

The exercise of judicial discretion in rent arrears cases

**Caroline Hunter, Sarah Blandy, David Cowan, Judy Nixon,
Emma Hitchings, Christina Pantazis and Sadie Parr**
Sheffield Hallam and Bristol Universities

DCA Research Series 6/05
October 2005

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First Published 2005

ISBN: 1 84099 062 7

Acknowledgements

We would like to thank all those who gave up their time to take part in the study, particularly the district judges who agreed to be interviewed, and the staff of landlords, advice and law centres and solicitors who attended the focus groups. The Housing Corporation very helpfully provided a venue for conducting the focus groups in London. Michael Walker, Honorary Secretary of the District Judges Association provided invaluable help in contacting district judges and encouraging them to take part in the study. The staff at the courts where observations were carried out were unfailingly helpful in enabling us to carry out the work.

The court data was entered onto SPSS by the Centre for Research and Evaluation at Sheffield Hallam University.

We should also like to thank Hal Pawson of Heriot-Watt University for letting us have sight of an early draft of the study conducted by him and colleagues at Glasgow University into the use of possession actions and evictions by social landlords. We have drawn heavily on it in setting the context for our study in Chapter 2 of this report. Michelle Diver at the Department for Constitutional Affairs research section provided support and patience when it was needed.

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Disclaimer

Whilst this research paper was produced with the financial support and general assistance of the Department for Constitutional Affairs, the views expressed within are those of the report's authors and do not necessarily reflect the opinion of the Department.

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Executive summary

The research questions

This study is concerned with how judges exercise their discretion in cases where social landlords (by which we mean local authorities and housing associations) seek possession against their secure or assured tenants on the ground of rent arrears. The study did not include possession actions by private landlords, nor against introductory, non-secure or assured shorthold tenants of social landlords, where landlords have an absolute right to possession (provided all formalities are complied with).

The key questions which the research set out to examine were:

- What factors influence the orders which judges make in housing possession cases and how far do these accord with the perceptions of stakeholders?
- How far is there a consistency of approach between district judges?
- What criticisms, if any, do key stakeholders (landlords, advice agencies and solicitors) have of the way in which judges exercise discretion in housing possession cases?

Methodology

The study was primarily qualitative, although some quantitative data was obtained. It comprised three key elements which were carried out in three geographical locations (the West Country, London and the North of England). First, a series of 6 focus groups were held with practitioners. The focus groups explored practitioners' experiences of housing possession cases and sought to detail examples of inconsistency in decision-making, and explore views of why this occurs.

Secondly, observation of cases was undertaken at four sites: London court, West Country court and Northern 1 and 2 courts. The analysis focuses on the 540 cases which were first hearings. The final and most important element of the research was interviews with district judges operating in the three geographical areas. These interviews included a series of case scenarios, developed through a focus group of senior practitioners and district judges, to explore the approach of district judges' to exercising discretion in housing possession cases.

Findings

This research showed that there were different patterns of decisions both between courts and between individual judges in courts. Various possible explanations for the variations between courts were explored:

- differences between courts in levels of arrears;
- the familiarity which claimants have with their local district judge, leading to a tailoring of orders sought which they know the judge is likely to grant;
- the prevalence of housing benefit problems;
- attendance by the defendant at court;
- the availability of housing advice for defendants, both in the community and at court.

It is not possible to show the different weight these factors have, but all are likely to play a part in the differences observed. These factors may lead to the development of a particular court culture, possibly also affected by procedural factors, such as pressures on listing and the use of pro formas developed by each court.

There was also considerable variation between individual judges' decisions. The qualitative data from interviews with district judges sought to examine whether any of the following factors could explain these differences:

- length of experience;
- type of legal practice before appointment;
- attitudes to training and updating.

No clear patterns emerged, however.

The interview data suggests that relationships of trust between district judges and claimants (who are generally repeat players) is significant. Whilst the relationship between trust and outcome is merely suggestive, the interview data suggests that relationships of trust do impact on the process. This was particularly the case in the busier courts in our sample, where the district judges were scheduled to hear a case every few minutes or so. The overarching theme behind this was personnel management by district judges of claimants' representatives, and there was evidence of a reverse effect as well (that is, management of judges by claimants' representatives). This was made possible by a number of factors which combine together:

- the shift to housing officers appearing on behalf of claimants;
- the ‘training’ process in which district judges tend to engage claimant representatives and vice versa;
- those representatives length of time in post;
- levels of confidence placed in those representatives; and
- the nature of the claimant as a ‘social landlord’.

There is a wide variety of ways in which tenants’ circumstances and participation in the proceedings impact on judges’ use of discretion. Virtually all the judges interviewed considered attendance and payment history to be important factors they took into account when exercising their discretion, although given that decisions are being made about individuals in inevitably subjective ways there was less consistency in the way in which judges assessed tenants’ motivation. Thus the mere fact of attending the hearing did not necessarily result in a more favourable outcome for the defendant.

Much greater consistency in approach and outcomes was noted in relation to the impact of the personal circumstances of tenants, such as:

- dependant children,
- problems caused by age,
- mental health problems or
- an inability to understand the proceedings.

This suggests that while participation per se is not a key influence on outcomes, unless tenants attend hearings judges may not be made aware of factors which could have a significant impact on their decision-making process.

So far as the level of arrears is concerned, some judges interviewed operated a ‘rule of thumb’, but said that these were always used flexibly so that other factors could be taken into account. Unsurprisingly the quantitative data suggested a relationship between the level of arrears and the outcome of possession cases, affecting the likelihood of the three main orders: outright possession, suspended possession and adjournment.

As noted above housing benefit was a particular issue which emerged. Housing benefit problems are contributing to the increased number of adjournments. Claimants accept that adjournments are frequently necessary. Most district judges are well informed about housing benefit, both about the details of the system as it should work, and about the local

conditions under which it is administered. All of them have a certain amount of sympathy and patience with defendants, but are also aware that claimants are losing rental income while housing benefit problems are sorted out, and while possession cases are adjourned.

Most district judges have become cynical about the capability of housing benefit administration to deal with claims, through their experience of hearing cases involving lost application forms and other information, incorrect assessment of benefit, and administrative delay.

Ground 8 provides a mandatory possession ground for housing associations, where there are at least eight weeks rent arrears at the time of notice and hearing. Possession cases brought using Ground 8 caused district judges considerable difficulties. However, the recent case of *North British Housing Association v. Mathews* [2004] EWCA Civ 1736 may mean that the outcomes of the Ground 8 cases recorded in this study, and indeed the district judges' responses in interview would now be different. The findings in relation to Ground 8 were:

- It is more commonly used in London.
- A lower number of suspended possession orders and a higher proportion of outright possession orders were made in cases involving Ground 8.
- Ground 8 is operating in a far from mandatory way, with district judges using a number of tactics to avoid having to make an outright possession order.

The final part of the possession process, applications to suspend warrants for possession were perhaps the most difficult for judges, as they were acutely aware that their decision would have an immediate impact on the tenant's life, and that of any family members. Although a number of factors were likely to be consistently taken into account by all judges interviewed, their responses to the scenarios varied considerably.

Applications to suspend warrants were also the type of case which prompted judges to directly address the tenant in a possibly paternalistic manner, frequently referring them to sources of advice and warning them that this was their 'last chance' to remain in their home. Issues of consistency and fairness caused some concern particularly where district judges did not have the full case file.

Conclusions

A wide and diverse range of factors was reported by judges as being influential in how they exercised their discretion in individual cases with less consistency noted on the weight given to different factors. There was no evidence of judges having regard to self-evidently inappropriate factors, simply that they approached the task in the different ways set out above.

What this suggests is that there can be no “easy” way to achieving consistency between judges. Even where factors are consistently taken into account, this will not necessarily lead to the same outcome. It is however, possible to conceptualise the decision-making process in terms of a number of interrelated axes which represent a continuum of approaches.

The continuum of approaches is characterised by on the one hand by legalism, a reliance on the framework of contract law and recognition of the role of the judiciary in debt management. In contrast the opposite end of the spectrum is characterised by pragmatism, a concern with social welfare issues and the primacy of the home. Where individual judges place themselves within these continuums is informed by both macro and micro factors including personal attitudes and beliefs which in turn may be influenced by the amount of knowledge, experience and training received.

Thus it is likely that that even the introduction of some form of structured discretion which states that certain factors must be taken into account, e.g. level of arrears, personal circumstances of tenant, the impact on the landlord, will still lead to different outcomes for similar cases.

Finally we would return to the importance of the decisions made in housing possession cases. Judges were acutely aware of this and for many the human element could not be ignored. This particularly impacted on decisions on application to suspend warrants for possession. The hardest thing for judges is to make the final decision to put people out of their homes.

Chapter 1: Introduction

The nature of discretion

“In modern society the law regulates the complex behaviour of millions of people. To do this efficiently – to do this at all – broadly applicable rules must be used. Yes such rules are bound to be incomplete, to be ambiguous, to fail in some cases, to be unfair in others. Some of the drawbacks of rules can be minimised by giving discretion to the administrators and judges who apply them. Yet doing so dilutes the advantages of rules and creates the risk that discretion may be abused”

(Schneider, 1992).

This study is concerned with one particular area of social life where judges have been given a clear discretion – that is whether to evict a tenant of a social landlord (by which we mean local authority or housing association) from their home for rent arrears. The law could operate in two ways – it could give discretion to the administrators (the landlords) or to the judges. It could also create a rule-bound structure or leave a much more open discretion in order to take into account the myriad of circumstances which may account for why arrears have arisen, what the tenant may be willing or able to do about them, and what order the landlord is seeking.

As the legal structure set out in Chapter 2 indicates a broad discretion is given to judges in the type of cases we are considering, and this study seeks to examine how judges exercise this discretion.

Aims of the research

The focus of this research is on claims for possession for rent arrears. It may be noted that rent arrears are by far the most common reason for social landlords to seek possession, and that these make up over 95% of actions entered (Pawson et al, 2005). We refer to these actions throughout the report as housing possession cases, in which the landlord is the claimant and the tenant is the defendant.

The exercise of judicial discretion, by which judges decide whether it is reasonable to grant possession and if so whether to suspend it on terms, has become an area of concern for policy makers for two reasons. First there has been an increasing use of the courts by social landlords, which appears to have been accompanied by an actual rise in evictions (Pawson et al, 2005). Secondly, the Law Commission has been conducting a comprehensive review of the law relating to the security and status of tenants, which has inevitably brought a focus

on the role of judges under the existing legal provisions, and consideration of how, if at all, the law should be changed.

The Law Commission's initial discussion paper (2002) considered whether discretion should be more structured because of criticism that "the outcomes of court process are insufficiently certain" (para. 12.13). At para. 12.16, the Commission accepted that there is an argument that the discretionary powers of the court should be more structured, with a list of factors to be taken into account by judges. Subsequently, in their final report the Law Commission (2003) noted, at para. 9.83, that there were widely expressed concerns about how judges exercised their discretion on reasonableness and recommended the introduction of a more structured discretion.

This study was commissioned by the Department for Constitutional Affairs in January 2004, in part to inform the Law Commission review process. The outline for the project sought:

"qualitative research to examine the approach of district judges to possession proceedings with the aim of identifying the key influences on decisions to grant, suspend, adjourn or refuse possession. The research should also examine the perceptions of possession proceedings of key stakeholders in the outcomes of housing litigation such as social landlords, solicitors representing landlords and tenants, and advice organisations."

The key questions which the research set out to examine were:

- What factors influence the orders which judges make in housing possession cases and how far do these accord with the perceptions of stakeholders?
- How far is there a consistency of approach between district judges?
- What criticisms, if any, do key stakeholders have of the way in which judges exercise discretion in housing possession cases?

Methodology

The primary objective of the study was to conduct qualitative research into the approach of judges to decision-making in possession cases. In order to understand how judges make their decisions we have adopted a three-fold approach. First we wished to ground the study in the reality of the experience of regular court users. Thus we commenced with focus groups of these users to examine their experiences. Secondly, gathering our own data on the approach of judges involved observing decision-making and recording the outcomes of cases (the latter essentially a quantitative technique). However, as illustrated in Chapter 2, the decision-making process in such cases can be very quick, and given the time pressures involved judges do not generally give a reasoned judgement as to why they have made a

particular decision. Because of this, the research team considered that the third element and core of the research had to be discussions with judges to seek to understand how they went about this decision-making process and what factors influenced their decisions. These are matters which will not necessarily be apparent from pure observation and records.

Thus the study contained three phases (for detail, see Appendix 1), which were carried out in three geographical locations (the West Country, London and the North of England). The areas were chosen to reflect certain characteristics such as high/low volume of possession cases in the court, rural/urban, and different types of social landlord operating in their area.

1. *Focus Groups with Practitioners*

A series of 6 focus groups were held with practitioners. In each location a focus group was held with those who represent claimants (landlords and their lawyers) and those who represent defendants (lawyers and advice workers).

The focus groups explored practitioners' experiences of housing possession cases, with a view to drawing out what they feel influences the exercise of discretion in such cases. The focus groups also sought to detail examples of inconsistency in decision-making, and explore views of why this occurs. (See Appendix 2 for research instruments used.) We have not written the responses to these focus groups as a separate chapter, but used them throughout the report to highlight the reasons why we have explored certain issues with district judges, and the criticisms which have led to these explorations.

2. *Monitoring of cases*

In order to provide some quantitative data to contextualise what is essentially a qualitative study, observation of cases was undertaken at four sites: London court; West Country court and Northern 1 and 2 courts.

London court is a very busy county court hearing over 3000 housing possession cases a year. Sixteen possession sessions were observed at this court, amounting to 524 relevant cases; around 17% of the annual cases heard here.

West Country court is a small county court serving a more rural population and hears in the region of 200 housing possession cases per year. Nine possession sessions were observed at this court, amounting to 87 cases; around 44% of the annual cases heard here.

Northern 1 court hears over 1500 housing possession cases a year. Two possession sessions were observed at this court, amounting to 98 cases; around 7% of the annual cases heard here. Northern 2 court has a smaller number of cases, around 900 a year. Five possession sessions were observed at this court, amounting to 89 cases; around 10% of the annual cases heard here.

In total 894 cases were observed, although not all of these were included in the analysis as some involved e.g. non-secure, introductory or assured shorthold tenancies where the judge has no discretion but must grant possession. An effective database of 798 cases involving decisions on housing possession cases (i.e. rent arrears) was obtained. We have focused the majority of our quantitative analysis on the 540 hearings which were the first time that case came to court, in order to compare outcomes of the same type of hearing.

For each case in the session, the researcher sought to record the important facts in the case, including (where available):

- Weekly rent
- Any outcome requested by claimant
- Representation of defendant – in person, legally, in writing
- Level of arrears
- Any housing benefit issues
- Any previous hearings
- Family make-up of defendant
- Work history of defendant
- Outcome of case at hearing

In order to confirm any facts established at the hearing, the researchers also checked the details against those in the court file. We also sought to record the nature of the judges' interactions with both parties, although it must be acknowledged that the presence of a researcher in court may have affected the way that judges dealt with claimants and defendants.

Given the qualitative focus of the research we have used this quantitative database merely to describe outcomes and difference, without seeking to provide a statistical analysis which might ascribe statistical significance to different facts about defendants.

3. *Interviews with district judges*

Interviews were carried out with 26 district judges. Judges in the three geographical areas were approached through the District Judges Association, and asked to take part in the research. Judges were free to refuse. Interviews lasted between one and two hours and were recorded and transcribed.

The interviews were structured into two broad parts. The first part drew on a semi-structured questionnaire around a number of key topics about the judge's background experience; their approach to decision-making in possession cases; their views about procedure and external factors (including housing benefit); the impact of landlords and their representatives; and the impact of tenants and their representatives; finally, they were asked about warrants of possession. This part of the interview was designed to elicit information about the influences on decision-making, for example from their training to the kinds of considerations about 'repeat players' which are mentioned in the literature (see further Chapter 5, below). (See Appendix 2 for the interview schedule.)

The second part of the interview involved the presentation of scenarios to the judges to gauge their responses to them, the order they would make in that case on the basis of the facts provided in the scenario, and their explanations for making that order. The scenarios are set out in Appendix 2, and also included at relevant points in the report. This part of the interview was designed to overcome the problem, anticipated by the research team, that district judges would not feel able to talk about specific cases. The scenarios were developed, then, to reflect the run-of-the-mill, ordinary possession case with a number of variations reflecting variously increased vulnerability of the occupier, issues with housing benefit, technical problems with non-rent expenses, possible variations on the worthiness of the occupier.

In order to prepare these scenarios, a focus group comprising a mix of senior practitioners and district judges was held. A number of potential scenarios were developed prior to the focus group being held which were then further refined and developed following the feedback from the focus group. The response of the district judges to these was very positive, in that they commented that they were very "familiar" and reflected similar cases which they had recently encountered.

Given the qualitative nature of the interviews we have generally not. The earlier focus groups suggested that there would be a range of attitudes from judges and this was borne out by the interviews, and it seems inappropriate to try and ascribe any numerical

significance to a particular response or attitude. We have illustrated the range of responses through direct quotes from the transcripts of the interviews.

Structure of the report

The report starts in **Chapter 2** by providing background contextual material on both the legal process and the incidence of rent arrears. This material gives rise to a number of questions which are explored in this study.

Chapter 3 sets out the pattern of decision-making which arises from the quantitative data. A point of comparison is provided by a 1996 study of housing possession cases (Nixon et al, 1996). This also provides context for the exploration of the exercise of discretion in the following Chapters.

Chapter 4 examines the issues of consistency and difference in decision-making by judges, both between courts and between individual judges.

Chapters 5 and 6 examine respectively the impact that the actions of the claimant landlord and factors relating to the tenant defendant can have on decision-making.

The importance of two particular factors, the level of arrears and housing benefit, to decision-making are explored in **Chapter 7**.

Two particular decisions which judges have to make are dealt with in **Chapter 8**. First those relating to the mandatory possession ground, Ground 8 and second decisions on applications to suspend warrants for possession.

Chapter 9 provides conclusions to the study.

Chapter 2: The legal and policy context

Introduction

In this chapter we describe the legal framework which applies to the possession process. We then move on to consider the incidence of rent arrears amongst tenants of social landlords and, briefly, what is known about why they arise and how landlords deal with them.

The legal framework

The majority of tenants of local authorities and housing associations are either secure or assured, governed by either the Housing Act 1985 in the case of secure tenants or the Housing Act 1988 for assured tenants. That is to say, in either case, the tenant cannot be evicted without the landlord first serving a notice of seeking possession (NSP), which must set out the ground and reasons for seeking possession. For both secure and assured tenants, rent arrears provides a discretionary ground for possession, i.e. before the court can make an order for possession, the judge must consider that it is reasonable so to do. For secure tenants a case may be brought under *Ground 1* (rent lawfully due from the tenant has not been paid or an obligation of the tenancy has been broken or not performed); for assured tenants under *Ground 10* (some rent lawfully due from the tenant is unpaid on the date on which the proceedings for possession are begun and was in arrears at the date of the service of the notice); or under *Ground 11* (whether or not any rent is in arrears on the date on which proceedings for possession are begun, the tenant has persistently delayed paying rent which has become lawfully due).

There are no statutory constraints on the judge's exercise of discretion, and the case law has emphasised that there is no restriction on what may be taken into account, save relevance (*Cresswell v. Hodgson* [1951] 2 K.B. 92), although more generally in that case Lord Denning stated that "reasonable" means having regard to both the interests of the parties and also having regard of the interests of the public.

When considering possession brought on a discretionary ground, the judge has a range of options as to what order s/he may make under section 85, Housing Act 1985, or section 9, Housing Act 1988:

- The application may be dismissed (e.g. because the arrears have not been proved, or because the judge does not consider it reasonable to make the order)
- Possession may be refused but a money or costs order may be made

- The application may be adjourned; the adjournment may be on terms and/or for a fixed period of time;
- A suspended possession order may be made (SPO), granting possession but suspending it on terms (e.g. that the tenant pays the current rent, plus an amount towards the arrears)
- An outright order (OPO) may be made requiring possession to be given up by the tenant on a particular date.

Save where the application is dismissed, the case may come back before the court for a further application. It is common for adjourned cases to have a review date, when the court will consider whether to further adjourn or make a different order. If a suspended order is breached, the landlord may issue a warrant for possession, without a further hearing.

Although tenants may apply to have such a warrant stayed, the difference in effect between a suspended possession order and adjournment is significant because of the effect of breach of a suspended possession order. On the making of an SPO the tenant remains secure or assured. For secure tenants any breach of the suspended order (e.g. failure or delay in making one weekly payment) has the effect of determining the tenancy: Housing Act 1985, s.82(2); *Thompson v. Elmbridge BC* (1987) 19 H.L.R. 526. Even if the landlord permits the tenant to stay on after such a breach the status of the tenant will generally be reduced to that of a tolerated trespasser: *Greenwich LBC v. Regan* (1996) 28 H.L.R. 469, CA; *Burrows v. Brent LBC* [1996] 1 W.L.R. 1448; (1996) 29 H.L.R. 167. The position of tolerated trespassers in law is complex and difficult and has led to a number of cases in the higher courts (see Bright 2003, Nichol 1991, and 2001). There has been no case law to test whether the same principles apply to assured tenants (the Acts do differ slightly in their wording, which might make a difference in law), although housing associations with both types of tenants have not generally differentiated between them, and proceed on the basis that any breach of the terms of the suspended order brings the tenancy to an end, whether secure or assured.

As the figures at Table 1 below indicate, the most common order in housing possession cases is suspended possession with over twice as many SPOs granted as outright possession orders. As these figures include anti-social behaviour cases as well (which are more likely to result in outright orders), the percentage of suspended possession orders in rent arrears cases is probably even higher. The gap between the number of cases issued and the number of possession orders may be explained in part by the court either dismissing

or adjourning the application. One earlier study (Nixon et al 1996) indicated that dismissal is rare (4% of cases), but that adjournment occurred in 26% of cases. We consider the outcomes in the cases we observed further in Chapter 3.

Ground 8

For housing association assured tenants, in addition to the discretionary grounds 10 and 11, there is also a further mandatory ground (Ground 8) which is available where a tenant who pays rent weekly is in 8 weeks' arrears both at the date of issue of the NSP and at the court hearing (this figure was reduced from 13 weeks in 1997).

Although the use of Ground 8 has been discouraged in the past by the Housing Corporation (see Chapter 8, below), Pawson et al (2005) found that a third of housing associations reported making some use of it, although there were regional variations. In particular, half of all London-based associations reported sometimes making use of Ground 8.

The powers of courts where Ground 8 is used have been the subject of some debate amongst judges; some believing they have power to adjourn cases (at least providing no evidence has been heard), while others consider that they have no such power. In this study we have explored the different attitudes of district judges when confronted with Ground 8 claims. It may be noted that the Court of Appeal has, since the interviews and observation for this study were completed, heard and decided an appeal relating to the powers of the county court to adjourn possession actions in these circumstances which severely limits when adjournments may be granted (*North British Housing Association v. Mathews* [2004] EWCA Civ 1736). Decisions in cases involving Ground 8 are discussed further in Chapter 8.

Procedure in rent possession cases

As mentioned above, the process of eviction starts with the landlord issuing a NSP. If the landlord wishes to proceed to a court action proceedings must be issued. The current court form (N119) requires the landlord to set out details of the unpaid rent. It also asks the landlord what information is known about the defendant tenant's circumstances. The standard information requested of the landlord allows the court to establish that it has jurisdiction to decide the case.

When the papers are issued the tenant will be sent a defence form (N11R) which s/he may return to the court for consideration. The form asks questions about the tenant's income, dependants, outgoings and other debts. Earlier research (Nixon et al, 1996) suggests that

such forms are completed in less than a quarter of cases, in part due to the length and complexity of the forms.

The papers will be issued by the court with a fixed return date for the hearing. Unlike many other court actions there will be no preliminary hearing, rather courts will generally have possession hearings listed on a regular basis. The exact details will depend on the number of actions the court has entered, but typically in a medium sized county court a possession list will be heard one morning a week. Again listing practices may vary between courts, but it is not unusual for around 40 - 50 cases to be listed in a morning.

Cases are heard by district judges. As at 1 December 2004 there were 415 district judges and 748 deputy district judges in the county court (DCA, 2004). It is not uncommon for housing possession cases to be listed in front of deputy district judges.

The use of possession in rent arrears cases

The use of court proceedings to deal with possession has increased alongside the levels of arrears, although for the first time in 10 years the numbers reduced in 2003. Table 1 sets out the numbers of court actions for possession issued by social landlords in England and Wales, together with the number of outright and suspended possession orders granted.

In seeking to explain these increases, Pawson et al (2005) asked social landlords what were the most important factors in this change. The most common response (which was particularly dominant amongst local authorities) was “policy and practice changes of (our) organisation.” Thus from their perspective increasing possession actions were being driven by the landlord, rather than any change in legal policy or procedure. The court records do not necessarily indicate that evictions have been rising, as they only record orders made. Other data analysed by Pawson et al, does, however, seem to suggest that the increasing numbers of eviction actions is also leading to a larger number of actual evictions.

Table 1: Court Actions for Possession by Social Landlords in England and Wales, 1994-2003

Year	Actions entered		Suspended Possession Orders granted		Outright Possession Orders granted	
	Number	Annual % change	Number	Annual % change	Number	Annual % change
1994	65,394	-	36,251	-	13,499	-
1995	83,637	28%	49,327	36%	17,654	31%
1996	91,522	9%	54,728	11%	15,869	-10%
1997	107,861	18%	64,137	17%	18,060	14%
1998	132,032	22%	72,357	13%	22,281	23%
1999	138,984	5%	72,046	0%	24,184	9%
2000	147,519	6%	69,352	-4%	27,168	12%
2001	150,563	2%	70,293	1%	30,350	12%
2002	151,184	0%	68,776	-2%	29,929	-1%
2003	135,829	-10%	62,217	-10%	29,825	0%
1994-2003	-	108%	-	72%	-	121%

Reproduced from Pawson et al 2005, p. 20. Sources: Phelps and Carter (2002), Delargy (2003). Original data from Department for Constitutional Affairs (formerly Lord Chancellor's Department).

The impact of court proceedings on tenants

Tenants against whom possession is sought find the receipt of a summons shocking and upsetting (Blandy et al, 2002). Many who have housing benefit problems feel that the court summons is irrelevant to their problem (Blandy et al, 2002, p. 38). Given these responses it is not perhaps surprising that attendance rates by tenants at court are low with less than a quarter of tenants (23%) attending the hearing and a further 10% providing some form of written representations (Nixon et al, 1996).

If tenants do attend the evidence suggests that they may achieve an improved outcome. Nixon et al (1996) showed that attendance was less likely to lead to an outright possession order. We discuss further the attendance of tenants in Chapter 3, and explore the reasons why their attendance has an impact in Chapter 6.

Duty Desk Schemes

One development of recent years which has impacted on housing possession cases is the provision of "duty desk schemes," whereby housing advisers (sometimes legally qualified, sometimes not) are available in court for tenants on the days when possession cases are listed. The study by Nixon et al (1996) illustrated the benefit of such schemes in providing invaluable support and guidance and improved outcomes. In 1998 schemes were running in over a third of county courts (Sefton et al, 1998), and it seems likely that the number has increased since that time.

In November 2001, the Legal Services Commission announced the selection of 13 schemes for pilot funding (5 of these were new schemes, the remaining already existing). Evaluation of these pilots (Myers Wilson, 2004) showed that the vast majority of those assisted were eligible for Legal Help. It also concluded (p. 46) that “broadly speaking the Duty Schemes were successful in securing a positive outcome for most clients, and often for landlords as well.”

Criticisms

The procedure for housing possession cases has not been without criticism. In his Final Report on Access to Justice, Lord Woolf said (Chap 16, para. 20):

“It is generally agreed that the present procedure for possession of tenanted property on grounds of arrears is unsatisfactory.”

The particular concerns outlined above were echoed by the Law Commission (2002, para. 12.34):

“There have been concerns that suspended possession orders for rent have been too readily given out, made in hearings listed in bulk for only a matter of minutes each, with very low attendance rates and poor participation by occupiers. It also appears illogical to focus the statutory regulation on a hearing which produces only a suspended order, with very little statutory regulation of the process for dealing with the breach of the order which then leads to the actual eviction.”

The incidence of rent arrears

The study is concerned with the use of legal proceedings to deal with tenants of local authorities and housing associations who have rent arrears, and here we discuss the policy background. A number of studies have examined why tenants of social landlords get into arrears and the single most significant underlying factor is poverty. Tenants of social landlords are less likely to be in work than the average and have a lower gross weekly income (ODPM, 2004). Households in arrears are characterised by lack of work or low paid work, combined with wider debt problems (Pawson et al, 2005, Ford and Seavers, 1998, Gray et al, 1994). In Pawson et al’s recent study (2005) landlords pointed to the growing vulnerability of tenants in what has become an increasingly residualised sector. Thus those suffering from mental ill-health were particularly liable to accumulate arrears.

Although research into arrears has generally characterised those in arrears as either “can’t payers” or “won’t payers” (see e.g. Ford and Seavers, 1998), Pawson et al, suggest that a more recent factor is changing attitudes to household debt, which while increasing debt generally also made tenants less averse to incurring arrears.

Housing benefit

Linked to these general problems which may lead to arrears, is the specific issue of housing benefit. Over 60% of tenants of social landlords were claiming housing benefit in 2002/03 (ODPM, 2004). A number of studies have pointed to the fact that rent arrears may be attributable to delays and problems in housing benefit administration. In particular delays in processing (Pawson et al, 2005, Audit Commission, 2002, Raynsford Dallison, 1992), the recovery of overpayments (following a move into work by the tenant) (Pawson et al, 2005, Evans, 2003), the complexity of the housing benefit system (Pawson et al, 2005, Blandy et al 2002, and Ford and Seavers, 1998), and communication difficulties between the landlord and the housing benefit department (Pawson et al, 2005, Blandy et al, 2002, and Ford and Seavers, 1998) may all contribute to the accumulation of arrears.

The impact of housing benefit (HB) on decisions to move towards possession are clear from Pawson et al (2005, pp. 67 - 68):

“...the vast majority of landlords responding in the postal survey (over 83 per cent of LAs [local authorities] and 95 per cent of HAs [housing associations]) reported that they sometimes issued NSPs where HB claims remained outstanding. Similarly, 60 per cent of LAs and 79 per cent of HAs would, in some cases, enter a case in court even where there was an unresolved HB application.

Case study evidence shows that the commonest scenario where a Notice will be served on a tenant awaiting settlement of a Housing Benefit claim is where it is considered that the delay results from the tenant's own failure to provide requested information (e.g. identification documents required under the HB verification regime).

By and large, housing associations appeared more likely than local authorities to issue Notices where HB claims remained outstanding for reasons other than those described above. In at least two case study HAs there was an explicit policy of using Notices to pressurise Housing Benefit Departments to prioritise specific cases (in breach of Housing Corporation advice (Housing Corporation, 2004)). It was, however, apparent that in some areas HB officers routinely advised HAs to initiate court action to trigger 'fast track' processing of cases. The rent arrears procedure manual of one case study HA explicitly advised officers to serve Notices on all tenants whose arrears exceeded a given threshold value, making clear that such action was to be taken irrespective of the tenant's HB status 'to protect the association's interest'. The extent to which the tenants affected were made aware that Notices issued to influence HB casework prioritisation did not represent any genuine intention to pursue legal action was not clear.”

The impact of housing benefit issues on the decisions of district judges is something which we have sought to explore in this study and is considered in Chapter 7.

Levels of arrears

Although the reasons for arrears have generally not changed over time, the level of arrears has. Most notably Pawson et al (2005) record that between 1997 and 2002 the value of rent arrears owed by current tenants of local authorities rose by 20 per cent from £335 million to £403 million, although the total fell back in 2003 to £349 million. By contrast, they note, the proportion of social sector tenants in arrears has generally been static or falling, implying that the average debt per debtor must have increased. Indeed their figures indicate that the average value of arrears per debtor rose from £249 in 1997 to £349 in 2003 – an increase of 42 per cent.

Responses of social landlords to arrears

Pawson et al (2005) report a number of responses by social landlords to the increasing level of arrears amongst tenants. While some responses, such as better assistance to tenants at commencement of the tenancy and the use of incentive schemes, do not affect the court process, some will do so indirectly and others directly. For example landlords report a greater use of forms of welfare benefits advice and debt counselling, which may both reduce the incidence of cases going to court and also impact on a judge's decision as to whether it is reasonable to grant possession.

In general most landlords had a threshold of arrears which triggered consideration (or issue) of NSPs. There was some evidence of a shortening of periods before which an NSP would be issued which may reduce the time (and potentially the level of arrears) at which cases come to court.

A very common response by social landlords has been a move to more specialist officers to deal with rent arrears. Of particular note in the context of this study is the increasing employment of specialist rent arrears "court officers". Pawson et al (2005, p. 24) note that the aim of creation of such posts is to facilitate the development of:

“(a) specialist knowledge of legal procedures, and (b) a rapport with county court judges with objective of enhancing the credibility of the landlord's evidence.”

In this study we have sought to examine the “relationship” between landlords and county court judges – see further Chapter 5.

Chapter 3: The pattern of cases

Introduction

In this section we describe the general pattern of cases and outcomes in court, drawing primarily on the data from the recorded cases. To provide some context to this we will compare the position with that in a study of county court cases decided in 1995 (Nixon et al, 1996). These comparisons must be approached with care, as in both cases only a small proportion of the total number of cases heard in England during the relevant time frame was sampled and the courts sampled in the two studies are not the same. In particular the majority of cases in the current study came from London, which may have particular effects, as levels of participation and arrears are higher there. Nonetheless we are of the view that they do indicate some relevant changes over time.

Levels of arrears

As indicated in Chapter 2 there is some evidence (Pawson et al, 2005) that landlords have been starting possession proceedings at an earlier stage, to ensure that arrears do not get out of hand before a case comes to court. The level of arrears and average debts amongst tenants is set out in Table 2.

The average level of rent amongst the recorded cases was higher than the national average, possibly because of the preponderance of cases in London, where rents are higher. It is noticeable that while both local authorities and housing associations issue proceedings where arrears are at a similar level (measured by weeks in arrears), for local authorities this had risen by the time cases came to court, while for housing associations the average level of arrears fell between summons and hearing.

There is some evidence that landlords have been getting their cases to court earlier, in that the average number of weeks in arrears at the date of the first hearing has come down from 16 in the 1996 study to 14 in this. It is noticeable that the reduction in this average has primarily been driven by housing associations bringing their cases to court earlier.

Table 2: Rent levels from ODPM statistics and current study, with average arrears at first hearings (n=540)

Type of landlord	English average weekly rent*	Study sample average weekly rent	Average arrears	Average no. of weeks in arrears at summons	Average no. of weeks in arrears at hearing	Range of arrears at hearing
Local authority	£50.96 (2003)	£57.05	£872.14	14.88	15.89	£0.00 - £10,020.43
Housing Association	£54.76 (2004)	£74.08	£993.77	14.48	12.57	£0.00 - £7,484.08
All landlords		£66.14	£947	14.67	14.14	£0.00 - £10,020.43

*Source: ODPM Housing Statistics Live Tables available at:

http://www.odpm.gov.uk/stellent/groups/odpm_control/documents/contentservertemplate/odpm_index_hcst?n=1537&l=1

The 1996 study found that the level of arrears varied considerably between courts at the time of the first hearing (Nixon, et al, 1996), ranging from an average of 5 – 18 weeks of arrears. There is less variation between the courts in the current study (see Table 3). As indicated below, the level of arrears is an influential factor in district judges' decisions, but a number of factors may be influencing the level of arrears at the hearing, not just the level of arrears at which the landlord decides to take action. These include the speed at which the court is able to list cases and whether the landlord is able to recover any payments from the tenants between summons and hearing date. As indicated in Table 2, it appears that housing associations were successful in reducing arrears between summons and hearing.

Table 3: Variations in the average levels of arrears at first hearings, by court

Court	£ average arrears	Average weeks outstanding at 1 st hearing
London	£1098	14
West Country	£857	12
Northern 1	£747	14
Northern 2	£680	13

Attendance

In this section we describe the levels of attendance generally, before turning to an analysis of the impact of attendance. The reasons for the impact of attendance by the tenant are further explored in Chapter 6. One of the striking features of the 1996 study (Nixon et al, 1996) and indeed an earlier study in 1986 (SAUS, 1986) was the failure of most tenants to attend court. A small number of the district judges interviewed for the current study felt that tenants were attending in greater numbers than had previously been the case, and felt that the courts in conjunction with the work of those staffing duty desks were encouraging more to attend.

Table 4: Tenants' participation in hearings

Forms of participation	DCA 2004	Nixon et al 1996	SAUS 1986
Tenant represented by solicitor/ duty desk	22%	6%	8%
Tenant attending in person, but unrepresented	20%	23%	34%*
Written submissions only	3%	10%	
No participation by the tenant	55%	62%	58%
Total	100%	100%	100%

*The SAUS study did not differentiate between participation in the form of unrepresented attendance or by written submission.

The court data indicates a considerable change. The most striking is in the number of tenants represented by a solicitor or duty desk. This can in part be explained by the fact that all but one of the courts in this study had some form of duty desk available on possession days, compared with only half the courts in the 1996 study. Nonetheless in order to use the duty desk it is necessary for tenants to attend court and the figures do indicate that there has been some success in improving participation, with the percentage of tenants failing to participate at all falling from 62% to 55%.

The written forms which are sent to tenants (N11R) have been redrafted on a number of occasions since first introduced. The percentage of those relying on these as their only form of participation has fallen from 10% to 3%. It may be that this is because of the greater level of attendance, so that those who previously were making only written representations are now also attending. A further 8% also used a written response in addition to attending.

Outcomes

The pattern of outcomes for first hearings shows an increased number of adjournments, generally in place of suspended possession orders. Given that the majority of cases recorded were in London, which had a higher rate of adjournments than the other courts, some care must be taken with this comparison. The increased use of adjournments is, however, also borne out by the outcomes in the cases assisted by the Legal Services Commission pilot duty desk schemes, where adjournments were obtained in 57% of cases (Myers Wilson, 2004).

Table 5: Changes in outcomes of initial hearings between 1996 and 2004 studies

Outcome	DCA 2004 (n=540)	Nixon et al 1996 (n=248)
Outright possession	13%	11%
Suspended possession	22%	61%
Adjourned	55%	23%
Dismissed/withdrawn/costs only	9%	10%

There are a number of factors which may be suggested to explain these changes.

First, since 1996 the number of cases where housing benefit is an issue is likely to have increased. Although it emerged as an issue in 1996 (see Nixon et al, p. 49), it did not do so nearly as strongly as in the current study. We examine the impact of housing benefit on decisions in Chapter 7, below.

Secondly, in the 1996 study a greater percentage of tenants who were represented by a solicitor or the duty desk obtained an adjournment. As the number represented in this study has increased significantly, because of the presence of duty desks in the courts, it is likely that the number of adjournments would also increase.

Thirdly, a number of the claims involving housing associations also included claims based on Ground 8. Where the requirements for Ground 8 are made out the judge cannot grant a suspended possession order, and his/her choices are between an adjournment or outright possession (see further Chapter 8, below). At the time of the Nixon et al study in 1996, far fewer housing associations were using Ground 8, and accordingly more suspended possession orders might be expected.

Finally and perhaps most significantly the adjournment has come to be used as a standard order for many judges in rent arrears cases (perhaps because of the factors outlined above). Many judges referred to using an adjournment on terms as a standard order, rather than a suspended possession order. For some this was a question of the level of arrears and it should be remembered that landlords are bringing cases to court with a lower average level of arrears (see above). If they are below a certain level some judges consider that it is not reasonable to make a possession order at all, and an adjournment on terms is appropriate. One stated clearly:

"I rarely make possession orders, suspended or otherwise for arrears below five hundred pounds." (DJ L)

As another put it:

“My starting point is, if I see the arrears are less than two hundred pounds, then I will probably say, ‘Well why is it reasonable that I should make an order at all? Why not adjourn it on terms?’” (DJ U)

The impact of the level of arrears on orders is considered further in Chapter 7.

Another reason for adjourning was where the tenant had made an agreement with the landlord and was keeping to it:

“You’ve reached an agreement, the tenant is paying – why should I penalise them by putting on a suspended order?” (DJ O)

This was clearly linked to an awareness of the greater legal risks associated with a suspended possession order than an adjournment (see the discussion of tolerated trespassers, above p. 8). As one judge pondered:

“There are so many disadvantages to a suspended order legally, that we ought to make more of these [adjournments on terms], but do they actually do the trick? Is it an effective method of paying the rent, in other words? I don’t know the answer to that question at all.” (DJ G)

This change in practice has also been reflected in the requests made by landlords and to some extent this must be seen as a reinforcing process. As judges appear more inclined to grant adjournments landlords are more likely to ask for them. This is explored further in Chapter 5.

The impact of attendance on outcomes

Representation was shown to assist tenants in obtaining more favourable outcomes in 1996. This pattern was also replicated in 2004, with those being represented by a solicitor or duty desk the least likely to subject to an outright possession order and the most likely to obtain an adjournment. This could not be explained by those being represented having lower level of arrears; indeed they had the highest average number of weeks in arrears at the date of the hearing.

Table 6: Impact of participation on outcomes

Outcomes	Representation by a solicitor/duty desk (n=109)	Defendant present (n=102)	Written representation only (n=16)	No one in court (n=274)
Outright possession	5%	3%	6%	20%
Suspended possession	17%	28%	13%	23%
Adjourned	75%	66%	75%	44%
Withdrawn/ dismissed/costs only	3%	4%	6%	14%
Average weeks in arrears at hearing	21.26	13.87	8.41	12.76
Range of arrears	£0.00 - £10020.43	£0.00 - £7104.67	£0.00 - £1077.96	£0.00 - £7484.08

Conclusions

The pattern of cases observed for this study shows some changes from 1996. Although it must be remembered the studies are not directly comparable because different courts were studied in each, they do indicate a number of changes. First there is some evidence that landlords, in particular housing associations, are bringing cases to court at an earlier stage. Secondly, the proportion of tenants participating in the court process has increased.

The pattern of outcomes for first hearings shows an increased number of adjournments, generally in place of suspended possession orders. While this seems likely to have occurred in large part to the increasing representation of tenants through duty desk schemes, the interviews with district judges suggests that the granting of adjournments in possession cases has in some areas become normalised as the standard order. As with previous studies, the advantages of attendance and representation in achieving better outcomes are illustrated by the data.

Chapter 4: Consistency and difference

Introduction

In this chapter we examine the issues of consistency both between courts, and also between judges sitting in the same court. “Consistency” is taken to mean that cases with broadly similar features (primarily level of arrears, financial and other circumstances of the tenant) result in broadly similar outcomes, wherever the case was heard, and regardless of which district judge heard it. We also examine consistency in terms of approach, and whether differences in approach between judges may result in different outcomes. This chapter makes use of the information from the focus groups to establish the perceptions on this issue of key stakeholders: landlords, advice organisations, and solicitors. The quantitative data in respect of recorded cases has been analysed together with observations of the courts and their hearings to examine whether consistency does in fact appear to be achieved. Qualitative data from the interviews with district judges is used to suggest reasons why different outcomes may result from apparently similar cases.

Perceptions of focus group participants

Each of the focus groups started with an opening discussion of the participants’ experiences at the different courts they attended in their locality. These discussions invariably revealed perceived differences, in outcome, approach, and process, between different courts and between different judges. The focus group participants, both claimant and defendant representatives, in all three geographical areas, were concerned at this lack of consistency.

Each of the focus groups was asked to consider which factors, in the opinion of the participants, most influenced judicial discretion. Both tenant representatives and participants who represented claimants were agreed that the following factors (without ascribing any priority) were those which most influenced discretion:

- housing benefit;
- the level of rent arrears;
- whether an agreement had been reached;
- attendance of the defendant;
- the nature of the tenant; and
- district judges’ familiarity with the claimant landlord’s representative.

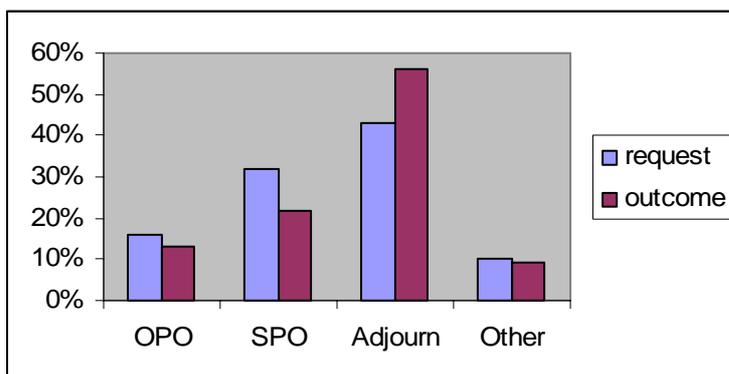
The focus group participants considered that particular courts each had their own established culture. This more clearly emerged in smaller court where fewer judges sat. It was also influenced by the factors set out above.

As a first step we sought to examine whether there were differences between the outcomes in the four courts which could be explained by differences between the cases coming to those courts or by the practices in those courts.

Differences between courts

The overall outcomes of cases at their first hearing have already been presented and discussed (see Table 6, p. 20, above). Here we examine them in relation to each individual court. Given the possible influence of the claimant on the outcome we wanted to see how far outcomes in cases reflected the requests made by landlords. Chart 1 below compares, for all cases observed in the four sample courts, the requests made by the claimant for a particular order (where recorded), and the outcomes of those requests at the first hearing. It shows that fewer possession orders, both outright (OPO) and suspended (SPO), were granted than requested, and more adjournments were granted than requested. (The 'other' category includes cases which were withdrawn, struck out, or dismissed, but the numbers in this category are too small for any meaningful distinctions to be made between these outcomes.)

Chart 1: Requests and outcomes in all four courts (n=540)



The following charts, 2-5 provide the same information for each court, enabling comparisons to be made between them.

Chart 2: Requests and outcomes in London court (n=363)

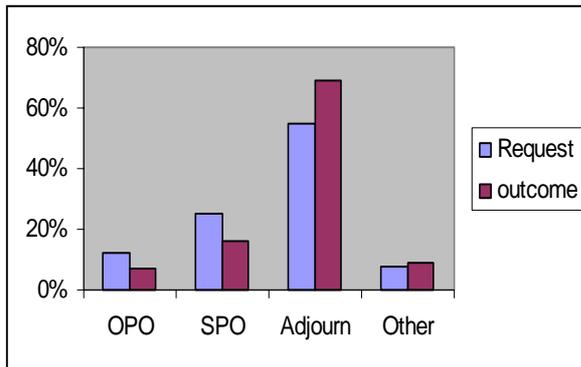


Chart 3: Requests and outcomes in West Country court (n=47)

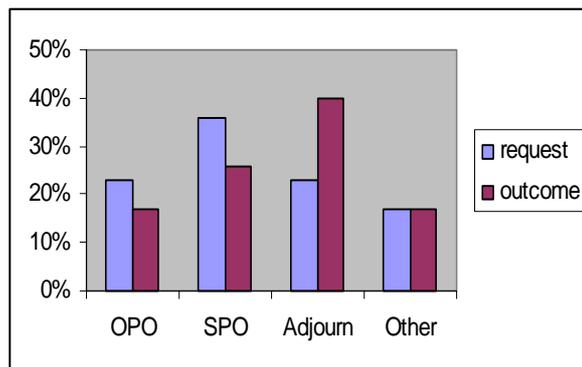


Chart 4: Requests and outcomes in Northern 1 court (n=61)

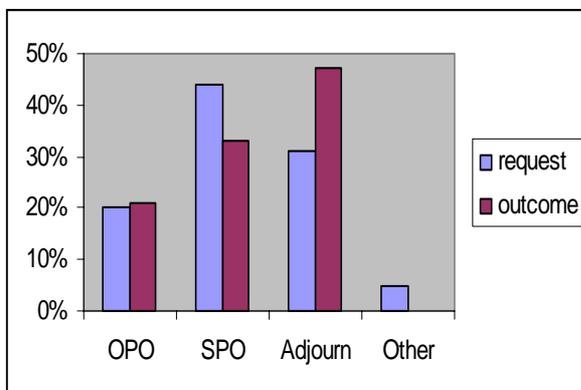
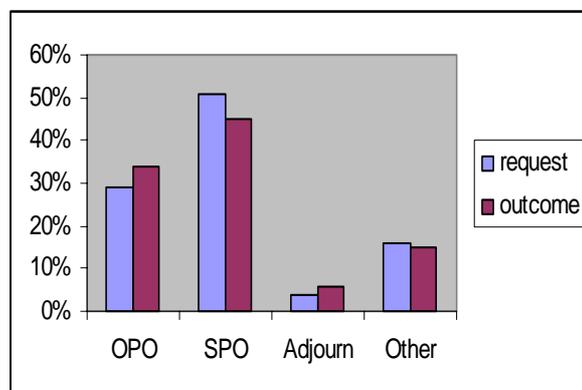


Chart 5: Requests and outcomes in Northern 2 court (n=69)



Although the numbers of recorded case outcomes are small, and care must therefore be taken in interpreting the data, there do appear to be differences between the courts in terms of response to requests made by the claimant landlords. Of the 162 initial hearings at which the landlord requested a suspended possession order (SPO), the proportion of requests resulting in an SPO across all four courts was 69%. However, there was some variation around this average, as the comparison of the above charts makes clear. For example, the proportion of SPOs granted to SPOs requested was lower in West Country and London courts (59% and 60% respectively), whereas in Northern 1 and Northern 2 it was higher than the average (70% and 88%). Where the landlord requested an outright order, the Northern 1 and Northern 2 courts always granted that order in our sample, whereas in West Country and London the proportions were lower (73% and 56% of requests granted, respectively).

We now consider a number of factors, including those raised by the focus group participants, that might be leading to these differences, in both general outcomes and between requests and outcomes. The information from recorded cases is used here to examine whether these factors can begin to account for any differences between the four courts. After initial

consideration in this chapter, the factors which appear to be particularly influential are examined in greater depth in subsequent chapters.

Level of arrears

It might be expected that the most obvious factor to affect outcome would be the level of arrears, and judicial attitudes to arrears are explored further in Chapter 7. However, Table 3, p. 16 has shown that the variations between courts in the average levels of arrears at first hearings is not significant, being 14 weeks in both London and Northern 1 courts (although the average level of arrears was higher in London due to higher rents), 13 weeks in Northern 2 court and 12 weeks in West Country court. While the average level of arrears does not appear to account for the differences in outcomes between the courts, the relevance of the level of arrears should not be discounted in relation to individual cases and may be a factor in differences between individual judges (see Chapter 7).

Housing benefit

The importance of housing benefit in possession cases was raised in Chapter 2, above. When researchers observed and recorded cases for this study, they noted those cases where housing benefit was mentioned as a particular issue. There was a marked difference between the number of recorded cases in the different courts in which housing benefit was noted as a problem, specifically between Northern 2 court (3 cases, or 5%) and the other courts. London court had 93 cases where housing benefit was noted as a problem (26% of the total); West Country court had 10 cases in this category (21%); and Northern 1 court 15 cases (26%). The very low proportion of 'housing benefit problem' cases in Northern 2 court may be a factor in the low number of adjournments in that court as compared to the other three. The impact of housing benefit on outcomes is discussed in more depth in chapter 7.

Attendance by tenant

We have already seen (Chapter 3) that attendance and in particular participation by the defendant tenant may have an impact on outcomes. Levels of attendance did vary between the courts in our sample. In particular, participation was highest in London court, with only 52% of tenants not participating in any form, contrasting with the other courts where non-participation rates were all 60% or more, the highest being West Country court at 64%. Defendants were most likely to be represented in Northern 1 court where 29% of tenants had some form of representation, and in London where this applied to 26% of tenants. Representation and attendance was very low in Northern 2 court.

The quantitative data from the four courts does seem to bear out the importance of tenant participation in possession hearings. In London court, with the highest participation rate, there was a higher proportion of requests for adjournments, and of adjournments as the outcome of initial hearings. Northern 2 court, with the lowest proportion of representation, had both the lowest proportion of adjournments requested and granted, and the highest proportion of possession orders (outright and suspended) requested and granted in all the four courts. The impact of housing benefit, as stated above, should also be taken into account here. The reasons why 'the physical reality' of the tenant's presence might be so important are discussed further in Chapter 6, below.

Type of landlord

Local authorities tend to be repeat players (for the effect of this, see Galanter (1974) and further discussion in Chapter 5), with their representatives attending the same court week after week, while a housing association might have very few cases in any particular court over the course of a year. This could have an effect both on the expertise of the landlord's representative, and also on the trust placed in them by the district judge. This is illustrated by the following comment:

"Others are more amateur, and sort of obviously perhaps don't come to court as much or, to give them the benefit of the doubt, they perhaps go to quite a number of different courts and get different expectations, so they're a bit confused about what anyone might want. I mean it's obviously an advantage for people in that situation to be coming to the same court all the time. They really do get used to what we want." (DJ F)

The most striking example of a close relationship with a repeat player was at Northern 2 court, where an established practice had been developed with the local authority landlord (it was noticeable that this practice did not apply to other social landlords bringing cases to this court). In Northern 2 the tenant and the local authority (the largest social landlord in the jurisdiction) will agree the outcome of the case by meeting in the court building before the case is called in to the judge's chambers:

"The arrangement here is that the housing officers sees the tenants outside first [...] and will reach an arrangement with them. [...] on a standard local authority, local authority rent possession list, it would be exceptional to see a tenant." (DJ Y)

This convention adopted for dealing with claims by the major social landlord was described in very positive terms:

"The reason we can get through a very heavy list is that they go and talk to everyone who's here and I would have said in 80% or 90% of cases they'll come in saying, 'we've talked to so-and-so and she's agreed to pay this, and we're happy to have a suspended order on that basis.' So there are very few really, where you end up with the tenant coming in." (DJ F)

Neither of the judges seemed to consider that tenants might suffer from lack of representation (there is no duty desk scheme at Northern 2 court), or from being excluded from hearings:

“I find our local authority, [name], very good, and the representatives are very good. And I trust them. So obviously that affects the way I deal with it. And they also are quite good really at putting the tenant’s position when, if the tenant comes and they talk to them, they’ll explain what the tenant has said.” (DJ F)

In this court, the relationship with the local authority claimant is longstanding and based on frequent contact with the same representatives. The reliance on agreements reached between the parties was very significant in this court, which exemplified views expressed in the focus groups that ‘district judges love them’. Because tenants were not usually present at the hearings, there was no opportunity for the district judges to open the agreements to ascertain whether they were reasonable. The district judges were aware that the established practice could be seen as one-sided, but offered reassurance that

“I’ve never had a tenant sort of in any way communicate that they felt they’d been stitched up, as it were, or anything. So, so we’re happy really.” (DJ F)

One of the Northern 2 court judges sits occasionally in a different county court where tenants who attend court always come in to the hearings, but nonetheless felt that at Northern 2 the district judges had

“come to an arrangement that we can trust...they’re extremely reasonable, whoever it is in the council. We have quite a good rapport with them.” (DJ Y)

This rapport has produced the smallest differences between orders requested, and orders granted, for any of the courts where cases were observed (see Chart 5, above). However, it would be wrong to conclude that this means that the judges at Northern 2 court are just prepared to agree to whatever the claimant local authority asks for. It may be that this claimant has learned to ask for what the judge will be prepared to grant, in the circumstances of each individual case. This consistency of requests and outcomes may well be the result of trust built up over time, in a small court with one main repeat player claimant, but it may equally reflect the fact that this claimant is efficient and provides reliable information to the court (see Chapter 5 for further discussion of the ‘repeat player’ impact on outcomes). The practices and pattern of outcomes at Northern 2 court are probably also affected by the fact that most tenants in the area are unable to obtain housing advice before their case is heard, there is no duty desk scheme at court, and the use of the money adviser varies between the district judges (see further below).

A further consequence of different landlord types is that there might be more outright possession orders in areas where housing associations own more properties, because Ground 8 (the mandatory ground for possession, see p. 9, above) is available only to housing associations. In London court, 1.4% of cases were based solely on Ground 8. In West Country court, 4% of the claims heard were based solely on Ground 8. In the cases recorded at Northern 1 court there were no Ground 8 cases, while at Northern 2 court, 3% of cases were based solely on Ground 8. In fact, Charts 2-5, above show that London court had the fewest outright possession orders, while Northern 2 court had the most, so the difference in Ground 8 claims does not appear to directly lead to increased outright possession order. The reasons for this are explored in Chapter 8.

Court cultures

As noted above, the focus group participants considered that particular courts each had their own established culture. Physical details such as the age of the court building and its layout were said to make a difference. It is difficult to see how this might impact on case outcomes, although focus group participants described some courts as being arranged in a way that facilitated meetings between tenants and representatives. The focus groups held in the West Country considered the rural/urban divide to be important; one district judge could 'rule' a small court serving a rural area. The throughput of cases could also affect the court culture, and the focus group participants contrasted the very busy London and metropolitan courts with the slower pace of more rural courts dealing with a smaller number of cases. Courts also differed in their administrative efficiency, according to focus group participants, with claimant representatives feeling that some courts lacked a 'service culture'.

The following sections provide more detail about the four courts where cases were observed and recorded, offering some explanation of the differences between them and drawing out aspects of their respective cultures.

Physical aspects. The four courts offered a contrast in architectural styles. London court is in an old building and at various times during the day can get overcrowded and noisy, with long queues forming at the ushers' desk, although there are conference rooms on the first floor for private discussions. West Country court has recently been refurbished, and a comfortable waiting room is provided, as well as private conference rooms. Northern 1 county court is contained within a large modern Combined Court, and the focus group participants felt this could make it a more intimidating experience for tenants who have to walk through the Crown Court waiting area, past police and robed barristers, as if they were facing criminal proceedings. The layout of this large building also means that the judges'

chambers, where the possession lists are heard, are not easy to find although, once there, the waiting room is modern and comfortable. Northern 2 court is another older building with a busy public area, although there are plenty of conference rooms for private discussions. The judges' chambers are large but not overly formal. One of the district judges here had in fact made a deliberate effort to:

“make it sort of look more like a sort of living room than a, than a court room...make it a friendly environment.” (DJ Y)

Duty desk schemes. The Duty Desk in London court is well signposted, but consists of a small table, a couple of chairs and a bookcase in a public space and, therefore, others who are close by can hear the advice given by duty solicitors to tenants. This Duty Desk Scheme has been in operation for some years and appears to be well supported by the judges. For example, at a number of hearings we observed in this court the judge made a point of asking unrepresented tenants whether they had had an opportunity of seeking legal advice and, if not, whether they preferred the case to be put back in order to speak to a duty advisor. This invariably happened in those cases where the claimant was seeking either an outright or suspended order of possession.

When tenants arrived at West Country court, the clerk would ask whether they would like to see the duty solicitor/advice worker, who was allocated a separate room. Posters were also on display in the waiting room advertising the services of the free duty solicitor/advice worker for defendants facing possession proceedings. At Northern 1 court the ushers would put unrepresented tenants in touch with the duty desk solicitors who were also present in the waiting area outside the court room ready to offer advice in one of the private conference rooms adjacent to the court.

As explained earlier, there is no duty desk scheme at Northern 2 court, although the local Citizens Advice Bureau runs a money advice desk on housing possession days. Indeed, it is an area where there are no franchised housing law legal aid services at all (Citizens Advice, 2004). It must therefore be assumed that most tenants who do arrive at court do so unrepresented. There did not appear to be a system for the ushers to refer defendants to the money advice desk on arrival at court, nor any signs directing court attendees to the money advice scheme. One of the district judges, who had been instrumental in setting up the service, found that the advice the adviser provided was very useful in sorting out housing benefit problems, and would tell the tenant mid-hearing:

“Look I’m going to just stand this down for a few minutes. I need you to go and see Mrs [name] from the CAB...” (DJ Y)

In this way the money advice scheme was incorporated into the court process, serving the needs of the court as well as assisting the tenant. However, the other district judge who regularly sat at Northern 2 court seemed quite uninformed about this service provided on possession days:

“I’m not aware that anybody sits out there, and certainly nobody sort of comes in as a routine.” (DJ F)

Procedural matters. Focus group participants felt that the number of cases dealt with in each housing possession case could have an effect on outcomes. In this respect our four courts represented a range. In London court one day per week is dedicated to hear public housing possession cases. Northern 1 court has one day of local authority possession cases, and another day of private landlord and housing association cases, each week; each list may have up to 70 cases. Northern 2 court has one possession list of about 30 cases, encompassing both rent (all types of landlord) and mortgage cases, which is heard on one morning each week. In West Country court possession hearings brought by all types of landlord are scheduled once every two weeks for a two-hour morning session, during which the judge hears about 20 cases.

In some of the courts where the interviewee judges sat, up to 30 possession cases were listed each hour. In others, the more rural courts, there were far fewer. London court was extremely busy, and West Country court fairly leisurely in comparison, with the two Northern courts somewhere in between. One judge reflected on the effect of these differences:

“If there’s ten in the two hour slot I can give them proper and due consideration. If there’s sixty in the two-hour slot I’m going at it like hammer and tongs to get rid of them. So listing does impact.” (DJ D)

Pressures of large lists were a fact of life for London judges. One merely commented that it “concentrates the mind” (DJ O), while another reflected that:

“Some of us have a greater tendency to be held up than others; deputies regularly.” (DJ B)

A less pressured list probably makes the experience more comfortable for all parties, including the judge, but it is hard to establish whether it has any discernible effect on the outcome of cases. Given the higher levels of adjournments in London court, it might be suggested that the greater pressure on cases may be a factor as most judges “haven’t got the time to pick through the documents and so on” (DJ C), so that they would more readily adjourn if a problem became apparent.

Most of the district judges felt that they were ruled by the court administrators on the question of listing. Although in some courts there was evidence of discussions between judges and the court manager leading to changes in listing practices, one judge was clear that there was limited room for manoeuvre:

“Each court manager has to put in a return as to how efficient they have been...in complying with this listing requirement, so there’s no mercy. And it’s just a question of resources, quite honestly.” (DJ I)

In the interviews, judges were asked about the impact of the changes in the Civil Procedure Rules, and whether this had any effect on the outcomes of possession cases. One district judge summarised the current procedure as *“all very much a matter of the case being judged” (DJ B)*. However, these changes seemed to be less significant than the changes in landlord practice which have led to most claimants not being legally represented. When neither party is legally represented, it becomes more important for the judge to pick up any points of law and to ensure that all the requirements for possession have been met.

Standardised recording forms. It might be thought that pro forma records could provide an aid to consistency; however, we found that these forms were not standard for every county court. All the courts we visited had their own ‘tick box’ form used by district judges to record evidence and details of the hearing and the order made, in each case. In London and Northern 1, these pro formas were identical. When completed, they provide a useful record of the hearing: which parties attended; whether they were represented and by whom; any order made, and on what grounds. The forms also acted as a prompt to the district judge to obtain salient facts such as the date of the tenancy agreement, the date notice was served, the amount of the arrears, and the rent level, both gross and net (of housing benefit) before the making of the order. In West Country court a variant was used, possibly an earlier version of the one already described. It included fewer details for a suspended possession order, no details of possession orders made on mandatory grounds, and fewer facts: just the weekly rent and the amount of the arrears.

The pro forma used in Northern 2 is very different from those used in the other three courts. As well as providing for a record of the parties and their representatives, the form allows the district judge to tick the sentence: “Defendant has been at court and agreed to order”. This of course records information given to the court by the claimant, rather than any evidence given by the defendant, implying that although the tenant had attended the court building, s/he had left before the actual hearing following a meeting with the claimant landlord. There is no tick box on the Northern 2 court pro forma for recording details of the tenancy agreement or notice served, although there is space to note current rent and whether this is

rebated. The options in terms of possession orders are restricted to 28 days, or suspended on payment of arrears; no information is elicited on whether the order was made on mandatory or discretionary grounds. Further, the alternatives of “claim dismissed” or “claim struck out” do not appear; the only possibility noted on the form is “claim withdrawn.” The form used in Northern 2 court clearly reflects local practice, but it may also have an effect in consolidating that practice. This court had the best ‘match’ between request and outcome, the highest number of outright possession orders, and the lowest number of adjournments recorded in all of the four courts.

Individual judges, consistency and difference

Having explored the differences between courts, we now turn to the differences between individual judges. This was a matter of concern for the focus group participants, with both claimant and defendant representatives asserting that there was a lack of consistency between the outcomes of similar cases in the same court. Inconsistency was said to arise especially regarding the threshold of arrears over which different judges would make an order. Consistency was considered to be a desirable characteristic by all focus group participants, provided the judge took into account the facts of each case.

In each of the six focus groups held, there was a remarkable degree of agreement between participants about the characteristics which, from their perspective, made for an ‘ideal’ and consistent judge. Defendant representatives considered that fairness, understanding, and accuracy were important. ‘Accuracy’ required judges to be well-informed about the law as well as about local issues (particularly as regards housing benefit administration). ‘Fairness’ was generally regarded as:

- lacking bias or prejudices;
- listening to arguments;
- reading the papers thoroughly;
- questioning the claimant critically;
- having no preconceptions.

These characteristics were linked to ‘understanding’ that:

- the tenant might lose their home as a result of proceedings;
- tenants might have multiple problems, for example with debt or vulnerabilities;
- and
- judges therefore should try to put tenants at ease and explain what is going on in the proceedings.

The views of the claimants' groups were, in fact, not dissimilar to the views of the defendants' groups. In particular, claimants were just as keen as defendants on judges explaining the process and outcome to defendants. Some claimant representatives expressed the view that certain district judges appeared not to understand their ways of working: 'the aggravation of going through eviction is immense and judges don't understand this'. There was a perception that those district judges with a family law background were prone to be over-sympathetic to tenants with children. Other less than ideal judicial characteristics were said to be paying too much attention to 'sob stories' and inaccurate claims by defendants about housing benefit. There were fewer assertions that district judges were 'pro-claimant', although one focus group of duty desk advisers said that a particular district judge automatically made outright orders if the tenant did not attend, even if the claimant requested a suspended possession order.

All focus group participants considered that knowledge of housing law by district judges was important. When asked to consider a continuum of judicial approaches, from rule-bound to discretion-led, all participants were able to identify examples of judges at either end of this continuum. However, a rule-bound judge might be respected for their knowledge of the law, and a discretion-led judge because of their willingness to listen to all the facts of the case. Nevertheless, particular concern was expressed about certain deputy district judges who were felt to place over-reliance on rules to the exclusion of other concerns such as housing benefit.

The individual manner of some district judges had a large impact on the focus group participants. For example, representatives of both claimants and defendants dreaded having to appear before judges who were characterised as being 'moody' or 'snappy', while lay representatives could feel intimidated by a judge who was seen as unnecessarily legalistic. This might affect the quality of their representation and ultimately the outcome of the case.

Another view which emerged from the focus groups, not necessarily shared by the majority of participants, was that the length of experience of a judge may make a difference. In particular, older judges were perceived as not using their powers of case management under the Civil Procedure Rules effectively, while deputy district judges were more willing to explore the extent of their powers, for example to consider granting adjournments.

In this section we consider how far these concerns are borne out by our data. In Northern 1 court we were able to observe the different styles of two district judges, while in London

court we observed sufficient cases distributed between eight judges for some data analysis to be undertaken on the outcomes in this one court.

Qualitative observation in Northern 1 court

The first judge observed appeared keen to put tenants who had attended at ease, for example in one case making a friendly remark about the football shirt a defendant was wearing, while in another telling a defendant not to look so worried. The judge was also happy for defendants' children to be present during the hearing. The judge took a considerable amount of time to make each order, carefully considering the details of each case, particularly those where a possession order had been requested and seeming very reluctant to grant possession orders unless there was an indisputable case, instead preferring to adjourn. Adjournments would often be made on the evidence of at least some rent payment by the tenant in recent months, even if those payments had been sporadic. The judge saw this as an indication that the tenant "was trying". In some cases the judge also took into account the defendant's family circumstances. If the defendant was present the reasons for making an order and its terms would be explained. While underlining the seriousness of the issue, the judge also made clear that the defendant would be in no danger of losing their home if they adhered to the terms of the order made.

The second judge observed in Northern 1 court was a deputy, with less experience of both possession hearings and of this particular court. This judge made orders on the basis of less information than the first, only asking for further details if an outright possession order was requested, or in some instances when the defendant was present at the hearing. This judge seemed more willing simply to accept the request of the claimant's representative without question and processed cases very quickly. The deputy judge's manner was also less affable than that of the first judge observed; on one occasion a defendant was interrupted and an outright order made after hearing very few details about their circumstances.

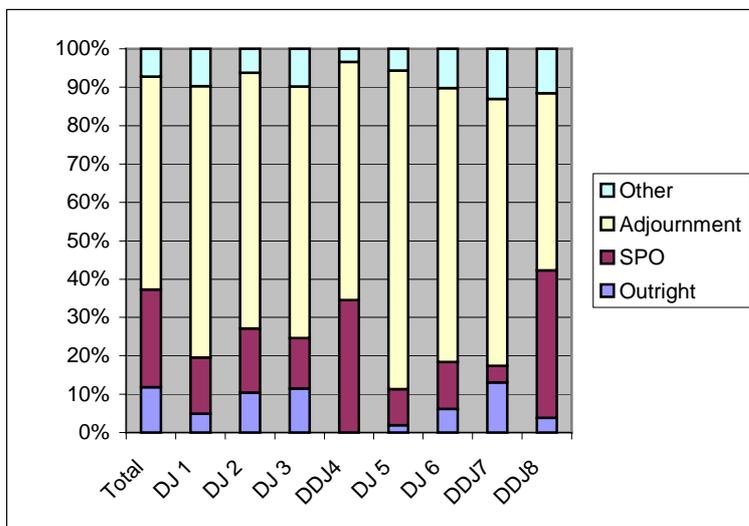
Thus Northern 1 court provided an opportunity to observe a contrast in judicial styles. Although no more than anecdotal, the observation sessions and the cases recorded tend to support the view that judicial approach affects outcomes, with the first judge adjourning more cases and the second making more possession orders as requested by the claimant, which in both sessions observed was the local authority.

Qualitative and quantitative data from London court

Chart 6 below shows the way in which the outcomes of the cases (already presented in Chart 2 above) were distributed by district judge (who have been given numbers for this purpose). These demonstrate some variation, although the number of actual cases heard by some judges are small and the chart should, therefore, be viewed with some caution. For example, in the sample of cases observed, deputy district judge (DDJ) 4 granted no outright possession orders in the sample of 29 cases observed, and DDJ 7 made a possession order in four cases out of a sample of 23 cases observed.

There were also variations on granting adjournments which, in some cases, are marked: DDJ 7 granted an adjournment in 16 cases out of 23 cases observed (70%); whereas DDJ 8 granted adjournments in eight cases out of a total of 26 cases observed (31%); on the other hand, district judge (DJ) 5 granted 44 adjournments out of 53 cases observed (83%); DJ 1 granted 29 adjournments out of a sample of 41 cases observed (74%); and DJ 6 granted 35 adjournments out of 49 cases observed (71%).

Chart 6: Orders Granted by London DJs



It is also striking how the different district judges responded to requests made by landlords. For example, DDJ 4 and DDJ7 both always granted the order requested by the claimant. The distribution for the other judges is more varied where an outright order or a suspended order was requested. For example, DJ 1 granted a suspended possession order in six cases out of the 15 requested (40%) and DJ 2 in seven out of the 12 requested (58%). It was suggested in the focus groups that there was a tendency for deputy district judges to be harder on defendants, which is not totally borne out by this limited sample.

These quantitative findings reflect the qualitative experience of observation. The researchers remarked on the difference made by the district judge to the atmosphere and proceedings in the court room. This too was the experience of focus group participants. For example, one district judge at London court was regarded as being “quite aggressive towards landlords”. If there was any problem with the paperwork, (e.g. where the claimant had forgotten to delete one of the options on the court forms, or was unsure who had served the notice), this judge would simply refuse to hear the case and ask the claimant how they wanted to progress. In particular, this judge was concerned to ensure that the claimants had done everything they could to contact the defendants.

Qualitative interviews were conducted with three of the district judges and one deputy district judge observed in this court. These also demonstrated that differences existed in the practice between the judges. There were clear differences between them on questions of procedure and substance. For example, three interviewees preferred oral evidence, whereas one preferred it in writing. One district judge made clear that he had a sliding scale of the evidence required depending on the order requested, whereas the others varied on whether they consciously had a mental checklist of the evidence they required to see. In addition the degree of attention given to the defendant’s behaviour was different. When asked whether the defendant’s behaviour in court affected the outcome, a range of responses was given from these interviewees:

“I do very much try to take into account that people do get nervous, that it is a huge issue for them, it’s their home and they can’t be...there isn’t much that’s more...worrying than losing your home. And to try and understand and remember that some people...become aggressive, some people become quiet, some people laugh when they’re under stress, and I try to factor that in.” (DJ E)

“I think with the demeanour and attitude of the tenant and what they say and the impression you form of them does actually have quite a bearing, yes. I can’t pretend otherwise.” (DJ J)

As regards the substance, it was noticeable that, although there was conformity in their answers to a number of the scenarios included in the interview, some did elicit different responses. For example, in answering the variant to question 1 (see Appendix 2) where the tenant’s arrears were £495, two interviewees would have granted an outright order, and two would have granted a suspended possession order:

“As long as I’m satisfied that they’d done everything they can and that by adjourning it there’s nothing else they can do.” (DJ E)

“I would probably still make an outright order, but bearing in mind that presumably this is a case where there is still going to be discretion to suspend the warrant, so that’s sort of a fall-back. You can make an outright order, hoping that if he has got

anything to say, and wants to stay there, he will sort himself out and either reply to suspend the possession order or apply to suspend the warrant, or get in contact with the local authority.” (DJ Q)

As regards Scenario 4 (housing association claiming possession under Ground 8 and tenant alleges that problems with housing benefit have caused the arrears), two interviewees said they would always try or seek to adjourn Ground 8 cases, whereas the others felt they had no discretion to do other than grant an outright order. One judge who would adjourn this case said:

“I think we’d all try to adjourn it...if there is a reasonable prospect that there’s going to be some backdated housing benefit. Assuming the application’s made right at the beginning, before you’ve heard any evidence, I think we would try to ask penetrating questions to have evidence that the claim for backdating has been made, that there’s a reasonable prospect of it being granted.” (DJ Q)

Even so, the district judges noted in their interviews that they made conscious efforts to obtain consistency in decision-making. Although there was no formal procedure for discussing cases, the interviewees said that they did discuss general issues around housing or a specific issue (such as rights of audience):

“We don’t sit and decide how we’re going to decide different sorts of cases, I don’t mean that. But we do discuss cases, and...we discuss the law, and so that I do think that we sort of sound each other out in a fairly informal way really, as to our general approach about a particular point or a legal point, but I don’t think any more than that really.” (DJ E)

It was the case, for example, that the three district judges in this court clearly agreed on the quality of housing officers who appeared before them, regarding the local authority officers highly and others less so. In particular, one housing association had been marked out because it requested orders under Ground 8.

Factors potentially leading to differences between district judges

As the above discussion and data indicate we found both perception of and actual differences between courts and individual judges. In this section we draw on the qualitative interviews with district judges to explore further the possible reasons for this. In the interviews we asked the district judges about their legal practice background, the training which they had received, and how they kept up to date with the law. The interview questions also covered consistency and professional relationships with colleagues.

Experience before and after appointment. The 26 district judges interviewed represented both a geographical spread and a variety of experience. Half of them had been sitting as a district judge, or deputy, for more than 15 years in total, and seven for less than 10 years.

They spent varying amounts of time on housing possession cases. Eleven of them had some experience of such work before being appointed, although this might be very little, or a very long time ago. Six had experience of family law in practice, and three of criminal work, prior to their appointment. One district judge had previously been director of legal services for a local authority. Nine said they had had no relevant experience prior to appointment. No pattern was, however, discernible in terms of general approach or suggested outcomes to the scenarios put in the interviews, connected with the judges' prior experience. The judges who were of longest standing tended to be more confident in their approach, but could not be grouped together in a similar way; for example as either pro-claimant or pro-defendant, or either rigidly legalistic or with a social welfare approach.

Training and updating. Some of the district judges we interviewed had been appointed before the standard provision of induction training for new deputies was instituted by the Judicial Studies Board. This is now in place, and aims to equip new district judges with the necessary knowledge for determining housing possession cases.

In addition the Board provides triennial continuation training, seminars on particular topics for district judges, and an annual district judge seminar. The Judicial Studies Board (2004) states that:

“The aim of encouraging a consistent and coherent approach to civil litigation at every level of judge has only to be stated to appear desirable. The experience of participants always helps the JSB to assess whether it is moving in the right direction. Attendance at seminars is often difficult for practitioners, but they are not optional. The Lord Chancellor expects all part-time and full-time judges to attend.”

One of the district judges interviewed had previously been a member of the JSB civil committee, and another was currently a tutor for the training courses run by the JSB.

Other sources of information for district judges include the Civil Bench Book which is available online and includes a section on “Possession Claims – Practical Tips”, summarising the relevant law and procedure for housing possession cases (Judicial Studies Board, 2004). District judges have also been provided with a CD-ROM which covers the law on housing possession cases, and are able to access Felix, the discussion website hosted by the JSB. There are, in addition, other materials which district judges may use to keep up to date. The range of sources used, and the frequency of use, is summarised in Table 7.

Table 7: Sources of training and updating mentioned by district judges interviewed

Type of training/updating	Number of judges using this source (n= 26)
JSB Triennial refresher training	24
Law reports, journals and other websites	13
Felix	11
CD-ROM on housing possession cases	11
JSB website and Civil Bench Book	6
Other JSB seminars (e.g. on ASBOs and demoted tenancies)	6

The views of the district judges we interviewed about these different sources of training and updating varied considerably. Generally speaking, the longer a judge had been sitting, the less likely they were to make use of web-based material and the less enthusiasm they showed for refresher training. Some experienced district judges may feel that further training is unnecessary; for example:

“I receive the training that is administered to me. I go in for a de-coke regularly.”
(DJ B)

However, most of the district judges interviewed felt that the training provided was useful, if limited:

“The job lacks training overall, quite frankly. It’s, in my view, the training that we receive is very often euphemistic. You know, you can get a day...for something completely new.” (DJ G)

There was also a range of opinions about the difficulty involved in this area of law. One district judge described it as “a technical area” and was concerned that some judges might not “understand about notices and things, and actually make the wrong decisions, possibly” (DJ H). At the other end of this range of views, two other district judges felt that: “It’s easy to keep yourself up to date. It’s not an obscure area at all.” (DJ L); and that: “I can’t imagine housing possessions produce any problems at all” (DJ T).

Although there were considerable variations in attitudes to training and updating, it was not possible to see that these views affected in any way the pattern of different outcomes suggested by district judges to the scenarios that were put to them in the interviews.

Judges’ views on consistency and difference

Most of the judges interviewed considered that consistency – both within one court and across courts – was important. However, their views varied as to whether it was achievable, or had already been achieved, one view being that: “It’s never occurred to me there could be any inconsistency in possession proceedings” (DJ T). Most of the district judges interviewed

were aware of colleagues' approaches in the same court, as is evident from the section on London court, above. The same was true of other courts:

"We have frequent chats. We all know the difficulties, you know...I think we would all be adopting the same sort of approach when it comes to reasonableness and things of that nature, and suspensions of warrants and so on and so forth." (DJ W)

"Usually the possession stuff, it's pretty run of the mill and routine, and if something unusual comes along, like if there's a new advocate or something for one of the housing associations, who's perhaps been a bit heavy or something like that, when it might come up in conversation. ...I think we probably are fairly consistent." (DJ V)

Most of the district judges interviewed considered discussions with colleagues very valuable in developing consistency, whether in the same court or at training courses:

"It's fair to say most of it you pick it up off each other." (DJ J)

"In a three day residential training session, there will always be an hour or two on housing... And also of course, these courses are very useful to talk to other people informally and you share what you're doing." (DJ F)

If colleagues at the same court took a different approach, the interviewees seemed very aware; for example:

"[Name of colleague] takes a more legalistic view...a very extreme view I would say, it's the other end of the spectrum. ...he's been here for fifteen years so it's 'his' court." (DJ A)

A few of the judges we interviewed sat regularly in more than one court in the same area. This practice proved a great aid to consistency as it enabled these judges to see what had become familiar from a different viewpoint. One district judge who had the benefit of sitting at another court hearing possession cases one day a month, felt that it:

"helps, just seeing sort of how different people approach cases...a bit of experience of dealing with things in a different way." (DJ Z)

Conclusion

The participants in the focus groups were able to point to examples of different approaches and outcomes between judges in their local courts.

The focus groups expressed concern that similar cases led to different outcomes in different courts. The quantitative data from this study indicates that there are, indeed, variations between the four courts in this sample, both in terms of outcomes granted in similar cases and the likelihood that claimants will obtain the orders which they seek. Various possible explanations for this have been explored: differences between courts in levels of arrears; the familiarity which claimants have with their local district judge, leading to a tailoring of orders

sought with what they know the judge is likely to grant; the availability of housing advice locally and a duty desk scheme at court; and housing benefit problems.

Particular court cultures have emerged from an examination of the quantitative and qualitative data. The four courts in our sample represent differences in terms of the building's age and architectural style; presence or absence of duty desk schemes; relationship with particular landlords; prevalence of housing benefit problems; and throughput of cases. It would be unsafe to suggest causal connections between particular factors and outcomes in the different courts on the basis of this small sample of cases, but the following are noteworthy:

- A combination of high levels of attendance by tenants, duty desk scheme, and pressure from high numbers of cases in the list, may lead to an above-average number of adjournments (London court).
- A combination of spacious refurbished building, duty desk scheme, and a low number of cases per session, may facilitate agreements and consequent low proportion of adjournment requests being granted (West Country court)
- A combination of no duty desk scheme, low number of cases where housing benefit problems are raised, and a practice of accepting agreements reached outside the court and presented only by a 'repeat player' landlord rather than both parties, may lead to an above-average number of orders granted and a low proportion of adjournments (Northern 2 court).

The interviews with district judges explored various factors which could have an effect on consistency; for example, length of experience; type of legal practice before appointment; attitudes to training and updating. Although there were considerable variations between judges relating to these factors, there was no discernible relation between the judges' experience and attitudes and their outcomes they suggested to the scenarios discussed in the interviews.

Most of the judges who were interviewed considered that consistency – both within one court, and across courts – was important. However, they differed on whether they saw housing possession cases as involving complex decision-making, and whether the initial or updating training provided to them was useful or indeed adequate. Most of the district judges interviewed were aware of colleagues' views and saw discussion with colleagues as a useful aid to knowledge and to consistency. The practice of sitting in more than one court was also potentially an aid to consistency of procedure, approach and outcome. Similarly,

the introduction of standard pro-forma records across all courts could assist in achieving greater consistency, by prompting all judges to draw out evidence on the same key issues in possession cases and to consider the same range of outcomes.

Chapter 5: Judges and landlords

Introduction

In this chapter, we consider how the relationship between the district judges and claimant landlords impacted, if at all, on decision-making in individual cases. It might be posited that the social reality of decision-making 'on the ground' would mean that the relationship between judges and claimants would impact on the outcome. The 'repeat player' nature of the claimants (see Galanter, 1974), their position within both tenure relationships and society, as well as the length of time allocated in some courts per case, all suggest that outcomes might be affected by this relationship.

The fact that a degree of trust and confidence developed between judges and landlords was noted in the study by Nixon et al (1996). This particularly affected the confidence which judges placed on the information which the landlord gave them. In the current study, claimant representatives in the focus groups felt that their familiarity with the district judge could help sometimes, in that cases were easier to present when they knew the particular judge's approach, and a "good judge will remember reasonable or good organisations". In the defendant focus groups there was some doubt about the impact of the relationship between judge and claimant's representatives. First, it was said that this could influence the outcome, for example, where the judge was aware that the claimant habitually overstated their case. Second, the closeness of the relationship could unsettle the defendant: *"Actually, its importance is not about the influence but about the impact it has on the proceedings, how they are perceived"*.

We asked the district judges in our interview sample about their relationship with the landlords who appeared in front of them, and, in particular, whether requests made by the claimants impacted on their decision-making process. Some judges in our sample asserted their neutrality in response to this question: *"it's a judicial relationship" (DJ B); "I mean, all our training, and not just as a judge but as lawyers, you know, teaches us that you keep the acquaintanceship apart from the argument" (DJ L)*. Some judges spoke of the need to resist 'cosy' relationships whilst, nevertheless, having *"a good relationship with them because they're in here all the time" (DJ O)*.

We discuss how and why trust arises in the relationship between judges and claimants in the second section below. However, before we discuss this, we consider whether our

observation data generally supports the conclusion that this relationship affects the outcome of cases.

Trust and Outcomes

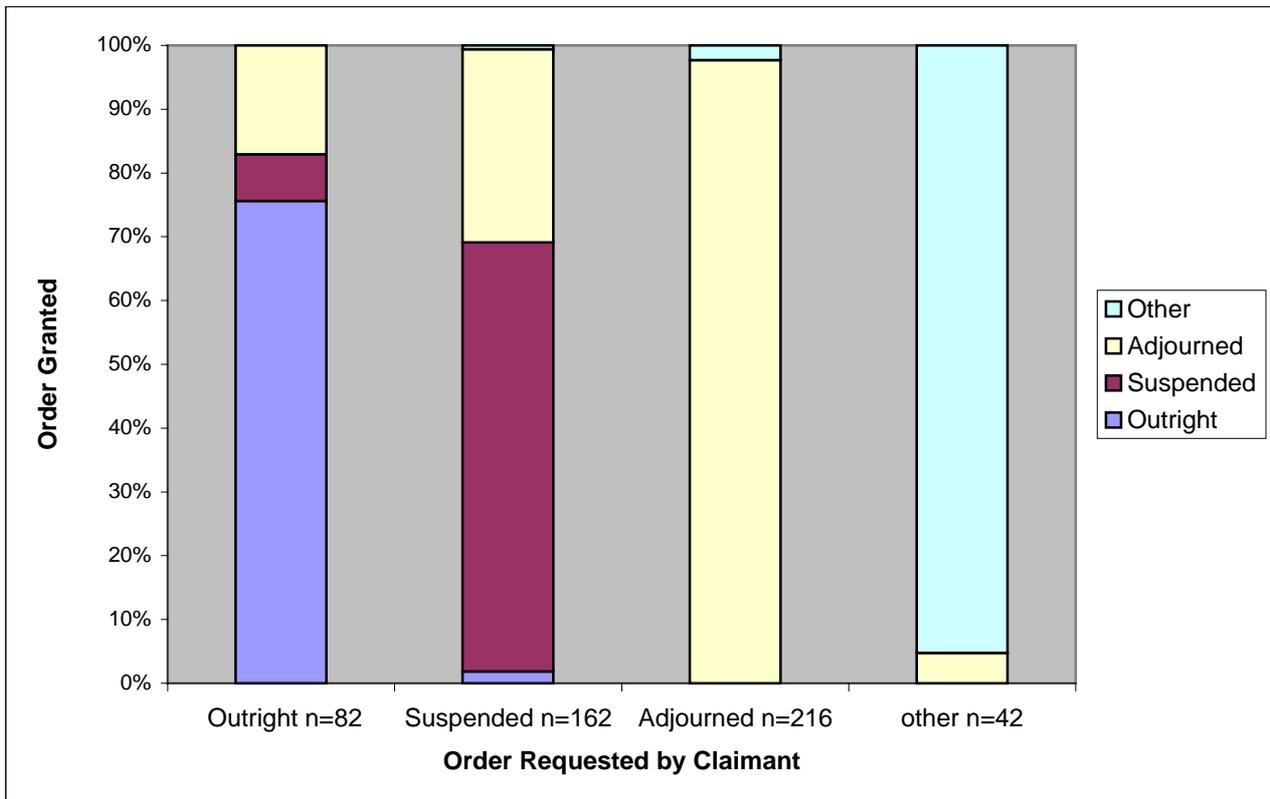
If one posits that high levels of trust exist between claimants and district judges, which affect the outcomes of cases, then one might anticipate that there would be a relationship between the requests made by claimants and the actual decision. We drew on our quantitative data to examine whether this relationship had an impact on the outcome of the decision by considering how often district judges granted the order requested (we were able to record this data in 502 cases).

Chart 7 below demonstrates that there is an apparent relationship between the request and the outcome on first hearing of the case (which might have been anticipated) but that this is by no means uniform. What can be said from our sample is that where landlords in our sample requested an adjournment, this was almost always granted (in 98% of requests). This is not particularly surprising as it would be unusual for a judge to grant an order for possession where the claimant has only requested an adjournment. The 'other' category reflects those cases where, for example, the claimant requests that the case be withdrawn or does not attend the court.

Requests for a suspended possession order or outright possession were more likely to be granted than not (67% and 76% respectively), but there is greater distribution of outcomes than with requests for adjournment. Some caution should be exercised when considering this data, however, as other factors may be at play for which we could not control. For example, it may be the case that landlords only request outright possession orders in the most hopeless of cases (from the tenant's point of view) such as abandonment; or request suspended orders where the arrears are high and not related to housing benefit.

Nevertheless, the data does suggest that the request does have some bearing on the outcome.

Chart 7: Orders granted by requests by landlord (n=502)



Note: an outright order was granted where the request was for a suspended possession order in three cases. These were all granted by the same DJ in Northern 2.

The responses of interviewees in our sample to the scenarios also bear this out, as the scenarios were designed in part to elicit whether there would be any difference in the outcome where the claimant requested a particular order. There is a suggestion from the responses to these scenarios that some interviewees were more likely to grant an outright order when it was requested. Scenario 6, for example, was initially framed on the basis that the claimant was requesting a suspended possession order.

Scenario 6

The landlord is a housing association, seeking possession against a tenant, who was granted a tenancy four years ago. The rent is £105 per week. The landlord tells you that the tenant is self-employed, has a wife and two children of school age. The tenant has a history, since the start of the tenancy, of building up arrears and then making lump sum payments which while they never clear the arrears reduce them substantially. NSPs have been issued on 2 previous occasions, but a sufficiently large sum was paid off the arrears that the association did not proceed to issue proceedings. When the current NSP was issued, the arrears stood at £1890. Since that time the tenant has made two payments of £600 each to the association. The association is nonetheless asking for a suspended possession order of rent plus £10 per week. The tenant does not attend.

On this basis, 20 interviewees would have granted the order requested, two would have granted an outright order and two would have adjourned the case. The scenario was then varied to have the claimant requesting an outright order – eight interviewees would, on this basis, have granted an outright order on the same facts (six of whom would previously have granted a suspended possession order).

However, these responses, when supplemented by the interviewees' reasoning, suggest that it is not necessarily the request which is important. Many interviewees on both sides (outright/suspended) regarded this scenario as a borderline case, which could be decided one way or the other on its own facts. Indeed, none of the observations made by interviewees suggested that the request by the landlord had any bearing on the outcome. Other factors, such as the non-attendance of the tenant and the level of arrears assumed greater significance:

“If they haven’t been substantially reduced, or if they’ve even gone up, I suppose it’s a possibility. It depends, I think, exactly how much information you’ve got about them.” (DJ Q)

“[The tenant is] not there and hasn’t made any offer – [the order] brings them to the surface... And in my view it’s a kindness to them at the end of the day, because they know where they stand. ...Well it actually makes them understand that the house has to be the first priority and not the children’s Christmas present or whatever it may be.” (DJ T)

“I would follow the same approach, give it maybe slightly longer than I would [normally]. But I would make an outright order. I think it’s probably the only way of hopefully frightening the tenant to at least come, make an application.” (DJ F)

This suggests that the request for a particular order has an effect only to the extent that the request itself must be considered against the facts. In other words, the request raises the question, which must be considered in the usual way. When an outright possession order is requested, for example, it might bring certain factors, such as the appearance of the tenant at court, to the fore.

Next, the different ways in which our interviewees spoke about this relationship, together with the different possibilities opened by the nature of the ‘repeat player’ claimant, might suggest that the correlation between claimants’ requests and the actual outcome might be distributed unevenly between judges. This was also a suggestion raised by the defendant representatives in our focus groups. We drew on our observation data to test this assumption. Although the number of cases observed for each district judge was small, and could not therefore be subjected to robust testing, the data does offer a hint that there is

some unevenness in the impact of relationships of trust which suggests that the identity of the district judge might be important. Some judges in our observation sample always granted the order requested, whilst there was a more even distribution for others.

Finally, trust might also be said to impact on consistency of decision-making. In our focus groups, both claimants and defendants were particularly concerned about the issue of consistency between district judges and between courts. We have already discussed whether individual judges respond differently to requests made by claimants. However, trust might have a geographical basis; that is, in certain courts, there might be a higher degree of trust which might impact on the question of consistency, thus affecting the outcome of cases. This has been discussed in Chapter 4, above, where the difference between the outcomes requested and granted were shown to vary between courts.

Factors affecting trust

In exploring the relationships of trust which develop there is a number of factors that emerge as important:

- The nature of representation
- “Training” claimants
- Longevity
- Trust and confidence
- Hierarchies of trust
- The ‘social’ aspects of landlords

The nature of representation

Most representatives who now appear in housing possession cases are housing officers, and not lawyers (see p. 14 as to the greater use of officers in court by housing organisations). A small number of district judges in our sample regretted this shift, for example because employees of the claimant might not be able to see the “*whole picture*” (DJ A). However, for most, the use of housing officers was a positive feature. There was a number of reasons for viewing this shift as positive, one district judge saying that he would rather hear the “*organ grinder*” (DJ C), and many regarded use of counsel as a waste of money. Counsel were said to feel that they had to plough through all the facts of the case, proving every point, which was regarded as a waste of time in lengthy court lists.

By contrast, there were many benefits of housing officers acting as representatives. For example, good housing officers knew their tenants and were able to answer questions about

them where they did not appear. They were in a position to meet with the tenant at court and make agreements in the doorway:

“There’s more opportunity for the housing officer to talk to the tenant at court and, you know, get to the bottom of what’s going on, and try and explain things” (DJ L)

Good housing officers cared about their tenants and might *“veer on the side of being as fair to the tenants as possible” (DJ R)*.

Local authority claimant representatives were generally regarded positively. There was said to be more variation as regards housing associations:

“A bit like that page in your diary which, for French wine, 0 was a bad year and 10 was excellent” (DJ P)

Poor representatives had ‘scripts’, or had to go through the file during the actual hearing, and were unable to answer questions about their tenants. Some judges had strident approaches when dealing with such representatives, for example refusing them rights of audience or adjourning their claims. Poor representatives could also affect decision-making:

“Sometimes they really drive you beyond the pale...it’ll actually work in the tenant’s favour...I ought to be being fair to both [sides, but] you’re only human.” (DJ O)

This difference between local authority and housing association representatives suggests that the outcome of cases might be affected by the type of claimant. We examined our quantitative data to explore the evidence for such a relationship, which might explain some of the differences between the four sample courts discussed in the previous chapter. For example, in London court, the recorded cases were evenly split between local authority and housing association claimants. In West Country court, 100% of the cases were brought by housing associations, probably mainly by the landlord to whom the former local authority stock had been transferred, which therefore operated very much as a local authority. The cases recorded at Northern 1 court were all brought by the local authority, while at Northern 2 court the local authority was responsible for 88% of the claims.

Although the actual numbers are small, and the results should therefore be read with some caution, the following differences were noted:

- Where local authorities requested an outright possession order at the first hearing (n=42), that order was made in 91% of cases; the equivalent for housing associations (n=36) was 56%.
- Where local authorities requested a suspended possession order at the first hearing (n=105), that order was made in 72% of cases; the equivalent for housing associations (n=56) was 57%.

Thus it can be seen that the type of landlord may have an influence on the outcome of the case. There may of course be other reasons for this, such as local authorities bringing claims for possession where the level of arrears is higher than the level at which housing associations bring their claims.

'Training' claimants

A relatively consistent feature of our interviews with district judges was the way in which they regarded housing officers as *trainable*, and trained them over time. This training was partly procedural and partly learning what the district judge would accept. Training made the list run smoothly because housing officers had 'got the answers off pat':

"If you're dealing, as we do, with fifty or sixty cases a day, it's helpful to have a reasonably set routine so we all know where we are, and they know what questions I'm going to be asking and they have their answers straight off pat, and it's quite a lot more effective, particularly if I want to ask a quick supplementary, as it were, on a particular issue, to have them there on the spot." (DJ J)

"...they're the same people who come, they know how we operate, they know what we expect, we expect everything to be in order, we don't expect them to ask the things that are unreasonable..." (DJ S)

"I think that they know my approach by now. And they would probably tailor their request as soon as they realise that they're not going to get anywhere with me. I'm sure my body language is perfectly clear. Then they adjust their position." (DJ U)

This training process also means that snapshot methods may not pick up on the relational nature of everyday activity in this area. Training is a limiting process – it limits what is necessary to ask, and what is possible to request by way of an order – in which the parties act silently and knowingly. It has a particular impact where untrained claimants repeatedly ask for orders which the judge would not ordinarily make or where a trained claimant asks for an order that is out of the ordinary (see below). This latter point also suggests that training is not a mere one-way process, and that messages are being sent when an out-of-the-ordinary order is requested: *"if they really want somebody out, they'll deal with the case differently"* (DJ U).

Longevity

The length of time a particular claimant representative appears before the same judge can be an important factor in this relationship of trust. Over time the district judge and representative become familiar with each other, as well as the parameters within which each will operate:

"We're talking now about landlords who appear frequently before me. And one gets the feel of, has the experience over the weeks, and months and years as to how, I

think they're all honest, but as to how reasonable they are in their demands or requests." (DJ N)

"Over the years you see how they approach a case. If they approach it obviously on common sense principles that they know I'm going to go along with." (DJ T)

There are suggestions in the data, therefore, that over time claimants themselves are being judged on the requests they make. Where these appear sensible to the judge, then this may impact on the decision.

"But I suppose you get to an extent where you find that where you challenged them [the landlord] on a few occasions, and they've always come up trumps on a large, busy list, you're tending to accept it." (DJ D)

This particular effect of the relationship was by no means universal amongst our interviewees. So, for example, on the other hand, it was said by one judge that:

"The longer one does the job, the easier it is to stick up to landlords. When you start, you lack confidence in sticking up to them" (DJ H)

Thus, there are clearly a range of possible impacts of this relationship over time.

However, sometimes just knowing the way landlords approach their cases meant that signals could be given by a landlord that a case was different in some way. This may not affect the actual decision in the case, but it would mean that the case was treated differently.

"If they are seeking an outright order or if they are opposing a warrant suspension, there's normally a pretty good reason for them to do so, it has to be said. You think, well, you know, 'If [local authority representative] is opposing this then, you know, he's got his reasons for it'. It doesn't necessarily mean to say you agree with those reasons. I mean there's many a request which he's made for me not to suspend a warrant, for example, which I have refused. But having said that, I think, ...if he's opposing an application then there's normally a good reason, even if there's not a sufficient reason." (DJ J)

"If [local authority] representatives are actively pursuing some sort of immediate order, I don't do it on the nod, but I think well there is clearly something here; this isn't their normal approach at all." (DJ F)

Trust and Confidence

The limited amount of time allocated to each case means that trust can have more of an impact on the process, as opposed to the outcome, in each case. We found that there was a relationship between trust and confidence. Where district judges express confidence in claimants' representatives, they were more likely to be trusting of them. Three examples are discussed where this trust/confidence affects the process: the paperwork, oral evidence, and agreements.

District judges differed on how much they would check the papers provided by the claimant in advance of the hearing. In some courts it was apparent that certain judges would be less likely to give lengthy consideration of the evidence of certain, usually local authority, repeat player claimants.

“They’re all very well geared to doing it and they know what they’re doing. And the paperwork’s normally, well I would expect the paperwork to be in order. So to be quite honest, I just check that there’s a court file and there’s been say a notice served and everything. I don’t make a big thing about checking all the paperwork. To be quite honest, if we had to check all that meticulously, we wouldn’t be able to list six or seven per half an hour.” (DJ V)

“With the local authority, though, it tends to be pretty much standard stuff they don’t always produce a copy of everything” (DJ Z)

Confidence can play a crucial role in busy courts, in that the judge feels that they do not necessarily have to press the landlord for further information or, even, feel that they are being excluded from some information about the defendant. The judge is able to limit questions to a narrower range, or expresses feelings of ‘comfort’ in knowing that he is being presented with all the relevant facts. It does not change the decision, but makes it easier to make, as the following quotations illustrate.

“The relationship doesn’t impact on the decision at all. It makes the decision-making easier because what you want is to get down to the important factors as quickly as you can. So knowing the person, them knowing what you want, them saying the things that are crucial to the issue is what’s important, not because it’s that person it’s easier to make a decision. It’s not. It’s getting the information before the court, that’s the important part.” (DJ S)

“And you sort of feel fairly safe with them, that they will tell you the information that you need and that they will not conceal something which they know that you might be interested in but they don’t want you to know about.” (DJ Q)

Confidence in the skills of the landlord representative can also have an impact on whether agreements between landlords and tenants are re-opened for consideration by the judge, for example as to their affordability. There was a range of practice on this issue. Some district judges stressed the need for agreements because their lists were lengthy (and in any event with tenants on benefit there were few alternative options), whilst others would routinely re-open them. Thus, this was not necessarily related to the trust/confidence that judges might have in claimants.

“If they come to me and ask for a suspended possession order and it’s been agreed and I think that...you know, I wouldn’t make this order...but...if that’s what they’ve agreed, I’ll do it.” (DJ M)

“I’d like to see the tenant. But sometimes they do come to an agreement particularly where they’re on benefits and we have the standard two pounds eighty five pence

per week. There's not a lot else anyone can do on those and if you've got a long list and one or two people need to get away, I'm not adverse to that happening." (DJ S)

Hierarchies of Trust

Our interview data suggests that district judges operate informal hierarchies of trust which was again linked to the confidence that was placed in claimants. Some claimant representatives were well-trusted and the possessions process may operate smoothly as a result. At the other end, however, some representatives were mistrusted, generally because they requested extreme orders. So, for example, DJ H referred to a "cry wolf scenario" where claimants requested certain orders too frequently; and DJ P made clear that, after dealing with an 'unreasonable' representative:

"I can't say her card is marked, but I'd look carefully at anything she did in the future. I thought it particularly unsympathetic".

These hierarchies of trust can impact on how closely a district judge might consider agreements between the claimant and defendant:

"...if you were going to suspend an order, and they ask for suspension on £5 a week in addition to the current rent,..., with some landlords I know that they will have good reason for pitching it at that. For others I might enquire further into the circumstances of the tenant." (DJ N)

Social nature of landlords

Although we did not ask explicitly whether the nature of the landlord impacted on the decision in rent possession cases, there is evidence from our interviews that this does have an impact in different ways and for different reasons. Certainly, social landlord cases are treated differently from private landlords. Various reasons were given for this – for example, social landlords should lean in favour of the tenant, should not bring proceedings where housing benefit was at issue, and should not use Ground 8. For some of our interviewees there was a clear link between the trust they placed in the landlord and the social nature of that landlord.

Most interviewees tended to regard housing associations as social landlords, although there was some hesitation and some doubt expressed as to whether this was correct. Some interviewees did distinguish housing associations from councils on this point. It was said, for example, that their rents may be higher or they may be more willing to take possession proceedings at an earlier juncture because they were more commercially oriented ("they behave like its their money": DJ L). However, as discussed in Chapter 8, below, the use of Ground 8 by housing associations raised this notion of social landlord squarely.

There were three other, more general reasons given for treating social landlord cases differently:

- there was a balance between entitlement to rent and social landlordism;
- there was the relationship between the current occupier and others on the waiting list in housing need; and
- there was the problem of rehousing occupiers.

We examine each of these in turn.

First, district judges expressed a dichotomy between social landlordism, on the one hand, and the contractual duty to pay rent or the duty to tax payers more generally, on the other hand. This tension was expressed in the following ways:

“It’s social housing, it is a contract. It cuts both ways. The tenant has got to realise he’s probably got an easy landlord. He’s got to do something to help.” (DJ P)

“I mean at the end of the day, even social landlords, we’re all paying for that as it were. The money doesn’t come from nowhere.” (DJ F)

Different elements within this dichotomy might be emphasised at different times. For example, two interviewees drew upon the contractual duty to pay rent when feeding back to the tenant, as part of a tactic to scare the tenant into paying their rent. This became apparent in an answer to scenario 7.

Scenario 7

The tenant is making an application to suspend a warrant for possession, made in favour of her housing association landlord. A suspended possession order was made against the tenant six months ago on payment of rent plus £4.50 per week. The tenant is in work. She has only paid intermittently since the order was made, and arrears have risen from £750 at the time of the order to £975 now. You have already granted one suspension of the warrant, at which time the tenant explained that she had had difficulties because she had had to pay out for car repairs in order to still be able to get to work. At this current application there have been no material changes in her circumstances, although she says she is having difficulty making ends meet.

In response to this one interviewee said

“I would suspend. I would scare her...before I suspended. ...‘Why should all the other local authority tenants have to pay rent, increase rents because you can’t be bothered to get your act together, Miss Jones, it’s just not good enough. There’s no reason why I should suspend this, is there? You’ve been warned once.’ At this point they burst into tears. And then I suspend it. It may sound cruel, that’s the way I happen to feel that I can get people to realise...and this is why I would say it, I would write ‘last chance’.” (DJ D)

The nature of the landlord became an important factor to balance against the occupiers' rights:

"Local authorities and a lot of the housing associations really can't fulfil their obligations as they would like to, because they simply haven't got the means to do it [...]. If they didn't have various people owing them quite a lot of money, there would be more to do the repairs." (DJ O)

Second, our interviewees expressed concern about the rights of the occupier who had not been paying their rent against the needs of others on the waiting list. For DJ W, this was a "subsidiary consideration" and "it's just my slight concern that perhaps I should be more bullish...particularly with the more persistent defaulters". On the other hand, DJ U would ask of some occupiers:

"Look, if you've chosen not to pay it then why do you expect the court to help you now?' If there's a lot of people screaming out for accommodation, willing to pay for it, why should I give priority to people who are not prepared to do so. Not are unable to do so, but not prepared to."

Again, this factor could be deployed at different parts of the process. For example, one interviewee used this in discussion of scenario 7 as a scare tactic:

"Look, £4.50 a week, it's not a king's ransom, and you're working. You've got to pay it otherwise you've got to go.' And then, if the landlord's there I invariably ask, 'How many people on the housing list?' A scare tactic to, not to frighten her, but to make her realise that if she wants to stay she's being housed for £4.50, you know, 60p a day is not a lot to ask." (DJ P)

This factor could, however, be used to swing the other way, in favour of the tenant. At least, the social obligation implied in the role of 'social landlord' would not outweigh the duties to the occupier. Thus, for example, it was said that if you evict a mother and her children, you are creating more problems in society at large:

"than you are trying to deal with the particular problem of them not paying the rent, and other people who would be good tenants being in the waiting list" (DJ I)

Finally, it was said that, where tenants of social landlords were evicted, the problem was that the social landlord – or, rather, the local authority – would be required to re-house the tenant at some considerable cost. Although some interviewees recognised the likelihood of a finding of intentional homelessness, others raised concerns over the costs of rehousing, using this as a technique to deny possession to a social landlord:

"But the local authority is really the end of the line in terms of housing. And they're going to be the ones that pick up the pieces when somebody presents with a priority need. So I think that's why, I suppose, I take a slightly different [approach], I say, 'Look, hang on, you know, where's this family going to go? You're going to have to pick up the pieces anyway'." (DJ H)

Conclusions

In this chapter, we have demonstrated that relationships of trust and confidence do exist between district judges and claimants. These are not necessarily in opposition to judicial neutrality – indeed, neutrality may coexist with such relationships. Our interviewees were generally clear, for example, that there was no relationship between the request made by the claimant and the order granted. The judge would make the order they considered reasonable in the circumstances of the case. The observational data does suggest, however, the following, which may have an impact on the outcome of cases and which may add to actual or perceptions of inconsistency:

- There may be a relationship between requests for certain orders and the order granted by the judge. However, our data does not account for other relevant factors, such as level of arrears.
- This relationship appears stronger for certain judges than others, although the numbers of cases observed per individual judge are too small to test this relationship further.
- This relationship appears to be stronger for local authority claimants than for housing association claimants. However, this may be because local authorities' requests were made on the basis of higher levels of arrears.
- The relationship appears to be subject to geographical variation.

Our interview data also suggests that mistrust might have a negative impact on the relationship between request and outcome. Thus, the poor quality of certain claimants (particularly housing associations), or where the claimant requested an order regarded by the district judge as particularly unreasonable, might mean that the requested order is not granted (at best).

Whilst the relationship between trust and outcome is merely suggestive, the interview data suggests that relationships of trust do impact on the process. This was particularly the case in the busier courts in our sample, where the district judges were scheduled to hear a case every few minutes or so. The overarching theme behind this was personnel management by district judges of claimants' representatives, and there was evidence of a reverse effect as well (that is, management of judges by claimants' representatives). This was made possible by a number of factors which might combine together – the shift to housing officers appearing on behalf of claimants; the 'training' process in which district judges tend to engage claimant representatives and vice versa; those representatives' length of time in

post; levels of confidence placed in those representatives; and the nature of the claimant as a 'social landlord'.

Chapter 6: Judges and tenants

Introduction

In this chapter we examine the value judges placed on the attendance of tenants and the impact of the individual circumstances of the tenant. Analysis of the transcripts of interviews with judges combined with findings from the survey of court cases revealed that there were a number of cross cutting themes associated with judges' relationships with tenants which impacted on decision-making in a diverse range of ways. This section explores the impact of these themes under the following headings:

- Attendance/non attendance
- Level of arrears and tenants' efforts to deal with the problem
- Family makeup and recognition of house as home
- Language difficulties
- Issues around infirmity, health and age of defendant
- Judges are human too – personal reactions to hearings.

Attendance

Earlier studies have shown that participation by defendants and in particular their attendance at the court hearing has a decisive impact on outcomes (Nixon et al 1996). The survey of court cases confirms that attendance matters. In practice just less than half of all defendants (45%) participated in the judicial process with 42% attending the hearing in person. In these cases the profile of outcomes was found to be more favourable to tenants as compared with the outcomes achieved when the tenant did not attend (see further Chapter 3). Further evidence of the importance of attendance was provided by the claimant and defendant focus groups with the majority of participants citing attendance as the single most important influence on judges. Participants in all focus groups felt that the defendant's attendance was a key influence on the outcome, leading to district judges being then more willing to exercise their discretion in the tenant's favour. Both claimant and defendant representatives agreed that if the tenant did not attend, then the claimant would be more likely to obtain the order they requested.

In interviews with judges we sought to establish why attendance by the defendant was considered to be so important. No single or consistent explanation was provided; rather we found there to be a wide range of different reasons why judges thought the attendance or

non-attendance of tenants was frequently pivotal in their decision-making process. Views on the impact of tenants' attendance at hearing clustered around the following issues:

- The effect of the physical reality of tenants' presence
- The opportunity to hear both sides of the story
- Attendance as a measure of tenants' commitment to keep to the terms of an order

The effect of the physical reality of tenants' presence

Judges were aware that the simple "physical reality" of the tenant's presence in court could be an influential factor in determining the type of order they would make. Views on the importance of attendance, however, covered a wide spectrum. For example, some judges interviewed were very explicit about the impact of the tenant's presence whatever the other circumstances of the case:

"It's unlikely that I would make an [outright] order for possession with the tenant present." (DJ B)

"I almost would never make an outright order on the first appearance...I invariably will make an outright order if they're not here" (DJ Y)

Other judges were more reflective about the effect of attendance, acknowledging it to be only one of many factors they would take into account when arriving at a judgement. The mere presence of the tenant in court would not necessarily result in an outcome favourable to the tenant. Indeed some interviewees expressed the view that in practice attendance could be irrelevant or even detrimental to the defendants' interests. For example one judge pointed out that although in general terms he felt it was beneficial for tenants to attend hearings this was not always the case:

"...sometimes it's against their interest to attend of course. You know, you get the odd tenant who, who plays merry hell and, and can shout and, and shows that whatever he is in regards to the tenancy, he's not committed to paying the rent." (DJ O)

Others reflected that the specific circumstances of cases were of far greater significance than the presence of the tenant in court:

"Just by attending does not mean I'm not going to make an outright order. If they attend and the facts mean there should be an order, I'll make an order, an outright order. If they attend and they're not, those aren't the facts, I won't make an order." (DJ S)

In considering the different weight given to attendance versus consideration of material circumstances one judge offered an interesting reflection on how his approach had changed over time. He attributed this change to the fact that he had become more resilient and had learnt not to worry about the consequences of his decisions. As a result of his changing

approach he was more confident in the way in which he exercised discretion and felt that this resulted in better decisions:

“It doesn’t worry me now if they attend, I really don’t think it makes any difference. It used to but I don’t think it does any more, when they attend. I’ve learnt to get harder, I suppose. I’ve learnt not to be worried too much about what happens. That sounds like callousness. (pause) Yes. If it’s the right order to make it’s the right order to make is, I suppose, the right answer...I think before it made a difference, I found it difficult to look at them and know that I was kicking them out of their house and they’ve got two children and she was crying her eyes out and everything else. But it doesn’t happen very often, but if it does happen, I can do it now far better than I could do six years ago...” (DJ D)

The opportunity to hear both sides of the story

A further common theme emerging from discussions about the impact of tenants’ attendance was the opportunity it afforded judges to find out more about the specific circumstances of cases and to gather material upon which discretion could be exercised. Many judges were aware that in the absence of the tenant, they only heard one side of the story and therefore had limited information upon which to base a decision. This led one judge to conclude:

“Anything is better than nothing. You need material to exercise your discretion upon. The attendance is really beneficial.” (DJ G)

The presence of the tenant in court was considered by some to provide an important opportunity to establish the viability of either agreements made prior to the court hearing or the terms of an order. It was also said to be valuable in ensuring that a realistic offer of repayment of the arrears were agreed and that in turn would influence the type of order made:

“If you can extract from them, which you generally can, a realistic offer of something, I will always try and suspend it. But, yes, try and suspend it in those circumstances.” (DJ W)

Having an opportunity to find out more about the personal circumstances which had led to the arrears also enabled judges to assess whether agreements made prior to hearings were likely to be sustainable:

“It’s very important because if they don’t attend I don’t usually know their side and even if the local authority have said: ‘Well we’ve spoken to the tenant and this is what we’ve agreed’, I don’t know whether that agreement is sustainable by the tenant. ...So their attendance to me is pretty crucial...it helps tremendously to make a better order.” (DJ S)

Attendance as a measure of tenants’ commitment to keep to the terms of an order

In addition to the impact of the tenants’ physical presence in court, attendance at hearings was used by some judges as a proxy measure of tenants’ attitude and approach to the situation. Where tenants attended court and engaged with the process it was commonly

believed to be a sign that they were taking the proceedings seriously and that they were prepared to do something to resolve the problem:

“People who bother to turn up, particularly if they’ve got a job and they’ve got to take time off work to, to come...you, you start off by wanting to assume they’re genuine and it’s a good start, yes”. (DJ K)

Conversely, if the tenant did not attend, this could be interpreted as a lack of interest:

“If the tenant doesn’t attend...you then take the view, if they aren’t here they’re not taking it seriously.” (DJ C)

Evidence of tenants’ commitment to face up to their problems was clearly a very influential factor in determining judges’ approach to possession hearings. For some judges attendance was perceived as an indicator that the tenant was taking responsibility for the debt and was making an effort to help themselves. In these circumstances they were predisposed to take a more favourable approach to the case, as a number of judges explained:

“They’re clearly taking the proceedings seriously and they’re concerned about their position and they want to do something to resolve the problem. I’m always reasonably happy to try to help people who are prepared to help themselves.” (DJ I)

“I mean loath though I am to make an outright order, I’m much more sympathetic to somebody who’s engaged with the procedure and tried to do something about it.” (DJ Y)

Equally important was the impact of tenants’ failure to attend and/or to produce evidence that they had tried to resolve the problem prior to the court hearing. In the absence of tenants’ active involvement in proceedings a number of judges indicated that they would be more likely to take a hard line:

“The only reason why I would think it was reasonable to turn somebody out is if they have made no effort whatever to get their housing benefit claim sorted out or whatever.” (DJ T)

Lack of engagement with the judicial process was seen by some as a mark of disrespect which made it more likely that an outright possession order would be ordered:

“It’s really their non-attendance that means it’s more likely there’s going to be an outright order and their non-attendance, their non-completion of the reply form, their non-co-operation with the housing officer who may have gone to see them, then there’s more likely to be an outright order because they’re not here to offer anything.” (DJ S)

The way in which individual judges measured motivation varied but tenants’ demeanour and attitude to the proceedings were often commented on and could be critical in determining the type of order made:

“I think in terms of exercising discretion, I just think the way people do communicate and what they say does have some impact on..., if they’re saying, ‘Oh, I don’t really care,’ and, you know, being abusive and all the rest of it, it might have an impact on whether or not I think that they’re likely to comply with any order I make.” (DJ S)

District judges assessed tenants’ motivation in a variety of ways. Defendants’ dress codes, body language, tone of voice were all mentioned in the interviews as key indicators of how an individual’s credibility could be measured. For some judges, however, equally important was their instinctive feel for the case, and these interviewees said they relied on their “gut instinct” and “common sense” when making decisions:

DJ: “I’m particularly concerned about a tenant’s motivation to do something about their predicament.

Q: And how would you gauge that?

DJ: (Pause) Probably differently in every single individual case. It’s very difficult this...because everyone’s different. You have to be aware of stereotyping them...some people have very great difficulty in, in saying, something across the desk to a strange judge, you know, and you have to...dig it out of them. And it doesn’t necessarily mean they’re not interested in sorting themselves out. Other people can be a bit too glib about it...but in the end you just have use your experience of people and common sense to assess them.” (DJ K)

Judges said they were looking for evidence as to whether tenants genuinely wanted to resolve their problems or not and that this factor was influential in determining whether they thought tenants could be trusted to keep to the terms of a suspended possession order or adjournment:

“I’m weighing it up then as to is this person kidding me or is he genuine. I suppose all judges like to think they can normally distinguish...so I’ll take that into account as well, if you like, the demeanour and actions of the tenant from...first of all being given the notice, and then secondly from being served with the pre-pleadings,... So...that is the main thing, can they be trusted, I suppose, it comes down to.” (DJ D)

For some however, the physical demeanour of the tenant was considered less important than whether they accepted their need to seek advice on the management of their affairs:

“Their acceptance of some proper advice and their acceptance of a need to sort a budget out, will influence my decision as to whether I’m going to make a final order, an outright order or a suspended order.” (DJ S)

The level of arrears and tenants’ efforts to deal with the problem

We were interested to establish if the level of arrears measured either in terms of the total amount owed or as a proportion of the number of weeks rent outstanding, were key factors in determining outcomes. While there was broad agreement amongst judges that the level of arrears and payment history were important factors, there was no single voice as to why they were important or what impact they would have on the exercise of discretion.

A few judges used benchmark figures to trigger particular types of order (see Chapter 7) but this was a relatively uncommon practice. Indeed not all judges considered the level of arrears to be a key factor in determining the outcome of cases. As an alternative some judges stated they scrutinised the payment history as a way of deducing information about the tenants' motivation and attitude to the arrears. The payment record could be used both as an indicator of the tenants' ability to keep to the terms of an order and as a measure of reasonableness i.e. the capacity of the tenant to pay the rent and their arrears within a reasonable time. In describing why the payment history was important many judges drew on polarised stereotypes to explain what they were looking for. For example, a number of judges explained their approach in terms of distinguishing between tenants who "can't pay" because of unemployment, ill health, or some other vulnerability and those that "won't pay" (reflecting evidence suggesting this difference – see p. 12):

"There is of course the hard core who simply will not pay no matter what, they don't see why they should. [...] I'm much more likely to be tough on them because, you know, there's a difference between 'can't pay' and 'won't pay'". (DJ O)

"It's fair to say that a lot of these people, they will fall into two categories: Either they're just feckless and irresponsible, they choose not to pay the rent and they've got it coming to them or they can't...they have problems you know, often around drugs or alcohol, unemployment or illness." (DJ J)

Others focused on whether the tenant was a habitual defaulter or if they were generally reliable:

"What I'm looking for usually in a way is to see the pattern of what the tenant's doing. I mean are they a habitual defaulter who will make a bit of an effort when it comes to court, but fall back again automatically and all the rest of it or whether they're somebody who's got onto a particularly sticky period and is getting deeper into a mess at the moment. Or whether they're somebody who's generally been very reliable but just obviously struck some problem..." (DJ F)

Judges were concerned to establish if the tenant was trustworthy. In assessing the extent to which tenants could be trusted, judges were looking for evidence of what efforts had been made prior to the court hearing. In this context information about how tenants had conducted themselves during the tenancy and the action they had taken to deal with the arrears prior to the court hearing were thought to be important factors in determining outcomes. As one judge pointed out, if the tenant had done nothing to help themselves, why should the court?

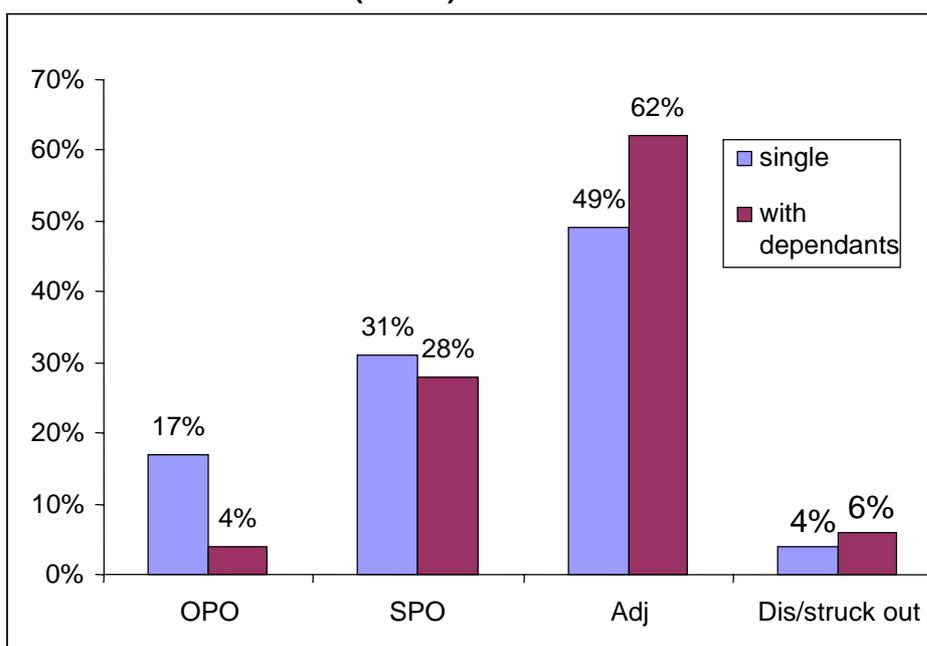
"One of my guiding principles, is I look to see to what extent the tenant has helped him or herself or is able to help him or herself and, if they are able to help themselves. If they do absolutely nothing to help themselves then I don't see why the court should help them frankly." (DJ U)

Family make up

The broad powers of the court in rented actions requires that judges consider a wide range of factors in deciding the most appropriate order to make. The findings from the focus groups with both practitioners representing defendants and those representing claimants suggests that the personal circumstances of the tenant is one of the set of factors which impact on the use of judicial discretion. In particular representatives of claimants felt that whether or not the defendant was single or had dependant children were very relevant. The experience of the London landlord focus group suggested the following: if the tenant was elderly, there would be an adjournment; if the tenant was a young, single male, there would be an order; if the tenant brought a baby to court, no order would be made; if there were children, there would be comments from district judges about the revolving door (of homelessness); if there was other vulnerability, then district judges would want to ensure that claimants had provided support.

Analysis of observed court cases demonstrates that there were indeed variations in the profile of outcomes, depending on whether the defendant was single or had dependants. As Chart 8 below shows, defendants with children were less likely than single people to have an outright possession order (OPO) made against them, with 17% of single people being given an OPO as compared to 4% of those with dependant children. There was also a tendency for slightly higher levels of adjournments to be made in cases involving dependants; 49% of cases involving single people were adjourned as compared to 62% of those with children.

Chart 8: Outcomes across all courts for single people (n=109) as compared to defendants with children (n=139)



There are a variety of possible explanations as to why the profile of outcomes for single people is different from those with children, which may include differing levels of arrears and housing benefit issues. In order to explore in more depth what impact the presence of children has on decision-making, judges were presented with a number of the case study scenarios which referred to the family make up of the defendant.

The outcomes to scenario 2 illustrate the differences.

Scenario 2

The local authority is seeking possession against a tenant who was granted a tenancy 3 years ago. The rent is £75 per week. The arrears are currently £1125. The landlord tells you that the tenant is a single mother with two children of school age who is in part-time work. She is on partial housing benefit but regularly fails to make up the shortfall. The landlord says that she has failed to stick to several agreements to pay off the arrears. They have met with her and agreed a suspended order on terms of rent plus £5.00 per week. The tenant does not attend.

Initially judges were asked in interview what decision they would reach if the defendant did not attend the hearing. Just under a third (7) indicated that they would adjourn the case rather than grant the order requested. Even of the 15 judges who stated they would agree to a suspended possession order, 6 expressed reservations about the terms requested and indicated that would reduce the terms of the order to rent plus £2.85 per week.

When asked why they had arrived at their decision a number of different explanations were proffered, with the majority expressing the view that the welfare of children was an important material fact they would take into account when determining the reasonableness of the order to make.

“Family make up too is bound to play a part, because if you’ve got a deserted wife with three small children you’re going to, with the best will in the world, ... I am going to approach that on a different basis to that of a single man of nineteen who’s got a full time job and goes out drinking and can’t be bothered to pay his rent, basically. You know, it’s human nature, isn’t it?” (DJ W)

For some district judges we interviewed, the predominant concern was that repossessing the home would have a major impact on the children even though it was not their fault. Others made reference to societal issues of poverty and deprivation, with concern being expressed about the practical consequences of evicting a family. The reasons link closely to those discussed in chapter 5 about the social nature of landlords – clearly these come much more into focus where children are involved:

“I think district judges tend to be soft...because at the back of their minds public policy considerations apply, which they shouldn’t. That is if you put this woman and two young children out, you’re creating more problems in society at large than you

are trying to deal with the particular problem of them not paying the rent, and other people who would be good tenants being in the waiting list. And so I'm sure that that subconsciously or otherwise operates on the DJ's mind." (DJ I)

One judge concluded that he would never evict a woman with children explaining that: *"you know...I...I just couldn't bring myself to do it, I don't think, quite honestly"* (DJ I). Others tried to balance the interests of the landlord with the need to prevent hardship and homelessness:

"You have make the decision but I think most people instinctively would prefer not to if they, if they can and if there's any way...particularly...in a scenario like this, if there's any way of not making the order then, ...not turfing a woman out on the street then you would try and do so." (DJ M)

Judges clearly found it hard to deal with possession cases involving children. As the above excerpts from interviews illustrate, it was not uncommon for judges to explain their hesitation to making outright orders for possession in emotive terms reflecting on their personal experience and view of the world (see p. 91 for further discussion of the impact of judges' personal reactions to possession).

The family make up of the defendant however, was not universally seen as being a critical factor in determining outcomes. While some judges said they would always seek out an opportunity to provide a defendant with dependant children with one last chance, others thought that the family make up of defendants was irrelevant to the decision-making process. A number of judges expressed the view that outright possession orders were valuable not only to protect the landlord's interests but also to give a clear message to defendants that their behaviour would not be tolerated. These two approaches representing either ends of a continuum are graphically illustrated by the following responses to Scenario 2 (above).

DJ W	DJ V
<p><i>"If you asked me to explain precisely in a cogent judicial fashion why not [evict], I would find it quite difficult. But I think it is...that here is a single mother with two children who's trying to keep body and soul together, and at this juncture it would not be reasonable to make a possession order, and I would want to adjourn it at this particular instance and see how she got on."</i></p>	<p><i>"Hasn't paid anything for several weeks, doesn't bother to turn up, no reply form, no contact...and then she'd be running in here with the warrant, when she gets notice of the bailiffs going round. And it'd be picked up on a warrant. That's [outright possession order] the only way you can make people like that do something about it."</i></p>

Further discussion of the impact of children at the warrant stage of proceedings is provided in Chapter 8.

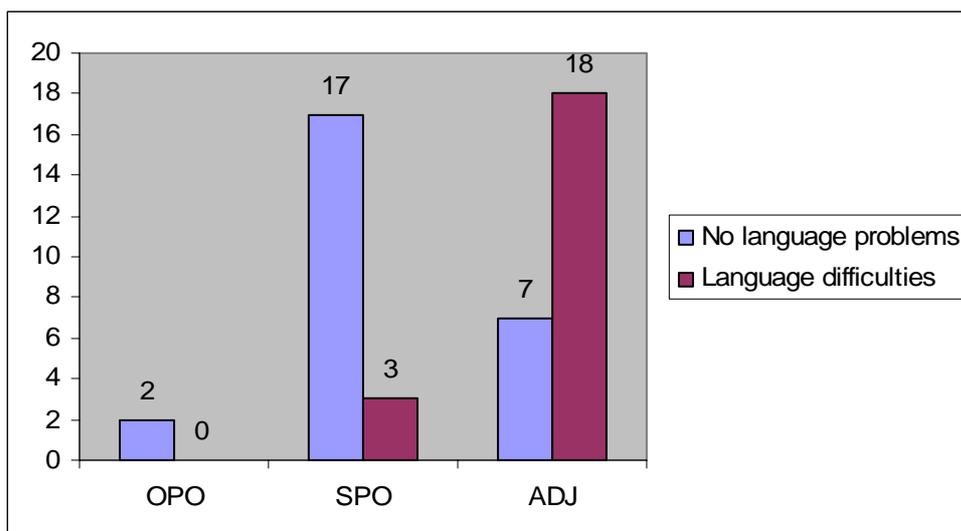
Language difficulties

An earlier study into the perceptions and experiences of black and ethnic minority defendants in housing possession cases (Blandy et al, 2002) found there to be a number of problems arising in the repossession process for defendants for whom English is not the first language. Their difficulties may range from an inability to understand the court documents, to not being able to read signs pointing to the duty desk scheme at the court building, to not understanding what is said in court nor the actual outcome of the case. In light of these findings we sought to explore judges' views on how awareness of language difficulties may impact on the decision-making process.

As a variant of Scenario 2 (above) judges were asked if their original decision would change if the defendant did appear in court, unrepresented and apparently unable to understand English. In the first scenario which just involved the non attendance of the tenant as set out above, a range of outcomes were recorded. The majority of judges stated they would be likely to grant either a suspended possession order or adjourn the case on terms.

Interestingly, when judges were given the additional information that there may be language difficulties preventing the defendant from understanding the proceedings, a much higher level of consistency in responses was recorded with all except three stating that they would adjourn the case without making any terms until an interpreter was present (see Chart 9 below).

Chart 9: The impact of language difficulties on outcomes



Various reasons were given as to why the case could not be dealt with until an interpreter was present. Some judges stressed the importance of being certain that the defendant understood what was happening:

“I wouldn’t dream of making an order...without being really certain that the person that I was making the order, one of the parties understood it entirely.” (DJ E)

Others placed emphasis on *their* need to understand the particular circumstances of the defendant and stated they could not make an order unless they were clear what the defendant said:

“Well I certainly wouldn’t then make an order if I wasn’t satisfied that she hadn’t been able to get across what she wanted to say. I’d probably have to adjourn it, and... I’d probably ask her to see one of the advisers so that they could then try and arrange appropriate interpreters to come again on another occasion, simply adjourn it without making any terms or anything at that stage.” (DJ R)

A few judges felt the need to test whether the defendant genuinely could not understand the process. For example, one judge stated that he would give a short adjournment to:

“see whether they understood what I’m saying or not, because they often...usually they give themselves away if they are conning. (pause) I would adjourn for a very short period of time, fourteen days at the most for her to provide proof.” (DJ D)

In general judges were concerned to ensure that defendants who are not fluent in English should access appropriate interpreting services. Mixed views were recorded however, as to who should be responsible for the provision of such services. In 1997 the Court Service was instrumental in creating the National Register of Public Services Interpreters (NRPSI) by the Institute of Linguists. The principle is that every interpreter working in the courts should be selected from this Register, or the CACDP Directory in the case of deaf people, and these registers are used frequently by Crown Courts. However, before the county court will pay for a registered interpreter in a civil case, all other possibilities must first be exhausted. This means in practice that interpreters are often paid provided by landlords, advice centres and/or Duty Desk Schemes, by members of court staff, or (with approval by the judge) by a friend or family member.

Judges’ comments on who should be responsible for the provision of interpreters reflected the need to explore practical alternatives to employing the services of a member of the NRPSI. Indeed only one of the judges even referred to the possibility of the court providing such a service stating:

“I’d be quite concerned to find out and if necessary I’d go and ask the court manager about getting an interpreter for her, I mean if it was that bad...and she wasn’t going to be represented.” (DJ Y)

More commonly judges sought to resolve the problem by relying on the claimant:

“I have made orders for the claimant to provide an interpreter if it seems difficult. I don’t do it often, but I have done it, particularly against local authorities and housing landlords.” (DJ Q)

“The landlord often can source one and find out if there’s someone in the community who can assist, but...I couldn’t deal with it if the tenant didn’t understand.” (DJ S)

It was recognised that where landlords are asked to provide an interpreter for a defendant there could be a potential conflict of interest:

“I mean in reality the local authorities in areas like that usually have people who can speak the language...so in practice they very often are able to sort that sort of thing out and I’m the one left in the dark because I have to accept the local authority representative’s version of what is being said by two people in another language.” (DJ F)

In order to avoid such conflict it was not uncommon for judges to suggest that the defendant obtained independent advice by contacting the Duty Desk Scheme or local advice agencies to arrange for an interpreter to attend court:

“...I’d probably ask her to see one of the advisers so that they could then try and arrange appropriate interpreters to come again on another occasion.” (DJ R)

While the majority of judges stated that they could not deal with the case if they thought the tenant could not understand English, this view was not universally accepted. For example, one judge who took as a starting point that possession hearings were essentially an exercise in debt management, expressed the view that as long as sufficient information had been provided by the landlord about the tenant’s income and outgoings there was little reason for adjourning proceedings:

“To my mind this is all about money, and provided I was satisfied that they understood what was going on, and I could get the information I needed, I would not be too troubled about difficulties in, ...understanding the niceties of it.” (DJ C)

Another judge, for whom the exercise of discretion in possession cases was premised on the overriding need to address the breach of contract and ensure that the rent arrears were repaid within a reasonable period of time, was also sceptical as to whether proceedings should be adjourned because of language difficulties:

“You’ve got a lot of people who don’t speak English and I’m always telling them that I don’t regard that as an excuse. You know, they ought to get somebody in the community [to assist]; they must know an important letter when they see one. But they seem to think, a lot of them, when they come along and say they don’t understand English, that you’ll say, ‘that’s all right, dear, you needn’t pay the rent!’” (DJ O)

During observations at the four courts we noted that in London court, information on civil procedure rules concerning housing re-possession hearings, is available on display boards but only available in English. The court does not specifically employ interpreters, although many of its members of staff are drawn from the ethnic groups representing the area and they are therefore able to assist tenants who would otherwise require the services of an

interpreter. Similarly, many of the representatives at the duty desk are from a minority ethnic group. At one observed case in Northern 1 court, an interpreter appeared in court with the tenant and the judge took great care to ensure that the tenant fully understood each stage of the hearing.

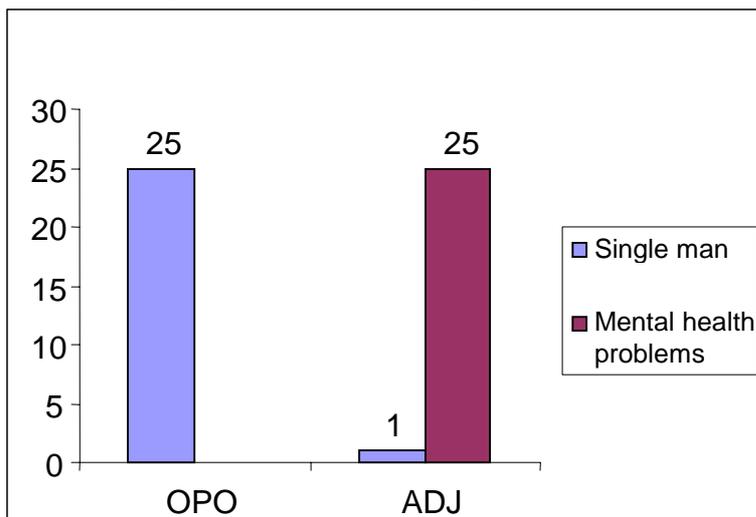
Issues around infirmity, health and the age of defendants

When judges were asked whether they had a check list of issues they considered when deciding whether it was reasonable to grant possession many volunteered that tenants' age, capacity problems and ill health were key influences:

*“Old people, again, you have to take into account ... You know, if they've been ill, they've been in hospital, they've been in for six or seven weeks in hospital, all of that comes into account as to whether they've acted reasonably, and whether the local authority's acted reasonably in the sense of the way they've issued proceedings.”
(DJ D)*

The impact of these factors was further explored in case study scenarios 1 and 8. In scenario 1, judges were asked what decision they would make in a case involving a single man who did not attend the hearing but had consistently failed to pay rent and had arrears of £2,700. They were then subsequently asked if it would make any difference if the landlord disclosed that the tenant had mental health problems and was receiving support through an independent agency. As Chart 10 below indicates the pattern of outcomes differed dramatically when judges were made aware that there were mental health problems.

Chart 10: Impact of mental health problems on outcomes



Note: one judge did not give a definitive answer to the question in relation to the single man.

In the initial scenario 1, all except one judge stated that an outright possession order would be the correct order to make. When asked for the reasons for this decision very similar

explanations were given with judges typically stressing the very poor payment history and the fact that the defendant was a single person who had not attended the hearing:

“We’ve got a single man, so...I haven’t got concerns about children and I’ve got a very, very poor history. I’ve got no contact, I’ve got somebody who is working apparently and therefore on the face of it has no good reason for not paying his rent. I have no doubt that I would make an outright order in this situation...especially given the level of arrears.” (DJ H)

Conversely when judges were informed that the tenant had a mental health problem the pattern of outcomes was reversed with all those interviewed stating that they would adjourn the case until they were provided with evidence that the tenant was able to manage his affairs:

“Right, that would make a huge difference. I’d want to know who that person was and...I’d adjourn it for that...person to attend.” (DJ Y)

The impact of age and infirmity was explored in case scenario 8 which involved an application to suspend a warrant for possession made by a 68-year old woman whose Housing Benefit had been reduced because she had an adult son living with her who had failed to pay his contribution to the rent. When asked what order would be made in these circumstances again very high levels of consistency were noted with all those interviewed stating they would either agree to the suspension of the warrant or grant an adjournment on terms in order to provide the defendant with an opportunity to resolve the problem. Some judges took the view that it simply would not be socially responsible to refuse the request for a suspension of the warrant:

“I would bet a fiver that no district judge would put a woman of sixty-eight out because her useless son wasn’t paying the lolly. We would just do our best to not face up to it and suspend it.” (DJ I)

Others were aware that technically the tenant was responsible for the arrears and recognised that simply suspending the warrant would not necessarily result in a sustainable outcome. For these reasons they stated they would adjourn the case in order for the tenant to seek further advice about what action she could take:

“Suggest to the woman that she goes to see a solicitor for advice in dealing with the son. [...] As the tenant she’s responsible, but...you’d be very loath to evict a woman of sixty-eight. It might be that you’d want to get it back in four weeks’ time, and see.” (DJ Z)

In both these scenarios the pattern of outcomes reveals very high levels of consistency amongst the sample of judges, indicating that age and mental infirmity are factors which would have a very high impact on outcome, as suggested by the focus groups.

Judges are human too - personal reactions to hearings

“These [warrant suspensions] are the hardest applications, you know. Forget all your complicated civil procedures and your trials and everything else. Kicking somebody out of their house is such a major thing.” (DJ D)

As the above quote illustrates many judges were cognisant of the practical and emotional consequences of the decisions they made in possession cases. It was not uncommon for interviewees to reflect on their sense of personal responsibility evoked by adjudicating in possession proceedings. They were however, aware of the need to balance their emotional responses with their judicial role, as one judge explained:

“Sometimes you have sympathy even when you make the order, even when you refuse the application to suspend, but you know judges’ decisions can’t be based on sympathy, you know it’s the justice of the case between the parties...but it doesn’t mean that we’re unfeeling so-and-so’s.” (DJ N)

In this context it was not uncommon for judges to explain their decisions in terms of giving the defendant “one last chance”. Providing the tenant with a last opportunity to stay in their home was linked for many judges with a responsibility to impress on the tenant the need to adhere to the terms of the order. A number of judges said they frequently wrote “last chance” in large letters on the case file and then delivered a short lecture to the tenants explaining that if they defaulted on the terms of the order they would be evicted. One judge graphically explained how he approached the task of ensuring that defendants were clear about the terms of an order, in terms of play acting:

“It may sound cruel, that’s the way I happen to feel that I can get people to realise...and this is why I would say it, I would write ‘last chance’. I will play, if you like, hard and fast with their emotions, because hopefully they’re going to go out of the room feeling really scared, and remember what that feeling in the pit of the stomach is like to think that they were about to lose their property, in the hope that they will remind themselves of that.” (DJ D)

Others also talked about having a set pattern or routine way of trying to emphasise to defendants the need to repay outstanding rent:

“The temptation here is to get a bit pompous and say to yourself, these tenants need teaching a lesson that the rent is to be paid weekly, monthly or whatever it is and not as and when they get round to it, which is generally a few days before the issue of a warrant, or a few days after the issue of proceedings or whatever it may be.” (DJ W)

A number of judges commented on the gravity of possession proceedings and reflected on the human dilemma involved in depriving someone of their home as the following comment illustrates:

“At the end of the day you’re talking about somebody’s home. There’s nothing more fundamental, it seems to me, apart from taking time to take someone’s children

away, but somebody's home is actually one of the most fundamental things, it seems to me.” (DJ H)

Some judges clearly felt there to be a tension between their role as an adjudicator on matters of law and their emotional reaction to depriving someone of their home which they reconciled by trying to make a difference. A few judges managed this tension by stepping outside their judicial role and intervening in a more practical and creative way by, for example, referring defendants to advice agencies and even contacting support agencies on behalf of defendants.

“Some of them, they don't come to the attention of any sort of authority until something goes wrong with the rent and then they come along here... (Pause) and so yes, I mean it does make a difference what I do, but only to a certain extent.” (DJ O)

Others felt that their decisions could not be based on sympathy and that the extent to which they could intervene was very limited as one judge explained: *“Again, it's very difficult to sort of move out into being a sort of social welfare person, rather than a judge” (DJ F)*. In this context the exercise of discretion involving a human element was seen as being very important:

“It's up to the particular judge to exercise his discretion as he thinks fit on the particular day, and we can't do it by tick-box, we've just got to do it...we've got to have that sort of human element in it.” (DJ I)

Conclusion

Judges' relationships with tenants are complex. There is a wide variety of ways in which tenants' circumstances and participation in the proceedings impact on judges' use of discretion. The explanations as to why judges valued the opportunity to engage with tenants differed, but in general terms it was seen as being important in terms of ensuring that the type of order made was both fair and sustainable. Virtually all the judges interviewed considered attendance and payment history to be important factors which they took into account when exercising their discretion, not least because it enabled them to find out more about a tenant's circumstances and their motivation to keep to the terms of an order. There was, however, less consistency between judges in the way they assessed tenants' motivation, so the mere fact of attending the hearing did not necessarily result in a more favourable outcome for the defendant.

Interestingly much greater consistency in approach and outcomes was noted in relation to the impact of the personal circumstances of tenants. For example, in the scenarios involving dependant children or problems caused by age, mental health problems or an inability to

understand the proceedings, a greater uniformity of outcomes was achieved across the sample of judges. This suggests that while participation per se is not a key influence on outcomes, unless tenants attend hearings judges may not be made aware of factors which could have a significant impact on their decision-making process.

The analysis of the importance of judges' relationship with tenants highlights a number of practical problems that need to be addressed to ensure that judges have access to relevant information prior to making a decision as to whether to evict someone from their home. For example, it is clear that language difficulties do impact on judicial decision-making process with hearings adjourned for interpreting services to be found. In particular judges need to know what interpreting services are available in their locality and how to ensure that defendants can gain access to impartial and independent services that meet their needs.

Chapter 7: Particular factors impacting on decisions: levels of arrears and housing benefit

Introduction

In this Chapter we examine two factors which, independently of the relationship between the district judge and the landlord or any characteristics of the tenant, impact on the outcome of cases. These are:

- The level of arrears
- Housing benefit problems

Level of arrears

The level of arrears, no matter the identity of the landlord or the judge's relationship with representatives of the landlord or indeed the particular circumstances of the tenant, was a very significant matter for a number of judges in deciding the order that they would make. For some this was a matter of the number of weeks the tenant was in arrears, other judges were looking more at the sum in arrears, in general what was significant was the interplay between these two.

A number of participants to the defendant representative focus groups noted that some district judges appeared to have thresholds over which they would generally grant certain orders. The thresholds were different in different locations and between different judges. The size of the arrears and the length of time of their accrual were generally regarded by claimants' representatives as very influential in judicial discretion. This factor was also apparent in some but by no means all of the interviews with district judges. For one, 10 weeks was the point at which he would start considering an outright possession order:

"Ten weeks is a kind of rule of thumb that I have... Obviously I have a discretion to expand it much more than that." (DJ C)

As has already been indicated in discussing the increased incidents of adjournments, some judges felt that some levels of arrears were too low to justify a possession order. This threshold varied between £200 (DJ U) £500 (DJ H; DJ L) £1000 (DJ O). Some clearly had a structure in mind:

"If the arrears, for instance, are over £10,000 I'm going to need some persuasion not to make a possession order, if they're between five...and ten then probably I'd be considering a suspended order. If they're...between sort of one and five...it might be adjourned, it might be suspended, depending on how long they've gone on for and so on and so forth. But if they're under a thousand I will almost never grant a possession order unless it's one of the cases where housing benefit is paying all the rent and they're suppose to pay £2.80 a week and they simply won't pay it." (DJ O)

What must be emphasised is that while some of the judges clearly did have some sort of framework or “rule of thumb”, as is shown by the above quotes, this is to be used flexibly, and is very much linked to the judges’ view of the tenants, which has been explored in Chapter 6, above.

“I also look at the quantity of money, and I have sort of mental steps. They don’t necessarily follow them, but I sort of have a five hundred step and a thousand step and a two thousand step. But having said all that, in appropriate cases I’ll still grant an adjournment on terms even if it’s five thousand quid. You know, so you’ve got to look the specific circumstances.” (DJ X)

The use of “rules of thumb” is a way of narrowing what is a very broad discretion to make decision-making easier and quicker. As Lempert (1992, p. 216) notes in relation to eviction decisions of the Hawaiian Housing Authority Eviction Board:

“...what shapes the exercise of authorized or rule-given discretion. One important factor is that, when a decision-maker is repeatedly confronted with cases of a particular type, there is a tendency toward...‘shallow’ decision-making. That is, there is a tendency to eschew a deep probing of circumstances and to rely instead on a few key facts that can be used to fit cases to stereotypes. There are no doubt many reasons for this, including psychological mechanisms and the efficiency that routine processing allows.”

The impact of judges considering the level of arrears is illustrated by the responses to scenario 1. While 24 of the judges stated that they would grant an outright possession order (with one adjourning) when the arrears were £2700, when this level of arrears was reduced to £495 only 9 stated that they would grant outright possession, with 8 suggesting a suspended possession order, 3 adjourning and 2 stating that they would make no order at all as the arrears were too low.

Some judges were also concerned where arrears were unusually high at the date of the first hearing. For one, while the fact that the tenant had a high level of arrears was important:

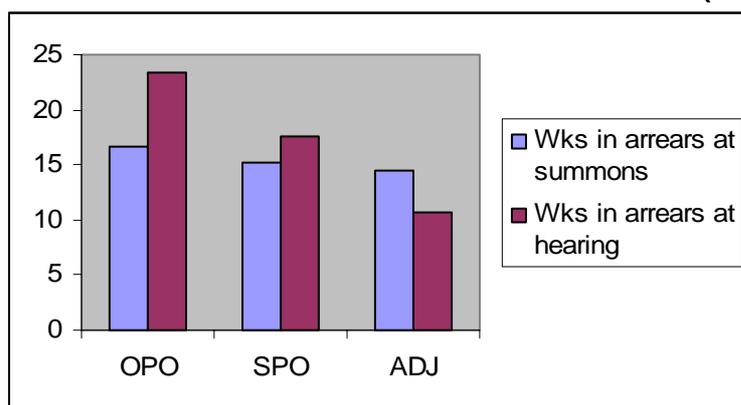
“There’s also...has the landlord waited until the arrears are very high before commencing proceedings? If so, why? Is it because of a slovenly policy or has it been that the tenants made promises or that the landlord’s given opportunity to the tenant? You know, it’s just...it’s just not black and white. (DJ N)

One commented how he got “cross” with the landlord “if they’ve allowed the arrears to run up” (DJ T). Where landlords had allowed the situation to get out of control, this was clearly a factor in the judge not making the order that the landlord requested.

Perhaps reflecting the findings by Pawson et al (2005) two judges (DJ R and DJ S) noted that landlords were more likely now to issue proceedings before the arrears got particularly high.

Although numbers are small, court data on the different levels of arrears for the three main orders: outright possession, suspended possession and adjournment, indicates a relationship between the level of arrears and the outcome. Unsurprisingly numbers of weeks in arrears at summons are not greatly different as these will be a reflection of the practices of the landlord. It is the level of arrears at the first hearing which differs between the three outcomes, illustrating the importance of both the absolute level of arrears on the outcome and also the efforts of the tenant in reducing arrears (see further Chapter 6, above).

Chart 11: Levels of arrears for different outcomes (n=523)



What emerges is the importance of the level of arrears, but that this is always considered in the context of the circumstances of the case, and in particular those of the tenant, as explored in Chapter 6 above.

Housing Benefits

The issue of housing benefit as a factor in rent arrears repossession cases came out very strongly from the focus groups. This is hardly surprising given the increasing number of tenants in social rented accommodation who are in receipt of housing benefit (see Chapter 2). Focus groups composed of both claimant and defendant representatives felt that housing benefit was a crucial influence, responsible for many cases being adjourned at initial and subsequent hearings. Participants indicated that several district judges were well informed about which local authority departments had a reputation for delay and poor administration of housing benefit. Although, as already highlighted, housing benefit was not found to be a particularly significant issue in previous research (Nixon et al, 1996), the picture had changed by 2001 when a study was carried out into the experiences of black and minority ethnic defendants. (Blandy et al, 2002).

By that time, housing benefit “proved a very significant, if not the major, factor in the development of the arrears of the majority of tenants who were interviewed” (p. 16) and was

also the most common explanation given by defendants for rent arrears in the 150 cases examined during that research. The impact of these difficulties was acknowledged by district judges in that study, who considered that they led to unnecessary adjournments and repeat hearing dates. One judge estimated that housing benefit issues were involved in 40% of rent arrears cases; another felt that the difficulties could “lead to the collapse of this court’s ability to effectively list possession cases” (pp. 90-91). The study found that in Leicester County Court only 12% of the cases were adjourned at the first hearing, compared to 64% at Wandsworth County Court, and suggested that these different outcomes were in part caused by lengthy housing benefit delays in cases involving Lambeth LBC.

The problems faced by, and caused by, the administration of housing benefits are well known. For example, it accounted for 10% of the nearly 19,000 complaints made to the Local Government Ombudsman in 2003/04 (Local Government Ombudsman, 2004). However, efforts made to improve the system seem to be having some effect. Statistics from the Department of Work and Pensions indicate that more councils are reaching the government’s targets; the average number of days reported by local authorities for processing new claims (for which the target is 14 days) has reduced from 55 days in 2002/03, to 49 days in the fourth quarter of 2003/04. But clearly a number of local authorities are failing to process new claims within 8 weeks, which has serious consequences for arrears cases based on the mandatory Ground 8 (see Chapter 8, below). However, in answer to the question whether county courts might be given discretion in such cases where the rent arrears resulted from a delay or failure to pay housing benefit, the Housing Minister Keith Hill responded that the Office of the Deputy Prime Minister had no plans to amend Ground 8, in view of the improving performance of local authorities in administering housing benefit (*Hansard*, 12 July 2004: Column 876W).

In this chapter we consider the impact of housing benefit under the following headings:

- Findings from the data on recorded cases
- Judges’ view and knowledge of housing benefit
- Housing benefit as a factor in determining reasonableness and type of order
- Responses of judges to housing benefit scenario

Findings from data on the recorded cases

Here we draw on data from 530 cases where the outcome of the first hearing was recorded. This is the number of such cases where we can be sure that the researcher recorded whether or not housing benefit was noted as an issue. In 121 cases the issue of housing

benefit was raised, representing 23% of the total. Although this proportion is somewhat lower than expected it is still sufficiently significant to make further analysis worthwhile. The numbers and percentages of the 'first hearing outcome' cases in all the courts in this study are shown in the Table 8.

Table 8: Number and percentage of cases where housing benefit was noted as a problem by court

Court	All (n = 530)	London (n = 358)	West (n = 47)	Northern 1 (n = 58)	Northern 2 (n = 67)
Number	121	93	10	15	3
Percentage	23%	26%	21%	26%	5%

The possible reasons for the marked difference shown here between Northern 2 court and the other courts have already been discussed in Chapter 4 (see p. 24).

The following table shows the different outcomes, by court, of cases in which housing benefit was noted as a problem and the rent arrears possession cases in which housing benefit difficulties were not involved. Although numbers are small, in each of the courts where data was collected on the outcome of first hearings, there was a clear difference in outcomes between cases where housing benefit problems were noted, and those without such problems.

Table 9: Outcomes, by court and by presence or absence of housing benefit problems

Outcome of first hearing	Did case have HB issue	All courts (No: n=409 Yes: n=121)	London court (No: n=265 Yes: n=93)	West Country court (No: n=37 Yes: n=10)	Northern 1 court (No: n=43 Yes: n=15)	Northern 2 court (No: n=64 Yes: n=3)
Outright possession order	No	16%	8%	22%	28%	36%
	Yes	2%	2%	0%	0%	0%
Suspended possession order	No	25%	17%	22%	40%	47%
	Yes	14%	12%	40%	13%	0%
Adjournment	No	49%	63%	35%	33%	2%
	Yes	83%	84%	60%	87%	100%
Withdrawn, etc.	No	12%	11%	22%	0%	16%
	Yes	2%	2%	0%	0%	0%

Although the precise pattern is different for each court, it is immediately apparent that a higher proportion of cases are adjourned once housing benefit is raised as an issue. This is true even for London court where a high percentage of adjournments are granted in any event. In each of the courts, when housing benefit problems are involved, there are virtually no outright possession orders granted; fewer suspended possession orders (except in the

anomalous case of West Country court, which involved only ten cases in total); and fewer cases are dismissed, withdrawn, or struck out. These findings confirm the common perception amongst the practitioners who took part in the focus groups, and indeed of the district judges themselves, that housing benefit issues are distorting the work of county courts in dealing with rent arrears cases.

Judges' views and knowledge of housing benefit

In our interviews with district judges, almost all of them mentioned housing benefit as a problem before being prompted to discuss it, and it became clear that the issue is a very complex one. The two main problems with housing benefit are:

- Delays in payment can lead to apparent arrears which will in fact be paid once the claim has been properly processed.
- Errors in calculating benefits can lead to disputes over the amount of rent arrears.

Frequently the district judge is called upon to decide whether the delay or error has been caused by the tenant failing to provide the necessary information, or by the failure of the housing benefit administration to keep to time limits or their negligence in dealing with documents supplied by the tenant.

DJ B expressed the frustrations of many of the district judges about housing benefit when he said that *"we really are in Wonderland here"*, meaning that it was often impossible to find out the true situation regarding rent arrears. This view was amplified by DJ F:

"Really...nobody can make sense of what's happening, you know. Nobody knows: the tenant doesn't know, and the landlord doesn't know, what the real position is. And everybody knows that what the tenant's being asked to pay is not likely to be the right figure. So the whole thing becomes nonsensical really."

In describing housing benefit, no fewer than four of the district judges described it as *"a nightmare"* while many others used phrases such as *"overwhelming issue"*, *"huge problem"*, and *"bugbear"*. This situation impacts on the work of the county court in two specific ways. First, the delay and possible errors in administering housing benefit mean that more arrears cases are brought to court. DJ Q estimated that:

"If housing benefit was sorted out we would have half the cases we do (laughs)...I mean, if you didn't have those housing benefit problems, I would say the majority of cases probably would never come to the court, they wouldn't be listed."

Secondly, district judges often have no option but to adjourn a proportion of cases in each list for further information about the defendant's housing benefit claim:

“Well, the last list I did I probably adjourned out of, say, twenty, about four – just for housing benefit, because it hadn’t yet been sorted out. And of those four, at least two were at the request of the landlord.” (DJ G)

These adjournments inevitably lead to more cases being listed at a future date.

The role of the social landlord. Local authorities who are both landlords and responsible for housing benefit administration came in for some criticism, for example from DJ J who said *“when it comes to housing benefit delays, they can be caused by...their own administrative shortcomings”*, and from DJ X who felt that *“local authorities should not be bringing their cases if there are housing benefit issues.”* However, she also acknowledged the difficulties faced by local authorities in saying that:

“Housing benefit, in my experience, works quite well if you have only between five and ten per cent of your tenant population on it. If you’ve got ninety per cent, which I suspect is the case in the inner London boroughs, how can you cope? You don’t have the finances for it.”

On the other hand, some district judges expressed considerable sympathy with housing associations which:

“have their books to balance. They know of these delays, but they still feel that it’s...it’s prudent to issue these proceedings.” (DJ I)

This perceived difference between social landlords may affect the outcome of cases if judges consider it unfair for housing associations to bear the financial burden of arrears caused by housing benefit.

Comparisons over space and time. Similar views about the difficulties caused by housing benefit administration were expressed by district judges in each area of the country where interviews took place. Two district judges were able to compare the administration of local authorities where court jurisdictions straddled boundaries; however, in both cases this was a comparison of *“appalling”* with *“mediocre”*, or *“dreadful”* as against *“slightly better”*. Three of the district judges interviewed (two in London, one in the Midlands) felt that problems caused by housing benefit were improving:

“When I was first appointed, housing benefit was almost a national joke; it’s now merely a service under pressure.”

On the other hand, two (in West Country and in Northern 2 courts) considered that the problems were becoming worse:

“Certainly within the last year it’s become steadily worse and is far worse than it’s ever been before”.

District judges' knowledge. Some of the district judges interviewed displayed a detailed knowledge of the housing benefit system, and were able to comment on difficulties caused by aspects such as the requirement for annual re-applications, and by both the possibility of backdating claims and by the restrictions on backdating benefit. None of the interviewees said that housing benefit calculations had been covered in training, but many were very conscious that some particular categories of claims were not straightforward. For example, DJ O was among the district judges who were well aware that claiming housing benefit was: *“particularly difficult if the tenant is low paid, in and out of casual work, working for their brother-in-law, no wage slips, you know.”*

A number of district judges had had personal experience, through assisting elderly relatives or in one case the judge's own tenant, of completing housing benefit forms. They had all found the process complicated. Even without this personal experience, most of the judges interviewed were well aware of how difficult the process of claiming could be. DJ D expressed the view that “anybody on housing benefit has my sympathy, not because of their predicament, but because of the bureaucracy they have to deal with.” Another was concerned about the difficulties faced by any claimant “who's not terribly bright or doesn't speak much English” (DJ J).

This empathetic approach may help to explain why the mention of housing benefit problems so frequently leads to cases being adjourned.

Contradictory evidence. The frequent delays in processing claims, the complex nature of housing benefit, and the potential for error, mean that the district judge is often faced with deciding between two versions about why a claim had not yet been processed: *“is it because housing benefit are being inefficient, or is it because the tenant hasn't co-operated, or is it a mixture of the two?”*, in the words of DJ O. A few district judges said that when this situation arose they made an assessment of whether *“the tenant is telling the truth so far as you can judge”*, using *“experience and gut feeling about knowing what to do, what questions to ask”*.

Some were inclined to see housing benefit delays as a ‘fact of life’ and did not attribute blame to either party:

“Just the local authority being very slow, and often tenants not doing what they should do.” (DJ Q);

“Housing benefit sitting on an application for three or four weeks before they return it because somebody's forgotten to sign page three, or whatever it may be.” (DJ W)

Others took the view that on occasions, as DJ J explained, housing benefit delays were due to tenants who:

“prefer to bury their head in the sand [so that] despite two or three chases by housing benefit, the basic reason why the application hasn’t been processed, it has to be said, is the tenant’s fault, not the landlord’s.”

However, on the whole, the district judges we interviewed were sceptical about information provided by housing benefit officers where this was contradicted by the tenant’s evidence in court. A typical view was that of DJ F:

“I’m afraid that whereas at one time I’d have believed the housing benefit officer, I tend these days to give the benefit of the doubt to the tenants...I don’t think housing benefit officers go around deliberately lying, but I think they’re under such pressure of work that you can’t really rely on what they say these days, quite honestly.”

This scepticism was borne out of experience:

“When a tenant says, ‘I did send my review forms and they must have lost them’, I now know that that’s more likely to be true than not.” (DJ H)

A further problem for district judges arises where the claimant is the local authority, and their representative at court gives ‘second-hand’ information obtained from colleagues in the housing benefit section, about the defendant tenant’s housing benefit claim. Again, many of the district judges interviewed felt that this type of information could not be relied upon. DJ Q explained that:

“so often I’ve had cases where...sometimes the tenants actually produce a letter from housing benefit saying one thing, and the local authority [as landlord] says, ‘well, our information’s completely different’. You know, I’ve actually on occasion adjourned cases anyway, and directed that somebody from [housing benefit contractor] comes to court to tell me what actually is happening, because I can’t make head or tail of it.”

This lack of trust about housing benefit information was in strong contrast to the acceptance by most judges of other evidence given by housing officers (see Chapter 5, above).

Housing benefit as a factor in determining reasonableness and type of order

Many of the district judges raised the issue of housing benefit when asked about their ‘mental checklist’ of factors to be taken into account in considering reasonableness. The amount of housing benefit payable, and any shortfall between that amount and the full rent, appeared on the pro forma record of hearings used by district judges at London and Northern 1 courts.

Two of the judges interviewed felt that the tenant's attitude towards making the housing benefit claim, and dealing properly and promptly with further queries made by the local authority, had a particular bearing on reasonableness.

"The only reason why I would think it was reasonable to turn somebody out is if they have made no effort whatever to get their housing benefit claim sorted out." (DJ T)

"If I find that they just haven't bloody well bothered to get their act together, that will count against them as far as I'm concerned. Whether it would count against them to the extent of having an outright order...but I certainly say 'It is your responsibility to get round to the housing benefit office, find out what they want, and go away and get every scrap of paper that they want and get it back to them', in the hope that they do." (DJ I)

This response reflects those noted in Chapter 6 in relation to tenants' efforts in attending court, and showing that they have a commitment to the tenancy and preserving it.

The interviews with the district judges made it clear that once there is some doubt about a housing benefit claim, the usual outcome is for the case to be adjourned for the problems to be sorted out. DJ S took the view that "whilst you sympathise with the tenants, in the end the rent's got to be paid", but nonetheless:

"Where you're clear that the problem has arisen not because of the tenant's error, and therefore you shouldn't be making an order, you should be adjourning it on terms to enable them to try and get it sorted out."

Another district judge agreed that such cases had to be adjourned, but would tell the tenant:

"You will pay the £2.80 minimum payment and I am granting you an adjournment but I want to see this paid. It will come back before me and the first thing I'll be asking is, 'Has this been paid?'" (DJ Y)

Most district judges clearly felt very frustrated at both their inability to do anything other than adjourn, and at the length of the adjournments. DJ P noted that "in some boroughs it can take many months, you know" to sort out housing benefit; he was also aware of the effect of repeated adjournments on tenants who work part-time and risk losing their income, possibly even their employment, due to having to attend court. However, on the positive side, DJ G noted that adjourning cases relieves pressure on that day's list:

"If it's housing benefit, then you probably adjourn...it takes no more than a minute to have that consideration dealt with, and then you have got more time to deal with the rest".

Even where housing benefit is being claimed without any apparent difficulties, it remains a factor in rent arrears possession cases. The weight given by district judges to the level of rent arrears and the number of weeks in arrears, has been discussed above. Eleven district

judges spontaneously mentioned that they would consider granting possession on low amounts of arrears, if these were attributable to a small proportion of the rent not covered by housing benefit, and were therefore the tenant's responsibility. This might persuade them to grant possession because, as DJ U argued, if a low level of arrears:

"In fact represents non-payment of the shortfall between housing benefit and rent for a considerable number of weeks, then it may nevertheless be reasonable to make the suspended possession order."

Many district judges seemed to feel strongly about tenants' failure to pay a small contribution; for example DJ J said:

"I think in many ways that's more reprehensible than not having paid two hundred and fifty pounds over five weeks."

Responses of district judges to housing benefit scenario 3

Scenario 3

A local authority is seeking possession against a tenant, who was granted a tenancy four months ago. The rent is £55 per week. No rent has been paid since the tenant moved in and arrears are £935. The tenant, a single woman attends and tells you that she is unemployed and has submitted a housing benefit claim. She has tried to contact housing benefit, but has not been able to find out what has happened. The housing officer tells you that she (the housing officer) has contacted housing benefit that morning. The housing benefit office state categorically that they have written to the tenant asking for further information, and until that information is received the claim cannot be processed.

As already noted, the district judges interviewed had definite views about the problems posed by housing benefit. Many of them volunteered examples of these, and made clear their attitudes towards the tenants, landlords and the housing benefit administration with which they had to deal on a regular basis. The scenario which was then put to them provided a good opportunity of testing out these views against a typical case.

The district judges had to adjudicate between the evidence of the unemployed single female tenant that her housing benefit claim had disappeared into the system, and the information from housing benefits relayed to the court by the housing officer, that the tenant had failed to respond to their request for further information without which the claim could not be processed.

Only one of the district judges interviewed (DJ G) considered a possession order:

"DJ: Four months ago, right, no rent paid. Mmm-hmm. (pause) And this is an outright order that's being sought, is it?"

Interviewer: Yes.

DJ: *I'd be inclining towards the landlord. I might possibly adjourn to establish whether what has been said is right or not. But on the information that you've got there, ... there's no rent paid at all since they moved in, there appear to have been requests for information and contacts with the tenant which have not been responded to. So the reasonableness see-saw is going way against her. She says that she has... tried to contact them but has not been able to find out what has happened. That seems pretty weak to me on the face of it. I know there are many occasions when...there are failures to contact, failures to respond and so and so forth, but that seems extremely weak to me. I would incline there towards an order."*

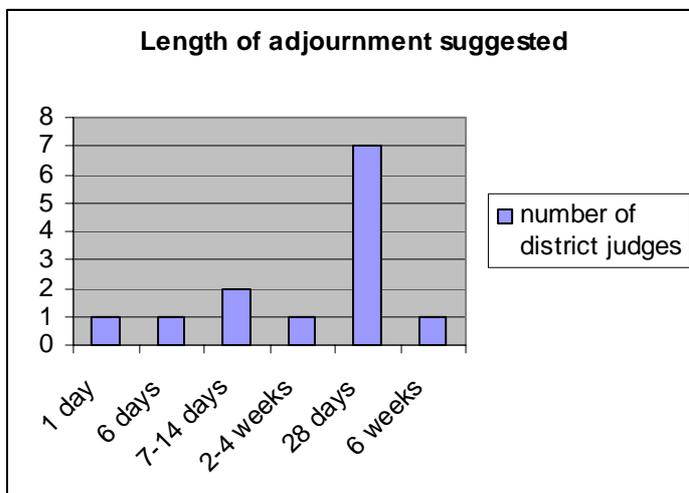
All the other district judges interviewed said that they would adjourn the case, some expressing considerable reluctance at having no other option:

"I don't like doing it...by the time they come back the arrears are much larger than they are now and one is, on the face of it, holding out the promise that nothing very serious is going to happen – unless you spell it out, which I always have to." (DJ W)

The considerations which have been discussed above, about giving the tenant the benefit of the doubt in such circumstances, were again the basis for many of the decisions to adjourn. DJ O said that "the fact that housing benefit have said something categorically doesn't mean I accept it at all" but nonetheless would grant only a short adjournment of 6 days because of the possibility that the tenant was 'crying wolf'. Five of the district judges indicated they would adjourn on terms, two giving the standard figure of £2.80 per week and one suggesting that five pounds would be appropriate. The justification for requiring a weekly payment was that "she might as well start and that'll test the motivation" (DJ K).

There was considerable variation amongst the thirteen judges who suggested the length of adjournment they would order.

Chart 12: Length of adjournment suggested by district judges where housing benefit raised as an issue (n=13)



The shortest adjournment was suggested by DJ Y, who said she would tell the tenant:

“She must go down to CAB now, and [I would] make her promise that she would go here and now. ...I might even say ‘I want you to come back tomorrow morning, you know, and tell me what everybody’s said, and what’s happening’ just so...that there’s a degree of urgency for them.”

This very personal, interventionist, approach represents one end of a range of approaches amongst the ten district judges who said they would directly advise the tenant about her future course of action. In three other instances this included ‘instructions’ to attend at the housing benefit office. Five judges would suggest that the tenant should seek advice from, or said they would ‘refer’ her to a solicitor, money adviser, or the CAB:

“They’re used to the paperwork, they know how to fill the forms in and they know how to chase the system.” (DJ Z)

Two district judges would tell the tenant they expected to see a receipt or some confirmation from the housing benefit office at the next hearing.

At the other end of this range lay a more impersonal approach adopted by two district judges, with an emphasis on the consequences for the tenant if she failed to sort out her housing benefit by the time of the next hearing. DJ M would explain to the tenant that he would then find it *“difficult not to make a possession order, difficult to suspend”*. The warning which DJ P expressed would *“emphasise that any failure to co-operate in these circumstances is likely to have very serious adverse implications”*. This same judge would also:

“explain to the housing officer that unless his or her colleague has sorted it out by next time, he or she is likely to be on the receiving end of an order to attend”.

Some district judges were clearly concerned that the tenant might be using housing benefits as an excuse for her failure to pay the rent, and were prepared to take more formal action. DJ A said that he would make a direction that the tenant attend the next hearing “to give her a chance to explain” and would place a note on the court file that “the local authority are saying that they haven’t received anything”. Another district judge would note “the reason for the adjournment”, and a third would make a note of the tenant’s referral to Money Advice – so that if by the next hearing an adviser had not become involved and the position regarding the arrears remained the same, there would be an outright order.

Conclusions on housing benefit

There is no doubt that housing benefit problems are contributing to the increased number of adjournments, and have a marked impact on judicial decision-making. DJ G, when asked

how he dealt with the housing benefit issue, replied “I’m adjourning, adjourning, adjourning”, while DJ F explained that he tended:

“to make an order and re-list it after so many weeks, so that it comes back. So there is an actual order of some kind, and everybody knows where they are. But that’s just phraseology, really.”

Some district judges pointed out that claimants also are now “*much more realistic about the housing benefit situation than they used to be*” and will accept that adjournments are frequently necessary, and in many cases apply for adjournments themselves.

Most of the district judges interviewed were well informed about housing benefit, both about the details of the system as it should work, and about the local conditions under which it is administered. All of them have a certain amount of sympathy and patience with defendants, but are also aware that claimants are losing rental income while housing benefit problems are sorted out, and while possession cases are adjourned. Most of those interviewed judges have become cynical about the capability of housing benefit administration to deal with claims, through their experience of hearing cases involving lost application forms and other information, incorrect assessment of benefit, and administrative delay.

Many of the district judges we interviewed regularly gave the benefit of their experience in the form of advice to defendants who are having difficulties with their claims for housing benefit. The judges also make use of expert advisers, either present at court as duty desk advisers or working in the community, who they hope will be able to speed up the system. One practical suggestion, from DJ L, was that each court should have a housing benefit officer attending possession days with the relevant files, and access to the benefits computer, who would be able to check the progress of defendants’ claims before each case was heard.

Although these district judges represent a range of attitudes towards claimants (see chapter 5) and towards tenants (see chapter 6), their responses to a ‘real-life’ scenario of a possession case based on arrears of rent, which the tenant claimed was due to housing benefit problems, were remarkably consistent in that only one even considered granting an order rather than adjourning the case. However, thirteen of the interviewees suggested the period of adjournment, and this ranged from one day to six weeks. From the analysis of the database of recorded cases across all four courts, the vast majority of those where housing benefit was raised as an issue, resulted in an adjournment. There is little scope for district judges to exercise their discretion on reasonableness in such cases. Indeed their role is limited to reassuring (or warning) tenants to progress their benefit claim, and to ensuring that

claimants are not granted possession in cases where the administration of housing benefit, rather than the tenant, is responsible for the arrears of rent.

Chapter 8: Particular decisions: ground 8 cases and warrants for possession

Introduction

In this Chapter we examine two particular decisions which district judges have to make. The first are those where the landlord is seeking possession against an assured tenant under Ground 8. Secondly, we consider decisions on applications by tenants to suspend warrants for possession.

Ground 8

As has been outlined in Chapter 2, where housing associations are seeking to evict assured tenants they may rely on the mandatory ground for possession (Ground 8). As noted, there are some indications that housing associations, particularly in London are increasingly using this ground (Pawson et al, 2005). It would seem likely that the use of Ground 8 was accelerated by two factors in 1996/7. First from 7 September 1996, changes to the housing benefit rules meant that all new claims were paid in arrears. Thus in circumstances where the landlord is paid directly by the local authority (which will be the norm for housing association tenants) the payment will be made four weekly in arrears. Secondly, the number of weeks of arrears required at the date of the notice of seeking possession and hearing was reduced from 13 to 8 weeks by amendment to the Housing Act 1988 by the Housing Act 1996. This increased the likelihood that tenants would have sufficient arrears to satisfy the requirements for Ground 8 to apply.

A practice of adjourning Ground 8 claims was described by the claimants' focus groups and the focus groups felt that this indicated the judges' lack of knowledge of the law. In fact the legal position is less clear than might be thought. Some judges have taken the view that they do have power to adjourn a Ground 8 case, provided that there has been no evidence heard.

The powers of the county court to adjourn Ground 8 cases were considered by the Court of Appeal in *North British Housing Association v. Mathews* [2004] EWCA Civ 1736.

Judgement in the case was given on December 21, 2004, after the data for the study had been collected. In essence the Court of Appeal ruled that the county court's general power to adjourn is not completely ousted but that it may only be exercised for the purpose of enabling a tenant to reduce the arrears to below the Ground 8 threshold (as opposed e.g. because of the illness of the defendant) in exceptional circumstances (para. [32]). The type of circumstances include where the tenant is on his way to court on the hearing date carrying all the arrears of rent in cash in his pocket, and he is robbed and all his money is stolen and

where the tenant is in receipt of housing benefit, and the housing benefit authority has promised to pay all the arrears of housing benefit, but a computer failure prevents it from being able to do so until the day after the hearing date. The simple maladministration of housing benefit is not, however, an exceptional circumstance. In the light of this case it may be that both the outcomes of cases, and indeed the district judges' responses to our questions would now be different.

Outcomes in Ground 8 cases

The outcomes in the court data indicated that Ground 8 certainly does not guarantee that an outright possession order is obtained. Out of the total number of cases 43% (237) involved assured tenancies. In 62 of the assured tenancy cases (26%) the landlord sought possession on mandatory Ground 8 as well as discretionary Grounds 10 and 11, while in only 4% (9) was Ground 8 relied on alone. We were able to record the amount of arrears owing at the hearing in 56 of these cases. Of these cases 75% satisfied the 8 weeks arrears at the date of the hearing. Accordingly in 25% of cases the judge could not make a mandatory order based on Ground 8, and did have power to suspend the order.

Because of the listing practices of the different courts we were not able to observe a significant proportion of RSL cases in the two northern courts. In the London court 50% of the first hearing cases (182) involved assured tenancies and in the West Country (because all the local authority stock in the area had been transferred to a housing association) all the first hearing cases observed (47) were assured tenancies. In the London court there was a greater tendency to use Ground 8; 36% of assured tenancy cases included a Ground 8 claim (generally in conjunction with grounds 10 and 11). In the West Country, only 9% of claims involved Ground 8. This provides some evidence to support that of Pawson et al, (2005) that Ground 8 is more commonly used in London.

The outcomes of the cases involving Ground 8 show a different pattern from the average. As Table 10 indicates, unsurprisingly a lower number of suspended possession orders and a higher proportion of outright possession orders were made in cases involving Ground 8. It is noticeable that it is only where the landlord relies on Ground 8 alone that the pattern changes markedly, with 7 out of the 9 cases resulting in an outright possession order. The drop in suspended possession orders in cases involving grounds 10, 11 and 8 is largely compensated for by an increase in the use of adjournments. This does seem to indicate that Ground 8 is operating in a far from mandatory way.

Table 10: Outcomes in Ground 8 cases (first hearings)

Outcome	All tenancies (n=540)	Grounds 10 and 11 alone (n=163)	Grounds 10, 11 and 8 (n=62)	Ground 8 alone (n=9)
Outright possession	13%	6%	11%	78%
Suspended possession	22%	21%	8%	0%
Adjourned	56%	62%	71%	11%
Dismissed/withdrawn/costs only	9%	11%	10%	11%

The approach of district judges to Ground 8

We explored with district judges their views on the use of Ground 8 and how they would approach such cases if asked to decide one. A number of judges, all outside London, came across its use so rarely that they did not have a general view. The fact that it was only rarely used did, however lead one judge to the view that when a housing association did seek possession on the basis of Ground 8 they were to be regarded as a “maverick”.

For those with more experience of it, all but one judge expressed distaste in some form or other for its use. This even applied to those who felt there was no alternative to granting possession:

“...It’s not I would see it morally, the function of the social landlord to start using Ground 8, but they are doing. And if they ask you to do it I’ve got no choice in it.” (DJ G)

For this judge the certainty of the law was paramount. This was also borne out by a number of judges in relation to Scenario 4 which asked about the decision the judge would make in a Ground 8 case, where the tenant through a representative from the duty desk alleges that the majority of the arrears are due to housing benefit problems.

“It’s very unfair but my understanding of the law is that, however unfair it is, if parliament intends that the arrears...are on a certain two dates, over eight weeks or whatever, you have to make possession order and the reasons are irrelevant, which is pretty tough. I don’t like it but, you know, I await a determination from the Court of Appeal on it.” (DJ U)

Even where the judge accepted there was nothing he could do, there was an inclination to advise the housing association as to its future behaviour:

“Nothing I can do, but I would point out that if these arrears were cleared by HB, I would expect the housing association to grant a new tenancy.” (DJ B)

Another also commented that notwithstanding granting the outright possession order:

“I will tell the housing association I don’t think it’s appropriate for them to pursue it under Ground 8.” (DJ X)

For some, however, this belief that housing associations should not be using Ground 8 at all was related more specifically to a “Protocol” or “Code of Conduct” (referred to by three judges). For them this provided a basis for not granting possession. It is certainly the case that when the Housing Act 1988 first came into force the Housing Corporation issued guidance in the form of the Tenants’ Guarantee which stated that registered housing associations should only use certain of the statutory grounds which equated to those available against secure tenants, and did not include Ground 8 (Alder and Handy, 1991, p. 154). Housing associations are required by statute to have regard to this Guidance, although it does not give enforceable rights to the individual tenants. In any event by 1994 the Guidance had changed. This prescription as to which grounds could be relied upon had gone. The requirements placed upon them were simply that (Housing Corporation, 1994, para. C5):

“prospective tenants should be fully informed of the rights of assured periodic tenant under the Housing Act 1988, and the specified grounds on which the Courts would be able to end the tenancy...”

The current Guidance (Housing Corporation, 2004) from the Corporation states (para. 3.1.4):

“Before using Ground 8, associations should first pursue all other reasonable alternatives to recover the debt. Where the use of Ground 8 forms part of an arrears and eviction policy, tenants should have been consulted and governing board approval for the policy should have been given.”

What the Guidance does not do is preclude the use of Ground 8.

For some district judges this dislike of the use of Ground 8 and the erosion of judicial discretion meant that they were prepared to adopt strategies to circumvent the certainty of the law. As a first line of attack, six judges commented on how they would examine the paper work very closely.

“I have to say I don’t like it and therefore I insist upon all the requirements of the CPR being met... I feel that my hands are tied, I have to hear the case, I can’t adjourn it and I don’t like that and therefore I will look to see if there’s any way in which I can adjourn it because of some technical defect in the papers. So, it gives the time, a chance for the housing benefit to come through. But, if everything is clear, then I make the order...” (DJ U)

In response to scenario 4 one commented that:

“I would ask the housing association whether they agree to the adjournment. If they say they’re not... I would probably find a reason to adjourn. ...the difficulty arises if I can’t find a genuine reason, but it’s not normally hard to find a reason. I can normally find a defect.” (DJ D)

Others were, however, prepared to go further. One simply suggested that Ground 8 cases were put to the end of the list:

“The old way of looking at it was not to hear any evidence and adjourn it, but the recent dicta of the Court of Appeal suggest that that’s wrong... So I suppose the way I would now deal with it is...by putting the claimant out to the end of the day and suggesting that...I might not reach him. I don’t know. There’s always going to be a way.” (DJ B)

This sort of approach was designed to put pressure on landlords not to insist on using Ground 8. Some judges clearly sought to persuade landlords either to reach an alternative agreement with the tenant or to not rely on Ground 8, but rather to proceed on the discretionary Grounds 10 and 11. This could be combined with very close scrutiny of the documents:

“I tend to say to the housing officer... ‘Which ground are you proceeding on?’ meaning only Grounds Ten and Eleven...and we’ll have to look at the papers very closely to see that everything is in order, which it never is. Often the agreement’s undated, it’s not stamped, and they tend to say ‘Ten and Eleven.’” (DJ P)

Most commonly reference was made to using adjournments. For most there was an awareness that any adjournment must be granted prior to any evidence being heard (although as has already been noted there was some dispute as to the legality of this). Some were aware that adjourning was something that they perhaps were not entitled to do legally.

“I attempt not to hear it on the first occasion if I possibly can think of any excuse for adjourning it, to give the tenant a chance to try and bring the arrears down. I know what the law says, and I know I shouldn’t.” (DJ O)

This general use of adjournments was also illustrated in the responses to Scenario 4. The fact that there was a potential housing benefit claim led a majority of the judges (15/26) to state that they would adjourn the case. For some the fact that there was a potential backdated housing benefit claim was important:

“Well, you’d hope that the duty representative who knows these things leaps to his feet straight away before the housing officer can utter a word and says, ‘This is an application for an adjournment.’ It’s more difficult if they’re not represented, of course, because you often don’t know until you’ve got into it that that is what it is, although obviously you can see from the papers it’s a Ground Eight. I think we’d all try to adjourn it...if there is a reasonable prospect that there’s going to be some backdated housing benefit. Assuming the application’s made right at the beginning, before you’ve heard any evidence, I think we would try to ask penetrating questions to have evidence that the claim for backdating has been made, that there’s a reasonable prospect of it being granted.” (DJ Q)

An extremely robust attitude was expressed by some judges to the fact that they may not have power to make an order:

“No, I’d adjourn it. And if they don’t like it, they can appeal. It’s as simple as that...”
(DJ N)

One final way of avoiding the effects of Ground 8 was suggested by one judge, based on district judges still having administrative responsibility for bailiffs:

“There’s also the other device of directing any warrant that might lie on the file...we can give administrative directions to the bailiffs not...to execute warrants. So that’s the device.” (DJ A)

It was not clear whether this was used in practice or effective.

Conclusions

In enacting Ground 8 no doubt parliament thought that it was legislating for what appeared a straight forward circumstance in which landlords would be entitled to possession.

Nonetheless as the judges all seem aware this is, perhaps surprisingly, a contested area of law. Many judges referred to there being different views of the law and to a decision from the Court of Appeal being awaited. Whether the fact that the decision has now been made, will affect their responses we will have to wait and see. While there was an almost universal feeling that the use of Ground 8 by housing associations was inappropriate, this did not necessarily lead to strategies to circumvent the law. After all “the law is the law”.

For some, however, their view of the use of Ground 8 was such that they were prepared to use strategies to avoid make an outright possession order. Some were prepared to take this further than others. There were those who would only adjourn on procedural grounds (i.e. finding fault in the paper work), while others simply asserted the right to adjourn, and effectively were willing to “dare” the landlord to appeal. A willingness by district judges to “ignore” the law is not unique to this study. Baldwin (1997, p. 72) noted both a willingness to investigate consumer credit cases very carefully where it was felt that the lender had been “conned” morally if not legally, and in one case a refusal to apply the law:

“After the hearing, the district judge confided to the author that, although the relevant law was clear, he had refused to allow an unscrupulous plaintiff to ‘get away with it’ and exploit the ignorance of the defendant who had foolishly signed the contract.”

The Ground 8 cases are slightly different in that the moral impropriety on the part of the landlord is less clear, but what is noticeable is the extent of resistance to the use of Ground 8 by housing associations. Given this, it is perhaps surprising given the attitudes of district judges that the issue has not come before the Court of Appeal sooner, and it is noticeable that the recent decision involved an appeal by tenants and not the landlord housing associations.

It is perhaps not surprising that, given this lack of consistency of approach, landlords felt that when they used a ground that was supposed to give them a “certain” outcome, certainty was not what they were getting.

Warrants for possession

Applications by the tenant to suspend the execution of a bailiff’s warrant illustrate a significant difference in approach between judges, which to some extent has already been discussed in Chapters 5 and 6; viz. whether the judge approaches rent arrears cases from the contract point of view, or is prepared to exercise discretion on social welfare grounds. Of the cases observed where data was recorded, only twenty-three concerned applications to suspend a warrant. Therefore, as it has not been possible to draw conclusions from such a small sample, this section of the report draws on our interviews with district judges.

The district judges who were interviewed were very much aware that deciding whether to grant or dismiss a tenant’s application to suspend a warrant was *“one of the most difficult decisions that you are going to have to make at all”* (DJ G). All that has been said previously (see chapter 6), concerning the importance of attendance by the tenant, applies particularly to these applications. The tenant must play an active role in seeking advice on how to challenge the imminent eviction and in filing the application at court to arrange a hearing. It can be assumed that virtually all warrant suspension hearings give the district judge an opportunity to hear the tenant’s side of the argument, and to assess their motivation and measure their commitment. In the rare case where a tenant does not turn up, this is seen as reflecting extremely badly on *“how importantly he regards the tenancy”* (DJ N).

Judges accept that, for some tenants, the warrant will be the point at which they first become involved in the possession process. They also tacitly or overtly acknowledged that an application to suspend the warrant provides a type of informal ‘backstop’ to outright possession orders:

“If the arrears are high and there’s been little or no contact, then if I’m asked to make an outright order I make it. But they’ve got 28 days and then they’ve got the warrant, so they can always apply...to come back.” (DJ V)

“If they’re not there then you make a possession order and if there’s – forgive me for putting it in these terms – if you’ve got it wrong, they can always come back...” (DJ M)

Some district judges said they would review the original order if the tenant had not appeared at the original hearing, and if the tenant:

“comes along with some sort of half-decent explanation on the [application to suspend the] warrant; I may very well vary it to a suspended order.” (DJ O)

General approach

It was possible to discern a distinction between those district judges who were concerned about breach of the tenant's obligations (*"why haven't they complied with the order?" DJ N*), and the majority who took a more social welfare approach to deciding applications to suspend a warrant. The interviews showed that some district judges had a strictly legalistic view of applications to suspend warrants: *"if it's [i.e. a refusal is] the right order to make, it's the right order"* (DJ D). However, most would err on the side of compassion, with one district judge going so far as to say he would *"very rarely refuse an application to suspend a warrant"* (DJ A).

This second attitude was criticised by landlords' representatives in the focus groups, with one London representative citing a case in which there had been twenty-six successful applications to suspend a warrant. A more balanced view was expressed by DJ F who felt that, however reluctant he might be to make an order which would result in someone losing their home:

"I think a judge is under a duty at some point to face up to it and say, 'This is the end of the line. We can't go any further.' And from time to time I do."

Factors taken into account

When asked what factors they would take into account when hearing an application to suspend a warrant, some district judges were unable or unwilling to say that they had any mental checklist:

"You do this job for so long and...you have an instinctive feel for it, so it's difficult to assess them [the factors] intellectually." (DJ N)

This group emphasised that each case is different:

"Very often, on the day, when you're faced with a particular human dilemma, you don't know which way you're going to jump until you see the whites of their eyes." (DJ I)

One judge relied on the parties to raise any pertinent factors:

"Obviously you'll find out from the local authority what the current position is and what their position is on the application. And then it's up to the tenant then to say what...they want to say." (DJ R)

However, most district judges said they would take into account very much the same factors as they did for possession hearings, routinely listing the following:

- the basis of the original possession order;
- whether the tenant attended the hearing at which this order was made;
- the arrears levels at the time of the possession order, and at the time of the applicant to suspend the warrant;
- any changes in the tenant's circumstances following the original order;
- the tenant's current family circumstances;
- what the tenant can afford to pay;
- whether any offer is being made, and if so, how realistic that is.

An important additional factor mentioned by many of the judges interviewed was the number of previous applications to suspend, although attitudes to this were divided. Some district judges operated a rule of thumb:

“A first application to suspend is very probably going to succeed, a second application may succeed or not, but three is about the limit – unless the earlier applications to suspend had been close together and/or a fairly long time ago.” (DJ C)

The majority said that they *“don't put any limit on the number of times as a blanket rule at all”* (DJ G) but would acknowledge that *“you get awfully fed up when you're after about five”* (DJ W).

Relations with landlords

Although this was a very important factor in hearing possession claims (see chapter 5), the focus of most district judges at the stage of an application to suspend a warrant was on the tenant. This did not mean, however, that the landlord's interests were ignored. For example, one judge explained that:

“What I will often do if someone applies to suspend and I'm not sure, I'll adjourn it for a month or two months on terms, and see if they can comply during that period. The local authority are happy with that because we're giving them a test.” (DJ S)

Another said that

“I might appease the landlords by offering to adjourn it to make sure they pay.” (DJ A)

There was an indication from at least one judge that the difference between private and social landlords could also be significant when dealing with this type of application, who referred to a recent refusal to suspend a warrant when:

“This was a private landlord, who desperately needs the money from the rent, they're struggling...” (DJ Y)

Attitudes to tenant at hearings to suspend a warrant

Several judges felt that last-minute involvement in the possession process, and indeed last-minute applications, reflected badly both on the tenant's ability to organise their life, and on their commitment to the tenancy:

"Often they come in at three o'clock in the afternoon before the morning of the eviction...if it was my roof over my head at risk...I'd be down the court like a shot."
(DJ I)

One judge was concerned that this might almost amount to a deliberate tactic by the local CAB, which she felt might have been:

"telling people that if you go at the very last minute, and you know... and particularly, go along with your children, that you're more likely to have your warrant suspended. And actually that isn't the case with me, because my first question is, 'Well, you knew that you'd got an eviction date three weeks ago so why have you left it till this morning?' And unless they can come up with a good reason..." (DJ Y)

Responses to warrant scenarios

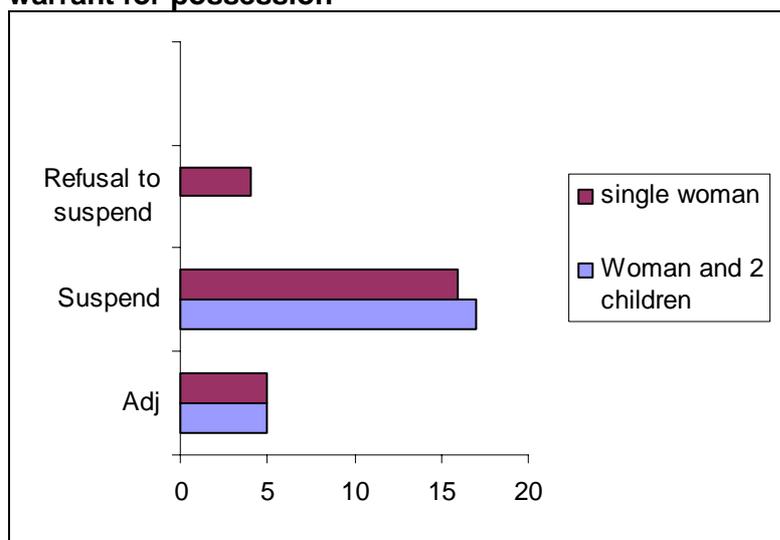
In the interview, district judges were presented with a scenario involving a request by a single woman to suspend a warrant for possession. She had only paid rent intermittently since the suspended possession order was made and the arrears had risen from £750 to £975. The defendant had already been granted one suspension of the warrant and there had been no material change in her circumstances.

In response to this set of facts many judges expressed concern about the defendant's failure to adhere to the terms of the earlier suspension, but when asked to decide what order to make the majority thought that the defendant should be given one last chance. There were however, a minority of judges who felt that in a case involving a single person there were insufficient grounds to agree to the suspension and who therefore decided to refuse the application. This group spoke of their 'difficulty' in suspending a warrant where there had already been one suspension and the tenant's circumstances did not appear to have changed, in the absence of 'persuasion' or 'convincing' evidence from the tenant:

"I would have some difficulty in suspending this warrant I think... Particularly if she lived there on her own I'd have difficulty in suspending that. I mean she has had one opportunity already, and there is just no real explanation as to why she's got herself into difficulties..." (DJ R)

When presented with an identical scenario save for the fact that, rather than a single person, the defendant was identified as a mother with dependant children, all those who had originally said they would refuse the application to suspend the warrant subsequently agreed to either adjourn the case on terms or to suspend the warrant for one further time, as illustrated in Chart 13 below.

Chart 13: Impact of family make up on the outcome of an application to suspend a warrant for possession



However, the reasons why children were seen as an important factor were twofold. Some judges felt that this explained the tenant's inability to keep up regular payments, as children create "greater calls on her, on her income". Others would grant the suspension because of the effect on the children if the household were evicted.

A further alteration to this scenario which was put to twenty of the district judges interviewed, was that the tenant had come up with an offer to pay a lump sum to the landlord. Only 10% would dismiss the application in these circumstances; 20% would adjourn the case for a short period, and 70% would agree to suspend the warrant. The majority of the interviewees were very concerned about the possibility of the tenant becoming further indebted, and would ask the tenant where she was getting the money from:

"Aunty Flo would be one thing. The backstreet loan shark would be another. [That] would be, to my mind, evidence that she can't afford to pay the rent...and I wouldn't encourage her to go out of the frying pan into the fire. If it's Aunty Flo, then yes, of course." (DJ C)

The final scenario, concerning an elderly woman tenant and her son who refuses to make up rent lost through a non-dependant deduction, has already been discussed in chapter 6. This was the scenario which caused the district judges the most concern, particularly for those whose formal approach was at odds with their sympathy for the tenant:

"In the end I don't think that I would be entitled as a matter of law to suspend where the rent wasn't being provided for...it's extremely difficult." (DJ C)

When pushed to say what their decision would be, the district judges were fairly evenly divided between granting the application to suspend the warrant, and adjourning the case.

None of them would dismiss the application, even those who were concerned about the landlord’s contractual entitlement to the rent.

When the responses by the district judges to the four scenarios are summarised, as in Table 11 below, the variation in outcomes is apparent. It must be borne in mind, of course, that these were not real cases and many of the judges interviewed came to extremely tentative conclusions about the likely decision they would make. Indeed, one judge declined to opt for any outcome to scenario 7, because:

“What would guide me most significantly here, most powerfully, is my assessment of the tenant. And...I don’t know, I honestly don’t know I’m afraid, without that.” (DJ N)

Table 11: Application outcomes suggested by district judges to the warrant scenarios

Scenario	Granted	Dismissed	Adjourned	
7: Single female tenant	17	4	4	Number of district judges suggesting each outcome*
7a: Female tenant with children	16	0	4	
7b: Tenant offers lump sum payment	13	2	4	
8: Elderly woman tenant; son refuses to contribute to rent despite non-dependent deduction from HB	14	0	12	

*Note: not all DJs gave a clear answer to each scenario and there is accordingly not the same total number of answers to each.

Within these variations, the noticeably consistent element is that very few of the judges interviewed would refuse the applications to suspend, in any of the scenarios. The interviews revealed some of the techniques which judges used to avoid this outcome. Many district judges said that their suspensions or adjournments would include a review date, to give the tenant “an opportunity for establishing herself as a regular payer”. One district judge explained this approach as a way of ensuring that, at the next hearing, all the information would be available to resolve the matter:

“I think these 28 day adjournments are a good idea. Because it won’t go away, this problem: it’s either going to be confronted and sorted within that period, or it isn’t.” (DJ S)

Whatever their decision on the scenarios, nearly all of the district judges interviewed said they would take the opportunity to address the tenant directly at the hearing. Their descriptions of this practice varied from an avuncular ‘little talk’ to a ‘stern lecture’. For those who would agree to a further suspension or an adjournment, this would often include informing the tenant that this was her ‘last chance’:

“I would give her one of my little talks, saying, ‘I’m making a note of this, and...and you’ve really got to get your act together, because it will be inevitable, I think, that...if you default again, you won’t get another suspension.’ I’d give her one last chance.” (DJ I)

The advice to the tenant was often expressed very directly: *“I’d tell her not to be so silly as to go and borrow more”* (DJ B). A number of judges would suggest to tenants in this situation that they obtain debt advice, and several would refer the tenant to a CAB or Money Advice Centre. In the case of the elderly tenant whose son was not contributing to the rent, a number of judges said they would suggest to her that she seek legal advice to have her son evicted from the property. Other suggestions were referrals to Age Concern or to Supporting People schemes. Three judges were prepared to intervene to the extent of telling the tenant that her son had to come with her to the next hearing.

Procedural considerations

The frequently last-minute nature of tenants’ applications to suspend a warrant meant that these cases, seen as extremely important and challenging by the judges, had to be fitted in to an already pressured court list. One district judge expressed concern that:

“Applications to suspend warrants are a fairly summary exercise. They aren’t allocated generally speaking more than 10 or 15 minutes, although...I have taken longer.” (DJ K)

In one London court there were sometimes as many as 12 applications to suspend listed at 10 am, before the possession list of between 65 and 70 cases started at 10.30; here, however the judge took a more robust view:

“If something complicated comes along you’ve always got the option to adjourn it and give it a longer hearing.” (DJ L)

District judges were very aware that applications to suspend warrants were among the most serious cases they had to deal with, and one said that:

“It’s not inconvenience to me to come in 15 minutes earlier, particularly when...it’s such a decision.” (DJ M)

However, in very busy courts, emergency applications inevitably *“completely kibosh the rest of the list”* (DJ X).

In a number of courts the practice is to start a separate bailiff’s file when the claimant applies for an eviction warrant. This administrative process means that if the defendant then applies to suspend the warrant, the judge is not provided with the full court file containing all documents from the claim form onwards. This makes it difficult for district judges to assess the factors that they would wish to take into account, such as the level of arrears and the reasons for making the original order.

A further concern is that in busy courts, it is impossible for judges who grant an application to suspend, or who adjourn it, or fix a date for review, to reserve the file to themselves. This led to judges being “*more likely to start again, take a step back*” (DJ C). The likelihood that cases listed for review would return to the same district judge was said to be “*the great advantage of sitting in a small court*” (DJ M). DJ K expressed the view that:

“It’s obviously easier for judges to deal with cases that they already know about, so judicial continuity is very helpful in that respect. [...] If it’s not one of your cases, then you are having to rely on somebody else’s notes and they may vary...”

Another interviewee complained that deputy district judges were reluctant to:

“grasp the nettle. From their point of view also, it doesn’t matter much, because they’re not going to be here tomorrow, are they?” (DJ G)

Conclusion

District judges found it challenging to exercise their discretion in applications to suspend warrants, being acutely aware that their decision would have an immediate impact on the tenant’s life, and that of any family members. Although a number of factors were likely to be consistently taken into account by all judges interviewed, most particularly the presence of children in the household, their responses to the scenarios varied considerably.

Applications to suspend warrants were also the type of case which prompted many judges to directly address the tenant in a direct and interventionist manner, referring them to sources of advice and warning them that this was their ‘last chance’ to remain in their home.

Issues of consistency and fairness caused some concern to judges themselves in these cases, particularly where district judges did not have the full case file, and where they had to rely on a colleague’s notes of what had influenced a previous decision to suspend the warrant.

Chapter 9: Conclusions

Where the law gives judges a wide-ranging discretion as in housing possession cases, it is inevitable that there will be issues as to how consistently such discretion is exercised. As illustrated in Chapter 6, housing possession cases involve judges making decisions about a key aspect of people's lives and judgements about their ability and willingness to pay rent in the future which are necessarily to a certain extent speculative. In these circumstances, unless rigid criteria are set out which leave no room for individual decision-making, there will inevitably be differences in the way judges approach cases.

A summary of the findings

This research showed that there were different patterns of decisions both between courts and between individual judges in courts. Various possible explanations for the variations between courts were explored:

- differences between courts in levels of arrears;
- the familiarity which claimants have with their local district judge, leading to a tailoring of orders sought which they know the judge is likely to grant;
- the prevalence of housing benefit problems;
- attendance by the defendant at court;
- the availability of housing advice for defendants, both in the community and at court.

It is not possible to show the different weight these factors have, but all are likely to play a part in the differences observed. These factors may lead to the development of a particular court culture, possibly also affected by procedural factors, such as pressures on listing and the use of pro formas developed by each court.

There was also considerable variation between individual judges' decisions. The qualitative data from interviews with district judges sought to examine whether any of the following factors could explain these differences:

- length of experience;
- type of legal practice before appointment;
- attitudes to training and updating.

No clear patterns emerged, however.

The interview data suggests that relationships of trust between district judges and claimants (who are generally repeat players) is significant. Whilst the relationship between trust and outcome is merely suggestive, the interview data suggests that relationships of trust do impact on the process. This was particularly the case in the busier courts in our sample, where the district judges were scheduled to hear a case every few minutes or so. The overarching theme behind this was personnel management by district judges of claimants' representatives, and there was evidence of a reverse effect as well (that is, management of judges by claimants' representatives). This was made possible by a number of factors which might combine together – the shift to housing officers appearing on behalf of claimants; the 'training' process in which district judges tend to engage claimant representatives and vice versa; those representatives length of time in post; levels of confidence placed in those representatives; and the nature of the claimant as a 'social landlord'.

There is a wide variety of ways in which tenants' circumstances and participation in the proceedings impact on judges' use of discretion. Virtually all the judges interviewed considered attendance and payment history to be important factors they took into account when exercising their discretion, although given that decisions are being made about individuals in inevitably subjective ways there was less consistency in the way in which judges assessed tenants' motivation. Thus the mere fact of attending the hearing did not necessarily result in a more favourable outcome for the defendant.

Much greater consistency in approach and outcomes was noted in relation to the impact of the personal circumstances of tenants, for example, dependant children, problems caused by age, mental health problems or an inability to understand the proceedings. This suggests that while participation per se is not a key influence on outcomes, unless tenants attend hearings judges may not be made aware of factors which could have a significant impact on their decision-making process.

So far as the level of arrears is concerned, some judges interviewed operated a 'rule of thumb', but said that these were always used flexibly so that other factors could be taken into account. Unsurprisingly the quantitative data indicates a relationship between the level of arrears and the outcome of possession cases, affecting the likelihood of the three main orders: outright possession, suspended possession and adjournment.

As noted above housing benefit was a particular issue which emerged. Housing benefit problems are contributing to the increased number of adjournments. Claimants accept that adjournments are frequently necessary. The analysis of the database of recorded cases

shows that the vast majority of those cases where housing benefit was raised as an issue, across all the courts, resulted in an adjournment.

An analytical approach

Thus, a wide and diverse range of factors was reported by judges as being influential in how they exercised their discretion in individual cases. There was no evidence of judges having regard to inappropriate factors, simply that they approached the task in the different ways set out above. What we have sought to do in this final section is to seek to understand and conceptualise the network of influences that inform how judges use their discretion in housing possession cases. In doing this, Lawrence's work (1995) on sentencing processes provides a useful starting point.

By analysing the forces influencing the use of discretion in judicial sentencing she develops a methodology which recognises sentencing as a complex cognitive process that is located within a system of interacting micro and macro factors and influences. The macro forces are summarised as social/cultural attitudes and values, legislative and legal factors and institutional and bureaucratic arrangements.

When dealing with specific offences and offenders however, these broad structural influences are mediated through individual judges' interpretation and understanding. Rather than seeking a single dominant causal explanation of sentencing outcomes, decisions, Lawrence concludes that these are located within individual contextualised, interactive and interpretative processes. She claims that individual judges:

“construct meanings for cases, apply their own objectives and beliefs, and respond to contextual factors with varying biases and varying levels of self awareness“
(Lawrence 1995, p 70).

Lawrence's theoretical model of the way in which decision-making is informed by both structural and individual variables provides a useful starting point to explore the complexity of factors which impact on the use of discretion in housing possession cases.

Macro factors

Social/Cultural Attitudes and Values

The impact of macro social and cultural attitudes and values is not uniform but it is clear from interviews with judges that the local context and wider culture exert some influence on the use of discretion. Reference to normative values and judicial consensus were not uncommon as the following comment about Scenario 8 illustrates:

“I bet a fiver that no district judge would put a woman of sixty-eight out because of her useless son wasn’t paying the lolly.” (DJ I)

This discourse is resonant with normative judgements. The personal view that it would be unjust to evict a woman of 68 is legitimised by reference to values that are attributed to all judges.

A further example of the impact of social values is provided in the way in which perceptions and understandings of the social role of housing associations and local authorities impacted on the decision-making process in different ways and for different reasons (see chapter 5, above). These influences can be in part seen as a reflection of wider community and media attitudes and beliefs about welfare provision. However, socialising forces and normative cultural values are not simply transmitted into the mental world of the individual. As Lawrence (1995, p. 57) points out:

“People interpret the social message so that different individuals’ version of the same cultural values are influenced by their own experiences and reflections”.

Thus the particular personal characteristics and responses of judges combined with individuals’ decision-making goals were found to be influential in the decision-making process and indicate the importance of individual agency in the exercise of discretion.

Legislation and legal factors

The framework within which discretion is exercised is constrained by a body of housing law that reflects legal concepts and principles. At its most fundamental judges are required to make judgements that reflect agreed legal principles and take into account Court of Appeal decisions. The influence of these factors in the way judges exercise their discretion is apparent but equally it is evident that the law even where apparently at its most rigid as in the instance of Ground 8 cases, can provide scope for significant contest. While the majority considered that the use of Ground 8 by social landlords was inappropriate this did not necessarily lead to the adoption of strategies to circumvent the law. What is interesting, however, as the discussion in Chapter 8 illustrates is that some judges articulated their resentment of the imposition of restrictions on their personal use of discretion and used strategies to avoid compliance.

Institutional arrangements

The Woolf Enquiry into civil justice (Woolf, 1996) resulted in a number of fundamental reforms, in particular the institution of case management by judges. Notwithstanding these reforms, managerial and physical resources clearly exert an influence. One of the most

important determining factors is the very short amount of time available to judges to hear evidence and make a decision. The listing practices used in county courts mean that on average judges have fewer than five minutes to arrive at a decision in housing possession cases. The speed with which cases are heard combined with the need to deal efficiently with a large list are reflected in the summary decisions made in response to the case study scenarios. It was also apparent that some judges employed strategies to gain more time for decision-making. These strategies most commonly involved the use of adjournments in order to obtain further evidence.

Chapter 4 illustrates that different courts have adopted local practices for dealing with possession cases, and also that larger courts will be under greater pressure to deal with cases.

Another factor which in a sense may be regarded as institutional, are the national problems of the housing benefit system, which are addressed in Chapter 7. That these have had an impact on outcomes is clear, in general leading to a much greater level of adjournments than would otherwise arise.

Micro Factors

The micro factors which come into play are those which relate to the individual circumstances of the case. As chapter 5 illustrates, in part these will be mediated by the relationship which the particular judge has with the officer presenting the case. The officer may make a particular request, the impact that this has on the district judge will be influenced by the judge's own trust of that officer, which may in turn have been influenced by their previous experience of the officer (or lack thereof).

Chapter 6 shows how factors relating to the tenant will also impact on the outcome of an individual case. The attendance and payment history of the tenant will impact on the outcome, but again this will not necessarily have a uniform outcome. Judges talk of "gut instincts" when making decisions, particularly as to the motivation of tenants to maintain payments. When decisions are made at such an intuitive level it will be difficult to predict what impact any particular tenant will have on the outcome.

There is more consistency as to the impact certain objective factors will have. In particular, the presence of children, health problems, old age were shown to regularly impact on the outcome.

Decision-making axis

Examination of the diverse influences illustrates the complex ways in which interactions depend in part on judges' personal interpretations and values, which in turn informs the assessment of the credibility of evidence presented. The very complexity of the network of influences defies a simple explanation in which different factors could be ranked in terms of importance. It is however, possible to conceptualise the decision-making process in terms of a number of interrelated axes which represent a continuum of approaches.

The continuum of approaches is characterised by on the one hand by legalism, a reliance on the framework of contract law and recognition of the role of the judiciary in debt management. In contrast the opposite end of the spectrum is characterised by pragmatism, a concern with social welfare issues and the primacy of the home. Where individuals place themselves within these continuums is informed by both macro and micro factors including personal attitudes and beliefs which in turn may be influenced by the amount of knowledge, experience and training received.

Narrowing of discretion

Another characteristic of decision-making which is given a very wide discretion is the need for the decision-maker to narrow this. We see this in the use of rules-of-thumb in both relation to levels of arrears (see Chapter 7) and also to the use of warrants for possession (see Chapter 8).

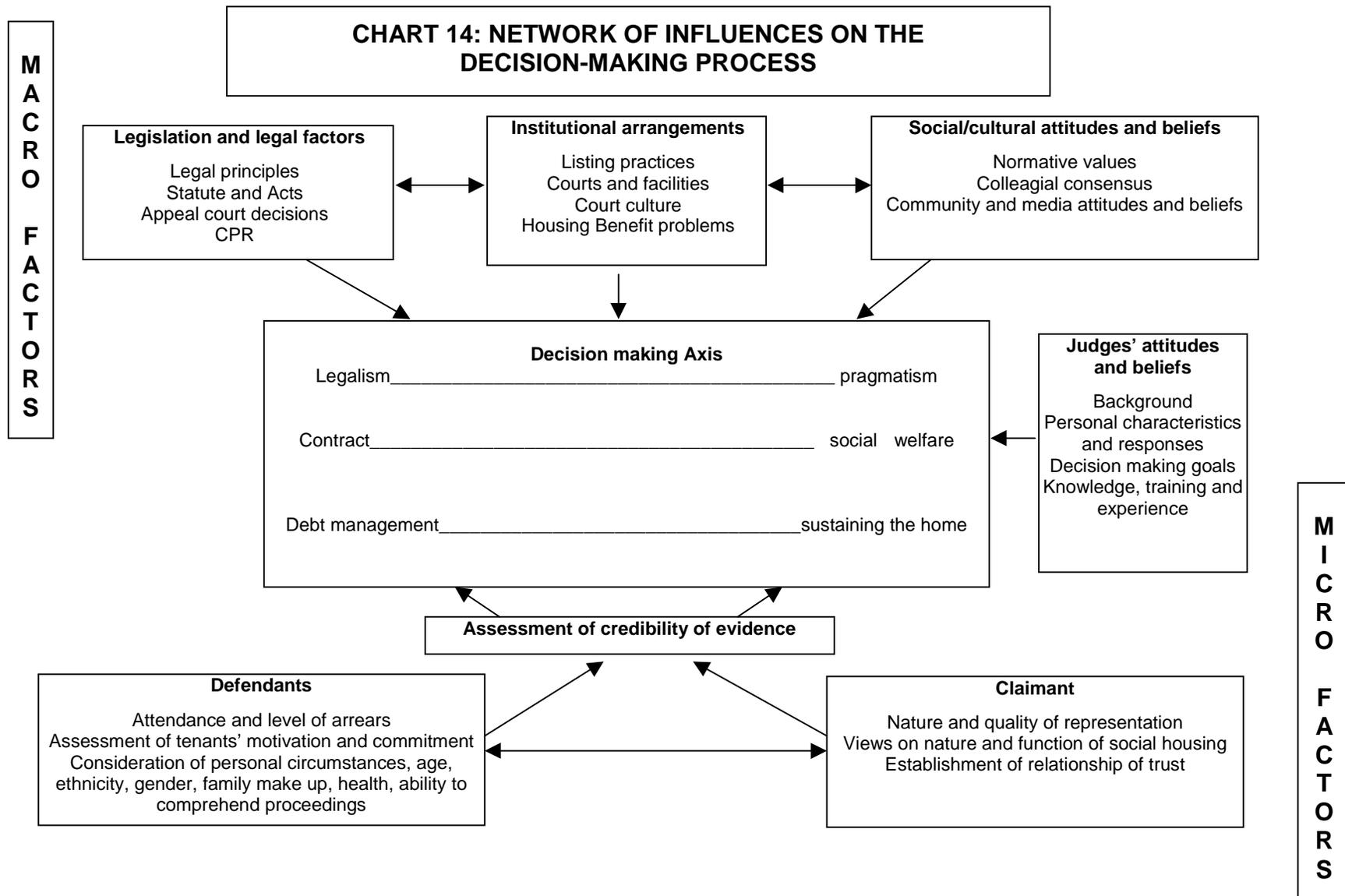
The narrowing of discretion is also evident in the development of a relationship with claimants. While it is evident that judges do not simply slavishly follow the request of landlords, Chapter 6 illustrates how an out-of-the-ordinary request can be a trigger for a closer look than would normally be the case.

Conclusions

What this suggests is that there can be no "easy" way to achieving consistency between judges. Even where factors are consistently taken into account, this will not necessarily lead to the same outcome. The weight and effect of a particular factor will depend on how the judge approaches cases more generally and where s/he sits on the different axes we have identified. Chart 14, below seeks to represent the complexity of the decision-making process and to describe some of the specific categories of individual and structural factors that influence outcomes in possession hearings.

Thus it is likely that that even the introduction of some form of structured discretion which states that certain factors must be taken into account, e.g. level of arrears, personal circumstances of tenant, the impact on the landlord, will still lead to different outcomes for similar cases.

Finally we would return to the importance of the decisions made in housing possession cases. Judges were acutely aware of this and for many the human element could not be ignored. This particularly impacted on decisions on application to suspend warrants for possession. The hardest thing is for judges to make the final decision to put people out of their homes.



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Appendix 1: Research Methodology

The study contained three key elements, which were carried out in three geographical locations (the West Country, London and the North of England):

1. *Focus Groups with Practitioners*

A series of 6 focus groups were held with practitioners. In each location one focus group was held with those who represent claimants (landlords and their lawyers) and one with those who represent defendants (lawyers and advice workers). The focus groups were conducted separately to capture the (anticipated) different viewpoints of each, which could then be explored further. It was also felt better to separate the groups so as to avoid any possible antagonism between them.

Invitations were issued to those with considerable experience of social housing possessions practice. For landlords a list of social landlords operating in the area was compiled from directories and invitations sent to local authorities, housing associations established following large scale voluntary transfer (LSVT) from a local authority, and those housing associations with more than 500 properties in the area, as well as those associations catering for black and minority ethnic communities. Defendants' invitations were issued to those who worked on the Duty Advice Scheme rotas, and we sought to obtain a balance between lawyers and housing advice workers. Contacts were made through local knowledge, as well as through local housing law practitioner associations, Shelter, the National Association of CABx and the Advice Services Alliance. Table 12 below gives details of the backgrounds of those attending:

Table 12: Focus group details

	North	London	West Country
Claimants	9 RSLs 2 LAs (inc one ALMO)	4 RSLs 3 LAs 1 LSVT	7 RSLs 2 LAs
Defendants	3 Lay Advisers	3 Solicitors 2 Lay Advisers	4 Solicitors 3 Lay Advisers

The purpose of the focus groups was to draw on the knowledge and opinion of the regular attendees at housing possession cases. The focus groups explored their experiences of housing possession cases, with a view to drawing out what they felt influenced the exercise of discretion in such cases. We also questioned whether inconsistency occurred and, where it did, explored why it might occur. The focus groups lasted between two and three hours, and required those attending to take part in a series of exercises: first, they were asked to

give a typology of the characteristics of a 'ideal' and 'worst' district judge in a housing possession case; second, they were asked to rank the influence of certain factors on the exercise of discretion; and third, they were asked to rank different district judges against a scale from 'rule bound' to 'maximum discretion'. Finally, there was some discussion about the impact of court cultures on discretion. The topic guide is set out in Appendix 2.

2. *Monitoring of cases*

In order to provide some quantitative data to contextualise what is essentially a qualitative study, observation of cases was undertaken at four sites: London court; West Country court and Northern 1 and 2 courts. The courts were chosen to provide a contrast between location (in particular between those operating in an urban setting and those in a more rural) and numbers of possession cases heard in each court. Three were initially chosen, all with some form of duty desk, providing advice on the day for tenants who attended. A fourth court (Northern 2) was added when it became apparent that for listing reasons we were going to be unable to observe a sufficiently large number of cases in Northern 1. This court provided a contrast in that it did not have permanent housing duty desk, although the CAB did provide a money advice service available to tenants.

Observation took place between June and October 2004. In total 894 cases were observed, although not all of these were included in the analysis as some involved e.g. non-secure, introductory or assured shorthold tenancies, where the judge has no discretion but must grant possession. An effective database of 798 cases involving decisions on housing possession cases based on rent arrears was obtained.

London court is a very busy county court hearing over 3000 housing possession cases a year. 16 possession sessions were observed at this court, amounting to 524 relevant cases; around 17% of the annual cases heard here.

West Country court is a small county court serving a more rural population and hears in the region of 200 housing possession cases per year. 9 possession sessions were observed at this court, amounting to 87 cases; around 44% of the annual cases heard here.

Northern 1 court hears over 1500 housing possession cases a year. 2 possession sessions were observed at this court, amounting to 98 cases; around 7% of the annual cases heard here. Northern 2 court has a smaller number of cases, around 900 a year. 5 possession sessions were observed at this court, amounting to 89 cases; around 10% of the annual cases heard here.

For each case in the observed sessions, the researcher sought to record the important facts in the case, including (where available):

- Weekly rent
- Any outcome requested by claimant
- Representation of defendant – in person, legally, in writing
- Level of arrears
- Any housing benefit issues
- Any previous hearings
- Family make-up of defendant
- Work history of defendant
- Outcome of case at hearing

In order to confirm any facts established at the hearing, the researchers also checked the details against those in the court file. We also sought to record the nature of the judges' interactions with both parties, although it must be acknowledged that the presence of a researcher in court may have affected the way that judges dealt with claimants and defendants.

Given the qualitative focus of the research we have used this quantitative database merely to describe outcomes and difference, without seeking to provide a statistical analysis which might ascribe statistical significance to different facts about defendants.

We have focused the majority of our quantitative analysis on the 540 hearings which were the first time that case came to court, in order to compare outcomes of the same type of hearing. 289 of these first hearings (54%), involved tenants of local authorities and 245 (46%) housing association tenants. Of these 303 (56%) were secure tenants and 237 (44%) were assured tenants. The largest number of hearings observed was in London, which had the most frequent and longest housing possession lists during the study period. Table 13 sets out the distribution of cases between the courts:

Table 13: Distribution of first hearing cases between courts (n=540)

Court	Number of Cases	% of total
London	363	67%
West Country	47	9%
Northern 1	61	11%
Northern 2	69	13%

In analysing cases percentages have been rounded and may not always add up to 100%. Where, in Chapter 4, decisions are identified by individual judge in London county court each judge has been assigned a number to anonymise decisions.

3. Interviews with district judges

The final element of the research was interviews with district judges operating in the three geographical areas. To obtain a large enough sample of judges we could not simply confine ourselves to those sitting in the courts where cases had been observed. Accordingly we also approached judges sitting in neighbouring courts. Some judges sat in more than one court, including the observation court and others.

Judges in the three geographical areas were approached through the District Judges Association, and asked to take part in the research. Judges were free to refuse, and a small number declined to take part.

One limitation to the sample of judges was that it included only one deputy district judge among the 26 judges interviewed.

Table 14: Location of judges interviewed

Court	Number of Judges
London	4
Neighbouring courts	5
West Country	3
Neighbouring courts	3
Northern 1	4
Northern 2	2
Neighbouring courts	5

Interviews lasted between one and two hours and were recorded and transcribed. Judges have not been identified by name or court, and have each been ascribed a letter to identify them. All the district judges who were interviewed had considerable experience of hearing housing possession cases, generally over many years. They came from a variety of backgrounds – the majority having been solicitors in private practice but with a wide variety of different types of practice – details are set out in Chapter 4.

These interviews were structured into two broad parts. The first part drew on a semi-structured questionnaire around a number of key topics about the judge's background experience; their approach to decision-making in possession cases; their views about procedure and external factors (including housing benefit); the impact of landlords and their

representatives; and the impact of clients and their representatives; finally, they were asked about warrants of possession. This part of the interview was designed to elicit information about the influences on decision-making, for example from their training to the kinds of considerations about 'repeat players' which are mentioned in the literature (see further Chapter 5).

The second part of the interview involved the presentation of scenarios to the judges to gauge their responses to them, the order they would make in that case on the basis of the facts provided in the scenario, and their explanations for making that order. This part of the interview was designed to overcome the problem, anticipated by the research team, that district judges would not feel able to talk about specific cases. The scenarios were developed, then, to reflect the run-of-the-mill, ordinary possession case with a number of variations reflecting variously increased vulnerability of the occupier, issues with housing benefit, technical problems with non-rent expenses, possible variations on the worthiness of the occupier. The response of the district judges to these was very positive, in that they commented that they were very "familiar" and reflected similar cases which they had recently encountered.

In order to prepare these scenarios, a focus group comprising a mix of senior practitioners and district judges was held. A number of potential scenarios were developed prior to the focus group being held which were then further refined and developed following the feedback from the focus group.

Given the qualitative nature of the interviews we have generally not sought to ascribe numerical outcomes to the responses to the questions, save where district judges gave clear indications of the orders that they would grant to scenario questions. The earlier focus groups suggested that there would be a range of attitudes from judges and this was borne out by the interviews, and it seems inappropriate to try and ascribe any numerical significance to a particular response. We have illustrated the range of responses through direct quotes from the transcripts of the interviews.

The interview schedule and scenarios are set out in full in Appendix 2.

Appendix 2 – Research instruments

1. Focus group

Exercises

1. *Typologising judges*

15 minutes

On posters ask each participant to write down the characteristics of their ideal and worst judge for a housing possession case. Ask them to illustrate with examples (no names needed) of these characteristics in action.

When everyone has completed an individual poster, try to obtain a consensus around the key characteristics.

2. *Influences on discretion*

30 minutes (split 20/10)

Ask participants to complete the following task individually. (Provide each with a separate sheet).

Taking the following issues which might influence the exercise of discretion rank on a scale of 1 (most important) – 10 (least important) how important you feel they are in influencing judges' decisions, and if possible give an illustration of how this has happened.

Factor	Ranking	Illustration of influence
Attendance by tenant		
Familiarity of judge with presenting officer		
Housing benefit issues		
Whether landlord is a local authority or an RSL		
Size of arrears		
Length of the tenancy		
Repayment history		
Nature of tenant, eg whether children, elderly, young single		
Work status of defendant e.g. unemployed, retired, type of work		
Whether other issues, e.g. asb, abandonment are involved		
The stage the proceedings are at, i.e. whether first or later hearing		
Whether a reply form has been submitted		
Whether the defendant has sought advice/help, e.g. debt counselling		
Whether the tenant's first language is English		

The length of time the arrears have accrued over		
The order requested by the landlord		
Whether the landlord has reached an agreement with the tenant		
Any other matters you wish to add		

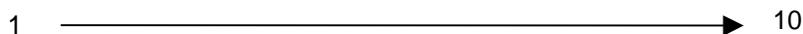
After completion by individuals establish whether consensus on rankings, and also ask for one illustration per heading to be shared with group

3. Differences between judges

30 minutes

Ask individual participants to complete the following task. Suggest that they use initials next to the judge to remind themselves who they were referring to.

Describe the relationship(s) you have with different judges. What factors differentiate the relationships you have with different judges?
 On a continuum of 1 (rule bound) – 10 (use most discretion) describe how far you feel the different judges you appear in front of are rule bound as opposed to using a lot of discretion to treat cases differently. E.g. how far do judges have rules of thumb they always apply e.g. to repayment levels, or look at the facts for each individual?



	Rule Bound	Max Discretion
Judge 1		
Judge 2		
Judge 3		
Judge 4		
Judge 5		

Give examples for why you have you have ascribed different rankings to different judges.

Once done individually ask each participant to take one judge, the ranking and describe why they have given it.

What has been your experience of judges' reactions to new people appearing in front of them?

4. Differences between courts

20 mins

If you work in more than one court, can you describe the differences between those courts?

What factors would you ascribe those differences to?

Do you think the difference between courts impacts on how judges exercise discretion?

2. Judges' Interview Schedule

Judge's background

1. How long have you been a district judge?
2. Which courts do you sit in?
3. Did you have any experience of housing law prior to becoming a district judge?
4. What percentage of your time as a district judge do you spend on housing possession cases?
5. How much housing law training have you received?
6. How do you update your knowledge of housing law?

Decision-making in possession cases

7. Do you have a mental checklist of evidence which you expect to see before granting possession?
8. Do you prefer evidence to be given orally or in writing?
9. Do you have a checklist of issues you consider when deciding whether it is reasonable to grant possession?
10. How important are the levels of arrears in your decision-making? Is it the total amount which is most important or the number of weeks that the rent is in arrears?
11. If the tenant attends the hearing, how likely are you to give an outright order for possession?

Procedure and external factors

12. Do you feel the CPR has had any impact on the way housing possession cases are conducted?
13. Do you feel the way you deal with cases has changed over the period that you have been a district judge?
14. Are there any local factors which impact on your decision-making?
15. What impact do issues around housing benefit have on your decision-making?
16. How are cases listed for hearing in the court you sit in? What impact does this listing procedure have on your decision-making process?

Impact of landlords

17. Typically, how would you describe the quality of the representatives before you from local authority and housing association landlords?
On a scale of excellent; good; okay; poor; very poor
18. Does this differ between RSLs and local authorities?
19. Do you find any difference in the approaches of landlords who represent themselves through housing officers and those who use legal representatives?

20. Typically, how would you describe your relationship with those representatives?
On a scale of excellent; good; okay; poor; very poor

21. How does that relationship impact generally on the decisions that you make?

22. What impact do the requests that landlords make in cases have on your decision-making?

23. Do any of the housing associations that appear before you use Ground 8? If so, what is your attitude to dealing with cases under it?

Impact of tenants and their representatives

24. What impact does it have on your decision-making if the defendant attends court and/or fills in the reply form?

25. How does the behaviour and attitude of a tenant who attends impact on your decision-making?

26. Do you have representatives for defendants who appear regularly before you? If so, how would you describe their impact on any decision-making?

27. Do you have a duty desk advice scheme operating for possession hearings? If yes, what is your involvement with it and how does it impact on your decision-making?

28. Where tenants do attend, how do you explain the procedure and outcome of the case to them?

Warrants for possession

29. What factors do you take into account in deciding whether to suspend a warrant for possession? Are there any limits on the number of times a warrant should be suspended?

30. Where the case has previously been heard and has been adjourned or warrant suspended, does it make any difference to your decision-making if you heard it previously or it was heard by another judge?

3. Scenarios for judges

1. A local authority is seeking possession against a tenant who was granted a tenancy 18 months ago. The rent is £45 per week. The arrears are currently £2700. The landlord tells you the tenant is a single male, who has barely paid any rent since he moved in. Also that the tenant was on housing benefit when he first moved in, but the landlord understands he subsequently obtained work, but he has not paid since the housing benefit stopped. Despite efforts, they have not been able to make any contact with him. They are seeking an outright order. The tenant does not attend.

What difference would it make if the arrears were £495?

What difference would it make if the landlord disclosed that the tenant had mental health problems and an independent voluntary agency is providing floating support?

Would it make any difference if the tenant turned up in court offering to make a payment of £500 and rent plus £20 per week? Would the landlord's attitude to the offer impact on your decision?

2. The local authority is seeking possession against a tenant who was granted a tenancy 3 years ago. The rent is £75 per week. The arrears are currently £1125. The landlord tells you that the tenant is a single mother with two children of school age who is in part-time work. She is on partial housing benefit but regularly fails to make up the shortfall. The landlord says that she has failed to stick to several agreements to pay off the arrears. They have met with her and agreed a suspended order on terms of rent plus £5.00 per week. The tenant does not attend.

What difference would it make if no agreement had been reached and they simply requested an order on those terms?

What difference would it make if the arrears were only £450?

What difference would it make if the tenant attended, and was represented by the duty desk who explained various health difficulties that her children had been having, and sought that the matter be adjourned on terms?

Would it make a difference if the information about the children was in a reply form, but the tenant did not attend?

How would you approach the case if the tenant appeared in front of you unrepresented but apparently not able to understand English?

3. A local authority is seeking possession against a tenant, who was granted a tenancy four months ago. The rent is £55 per week. No rent has been paid since the tenant moved in and arrears are £935. The tenant, a single woman attends and tells you that she is unemployed and has submitted a housing benefit claim. She has tried to contact housing benefit, but has not been able to find out what has happened. The housing officer tells you that she (the housing officer) has contacted housing benefit that morning. The housing benefit office state categorically that they have written to the tenant asking for further information, and until that information is received the claim cannot be processed.
4. A housing association is seeking possession under Ground 8 of the Housing Act 1988. The rent is £95 per week. The arrears are currently £950, which is a reduction since the NSP was issued. The arrears have a history of fluctuating. The tenant appears in court

with a duty desk representative who says that the tenant has a current application for back-dated housing benefit which is pending and which will clear the arrears. The fluctuations in arrears have generally been due to housing benefit problems.

Would it make any difference if the landlord included in evidence a letter previously sent to the tenant complaining about her anti-social behaviour?

How would you respond if the representative stated that there was a potential counterclaim and wanted an adjournment to pursue it?

5. A local authority is seeking possession against a tenant whose rent is £75 per week, which includes £3.55 per week in water rates. The tenant receives full housing benefit. The tenant has arrears of £177.50 which relate entirely to the failure to pay her water rates. The local authority state that the tenant has not responded to any letters and they are seeking outright possession. The tenant does not attend.

What difference would it make if the landlord was only seeking a suspended order of rent plus £2.80?

6. The landlord is a housing association, seeking possession against a tenant, who was granted a tenancy four years ago. The rent is £105 per week. The landlord tells you that the tenant is self-employed, has a wife and two children of school age. The tenant has a history, since the start of the tenancy, of building up arrears and then making lump sum payments which while they never clear the arrears reduce them substantially. NSPs have been issued on 2 previous occasions, but a sufficiently large sum was paid off the arrears that the association did not proceed to issue proceedings. When the current NSP was issued, the arrears stood at £1890. Since that time the tenant has made two payments of £600 each to the association. The association is nonetheless asking for a suspended possession order of rent plus £10 per week. The tenant does not attend.

What difference would it make if the association was asking for outright possession?

What difference would it make if the tenant did attend and offered a further lump sum of £200?

What order for costs would you make in the event of:

- the tenant not attending
- The tenant attending offering a lump sum?

7. The tenant is making an application to suspend a warrant for possession, made in favour of her housing association landlord. A suspended possession order was made against the tenant six months ago on payment of rent plus £4.50 per week. The tenant is in work. She has only paid intermittently since the order was made, and arrears have risen from £750 at the time of the order to £975 now. You have already granted one suspension of the warrant, at which time the tenant explained that she had had difficulties because she had had to pay out for car repairs in order to still be able to get to work. At this current application there have been no material changes in her circumstances, although she says she is having difficulty making ends meet.

Would it make a difference to your decision if she had children?

What difference would it make if the tenant said she could borrow all the outstanding arrears?

8. The tenant, a retired woman of 68, is making an application to suspend a warrant for possession, made in favour of her local authority landlord. A suspended possession order was made against the tenant seven months ago on payment of rent plus £2.80 per week. The tenant is on housing benefit, but has an adult son living with her and therefore a non-dependent deduction is made from her benefit. The local authority were initially unaware that the son was living with her and she was overpaid benefit of £250, which was subsequently deducted from her rent account. This together with the on-going non-dependent deduction, which the tenant is struggling to pay regularly led to arrears of £350. Since the court order arrears have risen to £400. The tenant explains that she has difficulty obtaining any money from her son, and finds it very difficult to make her payments regularly.

DCA Research Series No. 6/05

The exercise of judicial discretion in rent arrears cases

This study is concerned with how judges exercise their discretion in cases where social landlords seek possession against their secure or assured tenants on the ground of rent arrears. Through interviews with district judges, as well as observation of cases and examination of court files it examines:

- the factors which influence the orders which judges make in housing possession cases;
- how far there is a consistency of approach between district judges.

A wide and diverse range of factors was reported by judges as being influential in how they exercised their discretion in individual cases.

For further copies of this publication or information about the Research Series please contact the following address:

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