

Tenure Reform - Working Paper on the Court Process

31 March 2021

BPF Contact:
Ian Fletcher
Director of Policy (Real Estate)
ifletcher@bpf.org.uk
Tel 020 7802 0112

Working paper – seeking members' views

1. This paper forms a series that BPF is issuing to members on tenancy reform in the residential sector.
2. The Government is committed to a Renters' Reform Bill during its term of 2019-2024. There are no signs it will move a Bill shortly, but it is important the BPF puts in work now to ensure it can engage in the pre-legislative period and articulate our members' concerns.
3. This first paper in the series focuses on the Court process and gaining possession. We are grateful to members, Helen Kings of Touchstone and Yetunde Dania of Trowers and Hamblins, for their help and expertise in drafting it.
4. The focus of the paper is on the court process, and how it could be improved, particularly if landlords are having to rely on it more for possession proceedings. It also considers the possible role of mediation, in the period between a dispute arising and entering the court process.
5. Much of the Government's focus has been on a specialised Housing Court. Whilst that has been broadly welcomed, it does not provide a guarantee of improved process or timescales. A major conclusion of the paper is that only investment in the Courts, particularly in digitalisation, will deliver a system able to cope with the increased stress that will be put on, and deliver a system that provides fair and speedy access to justice for landlords and tenants.
6. By way of background, Annexes 1 and 2 explain the current (pre-pandemic) process for the accelerated procedure and section 8 grounds.

We would be grateful to members for their input.

Do you agree with the suggested changes to process (listed under the points below)?

Are there additional changes members would like to see?

Do members support a period of mediation prior to reaching court?

Suggested changes to process

Prepared by Helen Kings of Touchstone and Yetunde Dania of Trowers and Hamlins.

- i. All possession claims to have option to use online application– currently not available for trespass, breach of tenancy or accelerated possession claims.
- ii. Digital process throughout. At present claimants rely on the courts posting documentation which can be slow and unreliable. If they could be issued electronically across the board it would be more efficient. Tenancy Agreements would need to reflect the rights to issue notices and court claims electronically with the customers email address detailed within.
- iii. One form for all situations, to reduce issues of using the wrong form – currently there are different forms for different types of claims.
- iv. Claim form to include checkbox enabling costs/debt to be claimed from the customers deposit (where court awards costs, the order would automatically include instruction to the deposit stakeholder to release deposit up to the value of the claim or deposit (whichever is less) – currently this needs to be a specified as an adhoc request within the claim, which can be missed by the judge, or forgotten during the initial application by the claimant. This results in the claimant unable to use the deposit money against the debt, and the claimant having to return to court to amend the order. Especially important for any deposit held by the custodial schemes.
- v. Ability to upload all evidence electronically – rather than hard copies provided to the courts which delays the process and is time consuming for all parties. It would also be environmentally friendly.
- vi. Online tracking which enables both the claimant and the defendant to view current progress with a stage/status progress bar and expected timeframes – currently you need to phone the courts for an update which is time consuming for all parties including the courts. Where claimant uses online but defendant does not, court to maintain online tracking for claimant with any defence uploaded and claimant notified to review/respond.
- vii. Following court eviction date, ability to request warrant for possession online, again with stage bar to track progress.
- viii. Clear guidance for judges on when they can stay or dismiss a case (Judges who have excellent understanding of Housing Law rather than general judges who deal with a large variance of legal proceedings)

Mediation?

7. An option which may be appealing to landlord and tenant groups and would provide some fairness if a good system could be implemented, would be a requirement to use mediation before court. However, any mediation service would need to have short turn arounds, as not to unduly delay a process further.
8. If we use Rent Arrears as an example, there could be a requirement that if a customer becomes 2 months in arrears. There is a specified requirement within tenancy agreement to use a mediation service to resolve – this would need to be a service that is available swiftly and not delayed. If the customer refuses to engage or an agreement cannot be reasonably met, the mediation service would confirm the outcome which would enable the landlord to seek mandatory eviction in the court. This would only work if the mediation worked within the 3rd month. With swift court action afterwards enabling a landlord to gain possession within 4-6 months max.
9. The Government has just introduced a pilot mediation scheme (on 1st Feb 21) to try and help clear some of the backlog of cases that have been building up during the Covid-19 pandemic.
10. The scheme is funded by the Government and is being run independently by the Society of Mediators. The purpose of the scheme is to mediate on possession proceedings as they progress through the court system, to facilitate settlement between the parties without the need for a court hearing if possible, and to manage capacity within the over-stretched court system. The pilot will initially run for 6 months.
11. The service is staffed by clerks who take referrals from all over England and Wales, and the mediators themselves are fully trained professionals. Mediation sessions will be conducted by telephone, email, WhatsApp or Zoom.

Greater use of mediation is also supported by the National Residential Landlords Association as part of its [proposals](#) on renting reform.

Annex 1 - The accelerated possession procedure pre-Coronavirus pandemic

If you ask Google to how long it takes to recover possession using the accelerated possession route and you will receive an answer that it takes six to eight weeks.

The accelerated possession procedure is dealt with in Part 55 of the Civil Procedure Rules (**CPR 55**).

If everything is processed by the court when it should be then from the time a claim is issued to the steps that need to be taken to obtain a possession order should take the number of weeks detailed in the second column of table below. The column contains the dates from an actual case.

The process (undefended)	Theoretical amount of time for each step	Actual amount of time in practice
Service of Notice Seeking Possession	Pre pandemic: two months	Two months
Issue of proceedings by sending Form N5B to court		12 June 2019
Court issues claim and serves Notice of Issue by first class post, CPR 55.13(3)	1 week	17 June 2019 (5 days)
Deemed service and Defendant give time to defend claim	2 weeks	19 June 2019 (1 week)
Contact court and if no defence filed request Possession Order is made	1 week	4 July 2019
Treated as Judge's box work	2 weeks	30 July 2019 (26 days to make order)
14-day Possession Order made	2 weeks	12 August 2019
Total	8	
Apply for eviction if Defendant does not leave, it could take up to 6 weeks for an eviction date to be set	4 - 6 weeks	15 August 2019 eviction date requested. Eviction set for 19 September 2019

Tenure Reform - Working Paper on the Court Process

The ability of the court to process such matters very much depends on how work is allocated and their resources. Section 21(4D) of the Housing Act 1988, pre the pandemic, stated:

“Subject to subsection (4E), proceedings for an order for possession under this section in relation to a dwelling-house in England may not be begun after the end of the period of 6 months beginning with the date on which the notice was given under subsection (1) or (4).

The wording “may not be begun” means the proceedings must actually be issued not merely be sent to the court.

As such, if a landlord sent a claim to the court 5 months and 2 weeks after serving a section 21 Notice Seeking Possession, and the court did not issue the proceedings before the 6-month notice expiry date, a fresh two-month section 21 notice would have to be issued and fresh accelerated possession proceedings issued.

Furthermore, it should be noted that Judge’s box work (the time when the matter is considered, and a possession order is made) there is no time scale in which they are to deal with matters. As such it can take many more than weeks before a possession order is made.

Annex 2 - Section 8 possession procedure pre-Coronavirus pandemic

For possession proceedings based on mandatory Ground 8, 2-months rent arrears (with or without discretionary Ground 10 (rent arrears) and 11 (persistent delay in paying rent) the electronic PCOL system would be used.

Possession proceedings using PCOL is governed by Practice Direction 55B of the Civil Procedure Rules (CPR) and Part 55 of the CPR governs the possession procedure.

The process (undefended)	Theoretical amount of time for each step
Service of Notice Seeking Possession	Pre pandemic: two months
Issue of proceedings by using PCOL and court fixes a hearing date	
Hearing date	At least 4 weeks from date of issue of Claim Form
No Defence, Possession order made at hearing	Forthwith or 2-4 weeks thereafter
Total	
Apply for eviction if Defendant does not leave, it could take up to 6 weeks for an eviction date to be set	4 - 6 weeks

Tenure Reform - Working Paper on the Court Process

Sounds straightforward, but if the mandatory ground falls away because the tenant brings the arrears under the two-month threshold or the tenant wants to defend the claim/defend and bring a counterclaim, things will be become very protracted.

The following should happen if the matter is allocated to the Fast-Track:

The process (defended)	Theoretical amount of time - rolling weeks to total
Defence/Defence and Counterclaim	2 weeks
Disclosure	10 weeks
Exchange of witness reports	14 weeks
Sending of pre-trial checklists (listing questionnaires)	20 weeks
Filing of complete listing questionnaire	22 weeks
Trial	30 weeks
Total	Minimum 34 weeks
Possession order made	Forthwith, 2 -4 weeks for tenant to leave
Apply for eviction if Defendant does not leave, it could take up to 6 weeks for an eviction date to be set	4 - 6 weeks

The above timetable often takes much longer because the first hearing may be adjourned so the tenant can obtain legal advice. Furthermore, when following the court timetable, extensions will be sought, or applications made which have to be listed for a heard to be determined.

If the tenant lacks capacity then the proceedings will be even more protracted, especially if medical reports have to be obtained or a Litigation Friend appointed.

If possession is claimed for a reason, other than rent arrears, the Ground (s) are likely to be discretionary which means the court must make a decision that it is reasonable for a possession order to be made. This means the court could find it reasonable to make a possession order but suspend it on terms. The effect being the tenant can remain in the property as long as they comply with the terms made or the court could even make no order and decide to adjourn the matter for review, the court could even decide to make no order at all and dismiss the claim.

The PCOL procedure **cannot** be used and a paper process has to be adopted which will cause delay because it often takes the court 2 – 4 weeks to issue a claim, list the matter for a hearing and serve the court papers on the parties.