The Scope of PD 51 Z: Court of Appeal decision in *Marshall (acting by Mehmet Arkin as fixed charge receiver) v Marshall & Another*

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On 11 May 2020 the Court of Appeal remotely handed down judgment in Marshall (acting by Mehmet Arkin as fixed charge receiver) v Marshall & Another [2020] EWCA Civ 620. The Court of Appeal dismissed the challenges made to Practice Direction PD 51Z. The PD was not made ultra vires CPR 51, and is not contrary to the Coronavirus Act 2020 or incompatible with Article 6 of the European Convention on Human Rights and Fundamental Freedoms. Having rejected challenges to the Practice Direction, the Court turned to consider its scope. The court confirmed, first, that the stay applies even to directions agreed by the parties, though the parties are at liberty to follow agreed directions during the stay period, and a failure to comply with those agreed directions may be relevant to any further directions when the stay is lifted. Most importantly, there is a theoretical power to lift the stay. However such a power can only be exercised in the most exceptional circumstances. Such circumstances are likely rare.

Factual Background

Property practitioners will no doubt be familiar with Practice Direction 51Z. In brief summary, the introduction of PD 51Z on 27 March 2020 resulted in the imposition of a 90 day stay on Part 55 possession claims. It was subsequently amended on 18 April 2020 to include several exceptions. One of these exceptions, contained in Paragraph 2A(c), provided for an exception for "an application for case management directions which are agreed by all the parties". Despite only consisting of four paragraphs, PD 51Z has gave rise to a number of issues, some of whicb have been answered by the Court of Appeal in *Marshall (acting by Mehmet Arkin as fixed charge receiver) v Marshall & Another*.

The underlying facts of the two appeals before the Court of Appeal concerned possession proceedings brought by a receiver who had been appointed by a mortgagee. The claims were allocated to the multi-track and were listed for a case management conference on 26 March 2020. That hearing did not take place but directions were agreed by the parties on the same day. On 27 March 2020, being the day PD 51Z came into force, HHJ Parfitt sitting at Central London incorporated the directions into an order and sealed the same. The directions set out a

timetable for undertaking the usual steps for preparing for trial over the forthcoming months and made provision for a telephone listing appointment so that trial could be listed between October 2020 and January 2021.

Following the enactment of PD 51Z, the Respondents took the view that they were not obliged to take any of the steps which the parties had agreed to take during the 90 day stay. The Appellant did not agree that the stay applied to the agreed directions and further contended that, if it did, it should be lifted.

At first instance, the Appellant's application for a declaration came before HHJ Parfitt who held that the stay did apply and that he had no power to lift the same. Permission to appeal was given and the matter was transferred to the Court of Appeal. Sir Geoffrey Vos gave the judgment of the Court.

Decision of the Court of Appeal

The first ground of appeal was that PD 51Z was made ultra vires of CPR 51.2 which rule allows new practice directions for pilot schemes. The Respondent objected to the raising of this issue on the basis that, first, it had not been argued below and, secondly, that this issue was more appropriately dealt with by way of judicial review. Had the Appellant sought bring an application for judicial review, he would have been required to overcome numerous procedural hurdles (for example, obtaining permission). This procedure would also have allowed the Lord Chancellor to have been involved from the beginning of the litigation. Although the Lord Chancellor, also representing the Master of the Rolls, was a party by the time the appeal was heard, this had only occurred at the last minute and meant that, for example, there was no opportunity for him to adduce evidence.

Although the Court of Appeal considered these points to be well made, they were not permitted to prevail. Rather the Court considered that the circumstances made it appropriate for a public law challenge to be determined in the context of private law proceedings. The Appellant's failure to take the judicial review course was both understandable and had not caused any real unfairness.

As to the substance, the Appellant contended that there was no power to make the practice direction pursuant to CPR r. 51.2. This rule says:

> "Practice directions may modify or disapply any provision of these rules –
> (a) for specified periods; and
> (b) in relation to proceedings in specified courts,
> during the operation of pilot schemes for assessing the use of new practices and procedures in connection with proceedings."

The Appellant's argument was that PD 51Z was not a pilot scheme at all and that there were no schemes or new practices or procedures which were being assessed. The Court of Appeal considered that the pilot nature of PD 51Z was clear from its paragraph which gives its purpose as being to:

> **"**assess modifications to the rules and Practice Directions that may be necessary during the Coronavirus pandemic and the need to ensure that the administration of justice, including the enforcement of orders, is carried out so as not to endanger public health. As such it makes provision to stay proceedings for, and to enforce, possession. It ceases to have effect on 30 October 2020."

The Court of Appeal saw no reason why it was not reasonable to envisage that the stay may be shown to be effective in relieving pressure on the administration of justice, reducing the risk of spread of Covid-19 by enforcement of possession orders and abrogation of court hearings. Once that had been assessed, the Court considered that the Master of the Rolls might consider putting in place a permanent rule or PD imposing a stay in the event of another peak.

The Appellant also sought to argue that PD51Z was inconsistent with the Coronavirus Act 2020. In essence, the argument was that the blanket stay on possession proceedings rendered irrelevant the specific provisions in the Act which, for example, require landlords to give extended notices in the event that they intend to bring possession proceedings. This argument was rejected on the basis there was no conflict between the two regimes; they contain separate and different provisions. Whereas the Act made substantive changes to the law (for a period of two years, subject to extensions), PD 51Z imposed a stay to protect and manage County Court capacity, and ensure the administration of justice, without endangering public health during a peak phase of the pandemic.

The final challenge to the validity of PD 51Z was made on the basis of Article 6 ECHR and/or incompatibility with the right of access to justice. It would seem that it was common ground

that delegated legislation is ultra vires if it would result in a real risk that people would be prevented from having access to justice, and that the Court, even though it has unlimited jurisdiction and is a master of its own procedure, cannot regulate itself in such a way as to deny common law principles of open justice. It was also, however, common ground that in assessing whether there has been an unreasonable delay in legal proceedings regard should be had to all the circumstances. The Court considered that the short delay to possession litigation was amply justified in the circumstances of the pandemic.

The Court of Appeal then turned to consider whether there was power to lift the stay. Two submissions were made by the Appellant under this heading. First, it was submitted that paragraph 2A(c) was to be construed as meaning that any case management directions agreed by the parties should be carried into effect notwithstanding the stay. Secondly, it was argued that the Court must have a general discretion to lift the stay.

On the first issue, the Court again disagreed with the Appellant. It held that when paragraph 2A(c) says that paragraph 2 does not apply to *an application for* agreed case management directions, it means what it says. That is if the parties agree directions, they can apply to have the directions in question embodied in an order. The agreed directions are themselves subject to the stay. However, that does not prevent the parties from complying with them (and presumably incurring costs to do so). Parties are at liberty to take agreed steps, once the Court has ordered their agreed directions, and a failure to comply might be relevant to future directions.

As to the power to lift the stay, as a matter of strict jurisdiction, the Court held that the Court's wide case management powers contained in CPR r. 3.1, in particular the Court's power to grant stays, in which is implicit a power to lift them, were not excluded. Accordingly, it was at least a theoretical possibility that the stay could be lifted. However, the Court stressed that PD 51Z imposed a blanket stay which sought, amongst other things, to alleviate the burden on the justice system. PD 51Z did not allow for distinctions to be drawn between cases where the stay might operate more, or less, harshly on one of the parties. Whilst the Court would not go so far as to say there were no circumstances, in which the stay should be lifted they expressed great difficulty in envisaging such a case.

On the facts, the Court of Appeal held that HHJ Parfitt had been correct to refuse to lift the stay. They considered however that the Judge's decisions to positively postpone the directions until after the stay was wrong as he should not have countenanced any application at all in contradiction of the stay. Rather, he should simply have dismissed the application.

The full judgment can be found here: https://www.judiciary.uk/judgments/marshall-acting-by-mehmet-arkin-as-fixed-charge-receiver-v-marshall-another/

Commentary

The Court's judgment gives rise to short-term and medium-term considerations for property practitioners.

In the short-term, until 25 June 2020, it is clear that PD 51Z is here to stay. Although lifting the stay is a theoretical possibility, it cannot be overemphasised that such an application will only succeed in the most exceptional circumstances. Property litigators will likely be familiar with s.89(1) of the Housing Act 1980 which refers to the need to establish "exceptional hardship" if date for giving possession is to be postponed beyond 14 days in certain circumstances. In that context, exceptional hardship focuses on the effect of the possession order on the tenant, and in particular any hardship which is not a normal incident of such an order being made. In the present case, it seems to us that arguments based on such factors are unlikely to succeed.

The Court of Appeal made clear that PD 51Z would be "fatally undermined" if parties were permitted to rely on their particular circumstances to lift the stay. The kind of circumstances which might be exceptional must be those in which its effect is against the public policy of protecting the nation's health, and/or would burden the administration of justice. What might those be? Had an injunction not been sufficient, a case such as *University College London Hospitals Foundation trust v MB* [2020] EWHC 882 (QB) might have been a case in which there was a suitable benefit to the public health in allowing the case to be pursued. Likewise, a trespass case against named persons who had occupied part of a hospital for example, might well be such a case (assuming that the amended PD 51Z in allowing cases that fall in CPR 55.6 does not already permit it, and it was too late to use the IPO route). One could argue, with such

a case, that a possession order and its enforcement is a quicker remedy easier to enforce than an injunction, and indeed uses less court time to obtain. Likewise perhaps the removal of a former tenant from commercial premises needed by the Government for reasons to do with the Covid-19 crisis might just be such a case.

As for the purpose of the PD to reduce the burden on the courts, there just might be a basis for lifting the stay for an appeal of a possession order in the High Court or Court of Appeal, in particular on a point of important principle. Appeal cases have been heard during the stay (for example *Sangha v Amicus Finance Plc* [2020] EWHC 1074 (Ch) where the stay was not discussed, and indeed this very case). The High Court and Court of Appeal have perhaps a little more capacity to conduct remote hearings than the County Courts.

The Court's confirmation that paragraph 2A(c) only applies to application to embody agreed directions in Court orders is also significant. On the facts of this case, the agreed directions required witness statements to be exchanged by 26 June 2020. Assuming, for a moment, that PD 51Z is not extended, the stay will be lifted on 25 June 2020. During the currency of the stay it operates to halt or freeze proceedings such that, when it is lifted, the position between the parties will be the same as it was when it was imposed. If one party does not serve witness statements by 26 June 2020, the other party will not be entitled, on that day, to rely on CPR r.32.10. However, the Court of Appeal did make clear that the parties to a stayed action are at liberty to undertake the steps they agreed. Accordingly, the parties could continue to prepare for the trial during the stay with a view to exchanging witness statements on 26 June 2020. What about costs? Section 51 of the Senior Court Act 1981 provides that "the costs of and incidental to all proceedings" shall be in the discretion of the Court. It seems to us that such costs could include those incurred during a stay given the Court of Appeal's observations.

As to the medium term, it was not suggested to the Court of Appeal that the pandemic was likely to conclude by 25 June 2020. In these circumstances, it may be that PD 51Z is extended in its current form or otherwise varied. As set out above, the Court of Appeal's rejection of both the ultra vires and the denial of access to justice arguments was based, at least in part, on the fact that PD 51Z currently enshrines a short delay. As the pandemic continues, and, for the ultra vires argument if a more permanent not pilot PD is not imposed, this may cease to be a full answer.