent is a relevant circumstance.)

Mustafa v Ruddock (1998) 30 HLR 495, CA. Matters relevant to the exercise of discretion included:

a) the original letting purported to be an assured shorthold;
b) the proceedings were undefended. There was no evidence of hardship to the tenant;
c) there was genuine hardship to the landlord;
d) the error arose through the mistake of the landlord's agent who was now bankrupt.

The failure to notify the tenant that possession might be required was an important factor but in no way conclusive.

Hegab v Shamash June 1998 Legal Action 13, CA. The Court of Appeal stated that it was "inherent in . . . deciding what was just and equitable [to take] into account all the circumstances". The Court allowed the tenant's appeal because the judge had failed to take into account two matters, namely the fact that the tenant had paid a deposit of £4,000 in relation to a proposed purchase of the premises which had not been refunded and that the landlord had not paid the costs of earlier proceedings concerning an illegal eviction by the landlord.

AND EITHER

(b) at some time before the grant of the tenancy the landlord, or if there are joint landlords, at least one of them, occupied the dwelling-house as his or her only or principal residence. A landlord's previous occupation may be temporary and intermittent in order to suffice - see **Naish v Curzon** (1984) 17 HLR 220, CA and **Mistry v Isidore** (1990) 22 HLR 281, CA cf **Ibie v Trubshaw** (1990) 22 HLR 191, CA.

OR

(c) the landlord (or at least one of them) "requires the dwelling-house as his or his spouse's only or principal home". The landlord need not show that the premises are reasonably required, merely that the landlord "bona fide wants" or "genuinely has the immediate intention" of occupying the premises **(Kennealy v Dunne** [1977] QB 837, CA). Premises need not be required as a permanent residence and fairly intermittent residence will

be sufficient **(Naish v Curzon** (1984) 17 HLR 220, CA).

This ground for possession is not available to a new landlord who has acquired the premises "for money or money's worth" from an original landlord who gave a notice that possession might be recovered under this ground. **(Epps v Rothnie** [1945] KB 562, CA).

Ground 2 - Mortgagees

This ground applies if :

(a) a mortgagee is entitled to exercise a power of sale (e.g. if the mortgagor has defaulted on instalments of the mortgage) and

(b) the mortgagee requires vacant possession to exercise that power and

(c) a Ground 1 notice was given before the commencement of the tenancy or the court considers it just and equitable to dispense with the notice.

(NB comments of Lord Denning MR in **Quennell v Maltby** [1979] 1 WLR 318.)

Ground 3 - Tenancy preceded by "holiday let"

A landlord must prove that:

(a) not later than the grant of the tenancy, notice was given that possession might be recovered under this ground and;

(b) at some time during the twelve months prior to the grant of the tenancy, the dwelling-house was occupied for a holiday.

The court has no power to dispense with service of the notice required prior to the grant of the tenancy.
Fowler v Minchin (1987) 19 HLR 224, CA
but cf **Springfield Investments v Bell** (1990) 22 HLR 440, CA.

Ground 4 - Educational Institutions

This ground applies where, during the twelve months preceding the tenancy, premises were let by a specified educational institution. As with Ground 3, notice stating that this ground may be relied upon has to be served before the commencement of the tenancy. See the Assured and Protected Tenancies (Lettings to Students) Regulations 1998 SI No. 1967.

Ground 5 - Ministers of Religion

This ground applies to premises which are "held for the purpose of being available for occupation by a minister of religion as a residence from which to perform duties of his office". Notice that possession might be required must be served before the grant of the tenancy and the landlord must satisfy the court that the property is required for occupation by a minister of religion as a residence.

Ground 6 - Demolition or Reconstruction

This ground is available for a landlord who "intends to demolish or reconstruct the whole or a substantial part of the dwelling-house or to carry out substantial works". This ground is very similar to Landlord & Tenant Act 1954 s.30(1)(f).

(a) It has been held that "reconstruction" means "a substantial interference with the structure of the premises and then a rebuilding, in probably a different form, of such part of the premises as has been demolished by reason of the interference with the structure".

Joel v Swaddle [1957] 3 All ER 325 at 329.
Barth v Pritchard [1990] 20 EG 65.

(b) The landlord must show that the intention will be fulfilled shortly after the date of the hearing **(Betty's Cafe v Phillips** [1958] 1 All ER 607, HL). There are two elements to the concept of intention;
(i) a genuine desire that the result will come about; and
(ii) a reasonable prospect of bringing about that result.

Edwards v Thompson [1990] 29 EG 41. The landlord failed to prevent the grant of a new tenancy because she had not found a developer at the time of the hearing and "there was a real possibility that [she] would not be in a position to carry out the entire development on the termination of the current tenancy... . She had failed to show that she had the means and ability; she had not established the necessary intention."
It is not essential that a landlord obtain planning permission in advance if it can be shown that there is a reasonable prospect of getting consent. **(Gregson v Cyril Lord** [1962] 3 All ER 907).

(c) The landlord must show that, because of one of four specified reasons, the intended work cannot reasonably be carried out without the tenant giving up possession of the premises. "Possession" means "putting an end to legal rights of possession" and not merely access. **(Heath v Drown** [1972] 2 All ER 561 and HA 1988 s.16).

(d) This ground is not available to a landlord who has acquired his or her interest in the property by purchasing it after the grant of the tenancy.

(e) When a possession order is made under this ground the landlord must pay a sum equal to the tenant's reasonable removal expenses (section 11(1)).

Ground 7 - Death of the Tenant

Although an assured tenancy may pass by will or on intestacy after the death of a tenant, the landlord may obtain possession if proceedings are brought within twelve months of the death of the tenant or the date upon which the landlord became aware of the death. “Proceedings for possession” means court proceedings, not the service of a s8 notice (**Shepping v Osada** [2000]

30 EG 125, [2001] L&TR 489, CA).

This ground does not apply if a spouse succeeds to the tenancy under section 17. The Act specifies that acceptance of rent after the death of the former tenant should not be regarded as creating a new tenancy unless the landlord has agreed in writing to a change in the terms of the tenancy, such as an increase in rent.

Ground 7A – Serious Anti-social behaviour

This Ground was inserted by the Anti-social Behaviour, Crime and Policing Act 2014 (ASCPA). The court must grant possession if any one of five conditions is met, the notice requirements have been met, and, where relevant, the review procedures have been followed. The five conditions relate to anti-social behaviour by the tenant, a member of the tenant's household or a visitor to the property.

Condition 1, 2 or 3 will be met if the tenant, a member of the tenant's household or a person visiting the property has been:
(a). convicted of a serious offence (which is one of the offences set out in new Schedule 2A to the 1985 Act as inserted by subsection (2) of section 94 and Schedule 3 to the Act);
(b). found by a court to have breached an injunction obtained under section 1 of the Act; or
(c) convicted for breach of a criminal behaviour order obtained under section 22 of the Act.
The offence or anti-social conduct must have been committed in the dwelling-house or in the locality of the dwelling-house, affected a person with a right to live in the locality of the dwelling-house or affected the landlord or a person connected with the landlord's housing management functions.

Condition 4 will be met if the tenant's property has been closed under a closure order obtained under section 80 of the Act as a result of anti-social behaviour in or near the property and the total period of closure (under the order or under a preceding closure notice) was more than 48 hours.

Condition 5 will be met if the tenant, a member of the tenant's household or a person visiting the property has been convicted for breach of a notice or order to abate noise in relation to the tenant's property under the Environmental Protection Act 1990.

Ground 8 - Two months' rent arrears

As amended by Housing Act 1996 s101.
This is the first of three distinct grounds for possession based on rent arrears, although in practice most landlords plead all three in the alternative. Under Ground 8, two months' rent arrears (or eight weeks' arrears in the case of a weekly tenancy) give a landlord an automatic right to a possession order. However, the landlord must prove that there are two months' arrears, both at the time when the notice of the landlord's intention to bring proceedings is served and at the date of the hearing.

Judges are entitled to find that Ground 8 is satisfied despite the fact that housing benefit is owed by the local authority (**Marath v MacGillivray** (1996) 28 HLR 484, CA, where the local authority paid benefit after the hearing with the result that the arrears were reduced below the Ground 8 threshold).

N. B. **Day v Coltrane** [2003] EWCA Civ 342; [2003] 1 WLR 1379. Delivery of a cheque is a conditional payment. If it is agreed (either expressly or through a course of dealing) that payment may be made by cheque, "where a cheque is offered in payment it amounts to a conditional payment…. from the time when the cheque was delivered" provided that it clears. That principle applies to Ground 8. If a cheque clears on presentation, the debt is paid when the cheque was delivered. An un-cleared cheque delivered to the landlord at or before the hearing and which was accepted by him, or which he was bound by an earlier agreement to accept, is to be treated as payment on the date of delivery provided it was subsequently paid on first presentation.

If possession proceedings are brought during the fixed term of a tenancy, there is no power to grant relief from forfeiture – County Courts Act 1984 s138 does not apply – **Artesian Residential Investments v Beck** [2000] QB 541, [2000] 2 WLR 357, CA, but does the court have power to adjourn for a short period so that those problems can be sorted out? In **North British Housing Association Limited v Matthews** [2004] EWCA Civ 1736; [2005] 2 All ER 667, the Court of Appeal held

- The court cannot be satisfied that the landlord is entitled to possession before the date of the hearing. The date of the hearing is the date when the claim is heard. It is not the date fixed for the hearing if, on that date, an adjournment is granted without a hearing taking place at all.

- There is no doubt that it is a perfectly proper exercise of the court's discretion to adjourn, if a case has to be taken out of the list because there is no judge available, or because there has been over-listing, or because the defendant is prevented by ill-health from attending court.

- The court retains jurisdiction to grant an adjournment before it is satisfied that the landlord is entitled to possession. It may be a proper exercise of discretion to adjourn the hearing before the court is satisfied that the landlord is entitled to possession - e.g. where there is an arguable claim for damages which can be set-off against arrears; where the tenant shows that there is an arguable defence based on accord and satisfaction or estoppel arising from an agreement whereby the landlord accepts an offer by the tenant to pay off the current rent and arrears at a certain rate in return for not pursuing the claim for possession; or where the court is satisfied that there is a real chance that the tenant would be given permission to apply for judicial review of the landlord's decision to claim possession because of abuse of power.

- However, it is not legitimate to adjourn to enable the tenant to pay off arrears and so defeat the claim for possession, unless there are exceptional

circumstances - e.g. if a tenant is robbed on the way to court, or if a computer failure prevents the housing benefit authority from being able to pay benefit due until the day after the hearing date. The fact that arrears are attributable to maladministration on the part of the housing benefit authority is not an exceptional circumstance.

- Once the court has expressed the conclusion that it is satisfied that the landlord is entitled to possession, there is no power to grant an adjournment in any circumstances (see s9(6)). The court cannot be "satisfied" within the meaning of s9(6) until the judge has given a judgment and effect is given to that judgment in a perfected order of the court.

With all "rent arrears" grounds, there may be

(a) the possibility of a defence of set off, based on a counterclaim for breach of repairing obligations (express terms, Landlord and Tenant Act 1985 section 11, Defective Premises Act 1972, quiet enjoyment etc).

British Anzani (Felixstowe) v International Marine Management [1980] 1 QB 137
Chiodi v De Marney [1988] 41 EG 80, CA
Davies v Peterson (1989) 21 HLR 63, CA

or

(b) a defence relying upon Landlord and Tenant Act 1987 s48

Dallhold Estate v Lindsey [1992] 23 EG 112, CA
Hussain v Singh [1993] 31 EG 75, CA
Rogan v Woodfield Building Services [1995] 20 EG 132, CA
Drew-Morgan v Hamid-Zadeh (2000) 32 HLR 316,CA

2. Discretionary Grounds

Ground 9 - Suitable Alternative Accommodation

The availability of suitable alternative accommodation, either at the time of the hearing or when the order is to take effect, is a ground for possession. Part III of Schedule 2 gives further clarification as to the matters to be taken into account when determining whether or not accommodation is suitable. When a possession order is made under this ground, the landlord must pay a sum equal to the tenant's reasonable removal expenses (section 11(1)).

Ground 10 - Rent Arrears

A landlord must prove that there were rent arrears both at the date when proceedings were begun and, unless the court considers it "just and equitable" to dispense with the need for service of a notice prior to issue, that there were arrears when the notice was served. In theory a possession order may be made even if the arrears are paid off before the hearing, although in most circumstances there would be strong grounds for arguing that it would not be reasonable to make an order.

Dellenty v Pellow [1951] 2 All ER 716, CA
Lee-Steere v Jennings (1987) 20 HLR 1, CA

Ground 11 - Persistent Delay in Paying rent

Even if there are no arrears on the date when possession proceedings are issued, persistent delay in paying rent which is due is a ground for possession. The phrase "persistent delay" is not defined, but is likely to have the same meaning as in Landlord and Tenant Act 1954 s30(1)(b) - i.e. one instalment of rent has been in arrear for a significant period of time or instalments have persistently been paid late, or both.
Hopcutt v Carver (1969) 209 EG 1069
Horowitz v Ferand [1956] CLY 4843 (cc).

Ground 12 - Breach of any obligation

This ground applies if "any obligation of the tenancy (other than one related to the payment of rent) has been broken or not performed".

Ground 13 - Waste or Neglect

This ground applies not only to premises let, but also to common parts.

Ground 14 - Anti-social behaviour

Amended Ground, as inserted by Housing Act 1996 s148.

The tenant or a person residing in or visiting the dwelling-house-

(a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in lawful activity in the locality, or

(b) has been convicted of -

(i) using the dwelling house or allowing it to be used for immoral or illegal purposes, or

(ii) an indictable offence committed in, or in the locality of, the dwelling house.

There is no requirement that any person visiting the premises and causing a nuisance should be there lawfully. The ground is wide enough, for example, to encompass behaviour by a former partner of a tenant who has been excluded, but returns contrary to the tenant's wishes.
For the definition of “indictable offences”, see the Interpretation Act 1978 Sch.1.
See too **Northern British Housing Association v Sheridan**, (2000) 32 HLR 346, CA.

Indictable offences do not have to have been committed during the currency of the tenancy if a tenant pleads guilty or is convicted after the grant of the tenancy. See **Raglan Housing Association Ltd v Fairclough** [2007] EWCA Civ 1087; [2008] HLR 21.

On 13 May 2014 this ground was amended by the insertion of a new subparagraph. It extends the ground to cover nuisance directed against the landlord or the landlord’s staff wherever and whenever it occurs: Anti-social

Behaviour, Crime and Policing Act (ASBCPA) 2014 s98 and the Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 2, Transitional and Transitory Provisions) Order ('the Commencement No 2 Order') 2014 SI No 949 article 2.

Ground 14A - Domestic Violence

As inserted by Housing Act 1996 s149

This ground applies where one of both partners is a tenant and

(a) one partner has left because of violence or threats of violence by the other towards that partner or a member of that partner's family; and

(b) the court is satisfied that the partner who has left is unlikely to return.

Landlords seeking to rely upon this ground must satisfy the court that notice of proceedings for possession has been served on the partner who has left the home or that they have taken reasonable steps to effect service (Housing Act 1996 s150).

Where possession is sought under Ground 14A, it is not sufficient that the alleged violence or threats of violence were merely one of a range of causes of equal efficacy in the victim's departure from the property. For the ground to be made out, it has to be established that the alleged violence or threat of violence was the dominant, principal and real cause of the departure (**Camden LBC v Mallett** (2001) 33 HLR 204, CA).

Ground 14ZA – Riot Offences

New discretionary ground 14ZA was added ASBCPA s99. It enables landlords to seek possession where tenants or adult co-residents have been convicted of offences during riots, or at the scenes of riots, wherever they take place. The new grounds are only available where the relevant offence was committed on or after 13 May 2014.

Ground 15 - Deterioration of furniture

Ground 16 - Premises let to employees

An employer who has let accommodation to an employee "in consequence" of employment may claim possession if the tenant has "ceased to be in that employment". It applies whether or not the employer requires the premises for another employee.

Ground 17 - Tenancy induced by false statement

The tenant is the person, or one of the persons, to whom the tenancy was granted and the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by -

(a) the tenant, or

(b) a person acting at the tenant's instigation.

This ground was introduced by Housing Act 1996 s102 and is identical to

Housing Act 1985 Sched 2 Ground 5 as amended.

C. Reasonableness

The criteria for establishing whether or not it is reasonable to make an order for possession against an assured tenant are the same as those used in proceedings against secure tenants.

See e.g. **West Kent Housing Association v Davies** (1998) 31 HLR 415, CA.

As to suspension of possession orders, see s9 and the notes on Housing Act 1985 s85 above. Section 9 "gives a wide power to stay or suspend an order for possession which is applicable to all cases except those where it is expressly excluded by statute." The power may be exercised where circumstances have changed since the original hearing, even where an outright order was made by a different judge (**Ujima HA v Smith** April 2001 Legal Action 22, (2000) October 16, ChD, where the defendant was by the time of the application to suspend accepting her legal responsibility for serious damage to a shared kitchen and offering to pay £150 in compensation). Note also **Plymouth CC v Hoskin** [2002] EWCA Civ 684, 1 May 2002.

The same points about **"consent orders"** made in respect of secure tenancies apply to assured tenancies. The jurisdiction of the court to make an order for possession under Housing Act 1988 s7 (the comparable provision for assured tenancies) is limited. If the court is not satisfied that a ground under Sched. 2 has been established it does not have jurisdiction to make the order. A court is under a duty to determine whether the relevant ground has been established, whether or not it has been raised by the parties. Where a court lacks jurisdiction, it cannot be conferred merely by consent. To confer jurisdiction an admission that a ground is satisfied, either express or implied, has to be clearly shown. Any consent order should clearly spell out in express terms the admission made by the tenant, or the court should ask the tenant what admission was being made, so that there can be no room for confusion or doubt in the future. (**Baygreen Properties Ltd v Gil** [2002] EWCA Civ 1340; [2003] HLR 12. - "possession order by consent" approved by circuit judge set aside).

After an outright order

In a case where an outright order for possession was made under Housing Act 1988 Sched 2, Ground 8, but the landlord subsequently accepted the tenant's offer to pay rent and £100 per month off arrears, the Court of Appeal held that the landlord had done nothing to affect the legal relations between the parties. No new or different terms were come to. The landlord had no intention to create a new tenancy. The legal relations between the parties were governed by the terms of the order until the landlord took a position inconsistent with the order. (**Stirling v Leadenhall Residential 2 Ltd** [2001] EWCA Civ 1011, [2002] 1 WLR 499, CA)

Demoted tenancies

Under Anti-Social Behaviour Act 2003 county courts have power to change assured tenancies into demoted tenancies, lacking the rights that are associated with assured tenancies. The procedure relating to demoted tenancies is contained in CPR Parts 55 and 65 and PD 65.

The law concerning the demotion of assured tenancies is similar to new Housing Act 1985 s82A (see above). Under new Housing Act 1996 s6A, if a landlord succeeds, the tenant becomes a demoted assured shorthold tenant. The procedure for obtaining possession is the same as against other assured shorthold tenants (two months notice under HA 1988 s21) except that a possession order against a demoted assured shorthold tenant may take effect within six months of the grant of the tenancy.

ASSURED SHORTHOLD TENANCIES

Requirements for assured shorthold tenancies

The position is different, depending upon whether the tenancy was granted before 28 February 1997 or on or after that date.

A. Tenancies granted before 28 February 1997

Housing Act 1988 s20 stipulated four requirements for the creation of an assured shorthold tenancy:

- It had to be for **a fixed term of not less than six months**;

- It could **not contain any provision enabling the landlord to terminate the tenancy within six months of the beginning of the tenancy**;

- **Notice in the prescribed form had to be served before the commencement of the tenancy** stating that the tenancy will be an assured shorthold tenancy. The court has no power to dispense with service of this notice. The form of the notice is prescribed by the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1988.
  York and Ross v Casey [1998] 2 EGLR 25, (1999) 31 HLR 209, CA.
  Clickex Ltd v McCann [1999] 30 EG 96, CA
  Ravenseft Properties Ltd v Hall [2001] EWCA Civ 2034, [2002] HLR 33
  White v Chubb; Kasseer v Freeman [2001] EWCA Civ 2034, [2002] 11 EG 156
  Osborn and Co Ltd v Dior [2003] EWCA Civ 281; [2003 HLR 45
  A s20 notice could be served upon a prospective tenant's agent. (**Yenula Properties Ltd v Naidu** [2002] EWCA Civ 719; [2003] HLR 18)

- **It would have been an assured tenancy but for these three requirements being satisfied.**

B. Tenancies granted on or after 28 February 1997

Housing Act 1996 section 96 and Sched 7 take effect as Housing Act 1988 s19A and Sched 2A. They provide that **all tenancies entered into on or after 28 February 1997 which would otherwise have been assured tenancies are automatically assured shorthold tenancies lacking long term security of tenure unless certain exceptions apply** (See Schedule 2A). This applies whether the tenancy is granted orally or by a written agreement. In other words, the requirement of a s20 notice informing the tenant that the tenancy would be an assured shorthold tenancy has been abolished.

Possession proceedings – tenancies granted before 1st October 2015

Housing Act 1988 s21 provides:

> 21(1) Without prejudice to any right of the landlord under an assured shorthold tenancy to recover possession of the dwelling-house let on the tenancy in accordance with Chapter 1 above, on or after the coming to an end of an assured shorthold tenancy which was a fixed term tenancy, a court shall make an order for possession of the dwelling-house if it is satisfied
>
> (a) that the assured shorthold tenancy has come to an end and no further assured tenancy (whether shorthold or not) is for the time being in existence, other than a statutory periodic tenancy; and
>
> (b) the landlord or, in the case of joint landlords, at least one of them has given to the tenant not less than two months' notice in writing stating that he requires possession of the dwelling-house.

All that a landlord need do to recover possession is to:

a) prove that the tenancy has come to an end and that no new tenancy has been granted; and

b) give at least two months' notice to the tenant that the landlord requires possession; and

c) take court proceedings.

If landlords comply with these requirements, they are automatically entitled to possession. The court has no power to suspend possession orders, apart from Housing Act 1980 s89(1) which provides that orders for possession must take effect no later than 14 days after the court order unless exceptional hardship would be caused, in which case the maximum period that may be allowed is six weeks.

The section 21 notice

- may be given before any fixed term expires or even at the beginning of the tenancy (s21(2));

- need not be in any particular form, although it must be in writing (Housing Act 1996 s98);

- may be given by only one of several joint landlords (s21(4)(a)).

There is no power to dispense with service of the notice.

It is important to check that
(a) **the notice gives at least two months notice** although no actual date need be specified provided that "the tenant knows or can easily ascertain the date referred to." **Lower Street Properties Ltd v Jones** [1996] 48 EG 154, CA

(b) **if the tenancy is a periodic tenancy, the date specified in the notice is (or the period of notice given in the notice expires on) "the last day of a period of the tenancy"** (s21(4)(a)). See **McDonald v Fernandez** [2003] EWCA Civ 1219; (1987) 19 HLR 29; where the Court of Appeal rejected a landlord's contention that s21 should be construed in the same way as the common law rules relating to notices to quit. A section 21 notice is not a notice to quit. The niceties of contractual notices to quit should not be imported into the plain words of the statute. Section 21(4)(a) requires the notice to specify the last date of the period. It is not a situation where the legislation permits the form to be substantially to the same effect. The subsection is clear and precise. Accordingly, a notice served during a periodic assured shorthold tenancy which does not expire "on the last day of a period of the tenancy" is unlikely to be valid. N.B. also **Notting Hill Housing Trust v Roomus** [2006] EWCA Civ 407; [2006] 1 WLR 1375.

(c) **the date specified "is not earlier than the earliest day on which . . . the tenancy could be brought to an end by a notice to quit given by the landlord on the same date as the notice . . ."** (s21(4)(b)). Accordingly, more than two months' notice is required where there is an express provision requiring a longer period of notice or the rental period is longer than two months, e.g., where there is a quarterly tenancy, in which case three months' notice has to be given; and

(d) **proceedings have not been commenced before the date specified in the notice.** The claim for possession in **Lower Street Properties Ltd v Jones** was dismissed because proceedings were started the day before the s21 notice expired. Schiemann LJ stated it "is implicit that the landlord cannot bring proceedings until after [the date specified in the notice]" although Kennedy LJ reached his decision on the grounds that the notice served stated "The landlord cannot apply for such an order before the notice has run out", and left open whether, with a different wording, proceedings could have been begun before expiry;

(e) **if the tenancy is one to which Housing Act 1988 s19A applies, that any possession order will not take effect earlier than six months after the grant of the original tenancy** (Housing Act 1988 s21(5) as inserted by Housing Act 1996 s99).

<u>Tenancy deposits and s21 notices</u>

Housing Act 2004 s215 provides that landlords may not serve notices under Housing Act 1988 s21 at any time when there is a failure to comply with the tenancy deposit scheme provisions of that Act – i.e. where a deposit is not being safeguarded in accordance with an authorised scheme or where either the initial requirements of the scheme have not been met or the prescribed information regarding the safeguarding the deposit has not been given.

Possession proceedings – tenancies granted on or after 1st October 2015

Some of the contents of the preceding paragraphs no longer apply to tenancies granted after the provisions of the Deregulation Act 2015 were brought into force on 1st October 2015.

Those amendments:

- introduced the power to prescribe the form of s21 notices. See the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) (Amendment) Regulations 2015 SI No 1725;
- removed the requirement for s21(4) notices to end on the last day of a period of the tenancy; and
- introduced time restrictions in relation to the giving of s21 notices and the bringing of possession proceedings, following the service of a section 21 notice.

  Initially, those amendments only apply to assured shorthold tenancies of dwelling houses in England granted after 1st October 2015, but, as from 1st October 2018, they will apply to all assured shorthold tenancies, whether granted before or after the commencement day. See Deregulation Act 2015 s 41 and the Deregulation Act 2015 (Commencement No. 1 and Transitional and Saving Provisions) Order 2015 SI No. 994 (C. 69), Article 11.

3. M O R T G A G E S

Although some mortgages are regulated by the Consumer Credit Act 1974, most mortgage possession proceedings are governed by the provisions of the Administration of Justice Acts 1970 and 1973.

Power to suspend or to delay date for possession

At common law, "the court has no jurisdiction to decline to make a possession order or to adjourn the hearing, whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course" (**Birmingham Citizens Permanent Building Society v Caunt** [1962] Ch 883, ChD.) In **Caunt** Russell J stated that the sole exception to this rule is that possession proceedings

> "may be adjourned for a short time to afford the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring. When I say the sole exception, I do not, of course, intend to exclude adjournments which in the ordinary course of procedure may be desirable in circumstances such as temporary inability of a party to attend, and so forth". (p912)

However, Administration of Justice Act 1970 s36(1) provides:

> Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession . . . (not being an action for foreclosure in which a claim for possession . . . is also made) the court may exercise any of [its] powers . . . if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

Section 36(2) provides that the court:

> (a) may adjourn the proceedings, or
>
> (b) on giving judgment, or making an order, for delivery of possession ... or at any time before execution of such judgment or order may:
>
> (i) stay or suspend execution of the judgment or order, or
>
> (ii) postpone the date for delivery of possession
>
> for such period or periods as the court thinks reasonable.

The court's powers under s36 apply equally to repayment mortgages and endowment mortgages (**Bank of Scotland v Grimes** [1985] 2 All ER 254, CA).

In **Royal Bank of Scotland v Miller** [2001] EWCA Civ 344, [2002] QB 255, CA it was held that (1) the relevant time for determining whether land consists of or includes a dwelling-house within the meaning of s36 is the time when the mortgagee claims possession, not the date when the legal charge is entered into; and (2) breach of a term of the mortgage (e.g. occupation by a third party without consent) does not prevent s36 from applying.

The court's power under s36 to adjourn mortgage possession proceedings, stay or suspend execution or postpone the date for delivery of possession ceases after a warrant has been executed. (**Cheltenham and Gloucester Building Society v Obi** (1996) 28 HLR 22, CA.)

A bankrupt has *locus standi* to make an application to the court for relief under Administration of Justice Acts 1970 and 1973 (**Nationwide BS v Purvis** [1998] BPIR 625, CA).

Criteria and Evidence

The borrower must, on the balance of probabilities satisfy the court that it is likely that the arrears will be cleared within a reasonable period. The court cannot suspend an order for possession under s36, however hard the circumstances, if there is no prospect of the borrower reducing the arrears. (**Abbey National Mortgages v Bernard** (1995) 71 P&CR 257, CA)

The defendant need not always produce evidence in the normal formal sense (e.g. witness statement, affidavit or on oath). In **Cheltenham and Gloucester Building Society v Grant** (1994) 26 HLR 703, CA, where the building society unsuccessfully challenged the common practice of district judges exercising their discretion under AJA 1970 without hearing sworn evidence from borrowers, Nourse LJ stated that:

> "it must be possible for [judges] to act without evidence, especially where, as here, the mortgagor was present in court and available to be questioned and no objection to the reception of informal material is made by the mortgagee. Clearly, it will sometimes be prudent for the mortgagor to put in an affidavit before the hearing." (p707)

The Court of Appeal declined to lay down rigid rules as to how "busy district judges" should satisfy themselves as to the requirements in s36 and upheld the original order made by the district judge that a possession order should not be enforced without leave of the court while regular payments were made.

Reasonable period

One crucial question which has to be answered in every case is "What is a reasonable period?" The phrase is not defined by the Administration of Justice Act.

In **Centrax Trustees v Ross** [1979] 2 All ER 952, ChD, Goulding J stated that in assessing how long a reasonable period might be, the court must "bear in mind the rights and obligations of both parties, including [the lender's] right to recover their money by selling the property, if necessary, and the full past history of the security."

In **First Middlesbrough Trading and Mortgage Co Ltd v Cunningham** (1974) 28 P&CR 69, CA, Scarman LJ, when considering what is a "reasonable period" within s36, stated:

> "since the object of the installment mortgage was, with the consent of the mortgagee, to give the mortgagor the period of the mortgage to repay the capital sum and interest, one begins with a powerful presumption of fact in favour of the

period of the mortgage being the 'reasonable period"'. (p75)

In **Western Bank v Schindler** [1977] Ch 1; [1976] 2 All ER 393, CA Buckley LJ stated:

> "What must be reasonable must depend on the circumstances of the case... . In a suitable case the specified period might even be the whole remaining prospective life of the mortgage". ([1976] 2 All ER at p400)

These passages were *obiter* but were followed by the Court of Appeal in **Cheltenham and Gloucester Building Society v Norgan** [1996] 1 All ER 449, CA. Waite LJ stated that in determining "a reasonable period"

> "the court should take as its starting point the full term of the mortgage and pose at the outset the question: would it be possible for the mortgagor to maintain payment-off of the arrears by installments over that period?" (p458)

In **Norgan** there had been a history of arrears. In May 1990, when arrears stood at £7,216, the building society obtained a possession order suspended for 28 days. In December 1990 the terms of the suspension were varied, but not complied with, and the building society obtained a warrant. The warrant was twice suspended on terms, but when the borrower failed to comply, the building society applied to reissue the warrant and the borrower cross–applied for a further suspension. The district judge gave leave to reissue the warrant and refused any further suspension. By the time the appeal came on before the circuit judge the arrears were in the region of £20,000. He dismissed the borrower's appeal and she appealed to the Court of Appeal. The Court of Appeal allowed her appeal.

Evans LJ set out a number of considerations which are likely to be relevant when establishing what is a reasonable period. They include:

> "(a) How much can the borrower reasonably afford to pay, both now and in the future? (b) If the borrower has a temporary difficulty in meeting his obligations, how long is the difficulty likely to last? (c) What was the reason for the arrears which have accumulated? (d) How much remains of the original term? (e) What are the relevant contractual terms, and what type of mortgage is it, i.e. when is the principal due to be repaid?"

Other matters which may be relevant include family circumstances and the income of other members of the family. If arrears have accrued as a result of matrimonial breakdown, are any proceedings for ancillary relief likely to result in an order which will enable arrears to be paid off? Is the Benefits Agency (or should it be) paying anything towards the interest due on the mortgage?

Security at risk

Norgan was a case where the lender's security was not at risk. Courts are likely to be far more cautious about exercising s36 powers where there is already negative equity or where there is a risk of negative equity. In **Norgan** Waite LJ recognised that there would be cases where evidence might "be required to see if and when the lender's security will become liable to be put at risk as a result of imposing postponement of payments in arrear" (p459). Evans LJ indicated that courts should ask "Are there any reasons affecting the security which should influence the period for payment?" (p463) Similarly, in **First Middlesbrough Trading and Mortgage Co Ltd v Cunningham** the

Court of Appeal stated that when exercising its AJA discretion, one of the "relevant surrounding circumstances" which the court is entitled to take into account is the fact that the debt might be inadequately secured. Sometimes borrowers produce letters from estate agents in order to satisfy the court about the value of the property in comparison with the amount of the loan outstanding, but in **Bristol and West BS v Ellis** (1997) 29 HLR 282, CA the Court of Appeal stated that judges should approach such estimates with "reserve". If a borrower's valuation is disputed, it may be necessary for there to be an adjournment for an independent valuation so that the court can determine whether the lender's security is at risk.

Sale of the property

In most cases borrowers try to satisfy the court that it is likely that the arrears will cleared within a reasonable period by giving evidence about their income and expenditure. However, where borrowers' income is not sufficient to repay arrears, they may seek time in which to sell the property so that the outstanding balance (including arrears) can be paid from the proceeds of sale.

In **National and Provincial Building Society v Lloyd** [1996] 1 All ER 630, CA, the Court of Appeal considered an appeal against a decision to suspend a possession order to give the borrower time to sell premises and so clear mortgage arrears. The building society argued that any such suspension should only be for a short period. Neill LJ rejected this submission. If there is clear evidence that completion of the sale of a property "could take place in six or nine months or even a year", there was no reason why the court could not come to the conclusion that it was likely that the arrears would be repaid within a reasonable period. What is "a reasonable period" is a question for the court in each individual case. However, in **Lloyd** there was insufficient evidence before the judge to show that the arrears would be paid within a reasonable period. Much of it was "a mere expression of hope" and accordingly the building society's appeal against the suspension was allowed.

In **Bristol and West BS v Ellis** (1997) 29 HLR 282, CA, the Court of Appeal confirmed that what is a reasonable period for sale depends on the individual circumstances of each case, particularly the extent to which the mortgage and arrears are secured by the value of the property. In **Ellis,** the Court of Appeal allowed a lender's appeal against an order which would have allowed the borrower three to five years (when her children would have finished university education) to sell because there was insufficient evidence that Mrs Ellis could or would sell the property within that period or that the proceeds of sale would be sufficient to discharge the mortgage debt and arrears. The Court stated that the comments by Neill LJ in **National and Provincial BS v Lloyd** [1996] 1 All ER 630 that sale "could take place in six or nine months or even a year" did not establish a year as the maximum period "as a rule of law or as a matter of general guidance". (See too **Cheltenham and Gloucester BS v Johnson** (1996) 28 HLR 885, CA where **Lloyd** was followed.)

In most cases where the security is not at risk, the court will adjourn or make a suspended order to allow the borrowers to arrange a sale. It is generally accepted that borrowers occupying premises achieve a better price on sale than lenders through "forced sales". For example, in **Target Home Loans v Clothier** [1994] 1 All ER 439,

CA borrowers paid no mortgage installments for over 15 months and when possession proceedings came to court there were arrears of £46,000. The lenders sought an immediate possession order, but the district judge adjourned for 56 days under s36. When the Court of Appeal heard the appeal, there was a letter from estate agents indicating that an offer of £450,000 for the house had been received. Nolan LJ, after asking whether there was a prospect of an early sale, stated:

> If so, is it better in the interests of all concerned for that to be effected by [the borrower] and his wife or by the mortgage company? If the view is that the prospects of an early sale for the mortgagees as well as for [the borrower] are best served by deferring an order for possession, then it seems to me that that is a solid reason for making such an order . . . ([1994] 1 All ER at p447)

The Court of Appeal made a possession order to take effect in three months.

Even if the power to suspend execution under Administration of Justice Act 1970 s36 cannot be exercised because it is unlikely that the borrower can repay arrears within a reasonable period, the county court still has a residual inherent jurisdiction to defer the giving up of possession in order to enable the lender to sell the property (**Cheltenham and Gloucester plc v Booker** (1997) 29 HLR 634, CA.) In such circumstances, the court may give conduct of the sale of premises to the lender while postponing execution of a warrant for possession until completion of the sale, thus allowing the borrower to remain in occupation. There is no reason in principle for the court to accede to a lender's insistence upon immediate possession if

(a) possession will only be required on completion;

(b) the presence of the borrowers pending completion will enhance, or at least not depress, the sale price;

(c) the borrowers will cooperate in the sale; and

(d) they will give possession to the purchasers on completion.

However, in **Booker** Millett LJ stated these conditions are seldom likely to be satisfied and the circumstances in which such a course would be appropriate are hard to imagine. Such an order would "certainly be a rarity".

If a lender does not agree to a borrower selling premises, the borrower may apply for an order for sale under Law of Property Act 1925 s91(2). Such an application may be made in a county court if "the amount owing in respect of the mortgage or charge at the commencement of the proceedings does not exceed £30,000" (The High Court and County Courts Jurisdiction Order 1991, para 2(4)). If the amount owing is more than £30,000 a section 91 application has to be made in the High Court. In **Cheltenham and Gloucester BS v Krausz** [1997] 1 All ER 21, CA, the Court of Appeal held that a district judge in the county court has no jurisdiction to suspend a warrant in these circumstances. Phillips LJ did not consider "that the County Court, as part of its inherent jurisdiction, can properly suspend an order or warrant for possession in order to enable a mortgagor to apply to the High Court for an order under section 91. It [is] incumbent on the mortgagor to seek from the High Court any relief which the court is empowered to give before the warrant takes effect." He noted that s36 makes it clear that parliament did not intend that the court should have power to curtail mortgagees' rights to possession unless the proceeds of sale were likely to discharge the mortgage debt.

Mortgage Pre-Action Protocol

A pre-action protocol for possession claims based on residential mortgage arrears came into force on 19 November 2008. The latest version, the Pre-Action Protocol for Possession Claims Based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property came into force in April 2015. See *White Book, C12-001* and the annotations thereto. The Protocol does not alter the parties' contractual or statutory rights and obligations, but does describe the behaviour the court will normally expect of the parties prior to the start of possession claims. It aims to ensure that lenders and borrowers act fairly and reasonably with each other in resolving any matter concerning mortgages and encourages more pre-action contact between lenders and borrowers in an effort to seek agreement, and where this cannot be reached, to enable efficient use of the court's time and resources. For example, it provides that

- lenders should consider reasonable requests from borrowers to change the date of regular payment or the method of payment;
- lenders should respond promptly to any proposal for payment made by borrowers. If lenders do not agree to such a proposal they should give reasons in writing;
- if lenders submit proposals for payment, borrowers should be given a reasonable period of time in which to consider such proposals; and
- if borrowers can demonstrate that reasonable steps have been or will be taken to market the property at an appropriate price in accordance with reasonable professional advice, lenders should consider postponing starting possession claims.

The Protocol does not contain any specific sanctions, but concludes "Starting a possession claim should be a last resort and must not normally be started unless all other reasonable attempts to resolve the situation have failed."

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