



Cost of living crisis: Rent arrears possession claims



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Overview

- Rent arrears
 - The grounds
 - Rent lawfully due from tenant
 - Utilities charges
 - Rent increases
- Maximising income
 - Welfare benefits
 - Homelessness prevention
 - Lodgers
 - Other

Grounds: Housing Act 1985 / Rent Act 1977

- HA 1985, Ground 1 / RA 1977, Case 1: Rent lawfully due from the tenant has not been paid
 - No date specified but rights “crystallise” at issue of proceedings (*Bird v Hildage* [1947] 2 All ER 7)
 - If paid before trial, *prima facie* unreasonable to order possession, unless e.g. long history of non-payment (*Dellenty v Pellow* [1951] 2 KB 858)
 - (But matters relied on re reasonableness must be pleaded: *Raeuchle v Laimond Properties Ltd* (2001) 33 HLR 10 per Sir Richard Scott at para 31)
 - If no rent lawfully due at date of NOSP, are the particulars inaccurate? (*Dudley MBC v Bailey* (1990) 22 HLR 424 — “honest mistake” as to sum does not invalidate NOSP)

Grounds: Housing Act 1988

- Housing Act 1988
 - Ground 8: 8 weeks/2 months/3 months rent lawfully from T due is unpaid
 - At date of NOSP; and
 - At date of hearing — see *North British HA Ltd v Matthews* [2004] EWCA Civ 1736
 - Ground 10: Some rent lawfully due from T is unpaid:
 - At date of NOSP (unless dispensed with); and
 - At date on which proceedings begun
 - Ground 11: Whether or not in arrears, T has persistently delayed paying rent lawfully due

Rent lawfully due from tenant

- Relevant rent is that due:
 - From the *current* tenant, and not a predecessor prior to:
 - Succession (*Tickner v Clifton* [1929] 1 KB 207)
 - Assignment (*Parry v Robinson-Wyllie Ltd* (1987) 54 P&CR 187; notwithstanding LT(C)A 1995: see s23(1))
 - Under the current tenancy?
- Rent not lawfully due:
 - Until notice of landlord's address given under s48 LTA 1987
 - But can do so after claim and defence: *Rogan v Woodfield Building Services Ltd* (1995) 27 HLR 78)
 - If based on unlawful rent increase (see below)
 - If money paid into court (*Etherington v Burt* [2004] EWHC 95 (QB))
 - If subject to equitable set-off, e.g. disrepair (*Baygreen Properties Ltd v Gil* [2002] EWCA Civ 1340 25-26)
 - If limitation barred? (*R (McIntyre) v Gentoo Housing Group* [2010] EWHC 5 (Admin) para 71)
 - But note principles on apportionment of payments (*Milverton v Warner* [1995] 2 EGLR 28)

Arrears and payment

- Rent payable in arrears unless agreement to the contrary (express or implied) (*Woodfall* para 7.063)
- Accepted practice of late payment may result in estoppel (*Hazel v Akhtar* [2001] EWCA Civ 1883)
- If L refuses payments, T should pay into court and rely on defence of tender before claim
- Rent not in arrears until:
 - The end of the day on which it falls due (*Re Aspinall* [1961] Ch 526); and
 - If that is a bank holiday, the end of the following day: s1(4) Banking and Financial Dealings Act 1971
- Payment by cheque (*Avocet Industrial Estates LLP v Merol Ltd* [2011] EWHC 3422 (Ch)):
 - No entitlement to pay by cheque unless agreed (expressly or impliedly, including by conduct)
 - May be implied agreement for particular payment if cheque not rejected promptly
 - Uncleared cheque is treated as payment at moment of acceptance, condition on the cheque clearing
 - Landlord cannot rely on failure to present cheque for payment
 - Circumstances may give rise to implied agreement that, not only may payment may be made by cheque, but cheque treated as paid on date of posting, with landlord bearing risk of the cheque going missing; but threshold for proving this is higher than for agreement to accept payment by cheque

Service charges and utilities

- Under s.5 RA 1977 rent includes services charges, utilities etc
- Unclear whether the same applies under HA 1985/1988 although can be included as an obligation of the tenancy in any event (*Rochdale MBC v Dixon* [2011] EWCA Civ 1173)
- Issues may arise as to whether L is a reseller and, if so, whether charges are lawful under:
 - Water Industry Act 1991 and Water Resale Order 2006 (see [Ofgem guide](#); *Jones v Southwark LBC* [2016] EWHC 457 (Ch); *Kingston-upon-Thames RLBC v Moss* [2019] EWHC 3261 (Ch) & [2020] EWCA Civ 1381)
 - Maximum Resale Price under s37 Gas Act 1986 and s44 of the Electricity Act 1989 (see [MRP decision](#) and [Ofgem guide](#); *MacGregor v BM Samuels Finance Group Plc* [2013] UKUT 471 (LC); *King v Residential Marine Ltd* [2021] UKUT 309 (LC))
- Under each, T may request details of calculation of charge which, if not provided promptly, will reduce the amount that may be charged until the information is provided

Rent increases: Housing Act 1985 / Rent Act 1977

- Regulated (i.e. statutory and protected) tenants:
 - Rent lawfully due is rent registered under Part IV RA 1977 — no exceptions
- Secure tenancies
 - s24 HA 1985 requires local authority to fix “reasonable” rent
 - Challenge on public law grounds but v difficult (*Wandsworth LBC v Winder (No 2)* (1988) 20 HLR 400)
 - Potentially more fruitful are challenges based on procedure for variation:
 - s102 HA 1985: Terms of secure tenancy may be varied:
 - by agreement
 - in accordance with term of the tenancy
 - by notice of variation under s103 (save for fixed term tenancies)
 - s103 HA 1985:
 - No requirement for preliminary notice under s103(2) in relation to rent (s103(3))
 - Notice must specify variation and date, and give at least 4 weeks’ notice (s103(4))
 - Power to vary may be restricted by tenancy agreement (e.g. maximum frequency of increase)

Rent increases: Housing Act 1988 (1)

- Fixed term assured tenancies:
 - No statutory provision for rent increase
 - So depends on tenancy agreement (see *Riverside HA v White* [2007] UKHL 20)
- Periodic tenancies:
 - Governed by s13 HA 1988, unless:
 - Tenancy itself governs rent increases (s13(1)(b)) ()
 - Does not apply to statutory periodic, and any rent review term in original tenancy ceases: *London District Properties Management Ltd v Goolamy* [2009] EWHC 1367 (Admin)
 - However, L may serve notice under s6 HA 1988, within first year, to fix terms of SP tenancy, which will take effect 3 months later unless T applies to FTT
 - increase agreed (s13(5)) — but must be proper contractual agreement, including consideration, and cannot be agreement by estoppel (*Riverside HA v White* [2005] EWCA Civ 1385)
 - T may also apply

Rent increases: Housing Act 1988 (2): s13

- L must:
 - Serve notice in prescribed form
 - Propose a date for rent increase, being:
 - Beginning of period of tenancy
 - At least the minimum period (6 months/period of tenancy if >1 month/1 month)
 - At least 52 weeks after tenancy began (save for statutory periodic)
 - At least 52/53 weeks after rent last increased under ss13 or 14
- Tenant may refer to FTT under s13(4)(a) for determination under s14
 - Must refer before notice period expires
 - No power to extend (*R (Lester) v London Rent Assessment Committee* [2003] EWCA Civ 319)
 - FTT will determine rent at which “might reasonably be expected to be let in the open market” by a willing landlord under an assured tenancy for same period and on same terms
- In first 6 months of tenancy, T can apply under s22 for determination of whether rent excessive

Welfare Benefits

Local Housing Allowance

- General rule is that shared accommodation rate applies to:
 - Single claimants/couples without dependants living in shared accommodation
 - Single claimants without dependents who are under 35 in any accommodation

(Reg 13D HB Regs 2006/213)

Exemptions to LHA Shared Rate:

- For those who live in shared accommodation:
 - Claimant qualifies for Severe Disability Premium
 - Claimant under 25 and when aged 16/17 was subject to care order and/or was accommodated under section 20 CA 1989

(Reg 2(1) HB Regs 2006/213)

- For those in self-contained accommodation, e.g.:
 - Qualifies for SDP; under 25 and subject to care order/accommodated under section 20 (as above)
 - Survivor of domestic abuse since age of 16 and has contacted person in official capacity re. alleged abuse (since Oct 2022)
 - In receipt of a Positive Conclusive Grounds decision from National Referral Mechanism (Modern Slavery) (since Oct 2022)
 - Lives with non-dependant

(HB and UC (Care Leavers and Homeless)(Amd) Regs 2021/546; HB and UC (Victims of Domestic Abuse and Modern Slavery)(Amd) Regs 2022/942)

DHP and Homelessness Prevention

DHP is available where:

- Claimant is entitled to HB/Housing Element of UC
- Claimant requires help with housing costs over and above their HB/UC entitlement

(Discretionary Financial Assistance Regulations 2001 SI 2001/1167 as amended by Discretionary Financial Assistance (Amendment) Regulations 2008 SI 2008/637)

DHP can:

- Cover shortfall between HB/UC and full rent
- Be paid in lumpsum to bring down arrears even where there is currently no shortfall (*R (on the application of Gargett) v Lambeth LBC [2008] EWCA Civ 1450*)
- Be paid in lumpsum to help with rent in advance/deposit for new home/removal costs (paras 8 and 9 of Discretionary Housing Payments Guidance Manual, May 2022)

DHP cannot:

- Cover shortfalls caused by service charges, rent increases caused by arrears, deductions for debts/benefit sanctions, overpayment recovery, benefit suspension (*reg 3 Discretionary Financial Assistance Regulations 2001 SI 2001/1167 as amended by Discretionary Financial Assistance (Amendment) Regulations 2008 SI 2008/637*)

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Homelessness Prevention

- LAs are under a duty to those threatened with homelessness and eligible for assistance to take reasonable steps to prevent homelessness (*section 195 Housing Act 1996*)
- LAs are under a duty to assess needs and draw up personalised housing plan (*section 189A Housing Act 1996*)
- Code of Guidance encourages LAs to consider offering financial assistance by way of DHP under this duty (*para 11.23, COG June 2022*)

What to include in an application:

- Remember, the aim is to persuade the LA that it is *saving* money by making a DHP award
- Stress that if client does not bring down arrears they are at risk of homelessness
- Show there is an end in sight, i.e. set out steps your client is taking to enable they will not be reliant on DHP in near future (e.g. disability benefit applications, new job, lodger)

Lodgers

- All secure tenants have a right to take a lodger without landlord's consent but tenancies will lose security if tenant sublets part or whole of the property without written consent (section 93 Housing Act 1985)
- Difference between lodger and subtenant is that lodger will not have exclusive occupation of any part of the property
- Arrangements whereby the tenant provides services for the occupier that require them to enter the room (e.g. linen change, cleaning) or where the tenant has "house rules" (e.g. curfews, visitors) are likely to be characterised as a lodger arrangement (*Huwyler v Ruddy* [1996] 28 HLR 550)
- Assured tenants should check their tenancy agreements to see if lodgers are permitted. Many social landlords allow lodgers upon written request – worth remembering when defending rent arrears claims on grounds of reasonableness/proportionality

Breathing Spaces

- Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium (England and Wales) Regs 2020
- Debt:
 - Rent/Mortgage arrears can be included
 - Tenant/Mortgagor remains liable for the debt, but Regs limit what landlord/lender can do to enforce for a period of 60 days (reg 26(2)).
 - Landlord/lender cannot demand payment of the debt included in the moratorium, and cannot charge interest during the breathing space (reg 7(6)-(7)).
 - Landlords cannot:
 - Serve notice on rent arrears grounds during breathing space.
 - Issue claims on arrears grounds during breathing space, though the time limit for issuing a claim will be extended for 8 weeks if it falls during the breathing space (reg 7(6)-(7)).
 - Enforce possession orders.
 - Landlords must notify court of any breathing space if there are ongoing proceedings (*reg 10(1) and PD 70B*).
 - Court must adjourn ongoing proceedings to FAD after breathing space ends.

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- Mental Health:
 - Available to those receiving crisis treatment from specialist mental health service in respect of serious mental disorder (reg 28).
 - Lasts for length of treatment plus 30 days (reg 32(2)).
 - Can enter as many as needed.
 - Can be on application from debtor themselves or from third party (reg 29(1)).
 - If there are ongoing proceedings during a breathing space, court must adjourn generally with a review for directions six months after start of breathing space.
- Any steps taken by a creditor contrary to Regs will be void (reg 7(12)), though it is possible for the court to give permission where it is reasonable and not detrimental to the tenant (reg 7(5)).
- Debtors cannot be evicted during a breathing space of any kind, and can apply for their restitution if they are evicted in error (Lees v Kaye [2022] EWHC 1151 (QB)).

Ideas to think about on the duty desk...

- Deposit Counterclaims – have the regulations been followed to the letter (or near enough!) (*Ayannuga v Swindells* [2012] EWCA Civ 178; *Superstrike v Rodrigues* [2013] EWCA Civ 669)
- Disability Discrimination
- Public law defences for non-secure tenancies (*R (Yekini) v Southwark* [2014] EWHC 2096 (Admin))
- Children Act 1989 duties