

Your Appeal Fails: London Borough of Hackney v Okoro [2020] EWCA Civ 681

Yesterday the Court of Appeal in London Borough of Hackney v Okoro [2020] EWCA Civ 681 answered a question a few of us had been asked about and which had no clear answer:

Is an appeal from a possession order (or other order) made in a possession claim commenced under Part 55 of the CPR caught by the stay on “*all proceedings brought under CPR Part 55*” imposed by paragraph 2 of Practice Direction 51Z (as amended on 20 April 2020)?

The answer is “yes”, and so:

- appeal hearings in such cases which are listed to take place during the period of the stay – presently until 25 June 2020 but subject to extension – must be vacated; and
- assuming none of the other exceptions in paragraph 2A apply, the court can make no order in the meantime other than to approve agreed case management directions: para. 2A(c).

The judgment is at <https://www.bailii.org/ew/cases/EWCA/Civ/2020/681.html>.

This decision affects an appeal in a case of mine against a possession order made under Part 55 at a contested hearing that I attended as long ago as March 2019. It had been listed to take place the week after next (County Court administration for you) and now must be vacated. The points taken on appeal are completely unrelated to the COVID-19 Pandemic, which was far in the future when the order under appeal was made.

The clients will understandably be aggrieved, not least because even if the order were upheld on appeal, enforcement of the order would remain stayed by paragraph 2 of PD51Z for the duration of the stay. Our position was that if both parties were ready for the appeal to be heard, and the court had the resources to hear it remotely, the appellant would suffer no prejudice from it being determined and no-one would need to run the risk associated with attending court in person.

That is not how the Court of Appeal saw it in Okoro. They seemed to see it as part of the objective served by PD51Z simply to keep people, including court staff, out of the courts and to reduce the workload going through the County Court during the present crisis. As the Chancellor put it, repeating the remarks in Arkin v Marshall [2020] EWCA Civ 620 at [23], the purpose of the blanket stay is so that “*the burden on judges and staff in the County Court of having to deal with possession proceedings, which are an immense part of its workload, would be lifted, and also that the risk to public health of proceeding with evictions would be avoided*”.

One might critique that somewhat. Paragraph 1 of the PD refers to the intention of the practice direction being “*not to endanger public health*” in the administration of justice and the enforcement of orders. It makes no mention of any separate intention to “*protect and manage County Court capacity*”: Okoro at [26]. The Court of Appeal remarked in Okoro that “*The objectives of the pilot PD 51Z... are as much furthered by staying appeals as by staying first instance proceedings for possession*” but did not give any reason why. It was presented as a truism. But if the appeal is heard remotely, there is no increased risk to public health, so the reasoning must rest upon the (some might say) imputed intention to protect and manage capacity.

Further, focusing on the rationale for PD51Z, actual or presumed, doesn’t *really* answer the question in Okoro: what is a possession proceeding? The Master of the Rolls intended, on the

Arkin view, to protect and manage County Court capacity by staying all *proceedings* brought under CPR Part 55. But that doesn't tell you what such a "*proceeding*" is, and whether it includes appeals. If the reasoning is simply: an appeal should be part of the "*proceedings*" because that would best further the policy objective of the PD 51Z, then so be it. A true purposive construction carries the day, and there is nothing wrong with that *per se*.

Indeed, it is unsurprising that the Court of Appeal's decision focuses on the policy rationale of PD51Z as the linguistic arguments were clearly less favourable to the conclusion reached. Paragraph 2 of PD51Z says "*proceedings*", not "*claims*". The word "*proceedings*" isn't defined in the Glossary to the CPR despite being used nine times in the Glossary itself.¹ CPR Part 52, which governs civil appeals other than to the Supreme Court (CPR r 52.1(1)), refers at various points to "*the proceedings in the lower court*", again without defining the word 'proceedings' e.g. CPR rr 52.1(3)(e)(i); 52.14(1), 52.21(3)(b), 52.24(3)(e). It also appears to juxtapose the "*proceedings at first instance*" with the "*appeal proceedings*" in such a way as to suggest that the two are distinct sets of 'proceedings': CPR r 52.22(3).

CPR Part 55, by contrast, uses the word "*proceedings*" only once, in CPR r 55.16(1A)(b), and otherwise is consistent in its use of the word "*claim*", including in the interpretation section in CPR r 55.1.

As a practical matter, of course, once cases are appealed they are given an appeal reference number by the appeal court, in addition to the existing claim number.

Without mentioning any of this, the Court in Okoro concluded at [25] that "*As a matter of ordinary language, we think that proceedings brought under CPR Part 55 are still "brought under CPR Part 55", even if they are under appeal. It is true that the procedure governing the appeal is contained in CPR Part 52, but the proceedings remain proceedings brought under CPR Part 55*".

So there we have it.

Other points clarified by the decision are at [27]: enforcement of all orders for possession is stayed by paragraph 2 of the PD whether or not the claim was brought under Part 55. So an order for possession under CPR r 40.17 made ancillary to an order for sale in a TOLATA case cannot be enforced. Further, PD51Z has no effect on any ongoing appeal to the Supreme Court, as such appeals are beyond the jurisdiction of the Master of the Rolls in making Practice Directions under the jurisdiction in CPR r 51.2.

What then of the High Court appeals in claims commenced under CPR Part 55 which *have* been determined by the High Court during the period of the stay, such as Sangha v Amicus finance [2020] EWHC 1074 (Ch)? One must I suppose presume that an appeal to the High Court constituted "*exceptional circumstances*" implicitly justifying the lifting of the stay in such cases (see Arkin at [46]). One might as well be pragmatic about that.

Gavin Bennison
28 May 2020

¹ <https://www.justice.gov.uk/courts/procedure-rules/civil/glossary>