

Unlawful Eviction – Causes of Action and Injunctions
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1. Introduction

1.1 Most occupiers who are unlawfully evicted need a quick way back into the Property. The means of obtaining that remedy is by way of injunction, often without notice. The timeframe is usually very short. This paper is intended to give a practical guide to the steps that need to be taken to obtain that injunction and the principles the underpin the application.

2. Status

2.2 At the heart of every unlawful eviction claim is an initial question: What is the status of the occupier? The Client's status determines the cause of action and the remedy available. The potential categories include the following:

- (1) *Squatter trespassers*. A squatter is a trespasser who entered onto land without anyone's permission and remains there without anyone's permission;
- (2) *Trespasser who was a former tenant or licensee*. Although a trespasser, and without any common law rights of occupation, a trespasser whose right of occupation (whether as a licensee or a tenant) has been terminated has a greater protection than a mere squatter (s. 3 Protection from Eviction Act 1977 - see below);
- (3) *Tenants* (or statutory tenants for the purposes of the RA 77). Such tenants can be common law tenants or be protected by security of tenure, e.g. secure or assured tenants.
- (4) *Licensees*. Those with permission to occupy but with no greater status, e.g. service occupiers, lodgers or family members of a person with lawful permission to be in the premises.

2.3 Status is relevant to unlawful eviction in two ways:

- (1) it will usually be at the heart of a central factual question, namely whether the occupier's right of occupation was lawfully terminated - which itself determines the status of the occupier;
- (2) it determines which causes of action are available, if any, to prevent unlawful eviction or secure re-entry or damages.

3. Causes of Action available to the various types of occupier:

3.1 ***Causes of action available to all types of occupiers:***

- (1) Protection from Harassment Act 1997, s. 3. Requirements are:
 - *A course of conduct* (more than one incident). Conduct can include any kind of conduct that causes harassment. It includes speech (PHA, s. 7(4)).

- *that amounts to harassment.* Although not defined harassment includes alarming or causing distress to a person (PHA, s. 7(4)).
 - *The perpetrator knows or ought to know that the conduct amounts to or involves harassment.* A person ought to know that conduct is harassment if a reasonable person in possession of the same information would think that it did (*Allen v Southwark LBC* [2008] EWCA Civ 1478)
- (2) Trespass to goods and conversion. A trespass to goods involves direct interference with goods (e.g. change of locks resulting in deprivation of use of belongings in the property). A conversion of goods involves the permanent deprivation of their use, e.g. destruction or conversion to the use of another person such as sale to another.
 - (3) Assault and battery. An assault is any act which puts another in immediate and reasonable fear of a battery. A battery is any intentional application of direct physical force on another without lawful excuse. Although threatening words are not usually enough to amount to an assault in the absence of an earlier battery, they may nevertheless be enough to justify a *Quia Timet* injunction if the court is satisfied that it evidences the risk of a likely eviction.
 - (4) Deceit or fraudulent misrepresentation. See *Mafo v Adams* [1970] 1 QB 548, CA. Landlord tricked tenant into moving by offering alternative accommodation that was not in fact available. Note that whether or not deceit is available against an unlawful occupier such as a squatter would depend on whether the deception caused a loss - which may be doubtful if the only loss is the unlawful occupation.
 - (5) Intimidation. A threat, by words or deed, which is intended to make someone do something that causes damage to themselves or another constitutes intimidation. The threat must be intentional and must be to do an illegal act (whether a crime, tort or breach of contract). The threat must be coupled with a demand.

3.2 *Causes of action available to tenants.*

- (1) Trespass to land:
 - Any person with a sufficient interest in land may sue in trespass (*Hunter v Canary Wharf* [1997] AC 684): owner occupier, tenant, tenant by estoppel, licensee with exclusive possession (e.g. secure licensee), tolerated trespasser (*Pemberton v Southwark LBC* (2000) 32 HLR 784, CA, albeit no longer relevant) or a person in adverse possession (as against third parties but not the true owner).
 - Any unlawful entry onto land, or the unlawful placing of something on the land, constitutes a trespass to land.
 - Trespass is committed as soon as a person enters without permission or refuses to leave when asked to do so after reasonable notice is given.

- Trespass is actionable per se. No damage need be proven.
 - Common examples of trespass: changing locks, dumping rubbish to obstruct use of premises, coming into a property to inspect without permission, removal of entry door.
- (2) Breach of covenant of quiet enjoyment. Generally an implied or express term of any tenancy agreement. Note:
- Some quiet enjoyment clauses are expressed to be conditional, e.g. on payment of rent. Such conditions can be ignored (Woodfall, 11.280).
 - Covers any act which interferes with the tenant's ability to use the property in an ordinary lawful way. Interference with the tenant's comfort or that of his family is sufficient (*Kenny v Preen* [1963] 1 QB 499 CA: threats coupled with visits);
 - Cutting off gas and electricity supply is also capable of a breach (*McCall v Abelesz* [1976] QB 585 CA) or regular excessive noise (*Southwark v Tanner* [2001] 1 AC 1) or failure to comply with repairing obligations so as to make continued occupation undesirable (*Gordon v Selico* (1986) 18 HLR 219 CA).

3.3 *Causes of action available to other residential occupiers*

- (1) Protection from Eviction Act 1977 s. 3 - trespassers who were formerly tenants or licensees. Section 3 requires an owner of residential accommodation to recover possession by court proceedings where the tenancy or licence of the occupier has been terminated and the former tenant or licensee remains in occupation as a residence. Actionable as a tort. Relevant principles:
- the property must have been 'let as a dwelling' save that some tenancies are excluded (for which see s. 3A);
 - alternatively the property must have been occupied as a dwelling under a licence, save for excluded licences (for which see s. 3A).
 - the tenancy or licence must have been terminated but the former tenant or licensee *continues* to occupy the premises as a residence.
 - Exclusions are listed in section 3A and include: sharing with a resident landlord or a member of the landlord's family; grant as a temporary expedient to a trespasser; holiday accommodation; grant other than for money or money's worth; asylum seekers; licences of a public sector hostel.
 - An additional judge-made exclusion: *Desnousse v Newham LBC & others* [2006] QB 831; [2006] HLR 38 CA. Occupation of temporary accommodation under a licence pursuant to section 188(1) will **not** amount to 'occupation as a dwelling' for the purpose of section 3. It is moot whether a tenancy provided under section 188(1) will attract protection of s. 3.

- (2) HA 1988, s. 27, 28 (also available to tenants) entitles a claimant to damages only but very important. See paper on damages.

4. Common Defences Raised

4.1 Status. Very often a key issue in the case. See 1 above.

4.2 Surrender. A surrender must either be by deed or by operation of law. The latter will only take place where:

- (1) one party unequivocally offers, by conduct or words, to treat the tenancy as at an end;
- (2) the other unequivocally accepts the offer to treat the tenancy at an end;
- (3) the circumstances are such as to render it inequitable for the tenant or the landlord to dispute that the tenancy has ceased.

(see *Zionmor v Islington LBC* (1997) 30 HLR 822, at 827 to 828; *Woodfall* para 17.018 to 17.020) The intentions of the tenant are to be judged objectively on the facts.

4.3 Common relevant factors include the handing in of keys, the appearance of abandonment (e.g. disappearance of tenant, non payment of rent, absence of payment of utilities) without payment or rent, the absence possessions in the property or conversely sight of the tenant (even if occasionally) and the presence of possessions.

4.4 Property re-let to third party. No (interim) injunction is available if the property has been relet. The appropriate remedy is a possession order (*Love v Herrity* (1990) 23 HLR 217), e.g. by joining the new tenants and claiming possession. The new occupier has no defence (where an unlawful eviction has taken place) but may be entitled to damages and costs from the landlord on the making of the possession order and subsequent eviction.

5. Injunctions:

5.1 An injunction may be sought to remedy a breach of contract or a tort or to prevent an anticipated breach of contract or tort. Primary tool in any unlawful eviction.

5.2 *Discretionary remedy*. As a discretionary remedy a final injunction will not be given where damages are a better remedy. Rarely will it be refused if it was the occupiers home.

5.3 *Interim injunctions - CPR 25.1(1)(a)*. Most tenants want to get back in asap. Relevant principles:

- (1) *Undertaking as to damages.* This is an undertaking that any damages caused by the injunction will be paid if at trial the tenant loses the claim. Most courts will not require it of legally aided clients but it is a possibility and the client should be warned of that possibility and of the consequent potential liability (CPR PD 25A para 5.1(a); *Allen v Jambo Holdings Ltd* [1980] 1 WLR 1252);
- (2) *Balance of convenience.* An interim injunction will only be given if there is a serious question to be tried (i.e. it is not a frivolous or vexatious case) and the balance of justice favours the granting of an injunction to preserve the status quo (*American Cyanamid Co. v Ethicon Ltd.* [1975] A.C. 396)
- (3) *Balance of convenience and unlawful eviction cases.* Where a person's home and homelessness are at stake, the balance of convenience will tend to favour the occupier unless the property has been re-let (*Love v Herrity* (1990) 23 HLR 217 CA) in which case a possession claim will need to be issued against the new occupiers (interim remedies for possession are not available);
- (4) *Without notice.* Injunctions may be without notice if there is good reason: CPR Pt 25.3(1), e.g. threats likely to be carried out if the defendant is forewarned or if the matter is so urgent that there is no time to give notice because the client faces a night on the streets. Explanation for a without notice application *must* be included in the witness statements.

6. Procedure for issuing an injunction

- 6.1 *Jurisdiction.* Absent a harassment claim, the claim may be issued in any county court. If a harassment claim is included, it should be issued in the court for the district in which either the claimant or the defendant resides or carries on business (CPR 65.28).
- 6.2 *Track.* A claim that includes a claim by a tenant of residential premises against his landlord for a remedy in respect of harassment or unlawful eviction cannot be allocated to the small claims track (CPR 26.7(4)). Similar claims by licensees are likely to be treated in the same way notwithstanding a value in damages of less than £5,000 provided an injunction is being sought (see CPR 26.7(2) (court discretion where no financial value) and CPR 26.8 (factors to be taken into account including the 'nature of the remedy sought')).
- 6.3 *The documents to be drafted.* The court will require filing and service of the following documents:
 - The Claim form. The claim will be a Part 7 claim (form N1) unless it includes a harassment claim, in which case it will be a part 8 claim and will need an N208 (CPR 65.28)).
 - Particulars of claim. Required if a Part 7 claim. If a Part 8 claim that includes a claim under the Harassment Act, the claim form would only require brief particulars *but* good practice would be to provide a set of particulars in a similar form to a Part 7 claim particularly as other causes of action are likely to be pursued as well.

- Application for an injunction in form N16A.
- Witness Statements which must deal with all the necessary components of the causes of action and the need for the injunction, including urgency and good reason if application is without notice.
- Draft order, preferably in form N16.

6.4 *Issuing the claim and the without notice application:*

- Warn the court that you will be attending, have the relevant fee available.
- On attendance go to the court office and issue the application and a judge will be allocated. Don't take no for an answer!
- At the hearing:
 - (1) expect a short hearing unless paperwork is not in order. The court will, in all likelihood, give return date for an inter partes application (CPR PD 25A para 5.1(3));
 - (2) don't forget the duty of candour. To avoid losing the injunction at the interim hearing, you must ensure that you disclose all relevant matters to the court including information adverse to your client's case.
- Be prepared to give undertakings as to damages (or explain why not: see above) and as to service - as soon as practicable - on the respondent of the application notice, evidence in support and any order made (CPR PD 25A para 5.1(2)).
- After the hearing the Court office will draw up the order immediately or within a few hours; If it takes time, stay or return to pick it up and *check* that it is correctly drafted;
- Get sufficient copies for yourself and for each defendant;
- arrange for process server. e.g. get them to come to court to pick it up immediately. Service must be by personal service.

7. Evidence

7.1 Getting evidence quickly for an injunction can be difficult but will assist you in considering how to draft your documents and what remedy to seek. Evidence (e.g. tenancy agreements, rent books) may be difficult to get as they will be in the property of which possession has been lost. Therefore some lateral thinking may be needed. Sources of evidence can include:

- Contemporaneous notes with landlords. Ring the landlord, take a note and use what is said.
- LA tenancy support files. Any referral by a tenancy relations officer is likely to have resulted in a file of notes, interview records, etc. Get a copy sent through.
- Independent witnesses. Family members, employers (e.g. couldn't come into work/affecting work), neighbours, friends etc.
- Evidence of reletting or adverts, bank statements etc where existence of tenancy is denied;
- Pictures of criminal damage / assault etc;
- Hospital / GP records of injuries

- Text messages. Get a transcript printed - either by direct printing or by a typed record taken by a clerk who can give evidence of accurate record having been taken.
- Email messages.
- Recorded phone calls (See *Islam v Yap* [2009] EWHC 3606 (QB)).

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UNLAWFUL EVICTION

TYPES OF DAMAGES

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1. Possible Types of Damages

- Statutory damages (Housing Act 1988, ss. 27-28)
- Special Damages
- General Damages
- Pain, suffering and loss of amenity
- Aggravated damages
- Exemplary damages

2. Statutory Damages

2.1 **The statutory tort – section 27 HA 1988** The statutory tort of unlawful eviction was introduced by Housing Act 1988, ss.27 and 28 primarily because of concerns that following the introduction of assured tenancies at market rents, some landlords would calculate that any damages which they might have to pay as a result of unlawfully evicting a Rent Act 1977 protected tenant would be outweighed by being able to relet the property at a market rent or sell it on the open market

2.1.1 The tort is committed if (s 27(1) and 27(2)):

- (1) A landlord (or any person acting on his behalf) / unlawfully deprives / a residential occupier / of his occupation of the whole or a part of premises; or
- (2) A landlord (or any person acting on his behalf) / attempts / to unlawfully deprive / a residential occupier / of his occupation of the

whole or a part of the premises / and as a result / the residential occupier *does* give up his occupation of the premises; or

(3) A landlord (or any person acting on his behalf) / does anything likely to interfere with the peace or comfort of the residential occupier or members of his household / or withdraws or withholds services reasonable required for the occupation of the premises as a residence and:

- (i) as a result the residential occupier gives up the accommodation; and
- (ii) the landlord or the person acting on his behalf knew or had reasonable cause to believe that the residential occupier:
 - (a) would give up the accommodation; or
 - (b) would refrain from exercising his rights in respect of the property.

2.1.2 It is a defence if the landlord believed or had reasonable cause to believe that (s. 27(8)):

- (1) the residential occupier had already left when the tort was committed;
- (2) he had reasonable grounds for withdrawing services;

2.1.3 *Landlord.* Means the person entitled to occupy the premises (but for the residential occupiers rights) or any superior landlord. (HA 1988, s. 27(9)(c)).

2.1.4 *Residential occupier.* Any person occupying premises as a residence, whether by means of a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises (HA 1988, s. 27(9)(a); s. 1(1) of the PEA 1977). It includes tenants, licensees and trespassers who are former tenants and licensees but are protected from eviction without court order by s. 3 of the PEA 1977.

2.2 **Measure of Damages** Under s.28(1), the basis of assessment is:

- the difference in value,
- as at the date when the residential occupier left the premises,
 - between the value of the landlord's interest in the building with the occupier still enjoying the right to occupy
 - and the value of the landlord's interest without such right.

2.3 The level of s.28 damages turns on expert, valuation evidence. Many of the reported decisions are highly critical of the valuation evidence provided: *Jones v Miah* (1992) 24 HLR 578, CA, *Nworkorie v Mason*, (1993) 26 HLR 60, CA, and *Melville v Bruton* (1996) 29 HLR 319, CA.

2.4 The interest to be valued is the interest held by the landlord in the whole building (together with its curtilage) in which the premises are situated. Accordingly, where the landlord owns the whole house but the tenant only has a tenancy of one flat within it, it is still the difference in the value to the house not the flat which is to be assessed. The valuation must take into account the presence of other residential occupiers in the building: *Melville v Bruton* (1996) 29 HLR 319, CA.

2.5 The valuation is an open market valuation: s.28(3)(a),(b).

2.6 The development potential of the property for commercial purposes is not taken into account: s.28(3)(c). (It is assumed that it is unlawful to carry out any substantial development of the land in which the landlord's interest subsists or to demolish the whole or any part of any building on that land. 'Substantial development' means any development - see Town and Country Planning Act 1990, s.55 as to the meaning of 'development' - other than that within a general development order under the 1990 Act, or a change of use resulting in the building or any part of it being used as one or more dwelling-houses.)

2.7 Expert reports must comply with **CPR Pt 35** and the practice direction made under it. A report must:

- give details of the expert's qualifications;
- give details of any literature or other materials on which the expert has relied in making the report, *e.g.* details of comparable properties or citations from textbooks;
- where there is a range of opinion on the matters dealt with in the report, summarise that range and give reasons for the expert's own opinion;
- contain a summary of the conclusions reached;
- contain a statement that the expert understands his duty to the court and has complied with that duty; and,
- contain a statement setting out the substance of all material instructions, summarising the facts which are material to the opinions expressed in the report.

2.8 *Status of the Occupier.* The status of the occupier is crucial. The greater the security of tenure enjoyed by the occupier, the larger the damages are likely to be. It has been held that where the premises are let on an assured shorthold tenant at a market rent it is unlikely, the eviction of the assured shorthold tenancy is unlikely to make much of a difference: *Melville v Bruton* (1996) 29 HLR 319, CA.

2.9 It is likely that the number of cases in which significant damages under s.28 are awarded are diminishing but some experts take the view that the hassle factor of evicting an AST tenant is significant. See also *Mehta v Royal Bank of Scotland* (1999) 32 HLR 45, QBD, in which a very high award was made to a licensee.

2.10 **Reduction of damages.** Damages under s28 may be reduced in two circumstances (s.27(7)):

- on account of the conduct of the former residential occupier or someone living with her/him,
- or if the landlord offers reinstatement and it would be (or would have been) unreasonable for the occupier to refuse to accept.

2.11 If a landlord who wishes to rely on a s.27(7) defence, he must plead the facts relied on: *Regalgrand v Dickerson* (1996) 29 HLR 620, CA, and *Kalas v Farmer* [2010] EWCA Civ 106.

2.12 **Conduct Relevant** conduct is not limited to serious acts. Failure to pay rent may justify a reduction in damages, even where the landlord successfully counterclaims for the arrears: *Regalgrand v Dickerson* (1996) 29 HLR 620, CA. In that case, the Court of Appeal upheld a reduction from £12,000 to £1,500 because the tenants were in arrears of rent and had already decided to leave the property within a short time.

2.13 In *Wandsworth LBC v Osei-Bonsu* [1999] 1 WLR 1011; 31 HLR 515, CA, the claimant and his wife were joint tenants. The wife fled because of domestic violence. At the authority's suggestion, she served a notice to quit to determine the tenancy but the notice was invalid because it did not give 28 days' notice. Meanwhile, the claimant had been excluded from the house because his wife had obtained an ouster. The authority treated the notice to quit as valid so that, when the claimant asked to be let back into the house once the ouster had been discharged, they refused him re-admission.

2.14 In the county court, the claimant was awarded £30,000 statutory damages. The Court of Appeal held that the husband's conduct was relevant to the level of damages. His violence towards his wife broke up the family and by way of the

ouster injunction and the notice to quit led the authority to seek possession with a view to rehousing the wife and the children. The eviction was the culmination of an unbroken chain of events starting with the husband's conduct. The damages were reduced to £10,000.

- 2.15 Reinstatement For the purposes of s27(7), the offer of reinstatement must have been made before the occupier commences proceedings.
- 2.16 A reduction can only be made if an offer for reinstatement is *unreasonably* refused, *i.e.* presumably the tenant is perfectly entitled to not to return if the landlord's conduct has been sufficiently bad.
- 2.17 Set off against common law damages. Damages may not be awarded twice for the same loss.
- 2.18 The following are to be set off: general, aggravated damages or exemplary damages attributable to the loss of right of occupation (*Nworkorie v Mason* (1993) 26 HLR 60, CA) and compensation in criminal proceedings awarded under the Powers of the Criminal Courts (Sentencing) Act 2000, s.134(2).
- 2.19 The following are not set off: general damages for the landlord's acts of harassment prior to the eviction (*Kaur v Gill* (1995) Times June 15, CA) and aggravated damages unconnected with the right of occupation: *Nworkorie*.

3. Special damages

- 3.1 Special damages are designed to compensate for quantifiable losses. The two most common examples in unlawful eviction cases are:
- the cost of alternative accommodation pending reinstatement to the premises;
 - compensation for damaged or lost belongings.

- 3.2 **Alternative accommodation.** The liability to pay rent on the property lost is suspended: *London & County (A. & D.) v Wilfred Sportsman* [1969] 1 WLR 1215). The claimants are likely to be entitled to claim the cost of alternative accommodation (subject to the duty to mitigate any loss) if they recover possession of the property lost. If they do not recover the property lost, the claimants will be entitled to claim general damages for loss of occupancy (see below).
- 3.3 **Lost possessions.** The starting point for the measure of damages is the *value* of the goods at the time of their destruction not the cost of replacement, *e.g.* the cost of a second-hand television rather than a new one. Where, however, there is no market price for the item lost, the appropriate measure is the cost of replacement: *Hall v Barclay* [1937] 3 All ER 620.
- 3.4 The occupier is also entitled to consequential losses which are not too remote, *e.g.* a carpenter is entitled to loss of earnings caused by loss of his tools: *Bodley v Reynolds* (1846) 8 QB 779.
- 3.5 In practice, the claim for special damages is often the source of radical disagreement between the parties. Claimants need to be able to prove that:
- the goods existed - corroboration from family and friends is often important;
 - warranties, credit card/store card evidence;
 - the value of the goods - this can be difficult, although see *Ayari v Jetha* (1991) 24 HLR 639, in which the Court of Appeal refused to interfere with the award of £11,500 special damages, some of the value of which was proved with duplicate receipts;
 - avoid wish lists, they can become a focal point of credibility
 - If items are going to be set out in schedule form, provide as much detail as possible, a Claimant will instantly be given credit by a Judge if an item is described as damaged, scratched or worn.

- If items are pleaded that appear to be not in line with the Claimant's lifestyle, take instructions. There may well be a plausible reason, evidence of which can be obtained.

4. General damages

- 4.1 General damages are to compensate for discomfort, loss of enjoyment, pain and suffering, shock, physical injury and inconvenience.
- 4.2 Most commonly awards of general damages are made for the inconvenience caused by an eviction, *e.g.* spending the night walking the street, or staying on friends' and families' floors and sofas. There is no official tariff for such damages. Everything inevitably turns on the facts of the case. Where the eviction is short-term, damages in the region of £100 to £200 per night are commonplace. Some examples are set out at the conclusion of the paper.
- 4.3 General damages may also be awarded to reflect other discomfort caused: unpleasantness during the eviction or distress caused by acts of harassment leading up to the eviction. Such events should be fully explored prior to the completion of the Particulars of Claim.
- 4.4 More difficult are awards for loss of occupancy. Prior to the Housing Act 1988, awards in general damages for loss of occupancy were made but were usually very low. The success of claims for statutory damages meant that general damages for loss of occupancy lost their significance. Recent restrictions on the situations in which statutory damages may be awarded may lead practitioners to resurrect this head of damages. For a comparatively recent example, see *Grillo v Cant and Bassairi Ltd*, March 1998, *Legal Action*, 13, Central London County Court.

5. Pain, suffering and loss of amenity

5.1 Damages for pain, suffering and loss of amenity are general damages awarded in personal injury cases. Advisers need to bear in mind the need to comply with the personal injury protocol if such a claim is to be included. It will also need to be considered whether there has been any PI (e.g PTSD etc) prior to issue and thus obtain expert evidence to this.

6. Aggravated damages

6.1 As the Court of Appeal has often complained in unlawful eviction cases, aggravated damages are often confused with exemplary damages: *Ramdath v Daley* (1993) 25 HLR 273; *Nworkorie v Mason* (1993) 26 HLR 60, CA; *Francis v Brown* (1997) 30 HLR 143, CA.

6.2 The distinction is that aggravated damages are *compensatory* whereas exemplary damages are *punitive*.

6.3 Only available in **tort** and not contract: *Branchett v Beaney* (1992) 24 HLR 348, CA. Need to plead a tort to get aggravated damages. Awarded to compensate the claimant for injury to his feelings of dignity and pride. They are commonly awarded in unlawful eviction cases where the landlord has used violence or there has been sexual or racial abuse, or the eviction has resulted in scenes between the parties in the street outside the property. Again, any information which demonstrates that the Claimant was demeaned/humiliated or otherwise injured needs to be provided at the earliest opportunity.

6.4. There is strong authority to support the award of aggravated damages in many unlawful eviction cases: *Drane v Evangelou* [1978] 1 WLR 455, CA. The facts were sadly typical. The tenant returned home to find that his entry was barred by one of the landlord's associates. The door to his flat had been bolted on the inside and his belongings, some of which had been damaged, had been put in the back yard. The tenant and his partner were forced to store their belongings in a friend's garage and sleep on their friend's floor until they were eventually re-admitted to

the flat 10 weeks later. The county court judge awarded the tenant £1,000 exemplary (*sic*) damages.

- 6.5 On appeal, the level of the award was upheld not only on the basis that exemplary damages were appropriate but also on the basis that even if £1,000 for exemplary damages had been high, the amount was justified given that the tenant was in any event entitled to aggravated damages. Lawton LJ said:

"Counsel for the landlord at times seemed to be suggesting that this was a comparatively minor dispute between a landlord and a tenant. I emphatically dissociate myself from that. To deprive a man of a roof over his head is, in my judgement, one of the worst torts which can be committed. It causes stress, worry and anxiety... I myself would not have regarded the sum awarded... as excessive for aggravated damages."

7. **Exemplary damages**

- 7.1 Exemplary damages are awarded to punish the defendant and to deter him from similar behaviour in the future. They are to show that tort does not pay.
- 7.2 As with aggravated damages they cannot be awarded for breach of contract so that occupiers' advisers should ensure that a claim in tort is included. The fact that there has been a fine imposed by the criminal court does not impact upon the availability of either aggravated or exemplary damages (*Asghar v Ahmed* (1985 17 HLR 25 CA)).
- 7.3 In *Rookes v Barnard* [1964] AC 1129, the House of Lords provided that exemplary damages can only be awarded in three circumstances. For present purposes, only one of these is relevant namely:
- where the defendant's conduct has been calculated to make a profit which may well exceed the compensation available to the claimant.

- 7.4 Arguments often arise as to what is meant by "making a profit". Sometimes this may be obvious, *e.g.* the eviction of a protected tenant to install an assured tenant, eviction to obtain vacant possession to sell the property or redevelop it.
- 7.5 In practice, however, the test is usually met in unlawful eviction cases because they are not confined to cases involving money-making in the strict sense but extend to cases in which the defendant is seeking to gain at the claimant's expense some property which he covets which either he could not obtain at all or that he could not obtain at a price greater than he wants to pay: *Cassell & Co Ltd v Broome* [1972] AC 1027, HL. Obtaining vacant possession without resorting to the difficulty and expense of possession proceedings falls within this category: *Drane v Evangelou* [1978] 1 WLR 455, CA. This was reflected by District Judge Richmond in a recently reported case (*Walsh v Shuangyan* – June 2010 LAG) where exemplary damages of £1500.00 were awarded against a landlord, such a sum representing the legal costs that they would have incurred had they evicted the tenant lawfully.
- 7.6 The occupier's conduct is irrelevant: it does not matter that the tenant was in rent arrears: *McMillan v Singh* (1985) 17 HLR 120, CA.
- 7.7 The correct approach is for the court to assess the general and special damages suffered by the claimant and any aggravated damages before going on to assess the amount of any exemplary damages: *McMillan v Singh* (1985) 17 HLR 120, CA. Awards of exemplary damages are usually in the region of £1,000 to £2,500. Relevant factors include:
- the seriousness of the conduct complained, *e.g.* whether violence was used or threatened
 - the extent to which the landlord may have disregarded warnings, *e.g.* from the police, a tenancy relations officer, or the claimant's advisers.
 - whether the complied with any order for an interim injunction.
 - The need to protect tenants, and to be seen to disapprove of such behaviour.

7.8 **Problems with agents.** In *Ramdath v Daley* (1993) 25 HLR 273, CA, the Court of Appeal upheld the award of exemplary damages against a landlord. The property was managed by the landlord's son, who had been authorised and encouraged to throw the claimant out of the flat. On this basis, it was found that an award of exemplary damages against the landlord was justified. A separate award of exemplary damages against the son was, however, quashed because it was not shown that he had a sufficient interest in the eviction himself to benefit.

7.9 There is also a procedural issue. Where a claim for exemplary damages is made against two or more defendants, only a single award should be made, reflecting as a matter of law the lowest figure for which any of the defendants could be held liable: *Cassell & Co Ltd v Broome* [1972] AC 1027, HL; *Francis v Brown* (1997) 30 HLR 43, CA. Where an award may be appropriate against both the landlord and his agent, the solution (albeit cumbersome) is to commence separate proceedings against each of them and subsequently have the two claims heard together: as approved by Lord Hailsham in *Cassell & Co Ltd v Broome*.

8.0 **Some illustrations**

8.1 The Courts have increasingly adopted a view that a daily rate is appropriate to compensate the individual for the time that they have been de facto homeless, this is separate to any award for exemplary or aggravated damages. Usually this only applies for a short period of time, the view being that alternative accommodation could be found at some point. However recent awards appear to buck this trend. Thus, statements for trial should not only focus upon events that led up to the eviction but events thereafter in terms of seeking replacement tenancies. The levels of awards range from £100 per day to £300 per day. In *Walsh v Shuangyan* (Manchester County Court 14 January 2010 – LAG June 2010 – District Judge Richmond) the tenant was awarded £200 per day for 30 days that she spent sofa surfing. In *Anslow v Hayes* (Manchester

County Court - Recorder Yip – LAG June 2010) an award of £7000 for 73 days in which the tenant had to stay in cramped conditions with his girlfriend before he was able to find suitable alternative accommodation was ordered. In *Schuchard v Fu* (Brentford County Court – DJ Plaskow – LAG June 2010) an award of £24,000 (representing 120 days at £200) was made in respect of general and aggravated damages for a period when the Claimant was street homeless, followed by £125.00 per day for 35 days sleeping on a friend's floor. In addition a lump sum of £2000 was made in respect of damages for living in local authority accommodation whilst a s.21 assessment was undertaken. In *Naughton v Whittle and Chief Constable of Greater Manchester Police* (Manchester County Court – HHJ Morgan – LAG July 2010) damages at £275 per day were ordered and in *Shyngle v Simons* (Slough County Court – LAG July 2010) damages at £175.00 per day were ordered.

- 8.2 In *Gina Singh v Bhakar and Bhakar* (**Nottingham CC – HHJ Scott QC – 24/7/2006 – Lawtel**) **A claimant who had successfully substantiated her allegations under the Protection from Harassment Act 1997 s.7 that her former mother-in-law's conduct towards her amounted to a campaign of harassment was awarded damages of £35,000.**

The claimant (G) claimed damages against the second defendant (B), her former mother-in-law, for conduct amounting to harassment of G during G's marriage to the defendants' son. G, a devout Sikh, contracted an arranged marriage with B's son, and in accordance with custom went to live with his family. She claimed that after the wedding B had conducted a campaign of harassment against her that included forcing G to depart from Sikh religious practice by having her hair cut, making G wear a locket bearing Hindu symbols, which was very offensive for a religious Sikh, forcing G to do excessive and pointless housework, controlling her contact with her family, and isolating her generally. G returned to her own family after four months and later sought medical attention. G and the son were divorced, although G showed a desire to maintain the marriage. Medical evidence indicated that G had suffered a moderate depressive episode and that in all likelihood the failed marriage was

a significant factor in the development of her depressive disorder. The defendants argued that the court should be slow to apply the Protection from Harassment Act 1997 in a domestic context.

HELD: (1) G's allegations as to the campaign of harassment were substantiated, and her condition after she had left B's house could be attributed to the maltreatment she had suffered at the hands of B. B's conduct was more than enough to amount to harassment under s.7 of the Act, Majrowski v Guy's and St Thomas's NHS Trust (2005) EWCA Civ 251 , (2005) QB 848 considered. A judge should be very slow to refuse on policy grounds to grant a statutory remedy if the provisions of that statute applied to the facts of the case. G was entitled to succeed on her claim.(2) There were differences between damages for personal injuries resulting from a single trauma and damages under the Act. The focus in a personal injury action was on compensating a claimant for the consequences of an accident, whereas in the instant case the court had to take account, not only of the period after the marriage ended, but also of G's experience during the marriage, and that the course of conduct towards G was deliberate. Those alone would be sufficient to take G close to the top of the bracket for moderately severe psychiatric damage in the JSB Guidelines for the Assessment of General Damages. G had suffered during her marriage, and general damages of only £27,500 would have been awarded had it not been for the way in which the defence case had been conducted (which was not a reference to counsel), so the overall award should be £35,000.

- 8.3 In Islam v Yap [2009] EWHC 3906 (Lawtel) HHL Wilcox (sitting as a High Court Deputy) awarded £5000.00 exemplary damages in a case which was by no means extraordinary. What he made clear was that cases in which individuals sought to profit would need an award to make it plain that such behaviour was not appropriate and that tenants required protection.

8.4 In Naveed v Raja (Willesden County Court – HHJ Copley – July 2007 LAG) £27,000 was awarded to the tenant representing £10,000 generals, £15,000 aggravated and exemplary and £2000 specials. In this case the Claimant was evicted having been beaten up. He slept in his car for three days, he obtained an injunction and was readmitted. Three days later he was beaten up again necessitating hospital admission. He was then too scared to return to the property.

Alex Durance
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