

Possession: all bets are off (at least for now).

Practice Direction 51Z

Highlights:

- ◇ PD 51Z came into force on 27 March.
- ◇ It stays all possession proceedings for 90 days.
- ◇ It is not limited to housing possession cases; it covers non-residential claims too.
- ◇ It applies to all types of possession claims, including proceedings against squatters.
- ◇ It applies to both existing and new possession claims.
- ◇ It is debatable whether it applies to claims for relief from forfeiture.

Introduction

The coronavirus pandemic is first and foremost a global public health emergency. However, it is also spawning a great deal of legislative activity. The field of property law is no exception. Events are very fast-moving.

In recent days the Government has announced:

- “Emergency legislation to *suspend new evictions from social or private rented accommodation* while this national emergency is taking place. ... Emergency legislation will be taken forward as an urgent priority so that *landlords will not be able to start proceedings to evict tenants for at least a 3 month period.*”¹ [18 March]
- “*Commercial tenants who cannot pay their rent because of coronavirus will be protected from eviction* ... These measures, included in the emergency Coronavirus Bill currently going through Parliament, will mean *no business will be forced out of their premises if they miss a payment in the next 3 months.*”² [23 March]

In relation to residential tenancies, s.81 of, and Sch.29 to, the Coronavirus Act 2020 (in force from 25 March) provide for protection from eviction for a 3 month period. In brief, this is achieved by mandating that any notice to quit, notice of intended possession proceedings and any Housing Act 1988 s.21 notice (in respect of an assured shorthold tenancy) must – if served between 26 March and 30 September (a period which can be extended) – give a minimum of 3 months’ notice to the tenant before possession proceedings can be commenced. By this means – an extension of the required period of notice for notices served in the relevant period

¹ <https://www.gov.uk/government/news/complete-ban-on-evictions-and-additional-protection-for-renters>

² <https://www.gov.uk/government/news/extra-protection-for-businesses-with-ban-on-evictions-for-commercial-tenants-who-miss-rent-payments>

(thereby delaying the “*start*” of “*new evictions*”) – the Government’s first announcement is implemented.

In relation to commercial tenancies, s.82 of the 2020 Act (in force from 25 March) offers business tenants comfort against forfeiture for non-payment of rent during a 3 month period between 26 March and 30 June. Again, this period can be extended. By this means – a fetter on forfeiture by landlords in such cases – the Government’s second announcement also comes to pass.

Practice Direction 51Z

However, sometimes it is more general *procedural* measures that are implemented with less fanfare that go further and are potentially more significant than direct adjustments of parties’ *substantive* rights. A topical example in point is the new CPR Practice Direction 51Z (in force from 27 March until 30 October 2020), entitled “*Stay of Possession Proceedings – Coronavirus*”.

PD 51Z followed this Government announcement:

- “From tomorrow ... following a decision by the Master of the Rolls with the Lord Chancellor’s agreement *the court service will suspend all ongoing housing possession action* – this means that *neither cases currently in the system or any about to go in to it can progress to the stage where someone could be evicted*. This suspension of housing possessions action will initially last for 90 days, but this can be extended if needed. This measure will protect all private and social renters, as well as those with mortgages and those with licenses covered by the Protection from Eviction Act 1977.”³

What does PD 51Z actually do?

The basic answer is simple. It provides that:

“All proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by a warrant or writ of possession are stayed for a period of 90 days from the date this Direction comes into force.”

In many respects this is self-explanatory. However, it merits some unpacking.

The ambit of PD 51Z

As the italicised text above shows, the 3 month stay of proceedings applies to **all** Part 55 possession proceedings.

³ https://www.gov.uk/guidance/government-support-available-for-landlords-and-renters-reflecting-the-current-coronavirus-covid-19-outbreak?utm_source=2073cc74-35f1-4c38-be38-40d575f20697&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

Therefore, in line with the Government’s announcements, the following are stayed for 90 days:

- (1) All residential tenancy possession proceedings, whether brought by private or social landlords.
- (2) All commercial tenancy possession proceedings for non-payment of rent.

But such is the breadth of PD 51Z that these are certainly *not the only* cases that are caught.

The following are *also* enveloped by the universal stay:

- All residential possession proceedings, including:
 - Mortgage possession proceedings. (CPR 55.2(1)(a)(ii))
 - Proceedings against former tenants at will. (CPR 55.2(1)(a)(i))
 - Proceedings against former licensees. (CPR 55.2(1)(a)(iii))
- All non-residential possession proceedings, including:
 - All commercial tenancy possession proceedings, irrespective of the ground on which possession is sought (i.e. not limited to arrears of rent). Such cases may include:
 - Where the lease has been, or is sought to be, forfeited on non-rent grounds.
 - Where the lease has determined pursuant to a break right (exercised by either landlord or tenant) or by surrender.
 - Where a contracted-out periodic tenancy has been terminated by notice to quit.
 - Where a contracted-out fixed-term lease has ended by effluxion of time.
 - Proceedings against former tenants at will. (CPR 55.2(1)(a)(i))
 - Proceedings against former licensees. (CPR 55.2(1)(a)(iii))
 - Mortgage possession proceedings. (CPR 55.2(1)(a)(ii))
- Possession proceedings against trespassers (squatters) – of *both* residential *and* non-residential premises. (CPR 55.2(1)(b))

The list is thus comprehensive and all-embracing. It will be seen that the effect of PD 51Z is far wider than the announcement of a stay of “*housing* possession cases”.⁴ It applies to commercial cases too.

⁴ The announcement of PD 51Z was in similar terms: “All proceedings for *housing* possession brought under CPR Part 55 ... are stayed”

Consequences

The following points flowing from PD 51Z should be noted:

- The 90 day stay applies to all *existing* possession proceedings.

It is thus retrospective in the sense that it catches any current possession proceedings regardless of (a) when they were issued, (b) the stage they have reached, and (c) the basis on which they were brought.

- The 90 day stay also applies to all *existing* possession *enforcement* proceedings.

The consequence of this is that the enforcement of any possession orders which had not been executed before 26 March is stayed, again irrespective of (a) when the possession order was made (i.e. how long the landowner has waited to recover possession) and (b) the nature of the claim which resulted in the possession order.

- PD 51Z does not in terms preclude the *issue* of possession proceedings.

Another Government announcement⁵ [18 March] included: “No new possession proceedings through applications to the court *to start* during the crisis.” This is not, it appears, quite the case, although in practice the immediate stay imposed on the issued possession proceedings (see below) will, generally, amount to pretty much the same thing.

It would, of course, be a strong thing to say that proceedings could not be issued, particularly where there may be/remain cases in which, even if a stay will bite as soon as the proceedings are issued, it is incumbent on a claimant to issue possession proceedings without delay for limitation-related reasons. Examples include:

- Many statutory notices in the context of residential tenancies have a limited shelf-life. For instance, proceedings based on HA 1988 s.21 notices must generally be brought by the landlord within 6 months of the date of service of the notice: s.21(4D).
- Cases in which the landowner faces a potential adverse possession claim and where it wishes (a) to stop time running for limitation purposes (Limitation Act 1980, s.15) (unregistered land), or (b) to prevent the accrual of a possible entitlement for the squatter to apply to be registered as proprietor under Sch.6 to the Land Registration Act 2002 (registered land).

Further, it is conceptually impossible to conceive that an *unissued* claim can be regarded “proceedings for possession” which can in turn be the subject of a “stay”.

So it is tolerably clear that *new* claims *can* be brought – but (see below) by reason of PD 51Z they will not progress further at the outset.

⁵ <https://www.gov.uk/government/news/complete-ban-on-evictions-and-additional-protection-for-renters>

- It is considered that the stay applies equally to *new* possession proceedings (i.e. those issued on or after 27 March) and (likewise) to *new* applications to enforce existing possession orders.

Certainly, the terms of paragraph 2 of PD 51Z (“all proceedings for possession brought under CPR Part 55”) are wide enough on their natural reading to embrace both claims already in the system as at 27 March and also any later entrants.

This squares with the Government’s announcement, for although it referred to suspending “all ongoing ... possession action”, it is not necessary to read “ongoing” as limited to already-issued claims. Indeed, the explanation in the same announcement certainly signalled the intention that the stay would apply both to “*cases currently in the system or any about to go in to it*”.

- Therefore, new claims will, it seems, presumably be issued but thereupon immediately stayed.
- The imposed stay will prevent the *service* of the issued proceedings.

However, when the stay expires, the position as between the parties will be the same as it was the moment the stay was imposed: *Grant v Dawn Meats (UK) Ltd* [2018] EWCA Civ 2212. Therefore, the landowner will still have the regular full 4 month period within which to serve the claim (CPR 7.5).

- The PD 51Z stay applies in both the High Court (in those exceptional possession claims which can be brought in that forum: PD 55A 1.1(1)) and also the county court.
- The *duration* of the imposed stay in either case (existing or new claims) is, it appears, until 25 June.

This follows from the stay being expressed to be “*for a period of 90 days from the date [PD 51Z] comes into force*”, i.e. for 90 days from 27 March, thus expiring on 25 June.

The underlined words are, it appears, intended to identify the start of the 90 day period in every case and to create a single, fixed period of the stay in any case (calculated by reference to, and running from, 27 March). The words do not refer to: (i) a 90 day period from the date PD 51Z comes into force for existing claims and (ii) a 90 day period from the date of issue for new claims. No such distinction is drawn.

It is therefore considered that the expiry of the stay is the same in relation to both existing claims and new claims, although (a) it is difficult to speak of a claim being stayed for a period before it has been issued and (b) the consequence of this interpretation is that a claim issued in, say, late April will itself be effectively stayed for just 60 days or so (rather than the full 90 days).

In other words, there is a common end date for the stay applicable to all claims, irrespective of when the claim is issued (i.e. before *or* after the coming into force of PD 51Z).

Moreover, the fact that the stay ends on the same date (25 June) in all cases avoids incongruous anomalies which might otherwise arise in relation to very similar cases if a

‘full’ 90 day stay were imposed from the date of issue in relation to new claims. To illustrate the point:

- ◇ An *existing or new* residential tenancy possession claim for non-payment of rent founded on a 14-day notice seeking possession given before 26 March⁶ would be subject only to the 90 day deferral pursuant to PD 51Z.
- ◇ Whereas an equivalent *new* residential tenancy possession claim on the same basis but founded on a notice seeking possession given on or after 26 March⁷ could – through the combined effect of the 2020 Act, Sch.29 and PD51 – be deferred by 5½ months (the notice seeking possession being extended by 2½ months (from 14 days to 3 months), coupled with the 90 day PD 51Z stay).

Also, the fact that (in all cases) the 90 stay period runs from 27 March reflects the announcement which accompanied the making of PD 51Z: “All proceedings ... are stayed *for a period of 90 days from today, 27th March 2020*”.⁸

The only real uncertainty as to the length of the stay stems from the fact that PD 51Z is expressed to cease to have effect on 30 October (paragraph 1). However, if the stay which it imposes (paragraph 2) expires universally on 25 June, PD 51Z seems to be a dead letter after that date.

(Unintended?) Ramifications

The stated purpose of PD 51Z is to ensure that the administration of justice and the enforcement of orders is carried out so as not to endanger public health: paragraph 1.

With that object, it may well be that the blanket, across the board, stay which PD 51Z imposes – without exceptions (except claims for injunctive relief: paragraph 2) – is entirely deliberate despite its breadth and even though it seems to go further than the Government’s announcement.

However, the following effects of PD 51Z (even if an inevitable by-product of a measure taken in the overall public interest) might perhaps be thought surprising:

- ◇ If squatters had taken possession of a property (residential or commercial) and had not been evicted from it before 27 March, they now have 3 months’ guaranteed tenure of the premises (unless, which seems unlikely in the current emergency, the police exercise any available powers to arrest the squatters under e.g. s.144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in the case of residential premises).
- ◇ The same applies if squatters should now take possession of a property. They will not face effective possession proceedings until late June.

⁶ See e.g. Housing Act 1988, s.8(4B).

⁷ HA 1988, s.8(4B), as temporarily amended by CA 2020, Sch.29, para.6(d).

⁸ <https://www.judiciary.uk/announcements/117th-practice-direction-update-to-the-civil-procedure-rules-coronavirus-pandemic-related/>

In those cases it will only be if, instead of seeking possession, the landowner can properly seek effective injunctive relief against the squatters that PD 51Z will not bite. As a means of recovery of possession, this seems unlikely.

A grey area

CPR 55 provides that all claims by tenants seeking relief from forfeiture are subject to the Part 55 procedure. (CPR 55.2(1)(c))

As noted above, CPR 51Z applies to “all proceedings for possession brought under CPR Part 55”.

Is a claim for relief from forfeiture (itself plainly within CPR 55) a “proceeding for possession” such that it too is caught by the CPR 51Z stay?

The expression “proceedings for possession” is not a defined term in CPR 55.

On the one hand, the phrase might be thought to connote only “a possession claim” (defined in CPR 55.1(a) as “a claim for the recovery of possession of land”) and, as such, to exclude a claim for relief from forfeiture, especially since the general focus of CPR 55 is on possession claims brought by landlords, mortgagees and licensors (CPR 55.2(1)(a)).

But on the other hand, it is arguable that a claim for relief from forfeiture (certainly following a peaceable re-entry) is a claim by which the tenant, if successful, will resurrect the forfeited lease and see it recover possession of the land from the landlord (itself in possession of the land following the forfeiture), and hence is properly categorised as a possession claim/proceedings for possession.

The point is a moot one.

If a claim for relief is within the scope of PD 51Z the following surprising outcomes may result:

- ◇ If the lease of (typically) a commercial tenant was forfeited by peaceable re-entry before 27 March, any *pending* but undetermined application by the tenant for relief and re-entry will now be stayed for 90 days, leaving the tenant dispossessed.
- ◇ The position will be likewise if the (erstwhile) tenant should *now* apply for relief in respect of a recent forfeiture effected by peaceable re-entry (as opposed to by court proceedings, which proceedings brought by the landlord would themselves be subject to the PD 51Z stay).

Summary

The general effect of PD 51Z is clear and far-reaching. However, as with any legislative intervention, it gives rise to some, albeit limited, uncertainties, and it may possibly yield some unforeseen consequences. However, in the fight to protect society against the spread of coronavirus it is likely that PD 51Z, though a somewhat blunt tool, will be effective to minimise

the danger to public health which might otherwise be caused by the progression of possession claims and the making and execution of possession orders at this time.

What happens when the coronavirus crisis is passed and the moratorium imposed by PD 51Z is spent remains to be seen. Underlying rights and obligations (e.g. the tenant's obligation to pay rent throughout) are unaffected. The Government has indicated that some further measures (e.g. strengthening and extending the Pre-Action Protocol for Possession Claims)⁹ may be introduced but at this stage details are awaited. However, for now when it comes to possession all bets are off.

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⁹ <https://www.gov.uk/guidance/government-support-available-for-landlords-and-renters-reflecting-the-current-coronavirus-covid-19-outbreak>