Property Litigation column: Section 21 or a 2 for 1: Issuing two sets of possession proceedings in a pandemic

by *Nic Taggart* and *Joel Semakula*, Barristers, *Landmark Chambers*

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Nic Taggart and Joel Semakula, barristers at Landmark Chambers, discuss whether landlords can issue possession proceedings based on notices served under both section 8 and section 21 of the Housing Act 1988, and the potential consequences of having two sets of proceedings on foot at the same time.

Landlords of assured shorthold tenancies (ASTs) within the meaning of the Housing Act 1988 (HA 1988) have always had two potentially available routes to obtaining possession. An AST may be determined by the no-fault notice mechanism provided for in section 21 of the HA 1988. Such a tenancy may also be determined by the procedures laid down in section 8 and Schedule 2, most of which involve the landlord having to prove some sort of default on the part of the tenant.

Until recently, landlords were often content to rely on either a claim commenced under the section 21 procedure or a claim based on the section 8 procedure. However, the recent introduction by the government of significant changes to the residential possession process appears to have caused some landlords to consider starting proceedings under **both** procedures in respect of the same tenancy, to hedge their bets as to which claim generates a possession order first.

In this article, we consider whether a landlord can have on foot two sets of possession proceedings, one under section 21 and one under section 8, in respect of the same AST. There are three scenarios in which this may be of particular interest to landlords:

- The landlord issues a fresh claim in reliance on a section 8 notice, where there is already a section 21-based claim on foot, but that claim is in "reactivation purgatory," under paragraph 2.1 of Practice Direction 55C (**Scenario 1**).
- The landlord already has a section 8 claim on foot, but considers its chances of securing possession are greater were it to rely on a fresh section 21 claim, rather than trying to prove fault under section 8 (**Scenario 2**).
- The landlord has already obtained a suspended possession order under section 8, with which the tenant is complying, but seeks a second possession order by starting a claim under the section 21 procedure that it could then enforce (**Scenario 3**).

A preliminary point on notice periods

The issues identified seem to have come to the fore due to the increased notice periods currently required under section 21 and section 8 of the HA 1988 in both England and Wales, pursuant to Schedule 29 of the Coronavirus Act 2020 (CVA 2020).

In England, the notice periods are now, with effect from 29 August 2020, generally six months. Previously, for notices served from 26 March 2020 to 28 August 2020, the notice periods were three months. We say "generally", because where the landlord is able to rely on one of the "serious exceptional" grounds under section 8 and Schedule 2 (for example, anti-social behaviour, at least six months' rent arrears, causing nuisance and/or annoyance, illegal/immoral use of property, domestic abuse or rioting) the notice periods are significantly shorter (*paragraph 6, Schedule 29, CVA 2020*).

In Wales, the notice periods are also now generally six months (subject to exceptions where the landlord relies on grounds involving anti-social behaviour, nuisance and annoyance, and domestic violence, where the notice periods are shorter).

Of course, where the landlord has a choice between issuing a notice under section 8 or section 21, there may be a tactical advantage in choosing to proceed with one type of notice over the other.

However, the landlord cannot realistically gain anything from the different notice periods where one set of proceedings have already been started. It is arguable that a landlord may not be able to issue a section 21 claim until the relevant notice period has expired (see the obiter comments of Schiemann and Kennedy LLJ in *Lower Street Properties v Jones (1996) 28 HLR 877 (CA)*). A landlord can, in theory, commence a claim under section 8 before the date set out in the section 8 notice has passed, on the basis that the court has a limited power to dispense with the notice under section 8(1)(b). A landlord who adopts this approach is taking a big risk, and one which is likely to add to the delays in ultimately obtaining possession.

Accordingly, where the landlord has already started one set of proceedings, any perceived advantages in the shorter notice period will ordinarily be illusory as, by the time the landlord starts the second claim, both the notice periods will have already expired.

We consider whether the way in which the courts will prioritise cases during the COVID-19 pandemic will have any bearing on these tactical considerations, below.

Salix Homes v Mantato [2019] EWCA Civ 445

Although not directly on the points raised in the scenarios we are examining, the decision of the Court of Appeal in *Salix Homes v Mantato* is very informative as to what a court might do if considering one of those scenarios.

Mr Mantato was a secure tenant under the Housing Act 1985 (HA 1985). In 2008, his then landlord, Salford City Council, obtained a suspended possession order under section 85 of the HA 1985. There were then several successive suspended warrants, each on terms, but the arrears were never cleared.

The reversion on Mr Mantato's tenancy was assigned by the Council to a private landlord, Salix, in 2015. The change in landlord caused the tenancy to become an assured tenancy, governed by the HA 1988. In 2017, Salix started fresh proceedings pursuant to section 8 of the HA 1988, relying on grounds 10 and 11 of Schedule 2 (namely, arrears of rent and persistent delay in payment of rent). Salix obtained a possession order and executed a warrant to obtain possession. Mr Mantato sought to set aside the order and the warrant on the basis that it was an abuse of process to issue the 2017 claim where there was still an undischarged warrant in the 2008 claim.

The question for the Court of Appeal was whether Salix was prevented from obtaining a possession order in the 2017 claim by the existing undischarged possession order made in previous proceedings. The Court of Appeal unanimously determined, at paragraph 35, that the cause of action for possession in the 2017 claim was separate to and different from that which founded the 2008 claim: the right to possession arose from different facts, relating to different types of tenancy, regulated under different statutes and which required proof of different facts and matters in order to obtain possession. Thus, there was no abuse of process or *res judicata* and Salix was entitled to possession.

Issuing additional claims

In our view, in light of *Mantato,* a landlord **can** issue separate claims in respect of the same tenancy, one relying on section 8 and one relying on section 21, either at the same time or when one claim is already on foot. It can also obtain a possession order under one or other claim, provided that it goes carefully in disclosing the existence of both claims.

This is permitted because the causes of action for possession in these claims are separate and distinct. They each rely on the existence of a different set of facts, even though they arise under the same Act. On the one hand, a claim under section 8 requires the landlord to **prove** that one or more of the grounds in Schedule 2 to HA 1998 is satisfied, and in the case of a discretionary ground, that it is reasonable to make the order under section 7(4). On the other hand, section 21 only requires the landlord to establish that it was entitled to serve and that is has served a valid notice in accordance with that section.

Thus, beyond proving the tenancy itself, there is no factual overlap between seeking possession under section 21 and under section 8. Indeed, section 21(1) expressly provides that the court may make an order for possession thereunder without prejudice to the landlord's right to make a claim under section 8 (see further *Panayi and Pyrkos v Roberts (1993) 25 HLR 421 (CA)*).

As the causes of action under section 8 and section 21 are separate and distinct, then the *Mantato* analysis demonstrates that there is no abuse of process in issuing two claims in respect of any of the three scenarios, nor is there a *res judicata* when the first judgment is obtained (in Scenario 3).

Abuse of process

However, the landlord seeking to issue separate claims is not quite in the clear. In *Mantato*, at paragraph 37, the Court of Appeal warned that a landlord could nevertheless find itself exposed to an allegation of abuse of process when obtaining judgment. The court thought that there could be an abuse of process in the wider sense identified by Lord Sumption in *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd [2013] UKSC 46* (at paragraph 17).

The court in *Mantato* held that there was no abuse of process of the facts before it, because the judge who dealt with the application to set aside the order made in the 2017 claim was aware of the 2008 claim, even though the judge who originally made the order in the 2017 claim was not. It further held that there was, on the facts, no unfairness to the tenant from the differing procedures, as the tenant would not be left unclear as to which conditions to comply with, nor could the landlord choose whichever set of conditions and order were most favourable to him.

From this, we deduce that it would be prudent for the landlord to disclose the existence of both sets of proceedings whenever before the court on one of them. This reduces the risk of an argument to set aside the judgment on the basis that the judge might have made a different order (even a case management order) had they been made aware of the other proceedings. In Scenario 3, where the landlord has already obtained a suspended possession order under section 8 with which the tenant is complying, there is an inevitable risk of the tenant raising such arguments.

Given the goal is to obtain possession as quickly as possible, we will now consider each of the scenarios in turn.

Scenario 1: section 8 claim where section 21 proceedings already started

In reality, the issue of section 8 proceedings may not be any faster. This all depends on the court's case management directions which we consider below. Section 8 claims usually require facts to be found at a trial, which make them usually take longer to come on and be determined than section 21 proceedings.

Scenario 2: section 21 claim where section 8 proceedings already started

This issue of section 21 proceedings should ordinarily be faster. Where everything is in order, the court usually deals with section 21 proceedings on the papers. However, once the court is informed that there are section 8 proceedings afoot, they may decide to call the claim in for a hearing. Further, it may not be quicker overall, as it depends on the speed at which any given claim is actually proceeding through the system; your guess is as good as ours as to which one will get heard first.

Scenario 3: fresh proceedings where suspended possession order exists

As long as the tenant continues to comply with the suspended possession order, the issue of section 21 proceedings will be a faster route to an enforceable possession order.

The COVID-19 pandemic

Finally, an article about possession proceedings today would be incomplete without proper consideration of the "C" word: coronavirus.

In circumstances where the purpose of issuing additional proceedings is to gain actual possession faster than existing proceedings allow, landlords should be aware that these new proceedings are being issued at a time when *"[t]he legal system faces a combination of (a) accrued demand from the stay, (b) forthcoming major demand caused by economic consequences of the pandemic, and (c) reduced physical court capacity because of social distancing. The challenge, and its scale, does not have a precedent"* (see paragraph 1 of *Overall Arrangements for Possession Proceedings,* dated 17 September 2020).

Users beware. A key purpose of the *Overall Arrangements* is to reduce volume in the system, and to enable court process and hearings to operate efficiently (see paragraphs 4 and 6 in particular). Every additional claim decreases the chances of everybody getting a speedy hearing. One option is for landlords to discontinue claims on which they no longer rely pursuant to CPR 38.2. However, this opens them up to liability for the tenant's costs in respect of those discontinued proceedings pursuant to CPR 38.6(1). In any event, these costs are unlikely to be significant in most cases.

For those that proceed with issuing additional claims, not all new claims are created equal. Certain types of claim (mainly those involving the risk or threat of harm, extreme rent arrears or other types of serious breach of tenancy) will receive priority listing. Subject to this, priority will be given to claims issued before the stay commenced in March 2020 (see paragraphs 43 to 45 of the *Overall Arrangements*).

It might be tempting for landlords to think, for example, that a section 8-claim that is started now relying on serious rent arrears (and for which a shorter notice period will apply), might be treated in priority to a section 21-based claim that was started during the stay imposed by PD 51Z and CPR 55.29. It would appear to be open to the landlord to draw the court's attention to the extreme rent arrears even in the section 21-based claim (in its reactivation notice), but it remains to be seen how the courts will deal with allegations of fault in the context of no-fault proceedings. In any case, we would be surprised if a later section 8-claim relying on this type of ground would be heard sooner than the existing section 21-based claim.

Even for those with existing possession orders, enforcement of evictions following a warrant of possession is likely to take longer than usual due to the large volume of cases currently in the system. When setting eviction dates bailiffs will, as far as possible, prioritise those warrants previously identified as priority cases where this information is known to them. Outside of this, warrants will be prioritised in date order (see *If you have an outstanding Warrant of Possession* in the government guidance note *Understanding the possession action process: A guide for private landlords in England and Wales*).

It seems likely, however, that orders made under section 8 on grounds which disclose the risk or threat of harm will get priority over other orders for possession.

Conclusion

While there is no legal bar to a landlord issuing proceedings under section 8 and section 21 of the HA 1988, there is an inherent risk that the court, once appraised of the existence of parallel proceedings, will be reluctant to make an order without satisfying itself that the tenant will not be prejudiced by there being two sets of proceedings on foot, let alone two orders for possession.

Moreover, given the delays and difficulties inherent in enforcement of any possession order, we rather doubt that there is any real advantage to issuing additional proceedings except, perhaps, in some section 21 cases or where the grounds for possession involve the risk or threat of harm of some sort. However, even then, much may turn on how the courts will in practice prioritise cases under the *Overall Arrangements*.

Here, as generally, it may be that all good things come to those who wait.

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