

**Housing Directors
Local Housing Authorities in
England**

Chief Executives of ALMOs

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Dear Housing Directors/Chief Executives

**NEW PROCEDURES FOR POSTPONED POSSESSION ORDERS -
AVOIDING UNINTENDED CREATION OF TOLERATED TRESPASSERS**

1. This letter is to inform Local Housing Authorities (LHAs) of recent developments concerning secure tenants who have become "tolerated trespassers" as a result of the wording of a possession order made against them. New wording for the standard order postponing possession has been agreed, together with a new procedure leading to obtaining a warrant for eviction. This letter also gives advice to LHAs concerning the options open to them, and the provision of relevant information to tenants (including possible remedies for those who have already become tolerated trespassers). A copy of this letter is available on our website. Please could you bring this to the attention of your Legal colleagues.

The 'tolerated trespasser'

2. As LHAs will be aware, the concept of the tolerated trespasser was developed by the courts, in particular the judgement of the House of Lords in the 1996 case of *Burrows v Brent*. Under the Housing Act 1985, courts have the power to postpone the date of possession or stay or suspend execution of the possession order. Section 82(2) states that where the landlord obtains an order for possession, the secure tenancy ends on the date specified in the order for the tenant to give up possession. Where orders were phrased to suspend operation of the possession order on condition that tenants obeyed the terms set out in the order, it was held that due to the section 82(2) wording the tenant became a tolerated trespasser if they breached those terms after the possession date. However, until recently it was assumed that security of tenure would be preserved so long as the tenant obeyed the terms of the order.
3. Where the court makes an outright possession order - i.e. stating a date for possession and not setting out any terms on which possession may be deferred - the tenant will become a tolerated trespasser as soon as that date has passed. The changes described in this letter will not affect outright orders - tenants subject to

outright possession orders will continue to be tolerated trespassers after the possession date.

“Blameless tolerated trespassers”

4. The standard form of wording used by the courts for deferring possession on terms is supplied to them by Her Majesty's Court Service (HMCS) as Form N28. HMCS is an executive agency of the Department for Constitutional Affairs (DCA). Form N28 has been revised several times over the years, and in October 2001 a new wording for Form N28 was introduced. In February 2006 the Court of Appeal in *Harlow DC v Hall* decided that the effect of the new wording, combined with the wording of section 82(2) of the 1985 Act, is that the secure tenancy ends on the possession date regardless of whether the tenant complies with the terms upon which the order is suspended.
5. The *Hall* decision has therefore resulted in the creation of an additional class of “blameless tolerated trespassers” - i.e. those who have not breached the terms of a deferred possession order, but have still lost security of tenure.
6. Despite use of the phrase “blameless tolerated trespasser” it is recognised that a tenant against whom a possession order has been made will already have been in serious and persistent breach of the tenancy agreement. However where possession orders are suspended on terms it is the intention of the court and the parties that the tenancy should subsist until the terms are breached, **and it is therefore inequitable for the result of the order to put the tenant at a legal disadvantage that was not intended**.
7. The *Hall* judgment applies only to the October 2001 N28 wording. No judicial pronouncement has been made on whether the same problem might have arisen with earlier versions of form N28. DCA/HMCS figures show that since this wording was introduced, suspended possession orders have been made against approximately 250,000 tenants. It is not known how many of these have fully obeyed the terms of the order, thus becoming blameless tolerated trespassers (those who have breached the terms of orders will have become tolerated trespassers in any case through their own default, regardless of the wording used). This figure should be treated with caution as it includes suspended orders made against assured tenants of social landlords

New order and procedure

8. As soon as the problem revealed by the judgment in *Hall* became apparent, the DCA worked swiftly to remedy the situation. A new N28A form has been introduced, with a wording which will not create unintended tolerated trespassers. However this has involved creating a new two-stage procedure (as approved by the Court of Appeal in May 2006 in *Bristol CC v Hassan*). A new Section IV to the Practice Direction to Part 55 of the Civil Procedure Rules (CPR) has also been introduced setting out this procedure where form N28A is used. This came into effect on Monday 3rd July 2006 (the usual 3 month preview period having been omitted in view of the urgency). The wording of form N28A is attached as Annex A to this letter, and the new Practice Direction is attached as Annex B. Guidance issued to the courts by HMCS on the new procedure is attached as Annex C.

9. In summary, the new wording grants possession postponed on terms but does not fix a possession date. LHAs who wish to proceed to eviction following breach of the terms must apply to the court (paying a £35 without notice application fee) for a possession date to be fixed. It is expected that the court will normally specify the next working date as the possession date, without a hearing. The LHA will then be able to request a warrant in the usual way. Whilst the £35 is a cost, there should be offsetting savings. LHAs will now be clear about the position of their tenants as no more new cases of innocent tolerated trespassers will occur, the tenant's rights will be protected, LHAs will not have to incur any costs for going to court to reinstate these tenancies. LHAs will now get the court orders that they have applied for, which was not the situation with suspended possession orders granted by the N28 form.
10. Unfortunately, although the new PD is already in force, we are informed by the DCA that at present their web update system does not allow them to override the normal 3 month prior-warning period. For the time being therefore, you will find the new PD section IV to Rule 55 in the Preview section of the CPR website. The exact website address for the PD is:
- http://www.dca.gov.uk/civil/procrules_fin/pdf/frontmatter/2006_07_03_adv_notice_42nd_updates.pdf.
11. Alternatively, in the CPR website (http://www.dca.gov.uk/civil/procrules_fin/) - go to the "What's New" page. Under the bullet point "Advance Guidance_Notes 42nd Update October 2006" scroll down to the heading "Preview". The second sentence under that heading gives a PDF link to an Adobe Acrobat document setting out all the PD amendments in the 42nd update. The update to PD 55 adding section IV starts at the bottom of page 10.

Options for local authority landlords

12. In future LHAs should request the courts to make one of the following orders on an application for possession:
- a. An order postponing possession on terms using the new form N28A wording. A date will not initially be fixed for possession, but once the court has subsequently set a date for possession the tenant will become a tolerated trespasser after that date.
 - b. An order using the 2002 N28 wording, which grants the LHA possession on a specified date but suspends execution of the order on terms. The tenant becomes a tolerated trespasser as soon as the possession date has passed. This order would probably only be used where the court feels that an outright order is justified but wishes to give the tenant a last chance (for instance where the tenant has not attended the hearing). It is likely that this type of order will rarely be appropriate since the tenant always has the right to apply for further postponement or suspension of the order.

- c. An outright order granting possession on a stated date. The tenant becomes a tolerated trespasser as soon as that date has passed (if they remain in the property).

13. Courts will continue to have the power subsequently to vary a possession order by postponing the date for possession, usually into the future, with the result that the tolerated trespasser status disappears and the tenant's security is restored retrospectively with no break. A landlord, as well as a tenant, can make an application to the court to revive the tenancy and LHAs should consider this option where appropriate.

Consequent Effects

14. Although it is open to LHAs to grant new secure tenancies to occupants who have become tolerated trespassers, this may raise difficulties for both parties. In particular a new tenancy would bring new succession rights, while the break in tenure would affect the tenant's right to buy and any right to claim damages for disrepair.

15. Where tenants have lost the right to buy as a result of losing security of tenure, local authorities can use their discretionary powers under Part 2 of the Housing Act 1985 to sell properties if they wish to do so.

16. There is no statutory obligation upon local authorities to repair and maintain property for tolerated trespassers. However, we expect LHAs to ensure that their properties do not fall into disrepair regardless of the status of their tenants. Tolerated trespassers have no entitlement to damages for disrepair due to neglect by the LHA under Landlord and Tenant Act 1985 s. 11 unless they can prove a negligence case, but where a successful application is made for the possession date to be varied to the future, thus restoring security of tenure retrospectively, entitlement for damages for disrepair is also restored.

17. The Housing Act 1985 provides for increases in rent to secure tenants, but these provisions do not apply to tolerated trespassers who are no longer secure tenants and therefore have ceased to be subject either to the Act or to the terms of the tenancy agreement. Where a possession date is fixed by the court the LHA should ask the court to order payment of occupation charges for the period from the ending of the tenancy until eviction. This occupation charge should not be treated as subject to the same procedures as rent. Although the courts have tended not to treat notification to tolerated trespassers of rent increases as implying the grant of a new tenancy without other strong evidence, LHAs should be aware that treating tolerated trespassers in all respects as though they were tenants carries that risk.

Information to tenants

18. Tenants should be made fully aware of the serious consequences of having a possession order made against them and should be informed that they may lose their secure tenant status even if they do not lose their home. It should be explained that if they become tolerated trespassers they will lose all the rights to which they are entitled as secure tenants, including for instance succession rights, exchange rights

and the right to buy. Where tenants become tolerated trespassers this information about their loss of rights should be repeated.

19. Where appropriate, and in conformity with any policy of assisting tenants so far as possible where legal proceedings concerning the tenancy are in progress, LHAs should inform tenants that they can apply to the courts for a fresh order to postpone further the date for possession and thus reinstate their tenancies.

Future developments

20. Although the changes summarised in this letter should prevent the creation of further unintended “blameless tolerated trespassers”, the problem remains of those which already exist. These are former secure tenants who -

- are subject to a possession order deferred on terms using the 2001 N28 wording;
- have complied with those terms; and
- remain in the property.

21. The DCA and DCLG will be considering as a matter of urgency whether any steps can be taken to resolve the problem of existing blameless tolerated trespassers. It had been hoped that this could be done by a group litigation order, but it has now been confirmed by the Deputy Head of Civil Justice, Lord Justice Dyson, that such an order will not be appropriate. An alternative approach is now under consideration which will enable the problem to be dealt with other than on a case by case basis, and if this is agreed we will provide further details as soon as possible.

Yours sincerely

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Form N28A

1. The defendant is to give up possession of [address] to the claimant.
2. The date on which the defendant is to give up possession of the property to the claimant is postponed to a date to be fixed by the court on an application by the claimant. The defendant's tenancy of the property will continue until that date.
3. The defendant must pay the claimant £[] for rent arrears and £[] for costs. The total judgment debt is £[] to be paid by instalments as specified in paragraph 4 below.
4. The claimant shall not be entitled to make an application for a date to be fixed for the giving up of possession and the termination of the defendant's tenancy so long as the defendant pays the claimant the current rent together with instalments of £[] per week towards the judgment debt.
5. The first payment of the current rent and the first instalment must be made on or before [date].
6. Any application to fix the date on which the defendant is to give up possession may be determined on the papers without a hearing (unless the district judge considers that such a hearing is necessary).
7. This order shall cease to be enforceable when the total judgment debt is satisfied.

To the defendant

The court has ordered that **unless you pay the arrears** and costs at the rate set out above **in addition to your current rent**, you must leave the premises.

Payments should be made to the claimant, not to the court. If you need more information about making payments, you should contact the claimant.

If you do not make the payments or leave the premises, the claimant can ask the court, **without a further hearing**, to fix a date for you to leave the premises and if you do not do so, to authorise a bailiff or High Court Enforcement Officer to evict you. (You can apply to the court to stay the eviction; a judge will decide if there are grounds for doing so.)

(If there is an order to pay money)

If you do not pay the money owed when it is due and the claimant takes steps to enforce payment, the order will be registered in the Register of Judgments, Orders and Fines. This may make it difficult for you to get credit. Further information about registration is available in a leaflet which you can get from any court office.

PRACTICE DIRECTION SUPPLEMENTING PART 55

After paragraph 9, insert

“Section IV Orders fixing a date for possession

10.1 This paragraph applies where the court has made an order postponing the date for possession under section 85(2)(b) of the Housing Act 1985 (secure tenancies).

10.2 If the defendant fails to comply with any of the terms of the order which relate to payment, the claimant, after following the procedure set out in paragraph 10.3, may apply for an order fixing the date upon which the defendant has to give up possession of the property. Unless the court further postpones the date for possession, the defendant will be required to give up possession on that date.

10.3 At least 14 days and not more than 3 months before applying for an order under paragraph 10.2, the claimant must give written notice to the defendant in accordance with paragraph 10.4.

10.4 The notice referred to in paragraph 10.3 must:

- (1) state that the claimant intends to apply for an order fixing the date upon which the defendant is to give up possession of the property;
- (2) record the current arrears and state how the defendant has failed to comply with the order referred to in paragraph 10.1 (by reference to a statement of the rent account enclosed with the notice);
- (3) request that the defendant reply to the claimant within 7 days, agreeing or disputing the stated arrears; and
- (4) inform the defendant of his right to apply to the court :
 - (a) for a further postponement of the date for possession; or
 - (b) to stay or suspend enforcement.

10.5 In his reply to the notice, the defendant must:

- (1) where he disputes the stated arrears, provide details of payments or credits made;
- (2) where he agrees the stated arrears, explain why payments have not been made.

10.6 An application for an order under paragraph 10.2 must be made by filing an application notice in accordance with Part 23. The application notice must state whether or not there is any outstanding claim by the defendant for housing benefit.

PROCEDURAL GUIDANCE TO THE COURTS

Applications for an order fixing a date for possession

This provides only a summary of the detailed procedure as set out in the new Section IV to Part 55 PD:

- ❑ A postponed possession order made under the new Section IV Part 55 PD procedure does not include a date for possession.
- ❑ Where defendant breaches the terms of the order the claimant may apply for an order that will fix the date upon which the defendant has to give up possession of the property.
- ❑ The claimant cannot apply for a warrant for possession until a date for possession has been fixed.
- ❑ At least 14 days and not more than 3 months before applying for an order to fix a date the claimant must give written notice to the defendant about what they intend to do.
- ❑ An application for an order fixing a date for possession must be made by filing an application notice in accordance with CPR Part 23 (i.e. the court would expect the application in Form N244 together with a £35 fee as mentioned below. This is on the assumption that the judge has included in the postponed possession order a direction for the application to be dealt with without a hearing unless otherwise directed.)
- ❑ The claimant must file the following documents with the application notice:
 - a copy of the notice to the defendant;
 - a copy of the defendant's reply, if any, received in response to that notice and any relevant subsequent correspondence between the claimant and the defendant;
 - a statement of the rent account showing the current arrears from the first failure to pay in accordance with terms of the postponed possession order; or,
 - where the first date of default is more than two years before the date of the application notice, for the period of two years immediately preceding the date of the application notice.
- ❑ CPR Rules 23.2.3, 23.2.4 and 23.2.5 (dealing with applications without a hearing), 23.7 (service of a copy of an application notice), and 23.10 (right to set aside or vary an order made without service of the application notice) do not apply to an application under this section.
- ❑ On filing, the application will be referred to the District Judge who:
 - will normally determine the application without a hearing by fixing the date for possession as the next working day; but
 - if he considers that a hearing is necessary:
 - will fix a date for the application to be heard; and
 - direct service of the application notice and supporting evidence on the defendant.
- ❑ If granted, the order fixing a date for possession would be drawn up as a General Form of Order (CaseMan Event 332). Suggested wording " Following on from the order for possession dated xxxx the Court orders that the Defendant(s) is/are to give up possession of [insert address] forthwith/on [insert date]".
- ❑ The normal rules for applying for warrant of execution set out in CCR 26 rule 17 apply following the granting of an order fixing the date for possession.

NB. The normal non-specific application fee of £35.00 will apply to all applications to fix a date for possession under the new procedure.