North West Housing Law Practitioners Group

Avoiding Possession Orders at the First Hearing- Part 1 – Rent Arrears Cases and Counterclaims

**INTRODUCTION**

1. In a claim for possession – in principle counterclaims are in scope of legal aid under Schedule 1 para 33 LASPO 2012. That can include cases that are already in scope such as claims for harassment under Protection from Harassment Act 1997 – attempted unlawful eviction and harassment claims and claims that are not in scope if brought as freestanding claims e.g., counterclaims for damages for breaches of the express and implied repairing covenants and in respect of unprotected tenancy deposits or where the prescribed information has not been given.
2. The Legal Aid Agency has tended to take a restrictive approach to counterclaims in Section 21 Housing Act 1988 proceedings – accepting that a deposit counterclaim may be brought as it is likely if it succeeds it will also defeat the claim for possession due to the effect of Section 215 Housing Act 2004. They take the view that counterclaims that do not amount to a defence either absolute or by way of set-off are out of scope. That is questionable as Schedule 1 para 33 makes no reference to the counterclaim being required to be a defence and indeed a landlord bringing a Section 21 claim faced with a counterclaim may be very keen to settle and therefore loss of home is avoided and hence the counterclaim is “ in relation” to the civil legal services provided in defence of the claim.

**SCOPE**

1. One of the annoying elements of Schedule 1 of LASPO 2012 is its “ hokey cokey “ approach to whether something is in scope. Claims and counterclaims may be in scope but subject to exclusions but then are reincluded due to exceptions. Schedule 1 para 33 provides inter alia

*(1) Civil legal services provided to an individual in relation to—
(a) court orders for sale or possession of the individual's home, or
(b) the eviction from the individual's home of the individual or others. …*

*General exclusions*

*(3) Sub-paragraphs (1) and (2) are subject to the exclusions in Part 2 of this Schedule, with the exception of paragraph 14 of that Part.*

*(4) But the exclusions described in sub-paragraph (3) are subject to the exceptions in sub-paragraphs (5) and (6).*

*(5) The services described in sub-paragraph (1) include services provided in relation to proceedings on an application under the Trusts of Land and Appointment of Trustees Act 1996 to which section 335A of the Insolvency Act 1986 applies (application by trustee of bankrupt's estate).*

*(6) The services described in sub-paragraph (1) include services described in any of paragraphs 3 to 6 or 8 of Part 2 of this Schedule to the extent that they are—*

*(a) services provided to an individual in relation to a counterclaim in proceedings for a court order for sale or possession of the individual's home, or*

*(b) services provided to an individual in relation to the unlawful eviction from the individual's home of the individual or others.*

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*(7) Sub-paragraphs (1) and (2) are subject to the exclusion in Part 3 of this Schedule.*

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1. So, it will be seen that in principle all the exclusions in Part 2 apply with the exception of that relating to setting up a business (no doubt to enable legal aid to be granted to those defending claims for possession of their home above a shop or related to their business for example e.g., a pub landlord
2. Five exclusions are reincluded for the purposes of a counterclaim – claims for assault, battery and false imprisonment, trespass to land, trespass to goods, damage to property and breach of statutory duty.
3. What is notable is that they are reincluded for that purpose, but a counterclaim is not restricted to those five exclusions. It clearly falls within civil legal services “in relation” to proceedings for the sale or possession of a person’s home. Hence, matters that are not in scope on their own – but which are not excluded by Schedule 2 such as claims for breaches of the implied covenant and under Section 214 Housing Act 2004 are included.
4. A more difficult issue is the question of counterclaims for damages for breach of the covenant to repair that include personal injury – Schedule 1 para 1 would appear to exclude them but para 8 – breach of statutory duty to include them (under Section 4 Defective Premises Act 1972) and Para 1 of Sch1 cannot exclude all personal injury claims as Para 3 would be useless if you could claim for injuries caused by battery for example.
5. Whilst not strictly in question here there is nothing in Schedule 1 para 33 that takes a counterclaim out of scope simply because the possession claim is discontinued. It remains service in relation to that original claim and it would be absurd otherwise and could deprive the LAA of the benefit of a costs order.

**CPR 55.8**

1. What then is the approach to be applied by a district judge at the first hearing. With the demise of the overall arrangements and a return to face-to-face hearings district judges are likely to face long lists with short hearing times. CPR 55.8 (1) & (2) provides:

**(1)** At the hearing fixed in accordance with rule 55.5(1) or at any adjournment of that hearing, the court may—

**(a)** decide the claim; or

**(b)** give case management directions.

**(2)** Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under paragraph (1)(b) will include the allocation of the claim to a track or directions to enable it to be allocated.

1. A common error appears to be that some district judges believe that these are two alternatives – either you decide the claim or give directions. The error in that approach is set out in the wording of CPR 55.1 itself “ or at any adjournment of that hearing”. It is also important to remember that CPR 55.7(3) confirms that a defendant who has not filed a defence may take part in a hearing.
2. The Court of Appeal has recently made plain the caution that a district judge should apply when an individual appears at a first hearing and raises the possibility of a defence and how unfair it may be to proceed to decide the claim on that day.
3. In *Birmingham CC-v-Stephenson {2016] EWCA Civ 1029, {2016] HLR 44* an introductory tenant attended, following an initial adjournment, for him to obtain legal advice at an adjourned hearing. His solicitor who had only just been instructed raised the possibility of a defence on the grounds that it was disproportionate to evict him but did not expressly refer to the Equality Act 2010. The district judge made an order for possession and the Circuit Judge dismissed an appeal. The Court of Appeal allowed Mr Stephenson’s appeal against the refusal of an adjournment. Lewison LJ explained :

*13. The rules thus envisage that at the time of the first hearing, or indeed at a subsequent hearing, the tenant may well not have served the defence and that judgment should not be entered in default of defence.*[*Rule 55.8*](https://uk.westlaw.com/Document/I11A7B0D0E45011DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=e766229cddc14a8b97f2c54148c44372&contextData=(sc.DocLink))*also envisages that the court may decide the claim without a full trial but it is also right to say that the existence of what appears to be a genuine dispute on substantial grounds is not a precondition to the giving of case management directions under*[*r.55.8(1)(b)*](https://uk.westlaw.com/Document/I11A7B0D0E45011DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=e766229cddc14a8b97f2c54148c44372&contextData=(sc.DocLink))*.*

1. Indeed, that is plain from the wording of CPR 55.8(1) – it envisages cases where directions can be given. The need for it to be genuinely disputed on substantial grounds is directed to the question largely of track.
2. Whilst *Stephenson* concerned a potential Equality Act 2010 defence the same approach in principle applies to all potential defences. It is generally unrealistic to expect all defendants to residential possession claims to have obtained advice or to be able to put in a defence before the first hearing. The number of housing lawyers and advisers has shrunk, most are overwhelmed and have to turn work away and the first time it has been possible to obtain advice is from the Housing Duty Scheme. Obviously, if it has been possible then it may well be very clear to a district judge from the defence filed that they should proceed immediately to allocation and case management.
3. In a case, largely concerned with CPR 55.8(2) and property guardians Lewison LJ returned to this issue. The CA took the view that although Part 24 CPR did not apply to Part 55 that in considering whether a case was genuinely disputed on substantial grounds once a defence had been filed that the test was the same as for summary judgment – namely was there a real prospect of success see *Global 100 Ltd-v-Laleva [2021] EWCA Civ 1835* [[2022] 1 W.L.R. 1046](https://uk.westlaw.com/Document/I7EA3DE20988A11EC859490726BE40E69/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=c4161795150242b9ab116a8e5eaed185&contextData=(sc.CommentaryUKLink)&comp=books)

*It may be procedurally unfair to decide a case against an occupier who turns up unannounced at a hearing without having filed a defence, but who tells the district judge that there is (or may well be) a substantive defence which he wishes to advance.*

**COUNTERCLAIMS**

1. A claim for possession on grounds of rent arrears whether under Housing Act 1985 or 1988 or indeed the Rent Act 1977 requires the landlord to prove that any rent that has not been paid has been lawfully due.
2. Where rent has not been paid but the tenant has a counterclaim for damages – whether for breach of the express of implied covenants to repair, or the implied fitness covenant under Section 9A Landlord and Tenant Act 1985, or a counterclaim for having been harassed by the landlord (often this occurs in the course of unlawful evictions but is far from uncommon in cases where possession proceedings are taken ) then the rent in fact may not be lawfully due as the defence of set-off arises.
3. Uncommonly, there is a common law defence of set-off where the tenant has retained the rent to pay for repairs that the landlord has failed to repair see *Lee-Parker-v-Izzet (no 2) [1971] !WLR 1688.* In principle, that would apply both where the repairs have been carried out and where the tenant can show they are saving up the rent to pay for the repairs e.g., in a bank account.
4. The more common defence is that of equitable set-off namely that it is inequitable for the landlord to be allowed to rely on the breach of the covenant to pay rent when the damages potentially payable for breach of the covenants to repair exceed the rent due or diminish it to such an extent either that a mandatory ground may no longer be made out or that it is not reasonable to make an order for possession.
5. The lead case, known to many, is *British Anzani(Felixstowe ) Limited -v-International Marine Management [1980] QB 137.* Forbes J held that this principle applied equally to counterclaims for unliquidated damages as well as liquidated sums.

*The important qualification is that the equity must impeach the title to the legal demand, or in other words go to the very foundation of the landlord's claim. This seems to me to involve consideration of the proposition that the tenant's cross-claim must at least arise under the lease itself, or directly from the relationship of landlord and tenant created by the lease. The landlord's covenant to repair contained in the lease, if broken, might found, as has been seen earlier, the ancient common law defence to a claim for rent if the tenant had been forced to pay for repairs to maintain the premises in a state fit for the purpose for which they were let. If instead of paying for the repairs the tenant cross-claims for damages for breach of the covenant, there is no common law defence, but there must, in my view, be an equitable right to set off the unliquidated damages.*

1. Hence, a counterclaim for damages for breaches of covenant arise under the lease itself, whether express or implied by statute or law. Thus, a counterclaim could arise for breach of the covenant of quiet enjoyment or non-derogation from grant or harassment. The same clearly applies to a Section 214 Housing Act 2004 claim which whilst arising from the statutory scheme has a close connection with the relationship of landlord and tenant.
2. What then is the nature of this set-off ? Some district judges seem to believe that they can treat it as discretionary and not allow it to be raised by way of defence but leave the tenant to bring a separate claim for breach of repairing covenants.
3. This is clearly wrong in law. A case that I would strongly urge all housing advisers to add to their portfolio of precedents they take to duty is that of *Televantos-v-McCulloch [1991] 23 HLR 412* which appears to have become rather forgotten. The Court of Appeal considered the application of *Anzani* in the context of residential possession proceedings and a counterclaim.
4. The lead judgment was given by the eminent property judge Nicholls LJ and is a complete answer to the idea that it is discretionary whether to allow a defence of set-off to be raised or whether a tenant should be required to issue their claim in fresh proceedings. In *McCulloch* the tenant withheld rent of £2,200 or so. Possession proceedings were commenced, and she counterclaimed for breach of the repairing covenant. She was awarded £2,700. The county court judge, however, despite making this award proceeded to make an order for possession in four months on the basis that as the quantum of the defendant's counterclaim had not been ascertained when the plaintiff started the proceedings, the rent was at that time in arrears, and it was reasonable to make an order.
5. Pausing there, that is the only conceivable basis upon which a court could make an order for possession at an early hearing and leave it for another court to ascertain the damages. It seems to underlie many of the reported reasons I have heard for district judges adopting this approach “ the landlord has had to wait too long for his rent “ – “ well until this counterclaim has been determined prima facie there are arrears “ etc
6. The Court of Appeal allowed Ms McCulloch’s appeal. The judge’s reasoning was admitted by the landlord to be insupportable but went on to argue that equitable set- off could not be raised as the tenant did not come to the court with clean hands. Nicholls LJ first addressed the question of equitable set-off

*The defendant's counterclaim relates to damage, by way of inconvenience and otherwise, suffered by her while the flat was in a state of disrepair and while extensive works of repair were being carried out. Those works began in about July 1987 and ended the following May. The plaintiff issued his proceedings early in that month. Thus, the subject of the counterclaim relates to a period which, save possibly for a few days, was wholly before the proceedings started. Thus, even when the proceedings were issued, the defendant had available to her a defence of equitable set-off to the rent claim. In due course, when the dispute over the defendant's claim was determined by the court, what then became revealed was that, indeed, the defendant had a defence to the whole of the claim for unpaid rent.*

1. This is thus a defence, presented as of right, to the claim for rent. It impeaches the whole claim for rent. The landlord’s argument was that the tenant did not come to court with clean hands on the basis that the judge had found that the tenant had been unco-operative with a builder and that on one occasion the tenant behaved in, to quote the judge's expression, an unladylike fashion when the glass in a door was broken.
2. The court was not only dismissive on the basis that the reply to the defence to equitable set-off had not been pleaded below but also to its merits

*In any event, in my view, the point is misconceived. None of the matters relied upon goes anywhere near furnishing grounds for saying that, although the damages payable by the landlord to the tenant exceed the amount of unpaid rent, the tenant should be precluded from relying upon those damages by way of equitable set-off.*

1. That was of course after a trial but applies *a fortiori* to the specious reasons being given for not allowing an equitable set-off to be claimed at a first hearing. The fact that a tenant is raising equitable set-off is not a good reason of denying equitable relief, nor is the fact that the landlord has not had their rent as that prejudges the defence without having heard it. As *Anzani* explains an unliquidated damages claim is enough and when that was ascertained it amounted to a complete defence in *McCulloch.*

**REDUCED ARREARS**

1. The same principles must apply when considering cases where the evidence available at a first hearing might suggest that the counterclaim is likely only to be sufficient to reduce the arrears.
2. An obvious example would be a claim brought under Ground 8 Schedule 2 Housing Act 1988 where the counterclaim might reduce the arrears at trial to below two months or eight weeks but not entirely. That would be a complete defence to a Ground 8 claim. It would be wholly unfair for a tenant to be shut out of raising such a defence. The Court of Appeal recognised this to be the case in *North British Housing -v-Matthews [2005] 1 WLR 3133 para 11*

*Thus if the defendant shows that he has an arguable claim for damages which he wishes to rely on as a set-off (*[*British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd [1980] QB 137*](https://uk.westlaw.com/Document/I7AC99661E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=afb0f2ffb19b4120a0e77586daa58683&contextData=(sc.Search))*), and the damages are sufficient to reduce the arrears of rent below the eight-week limit, that would be a good reason for adjourning the hearing date. Until the set-off issue has been determined, the court cannot be satisfied that the landlord is entitled to possession*

1. It is long established law that a counterclaim for damages is relevant to the question of reasonableness. Leaving aside *McCulloch* where the Court of Appeal held that even if it had been right there had been earlier arrears it could not be reasonable to make an order when it was found the counterclaim extinguished the claim this was made clear in *Lal-v-Nakum [1981]1 HLR 50*. There the appellant had counterclaimed but had lost. He had saved up the rent and offered to pay that and the costs when the trial ended. The county court judge made an order for possession. The tenant paid the rent and costs. The Court of Appeal found the reason given for non-payment relevant even though the tenant lost and set aside the possession order.
2. The point that arises, is simple, that if there is a valid counterclaim which may reduce the arrears then the court is not in a position to decide whether it is reasonable to make a possession order until that counterclaim has been tried. A tenant whose counterclaim fails and has substantial arrears may well face a possession order see *Haringey LBC-v-Stewart {1991] 23 HLR 557*. That is of course, however, a matter for trial once the court knows the arrears and not to be prejudged.
3. If a defence and counterclaim has been filed – then even if adopting the approach on summary judgment to whether there is a real prospect of a defence succeeding that is not confined to a real prospect of extinguishing the claim for rent but a real prospect of affecting a decision whether it’s reasonable to make an order for possession must be sufficient in light of those cases.

***TOO LATE ?***

1. It has also been held that a counterclaim may be allowed to proceed and in effect operate by way of a set-off even when a possession order has been made see *Rahman-v-Sterling Credit [2001] 1 WLR 496* so long as the possession order has not been executed. A stay of the possession order may be obtained until the counterclaim has been determined. That is not, however, a good reason for preventing a defence of equitable set-off when it is raised. The effect of the *Rahman* counterclaim is an additional statutory benefit in cases of discretionary arrears grounds. The counterclaim may enable the tenant to extinguish or reduce the arrears and obtain either discharge or variation of the possession order.

**PRACTICE TIPS**

* If you can get a surveyor’s report beforehand then obviously do
* Your client might have some evidence – photographs on phone, disclose them
* LL rep “ no record of reports “ – Matter of evidence, social landlords’ repairs records often unreliable – repairs where LL responsible from moment disrepair occurs e.g., outside the tenant’s demise.
* If a district judge is very difficult at first hearing – remind them forcibly of Lewison LJ ‘s remarks in *Stephenson & Laleva* and suggest they grant a short adjournment if they are overly sympathetic
* Appeal – refusing to adjourn in these cases where a potential defence raised even to allow it to be put is likely to be insupportable unless on the case outlined by the tenant it is hopeless or incredible

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