

# Conditional possession orders after *Knowsley Housing Trust v White*



**Robert Latham** considers how conditional possession orders should be framed in the light of the House of Lords' judgment in *Knowsley Housing Trust v White* [2008] UKHL 70, 10 December 2008 and the amendments which are to be introduced by the Housing and Regeneration Act (H&RA) 2008 in April this year.

## Introduction

In *Knowsley Housing Trust v White*, the House of Lords held that the concept of tolerated trespasser has no relevance to assured tenancies. An assured tenancy continues for so long as the tenant remains in occupation of his/her dwelling. From 6 April 2009, when H&RA Sch 11 is brought into force (which makes provision about possession orders and their effect on secure tenancies, introductory and demoted tenancies including provision about the status of existing occupiers), the same rule will apply to secure tenancies. (See also page 21 of this issue.)

Since 3 July 2006, most county court judges have opted for the use of Form N28A (the postponed possession order) to avoid the creation of a new generation of tolerated trespasser. The question is whether or not they now resume the use of Form N28 (the suspended possession order)? While any assured or secure tenancy will subsist for so long as the tenant remains in occupation, regardless of whether Form N28A or Form N28 is used, there are important procedural differences when it comes to the enforcement of either order.

The H&RA received the royal assent on 22 July 2008. One reason for the delay in bringing s299 (possession orders relating to certain tenancies) into force was to provide Her Majesty's Courts Service (HMCS) the opportunity to review whether or not a new template for a conditional possession order or any amendments to Civil Procedure Rule (CPR) 55 are desirable; however, no changes are proposed. One problem is the £30,000 cost of putting a new electronic form on the Caseman system. Given the financial difficulties faced by HMCS, it seems that there has been no proper consideration about whether or not any changes are required. This article argues that it is in the interests of both landlord and tenant that the courts continue to use Form N28A where possession is sought on a discretionary

ground and a judge has concluded that a conditional order is appropriate. It is apparent that some district judges are reverting to the use of Form N28 when making conditional possession orders against assured tenants. It is less clear whether they are aware of the consequences of this.

## The law

Section 85 of the Housing Act (HA) 1985, which is mirrored in section 9 of the HA 1988, gives the court an extended discretion when possession is sought on a discretionary ground. Section 85(2) provides that:

*On the making of an order for possession of such a dwelling-house on any of those grounds, or at any time before the execution of the order, the court may[:]*

(a) *stay or suspend the execution of the order, or*

(b) *postpone the date of possession, for such period or periods as the court thinks fit* (emphasis added).

In *Knowsley Housing Trust v White*, Lord Neuberger held that the words 'stay' and 'suspend' are synonymous.

## Form N28 (the suspended possession order)

The current Form N28 was introduced on 15 October 2001 by HMCS to coincide with the then new CPR 55 which provided for possession claims. Previous templates for Form N28 had been issued in 1982 and 1993; albeit that these were also described as 'suspended possession orders', their effect was rather to 'postpone the date of possession' (see HA 1985 s85(2)(b)).

The team responsible for drafting the new template, which included experienced district and circuit judges, strove for the use of plain English which would be comprehensible to the tenant against whom the order would be

made. They had no contemplation of the dangers of such an approach in the 'chaos of verbal darkness' which is to be found in the Rent Acts and Housing Acts.\* Thus they inadvertently created the new sub-class of the blameless tolerated trespasser (see *Harlow DC v Hall* [2006] EWCA Civ 156, 28 February 2006; [2006] 1 WLR 2116).

It is to be noted that this is the first time that a template for a conditional possession order had the effect of suspending the execution of the order (HA 1985 s85(2)(a)) rather than postponing the date of possession (HA 1985 s85(2)(b)). Traditionally, applications to suspend the execution of the order were only to be made when a warrant for possession had been issued. The legal effect of this template was not what had been contemplated by its drafters who had thought that a specific reference to 'rent', as opposed to 'mesne profits', would make it clear that a postponed possession order was intended whereby the tenancy was to continue until any breach of the conditions occurred.

Should the tenant breach the conditions specified in a Form N28, it is open to the landlord to apply to the county court for a warrant of possession to be issued. The landlord completes Form N235 (request for warrant of possession of land), and certifies that the tenant has breached the terms of the order. A warrant is then issued by the court bailiff as an administrative act.

There is no requirement for the landlord to give notice to the tenant of the application for a warrant. There is no provision for the tenant to dispute the landlord's contention that the order has been breached. There is no judicial determination about whether or not the eviction should proceed. The application for the warrant may be made up to six years after the possession order was made before the permission of the court is required (CCR Ord 26 r5). Yet, there is no opportunity for any judicial determination about whether or not the eviction is still reasonable and/or proportionate in the light of the circumstances that have arisen since the order was made.

In *Southwark LBC v St Brice* [2001] EWCA Civ 1138, 17 July 2001; [2002] 1 WLR 1537, the Court of Appeal held that these procedures are not incompatible with articles 6, 8 and 14 of the European Convention on Human Rights. However, the challenge did cause HMCS to introduce the new N54 (notice of eviction) in June 2001. Once the warrant for possession has been issued, the tenant must be notified of this fact and the date fixed for the eviction. The tenant must also be notified of his/her right to make an application to further postpone the date of possession or to suspend the execution of the order under HA 1985 s85(2) or HA 1988 s9(2).

These procedures depend on the tenant receiving notice of the proposed eviction, which may occur only a few days before the eviction is to proceed. *Leicester City Council v Aldwinckle* [1992] 24 HLR 40 is a cautionary tale where the tenant was absent from her home. She suffered from ill health and spent substantial periods away from her flat while attending hospital for operations and other treatment. On 18 July 1989, the landlord applied for a warrant for possession. This was issued on 31 July and executed on 15 August. The tenant returned on 23 November to find that all her belongings had disappeared. Ms Aldwinckle's application to set aside the warrant failed as she was unable to establish any oppressive conduct by either the landlord or the court in the execution of the order.

In *Aldwinckle*, the landlord had been entitled to a warrant for possession. The position would have been different had the landlord made an error in completing Form N325. In a rent arrears case, there could be a simple error in computing the arrears. In a case of nuisance, the existence of a breach may turn on a dispute of fact. The landlord may act on a complaint by a neighbour which later proves to be malicious and false. Where Form N28 is used, the landlord must bear the responsibility for any error. If it later transpires that there was no breach, the eviction will be unlawful. The absent tenant who returns to find that his/her dwelling has been re-let will not be able to secure readmission. S/he will rather have a substantial claim for unlawful eviction, equivalent to the value of a secure tenancy.

The use of Form N28 also causes administrative problems for local county courts. Applications by tenants under HA 1985 s85(2) or HA 1988 s9(2) will be inevitably made shortly before the warrant for possession is to be executed. The court must decide such applications, even if only on an interim basis, before the eviction. Such emergency applications must take priority over the other cases listed for hearing. Often, the tenant will appear in person, his/her lawyer having had insufficient time to make a proper application or to arrange representation. A final problem is that this template omits the phrase 'this order shall cease to be enforceable when the total judgment debt is satisfied'. This was done with the express intention of avoiding the trap of the entrenched tolerated trespasser, an absurdity which has been ended by Lord Neuberger's speech in *Knowsley Housing Trust v White*. As a result of the omission, even when the arrears are cleared, it is open to the landlord to apply to evict if new arrears arise. This situation could arise years after the possession order has been made.

In the author's opinion, this phrase should now be added to any suspended possession order that is made based on Form N28. HMCS could and should have added these words to the electronic version of the template. It is an unnecessary administrative burden for the courts to do this manually.

### **Form N28A (the postponed possession order)**

Form N28A was introduced by HMCS on 3 July 2006 to avoid the blameless tolerated trespasser that arose from the judgment in *Harlow DC v Hall* (above). No date for giving up possession is specified in the order. A green light for such an order was provided by the Court of Appeal in *Bristol City Council v Hassan* [2006] EWCA Civ 656, 23 May 2006; [2006] 1 WLR 2582. Brooke LJ emphasised that when the landlord applies to fix a date, the court will have no jurisdiction to revisit whether it had been reasonable to make the original possession order.

Should the tenant breach the conditions of a Form N28A, it is open to the landlord to apply to the county court for a date to be fixed. CPR Practice Direction (PD) 55 section IV provides a summary procedure for fixing a date. At least 14 days and not more than three months before making the application, the landlord must give notice to the tenant of the alleged breach. The tenant then has seven days in which to respond either agreeing or disputing the breach. The landlord's application notice to fix a date must be accompanied by both notices and supporting evidence to establish the breach. A district judge will then determine the application on the papers, without a hearing, and fix a date for possession as the next working day. However, the judge may decide that a hearing is necessary.

This procedure was considered recently in *Wandsworth LBC v Whibley* [2008] EWCA Civ 1259, 14 November 2008. In considering the paper application, Sedley LJ held that a district judge has a duty to consider whether or not to make an order and to examine the circumstances. However, a bare denial of a breach by the tenant will not suffice: s/he must rather establish a real triable issue regarding whether or not there has been a breach. Save in exceptional circumstances, the court will expect details, since a tenant who has already, by definition, breached the terms of the agreement has to have a cogent answer once there is prima facie evidence of repetition.

It is also open to the tenant to apply under HA 1985 s85, even if the breach is admitted, if s/he contends that there are grounds for a further postponement or suspension of the warrant of possession. Court time is saved if the tenant's application is heard at the

same time as the landlord's application to fix a date.

Form N28A includes the clause 'this order shall cease to be enforceable when the total judgment debt is satisfied'. Thus, if the arrears are cleared, the tenant will no longer be at risk of eviction. In a nuisance case, it is desirable that any order should be time limited.

### **Enforcing judgments**

On 26 April 2009, the tenth anniversary of the introduction of the CPR will be celebrated. However, the enforcement of possession orders in the county court is still governed by County Court Rules (CCR) Ord 26 r17 and in the High Court by Rules of the Supreme Court (RSC) Ords 45 and 46.

In *Leicester City Council v Aldwinckle* (see above), Leggatt LJ noted that CCR Ord 26 r17 does not require the landlord to give notice to the tenant of its application for a warrant for possession. The Court of Appeal could not, on its own motion, insist on such notice. He expressed the hope that the rules in the county court should be brought into line with those in the High Court which required both the giving of notice to the tenant and the need to obtain the leave of the court before a warrant for possession can be enforced. In *Bristol City Council v Hassan* (see above), Brooke LJ noted that it was not permissible under CCR Ord 26 r17 for a landlord to make a combined application to fix a date and request a warrant for possession.

Currently, there are no prescribed templates for possession orders based on anti-social behaviour. District judges do their best to adapt the templates for Form N28 and Form N28A. *Wandsworth LBC v Whibley* [2008] EWCA Civ 1259, 14 November 2008 (see below) is a cautionary tale of a landlord who failed to check that the order had been drawn up correctly by the court.

There are no impending changes to bring the enforcement procedures in the CCR and RSC into line. Again, the problem seems to be lack of resources. All work on bringing the remaining CCR and RSC procedures into line seem to have ground to a halt; this is a matter of regret.

### **Guidance from the Court of Appeal**

In *West Kent Housing Association Ltd v Davies* (1998) 31 HLR 415, Robert Walker LJ, with whose judgment Lord Bingham LCJ agreed, described the approach to be adopted where possession is sought under HA 1985 or HA 1988 under a discretionary ground:

... , the court has potentially three issues, although a determination of one issue in favour of the tenant may make further issues

*academic: first, to decide whether grounds for possession are made out, which is an issue of fact; second, to decide whether it is reasonable to make an order for possession, which involves the exercise of judicial discretion, but with a substantial element of judgment as to whether or not the making of the order is reasonable; and third, to decide whether to postpone the date for possession or to stay or suspend execution, which involves a further exercise of judicial discretion.*

Although there has been increasing emphasis on the exercise of this judicial discretion as being a judgment, rather than an unfettered discretion, the Court of Appeal has given no consistent guidance on how possession orders should be framed.

In *Knowsley Housing Trust v McMullen* [2006] EWCA Civ 539, 9 May 2006; [2006] HLR 43, Neuberger LJ suggested that it would be appropriate only in exceptional cases for a court to add a term to a conditional possession order requiring the landlord to apply to a court for permission before applying for a warrant. This was a possession order based on nuisance caused by the tenant's son. The Court of Appeal did add a clause to the postponed possession order which required the landlord to apply for permission to issue a warrant, but this was because the tenant was a disabled person with learning difficulties.

In *Wandsworth LBC v Whibley* (see above), a decision of the Court of Appeal in which *Knowsley Housing Trust v McMullen* was cited by counsel, Sedley LJ commended the approach of adapting Form N28A and CPR PD 55, which are framed to deal with rent arrears, to a case involving nuisance. He noted that in rent arrears cases, a breach is likely to be a matter of record dependent on the landlord's rent account. In nuisance cases, there is more likely to be a real dispute about whether or not there has been a breach. Sedley LJ stated:

*In a nuisance case there is obvious good sense in following a similar procedure: if, on being notified of the impending application and invited to respond, the defendant remains silent or puts in a plainly spurious or irrelevant response, an order may properly be made summarily. But if, as is more probable in nuisance cases, an issue is raised which is capable of affecting the court's decision, justice will require the defendant to be given an opportunity to put his or her case. The court will of course be astute not to let merely factitious or obstructive responses impede a summary disposal; but, inconvenient though it will be for the lessor and for a time nightmarish for the neighbours, it is not*

*permissible for a tenant who has a possible tenable answer to lose his or her home unheard (para 12) (emphasis added).*

In *Bristol City Council v Hassan*, Brooke LJ noted that it would be a matter for the discretion of the judge regarding what order to make, subject to any templates which the Rules Committee or HMCS may prescribe. The only templates currently available are Form N28 and Form N28A.

While it is open to a judge to devise his/her template, this puts administrative burdens on both the courts and the parties to ensure that any court order is drawn up accurately. The unfortunate reality is that regularly errors are made in drawing up possession orders. Such errors are frequently overlooked by the parties. It is not satisfactory to seek to correct such errors when the landlord is contemplating an application for a warrant for possession. A tenant who is subject to a conditional possession order is entitled to know precisely what s/he is required to do and the consequences of any breach.

### Conclusions

If a court is satisfied both that a ground for possession is proved and that it is reasonable for a possession order to be made, it will have three options:

- a postponed possession order (the current template available being Form N28A);
- a suspended possession order (the current template available being Form N28); or
- an outright order.

Form N28A is the template which should normally be used for a conditional possession order. This provides an enforcement procedure which is both just and expeditious. However, a landlord should be permitted by the CPR to make a combined application to fix a date and request a warrant for possession.

Form N28 should only be used in a

particularly bad case where the facts come close to justifying an outright order. This is consistent with the approach before October 2001 when courts only suspended the execution of an order after a warrant had been issued.

It is desirable that the enforcement procedures in the county court and High Court are brought into line in a new CPR. There should be a common rule which requires that the tenant is given notice and that leave of the court needs to be obtained before a warrant for possession can be enforced.

The wording of the current templates, which only relate to rents arrears, should be reviewed. A separate template should be prepared for a conditional possession order in respect of nuisance.

Consideration should be given to whether or not it is appropriate to 'suspend the execution of the order' at the time when a possession order is made. Alternately, should this be restricted to suspension of the execution of a warrant for possession, which was the historic position before the unfortunate drafting error that led to the introduction of the current template for Form N28 in October 2001.

\* The quote comes from the judgment of MacKinnon LJ in *Winchester Court Ltd v Miller* [1944] KB 734.



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