DEFENDING RENTED RESIDENTIAL POSSESSION PROCEEDINGS:

'How to stop the bailiffs without getting (physically) hurt …'

1. This short, non-exhaustive paper is intended to support training for advisers of occupiers facing residential possession proceedings. We endeavor to state the law as at 09.09.19.

2. We try to address the following questions, chronologically :

a) Types of occupation: secure tenancy, assured tenancy, assured shorthold tenancy, excluded tenancies, bare licenses, 'trespass' ;
b) Notice (s. 5 PEA, s. 8 HA88, s. 21 HA 88, s. 83 HA85) ;
c) Grounds (mandatory / discretionary) ;
d) CPR 55 and the court process ;
e) ASSERTED DEFENCES – equality defences, public law defences, counterclaims, technical chicanery.

3. All these questions are inter-related : housing law is a complex mish-mash of common-law, statute and procedure. There is nothing more frightening than the prospect of losing one's home, but unfortunately it can be very hard to advise, or even analyse, any given case – let alone predict the outcome.

4. Despite those difficulties, you can be a tremendous help to anyone facing eviction. Rest assured there is a formidable network of very committed lawyers and organisations out there, who are happy to help you do exactly that.

5. It's also worth mentioning the following free resources from the outset, as almost all of the law referred to in this note is available through these :

i) www.nearlylegal.co.uk
ii) https://england.shelter.org.uk/legal
iii) www.bailii.org

iv) www.legislation.gov.uk

A. TYPES OF OCCUPATION

6. Where a Claimant ('C') brings a possession claim against an occupier ('D'), C is effectively alleging that C has a better right to occupy that land than D's right. So it is important to understand what the different occupiers' rights are and how they can come to an end.

7. The first distinction to draw is between 'trespassers' on the one hand, and licensees/tenants on the other. D trespasses by entering onto the land without the consent of C, where C has a right to control access to the land (eg. as tenant or holder of title absolute). Perhaps unsurprisingly, trespassers have the weakest (or 'least secure') possession of land, although a number of defences may still be available to them (at least arguably).

8. Licensees are people with permission to be on the land. That may be a contractual permission such as a lodger's agreement, or a non-contractual permission such as where a friend is allowed to stay in a spare room. Licensees are not trespassers, but they do not have the right to exclude other people. Licensees are the second least secure occupiers.

9. More secure occupiers than licensees are 'tenants'. A tenant is different from a contractual licensee in that the tenant has been granted not only permission to be on the land, but the right to exclude other people from the land. Lawyers call this 'exclusive possession', and where it is granted for a term at a rent, a tenancy or lease is created (Street v Mountford [1985] UKHL 4). This elevates the occupier from a merely contractual position into that of a holder of an interest in land. This means that during the tenancy, tenants have a better claim to the land than even their landlords, and even have the right to exclude their

landlords (don't try this at home – if your landlord interferes with your enjoyment of your home, call the police or apply for an injunction!).

10. Although lawyers like to think of a clear distinction between tenants and licensees, the occupier's status often turns not only on the express terms of the contract but the conduct of the parties and the context of the arrangement entered into (see eg. R(N) v Lewisham LBC [2013] EWCA Civ 804, [2014] UKSC 62). The express terms of the agreement are not determinative (Street v Mountford). It can even be that an agreement expressed to be a license and granted by a mere licensee is held to be a tenancy (Bruton v London and Quadrant [1999] UKHL 26). This means that those advising occupiers can advise of difficulties, while helping occupiers to assert rights which, while sufficiently cogent to help a Defendant resist a claim, may be contradicted by the documentary evidence, and may well appear counter-intuitive.

11. Occupation by both licensees and tenants is protected by a number of important statutory provisions, the most important of which are :

    a. Section 6 of the *Criminal Law Act 1977*, which creates an offence of using or threatening violence to secure entry to residential property (even against trespassers), in the circumstances prescribed.
    b. Sub-section 3(1) of the *Protection from Eviction Act 1967*, which creates a civil tort of evicting a residential occupier without a Court order (subject to exceptions – see below).
    c. Part I of the *Housing Act 1988* gives statutory protection to certain types of tenancy (of non-local-authority landlords), called 'assured tenancies'.
    d. Part IV of the *Housing Act 1985* gives statutory protection to certain other types of tenancy (local authority landlords), called 'secure tenancies'.

12. Section 6 of the Criminal Law Act 1977 and ss. 3(1) of the Protection of Eviction Act 1977 ('PEA77') are mostly important only as background. They are the reason why people who are trying to exclude residential occupiers generally

instigate court proceedings, rather than trying to expel people under their own steam. It is worth noting that when a person has been illegally or unlawfully evicted, local authorities and the police may have a power (but certainly no duty) to investigate and perhaps even prosecute them; but also that the person may have a civil claim for re-entry and damages, for which they could get legal aid.

13. The Protection from Eviction Act 1977 ('PEA') provides the lowest level of protection for a tenant or licensee, but it can be very useful. It protects all tenants or licensees of residential premises, with the following exceptions (see s. 3A PEA, 'excluded tenancies and licenses') :

    a. Occupiers who share occupation with a resident landlord (s. 3A(2) PEA);
    b. Occupiers who share occupation with a resident member of the landlord's family (s. 3A(3) PEA) ;
    c. Occupiers who entered as trespassers but were then granted a license as a 'temporary expedient' (s. 3A(6) PEA) ;
    d. Occupiers permitted to occupy 'for a holiday only' (s. 3A(7)(a) PEA) ;
    e. Occupiers occupying other than for money's worth (s. 3A(7)(b) PEA) ;
    f. Occupiers accommodated under s. 4 or Part IV of the Immigration and Asylum Act 1999 (s. 3(7A) PEA) ;
    g. 'Hostel accommodation', within the meaning of the Housing Act 1985, provided by certain public landlords (ss. 3A(8) PEA).

14. Interestingly, the Supreme Court has held that accommodation provided by local authorities pursuant to their duties to house homeless people under Part VII of the Housing Act 1996 is, or at least can be, excluded from s.3 of PEA (R(N) v Lewisham LBC [2013] EWCA Civ 804). However, in every case, advisers should pay careful attention to both: i) the contractual terms which the occupier entered into and ii) all of the circumstances, especially any statutory scheme which applied to the occupier at the time the tenancy/license was granted.

15. To terminate the protected license/tenancy, the licensor/landlord has to do two things. First, the licensor/landlord must serve on the occupier a 'Notice to Quit ('NTQ') – a document stating that the landlord/licensor requires the property back on a certain date (no fewer than 4 weeks from service of the notice) and is terminating the license/tenancy (s. 5 of the PEA77). The NTQ must also contain the information prescribed by the Notices to Quit etc (Prescribed Information) Regulations 1988: effectively informing the occupier of the right not to be evicted without a court order, and how to get legal advice about any other rights which may apply.

16. The second thing the landlord/licensor has to do is to bring court proceedings. In the Court proceedings, the Court will consider whether the landlord has served a valid NTQ, and whether there are any other applicable, or potentially applicable, 'asserted defences' advanced by the Defendant (such as public law, Equality Act 2010, etc – see below).

17. If the landlord/licensor has complied with the requirements of the PEA, and there are no applicable defences, then the Court has no power but to grant the Claimant's claim. Even then, the landlord will have to apply for a bailiff's warrant to enforce the order, and the Defendant would generally be notified of a bailiff's appointment some weeks from the possession order.

18. The highest forms of statutory protection for tenants come from the Housing Act of 1985 ('HA85') and the Housing Act 1988 ('HA88'). Between them, these two acts apply to the vast majority of dwellings let under a tenancy without a residential landlord.

19. Where the landlord is a local authority, unless one of the exceptions in schedule 1 of HA85 applies, the tenancy is a secure tenancy (s. 80(1), HA85). Where the landlord, such as a housing association or private landlord, is not a local authority, the tenancy is 'assured' (s. 1 of HA88). In some instances, in particular where a private landlord (ie not local authority, not housing

association) has given the proper notice, an assured tenancy can be terminated by a landlord without reference to any 'grounds' (ie. simply at the landlord's whim, subject to technical requirements). Such tenancies are called 'assured shorthold tenancies' (s. 19A and s. 20, HA88 – see below).

20. Both acts work in a similar way, but with important differences :

    a. At the end of the contractual term of the tenancy, if the tenant holds over, a statutory periodic tenancy arises by operation of law, independent of the contract (s. 79 HA85 ; s. 5(2) HA88).
    b. That tenancy can only be terminated by the proper execution of a Court order (s. 82 HA85 ; s. 5(1) HA88).
    c. For the Court to consider a claim for possession brought by the landlord, the landlord must first serve a notice on the tenant in the prescribed form, or the Court must dispense with notice (s. 83 HA85, s. 8 / s. 21 HA88).
    d. When the Court considers the landlord's claim for possession, it must consider and apply, amongst other things, the 'grounds for possession' (s. 84(1) and Sch 2 of HA85 ; s. 7(1) and Sch 2 of HA88).

21. There are a few important qualifications to these statutory protections.

22. The first is that one joint tenant can end a tenancy by serving a Notice to Quit on the landlord and the co-tenant, and this will terminate the statutory protection which the recipient co-tenant might otherwise have enjoyed (Sims v Dacorum BC [2015] AC 1336, [2014] UKSC 63).

23. The second is that a tenant can cease to fulfill the 'tenant condition', by not living at the property as his/her only or principal home (s. 81 HA85 ; s. 1(1)(b) HA88). While the tenant condition is not met, the tenancy loses statutory protection and the landlord can terminate the residual contractual tenancy by serving a notice to quit (Hammersmith and Fulham LBC v Clarke (2001) 33 HLR

77, CA). Similarly, if an assured tenant sublets the whole of the property in breach of tenancy, then assured status is irrevocably lost (s. 15A HA88).

24. A tenant can also 'surrender' a tenancy, as well as serving a notice to quit on the landlord. Surrender is very fact dependent, but it is made out where both parties conduct themselves in such a way as to show that they have treated the tenancy as having come to an end (QFS Scaffolding Ltd v Richard Douglas John Sable et al [2010] EWCA Civ 682).

25. Finally, it is worth considering briefly the law of succession and how it may help Defendants. When tenants die, landlords can terminate the tenancy by serving a Notice to Quit on the public trustee and any occupiers. However, if, on the death of an assured or secure tenant, the occupiers fulfill certain statutory and/or contractual conditions (s. 86A HA85 ; s. 17 HA88), then *by operation of law alone* the occupier becomes a tenant. Landlords often assert that they have 'refused an application for succession', but this is nonsense: where the conditions are fulfilled, the occupier is a tenant and the landlord can do nothing about it.

26. In addition, where the conditions are not fulfilled, public landlords sometimes have policies for 'discretionary succession', and where a Defendant may assert a public law defence by asserting that a decision to refuse such a discretionary succession was unlawful.

27. We shall now look in more detail at the notice and claim stages of possession proceedings.

B. NOTICES (s. 5 PEA77, s. 83 HA85, s. 8 HA88 and s. 21 HA88)

28. Where a tenancy falls under one of the statutory protections set out above, the first protection that a tenant has is the requirement that the landlord serve a valid notice.

29. As set out above, where the tenancy/license is protected only by the PEA77, the landlord needs to comply with the requirements of s. 5 of the PEA77 and the Notices to Quit (Prescribed Information) Regulations 1988.

30. In relation to secured and assured tenancies, a landlord must serve a Notice Seeking Possession (s. 83 HA85 ; s. 8 HA88). For secure tenancies, the form is prescribed by the Secure Tenancies (Notices) Regulations 1987 (in particular, Part I of the Schedule). For assured tenancies, the form is prescribed by the Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 2015 (in particular, Form No. 3 of the Schedule).

31. A failure to comply with the substantive requirements for the form of the notice is not necessarily fatal to the claim : the Court has a power to dispense with notice in many cases (s. 83(1)(2) HA85 ; s. 8(1)(b) HA88). However, the Courts have been slow to grant possession where there is a serious failing in the text of the notice (see eg Mountain v Hastings [1993] 3 WLUK 361 ; Knowsley Housing Trust v Revell [2003] EWCA Civ 496). Moreover, it is important to remember that where a landlord relies on a 'mandatory ground' for possession, the Court has no power to dispense with notice, so any substantive failure to comply with the notice requirements is fatal to the landlord's claim for possession (see s. 84A and s. 83ZA HA85 ; s. 8(5) HA88).

32. In addition to the form of the Notice Seeking Possession, its key requirements are that it specify the 'grounds' on which possession is sought, and give particulars of those grounds. In other words, the Notice needs to quote the legal basis on which possession is sought, and explain how that basis applies to the tenant's circumstances. For example, a Housing Association landlord relying on rent arrears might include, on a fully completed 'Form No 3', the full text of Grounds 8, 10 and 11 of Schedule 2 to HA88, as well as stating the alleged rent arrears and (perhaps) a brief history of the failure/refusal to pay rent as and when it fell due.

33. In relation to assured short-hold tenancies, as well as Notices of Seeking Possession, private landlords are entitled to rely on notices served pursuant to

s. 21 of HA88 (fondly referred to as ‘section 21 notices’). These are notices which seek to terminate the ‘statutory periodic tenancy’, that arises under s. 5 of HA88, but without reference to any grounds. These are sometimes referred to as ‘no-fault possession proceedings’, although it is worth noting that a number of the grounds in HA85 and HA88 can be made out without any fault on the part of the tenant.

34. Although there is no substantive requirement for the landlord who has served a s. 21 notice to prove facts about the tenancy, such as breaches in the form of rent arrears or anti-social behaviour, there are interestingly a number of rather technical, formal requirements which landlords must comply with if they are to rely on s. 21 HA88. The most important of these were introduced by the Housing Act 2004 (‘HA2004’) and the astonishingly named Deregulation Act of 2015. In summary, a landlord seeking to rely on a s. 21 notice must show the following (Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015, Regg 2 and 3) :

    a. That the s. 21 notice was served on the tenant as required by s. 21 of HA88;
    b. That the s. 21 notice was in the prescribed form, namely Form 6A of the Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 2015 ;
    c. That any ‘tenancy deposit’ has been either returned or held in accordance with an ‘authorized scheme’, and that the landlord complied with the ‘initial requirements’ of such a scheme (s. 215(1) HA2004) ;
    d. That the landlord provided to the tenant an energy performance certificate, as required by Reg 6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012 ;
    e. That the landlord provided to the tenant any gas safety certificate as required by Regg 36(6) and 36(7) of the Gas Safety (Installation and Use) Regulations 1998 ;
    f. That the landlord provided to the tenant a copy of the DCLG’s ‘How to Rent’ booklet ;

g. That the eviction sought by the landlord is not a 'retaliatory' eviction, which is an eviction where (see s. 33 Deregulation Act 2015) :
    i. the tenant had complained in writing to the landlord about the condition of the property,
    ii. the landlord didn't give, in writing, an 'adequate' response,
    iii. the tenant then reported the condition of the property to the relevant local authority,
    iv. the local authority issued an improvement notice and/or an emergency remedial action notice

35. It is worth bearing in mind that, for a Claimant, satisfying the notice conditions is only the first hurdle. Even where Claimants rely on mandatory grounds, Defendants may assert positive defences, including but not limited to those based on discrimination, public law and/or factual disputes.

C. GROUNDS (Sch 2 HA85 and Sch 2 HA88)

36. The 'grounds' of possession are effectively factual scenarios, or conditions, of which the Court has to be satisfied before it can make a possession order (eg. rent arrears or anti-social behaviour). These are set out in Sch 2 of HA85 and Sch 2 of HA88. Some grounds are 'discretionary', meaning that the Court is not required to make an order and should only make an order where it is satisfied that it is reasonable to do so. Other grounds are 'mandatory', meaning that the Court has no discretion but to make the order sought by the Claimant (subject to the lawfulness of the Claimant's conduct – see below).

37. There are a number of grounds, and the full text of Sch 2 HA85 and Sch 2 HA88 deserve careful consideration in their own right. Nevertheless a very brief, non-exhaustive summary of the most commonly occurring grounds may help :

a. **Rent arrears** - Ground 1 (discretionary), Sch 2 HA85 ;
    Grounds 8 (mandatory), 10 and 11 (discretionary) Sch 2 HA 88.
b. **Anti-social behaviour** –

s. 84A HA88 (mandatory), Ground 2 (discretionary), Sch 2 HA85 ;
Ground 7A (mandatory), Grounds 12 and 14 (discretionary) HA88 ;

c. **Landlord induced to grant tenancy by false statement** –
Ground 5, Sch 2 HA85 (discretionary) ;
Ground 17, Sch 2 HA88 (discretionary).

d. **Repairs are required, and suitable accommodation offered** –
Ground

38. Where the Court makes an order on discretionary grounds, it may 'suspend' the enforcement of the order (s. 85(2) HA85 ; s. 7 HA88). This means that, so long as certain conditions are fulfilled, the Claimant cannot enforce the order (ie. cannot apply for a bailiff's warrant, the only lawful way to secure the tenant's eviction).The above might be most easily illustrated with reference to an example…

Case study 1 : Arrears, mandatory and discretionary grounds

A tenant ('D') is having difficulties with Universal Credit, misses 9 weeks' rent (9wk x £100/wk) and so is in rent arrears (£900). D's housing association landlord ('C') serves on D a valid notice of seeking possession under s. 8 HA88, relying on Grounds 8, 10 and 11 of Sch 2. Between the notice and the hearing, D's Universal Credit then comes into part payment. D also finds work and makes a payment reducing the arrears to £700 on the day of the hearing. D asks for an adjournment, but C asks the Court to make a 'suspended possession order'. The Court considers D's history of previous arrears and makes an order that D give C possession of D's home, not to be enforced as long as D pays C the current rent + £3.80 weekly towards the arrears.

39. In the above example, had D not reduced the arrears below £800, C could have relied on ground 8 – a mandatory ground, which, if established would have required the Court to make an 'outright order' (ie. an order not suspended).

D. CLAIM FORM, PARTICULARS AND CPR 55

40. When a tenant holds over on the expiry of one of the notices referred to above, the landlord's next step is to issue a claim in the county court for possession of the property.

41. Before bringing a claim, a social landlord (ie. housing association or local authority) should really abide by the pre-action protocol for social landlords (see below). In principle, any failure to do so by a Claimant can be taken into account by the court when considering what order to make.

42. Claims for land are governed by Part 55 of the Civil Procedure Rules ('CPR'). The landlord must start the claim by issuing a Claim Form (N5 is the dedicated form for rented residential premises) and Particulars of Claim (see form N119). The Claimant is required to set out the allegations in full in the Particulars of Claim (CPR 16.4(1)(a) ; PD 55A, para 4). The landlord or the court must then serve these documents on the tenant. Generally speaking there is no requirement to file or serve a formal Defence prior to the first hearing (CPR 55.7(1)). So defendants who receive a claim for possession of their home are not under a duty to take any step prior to the hearing, although they might well benefit from some advice and may wish to complete a 'defence form'.

43. The exception to the lack of formal requirements for a Defence on receipt of the claim form is under the 'accelerated procedure' (CPR 55, Part II – especially CPR 55.14). Landlords can opt for the accelerated procedure where they seek to rely on a section 21 notice to end an assured short-hold tenancy. The landlord must use the prescribed form N5B, and the Defendant will receive the completed N5B along with a copy of form N11B to complete and return within 14 days. Under the accelerated procedure, there will only be a hearing if the judge is not satisfied of any of the matters required to be proved (CPR 55.16(1)(b)). In other words, where the landlord's claim under the accelerated procedure is well-founded, and a Defendant does nothing or does not dispute the claim in writing on grounds which appear substantial, the Court will make a possession order without a hearing.

44. Under the ‘normal’ procedure (ie. not accelerated), the claim will be listed for a hearing, usually in a busy list with a time estimate of 5 minutes. At that hearing the Court will consider whether the claim is ‘genuinely disputed on grounds which appear substantial’ (CPR 55.8(2)). If not, it can make a possession order. If so, it should make directions (CPR 55.8(1)(b)). Defendants and those advising them should bear in mind that any defence will have to be sufficiently clear to the Court for it to be able to manage the case, so a fully set out draft statement of case is of substantial assistance (Birmingham v Stephenson [2016] HLR 44).

45. ‘Grounds which appear substantial’ are often easier to formulate than to discern. If the landlord has failed to comply with the requirements set out above in relation to notice, or the civil procedure rules themselves, this may amount to a sufficient technical defence. As one might expect, a denial of the facts underlying the claim would also clearly amount to ‘grounds which appear substantial’. For example, if a defendant simply avers that they did not do the anti-social behaviour alleged, or that they have paid the rent and there are no arrears, then the Court will make directions for the disposal of the claim. Alternatively, a Defendant may seek to rely on one of the asserted defences set out below.

46. Sometimes a defendant will miss such a hearing, and a possession order will be made in the defendant’s absence. A defendant can apply to set aside such an order, but will have to show (pursuant to Salix Homes v Mantato [2019] EWCA Civ 445, applying the principles in CPR 39.3) :

    a. The Defendant acted promptly upon finding out about the order ;
    b. a good reason for not attending the hearing ;
    c. reasonable prospects of success at the hearing.

47. One important feature of possession proceedings is that the order for possession is not the end of the claim. If a Defendant holds over after the date for possession, then the Claimant has to apply to the Court office to enforce the order– subject to any suspension on the enforcement of the order. The flip-side

of that is that, where a Defendant has breached the terms of a suspended possession order, the Defendant has to apply (on form N244) to stay or suspend the enforcement of the order.

E. ASSERTED DEFENCES

48. There are a number of asserted defences which can help a Defendant, although not all of them apply to all claims :

    a. Equality Act 2010 defences (against all claims) ;
    b. Public Law defences (against all claims by local authorities and housing associations) ;
    c. Counterclaims (against all claims based on rent arrears) ;
    d. Technical chicanery (various).

Equality Act 2010

49. The Equality Act 2010 ('EqA2010') creates civil torts of discrimination in different spheres. Discrimination is defined as differential treatment on account of a 'protected characteristic'. The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation (s. 4).

50. Discrimination can be direct: where the discriminator has in mind, consciously or subconsciously, the protected characteristic, and decides to treat the Claimant differently (s. 13, EqA2010). It can also be indirect: where the discriminator applies a 'provision, criterion or practice' ('PCP') to everyone, and it is that PCP which places the Claimant at a substantial disadvantage, when compared with those who do not share the relevant protected characteristic (s. 19 EqA2010). The classic example of indirect discrimination is the erstwhile requirement of the City of London police that all its officers had to be 6 feet (ca.

1.8m) tall. Clearly this made it harder for women than it was for men, even though the rule had no direct provision as to gender.

51. There are two further forms of discrimination which apply only to disability: discrimination arising from disability (s. 15 EqA2010) and failure to make reasonable adjustments (s. 20 and 21 EqA2010). Discrimination arising from disability is simply where someone who knows or should know of someone else's disability, treats that person less favourably because of something arising from their disability. Failure to make reasonable adjustments is made out where, knowing of the person's disability, the alleged discriminator fails to take some step that would mitigate a disadvantage to which a disabled person has been, or would be, subjected.

52. In all forms of discrimination, except for direct, the alleged discriminator can rely on a defence of justification. If the alleged discriminator can establish that the alleged discrimination was actually a proportional means of achieving a legitimate aim, then the conduct is not discriminatory. It is worth stressing that the proportional means has to be 'rationally connected' to the legitimate aim. So, although the collection of rent is a legitimate aim, a breach of the pre-action protocol, such as failure to help a tenant with a benefit claim, might amount to a PCP which could not be justified as it does not further the aim of rent collection.

53. These provisions prohibiting discrimination are of great use to Defendants in possession proceedings because of s. 35 of the Equality Act 2010, which prohibits 'taking steps to secure a person's eviction' in a discriminatory manner. So, a person with severe depression, for example, and who is dependent on state benefits which (through no fault of the tenant's) have been sporadic and have underpaid, can argue that the rent arrears on which the Claimant relies are a 'matter arising from the disability', which would require the landlord to show that it had acted reasonably.

54. Discrimination law is intensely complicated and a proper discussion of it lies far beyond the scope of this note. There are two key cases which help to shape its

application to possession proceedings, although there is a great deal of case-law and statutory guidance in relation to possession proceedings and beyond.

55. In Akerman-Livingstone v Aster Communities Ltd [2015] UKSC 15, the Supreme Court gave guidance about how to treat an Equality Act defence raised at the first possession hearing. It drew a distinction between public law defences (see below), which should normally be considered summarily, and defences under the Equality Act 2010. Because the Equality Act 2010 protection is stronger than the public law protection, the structured approach to proportionality has to be adopted (see especially paras 18-34, 51-58 and 64).

56. In Paragon Housing v Neville [2018] EWCA Civ 1712, the Court of Appeal held that, where a Court has made a suspended possession order, the Defendant cannot challenge the enforcement of that order as discriminatory. With respect, this decision makes little sense. It is easy to imagine a scenario where the enforcement of an order is in itself discriminatory (eg. a new housing officer who directly discriminates against the tenant based on race), and the clear wording of s. 35 of the Equality Act 2010 prohibits discriminatory 'steps to secure the eviction'.

Public Law

57. For a long time, a tenant had no means to challenge possession proceedings on the basis that the public authority landlord had breached public law. However, in Manchester City Council v Pinnock [2010] UKSC 45, the Supreme Court held that occupiers could avail themselves of 'public law defences' in possession proceedings. This has been held to apply to claims by housing associations in the same way as it applies to claims by local authority landlords (Eastlands Homes Partnership Ltd v Whyte [2010] EWHC 695 (QB)).

58. As with Equality Act defences, public law is intensely complicated. It is worth considering, in very rough outline, this non-exhaustive list of potential challenges :

a. Illegality: where a public authority acts outside 'the four corners of the statute' (or, indeed, common law), its decision has to be quashed or, in possession proceedings, its claim should fail. A possible example would be a challenge to a decision to evict a parent and his/her children without making arrangements for, or considering the impact on, the children (s. 11 of the Children Act 2004).
b. Irrationality: where a public authority arrives at a decision so unreasonable that no reasonable public authority could have made such a decision. An example might be a decision that the occupier was not the son of the deceased tenant, because of his eye-colour, so that his application for a discretionary succession was refused. Irrationality can also be made out where the public authority fails to consider a relevant consideration (eg its published policy), or takes into account an irrelevant consideration.
c. Procedural unfairness: examples are where a decision-maker is 'judge in his/her own cause' (eg. the housing officer is the brother of a neighbour complaining of ASB by the Defendant), or has not given the Defendant the opportunity to put their case before bringing proceedings (see the pre-action protocol for social landlords).
d. Legitimate expectation : this is where the landlord has made a promise, which has led the Defendant to 'change position', and then the landlord seeks to renege on that promise.
e. Human Rights : the most commonly asserted are article 8 (the right to respect for one's home and private life) and article 6 (the right to a fair and public hearing in the determination of one's civil rights and obligations). Again, interference with these must be 'proportional', although the higher courts have encouraged summary consideration of defences based on proportionality alone (see Pinnock).

Counterclaims

59. Often a possession claim is based on rent arrears (see above, ‘GROUNDS’). In such a case a Defendant is generally entitled, subject to case-management and the overriding objective, to assert by way of ‘set-off’ that the Claimant owes the Defendant money too, which should be credited to the Defendant.

60. Although a court may expect a Defendant to advance such a case at an early stage, the court has power to allow a counterclaim even after the possession order has been made and a date has been set for the eviction (see Rahman v Sterling [2001] 1 WLR 496).

61. The most common counterclaims, although certainly not all, are based on the following possible causes of action :

    a. Disrepair : s. 11 of the Landlord and Tenant Act 1985 provides for an implied term in all residential short leases that requires the landlord to ‘keep in repair’, the structure and exterior of the property, and keep in repair and good working order the installations for water, electricity, and water and space heating. The tenant needs to show the deterioration in the condition of the item, and that the landlord had notice of it. Damages are normally awarded as a percentage of rent (see Wallace v Manchester City Council [1998] 30 HLR 111 ; English Church Houses v Shine [2004] HLR 42).
    b. Breach of the covenant for quiet enjoyment : you may be shocked to learn that landlords sometimes treat their tenants in an aggressive way, for example shutting off utilities, or attending the property unannounced and being abusive. All tenancies have an implied covenant requiring the landlord to allow the tenant peacefully to enjoy the property during the tenancy, and any substantial breach of that covenant can sound in substantial damages. In addition, any trespass to the tenant’s person or goods will normally amount to a civil tort.
    c. Equality Act 2010 : where, for example, a Defendant raises a defence that the landlord’s possession claim is based on rent arrears but is somehow discriminatory (eg. arrears because of disability – s. 15

Equality Act 2010), the Defendant would be well advised to include a counterclaim seeking damages including 'injury to feelings'.

d. Deposit Protection : where a landlord fails to comply with the deposit protection provisions (s. 212 to 217, HA2004), the tenant can ask the court for an order that the landlord return the deposit and pay to the tenant 1 to 3 times the deposit (s. 214, HA2004).

62. It should be emphasized that this is a non-exhaustive list, and that the principle of set-off can be used in relation to any claim, in debt or damages, which a tenant can assert against a landlord.

Technical chicanery

63. In addition to all the possible defences set out above, there are a number of nifty technicalities on which a Defendant can seek to rely :

a. Section 47 and 48 of the Landlord and Tenant Act 1987 provides that, where a residential landlord has failed to furnish the tenant with an address at which notices can be served, no rent can be lawfully due from the tenant.
b. Rent increases are governed by statutory provisions (s. 103 HA85 ; s. 13 HA88), as well as any contractual mechanism. If a landlord does not comply with the relevant requirements, the rent is not increased.
c. Service charges are an extremely complicated area of law, but are basically a contractual non-rent charge (eg. heating, 'concierge', 'CCTV'). However, many large landlords simply charge tenants for 'services', without carefully checking whether the service is one to which the tenant has agreed, or alternatively whether the proper statutory notification procedures have been complied with (eg. s. 103 HA85).
d. Pre-action protocol for social landlords provides guidance for local authorities and housing associations about what they should do before bringing a claim. Failure to comply with the pre-action protocol can be taken into account by the court before considering 'what order to make'.

Moreover, the pre-action protocol ('PAP', to its friends) can be used in conjunction with other defences (eg. public law, discrimination), to strengthen an argument that a public landlord should have behaved differently.

64. There are a wealth of other interesting technical aspects to the common law of landlord and tenant, as well as the statutory provisions governing residential tenancies. The important thing to do is to be creative and focused, no matter how many alternative arguments you are bound to raise. It is also worth framing any technical argument as the basis for which the court has the power to do something which is fair, rather than an end in its own right. A busy judge is unlikely to have much sympathy for a potentially disruptive service charge argument, but he may well have sympathy for a Defendant's young disabled child. If you can bring the arguments together concisely and clearly then you are well on your way.

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