Rethinking possession orders

Jon Holbrook and **Nick Billingham** explain how to strike a proper balance between landlords and tenants

IN BRIEF

- Pre-action protocol should make suspended possession orders less common.
- Tolerated trespass is a proportionate response to a tenant's default.
- No-date possession orders as envisaged in *Bristol City Council v Hassan* are not necessary.

Many tenants are unable to pay their rent, through no fault of their own, and judges are rightly sympathetic to their plight. But there are some tenants who are at fault in failing to pay their rent. Too many judges are unable to distinguish between these two types of tenants.

Catalyst Communities Housing Association v Colemack (Brentford County Court, 7 November 2006, unreported) illustrates the problem (see graph on p 507). In June 2000 the court gave Ms Colemack 13 years to repay her arrears of £3,337 at £5 per week. During the next six years she succeeded on seven occasions to get the warrant suspended while her arrears continued to increase. By the seventh warrant suspension Colemack's arrears were £12,358 yet the district judge gave her another 47 years to pay them. The housing association became tired of the court 'driving a coach and horses' through its rent recovery systems, and an appeal to the circuit judge enabled Colemack to be evicted. The court's indulgence had effectively given Colemack a six-year interest-free loan of up to £12,000 that ended up as a grant. The considerable cost of servicing this loan/grant in terms of staff time and legal expenses was borne by the housing association. Fortunately, the new rent arrears pre-action protocol gives social landlords an opportunity to ensure that cases such as this are no longer a problem.

ARREARS PROTOCOL

The Protocol for Possession Claims Based on Rent Arrears, available at *www.dca.gov.uk*, requires social landlords to give their tenants five opportunities to pay their arrears before the court can make a possession order. The steps are as follows:

- once before a notice seeking possession is served (para 2);
- twice before issuing proceedings (paras 9 and 10); and
- twice before seeking a possession order from the judge (paras 13(b) and (c)).

The protocol also requires the landlord to take reasonable steps to:

- ensure that the tenant understands what is happening (para 4);
- secure payments from the tenant's benefits (para 5); and
- work with the tenant to resolve any housing benefit difficulties (paras 6 and 7).

If the landlord has discharged these obligations it should be in a strong position to secure an outright, rather than a suspended, possession order on the grounds that having given the tenants five opportunities to reduce the arrears, they will need a compelling reason why they should be given a sixth.

REASONABLE TIME

Possession orders should be made outright unless the tenant's arrears can be paid off within a reasonable period of time. Some district judges have followed mortgage possession cases when deciding that a reasonable period can be for many years. This approach is unlawful; the situations are not comparable, because in mortgage possession cases the loan is secured, interest is paid on the arrears and the costs of court hearings are added to the security (*Taj v Ali (No 1)* (2001) 33 HLR 26, [2000] 3 EGLR 35).

Five years should usually be the maximum period that a tenant should be given for paying off his arrears (*Taj v Ali (No 2)* (2001) 33 HLR 27, para 16). It would be surprising if more than six years could ever be considered reasonable because the landlord needs the court's permission to enforce a possession order that was made six years earlier (CCR Ord 26 r 5(1)(a)). But even these periods are too generous for most rent arrears cases. It should not usually be reasonable for a tenant to be allowed to hold an unsecured interest-free debt for more than a year or two. If the tenant can afford to reduce his arrears by only £3 per week (£150 per year) then an arrears figure in excess of £500 should normally warrant the making of an outright possession order. This argument will be even stronger where the landlord has followed the pre-action protocol.

TOLERATED TRESPASSERS

Practitioners used to talk in terms of suspended possession orders (SPOs) when describing possession orders that enabled occupiers to retain their tenancies providing they did not breach the conditions of suspension. Last year, the Court of Appeal pointed out that the statutory schemes talk about suspending *execution* of the order and postponing the date of possession—Housing Act 1985 (HA 1985), s 85(2) and Housing Act 1988 (HA 1988), s 9(2). The court noted that the court form, N28, ordered the defendant to give the claimant possession on a specified date and thereafter suspended *enforcement* if the arrears were reduced by specified weekly amounts. The traditional SPO determines the tenant's tenancy on a specified date and thereafter suspends enforcement (see *Harlow DC v Hall* [2006] EWCA Civ 156, [2006] All ER (D) 393 (Feb)). Such an order turns a secure tenant into a tolerated trespasser on the date specified (HA 1985, s 82(2) and *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425, 19 HLR 526) and probably does likewise for an assured tenant. The situation concerning assured tenants will be decided shortly by the Court of Appeal in *White v Knowsley Housing Trust*.

Tolerated trespass is a proportionate response to the tenant's previous conduct. Had the tenant responded appropriately to the service of a notice seeking possession or any of the five opportunities that arise under the pre-action protocol then they would not have lost the tenancy. Given the history of default and the fact that a judge will have found it reasonable to make a possession order, the status of tolerated trespasser is an appropriate halfway house between being a tenant and being evicted. The status of

tolerated trespass should not normally last for more than a year or two.

SUSPEND EXECUTION OR POSTPONE POSSESSION?

The statutory schemes created by HA 1985, s 85(2) and HA 1988, s 9(2) create two types of conditional orders: suspended and postponed. The difference between the two is significant: with a suspended order the occupier becomes a tolerated trespasser on a specified date; with a postponed order the occupier retains the tenancy for so long as they do not breach the conditions. This distinction arises because with a suspended order it is *enforcement* that is suspended/stayed, whereas with a postponed order it is the day for possession that is postponed.

Which order should be made when? The words 'suspend' or 'stay' suggest that something is being put off for an unspecified and extended period but 'postponed' suggests something that is put off for a short and fixed period. An order that requires an occupier to pay arrears at £3 per week is a suspended order. It follows that the drafters of the traditional SPO, the N28 and similar forms that have been used for decades, turned tenants into tolerated trespassers when stating that their arrears were to be reduced with weekly payments.

So, when is it appropriate to make a postponed possession order? As 'postpone' suggests a short and fixed period, it is appropriate to make a postponed order when a defaulting tenant expects to come into funds that would enable them to pay the arrears within a short and fixed period.

NO-DATE POSSESSION

In *Bristol City Council v Hassan* [2006] EWCA Civ 656, [2006] 4 All ER 420, the Court of Appeal was so concerned about the apparent unfairness associated with tolerated trespass in a rent arrears case that it suggested the problem could be overcome by courts making no-date possession orders, ie possession orders that require the landlord to return to court for a possession date to be fixed. CPR PD 55 was then amended to create a procedure for getting a date fixed. The procedure is intended to protect the tenant who breaches the terms of a no-date possession order in a *de minimus* way: the absence of a date for his possession means that such a breach will not deprive him of his tenancy status because a secure tenancy can only end once a date for giving up possession has been fixed—HA 1985, s 82(2), and a similar situation probably applies to assured tenancies. And if the breach is *de minimus* then the district judge is unlikely to fix a date for possession.

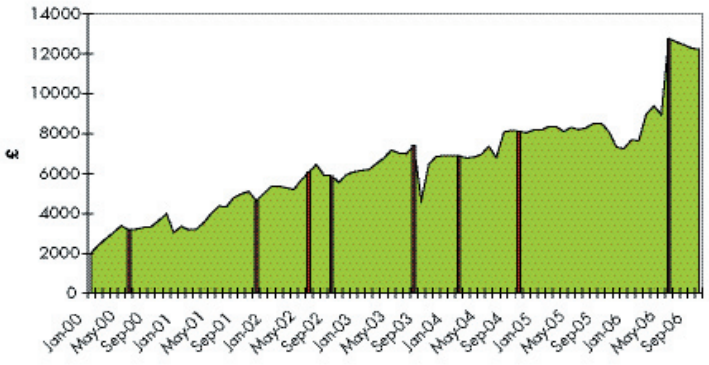
The Court of Appeal intended the procedure for fixing a date to be informal and summary. Its intentions were probably unrealistic. In *Merton London Borough Council v Cook* (Croydon County Court, December 2006, unreported) a district judge heard evidence over two days before fixing a date for possession. *Merton* may be an extreme example of what can go wrong with no-date possession orders but the more fundamental issue is whether or not a no-date possession order should be made in the first place.

SPOs AND TERMS

No-date possession orders were given the go-ahead in *Bristol City Council v Hassan* to deal with a fictitious problem: tolerated trespass. It is fictitious because, as far as tenants are concerned, tolerated trespass is a proportionate response to their history of default. Some landlords have suggested that tolerated trespass is a problem for them because of the absence of enforceable tenancy terms. The problem can be dealt with in one of two ways. First, if the trespasser's conduct gives cause for concern then even if they have not breached the rent repayment terms of the SPO the landlord can return to court to ask for the warrant to be suspended on additional terms. This right arises under HA 1985, s 85(2–3) and HA 1988, s 9(2–3).

Alternatively, when the SPO is made the landlord can ask that the suspension is subject to an additional condition that the "defendant complies with his tenancy terms until he gives up possession". Landlords have traditionally overlooked the courts' ability to "impose such other conditions [ie non-rent conditions] as it thinks fit" but the power is there.

CATALYST COMMUNITIES HA LTD v COLEMACK
Rent arrears Jan 2000 – Oct 2006



The first vertical line indicates when the suspended possession order was made and the others indicate when the warrant was suspended. Graph courtesy of Catalyst and Owen White Solicitors

ORDERS DETERMINE RIGHTS

The statutory schemes under the Housing Acts establish that the parties' rights are determined by the making of a possession order. Hence, there is the statutory need for a notice seeking possession before issuing a possession claim and the statutory requirement that the court satisfy itself that it is reasonable to make a possession order. The primacy of the possession order is also reflected in the fact that enforcement is merely administrative (*Southwark London Borough Council v St Brice* [2001] EWCA Civ 1138, [2001] All ER (D) 209 (Jul)). Given the primacy of the possession order the court will always need compelling and credible evidence from the occupier before it accedes to an application to suspend a warrant.

Instead of being the order that determines the rights of the parties, the making of a possession order has, in recent decades, been undermined by the ease with which district judges suspend warrants. This is a situation that undermines the court's authority, causes social landlords to incur expense that could be better spent on their tenants and does little to instil a sense of responsibility in defaulting tenants.

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