Scope of CPR PD51Z extends beyond CPR Part 55

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STOP PRESS: The stay imposed by PD51Z extends to any possession claim brought by a landlord, mortgagee or licensor, or to a possession claim against trespassers – even where that claim is not actually initiated under CPR Part 55. If such a claim for possession is brought under CPR part 7, CPR part 8, or by way of Part 20 counterclaim it will still count as "*proceedings for possession brought under Part 55*" for the purposes of PD51Z and as such will bring to a halt (for the time being) the whole action.

The Court of Appeal has just made this clear in an interlocutory decision at the outset of the appeal in TFS *Ltd v BMG (Ashford) Ltd & Ors* [2019] EWHC 1363 (Ch) 2 July 2020 (unrep.). It is an important third decision on PD51Z by the Chancellor, Sir Geoffrey Vos, further to his rulings in *Arkin v. Marshall* [2020] EWCA Civ 620 and *London Borough of Hackney v. Okoro* [2020] EWCA Civ. 681.

The Court of Appeal decided by a majority of 2:1 that a claim for possession - even if not initiated under the Part 55 procedure – is caught by the blanket stay imposed by PD51Z. This will be of immediate importance to the profession and to the landlord and tenant sector. Any party who has an ongoing claim for possession that would fall within the definition of CPR r.55.2 but which is in fact brought by way of Part 7, Part 8 or Part 20 claims – is in fact caught by the stay.

In this case the Court of Appeal were due to hear the tenant's appeal in two cases that had been joined for case management and trial at first instance.

The first set of proceedings had started life as a Part 7 claim by the tenant for declaratory relief that certain leases it held had the protection of the 1954 Act. The landlords counterclaimed for an opposite declaration and for possession of the premises in respect of which the fixed term had expired.

The second set of proceedings were started by the landlords, also under CPR Part 7, in respect of other premises let to the same tenant, seeking a declaration that these leases were not protected by the 1954 Act. At the date the second action was issued the fixed term of those leases had not expired and so the landlords were not able to plead a claim for possession.

The tenant lost at first instance in both sets of proceedings, by which time the leases which were the subject of the second claim had expired. The parties reached agreement that the order of the court upon the judgment would include orders for possession in respect of all the premises under both claims, without the need for the landlords to amend the second set of proceedings via Part 17 to plead expressly a claim for possession.

Shortly before the appeal was due to be heard, and in light of the Chancellor's decision in *Okoro* that PD51Z extends to appeals from Part 55 as well, the tenant sought confirmation from the Court of Appeal that this appeal too, was stayed. Lewison LJ dismissed that application on paper, on the basis that the gateway upon which PD51Z depends is that the claim be brought under Part 55, and none of these claims for possession were. The tenant asked that decision to be reconsidered at the outset of the appeal, which was listed to be heard before the Chancellor, Asplin and Arnold LJJ.

*PD51Z stays "**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…".*

The Chancellor agreed that the tenant's claim in the first proceedings were clearly not *""proceedings for possession brought under CPR Part 55" or "proceedings seeking to enforce an order for possession" within the meaning of paragraph 2 of PD 51Z*." But he then also held – albeit without elaboration - that "*…the landlords' counterclaims in the first action were, equally clearly, "proceedings for possession brought under CPR Part 55" within the meaning of paragraph 2 of PD 51Z*".

With regard to the orders for possession made in the second proceedings, which had been agreed in a pragmatic manner to avoid the need an amendment to the claim, he likewise held that although this was a helpful short cut once it was done "*the proceedings on which the judge made his Order must properly be regarded as "proceedings for possession brought under CPR Part 55". The judge could not otherwise properly have made the Order.*"

This conclusion does not sit easily with Neuberger J's decision in *Kirin-Amgen Inc v Transkaryotic Therapies Inc (No.3)* [2002] RPC 3, that a prayer for "further or other relief" can support other relief as long as the cause of action is properly pleaded, nor with CPR r.16.2(5) which states that "*The court may grant any remedy to which the claimant is entitled even if that remedy is not specified in the claim form."* So it is not in fact clear that an amendment would have been required by the landlords at all, even though they were prepared to make an application to do so for the avoidance of doubt.

It is apparent from the further remarks in the decisions of the Chancellor and Asplin LJ that policy concerns as to the need to protect the court system and public health concerns owing to the current coronavirus pandemic are paramount. As per the Chancellor, in considering whether the stay ought to be lifted under the residual CPR r.3.1 jurisdiction confirmed in *Arkin*, he stressed:

> *…the undesirability of any approach that allows claims or appeals that are part and parcel of possession claims to be continued despite the automatic stay…*
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> *… It would send entirely the wrong message if we were to continue to hear an appeal in what must properly be regarded as possession proceedings on the technical ground that a part of the claim is for a declaration as to the law underlying that claim for possession.*

The approach of the majority in this case to the primary question – namely that the stay does catch possession claims in what would otherwise be non-Part 55 claims - leaves open a potentially complicated procedural question for parties and practitioners once possession action life returns to normal.

If a landlord seeks possession by way of a counterclaim, or if it adds a claim for possession to a Part 7 or Part 8 claim, does it have to follow the service requirements of Part 55? Will the defendant to such a claim have to file and serve an acknowledgment of serve and under Part 10 or Part 15, or would it be entitled to rely upon Part 55.7 which dispenses with an acknowledgment of service and has different rules re filing a defence? Will the court have to list a hearing of the counterclaim or Part 7 claim not less than 28 days nor more than 8 weeks after issue as per r.55.5? Will the Court have the power to decide the claim at that first hearing under r.55.8?

These difficulties may be avoided if the effect of the decision is limited to PD51Z itself that i.e. that within this specific part of the rules these different potential routes to a possession order

are treated "*as being proceedings for possession bought under Part 55*" – but that once the current crisis has passed and PD51Z recedes into history the separate codes under the CPR will remain distinct. But it is a subtle distinction to maintain, and this difficulty – amongst others - troubled Lord Justice Arnold (dissenting) who noted that:

> *In my judgment the landlords' counterclaim in the first action could not have been fitted into the prescriptive procedural code set out in Part 55. Quite simply, Part 55 does not envisage possession claims being brought by counterclaim to a Part 7 claim. (Perhaps it should do; but that is a matter for the Civil Procedure Rules Committee on another day.)*

The same procedural difficulty would apply with regard to the notionally amended claim in the second proceedings – had that happened it would have taken the form of a Part 17 amendment to a Part 7 claim, and none of the procedural rules of Part 55 would have applied.

Lord Justice Arnold said that he did not consider that PD51Z applied in these circumstances – as the Court of Appeal had itself noted in *Okoro* the focus under PD51Z is on how the claim is initiated. None of the possession aspects of the two claims were initiated under Part 55 and could not be treated as such. He would have allowed the appeal to proceed.

Despite these complicated issues, the key point to be derived from this decision is the clear and consistent message laid down by the Chancellor in three appeals heard in quick succession: PD51Z captures all forms of possession proceedings brought by landlords, mortgagees, and licensors, howsoever brought, and any appeals therefrom. Normal service will resume only after 23 August 2020 at the earliest, unless the stay is extended (in its present form) yet again.

The judgments can be found here: https://www.judiciary.uk/wp-content/uploads/2020/07/TFS.APPROVED-JUDGMENTS.1-002.pdf

Joanne Wicks QC and Mark Galtrey appeared for the appellant tenant, Wayne Clark and Joe Ollech appeared for the respondent landlords.