

Possession Proceedings stay challenge in the Court of Appeal

April 2020



Published by
Della Gilbert

Subject to a few exceptions (notably in relation to trespasser proceedings) all possession proceedings of all types of real property and enforcement of orders for possession are currently stayed until 24 June 2020 by virtue of a practice direction ("PD51Z"), which came into force on 27 March 2020 with a view to protecting public health during the Covid-19 pandemic.

Usually, where proceedings are stayed, there is a freeze on the parties' obligations to take procedural steps. The extent of the stay imposed by PD51Z is, however, subject to a challenge which is to be heard in the Court of Appeal on 30 April in an expedited leapfrog appeal from the County Court at Central London in *Arkin v Marshall*.

In *Arkin*, mortgage possession proceedings were issued in November 2019 and a trial window fixed of between October 2020 and January 2021. Shortly before the implementation of the 90 day stay on 27 March, the parties were able to agree directions to include disclosure and exchange of witness statements on 26 June 2020. The question arose as to what was the effect of the stay on the parties' obligations to comply with the directions? The parties agreed that if the stay was effective, it would prevent them complying with directions during the period of the stay, which was against the interests of the claimant lender (acting through a receiver) who wanted the claim progressed. The lender argued, therefore, that the compulsory application of the PD51Z stay would curtail the court's general power to manage cases (which includes the ability to vary or shorten time periods), there was no increased risk to public health by the parties complying with the agreed directions and that it would therefore be a nonsense for the stay to apply. The defendant borrower countered that PD51Z provided clarity which would be undermined if the court, in any particular case, had to deal with disputes about the applicability of the stay and/or whether it should be lifted.

In a decision handed down on 15 April, the County Court Judge agreed with the borrower that it was a requirement of statute that practice directions be observed by the court where the nature of the practice direction so required and this was the case with PD51Z, thereby effectively securing the borrower an additional period of reprieve until the claim could progress.

However, County Court cases are not binding and so, just two days later in a separate case in the County Court at Newcastle, another County Court Judge came to a different conclusion, deciding that the court's general powers permitted him to curtail PD51Z's 90 day stay to 0 days and to give an immediate order for possession (to which the defendant had already consented).

Independently, on 17 April, PD51Z was amended to omit from its effect possession claims against trespassers (as mentioned above), applications for interim possession orders and *any applications for case management directions which have been agreed by all the parties*. Potentially, the italicised amendment may have addressed the point in dispute in *Arkin*, but it will be interesting to see the Court of Appeal's views on the validity of PD51Z and whether it covers directions which had already been agreed by all parties before it came into effect. The case will be important in relation to all possession proceedings so much so that the Housing Law Practitioners Association is considering an application to intervene and make submissions to the Court of Appeal.

For further information please contact:

Dellah Gilbert

T: 020 3465 4353

E: dgilbert@maplesteesdale.co.uk