

DEFENDING POSSESSION PROCEEDINGS



SAFER RENTING

BEN REEVE-LEWIS

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OVERVIEW OF POSSESSION PROCEEDINGS

- Landlord serves notice.
- Notice expires and landlord applies to court.
- Landlord obtains possession order.
- Tenant doesn't move out, landlord applies for bailiff's warrant.

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N5 FORM

- All possession claims must use this form, including council and housing association claims. It is the basic application form for a possession order.

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N119 FORM

- Identifies the land or property.
- States whether it is residential property.
- State the grounds on which possession is being claimed.
- Give full details of any tenancy.
- Give full details of all persons in possession of the property.
- Provide a concise account of why the claim is being made.
- If interest is being sought give details of the interest.

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NI 19 FORM

- If the claim is for rent arrears then the particulars of claim must:-
- State the amount of rent arrears at the start of proceedings.
- The date when the arrears of rent arose.
- The dates and amounts of all payments made.
- A running total of the arrears.

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THE DEFENCE FORM NI 1R.

- The court rules require the defence to be both filed and served, so the tenant will send the defence form back to the court to be filed and send a copy to the landlord to be served.
- Tenants should file a defence to every point raised by the landlord in case the court takes silence on a particular issue as an acceptance of it.
- If they have a counter version of events then these should be put in the defence, including differing figures for arrears and reasons why they are different.

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COUNTERCLAIMS ON NI IR

Commonly, if there are supported allegations of

- harassment,
- illegal eviction,
- breach of deposit protection regulations and
- disrepair

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ACCELERATED POSSESSION APPLICATION

- Only for s21
- You cant (generally) counterclaim on section 21 proceedings but you can still mount a defence to the application or raise enough issues to require a court hearing instead of the automatic granting of a possession case
- If the judge looking at the application is not happy with any issues themselves then they could also allot a hearing for their queries to be answered.

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N5B ACCELERATED CLAIM FORM

- N5B is the form to use for accelerated claims, which effectively amalgamates the N5 and the NI 19 particulars of claim form into one single form for the procedure. It was redrafted in November 2017 to reflect all of the requirements of the Deregulation Act 2015 which the previous form did not do.

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ACCELERATED DEFENCE FORM NI 1B

- The NI 1B will require the tenant to answer all questions relating to matters that the landlord has to prove, so dates should be checked very closely with the client to ensure that the relevant documents referred to by the landlord were actually served in the required timescales.
- Any errors you can pick up in the N5B need to be countered in the NI 1B

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STATEMENT OF TRUTH

Who can sign a statement of truth?

- The party
- The witness, if the document is a witness statement
- The party's solicitor (but not a lay adviser)
- Senior officers of a corporation eg Local Authority:
- **A managing agent cannot sign a statement of truth**

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STATEMENT OF TRUTH

Who signs when the landlord is a limited company?

S44 Companies Act 2006.

Bali v Manaquel Company Limited (2016)

“it was a certification of the accuracy of the information for a ‘formal legal purpose’, meaning it had to be Companies Act compliant.”

Hilmi & Associates Ltd v 20 Pembridge Villas Freehold Ltd [2010],

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COMPANIES ACT

“Execution of documents:-

(2) A document is validly executed by a company if it is signed on behalf of the company—

(a) by two authorised signatories, or

(b) by a director of the company in the presence of a witness who attests the signature.

(3) The following are “authorised signatories” for the purposes of subsection (2)—

(a) every director of the company, and

(b) in the case of a private company with a secretary or a public company, the secretary (or any joint secretary) of the company.”

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WHAT EVIDENCE CAN BE USED AT THE HEARING?

- All written evidence that is to be relied on at the hearing must be filed with the Court and served on all other parties at least **2 clear working days** before the hearing;
- This is subject to the Court’s general power to control evidence, which is aimed at encouraging settlement by “cards on the table” litigation
- Evidence that a party wishes to rely on that is not filed and served in accordance with the rules can only be admitted at trial if the parties agree or if the court gives permission having been asked for it.

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WHO HAS RIGHTS OF AUDIENCE?

- Qualified solicitors and barristers;
- In local authority possession proceedings before a District Judge, any person authorised by the local authority may represent it.
- At a hearing in the judge's room anyone employed to assist in the conduct of litigation who is being instructed by a practicing solicitor
- Any other person who wishes to represent a party must seek the permission of the court

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MACKENZIE FRIENDS

- Non-qualified people can sit in court to support a defendant but they aren't allowed to address the court, just help the litigant with advice.
- MacKenzies are allowed to charge for things like photocopying and admin but costs aren't recoverable.

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POSSESSION ORDERS

- Outright possession orders
- Suspended possession orders
- Postponed possession orders

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WARRANT OF EVICTION AKA BAILIFF'S WARRANT

- The landlord has to fill in a form called an N325 in order to apply for a warrant. The warrant comes out of the county court bailiffs office and execution of the warrant.
- The warrant itself is actually form N54
- County court possession but high court warrant.

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POSSESSION ON MANDATORY GROUNDS

- The grounds used for possession against assured tenants, which includes ASTs and statutory periodic tenants are divided into two groups, mandatory grounds and discretionary grounds.
- If the possession application involves mandatory grounds then the courts have little discretion and must make an order for possession if the ground is made out.
- You need to check what grounds possession was granted on in order to launch future defences as the courts powers to suspend warrants is very limited in mandatory possession cases.

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POSSESSION ON DISCRETIONARY GROUNDS

- The burden is on the landlord to satisfy the court that it is reasonable.
- The court must always consider whether it is reasonable to grant possession
- *"The duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad commonsense way giving weight as he thinks right to the various factors in the situation. Some factors may have little or no weight others may be decisive".*
- The Court's powers in relation to a claim for possession on a discretionary ground are very wide and exist in full right up until the bailiffs execute the order for possession by evicting the occupier.
- These powers are to stay or suspend possession, or adjourn the claim, on such terms as the Court thinks fit. Unless it will cause hardship to the tenant the Court must impose conditions dealing with payment of the current rent.

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DEFENDING POSSESSION CLAIMS

Advisers may become caught up in these proceedings at various stages:-

- Application to the court where the tenant needs help filing a defence before the possession hearing.
- At the possession hearing itself.
- Post possession hearing but prior to issuing a warrant.
- Interceding where the warrant has been issued.
- Interceding after the warrant has been executed.

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APPLYING AFTER ANY FORM OF JUDGEMENT

- The standard form to use is the N244, general form of application or N245 but in practice the courts are happy with either. The difference being that the N245 has a budgeting sheet attached but the N244 doesn't.
- If the tenant is on benefits or a low income then you will need to also fill in an EX160 fee remission form, which will make the application free. The courts can run a check online to see if the person really is on benefits that would entitle them to fee remission.

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N244 IN PRACTICE

- Applications have to be made to the court listings office and any appropriate fee paid. Some courts have an open office, whose hours are from 10am to 2pm but increasingly you will find that a number has to be called before 12pm in order to make an appointment to see someone in the listings office.

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PREPARING A DEFENCE.

You should at least compile the following documents.

- Tenancy agreement.
- Notice served.
- Application for possession.
- Statement of rent accounts
- Any relevant documents
- Examination should then be made of the case against the tenant, the evidence against it and any possibilities for a counterclaim.

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CHECKING THE PAPERWORK.

- Wrong dates on the notice.
- Wrong names or address on the notice.
- Wrong notice type for the tenancy type.
- Court application signed by the agent.
- Insufficient detail in the particulars of claim or the notice.
- Rules or grounds quoted in error.
- Statement of truth not signed.

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TECHNICAL DEFENCES.

- Defects in pleadings
- Failure to serve papers in time
- s.48 Landlord and Tenant Act 1987: Landlord's obligation to furnish tenant with address for service of notices. Failure to do so means rent shall not be treated as being due at any time prior to service of such a notice. Late provision of a relevant address for service will make rent retrospectively due; addresses on notices/claim form will suffice.

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SUBSTANTIVE DEFENCES.

- No notice/defective notice
- Status of tenant/licensee not as claimed (i.e. some form of security)
- Ground not proved
- Not reasonable to grant possession (discretionary ground)

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DISMISSING THE CLAIM

- You will need strong, incontrovertible evidence on your side or just really bad paperwork from the other side, the latter of which is very common..
- If you can get the case dismissed then everything goes with it, including the notice that was served in the first place.
- If the case is dismissed then the landlord will have to go right back to the beginning, including the re-issue of any notice served.

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SEEKING AN ADJOURNMENT

- You have had no time with the client and believe they have a strong case and need time to prepare.
- The landlord has produced information at the hearing that wasn't presented before and you want time to consider your response.
- Significant information needs to be provided from other sources that isn't there at the hearing, such as housing benefit confirmation.
- Time is needed to seek further advice and possibly clear the rent arrears.

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ADJOURNMENT ON TERMS

- Alternative to a possession order
- Good to be able to refer the judge back to CPRI, the overriding objective of the courts. The importance of dealing with cases justly, which includes ensuring that the parties are on an equal footing, saving expense and dealing with cases proportionately and fairly whilst allocating an appropriate share of the court's resources.

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ADJOURNMENT WITH GENERAL LIBERTY TO RESTORE

- The case is adjourned and the courts set a time during which the applicant can find legal representation, legal aid etc.
- If they do not lodge for a hearing within the set timescales, the case will be considered abandoned

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ADJOURNMENTS GENERALLY

- Where possession is being sought on mandatory grounds, such as two months arrears you cant apply for an adjournment to allow the person to clear the arrears or sort out a housing benefit problem.
- North British Housing Assoc v. Matthews (2004)

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VARYING THE ORDER

There are two ways to vary an order for possession:

- Vary the type of order.
- Vary the terms of the order.

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SETTING ASIDE

CPR 39.3 (5) is the authority for this and it allows applications to set aside where:

- The tenant acted promptly once they found out that possession had been granted.
- They had a good reason for not attending.
- They would have stood a good chance of success had they attended.
- You can also use CPR 3.1 “The courts may take any other step or make any other order for the purposes of managing the case and furthering the overriding objective”

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SUSPENDING THE WARRANT

- The CPRs suggest that the landlord receive 3 days notice of an application to suspend the warrant but in practice this isn't always possible and courts understand this.
- The judge has more discretion to suspend warrants where the grounds that possession was obtained on were discretionary. In mandatory grounds you can't apply to suspend the warrant because the courts have no discretion but you can ask for the warrant to be delayed for a period of up to 6 weeks from the date of the order.

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SUSPENDING WARRANTS ON MANDATORY GROUNDS

Abuse of process was discussed by the Court of Appeal in *Camden LBC v Akanni* 1997

- The Court has an inherent jurisdiction to step in and prevent its process from being abused for the purpose of injustice;
- The Court should be very slow to exercise this power;
- The category of case in which the Court should be prepared to use this power is never closed.

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REPEAT APPLICATIONS TO SUSPEND

- A second application is allowed where there has been a material change of circumstances between the two applications but not otherwise

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APPEALING AGAINST A DECISION

Common reasons for appeal are:-

- That the trial judge misunderstood the facts.
- They took into account irrelevant matters.
- Failed to take into account relevant matters.
- Failed to exercise their discretion.
- Made a decision that no reasonable judge could have made

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APPEALING AGAINST A DECISION

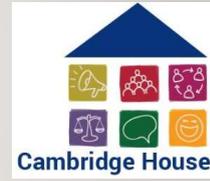
- If permission to appeal is refused by the district judge then the appellant should ask for a stay of execution pending an application to the appeal court, which will be the circuit judge sitting in the court.
- Permission to appeal should be made within 21 days of the order that is under appeal, or within any longer or shorter period that the court may order. CPR 52.4
- Form N161

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OVER TO YOU....

- What is your local authority / organisation doing in this area of work?
- What do you see as the biggest challenges you need to overcome?
- How do you plan to overcome these challenges?
- How do you think this work will improve service for your customers?
- What support or guidance would help you to do this?

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