
CIVIL PROCEDURE NEWS

Special Issue
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Possession Proceedings – Special Issue

This *Civil Procedure News Special Issue* is published due to the publication of the Civil Procedure (Amendment No. 5) (Coronavirus) Rules 2020 (SI 2020/889) and CPR PD Update 124 (August 2020). It reprints the Rules, the PD Update and consequential Guidance issued by the Queen’s Bench Division. It also contains a print version of the online edition of Civil Procedure 2020 commentary to CPR Pt 55, as at 24 August 2020.

Practice Updates

STATUTORY INSTRUMENTS

CIVIL PROCEDURE (AMENDMENT NO. 5) (CORONAVIRUS) RULES 2020

On 20 August 2020, the Lord Chancellor directed the Civil Procedure Rule Committee to make rules that would extend the stay on possession procedures from 23 August 2020 to 20 September 2020. By a majority on 21 August 2020, the Rule Committee agreed such rules. Consequently, the Civil Procedure (Amendment No. 5) (Coronavirus) Rules 2020 (SI 2020/889) came into force on **22 August 2020**. Its operative provisions are as follows:

Amendment of the Procedure Rules 1998

2. In Part 55 of the Civil Procedure Rules 1998(b), in rule 55.29, in paragraph (1)–

- (a) for “22nd August 2020”, substitute “19 September 2020”; and
- (b) for “23rd August 2020”, substitute “20 September 2020”.

Amendment of the Civil Procedure (Amendment No. 3) Rules 2020

3. The Civil Procedure (Amendment No. 3) Rules 2020(c) are amended as follows–

- (a) in rule 1, in paragraph (3), for “23rd August 2020”, substitute “20th September 2020”; and
- (b) in rule 2, in paragraph (2), for “24th August 2020”, substitute “21st September 2020”.

These amendments provide for:

- amendments to CPR r.30.4 concerning transfer of enforcement of possession proceedings from the County Court to the High , which were to come into force on 23 August 2020, by way of Civil Procedure (Amendment No. 3) Rules 2020 (SI 2020/747) now come into force on 20 September 2020;
- CPR r.55.29 to remain in force until 20 September 2020;
- CPR r.83.8A, which concerns writs of possession, to now come into force on 20 September 2020. No notice of eviction further to this rule can be delivered before 21 September 2020; and
- amendments to CPR r.83.13 concerning writs of possession, which were to come into force on 23 August 2020, by way of Civil Procedure (Amendment No. 3) Rules 2020 (SI 2020/747) now come into force on 20 September 2020.

PRACTICE GUIDANCE

QUEEN’S BENCH DIVISION – WRITS OF POSSESSION – CORONAVIRUS UPDATE

On 24 August 2020 guidance was issued by the Queen’s Bench Division to take account of the changes to possession proceedings effected by the Civil Procedure (Amendment No. 5) (Coronavirus) Rules 2020 (SI 2020/889) and CPR PD Update 124 (August 2020). It is reprinted below.

Queen’s Bench Division – Writs of Possession – Coronavirus Update – 24 August 2020

WRITS OF POSSESSION

Rule changes approved by the Civil Procedure Rule Committee on 21 August 2021 will come into effect today, as follows.

Stay on Enforcement of Possession Proceedings

The stay imposed on enforcement of possession proceedings (save against trespassers) has been extended to 20 September 2020 by an amendment to Rule 55.29.

Accordingly, the QB Enforcement Section will not:

- a) Issue writs of possession;
- b) Process applications for permission to issue writs of possession or writs of restitution in aid of a writ of possession;
- c) Process any of the above received, but not processed, since the suspension/restriction came into force;

until the first working day after 20 September 2020, namely **21 September 2020**.

Notice of Eviction

The 14-day notice of eviction required by Rule 83A before a writ of possession can be executed may not be delivered before **21 September 2020**.

Permission of the court to issue a Writ of Possession

The amendment to Rule 83(2), which removes the requirement for permission of the court to be obtained to issue a writ of possession, also comes into effect on **21 September 2020**. Judicial permission is still required to issue a writ to enforce section 33D Immigration Act, orders over 3 months old against trespasser and writs of restitution.

Transfers from the County Court to the High Court for the enforcement of a possession order

Rule 30(4), which requires applications to the High Court for transfer of proceedings for the enforcement of a judgment or order for possession to be made to the District Registry (where the possession order is in respect of land that is located within the area of a District Registry), will take effect from **21 September 2020**. This also applies to applications for stays of enforcement.

CIVIL PROCEDURE 2020 COMMENTARY

Background

In both *Civil Procedure News* No. 7 and No. 8 of 2020, updates were provided to take account of changes to the commentary to CPR Pt 55 in *Civil Procedure 2020* pending the Third Supplement to *Civil Procedure 2020*. Due to the unexpected changes introduced via the Civil Procedure (Amendment No. 5) (Coronavirus) Rules 2020 (SI 2020/889) and CPR PD Update 124 (August 2020) it is necessary to further update the commentary prior to the Third Supplement. The updated commentary is now current on the online version of *Civil Procedure 2020* Vol.1. It is reprinted here for ease of reference. Any further updates or commentary amendments will be set out in the Third Supplement.

Updated commentary text for Civil Procedure Vol.1 Pt 55

Add new paragraphs 55.0.0 to 55.0.0.5:

The COVID-19 Stay (27 March 2020 to 20 September 2020)

55.0.0 By Practice Direction 51Z, as amended, from 27 March 2020, all proceedings for possession brought under CPR Pt 55 and all proceedings seeking to enforce orders for possession by warrants or writs of possession are stayed for a period of 90 days (subsequently extended—see below). However, the stay did not apply to:

- (a) injunctions. For an example of an injunction requiring a patient to vacate a bed, see *University College London Hospitals Foundation Trust v MB* [2020] EWHC 882 (QB), Chamberlain J. See too *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 W.L.R. 2780, noted at para.55.4.5;
- (b) claims against trespassers to which r.55.6 applies;
- (c) applications for interim possession orders under Section III of Pt 55, including the making of such an order, the hearing required by r.55.25(4), or any application made under r.55.28(1); or
- (d) applications for case management directions which are agreed by all the parties.

The fact that a claim will be stayed does not preclude the issue of such a claim.

The full text of the Practice Direction is printed at para.51ZPD.1. It was amended on 10 June 2020 (CPR Update 121) to clarify that while the stay was in force procedural time limits were suspended and that the court was not to send any notices concerning individual proceedings. The stay expired on 25 June 2020, although the Practice Direction does not cease to have effect until 30 October 2020 (see para.51.2.15).

As from 25 June 2020, the Practice Direction has however been superseded by a new CPR r.55.29 which was introduced by the Civil Procedure (Amendment No. 2) (Coronavirus) Rules 2020 (SI 2020/582) and in turn amended by the Civil Procedure (Amendment No. 5) (Coronavirus) Rules 2020 (SI 2020/889) (see para.55.29.1). As from 25 June 2020, that provision replaces and continues the former stay, in a slightly modified form, until 20 September 2020. See para.55.29.1.

In *Arkin v Marshall* [2020] EWCA Civ 620, the Court of Appeal rejected contentions that PD 51Z was ultra vires and that ss.81–82 and Sch.29 to the Coronavirus Act 2020 were inconsistent with it. The court also rejected a submission that PD 51Z was incompatible with either ECHR art.6 or the fundamental principle of access to justice. “[T]he short delay to possession litigation enshrined in PD 51Z is amply justified by the exceptional circumstances of the coronavirus pandemic.” [33]

The stay under CPR PD 51Z only applied to “proceedings for possession brought under CPR Part 55” and “proceedings seeking to enforce an order for possession” within the meaning of para.2 of PD 51Z, but a landlord’s counterclaim for possession “clearly” amounted to “proceedings for possession brought under CPR Part 55”. If, in proceedings seeking a declaration, the landlord counterclaimed for possession, the entire action became “proceedings for possession brought under CPR Part 55” and so was caught by the stay when it was imposed in March 2020 (*TFS Stores Ltd v Designer Retail Outlet Centres (Mansfield) General Partner Ltd* [2020] EWCA Civ 833 where the Court of Appeal refused to lift the stay).

The automatic stay imposed by PD 51Z applied to appeals from possession orders which were extant when the stay began, as much as to first instance possession claims themselves. The words “all proceedings for possession brought under CPR Part 55” in para.2 of PD 51Z include such appeals. Proceedings brought under CPR Pt 55 were still “brought under CPR Part 55”, even when they were under appeal (*Hackney LBC v Okoro* [2020] EWCA Civ 681; [2020] 4 W.L.R. 85 and *TFS Stores Ltd v Designer Retail Outlet Centres (Mansfield) General Partner Ltd* [2020] EWCA Civ 833).

Lifting the COVID-19 stay (27 March 2020 to 20 September 2020)

55.0.0.1 In *Arkin v Marshall* (para.55.0.0, above) the Court of Appeal stated that although PD 51Z cannot be read as formally excluding the operation of CPR r.3.1 and so, as a matter of strict jurisdiction, judges retain power to lift the stay which it imposes, the purpose of the stay

“would be fatally undermined if parties affected by the stay were entitled to rely on their particular circumstances – however special they might be said to be – as the basis on which the stay should be lifted in their particular case.”

While the Court of Appeal at [42]

“would not go so far as to say that there could be no circumstances in which it would be proper for a judge to order that the stay imposed by PD 51Z should be lifted in a particular case, [it had] great difficulty in envisaging such a case ... The approach of a blanket stay ... makes clear that possession claims are not to be dealt with on a normal case by case basis during the stay. We would strongly deprecate parties troubling the court with applications that are based only on [case management] reasons and which are in truth bound to fail.”[44]

The court concluded,

“although as a matter of strict jurisdiction a judge retains a theoretical power to lift any stay, it would almost always be wrong in principle to use it. [It did not] however, rule out that there might be the most exceptional circumstances in which such a stay could be lifted, in particular if it operated to defeat the expressed purposes of PD 51Z itself.”[46].

For a case where the stay of possession proceedings imposed by CPR PD 51Z was lifted for the very narrow purpose of handing down a reserved judgment on an appeal against a refusal to set aside a possession order, which had been heard before PD 51Z came into effect, see *Copeland v Bank of Scotland Plc* [2020] EWHC 1441 (QB), although Sir Geoffrey Vos, Chancellor of the High Court, strongly disapproved of that decision in *TFS Stores v Designer Retail Outlet Centres (Mansfield) General Partner Ltd* (para.55.0.0 above).

Post COVID-19 stay changes to procedure (20 September 2020 to 28 March 2021)

55.0.0.2 Practice Direction 55C, made under r.55.A1, as inserted by the Civil Procedure (Amendment No. 4) (Coronavirus) Rules 2020 (SI 2020/751), and included in the 123rd PD Update (July 2020), but amended by the 124th PD Update (August 2020) which modifies the standard Pt 55 procedure until 28 March 2021 (“the interim period”). It seeks to address the case management and case listing difficulties caused by the pandemic and the backlog of cases caused by the stay (see para.55.0.0 above.) Some modifications apply to all claims whenever brought. However, other provisions differ, depending upon whether a possession claim was brought before or after 20 September 2020.

On 17 July 2020, a motion was laid before the House of Lords that a Humble Address be presented to Her Majesty praying that the Civil Procedure (Amendment No. 4) (Coronavirus) Rules 2020 (SI 2020/751) be annulled. As the Third Supplement went to press, no date had been fixed for the debate, but in view of the Summer Recess, it could not be before September 2020. Although the Rules would have been in force and operational from 20 September 2020, if the motion is passed, the Rules would cease to have effect.

Post COVID-19 stay changes to procedure (claims brought on or before 19 September 2020)

55.0.0.3 See PD 55C paras 2.1–3.1 and 5.1–5.4.

Unless the court directs otherwise, no stayed claim is to be listed, relisted, heard, or referred to a judge under r.55.15, until one of the parties (in practice, normally the claimant) files and serves a written reactivation notice confirming that they wish the case to be listed, relisted, heard or referred to a judge. There is no prescribed form. There is no need for a reactivation notice if a stayed claim was brought on or after 3 August 2020 or a final order for possession has been made. Except in proceedings relating to an appeal, reactivation notices must set out what knowledge the party filing the notice has as to the effect of the coronavirus pandemic on the defendant and their dependants. Where a reactivation notice is filed and served by the claimant and the claim is based on arrears of rent, the claimant must provide an updated rent account for the previous two years with the notice.

If case management directions were made before 20 September 2020, parties filing and serving reactivation notices must file and serve with them copies of the last directions order together with new dates for compliance with the directions taking account of the stay and either a draft order setting out additional or alternative directions (including a proposed new hearing date) or a statement that no new directions are required and that any existing hearing date can be met. They must also file and serve a statement in writing as to whether the case is suitable for hearing by video or audio link. Paragraph 5.2 contains a procedure which operates if the other parties do not agree with any of the proposals. If no party has complied with these provisions by 16.00 on 29 January 2021, the claim will be automatically stayed, but that stay is not a sanction for breach and an application to lift the stay is accordingly not an application for relief from sanctions under r.3.9.

Unless the court orders otherwise, any trial date set prior to 27 March 2020 is to be vacated and the case stayed unless a party complies with the reactivation notice provisions not less than 42 days prior to the hearing date. Again, if no reactivation notice has been filed and served in relation to a stayed claim by 16.00 on 29 January 2021 that claim will be automatically stayed. Such a stay is not a sanction for breach.

The court must, unless it directs otherwise, give at least 21 days' notice to the parties of any hearing listed or relisted in response to a reactivation notice.

Post COVID-19 stay changes to procedure (all claims)

55.0.0.4 During the interim period, r.55.5 is modified to provide that the courts should fix dates for hearings when *or after* they issue claim forms (emphasis added) and that the standard period of eight weeks between issue and hearing does not apply.

There are also provisions requiring claimants in proceedings to which the Pre-Action Protocol for Possession Claims by Social Landlords applies to bring two copies of a notice confirming that the claimant has complied with that Pre-Action Protocol and detailing how the claimant has done so to any hearing. The Practice Direction also provides that claimants should set out what knowledge they have as to the effect of the coronavirus pandemic on defendants and their dependants.

Amendments to substantive law due to COVID-19 (until 30 September 2020)

55.0.0.5 The Coronavirus Act 2020 s.81 and Sch.29 (Residential tenancies in England and Wales: protection from eviction) make provision about notice periods in relation to possession proceedings. The Schedule amends, temporarily, various sections in the Rent Act 1977, the Housing Act 1985, the Housing Act 1988 and the Housing Act 1996 and associated regulations contained in statutory instruments. The amendments will cease to have effect on 30 September 2020. The full text of the Coronavirus Act 2020 can be found at <http://www.legislation.gov.uk/ukpga/2020/7/contents> [Accessed 14 August 2020].

Add new paragraphs 55.A1 and 55.A1.1:

Coronavirus—temporary provision

55.A1 55.A1—(1) Practice Direction 55C makes provision for how claims under this Part (including appeals) are to proceed following the expiry of the stay provided for by rule 55.29.

(2) This Part has effect subject to Practice Direction 55C for the period specified, and in the manner specified, in Practice Direction 55C.

Editorial note

55.A1.1 Introduced by the Civil Procedure (Amendment No. 4) (Coronavirus) Rules 2020 (SI 2020/751) and amended by the 124th PD Update. See commentary at paras 55.0.0.2 to 55.0.0.4

*I. General Rules***Failure to attend the hearing***Add new paragraph at end:***55.8.10** See too the commentary at paras 39.3.6 to 39.3.9 above.*II. Accelerated Possession Claims of Property Let on an Assured Shorthold Tenancy**Add new paragraph 55.17.0:***Setting aside possession orders**

55.17.0 A possession order is a final order. On an application to set aside such an order, it is not sufficient to show that there has been a change in circumstances or that the facts were misstated at the time of the original decision. The importance of finality is a critical consideration and the circumstances in which it may be appropriate to set aside a final order are very rare. Other than where a defendant fails to attend the hearing at which an order was made, truly exceptional circumstances (such as fraud) are required to set aside a possession order under CPR r.3.1(7). Failure to obtain representation does not mean that a defendant has not been in attendance. Attendance is “a simple binary issue”. Even if “ineffectual” attendance can count as “non-attendance”, the CPR r.39.3(5) criteria apply (*Sangha v Amicus Finance Plc (In Administration)* [2020] EWHC 1074 (Ch), applying *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422; and *Madison CF UK v Various* [2018] EWHC 2786 (Ch)). See too the commentary at para.3.1.17.2 above.

For the position where a defendant fails to attend the hearing at which a possession order is made, see the commentary at para.55.8.10 above.

*III. Interim Possession Orders**Add new paragraphs 55.29 and 55.29.1:***Stay of possession proceedings, coronavirus**

55.29 55.29—(1) **Subject to paragraph (2), all possession proceedings brought under this Part and all enforcement proceedings by way of writ or warrant of possession that are—**

- (a) **stayed immediately prior to this rule coming into force; or**
- (b) **brought after this rule comes into force and on or before 19 September 2020, are stayed until 20 September 2020.**

(2) **Paragraph (1) does not apply to—**

- (a) **a claim against trespassers to which rule 55.6 applies;**
- (b) **proceedings under Section III of this Part;**
- (c) **an application for case management directions that are agreed by all the parties; or**
- (d) **a claim for injunctive relief.**

(3) **Paragraph (1) does not prevent the bringing of a claim notwithstanding that it may be stayed.**

(4) **For the purposes of the application of any rule to any proceedings that are stayed by paragraph (1)—**

- (a) **time does not run; and**
- (b) **no notice is required to be given by the court.**

Stay of possession proceedings, coronavirus

55.29.1 This new, temporary rule was introduced by the Civil Procedure (Amendment No. 2) (Coronavirus) Rules 2020 (SI 2020/582) and subsequently amended by the Civil Procedure (Amendment No. 5) (Coronavirus) Rules 2020 (SI 2020/889). It provides that possession proceedings and enforcement proceedings by way of writ and warrant for possession are stayed until 20 September 2020. The stay applies to proceedings which were previously stayed by PD 51Z immediately prior to the new rule coming into force and to those brought after the new rule comes into force on or before 19 September 2020.

The new rule further provides that (i) a claim may be brought notwithstanding that it may be stayed; and (ii) for the purposes of the application of the Civil Procedure Rules 1998 to proceedings that are stayed by the new rule, time does not run and the court is not required to give any notice.

The stay does not apply to claims against trespassers under r.55.6; to Interim Possession Orders under Section III; to applications for case management directions which are agreed by all the parties; or to claims for injunctive relief. See too the commentary at para.55.0.0 above.