

University College London Hospitals Foundation Trust v MB [2020] EWHC 882 (QB): the unintended consequences of the stay of possession claims under Practice Direction 51Z

1. Practice Direction 51Z was hastily brought into force on Friday 27 March 2020, after the Prime Minister's televised instructions to the nation on the evening of Monday 23 March 2020 that everyone should stay at home in order to beat coronavirus. Practice Direction 51Z imposed a three-month stay on all Part 55 possession proceedings, which ensures that those who were facing the possibility of eviction from their home have some protection during the crisis. However, since the Practice Direction came into force, property practitioners have been grappling with the possibly unintended consequences that come from its very wide scope. This has been brought into sharp focus by the recent case of University College London Hospitals Foundation Trust v MB [2020] EWHC 882 (QB), in which PD51Z prevented an NHS Trust from obtaining a possession order to facilitate the discharge of a patient from hospital, in circumstances where her bed was needed for critically ill-patients, she was medically fit for discharge, and indeed she would be at less risk of infection from COVID-19 if out of the hospital. As this article explains, the NHS Trust in the UCLH case was able to obtain the relief it needed by the alternative route of an injunction, but the case nevertheless highlights that PD51Z may need to be revisited.

Part 55 possession claims

2. Under the Civil Procedure Rules, claims for possession of land are governed by a discrete set of rules which are contained within Part 55 and are designed to enable such cases to be dealt with swiftly, on a summary basis, where possible. The matter will usually be listed (in a block of other possession cases) for an initial 5- or 10-minute hearing, at which the Court will dispose of the claim unless it is "*genuinely disputed on grounds which appear to be substantial*", in which case directions will be made for trial. If the claimant is ultimately granted a possession order (whether at the first hearing or at some point subsequently), it will then be necessary for him/her to seek a warrant of possession from the County Court, or its High Court equivalent, the writ of possession, so that the order can be enforced.
3. As any practitioner who has attended a possession list will know, although the aim of every Part 55 claimant is the same – to obtain an order for possession – the range of factual situations which may give rise to a Part 55 claims is very wide. This breadth is clear on the face of rule 55.2, which expressly brings within the scope of Part 55 possession claims brought by:
 - Landlords - whether those of commercial, agricultural or residential premises; those seeking to determine tenancies on the basis of a failure to pay rent or some other breach; private or public sector landlords; those seeking to forfeit a long lease, or simply wanting to determine a shorter, likely statutorily protected, tenancy;
 - Former landlords;
 - Mortgagees;
 - Licensors; and
 - Former licensors;as well as those claims brought against trespassers.

4. In order to accommodate the different issues which are likely to arise in each category of case, Part 55 modifies its own rules in certain circumstances. For example, rule 55.6 makes particular provision for service of a claim against trespassers where their identity is unknown.
5. It is this nuance which is arguably lacking from the recent (temporary) adjustments made to Part 55 in response to the coronavirus crisis, which are contained within the new Practice Direction 51Z.

Possession claims and COVID-19: PD51Z

6. PD51Z was announced shortly after the commencement of the lockdown and following some initial confusion at some courts as to whether and how possession claims were supposed to be proceeding. The government had been under considerable pressure to impose some sort of moratorium on evictions, as there were widespread concerns about the risks posed by making more people homeless amidst the ongoing crisis.
7. The Direction makes for crucial reading for any practitioner or party currently embroiled in, or considering embarking upon, a claim which falls within the scope of Part 55.
8. Paragraph 2 of PD51Z provides, in simple terms, 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”*.
9. It will quickly become apparent that PD51Z is itself of very broad scope - possibly broader than intended, especially once it is remembered how wide a range of cases potentially fall within Part 55, as exemplified by one of the first cases to consider the new PD51Z, *University College London Hospitals Foundation Trust v MB* [2020] EWHC 882 (QB).
10. The claimant in *UCLH* was an NHS Foundation Trust responsible for running a number of London hospitals at the forefront of the fight against Coronavirus. MB, who suffered from a number of psychiatric and other conditions, had been admitted to one of the Trust’s hospitals as a patient back in February 2019. Discussions in relation to her care had been ongoing for more than a year and it had been proposed that she be discharged to local authority accommodation with an appropriate care package. MB had initially objected to being discharged but ultimately, on 11 March 2020, had signed a tenancy agreement in relation to a property held by the local authority which was due to start on 13 April 2020, so as to allow works to be undertaken to adapt the property for MB’s needs. However, in the intervening period, and as explained by one of the doctors at the hospital in a witness statement, the situation *“changed dramatically due to the COVID-19 pandemic”*. The Trust came to be *“in desperate need of beds for patients unwell with COVID-19 and all patients who are medically fit for discharge are being discharged home or into other care arrangements that are deemed safe”*. On 23 March 2020, MB was given a letter terminating her license to remain at the hospital, after the local authority had confirmed that the property subject to the tenancy agreement was ready for her: but she refused to leave. The Trust sought an order for possession. The matter came before Chamberlain J, who immediately drew the parties’ attention to PD51Z, and the stay.

11. As he explained at paragraph 37 of his judgment, notwithstanding the unusual circumstances, the legal framework was straightforward. Following the termination of MB's licence to occupy her hospital room, she became a trespasser. "*Ordinarily, the Claimant would be entitled to seek an order for possession pursuant to CPR Pt 55*", as demonstrated in, e.g., Barnet Primary Care Trust v H [2006] EWHC 787 (QB), (2006) 92 BMLR 17 (Wilkie J). However, "[t]hat is not currently possible because of the general stay on possession claims effected by CPR 51Z PD."
12. In the UCLH case, however, there was an alternative remedy available to the Trust. As per paragraph 3 of PD51Z, and as Chamberlain J went on to explain, "*The stay does not, however, affect claims for injunctions... A property owner is in general entitled to an injunction to enforce its rights as against a trespasser*". The ability to obtain an injunction in cases involving trespassers, in addition to or as an alternative to a possession order, is now well established, having been confirmed by the Court of Appeal in Manchester Corporation v Connolly [1970] Ch 420 and by the Supreme Court in Secretary of State for the Environment Food & Rural Affairs v Meier [2009] UKSC 11.
13. At a directions hearing held the same day the claim was issued, 2 April 2020, the Trust was permitted to make an application for an injunction. The application was heard over two telephone hearings on 6 and 9 April 2020, and the Court ultimately handed down judgment on 9 April 2020 holding that an injunction should be granted: Chamberlain J was satisfied that MB had neither a private nor a public law defence to the claim, and made an order requiring MB to leave the hospital (and refrain from returning) by 12 noon the following day, 10 April 2020.

Implications for PD51Z

14. The UCLH case demonstrates that, in trespasser cases, PD51Z is sufficiently flexible – at least in principle – to enable the courts to order defendants to vacate land by way of an injunction, notwithstanding the stay on possession claims. Having said that, the facts of UCLH were undoubtedly particularly extreme. The courts may be less willing to grant injunctions, particularly in such a short timeframe, in other cases, which are less urgent and are not driven by the clear public health imperative that lay behind the Trust's claim in UCLH. Even where the court is willing to grant an injunction, this is a more procedurally complex and work-intensive route to obtaining what could otherwise relatively straightforwardly be achieved by possession proceedings. In trespasser cases, whether involving patients who are ready to be discharged, as in UCLH, or the more typical "squatters" often encountered in practice, it may be doubted whether PD51Z was intended to preclude possession proceedings altogether.
15. It should also be noted that injunctions will not be available to would-be claimants for possession in most non-trespasser cases. In trespasser cases, an injunction can be granted because the defendant has no legal right to remain on the land, e.g. because they entered the land as a trespasser (as in typical squatter cases), or because their licence to occupy has terminated (as in UCLH), or because - where applicable – a common law notice to quit their tenancy has expired, and no statutory protection is available. However, in many possession claims (e.g. involving residential assured tenants with statutory protection under the HA 1988), the defendant's right to possession will continue by statute until a possession order is made and executed: thus the claimant simply will not have an entitlement to possession (plainly a pre-requisite for an injunction enforcing the same) unless and until a possession order is made and executed (see for example section 5(1) of the Housing Act 1988). Of course, however, assured tenants are among those whom PD51Z was expected to protect.

16. Overall, whilst the intentions behind PD51Z may well have been commendable, it seems distinctly possible that due to the time pressure imposed by this ever-evolving crisis, its full implications may not have been properly thought through before it was implemented. The circumstances in UCLH cannot have been intended to be caught by the stay imposed by the Practice Direction. As time passes and there is an opportunity to reflect on the provisions of PD51Z, it may be that the scope of the stay on all Part 55 possession claims can be revisited and more precisely defined, so as only to apply to appropriate cases.

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