Losing a Home: Does the current housing possession process provide effective access to justice?
Susan Bright & Lisa Whitehouse report

IN BRIEF

- There is a lack of joined up thinking within the housing possession process.
- The amount of time and resources devoted to these cases fails to recognise the importance that occupiers attach to the prospect of losing a home, as well as the wider social and economic implications of eviction.
- A working group has been set up in the Departments for Communities and Local Government to look into how the eviction process can be speeded up, but more radical reform could be needed.

Every year, more than 220,000 claims are brought for possession, mostly for rent and mortgage arrears. To make the right decision, the judge needs to know not only about the defendant's financial situation (how much arrears are owed and how much income the occupier has), but also whether eviction really is a "last resort" and what the occupier's personal circumstances are.

We have recently completed a detailed study exploring how (and whether) this information is made known to judges during the possession process, and what kind of support is available to occupiers. Our findings show that although judges will usually have the facts and figures relating to the payment history available to them, they sometimes have only sketchy information available to them about both the occupier's circumstances more generally. Very few occupiers receive legal advice before the hearing, and it appears that many do not file a defence form or turn up at court to present their side of the story. This raises concern about whether the current housing possession process is providing effective access to justice.

The research

Our report is based on evidence from two surveys carried out in late 2012/early 2013 involving representatives of Housing Possession Court Duty Schemes (HPCDS) and county court delivery managers. We also interviewed a number of key actors involved in the process of housing possession, including district judges and mortgage lenders. We have taken into account some changes that have occurred since the surveys, particularly in relation to the impact of the legal aid and welfare cuts. A full copy of our report is available at *www.law.ox.ac.uk/ projects/Housing_Possession*; this article provides an overview of our findings.

The impact of protocols

In recent years, protocols have been introduced in arrears cases involving mortgages and social landlords to encourage greater communication and dialogue between the parties before court action. The idea is that it is in the best interests of all parties to resolve difficulties whenever possible without court proceedings. It is clear that these have had a beneficial impact on the possession process, reducing the number of claims bought and leading to an improvement in the practices of many landlords and lenders.

Nonetheless, not all claimants adhere to the spirit of the protocols and in some cases the protocols serve little more than a box-ticking exercise. Further, although mortgage lenders have to produce a

checklist to the court to confirm compliance with the Protocol, no checklist is required from social landlords. Some lenders appear to go to great lengths to make contact with borrowers in arrears yet, even with the aid of the protocol, when the case reaches court, the judge may not be aware of the extent of the pre-action communication, leaving lenders frustrated.

There is sense of missed opportunity here as the protocols could be used more effectively. One possibility, for instance, might be for a court administrator to check whether there has been compliance before a possession claim can be issued.

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Telling the story to the judge

The way in which a judge can learn about the claimant's case and the defendant's story is through a combination of reading the court forms and listening to evidence at the hearing. Again, however, our study shows missed opportunities and the judge may end up with only a partial picture. One problem is with the court forms. Information supplied on the claim form tends to be fairly minimal, even if there has been lots of prior contact between the parties, and we certainly heard of instances when the particulars of claim do not to make it onto the judge's file. The defence form is directed to financial information and not other dimensions that may be important to questions of **"**proportionality" and **"**reasonableness". Since the *Pinnock* case (*Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 1 All ER 285), it is clear that when the Art 8 right to respect for the home applies, a court should only order possession if it is proportionate to do so and that it is up to the defendant both to raise this defence and to show that it is seriously arguable. But, given how few defendants receive legal advice before the hearing, and that the defence form makes no reference to Art 8, it is doubtful if this will ever be an effective right unless the possession process changes.

Further, although there are no statistics kept on the number of defendants who file defence forms, our research suggests that only a low proportion do so, certainly fewer than half of all defendants and sometimes as few as 10%.

Of course, the defendant also has the opportunity to tell their story to the judge on the day of the hearing. There does appear to be a correlation between knowledge of the defendant's circumstances in relation to issues such as the family situation, health, and vulnerability, particularly if coupled with attendance, and a more favourable outcome for the defendant. Again, there are no statistics kept recording how many defendants attend the hearing but fewer than half do, and one judge thought it as low as one-fifth.

Even if the defendant does attend court, cases are listed to last on average 5-6 minutes, giving very little time to engage with the factual details of the case. Is it really right that such a small amount of time can be allocated to such a crucially important decision? As one judge commented: "[S]mall claims…could be important to the people involved but, you know, not someone's home, not someone's children. And we devote probably a good two hours plus to each case even if it's for £35 eBay charges. Now there's something a bit wrong there."

Given how vitally important homes are, it does raise questions about the priority of resources within the justice system. One judge commented that "the county court has always been regarded as the poor relation in the justice system".

Emergency legal advice & representation in court

HPCDS advisers play a valuable and significant role in assisting occupiers. Frequently this leads to a more favourable outcome for the defendant, perhaps by agreeing more realistic repayment terms with claimants, enabling them to stay in their home. Although **"**better late than never", it would be preferable for legal advice to be given much earlier in the process, and this might also reduce the number of court cases. One survey respondent noted that, in **"**very many cases, the defendant's background is complex and a superficial 'rushed' job on the morning does not do them justice, even if a HPCDS representative does assist them".

These schemes are not available in all courts on all possession days. There are also some simple things that could be done to enable them to work more effectively, such as making telephones available to them. It is clear from our work that these schemes are vitally important and that they should be extended to enable all courts to offer emergency advice and representation to those threatened with the loss of a home.

Private landlords

Private landlords present a particular challenge to court resources because of a lack of understanding of process requirements by both landlords and their agents. The time allocated to private landlord cases is commonly twice that devoted to other possession cases, and sometimes three times as long. Cases that could be determined by use of the paper-based accelerated possession procedure without a hearing often take up unnecessary court time because the correct procedure has not been followed. There has been a particular problem with the dates required to be given in the s 21 notice served on the tenant, but the recent Court of Appeal case of *Spencer v Taylor* [2013] EWCA Civ 1600 has made this easier for tenancies that began as fixed term tenancies, to the point where one judge commented that the failure rate for claims under the accelerated procedure has since fallen by two-thirds.

A working group has been set up in the Departments for Communities and Local Government to look into how the eviction process can be speeded up. The problem is that even the accelerated possession procedure can be awkward and slow to use, partly because private landlords so often seem to get things wrong. As one judge said: "Typically if a claim fails under the accelerated procedure then a landlord may be required to serve a fresh notice and then recommence his claim for possession. If a tenant has decided not to pay rent then a failed claim could result in an escalating arrears figure that can easily reach £10,000. An efficient accelerated procedure undoubtedly helps the return of housing stock to the market for new tenants and will of course encourage landlords to let if they know possession can be recovered quickly in appropriate circumstances."

Time for an overhaul?

In our report we suggest a number of areas in which improvements could be made. We wonder, however, if it is time for a more radical overhaul that might alleviate pressures on court resources,

but also improve defendant participation rates. The Law Commission put forward detailed recommendations on this in 2006 (The Law Commission, *Housing: Proportionate Dispute Resolution. An Issues Paper*) and now may be an opportune time to revisit those proposals.

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