CB(1) 1528/01-02(06)

Item 1

To seek legal advice on whether licence agreements with provisions similar to tenancy agreements should not be treated as tenancy agreements and whether the Administration would consider including licence agreements under Part V of the Landlord and Tenant (Consolidation) Ordinance (Cap.7)

(a) According to the Department of Justice, whether an agreement is a tenancy or licence agreement does not depend on how the parties describe the agreement. In determining whether the contracting parties have entered into a tenancy or licence, the court would consider all circumstances of a case including the terms of the agreement, and intentions and conducts of the parties at the time they made the agreement. An important factor is whether the occupier has exclusive possession of the premises. Other relevant factors include whether the occupier pays money for his occupation and the amount of such payment, and the degree of control retained by the grantor over the premises.

(b) If a licensee succeeds in establishing that the licence agreement is in fact a tenancy agreement which falls within the ambit of Part V of the Landlord and Tenant (Consolidation) Ordinance (LTO) in repossession proceedings, he would be entitled to six-month prior notice before vacating the rented premises. Yet, like other commercial tenancies protected under Part V, he cannot in any way resist repossession after the six-month period has elapsed.

(c) The Administration does not agree to extending the protection of Part V to include licence agreements. The Government's policy has

always been to keep intervention of the market to a minimum. Commercial parties should be given freedom to contract in the form of a tenancy agreement or a licence agreement.

Item 2

To consider whether a definition of unauthorized building works (UBWs) should be included in the Bill to avoid possible disputes in the event of repossession of premises due to erection of UBWs.

(a) The term "unauthorized building works" (UBWs) is not defined under the Buildings Ordinance (BO) (Cap.123) or other ordinances. It is a term commonly used to refer to building works to which Section 24 of BO applies, i.e. building works carried out in contravention of the provisions of the BO.

(b) If it is provided that the erection of UBWs by tenants will trigger an implied forfeiture clause, it may be necessary for scrupulous landlords and tenants to prove no erection of UBWs before and after letting and renting. To do so, landlords and tenants would have to consult Authorized Persons or to view the approved building plans themselves to determine whether the premises is UBWs-free. This would be too onerous a burden and would create additional cost to landlords and tenants.

(c) Taking into consideration of the practical difficulties and additional costs to landlords and tenants in making the erection of UBWs a condition for implied forfeiture of tenancy, the Administration proposes, alternatively, to introduce an implied forfeiture clause, to provide that **no addition or alteration** should be made to the rented premises **without the consent of the landlord**, failing which the landlord may forfeit the tenancy. Such a clause is already common in most standard tenancy agreements.

(d) The proposal in para. (c) would allow landlords to let the premises on an “as is” basis.

Item 3

To consider whether the proposed implied forfeiture clause in the lease for repossession of premises as a result of UBWs should apply to UBWs constructed before the new Ordinance comes into effect.

Please refer to the reply to **Item 2**.

Item 4

To consider including in the Bill a provision to require landlords to remove any UBWs before letting out of the premises.

Please refer to the reply to **Item 2**.

Item 5

To consider whether interest should be charged on rent in arrears during the proposed seven-day relief period. Consideration should also be given to imposing a fixed interest rate or a surcharge of certain percentage of the rent in arrears as a deterrent for default in payment of rent.

(a) Under section 48 of the High Court Ordinance (HCO) (Cap.4), the Court has discretion to grant interest on debt and rent in arrears between the date when the cause of action arose and the date of the judgment. Under section 49 of the HCO, the rent in arrears on becoming a judgment debt shall carry interest, i.e. a mandatory provision, on all or any part thereof which remains unsatisfied from the date of judgment until satisfaction.

(b) The courts have discretion to determine the interest rate and the period for which interest is to be charged under section 48. Section 49 also provides that judgment debts shall carry simple interest at such rate as the Court, including Lands Tribunal, District Court and High Court, may order (or in the absence of such order, at such rate as may be determined from time to time by the Chief Justice by order). The current post-judgment interest rate is 8.14%.

(c) Having consulted the Judiciary Administrator (JA), the Administration does not favour imposition of a fixed interest rate on rent in arrears or a surcharge. Firstly, it is not desirable to have a specific interest provision in the LTO when there is a general provision in the High Court Ordinance governing all types of actions.

Secondly, there is no evidence showing that judges would generally decline to exercise their discretionary power to impose interest under section 48 in recovery of rent arrears cases. Hence, it is not desirable to make specific interest provision in section 48 for such cases and the discretionary power delegated to judges should be maintained so as to enhance flexibility to cope with different circumstances.

<u>Item 6</u>

To list out all the options, including distress for rent, and the respective lead times through which landlords can recover rent in arrears or even repossess the premises.

(a) For recovery of rent in arrears but not repossession of the premises, landlords may apply to the District Court for distress for rent or apply to the Small Claims Tribunal, District Court or Court of First Instance for claims for arrears of rent. To repossess the premises on the ground of non-payment of rent, landlords may make applications to the Lands Tribunal, District Court or Court of First Instance, where they may at the same time claim for the rent in arrears.

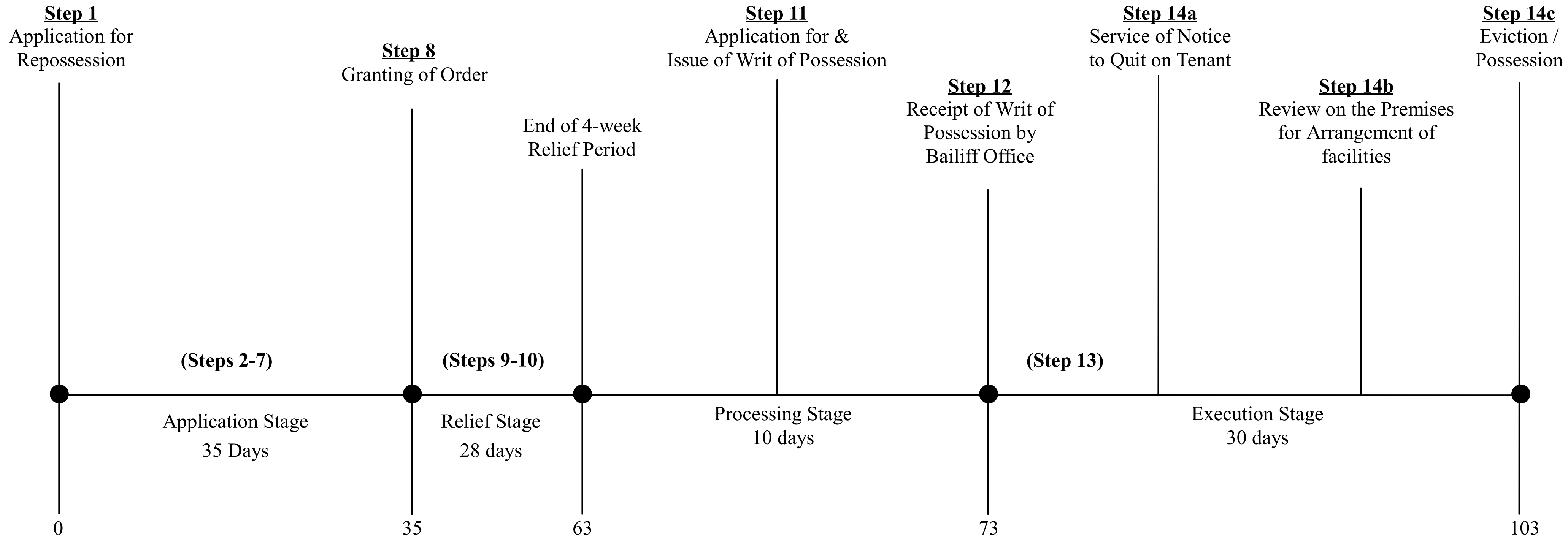
(b) Although applications may be made in various courts, the most common route taken is to apply to the Lands Tribunal for possession of premises and District Court for distress for rent.

(c) Attached please find the concerned steps and time limits of the aforesaid proceedings.

Time Chart

Repossession of Premises for Non-payment of Rent where a Notice of Opposition has been filed

(Lands Tribunal – existing relief period)



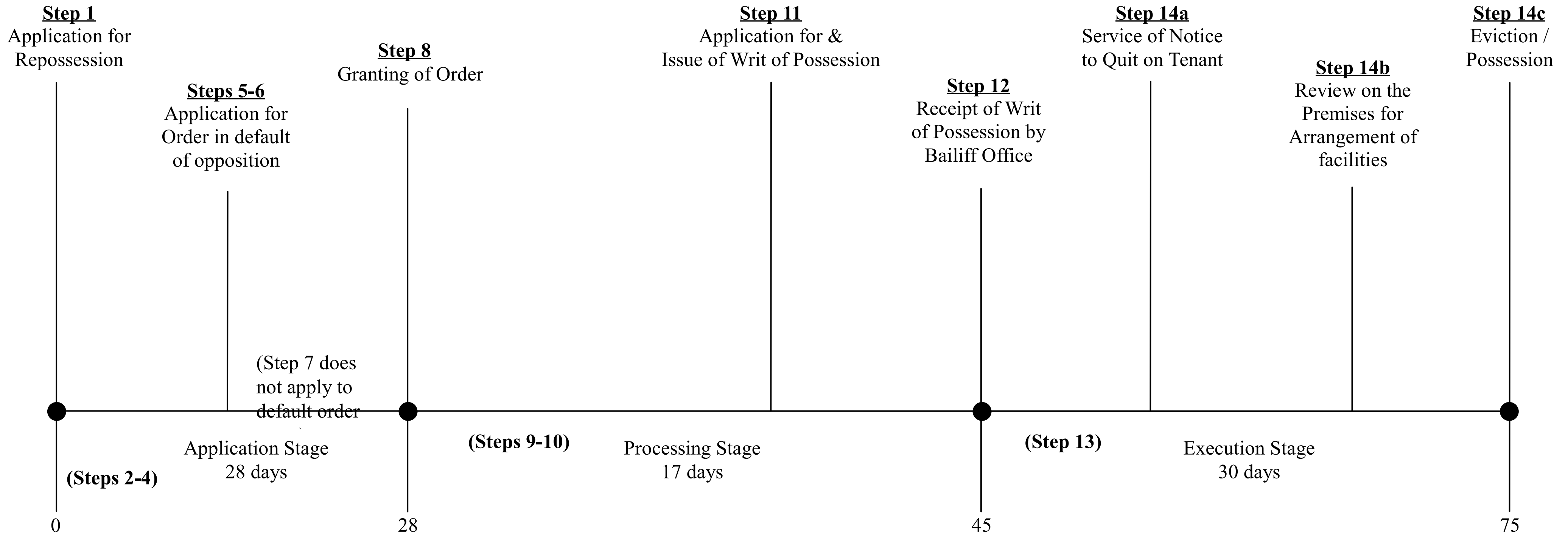
Notes :

1. The Chart illustrates a straightforward case which takes a total of 103 days. During the period an order is granted in about 35 days from the application date. The same process can however, take longer time depending on the circumstances of the case.
2. A relief period of 4 weeks will be granted following the order.
3. Please refer to attached table for details of steps and timings.

Time Chart

Repossession of Premises for Non-payment of Rent where a notice of Opposition has not been filed

(Default Order in Lands Tribunal with no relief period)



Notes :

1. The Chart illustrates a straightforward case which takes a total of 75 days. During the period an order is granted in about 28 days from the application date. The same process can however, take longer time depending on the circumstances of the case.

2. No relief period will be granted for default order cases.

3. Please refer to attached table for details of steps and timings.

Time Limits for Repossession of Premises in Lands Tribunal

<table>
<tr><th>Steps</th><th colspan="2">Statutory Procedure</th><th colspan="2">Ordinance Reference</th><th colspan="2">Statutory Time Limits</th><th>Procedure Stage</th></tr>
<tr><td>1.</td><td colspan="2">Applicant (landlord) to file an application form.</td><td colspan="2">Lands Tribunal Rule 68(1)</td><td colspan="2">-</td><td rowspan="6">Application Stage</td></tr>
<tr><td>2.</td><td colspan="2">Applicant is required to serve a notice of the application on the respondent (tenant).</td><td colspan="2">Lands Tribunal Rule 68(2)</td><td colspan="2">Not later than 7 days after filing of application under step 1.</td></tr>
<tr><td>3.</td><td colspan="2">Applicant is required to file an affirmation of service.</td><td colspan="2">Lands Tribunal Rule 10</td><td colspan="2">Within 3 days from service of notice under step 2.</td></tr>
<tr><td>4.</td><td colspan="2">Respondent is given stipulated time to file a notice of opposition upon the service of the application form.</td><td colspan="2">Lands Tribunal Rule 69</td><td colspan="2">Within 14 days of service of notice under step 2.</td></tr>
<tr><td></td><td>In case where an opposition is filed within the above time limit.</td><td>In case where no opposition is filed within the above time limit.</td><td colspan="2"></td><td colspan="2"></td></tr>
<tr><td>5.</td><td>Applicant / respondent to apply for setting down the case for hearing.</td><td>Applicant can apply for judgement in default of opposition by way of affidavit.</td><td>Lands Tribunal Rule 14(1) (a)</td><td>Lands Tribunal Rule 15</td><td>After opposition under step 4 has been filed.</td><td>(After time limit under step 4 has elapsed.)</td></tr>
</table>

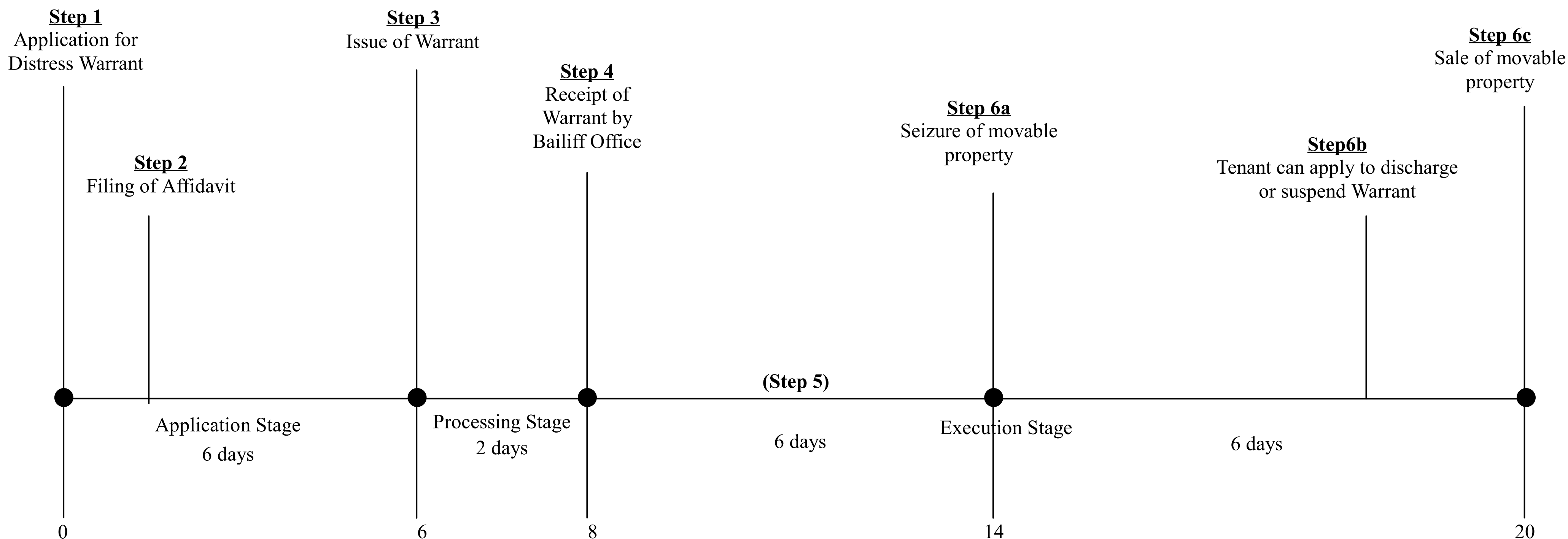
6.	The application is listed for hearing.	Applicant has to comply with all requisitions raised by the court before a court order can be made.	Lands Tribunal Rule 14(1) (b)	Practice	Not less than 3 days after appli-cation for hearing under step 5.	-	Application Stage
7.	Parties concerned will be given notice of the hearing.	-	Lands Tribunal Rule 14(1)(b) & Rule 16	-	Not less than 14 days of advance notice.	-	
8.	Court hearing and order for possession made.	Court order made.	Lands Tribunal Rule 23		-	-	Processing Stage
9.	Applicant to post up notice of the court order to the respondent.		Practice		(3 consecutive days)		
10.	Respondent given relief period to pay all the rent in arrears and the costs of action.	Respondent given a stipulated period to move out.	Lands Tribunal Ordinance s.8(9) & High Court Ordinance. s.21F	Practice	Not less than 4 weeks from date of order.	7 days	

11.	If respondent fails to pay within relief period or to move out within the stipulated period, applicant can apply to the court for leave to issue a Writ of Possession or a combined Writ of Fi Fa and Writ of Possession to execute the court order.	Rules of High Court Order 45	-	Processing Stage
12.	Writ of Possession or combined Writ of Fi Fa and Writ of Possession issued by Court and dispatched to the Bailiffs' Office for execution.	Rules of High Court Order 46	-	
13.	Applicant to make appointment with the Bailiffs' Office for execution of the writ.	Practice	-	Execution Stage
14.	Execution of Wits by Bailiff.	Practice	-	

Note : <u>Set aside order or stay execution of order</u>

Respondent may apply to set aside order at any stage from step (9) to (13). He may also apply to stay execution of order in step (14).

Time Chart
Distress for Rent in District Court



Notes :

1. The Chart illustrates a straightforward case, which takes a total of 20 days, during which period a warrant is granted in 6 days from the application date. The same process can however, take longer time depending on the circumstances of the case.

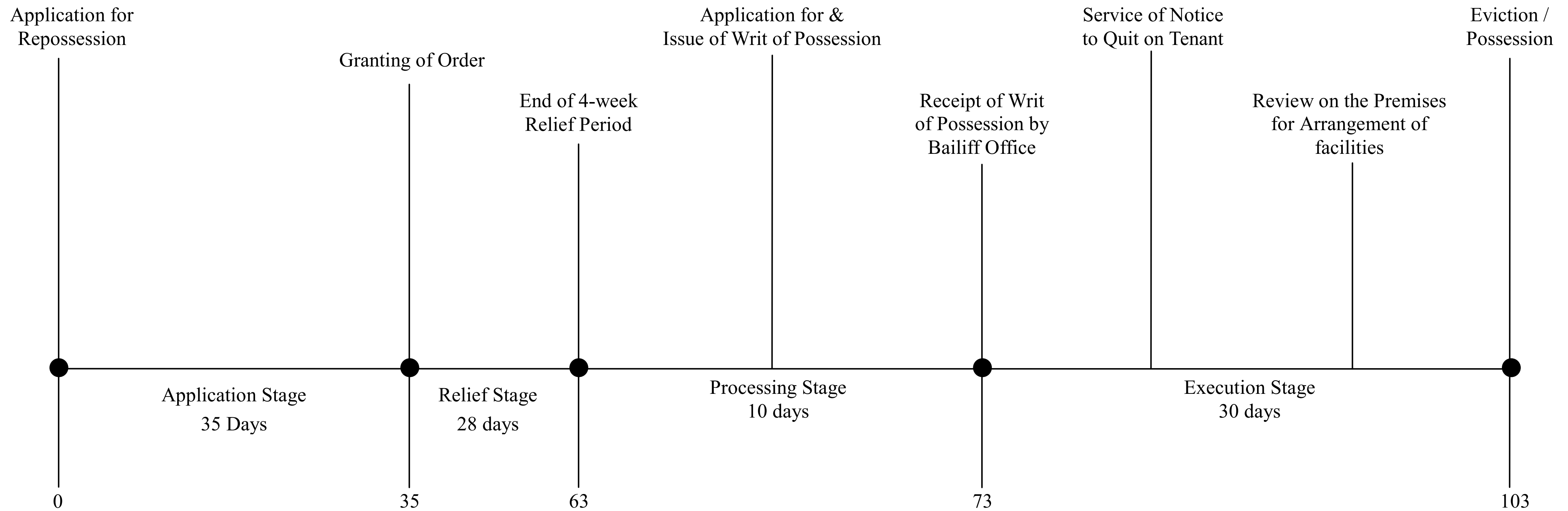
2. Please refer to attached table for details of steps and timings.

Time Limits for Distress for Rent in District Court

Steps	Statutory Procedure	Ordinance Reference	Statutory Time Limits	Procedure Stage
1.	Applicant (landlord) to apply for warrant to recover arrears of rent.	Landlord and Tenant (Consolidation) Ordinance, Section 81	-	Application Stage
2.	Applicant to file an affidavit that he is entitled to arrears of rent.	Landlord and Tenant (Consolidation) Ordinance, Section 82	-	
3.	Court to issue warrant directing movable property of tenant to be seized by Bailiff.	Landlord and Tenant (Consolidation) Ordinance, Section 83	Within 6 days	Processing Stage
4.	Receipt of warrant by Bailiff Office.	Practice	-	
5.	Applicant to make appointment with Bailiff Office To execute warrant.	Practice	-	Execution Stage
6a.	Seizure of movable property by Bailiff.	Landlord and Tenant (Consolidation) Ordinance, Section 87	-	
6b.	Tenant can apply to discharge or suspend the warrant within specified period.	Landlord and Tenant (Consolidation) Ordinance, Section 93	Within 5 days from seizure	
6c.	Distrained property to be sold and proceeds applied towards costs of distress and arrears of rent.	Landlord and Tenant (Consolidation) Ordinance, Section 99	-	

Note : Seizure action in Step 6a will be withheld if tenant settles the arrears of rent and costs on the spot.

Time Chart
Repossession of Premises for Non-payment of Rent where a Notice of Opposition has been filed
(Lands Tribunal – existing relief period)

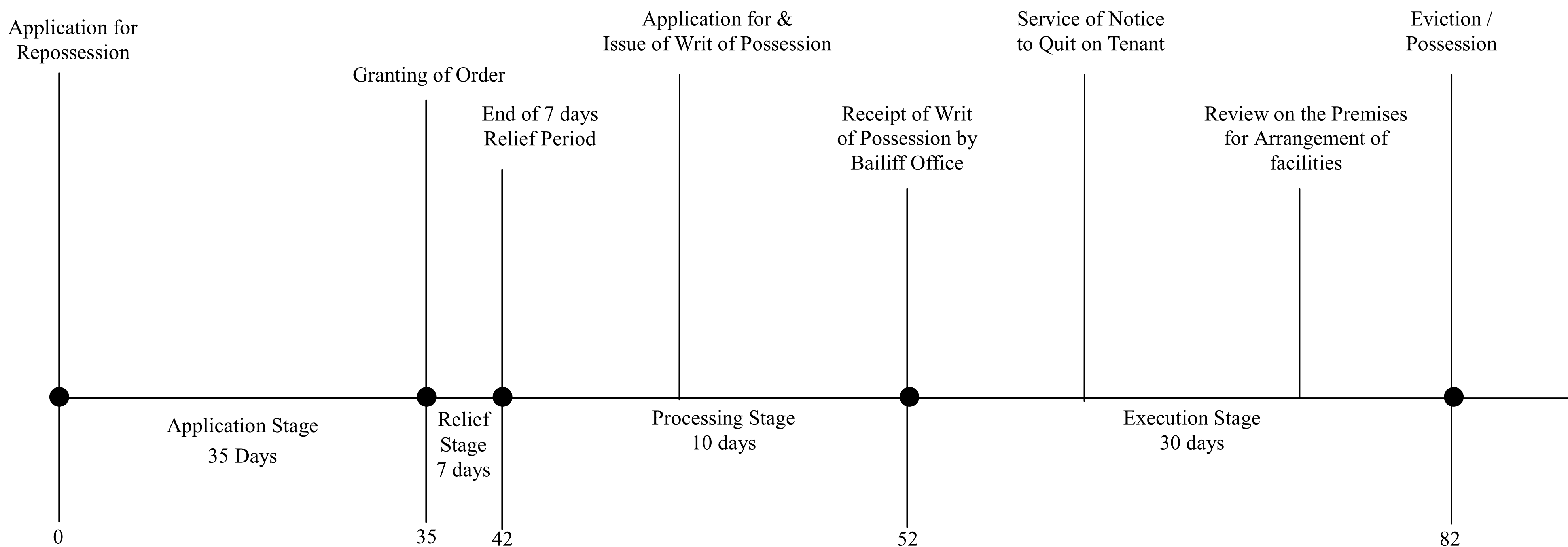


<u>Note:</u>

1 The Chart illustrates a straightforward case, which takes a total of 103 days, during which period an order is granted in about 35 days from the application date. The same process can however, take longer time depending on the circumstances of the case.

2. A relief period of 4 weeks will be granted following the order.

Time Chart
Repossession of Premises for Non-payment of Rent where a Notice of Opposition has been filed
(Lands Tribunal – shortened relief period)



Note:

1 The Chart illustrates a straightforward case, which takes a total of 82 days, during which period an order is granted in about 35 days from the application date. The same process can however, take longer time depending on the circumstances of the case.

2. A relief period of 7days will be granted following the order.

Item 8

To explore the ways through which the statutory procedures for repossession can be streamlined. Considerations can be given to carrying out some steps in parallel to shorten the lead time, having in place summary procedures for repossession and removing Writ of Possession.

To allow landlords to set down the case for hearing at the time of lodging application for Order of Possession

(a) The Hon James Tien suggested that the Administration should allow landlords to set down the case for hearing at the time of lodging application for Order of Possession.

(b) According to the JA, if a landlord is allowed to set down the case for hearing simultaneously as suggested, time would not be saved as court waiting time could be lengthened or wasted. Currently, there are about 50% of repossession cases where tenants do not file a notice of opposition and hence the landlords are able to obtain repossession through default judgment without a hearing. The time for a tenant to file a notice of opposition is 14 days after receiving the notice of application for possession by the landlord. In case of no notice of opposition, the landlord would vacate the hearing. If parallel steps are taken, by the time it is known that the tenant has not filed the notice of opposition and the landlord applies to vacate the hearing, the hearing date is just a few days ahead. The result is that the Tribunal would most unlikely be able to fix another hearing in the freed time slot.

(c) In the light of the above, such parallel steps would result in a waste of resources and in turn the eventual lengthening of waiting time for court waiting time.

Proposal of automatic execution of possession order by bailiff without the need to apply to court for leave to issue Writ of Possession

(d) As proposed in the first reply to the Bills Committee, the Administration undertakes to consider removing the need to apply to the court for leave to issue a Writ of Possession. The Administration has explored further with the JA about the feasibility of the proposal.

(e) The JA advises that the court has a duty to consider each application for repossession carefully, and if a tenant pays up the rent in arrears before the lapse of the 28-day relief period (7-day as proposed in the Bill), he shall be entitled to relief from repossession by the landlord. Under Order 45 rule 3 of the Rules of the High Court, the Writ of Possession shall not be issued without the leave of the Court. Such leave shall not be granted unless it is shown that every person in actual possession has received such notice of the proceedings. The purpose of such a provision is to alert each and every person or sub-tenants that there is a proceeding between the landlord and tenant. While the tenant fails to pay rent, the sub-tenants may have made punctual payments to the tenant. According to the JA, it would be unfair to sub-tenants for any automatic execution of order without their knowledge and thereby depriving them of their rights of relief given under Order 45 rule 3.

Summary procedure as that in the High Court

(f) Chairperson the Hon Audrey Eu suggested that a kind of summary judgment procedure such as that in the High Court should be provided for under the LTO.

(g) In the High Court, the summary judgment procedures under Order 14 rule 1 of the Rule of High Court arise when though the defendant has given notice of intention to defend the action, the plaintiff seeks to get a summary judgment on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed. This would involve a court hearing, and application must be made by summons supported by an affidavit. The summons together with a copy of the affidavit must be served on the tenant not less than ten clear days before the hearing date.

(h) The introduction of the Order 14 procedures in the Lands Tribunal might prolong rather than expedite proceedings, unless it is very clear that that the tenant has no defence to the claim.

Item 9

To re-examine the feasibility of imposing a criminal offence for tenants who provide false information to the landlords as a deterrent to professional tenants and those who use the premises for illegal purpose, without prejudicing the interest of other law-abiding tenants.

(a) The Hon Albert Chan suggested in the previous meeting on 6 March 2002 the imposition of criminal liability on those tenants whose provision of false information in entering into a tenancy agreement causes loss to a landlord. The Hon Chan further suggested that certain personal particulars such as salaries of tenants should be set out in the tenancy agreement and must be accurate at the time of entering into the contractual relationship.

(b) According to the Department of Justice, legal policy requires the court to avoid multiplying the number of offences that relate to the same factual situations. As suggested in our previous reply, the Administration is aware that section 16A (Fraud) of Theft Ordinance (TO) (Cap. 210) provides an avenue for possible prosecution if the requisite intention and causation can be proved beyond reasonable doubt.

(c) Moreover, according to the Department of Justice, there are also other ways out for aggrieved landlords through civil remedies depending on the facts of the case:

(i) landlord may have a claim under the Misrepresentation Ordinance (Cap. 284) or in tort;

(ii) landlord may be able to sue under the terms of the tenancy agreement, e.g. in cases involving arrears of rent or damage to the property arising from a use which is in breach of the tenancy agreement.

(d) Further, the mandatory disclosure of certain information such as salaries would amount to interference with the right to privacy of the tenants and may not be justified.

(e) As such, the Administration does not agree that the imposition of criminal liability on tenants or requiring tenants to provide their personal particulars such as salaries at the time they rent the premises are proportionate to the problem identified, namely, causing loss to landlords as a result of the wrongful information provided by the tenants.

Item 10

To consider enhancing the role of the Landlord and Tenant Services Division (LTSD) of the Rating and Valuation Department, such as making it as quasi-judicial body, to deal with rental disputes without going to court.

(a) Currently, there are sufficient avenues for settlement of rental disputes. For cases requiring adjudication, the aggrieved parties may apply to the Lands Tribunal, District Court, Small Claims Tribunal or Court of First Instance depending on the facts of the case. For rental disputes where mediation is needed and negotiation is preferred to a court hearing, the LTSD of RVD is already in place.

(b) To turn LTSD into a quasi-judicial body would mean turning it into a court-like adjudicating establishment. To ensure that the proposed quasi-judicial body will carry out its duties duly, necessary procedures have to be set down to provide an avenue for both parties to defend themselves to ensure a fair hearing. Similar procedures to those of Lands Tribunal may need to be followed. It is envisaged that the process and hearing time of dispute resolution through a quasi-judicial LTSD might not be shortened.

(c) Moreover, the services provided by LTSD have been running on a voluntary basis quite successfully for more than twenty years and there does not appear a need for the proposed authority. To

change LTSD into a quasi-judicial body is likely to bring much administration difficulties and resource implications.

(d) The Administration therefore does not agree to turn the LTSD of the RVD into a quasi-judicial body.

<u>Item 11</u>

To step up publicity of the services of LTSD.

RVD offers advisory and mediatory services at its office in Cheung Sha Wan, the Lands Tribunal and thirteen major District Offices. The services are publicized in the Department's webpage. RVD will liaise with Home Affairs Department to step up publicity for the services by District Offices over the entire territory. Other publicity plans through RVD's telephone hotline or the media will also be considered.