How to resist or enforce possession orders after 6 years

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1. It is common theme in social housing that landlords who have obtained a possession order (whether outright or suspended) may exercise restraint and not seek to immediately enforce the order by a warrant for execution. Another common scenario is where a landlord has tried, perhaps repeatedly, to enforce possession but cannot do so because the tenant successfully applies to the Court for the warrant to be stayed.

The legislation

2. Landlords require the Court's permission to enforce a possession order if the order was made over 6 years ago (CCR Ord 26 r 5(1)(a) and 17(6)):

> *"Rule 5 Permission to issue certain warrants*
> *(1) A warrant of execution shall not issue without the permission of the court where –*
> *(a) six years or more have elapsed since the date of the judgment or order;"*
>
> ***Rule 17 Warrant of possession***
> *(6) Rules 5 and 6 shall apply, with the necessary modifications, in relation to a warrant of possession and any further warrant in aid of such a warrant as they apply in relation to a warrant of execution.*

3. This is now mirrored in CPR r.83:

> ***83.2 Writs and warrants of control, writs of execution, warrants of delivery and warrants of possession-permission to issue certain writs or warrants***
> *(1) This rule applies to-*
> *...*
> *(d) warrants of possession.*
> *...*
> *(3) A relevant writ or warrant must not be issued without the permission of the court where-*
> *(a) six years or more have elapsed since the date of the judgment or order;"*

4. This somewhat obscure area is commented on in White Book Volume I at 83.2.2 (2015 edition):

> *"Obtaining permission to enforce by execution a judgment over six years old was never a mere formality. Permission may be refused (see e.g. Patel v Singh [2002] All E.R. (D) 453) unless the applicant discharges the burden of proving that it is demonstrably just to grant it (Duer v Frazer [2001] 1 W.L.R. 919). The test is whether there are*

facts which take the case out of the general rule that execution would not be allowed after six years; see Society of Lloyds v Longtin [2005] EWHC 2471 (Comm). There is nothing in the new provision to suggest that the test for permission has altered."

Case law

5. As the above passage indicates, the Courts have shown reluctance to wave through such applications by landlords.
6. In *Patel* at paragraph 14, Lord Justice Peter Gibson stated that in many, if not most, cases as a matter of principle, the passage of six years would be a sufficient ground in itself for refusing permission (also see paragraph 21).
7. A year earlier in *Duer*, it was held at paragraph 25 of Evans-Lombe J's judgment (cited with approval by the Court of Appeal in *Patel*) that:

> *"the court would not, in general, extend time beyond the six years save where it is demonstrably just to do so. The burden of demonstrating this should, in my judgment, rest on the judgment creditor. Each case must turn on its own facts but, in the absence of very special circumstances such as were present in National Westminster Bank plc v Powney [1991] Ch 339, the court will have regard to such matters as the explanation given by the judgment creditor for not issuing execution during the initial six-year period, or for any delay thereafter in applying to extend that period, and any prejudice which the judgment debtor may have been subject to as a result of such delay including, in particular, any change of position by him as a result which has occurred. The longer the period that has been allowed to lapse since the judgment the more likely it is that the court will find prejudice to the judgment debtor."*

8. Finally, in *Longtin*, Morison J held at paragraph 22, that:

> *"The law is this: are there facts which take the case out of the general rule that execution will not be allowed after 6 years? The exercise of my discretion must be directed to doing justice between the parties, having regard to all the circumstances of the case. I take this approach based upon the Court of Appeal's decision in the case of The Good Challenger at paragraphs 105 and 107 and 108."*

9. With suspended possession orders lasting 6 years or more, it is not ordinarily appropriate to allow enforcement where the arrears have not increased in size from the date of the order and where the effect of enforcement would mean that the order was permanently suspended, contrary to the guidance of Lord Justice Templeman at page 104 of *Vandermolen v Toma* (1981) 9 HLR 91, namely, that orders should not extend into the "mists of time"…

Discussion

10. Landlords seeking permission to enforce the order after 6 years should support their application with evidence of:
    a. the steps taken within the 6 years to seek a warrant for execution;
    b. the outcome of such attempts at enforcement;
    c. the reason/s for any delay within the 6 year period and afterwards;
    d. if rent arrears are relied on, an up to date rent account statement.
11. Depending on the facts, tenants may resist the application on the grounds that, among other things:
    a. The landlord has failed to discharge the burden on it to show that it would be "demonstrably just" to issue a warrant to enforce the possession order and/or to show that the circumstances justify departure from the usual rule;
    b. Any lack of explanation for the delay in enforcing the order earlier;
    c. Substantial compliance with any terms of the possession order (or suspended possession order);
    d. Where arrears are relied on, any substantial reductions of the arrears over time.
12. Another relevant factor will be whether the tenant could have applied to discharge of the possession order at some point after the order was made. If so, social landlords should explain what steps they took to bring this right to the attention of the tenant.
13. Where permission is refused, if, for example the tenant still has the requisite amount of rent arrears to meet Ground 1 of Schedule 2 of the Housing Act 1985 ('HA 1984') and the condition for possession in section 84(2) HA 1984, the landlord may issue fresh proceedings in respect of the additional arrears. However, the landlord should comply with the recently re-issued Pre-Action Protocol for Possession Claims by Social Landlords, which means effectively starting from scratch.

BEN AMUNWA, 26 January 2016

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