Staying for clarification

By Cecily Crampin and Julia Petrenko

Covid-19 has had quite an effect on property lawyers in their professional lives. The stay on Part 55 claims imposed by PD 51Z on 27 March 2020 has stayed part of many practitioners' day to day work. It has also led, however, to numerous questions. Can possession claims still be issued? Can directions still be followed or sought for possession claims already past the first possession hearing and heading towards trial? What are we supposed to do about trespass cases? Trespassers are not people the Government seemed to be keen to protect when it announced its intention to protect certain categories of occupiers from eviction, yet possession claims against trespassers have been caught in the general stay.

Two recent developments have changed the possession landscape. First, on 18 April, the Master of the Rolls replied to a joint PBA and PLA letter, which had queried the extent and legitimacy of the PD. His letter set out the rationale for the blanket stay, and several amendments to the PD which, if the Lord Chacellor agreed, would be made. They were: to exclude some trespass and all IPO claims from the stay, allow the parties to agree directions, and to emphasise that claims can still be issued. Those amendments were brought into force from 11am on 18 April.

Secondly, permission to appeal to the Court of Appeal has been given in a recent case before HHJ Parfitt, *Arkin (As Fixed Charge Receiver) v Marshall* (Central London County Court, 15/4/20, unreported). HHJ Parfitt found that he had no power to lift the stay imposed by PD 51Z, for example to make directions in that particular case for a future (even post possible lockdown lifting) trial. Given that, for now, the PD is in force for 90 days from 27 March, it seems likely that the Court of Appeal will endeavour to hear the case soon.

This article considers those developments, looking to see what clarification there is as to which steps in which possession claims now can be followed.

The amendment to PD 51Z

<u>The rationale for the stay</u>

The first interesting point about the letter of 18 April is that it sets out the rationale for the extensive stay, and why it was granted so as to protect more people than the short term

residential tenants and business tenancies which the Government sought to protect in the Coronavirus Act 2020. The focus, in the letter, and in the explanatory notes to the amendments to the PD, is on the efficient administration of justice in accordance with public health requirements. Possession claims are heard in the County Court, and in high numbers. There is less IT and support staff in those courts to deal with remote hearings, and hearings in person are a risk to public health.

The blanket stay thus seems to have been directed at the need to reduce the number of civil claims in the list during the lockdown. That explains a stay on directions too. The burden of such hearings has been removed. Presumably that is a point likely to be put to the Court of Appeal on the *Arkin* case too.

Exempting certain trespass claims from the stay

That leads us to the amendments to the PD. The first of the changes deals with trespass claims.

The original PD expressly excluded claims for injunctions from the stay. The Master of the Rolls' letter suggests a rationale for this. Claims against trespassers and squatters can be dealt with by injunction.

A possession order and its enforcement is a more practical solution to trespass than an injunction since a possession order is enforceable by physical removal of the occupiers. An injunction is enforceable by a threat of jail. Moreover, an injunction claim, with an interim injunction then directions to a final trial is more costly and time consuming than a possession claim can be. Trespass claims against defendants who never had permission to be in the premises in question are, in my experience, more often than not resolved at the first hearing by the granting of a possession order.

This may explain why two amendments have been made to assist with possession claims against trespassers. The general stay does not apply to "a claim against trespassers to which rule 55.6 applies" and "an application for an interim possession order under section III of Part 55" (encompassing all stages of that application including hearings and the making of such orders).

The exclusion of the IPO procedure from the stay is useful. The IPO procedure is designed to be a quick route to possession in trespass cases, with a failure by the trespassers to comply with the possession order made at the first hearing a criminal offence. However there are limits to the jurisdiction. The defendants must be trespassers in the sense that they entered onto the land and remained on it without consent; if a predecessor owner of the land gave consent then the IPO procedure can't be used (CPR 55.21(2)). The claimant must make the claim within 28 days of knowledge of the occupation.

What about the new exclusion of the stay for more general trespasser claims? What is odd about this wording is the reference to CPR 55.6.

For the purposes of Part 55, a claim against trespassers is limited to claims in which the claimant alleges that the land is occupied "by a person or persons who entered or remained on the land without … consent .." (55.1(b)) It does not include, for example, claims against tenants who have remained after the tenancy has ended, for example after the end of the term.

The amendment doesn't appear to lift the stay from all trespassers cases within that definition. It lifts it for such claims "to which rule 55.6 applies". CPR 55.6 sets out how to serve proceedings when the defendants are "persons unknown". It is not obvious how a set of instructions for service can qualify the more general definition in 55.1(b) of a claim against trespassers to tell us which such claims are and which aren't the subject of the stay. However, the only qualification which makes sense of the reference is that it is only those claims "issued against persons unknown" (the phrase which starts 55.6) which are to be free from it.

Presumably the rationale is that those claims are most likely to be claims against squatters, that is people taking advantage of the current situation to squat empty offices and shops, rather than people who occupy because they think they have the right to do so. It isn't, however, the case that squatters cases the trespassers' names are never known. Facebook searches in particular can sometimes mean that names are found; sometimes squatters give their names to enquiry agents. The case law on injunctions suggests that the defendants can only be "persons

unknown" if it is impossible to name them[1]. A practice of not including known names seems wrong.

Nor does it seem appropriate to add "persons unknown" as a defendant where the name of at least one defendant is known, without a real suspicion that persons whose names are not known are in occupation. In any event, even if that approach were taken, that would leave the question whether the stay would be disapplied to the whole of the claim because the claim had been issued against a defendant who was a person unknown, or whether it was only the claim against that person unknown which could proceed, with the claim against the named defendant stayed. The latter seems an odd and unworkable conclusion, but a possible interpretation.

It seems odd too if it is intended that IPO claims against named defendants are to be allowed, but not squatters claims more generally. If the intention is to reduce active possession claims only to those where the trespasser has never been permitted to occupy, then surely the answer is to exempt from the stay all trespass claims, as defined in CPR 55.1(b), which also fulfil 55.21(2). That would bring general trespass claims as exempted into line with the IPO regime. Since IPO claims require at least two hearings (a first hearing at which possession may be given, and a second at which it is confirmed) and general possession claims only one, this approach might well achieve the stated aim of reducing the burden on the courts, whilst allowing possession claims against squatters to go ahead.

Agreeing directions

The other amendments to the PD are (1) clarity that new claims can be issued (though they will then be stayed, if not one of the trespass exceptions), and (2) an exception to the stay allowing parties to agree directions to trial, and have those sealed. The first is helpful. The practice of county courts has in places been to refuse to issue.

The question about the second of those exceptions is whether the parties, once the agreed directions have been approved, can comply with them, assuming they include steps to be taken by dates within the period of the stay. As defined in the Glossary to the CPR, "a stay imposes

[1] *Boyd v Ineos Upstream Ltd* [2019] EWCA Civ 515 for example. The position with a possession claim might be a little different in that the remedy, a possession order, and its meaning is clear, and, save in the IPO situation, there is no immediate risk of a criminal offence. It seems odd, however, and against the interests of justice, not to name a defendant if a name is known, so that they can be clear they are an intended defendant.

a halt on proceedings, apart from taking any steps allowed by the Rules or the terms of the stay". The position of the parties is preserved until the lifting of the stay[2]. There is nothing express in the amendment to the PD that the directions that are agreed are themselves free of the stay. It is arguable that that is implicit, but it is certainly possible that a party who has agreed directions to take effect during the stay will find, at the end, that any non-compliance with them by the other side is excused because the stay has made the dates for each direction run from its lifting. Thus it seems possible that this apparently practical amendment only allows parties to fix directions during the stay to run from when the stay is lifted.

Can the stay be lifted?

The amendments to the PD, and the letter to the PLA and the PBA, suggest that the intention of the stay imposed by PD 51Z is that the courts simply will not progress possession claims, (save for issue, the trespass exemptions and the giving of agreed directions). The separate issue in *Arkin (As Fixed Charge Receiver) v Marshall* (Central London County Court, 15/4/20, unreported) to be heard in the Court of Appeal was whether the court has jurisdiction to lift the stay in individual cases, that is, whether the court can progress a suitable, perhaps exceptional, claim.

Since the *Arkin* case is unreported, the brief account of it that follows comes from an article on it written by Philip Rainey QC (https://www.linkedin.com/pulse/staying-put-philip-rainey-qc/) and discussions with counsel for the Appellant, Michael Walsh. It appears that the issue was whether the court had the jurisdiction to give directions in a contested possession claim. HHJ Parfitt decided that it did not, relying on the decision in *Sec of State for Communities v Bovale Ltd* [2009] EWCA Civ 171. He said that the court had to give effect to this particular Practice Direction which gave him no discretion for individual cases.

The issue in *Bovale* was the jurisdiction of a judge to lay down general matters of procedure in relation to Part 8 claims to quash planning decisions. Collins J had set out in a judgment that in those types of claims, and contrary to the usual Part 8 rules, the defendant should serve not only evidence in response, but also pleaded grounds of resistance, and that there could be costs consequences as a matter of generality if his rules were not followed. The Court of Appeal, in deciding that Collins J had exceeded his powers, surveyed the source of Practice Directions.

[2] White Book 2020 vol 1 at 3.1.8.

However, at [24], the Court of Appeal said this: "It is, we think, important to recognise at this stage the wide powers given by the CPR for judges to depart from the rules and practice directions in the exercise of their case management powers in individual cases and to further the overriding objective". The issue in *Boyale* wasn't whether a judicial direction in an individual case contrary to a rule or practice direction was outwith judicial powers, but whether giving general directions for particular categories of cases was permissible. A judge cannot vary a practice direction, and it is binding on him, but there are powers under in particular CPR 3 to facilitate case management in particular cases (see [28]). Thus he can do anything within his general powers save if the Practice Direction disapplies them. writing article

The imposition of a stay under the CPR as it stood before PD 51Z came into force would not have removed from the court the jurisdiction to decide, during it, that the stay should be lifted. The court has jurisdiction under CPR 3.1(f) to stay the whole or part of any proceedings generally or until a specified date or event. It must follow that it has the jurisdiction to lift such a stay, even if the stay was general and there was no express liberty to apply[3]. Moreover, the rules include a number of automatic impositions of stays which can be lifted by the court. For example rule 15.11 stays undefended cases in which judgment has not been sought for 6 months. Though that rule expressly includes a liberty to apply provision, it seems surprising to suggest that the court could not lift the stay of its own motion where appropriate, that is, in the interests of justice.

If the court before PD 51Z could have lifted stays, then why can it not now, in suitable cases, lift the stay imposed by PD 51Z? Though PD 51Z is made under CPR 51.2, which permits Practice Directions to modify or disapply rules, PD 51Z does not expressly disapply other rules, in particular CRP 3.1. It is only the seriousness of the current national crisis as the reason for the PD that suggests this, not the express reference to any other rules in the wording of the PD itself. It is not obvious from the wording of the PD that the imposition of a stay, even for the benefit of public health, is intended to be incapable of lifting before the 90 day period has ended, thus that the PD is in conflict with existing case management powers so as to disapply them.

[3] See White Book 2020 vol 1 at 3.1.17.3 for the suggestion, in a different context, that the absence of liberty to apply in an order does not mean that a party cannot make an application.

There may be good reason in individual cases apparent at least to the parties why the stay should be lifted to allow for useful case management, for example which could be dealt with on written submissions only, and which would likely make the management of the case at the end of the stay quicker, cheaper, and more just. For example, it may be useful to set down unagreed directions to a trial in say 2021, which can be disposed of without further delay when that day comes. It may be useful to make unless orders for non-compliance with directions whose dates preceded the lockdown and the stay so that cases can be disposed of quickly, if there is further non-compliance, once the lockdown ends.

There is a difference between the question of whether the court has jurisdiction to lift a stay and whether it will lift it in all but exceptional circumstances. The question of whether there is jurisdiction is a question of interpretation of the CPR and the practice directions: has the general jurisdiction under CPR 3.1 been disapplied by PD 51Z. That question is not necessarily answered, save in cases of ambiguity, by the motivation for the PD. That motivation has a stronger place in the question of how a discretion whether to lift the stay should be exercised.

In the current situation, the answer may well be that even if the court does have jurisdiction to lift the stay it is a rare case that it will do so, since the interests of justice include reducing the claims on the time the courts have available. That may well outweigh most arguments that an individual case is exceptional.