



SELBORNE CHAMBERS

When the s.8 Notice Fails: rent arrears residential possession proceedings

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In any residential possession claim for property on an Assured Shorthold Tenancy, the Court will be careful to scrutinise the notice served under s.8 of the Housing Act 1988. As all practitioners will be aware, this notice will set out the grounds of possession, as found in Schedule 2 of that Act, on which the Landlord relies.

The Court has no power to waive a landlord's failure to comply with the statutory requirements in a s.8 notice (minor defects may be interpreted away under the Mannai test: see *Pease v Carter* [2020] EWCA Civ 175). As such, if the Landlord has not complied with the statutory requirements in respect of that notice, this can leave the possession claim in a precarious position. It may result in the claim being dismissed and the Landlord having to start the process again with a fresh notice being served.

This note assumes that the s.8 notice has been found to be invalid and explores the effect of this finding on a claim for

possession of residential premises based on the Tenant's failure to pay rent.

The grounds for possession based on rent arrears

There are three grounds of possession concerned with rent arrears:

- Ground 8: this is a mandatory ground, which will be made out where, both at the date of the notice and of the hearing, at least a specified amount of rent is unpaid (depending on the time period in which it is payable under the Lease).
- Ground 10: this is a discretionary ground, which will be made out where some rent lawfully due from the Tenant is unpaid on the date of issue of the proceedings and was in arrears at the date of service of the s.8 notice (essentially, a Ground 8 claim where the Tenant has paid off enough arrears to bring it below the threshold in that ground).
- Ground 11: this is a discretionary ground,

which will be made out where a Tenant has a history of delaying paying rent due under the Lease. No present rent arrears are required to be made out.

The effect of an Invalid Notice

If the s.8 notice is invalid, in so far as Ground 8 is concerned, that's the end of the claim (s.8(5)). However, in respect of Grounds 10 and 11, the Court has the power to dispense with the requirement to have served a s.8 notice where it considers it to be just and equitable to do so (s.8(1)(b)). As such, in so far as a claim relies on these two grounds, it may survive an invalid notice.

In exercising this discretion, the Court should weight all the factors before it and take into account all the circumstances, both from the view of the landlord and the tenant. This includes events since commencement of the claim (**Kelsey HA v King (1995) 28 H.L.R. 270**). Whilst this is therefore a wide discretion, some warning has been given that it is only in relatively exceptional cases that the Court should dispense with the notice (**Braintree DC v Vincent [2004] EWCA Civ 415**).

As Grounds 10 and 11 are discretionary, the Landlord will also have to satisfy the Court that it is reasonable in the circumstances for a possession order to be made.

An invalid s.8 notice therefore does not necessarily spell the end of a possession claim based on rent arrears. It may still be able to proceed on the basis of Grounds 10 and 11. There are, however, additional hurdles the Landlord will have to deal with, namely dispensing with the notice, and the reasonableness of a possession order.

Some practical pointers for Landlords:

- Get the notice right: An obvious starting point, but there are plenty of technical details that can be all too easily overlooked.

It's a good idea to check internal databases frequently to ensure that the most up-to-date version of the notice is being used. Remember to view the notice carefully before issuing a claim – as above, if the notice is invalid, a claim based on it may need to be discontinued.

- Include Grounds 10 and 11: remember to include the discretionary grounds as a fallback, even if confident that Ground 8 has been made out.
- Refer to the statutory grounds in the Particulars of Claim: it is a mandatory requirement under Practice Direction 55A para 2.4B that all statutory grounds relied on are included in the Particulars of Claim. If the Particulars do not refer to Grounds 10 and 11, the Landlord is not going to be able to rely on them if the Ground 8 claim fails.
- Spot defects early: if, for example, you inherit a claim from a litigant in person after it's been issued, make sure you identify any defects in the s.8 notice in good time for the hearing. This will allow you to prepare to make arguments on dispensing with notice.



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