POSSESSION PROCEEDINGS
AGAINST PRIVATE LANDLORDS

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INTRODUCTION

1. This paper intends to complement and pick up from Deirdre Forster's paper. Where she explores claims brought under the accelerated procedure and considers the validity of section 21 notices, this paper looks at claims brought under the Part 7 (CPR) procedure, where the landlord relies on a ground of possession under section 8 Housing Act 1988.

2. However, the real focus of this paper is on claims brought by private landlords relying on and in the context of Ground 8. While the accelerated procedure provides and quick and cheap way of private landlords obtaining possession, there are of course many situations where a private landlord will nonetheless choose to rely on the ordinary Part 7 procedure and will serve notice under section 8 HA 1988. Typically this will be where either: (a) a landlord is unable to serve a section 21 notice because it would not be valid, and its validity cannot be restored (e.g. in the case of failure to serve a gas safety certificate); or (b) where there are rent arrears which the landlord would seek to recover (see r. 55.12(1)(b)). While there are rare cases where a private landlord will rely on, for example, anti-social behaviour or a deterioration in the condition of the premises, the vast majority of claims where a private landlord seeks to rely on a ground of possession will be Ground 8 cases.

3. This paper therefore aims to explore possible defences to Ground 8 claims, as well as tactics and strategies for dealing with such claims in the context of a private landlord:

    a. Ground 8: the first possession hearing

    b. Technical and procedural issues

    c. Substantive defences

    d. Set offs and counterclaims

GROUND 8: THE FIRST POSSESSION HEARING

4. As we all know, Ground 8 is a mandatory ground for possession so that once the court is satisfied that the relevant level of arrears is made out at both the date of notice and the date of hearing, it has no choice but to make an outright possession order: ss. 7(3) and 9(6) HA 1988 / s. 89 Housing Act 1980.

5. However, the court retains the power to adjourn the claim at any point prior to being "satisfied" as to the level of arrears. Plainly, if the tenant can raise an arguable defence or set off then the court cannot be so 'satisfied' and directions should be given.

6. It is not however legitimate for the court to adjourn the hearing to enable the tenant to pay off arrears so as to defeat the Ground 8 claim for possession, unless there are 'exceptional circumstances': *North British Housing Association Limited v Matthews* [2005] 1 W.L.R. 3133. 'Exceptional circumstances' are however to be narrowly construed. It might include being robbed on the way to the hearing for example, but it does not include the fact that arrears are due to maladministration on the part of the housing benefit authority.

7. It follows that if all that is wanted is an adjournment, and there is little in the way of a substantive defence to the claim, the tenant facing Ground 8 must apply for an adjournment *before* the court is satisfied as to the relevant level of arrears. Some examples are:

    a. to allow a tenant to obtain legal aid and representation: *Bates v Croydon* (2001) 33 HLR 792;

    b. to allow a tenants appeal again a refusal of legal aid to be determined *Birmingham v Lloyd* [2012] EWCA Civ 744; or,

    c. pending the outcome of an appeal in the Supreme Court: *Kingcastle v Owen-Owen* (1999) *The Times* 18 March.

8. In reality however, the tenant who wishes to avoid a possession order being made at the first hearing will have to identify some procedural flaw or at least have some indication of a substantive and genuine defence.

9. The relevant rules are CPR r.55.8 reads, so far as material, as follows:

> *(1) At the hearing fixed in accordance with rule 55.5(1) or at any adjournment of that hearing, the court may—*
>
> *(b) decide the claim; or*
>
> *(c) give case management directions*
>
> *(2) Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under paragraph (1)(b) will include the allocation of the claim to a track or directions to enable it to be allocated."*

10. In *Birmingham City Council v Stephenson* [2016] H.L.R. 44 the Court of Appeal overturned both the District Judge and Circuit Judge's refusal to adjourn where a possession order was made at first hearing. It was not a Ground 8 case, but it was a mandatory possession claim, relating to an Introductory tenancy. Finding that the case ought to have been adjourned, the Court observed that:

> *13 The rules thus envisage that at the time of the first hearing, or indeed at a subsequent hearing, the tenant may well not have served the defence and that judgment should not be entered in default of defence. [but] the existence of what appears to be a genuine dispute on substantial grounds is not a precondition to the giving of case management directions under r.55.8(1)(b)*

11. Thus, the tenant who is able to establish that the claim is genuinely disputed on grounds which appear to be substantial should have her case adjourned, but there may also be other cases where it is appropriate to adjourn the case in order to explore whether there *may be* a defence.

TECHNICAL AND PROCEDURAL ISSUES

Standing / validity of the claim

12. The only person that can bring a claim for possession against a tenant is the immediate landlord entitled to possession. In particular, a managing agent has no standing to bring a claim: *Chesters Accomodation Agency v Victor Abebrese* [1997] 7 WLUK 413. This stands to reason given that an order for possession is an order that possession is given to the claimant. Of course, this is reflected in paragraph 1 of N119, and is in accordance with who can serve a notice under section 8 HA 1988 (see below).

13. Further, where there are joint landlords (even if one has been a 'silent' landlord or not recorded on the tenancy agreement) both must be claimants: CPR 19.3(1).

Statements of truth

14. One issue however that arises frequently in relation to private landlords is the use of managing agents. As to this paragraph 3.11 of PD 22 (Statements of Truth) provides expressly states: "An agent who manages property or investments for the party cannot sign a statement of truth. It must be signed by the party or by the legal representative of the party."

15. In relation to the PCOL procedure paragraph 9.1 of PD 55B further provides: 9.1 *"Any provision of the CPR which requires a document to be signed by any person is satisfied by that person entering his name on an online form."* Thus, an agent or 'eviction practitioner' filling out the claim form on the landlord's behalf does not satisfy the requirements for a valid statement of truth. While it will not always be possible to know who has filled out the PCOL claim form, there will be cases where it will be obvious, for example where the landlord is known to the tenant personally, and/or where they are known to be abroad.

16. Further, in relation to corporate landlords, there may be an issue about the identity of the person signing the statement of truth on the landlord's behalf. As to this:

3.1 In a statement of case, a response or an application notice, the statement of truth must be signed by:

(1) the party or his litigation friend, or

(2) the legal representative of the party or litigation friend.

3.4 Where a document is to be verified on behalf of a company or other corporation, subject to paragraph 3.7 below, the statement of truth must be signed by a person holding a senior position in the company or corporation. That person must state the office or position held.

3.5 Each of the following persons is a person holding a senior position:

(1) in respect of a registered company or corporation, a director, the treasurer, secretary, chief executive, manager or other officer of the company or corporation, and

(2) in respect of a corporation which is not a registered company, in addition to those persons set out in (1), the mayor, chairman, president or town clerk or other similar officer of the corporation.

17. Further guidance is given at paragraph 3.11:

"The word manager will be construed in the context of the phrase 'a person holding a senior position' which it is used to define. The court will consider the size of the company and the size and nature of the claim. It would expect the manager signing the statement of truth to have personal knowledge of the content of the document or to be responsible for managing those who have that knowledge of the content. A small company may not have a manager, apart from the directors, who holds a senior position. A large company will have many such managers. In a larger company with specialist claims, insurance or legal departments the statement may be signed by the manager of such a department if he or she is responsible for handling the claim or managing the staff handling it.

18. Another issue that arises in relation to the standing of private landlords to bring claims are the claims brought by head landlords of accommodation provided under s. 193(2) HA 1996. In such cases, the local authority typically takes a license of the premises, which it then sublets to the applicant as a non-secure tenancy. However, problems have arisen where the local authority seeks to determine its licence and leave the private landlord to effect an eviction, but continues to accept rent from the tenant. In such cases determining the identity of the landlord (and therefore the nature of the tenure) is not straightforward.

'Eviction practitioners' and the use of "solicitors' agents"

19. There are a great number of dodgy firms out there keen to offer 'hassle free' evictions of tenants for private landlords who either don't want to pay for legitimate legal representation, or think that they are paying for legitimate legal representation[1]. Firms with names like "EvictMyTenant"[2]. Such firms are acting unlawfully and committing a criminal offence if they are conducting litigation, (which will include service of documents and statements of case, and giving out their address for service: *Ndole Assets Ltd v Designer M&E Services UK Ltd* [2018] EWCA Civ 2865). Any person seeking to derive a right of audience out of such conduct of litigation, is likely to be unable to do so.

20. Most often, a private landlord, especially a large property investment company will use a so-called "solicitors agent" to represent its interests at a first possession hearing. However, while such 'agents' generally purport to enjoy a right of audience, whether they in fact do so is highly questionable.

21. The purported right of audience enjoyed by solicitors' agents derives from paragraph 1(7) Schedule 1 Legal Services Act 2007, which provides in so far as relevant as follows:

[1] See e.g. https://nearlylegal.co.uk/2018/08/eviction-companies-conducting-litigation-and-defective-notices/ and https://nearlylegal.co.uk/2019/02/u-cant-do-this/

[2] Not even made up, an actual 'opponent' in a case of mine.

(7) The person is exempt if–

(a) the person is an individual whose work includes assisting in the conduct of litigation,

(b) the person is assisting in the conduct of litigation–

(i) under instructions given (either generally or in relation to the proceedings) by an individual to whom sub-paragraph (8) applies, and

(ii) under the supervision of that individual, and

(c) the proceedings are not reserved family proceedings and are being heard in chambers—

(i) in the High Court or county court, […]

22. Therefore a person purporting to enjoy a right of audience must be "assisting in the conduct of litigation" both generally and in relation to that case, and must be doing so under both instructions and the supervision of an authorised person (likely to be a solicitor).

23. There is no binding authority on the circumstances in which a person will enjoy a right of audience under paragraph 1(7) Schedule 1 Legal Services Act 2007 but two County Court decisions concerning the application of the provision are illustrative of the need for a court to consider each aspect of the provision, and in both cases it was determined that the solicitors agent did not have a right of audience: *McShane v Lincoln*, 28 June 2016, unrep., County Court at Birkenhead (DJ Peake); *Ellis v Larson* 20 September 2016, unrep., County Court at Manchester (DDJ Hampson). Guidance has been issues by the Bar Council, which provides a useful summary of the relevant provisions[3].

[3] https://www.barcouncil.org.uk/media/404046/solicitor_s_agents.pdf

24. Raising the issue is an important obligation of professional practice because to purport to exercise a right of audience which one does not have is a criminal offence: ss 14-17 Legal Services Act 2007.

25. Further from a practical point of view, raising the issue is likely to mean that the matter is adjourned, and may enable a tenant to resolve benefits issues or make a payment in order to bring their arrears down.

CPR requirements

26. It is worth remembering that there are some mandatory requirements in relation to the issuing and service of the claim which if breached may result in the case being dismissed, but more likely will result in an adjournment for the claimant to remedy the defect and, again, an opportunity to resolve underlying issues.

27. It is impossible to set out all the numerous procedural and formal requirements contained in the CPR, but some that are encountered fairly often are as follows:

    a. Rule 55.5(3)

        i. *(a) the hearing date will be not less than 28 days from the date of issue of the claim form;*

        ii. *(c) the defendant must be served with the claim form and particulars of claim not less than 21 days before the hearing date.*

    b. Rule 55.8(4) *"all witness statements must be filed and served at least 2 days before the hearing."*

    c. Rule 55.8(6) *Where the claimant serves the claim form and particulars of claim, the claimant must produce at the hearing a certificate of service of those documents and rule 6.17(2)(a) does not apply.* [filing COS within 21 days]

d. Rule 22.2(1)(b) *"A party which has not properly endorsed its statement of case with a statement of truth "may not rely on the statement of case as evidence of any of the matters set out in it."*

e. PD 55A paragraph 2.3 *"If the claim includes a claim for non-payment of rent the particulars of claim must set out:*

(1) the amount due at the start of the proceedings;

(2) in schedule form, the dates and amounts of all payments due and payments made under the tenancy agreement for a period of two years immediately preceding the date of issue, or if the first date of default occurred less than two years before the date of issue from the first date of default and a running total of the arrears;

(3) the daily rate of any rent and interest;

(4) any previous steps taken to recover the arrears of rent with full details of any court proceedings; and

(5) any relevant information about the defendant's circumstances, in particular:

(a) whether the defendant is in receipt of social security benefits; and

(b) whether any payments are made on his behalf directly to the claimant under the Social Security Contributions and Benefits Act 1992.

f. 2.3A If the claimant wishes to rely on a history of arrears which is longer than two years, he should state this in his particulars and exhibit a full (or longer) schedule to a witness statement.

Validity of section 8 notice

28. Section 8 HA 1988: Notice of proceedings for possession.

(1) The court shall not entertain proceedings for possession of a dwelling-house let on an assured tenancy unless—

(a) the landlord or, in the case of joint landlords, at least one of them has served on the tenant a notice in accordance with this section and the proceedings are begun within the time limits stated in the notice in accordance with [subsections (3) to (4B)] 1 below; or

(b) the court considers it just and equitable to dispense with the requirement of such a notice.

(2) The court shall not make an order for possession on any of the grounds in Schedule 2 to this Act unless that ground and particulars of it are specified in the notice under this section; but the grounds specified in such a notice may be altered or added to with the leave of the court.

(3) A notice under this section is one in the prescribed form informing the tenant that—

(a) the landlord intends to begin proceedings for possession of the dwelling-house on one or more of the grounds specified in the notice; and

(b) those proceedings will not begin earlier than a date specified in the notice [in accordance with [subsections (3A)] 3 to (4B) below] 2 ; and

(c) those proceedings will not begin later than twelve months from the date of service of the notice.

(4B) In any other case, the date specified in the notice as mentioned in subsection (3)(b) above shall not be earlier than the expiry of the period of two weeks from the date of the service of the notice.

(5) The court may not exercise the power conferred by subsection (1)(b) above if the landlord seeks to recover possession on [Ground 7A , 7B or 8 in Schedule 2] 9 to this Act.

29. Importantly, there is no power to waive, dispense with or amend notice in the case of Ground 8. A defect to the notice or the service thereof is fatal to such a claim: s. 8(5) HA 1988.

30. The notice must be one in the prescribed form (s. 8(3) HA 1988). The prescribed form is contained within Schedule 1 Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment) Regulations 2015/620 and was last changed on 6 April 2016.

31. Any notice will be invalid unless it is in the prescribed form "or to a form substantially to the same effect": Regulation 2.

32. In *Ravenseft Properties v Hall* [2002] H.L.R. 33 the Court of Appeal held per Mummery and Tuckey L.JJ.) that the question whether a section 20 notice is in the prescribed form or is in a form "substantially to the same effect" is one of fact and degree in each case, turning on a comparison between the prescribed form and the particular form of notice given. In answering that question, it is necessary to apply the approach to construction laid down by the House of Lords in *Mannai Investment Co. Ltd v. Eagle Star Life Assurance Co. Ltd* [1997] A.C. 749 , in the contextual setting of the statutory purpose of the information set out in the prescribed form [27], [46].

Service by the landlord

33. The notice must be served by the "landlord". In *Barrow v Kazim* [2018] EWCA Civ 2414 the Court of Appeal agreed the relevant time for determining the identity of the landlord was the date of the notice. Thus, in that case where a head landlord had purported to serve notice on a subtenant at the same time as on the mesne tenant the notice was invalid. It was not until the mesne tenancy had been determined that

the head landlord became the immediate landlord of the subtenants and was entitled to serve notice.

34. Landlord is defined at section 45(1) HA 1988 as follows:

"landlord" includes any person from time to time deriving title under the original landlord and also includes, in relation to a dwelling-house, any person other than a tenant who is, or but for the existence of an assured tenancy would be, entitled to possession of the dwelling-house;

35. Thus, the term "landlord" can include mesne tenant, and indeed *must* mean the mesne tenant where relevant, because, as the Court of Appeal confirmed in *Barrow v Kazim* [2018] EWCA Civ 2414 it is only the immediate landlord of the tenant who satisfied the definition at section 45 of being someone who "*but for the existence of an assured tenancy would be, entitled to possession".*

36. In the context of private landlords an issue will often arise in relation to the use of letting agents and managing agents, both evidentially and in law. A managing agent that uses a "guaranteed rent" scheme, is probably in fact being granted a fixed term contractual tenancy subject to the right to sub-let. In such cases, the 'managing agent' will in fact be the mesne landlord. However, plainly it is for the claimant in any such case to demonstrate that, at the time of the notice, the managing agent was 'the landlord', and as a matter of evidence they will therefore need to have exhibited their own tenancy agreement establishing their superior right to possession. Further, unlike a residential occupier in possession, such a tenancy has no statutory rollover of their tenancy, so that the intermediate tenancy will need to be current at the date of notice and throughout. A claim who is unable to establish that they had the immediate right to possession in remainder at the time of notice is liable to have the claim dismissed at the first hearing, or in a worst-case scenario, adjourned to enable that evidence to be provided.

Service on the tenant

37. 'Tenant' is defined at s. 45(1) and (3) and importantly, provides as follows:

(3) Where two or more persons jointly constitute either the landlord or the tenant in relation to a tenancy, then, except where this Part of this Act otherwise provides, any reference to the landlord or to the tenant is a reference to all the persons who jointly constitute the landlord or the tenant, as the case may require.

38. Thus, where there are joint tenants, the notice must be served on *all* of the tenants. There is no requirement that the notice must be served on the tenants individually. However, there is any issue as to whether the notice will have been received by one of the joint tenants, it would be wise for the landlord to take steps to ensure that each tenant has in fact received or been properly served with notice.

39. As to service, Although a notice does not at common law require personal service, the landlord must still be able to prove that, if left at the tenant's house, it came into the tenant's hands: *Wandsworth v Atwell* (1995) 27 HLR 536, CA; *Enfield BC v Devonish and Sutton* (1997) 29 HLR 691, CA; see also *Woodfall* para. 17.241 and *Defending Possession Proceedings* para. 14.24. Service can be by any method, provided such method is not precluded by the agreement.

40. The Law of Property Act ("LPA") 1925 does allow for deemed service of a notice to be made by registered post / recorded delivery, or by delivery to the tenant's property. Section 196 provides, so far as relevant:

(1) Any notice required or authorised to be served or given by this Act shall be in writing.

(3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(5) The provisions of this section shall extend to notices required to be served by any instrument affecting property executed or coming into operation after the commencement of this Act unless a contrary intention appears.

41. However, although a tenancy agreement has been held to be an "instrument", a notice to quit (in that case), or a section 8 notice, is not a notice "required to be served" by that tenancy agreement. Neither does the "requirement" for a notice under the Protection from Eviction Act assist, since the statute expressly provides that the "instrument" requiring notice may not be a statute: section 205(1) LPA 1925 / *Wandsworth v Atwell* (1995) 27 H.L.R. 536.

42. Thus, section 196 may provide for a mechanism of deemed service but only where the tenancy agreement *expressly* incorporates it, and where the wording of the tenancy agreement is such as to "require" service of notice: *Wandsworth v Atwell* (1995) 27 HLR 536, CA; *Enfield LBC v Devonish and Sutton* (1997) 29 HLR 691, CA. Further, the landlord must be prepared to "prove the terms of the agreement in any action for possession following service of such a notice" *Atwell* p. 542.

43. Where s. 196 does apply, service is deemed to take place at a time when the recorded delivery letter would arrive in the ordinary course of the post: *Re 88 Berkeley Road, London NW9, Rickwood v Turnsek* [1971] Ch 648.

44. Alternatively, it is open to the parties to have a tenancy agreement that deems services in the event of the notice being sent in a certain way. However, there is a distinction between a tenancy agreement that *permits* service in a particular way, and one that *deems* or *requires* service in a particular way.

Specification of grounds and particulars

45. Not only must the ground be specified but also "particulars" of the ground: see *Torridge DC v Jones* (1985) 18 H.L.R. 107, CA, in which s.82 of the Housing Act 1985 in analogous terms was held to require sufficient particulars to show the tenant what he had to do to put matters right before proceedings commenced. By contrast, in *Marath*

v MacGillivray (1996) 28 H.L.R. 484, CA, a notice which did not set out the full amount of arrears, but merely alleged an amount owing at a certain date and that no rent had subsequently been paid, was held to be adequate as it enabled the tenant to calculate how much was owed. Where a notice is served simply to put pressure on the tenant to leave, without any honest belief in the matters alleged against the tenant as reason for recovering possession, the notice may be a nullity and ineffective: *Earl of Stradbroke v Mitchell* , Independent, September 18, 1990, CA (notice served under the Agricultural Holdings Act 1986).

46. In *Mountain v Hastings* (1993) 25 H.L.R. 427, CA, a notice under this section was held to be defective where the landlord had failed to set out fully the substance of the grounds upon which he sought possession. The ground relied upon was Ground 8 and the court held that, although it was permissible to depart from the exact wording of the Act, the notice had to be adequate to achieve the legislative purpose of the provision, which is to give the tenant the information with which to consider what should be done to protect the home, which in this case meant that the tenant should to be told that under Ground 8, arrears needed to be outstanding both at the date of service of the notice and at the hearing. In *Masih v Yousaf* [2014] EWCA Civ 234, a notice which did not set out the full text of Ground 8 but which did state that the tenant was two months in arrears and provided a figure for the arrears was sufficient, as it gave the tenant the necessary information (applying *Mountain v Hastings*). The court rejected an argument that there should be a stricter approach where a mandatory ground for possession was relied upon; the approach in *Mountain v Hastings* was of general application.

The signature on the notice

47. In *City of London v Devlin* (1997) 29 H.L.R. 58 the Court of Appeal considered a notice where the space in the prescribed form for a signature had been left blank. The notice was accompanied by a letter which was signed by an estate officer, who may or may not have authorised to sign. The Court of Appeal held that the typescript “Director of

Housing" on the prescribed form, coupled with the covering letter from the City's estate officer, meant, in the words of the Regulations, that it was a form "substantially to the same effect". Thus, it seems that where there are elements missing from the notice, this *may* be cured by accompanying documents: (as to which see *Stidolph v. American School in London Educational Trust Ltd* (1969) 20 P.&C.R. 802, or in the context of Introductory tenancies *Islington v Dyer* [2017] P.T.S.R. 731*)*

48. However, crucially, *Devlin* did not find that the signature was unimportant. Rather, what was held was that the requirement contained in the prescribed form had been met in another way so that the notice was "substantially to the same effect". Thus, where the signature, or another box is left blank, the question is whether the information requirement by that section (or the signature) is to be found elsewhere.

49. Query how the signature box on the prescribed form applies where the landlord is a company and/or where the notice is signed by an agent. Although, the Court of Appeal in *Devlin* found that it was irrelevant as to whether the covering letter had been signed by someone authorised to sign on behalf of the Director of Housing, this was in the context of 'Director of Housing' appearing in typescript.

SUBSTANTIVE DEFENCES

Meaning of "rent lawfully due"

50. "Rent" is defined as "a payment which a tenant is bound by his contract to pay to the landlord for his use of the land" *United Scientific Holdings Limited v Burney* [1978] AC 904 at 934. However, more commonly, the word 'rent' is used to mean all manner of things and in the case of a private landlord may include for example utilities, council tax or internet useage. In those circumstances such costs are likely to be attributable as 'rent'. See *Escalus Properties v Robinson* [1996] Q.B. 231:

"by providing that service charge should be deemed to be sums due by way of additional rent, had the effect of conferring the like attributes on the service charge,

an effect confirmed by the further provision that it should be recoverable as rent. To hold thus is to do no more than give full effect to the agreement between the parties."

51. There are a number of reasons however why rent might not be "lawfully due": E.g.

    a. failure to serve notice under section 48 Landlord and Tenant Act 1987; or,

    b. unlawful increases in rent.

52. The Landlord and Tenant Act 1987 section 48 provides that landlords must furnish tenants with an address in England and Wales at which notices may be serviced. Failure to provide such notice means that any rent or services charges is treated as not being due. Failure to comply with section 48 does not however extinguish the liability to pay the rent forever; as soon as the landlord provides a compliant notice, the tenant becomes liable to pay the rent and service charges: *Lindsay Trading Properteis Inc v Dallhold Estates (UK) Pty Ltd* (1995) 70 P&CR.

53. The general principle is that the landlord can rectify the matter at any stage and including after the tenant has taken the point in a defence: *Rogan v Woodfield Building Services* (1995)27 HLR 78. However, this will not assist in relation to Ground 8 where the landlord must prove that the arrears were "lawfully due" not only at trial, but at the date of notice.

54. Importantly, in the case of private landlords, the provision of an agent's address on a section 21 notice has been held to be valid for the purposes of section 48, where it is given without limitation or qualification: *Drew-Morgan v Hamid-Zadeh* (2000) 32 H.L.R. 316. By contrast in *Beitov v Maretin* [2012] L. & T.R. 23 the Upper Tribunal found that service charge demands under section 47 LTA were not satisfied by the provision of an agent's address.

55. At common law rent becomes lawfully due at midnight at the start of the day it is payable, but it is not in arrears until the end of that day: *Aspinal v Aspinal* [1961] Ch 526.

Unlawful increases in rent

56. Rent will not be "lawfully due" if the rent has been increased unlawfully. Advisers will be familiar with section 13 HA 1988, which provides a statutory mechanism for increasing rent. However, it is unusual in a case of a private landlord for there to have been formal notice. More likely, the rent has been increased periodically either within the terms of the tenancy agreement, by "agreement", or by signing a new tenancy.

57. A tenant is unlikely to have a defence to a claim by the landlord that the tenancy has been increased in accordance with the tenancy (although this should be carefully checked). It is also possible that a section 13 notice is served in a way that is inconsistent with the tenancy agreement (for example with insufficient notice or at too frequent intervals, section 13(1)(b) of the 1988 Act. In such case, the increase in rent will be unlawful and the tenant will have both a defence to Ground 8, and a set off for breach of contract for overpaid rent: *Contour Homes Limited v Rowan* [2007] 1WLR 2982; *Riverside Housing Association v White* [2007] H.L.R. 31.

58. Of course, where the landlord and tenant have agreed a fresh tenancy, there can be no dispute about whether the level of rent has been lawfully increased. However, issues do arise as to whether there has been an "agreement" that the rent should be increased. The relevant provision is section 13(5) HA 1988 which provides that "nothing in this section (or section 14 below) affects the right of the landlord and the tenant under as assured tenancy to vary by agreement any term of the tenancy (including a term relating to rent)".

59. What constitutes an 'agreement' to increase rent is uncertain, but must be an agreement that has contractual force. For example, in *Riverside Housing Association v White* [2006] H.L.R. 15 the Court of Appeal held that a notice that the rent would be increased The Judge found that the rent increase notices contained no offer to vary the tenancy agreement that was capable of acceptance so as to constitute the beginnings of an 'agreement':

"In my judgment he was entirely right to do so. Those notices on their face are not offers capable of acceptance. They inform the Whites what they will have to pay by way of rent and service charges and from what date. Of course the Whites could have reacted by serving notice to quit, but they did not, and in continuing as tenants and not objecting to the amounts said to be in arrears, they were not accepting any offer because none had been made to them." (paragraph 58).

60. It was further held that the tenant's acquiescence to the increased rent could not found a cause of action. Whilst it would give rise to an 'estoppel by convention', such an estoppel could only be used as a shield and not a sword'.

61. An agreement to increase rent may be unenforceable for want of consideration if no equity has arisen: See *Fitzgerald v Lord Portarlington* (1835) 1 Jo Ex Ir 431; *Crowley v Vitty* (1852) 7 Exch 319. Alternatively, the consideration may be too uncertain: *Morgan v Rainsford* (1845) 8 I Eq R 299. An increased rent may be agreed upon orally provided there is consideration (such as the execution of improvements: *Donellan v Read* (1832) 3 B & Ad 899 at 905.

Discrimination

62. A claim that the decision to seek and pursue possession amounts to unlawful discrimination constitutes a complete defence to a claim, even under Ground 8 and applies irrespective of whether the landlord is a private landlord.

63. Section 35 concerns the management of premises:

> *(1) A person (A) who manages premises must not discriminate against a person (B) who occupies the premises—*
>
> > *(a) in the way in which A allows B, or by not allowing B, to make use of a benefit or facility;*
> >
> > *(b) by evicting B (or taking steps for the purpose of securing B's eviction);*

(c) by subjecting B to any other detriment.

64. Most commonly, the kind of discrimination encountered in Ground 8 cases will be that under section 15 "discrimination arising from disability". Section 15 provides as follows

(1) A person (A) discriminates against a disabled person (B) if

a) A treats B unfavourably because of something arising in consequence of B's disability and

b) cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the disability.

65. Clearly a Ground 8 case will mean that the rent arrears are the "something" which must arise in consequence of the tenant's disability. However, it is important to bear in mind that two issues are likely to be more relevant in relation to private landlords:

    a. Firstly, the private landlord is less likely to know that the tenant was disabled. In a social landlord case one can rely on the duty pursuant to section 149 Equality Act 2010 to make further inquiry where any feature of the evidence raised a real possibility that the tenant was disabled in a relevant sense: *Pieretti v Enfield* [2011] P.T.S.R. 565 para 35. But in a private landlord case no such duty of inquiry exists.

    b. Second, what is expected of a private landlord is likely to be much less so that where the court asks whether possession is no more than is necessary, it is more likely to answer yes.

66. It is also worth bearing in mind some of the other forms of discrimination that are unlikely to apply to a corporate or social landlord, for example:

    a. discrimination on other grounds including race and sex; or,

b. victimisation as a result of complaining about sexual harassment.

COUNTERCLAIMS AND SET OFFS

67. Any damages awarded by way of set off on a counterclaim will reduce the sums that are "due" in rent. The proper approach is to assess the level of arrears, if any, *after* calculating the effect of any set off: *Etherington v Burt* [2004] EWHC 95 (Qb) paragraph 19:

> *"… in my judgment, at the moment the judge made his order and arrived at the final relevant calculation of the figures, the real position was that only the sum of £469.50 was outstanding by way of arrears of rent, and I consider the submission that he should have ignored the £1,100 that he was simultaneously ordering to be paid out in part satisfaction of the arrears would have led to an artificial and inequitable result. I am satisfied that this approach … to abide the determination of a counterclaim, and which are paid out to the landlord as part of the final order of the court made on the relevant day for these purposes (the date of the hearing), is entirely consistent with the objective and the language of Ground 8, namely there must exist eight weeks unpaid rent as "at the date of the hearing". In the absence of any authority to the contrary, the judge was right to treat this sum in the way he did, and accordingly I dismiss this ground of appeal."*

68. Likewise in *Filross Securities Limited v Midgeley* [1999] 31 HLR 465 the Court of Appeal held that:

> *"The defence of equitable set off is an exercise of equitable jurisdiction which prevents a person from recovering damages without accounting for a sum that should be paid in equity. The defendant's obligations to pay rent and service charges were so intimately bound up with the alleged breaches of the plaintiff landlord's repairing covenant…that it would be unjust for the defendant to obtain damages without accounting for any rent due.*

69. When pleading a counterclaim it is worth bearing in mind that section 36(2) of the Limitation Act 1980 applies so that the court is not bound by the ordinary six year limitation rule. The counterclaim amounts to (if pleaded as such) an equitable set off so that damages for disrepair (in so far as they are being used to extinguish rent arrears) can extend beyond the limitation period. In *Filross Securities Limited v Midgeley* the court therefore held that:

… equitable defences are not governed by the statutory period of limitation that applies to claims to enforce legal rights, it is section 36(2) of the Limitation Act 1980 that applies to the defence of equitable set off rather than section 35."

70. The upshot of that is that if, on its proper construction, the tenant's counterclaim for damages is an equitable set off (as explained in *Filross Securities Limited v Midgeley* [1999] 31 HLR 465 citing *Hanak v Green* [1958] 2 QB 9) then normal time limits do not apply where equitable relief is sought.

Disrepair

71. Clearly one obvious possible counterclaim will be for disrepair or, in the future, on the basis of breach of the implied term of fitness for habitation.

Discrimination

72. Section 119(4) provides that an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis). As to this, *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 1 sets out 'bands' for damages which were amended in *Da'Bell v NSPCC* [2010] I.R.L.R. 19 and more recently uprated again by Joint Presidential Guidance issued in the Employment Tribunals:

    a. Lower band (for the least serious cases, e.g. a one-off or isolated incident of discrimination) - £900 to £8,600

b. Middle band (which is used for serious cases that do not merit an award in the highest band) - £8,600 to £25,700

c. Top band (for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment: £25,700 to £42,900

73. In *Vento* it was held that in general, awards of less than [£900] are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings [paragraph 65].

74. However, it is important to bear in mind that an injury to feelings award should have an evidential base. Therefore, when drafting witness statements lawyers should be astute to the ways in which the landlord's failure disempowered the client or diminished them in their self esteem, made them anxious or worried or feel insecure, since these are the kinds of issues that the award is intended to deal with. See for example *Frankish v Eye Watch Security Ltd (Hull)* (Case No 1803842/2005) (10 January 2006, unreported) where the tribunal made no award of injury to feelings because the claimant gave no evidence orally or in her witness statement or in any documents of her having suffered any hurt feelings.

75. Likewise in *Lalli v Spirita Housing* [2012] H.L.R. 30 the Court of Appeal held that there was no evidence that dealing with an injunction application against him was an "unreasonably adverse" experience because of his disability. Thus, a tenant wishing to claim damages must be clear that because of her disability she has suffered some particular injury to feelings as a result of the proceedings.

76. County Court awards for discrimination are subject to the decision in *Simmons v Castle* [2013] 1 W.L.R. 1239, so that general damages for "four types of damage in relation to both tort and contract cases, namely "pain and suffering and loss of amenity", "physical inconvenience and discomfort", "social discredit", and "mental distress"" are to be given the 10% uplift (para 48) where judgment is given after 1 April 2013.

Tenancy deposits

77. Where the landlord has failed to protect a tenancy deposit, has done so late, or has failed to serve prescribed information properly or in time, section 214 HA 2004 provides as follows:

Proceedings relating to tenancy deposits

(1) Where a tenancy deposit has been paid in connection with a shorthold tenancy on or after 6 April 2007, the tenant or any relevant person (as defined by section 213(10)) may make an application to the county court on the grounds–

> *(a) that section 213(3)* [payment into a scheme] *or (6)* [service of prescribed information] *has not been complied with in relation to the deposit, or*

(1A) Subsection (1) also applies in a case where the tenancy has ended, and in such a case the reference in subsection (1) to the tenant is to a person who was a tenant under the tenancy.

[…]

(2A) Subsections (3A) and (4) apply in the case of an application under subsection (1) if the tenancy has ended (whether before or after the making of the application) and the court—

> *(a) is satisfied that section 213(3) or (6) has not been complied with in relation to the deposit, or*
>
> *(b) is not satisfied that the deposit is being held in accordance with an authorised scheme,*
>
> *as the case may be […]*

(4) The court must [...] order the landlord to pay to the applicant a sum of money [not less than the amount of the deposit and not more than] three times the amount of the deposit within the period of 14 days beginning with the date of the making of the order.

78. *Okadigbo & Anor v Chan & Anor* [2014] EWHC 4729 (QB). When awarding a penalty for breach of the Section 213 Housing Act 204 requirements for tenancy deposits, the court has a discretion over the amount of penalty under section 214.

79. This was a counterclaim for a deposit penalty in a claim for possession and arrears of rent. At first instance, the Circuit Judge had found a breach of s.213 and had awarded the tenants, Mr O and another, a penalty of one times the deposit.

80. The tenancy had started and the deposit received on 1 August 2012, for a 12 month term. The deposit was protected, but not until 5 March 2013, and the prescribed information was provided later still, on 8 July 2013. The breach by way of late protection and late service of the prescribed information was admitted.

81. The Circuit Judge's reasoning for the size of the penalty was:

> *"the Defendant seeks a penalty pursuant to Sections 213 to 215 of the Housing Act 2004. Section 214(4) provides that in the event of a breach, and here the breach is admitted, I must award the Defendant a sum of money not less than the amount of the deposit and not more than three times the deposit. The Defendant contends for the maximum sum which would be three times £1,520, a sum of £4,560. The Claimant contends for one month's rent in the sum of £1,520. I find that the Claimants are not experienced landlords, that this is the first time that they had let out any property and that they were letting out their home. That they quite properly put the matter in the hands of professional managing agents who let them down by not complying with the terms of the Act. I find this case to be at the lowest end of the scale of culpability for non-compliance. And for those reasons I award the sum of £1,520."*

82. The tenants appealed to the High Court. Their argument was that the Judge exercised the discretion wrongly, placing undue weight on the inexperience of the landlords when set against a serious failure to comply with the deposit requirements for a considerable period of time.

"He [Counsel for the appellants] recognised realistically that there was a degree of mitigation in that the breach had been admitted and that there was in the event full compliance, albeit only after a period of delay. He contended that the discretion of the judge should, therefore, be set aside and that the appropriate order would be a multiple of twice the appropriate amount of rent."

83. The High Court dismissed the appeal.

"The judge was entitled to regard the question of culpability as the most relevant factor in determining what order to make and was entitled to find that the culpability in this case fell at the lowest end of the scale for the reasons which she gave. It is not as if the breach was uncorrected and therefore, although the appellants were lacking the protection for a period of some months, in the end matters were put right."

84. One issue that commonly arises in such damages claims is whether the tenant is entitled to claim a statutory penalty for each occasion on which the deposit was paid or deemed to have been paid.

85. This arises because upon a new replacement tenancy being agreed between the parties, the pre-existing deposit is treated as having been paid at the commencement of the new tenancy and thereafter held as security for– (a) the performance of any obligations of the tenant, or (b) the discharge of any liability of his, arising under or in connection with the new tenancy: *Superstrike Ltd v Rodrigues* [2013] 1 W.L.R. 3848 para 36 and 38.

86. Thus, in principal there is no reason why a claim cannot be made in respect of each period in which the tenancy is deemed to have been paid again. This argument has been accepted in a number of first instance decisions: *Kazadi v Brooks* (2015) September Legal Action 51; *Akrigg v Pidgeon* (2016) May Legal Action 40; *Chaudry v Cooley* (2016) November Legal Action 40; *Manu Ventures Ltd v Sida* (2017) April Legal Action 39. Though other first instance judges have held otherwise: see e.g. *Howard Davies v Scott*, County Court at Clerkenwell & Shoreditch, 18 January 2018, relying on the use of the singular in section 214 Housing Act 2004.

SARAH STEINHARDT

Doughty Street Chambers

19 March 2019