LANDLORDS BEWARE - GAP IN THE HOUSING ACT

Michael Grant - 2018

Introduction

I was recently instructed to advise a landlord in connection with a possession claim, on the merits of a tenant's defence. Upon a very cursory view of the papers, everything seemed to look rather standard. Let's say, there was no *raising of the eyebrows*. That was until I properly sat down and gave the papers some attention, when it is fair to say that my eyebrows were not so much raised, but rather could be located somewhere behind my neck!

I made a startling discovery; there is a gap in the Housing Act 1988 ("the Act").

Typical defences and counterclaims

Having specialised in residential property litigation for the last 10 years, I have become rather familiar with the range of available defences and/or counterclaims brought by tenants with a view to either escaping eviction or seeking to obtain a windfall from their landlords.

Most popular defences:

i) Defective S.8 notice;

ii) Invalid service of S.8 notice *(where the notice was served by a method other than one prescribed by way of the service provisions under the tenancy agreement)*;

iii) Failure to set out landlord's title;

iv) Failure to join all joint tenants;

v) Failure to properly (or at all) make out the Grounds under Schedule 2 of the Act;

vi) Failure to properly satisfy the minimum amount of rent in arrears under Ground 8 of Schedule 2.

The above list contains some of the most popular defences I see in response to a landlord's possession claim.

Often in addition to such defences, a counterclaim will be brought, seeking damages (or in some cases a penalty award) equal to or greater than the amount of rent in arrears.

Most popular counterclaims:

i) There is disrepair in the property and the landlord failed to act within a reasonable time, or at all, once notice of the disrepair was given.
ii) The landlord attempted, or in some cases carried out, an unlawful eviction and/or subjected the tenant to harassment.
iii) The landlord failed to protect the deposit within 30 days of receipt, or at all, and/or failure to provide prescribed information within 30 days of receipt of the deposit, or at all.

It is to be acknowledged that the facts of all (or most) cases differ to some extent. However, after having dealt with thousands of possession claims over the years, it is somewhat difficult to be able to recall with any real accuracy the details and/or arguments raised in any given case without first revisiting the paperwork. This is, of course, unless the case in question is so unique it is capable of standing out from the rest.

With this in mind, the particular possession claim I am about to discuss, will certainly not be forgotten any time soon.

The Possession Claim

The facts:

The facts of the case were not in any way out of the ordinary, in fact it had the hallmarks of a classic non-payment of rent tale.

The tenant was granted a 12-month fixed-term assured shorthold tenancy (AST) in August 2016, and rent was to be paid in the amount of £750 every 4 weeks (such days corresponding with the regularity of Housing Benefit payments). The landlord received the Housing Benefit directly from the local housing authority ("LHA"), which arrived in the landlord's bank account for the first 2 months of the tenancy, but when rent fell due in October 2016 no payments were received. The landlord contacted the LHA to enquire as to the Housing Benefit situation, and was told that the tenant had failed to notify them of a change in circumstance, which had the inevitable consequence of cancelling his Housing Benefit entitlement. This was all the LHA were willing to disclose.

The landlord sent numerous chasing letters to the tenant, all of which were not responded to, which caused the landlord in February 2017 to instruct his solicitors to instigate possession proceedings, the level of arrears at this point having reached the sum of £3750. The solicitors served a notice seeking possession under S.8 of the Act on grounds of non-payment of rent.

Accordingly, there was no response to the S.8 notice and so possession proceedings were issued. The pleadings relied upon Ground 8 of Schedule 2 of the Act (the mandatory rent ground). The claim also included a monetary claim for the arrears.

In my experience, it is commonplace in such possession claims to also include Ground 10 (i.e. some rent was due from the tenant both at the date of the S.8 notice and the date on which proceedings had begun), as well as Ground 11 (i.e. persistent delayed payments of rent), however for some unknown reason these other grounds were not included.

[The reason for the inclusion of other grounds in a case like this is to potentially save a possession claim just in case rent is paid by the tenant immediately prior to the hearing date which would otherwise nullify the application of Ground 8. In other words, depending on the amount of rent paid prior to the hearing, this could bring the arrears limit to less than the statutory 8 weeks (in the case of weekly rent) or 2 months (in the case of monthly rent), the effect of which would no longer entitle the landlord to rely on Ground 8. For those perhaps unaware, Ground 8 is a mandatory ground, which (if satisfied) affords the court with no room to manoeuvre, and so an order for possession must be granted. In contrast, Grounds 10 and 11 are discretionary, which means the court has a power to make an order for possession should it deem necessary, based upon the circumstances of the case and all the evidence brought in support.]

Once the possession claim was issued, the tenant filed a defence within 14 days.

The defence:

The tenant argued that '*the landlord's claim for possession should fail on the basis that Ground 8 of Schedule 2 is not satisfied*'. The reason given was that Ground 8 is restricted to only those tenancies that require rent to be paid at a rate of weekly, monthly, quarterly or yearly, and as the tenancy in this case required rent to be paid every 4 weeks it allegedly fell outside the ambit of Ground 8.

My instructions:

I was instructed to advise on the merits of the tenant's defence, which advice would determine whether or not it was in the landlord's interests to continue with the possession claim.

This was, and quite rightly so, a head scratcher!

It was not in dispute that the tenant was in arrears, nor were there indications that the rent could be paid moving forward. The tenant gave no reasons for the Housing Benefit payments having ceased, nor did he give i) any indication that he was intending to make a claim for a back-dated payment from the LHA, or ii) that he was intending to pay off the arrears. Nevertheless, it appeared, on the face of it, that the tenant's submissions within his defence were legally correct, in that the current tenancy seemed to fall outside the scope of Ground 8's application.

Ground 8 reads as follows:

"Both at the date of the service of the notice under section 8 of this Act relating to the proceedings for possession and at the date of the hearing—

(a) if rent is payable weekly or fortnightly, at least eight weeks' rent is unpaid;
(b) if rent is payable monthly, at least two months' rent is unpaid;
(c) if rent is payable quarterly, at least one quarter's rent is more than three months in arrears; and
(d) if rent is payable yearly, at least three months' rent is more than three months in arrears;"

The solicitor had relied on both paragraphs a) and b) (*pleaded in the alternative*), that either the phrase "weekly or fortnightly" could be interpreted to mean four-weekly, or in the alternative that the

interpretation of the word “monthly” could be stretched to include every 28 days, and hence in either case the Ground was satisfied.

The question was, when Parliament drafted the Act was it really its intention to exclude from Ground 8’s application any tenancy that requires rent to be paid at a rate other than those identified at paragraphs a), b), c) or d)?

Upon a strict interpretation of Ground 8, it certainly would appear that Ground 8 does indeed limit its application to tenancies that only require rent to be paid at the rates specified by the Ground. This, admittedly, seems incredibly unfair for a landlord, especially considering the fact that in the case before me the landlord included the four-weekly rent clause as a favour to the tenant so as to coincide with the payment of Housing Benefit.

However, the issue I had to determine was whether the tenant’s defence had merit, and if so whether there was anything that could be done to save the possession claim.

After much trundling through case law, sifting through textbooks, and reading endless parliamentary debates, I was really none the wiser. As far as I had been able to research, it seemed clear that this issue had not previously been discussed. I therefore formed the view that, after having spent considerable time researching the point and consequently having found little (or rather nothing at all), the tenant’s defence seemed to have very sharp teeth, the likes of which would inevitably cut right through the meat of the possession claim.

But what of salvage? Was there anything I could throw in the mix?

Potential Salvage Operation

I came up with two suggestions, only one of which seemed marginally plausible:

1) Statutory interpretation of Ground 8 to include rent every 4 weeks
2) Including Grounds 10 and 11 to the claim.

The first suggestion in relation to statutory interpretation was, after much consideration, not worth pursuing in my opinion, bearing in mind the fact that i) the Act has undergone many amendments since its creation in 1988 and yet Ground 8 had only been amended once in 29 years, ii) the wording

of Ground 8 was neither ambiguous nor unclear, and iii) there really could be no other way of interpreting Ground 8 other than the literal way, the way in which it reads.

The second suggestion, however, seemed much more plausible in theory. Nevertheless, the question remained as how in practice this could be achieved.

S.8 (2) provides that –

"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."

The Court of Appeal explained the meaning of S.8(2) in the case of *Mountain v Hastings* in 1993, Gibson LJ stating that –

"Subsection (2), however, does not, in my judgment, enable the court to invalidate a notice by "altering grounds specified." The language of this subsection is directed to a different matter. It assumes that there is a "notice under this section," i.e. *a notice which satisfies the requirements of the section. Subsection (2) then directs that "the ground specified in such a notice,"* — i.e. *a notice under this section — may be altered or added to with the leave of the court. That means that the court may alter the grounds specified — by, for example, taking out ground 8 and putting in ground 11 — or add to the grounds specified by, for example, adding ground 13 to ground 12."*

Therefore, the court must be able to take out Ground 8 and put in Grounds 10 and 11 but only if the notice was valid to begin with. As explained above, the notice in its current state is most likely invalid, and so it would seem the court would not be able to exercise its powers under S.8 (2).

The court can, however, dispense with the requirement of notice if the court considers it just and equitable to do so, as required under S.8 (1) (b). The only problem with this is that S.8 (5) prohibits the court from exercising such power in the event that the landlord seeks to recover possession under Ground 8.

In the Conclusion of Gibson LJ's Judgment in *Mountain*, it states –

"It is not necessary to consider what the power of the court would be under section 8(1)(b), to dispense with the requirement of a valid notice, by striking-out a defective reference to ground 8. The court, it could be said, has the power so to dispense because the landlord would not be "seeking to recover possession on ground 8" and the prohibition in section 8(5) would therefore not apply. This point was not addressed in argument."

Accordingly, whilst the above had only been said in passing, it seems to pave the way for landlords to potentially salvage possession claims under such circumstances. I would have thought that there would need to be a request at any possession hearing for the court to exercise its power under S.8(1)(b) and dispense with the requirement of notice, arguing that the landlord no longer seeks to recover possession under Ground 8. This, in my view, would seek to circumnavigate the prohibition in S.8(5). Thereafter I would recommend that an application is made (also to be dealt with at the possession hearing) to amend the Particulars of Claim, removing Ground 8 and replacing it with Grounds 10 and 11.

This plan could very well have succeeded, despite its execution seeming somewhat convoluted.

Nevertheless, despite my clearly explained route, the landlord decided subsequently to take a very cautious approach and discontinue the possession claim, at which point he decided instead to pursue an order for possession under S.21 of the Act once the tenancy came to an end in August 2017.

Conclusion

Whilst one will never know whether the outlined plan would have succeeded, the above indicates that a possession claim may not necessarily be lost simply as a result of there being a gap in the legislation, or even a statutory prohibition.

In any event, this is very much a cautionary tale, and landlords are advised never to require rent to be paid at any rate other than a) weekly or fortnightly, b) monthly, c) quarterly or d) yearly. Any other rate of payment would likely disentitle a claim under Ground 8, or at the very least expose one to the risk of such defences being raised by tenants.

Michael has assisted hundreds of solicitors, landlords, letting agents, and property managers over the years, and is able to provide advice, drafting and/or representation in court as and when required.

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