

Commentary

This Appeal considered the stay on possession proceedings created by PD51Z.

Amongst others, the Court of Appeal considered the following points:

1. Was PD51Z even lawful in the first place?
2. Does the stay apply to agreed directions?
3. Does the Court retain any kind of power to lift the stay on a case-by-case basis?

I set out the full detail of the case below, but the immediate answers are as follows.

First, the PD creating the stay was found to be lawful. The Court of Appeal held that it was a pilot scheme, a “trial run” to assess changes to Court procedure in times of epidemics. It is also not an unlawful interference with litigants’ Article 6 rights.

Second, it is clear that the stay applies even to agreed directions. This is a slightly subtle point. Whilst parties are free to make applications to Court for the approval of agreed directions, the actual directions themselves are immediately subject to the stay. So there is no particular work-around there.

Third, the Court does retain a jurisdiction to lift the stay on a case-by-case basis, but the Court of Appeal was of the view that the circumstances for doing so would be truly exceptional, almost unprecedented. Some sort of public danger would probably need to be established. In circumstances where claimants remain free to apply for injunctions, it is difficult to envisage what such circumstances would be.

You may find that there is some inconsistency to the Judgment. In paragraphs 22-24 the court confirms that PD 51Z can be defined as a pilot scheme as it is trialling for 3 months, a response to an epidemic which may last longer. It is a short-term procedural PD being used in order to inform a longer one. However the Judgment then goes on in paragraph 33 to conclude that PD 51Z is not inconsistent with Article 6 of the European Convention on Human Rights or the principle of access to justice because it is a “short delay” amply justified by exceptional circumstance. It is, you may think, either a short delay leading to a longer delay, thereby enabling it to be classified as a pilot, or an isolated short delay when

assessed against any Article 6 infringements. It cannot be both, and yet the Court of Appeal's reasoning rather requires it to be.

A further point is that the Judgment concludes that as the stay is unconditional, the County Court's power to lift it should ultimately not be used. There is no reference to any rule or authority which states that an unconditional stay requires unprecedented circumstances before it can be changed or lifted however that is the conclusion reached in today's judgment.

We do not yet know whether there will be further challenges to PD 51Z in the days ahead or further clarity sought. It would seem that if it is extended, there would be a sound basis for resurrecting the Article 6 argument.

This is unprecedented times for those involved in possession hearings, but what we can be certain of following this Judgment, is that possession proceedings will be stayed until 24 June 2020. What will happen following 24 June 2020 remains to be seen.

FACTS

Possession proceedings were brought under CPR Part 55 on 24 September 2019 to enforce mortgage rights. On 18 November 2019 the Proceedings were allocated to the multi-track. A CCMC was due to take place on 26 March 2020. The hearing did not happen but the parties' counsel enabled the court to give directions leading to a trial in a window between October 2020 and January 2021. Witness statements are due on 26 June 2020.

The Practice Direction PD51Z provides a paragraph 2: *All proceedings for possession brought under CPR Part 55...are stayed for a period of 90 days.* The 90 day period runs out on 24 June 2020.

In the first it was argued by Mr Walsh for the Claimant, that there is no increased risk to public health by the parties complying with the agreed directions and so it would be a nonsense for the stay to apply to these proceedings – which had developed beyond the usual Part 55 starting point. Mr Gun Cuninghame, for the Defendant, argued that the clear consequence of PD51Z is that the Proceedings are stayed and it would undermine that clarity if in any particular case the court will need to deal with disputes about whether the stay applies or whether if it does apply it should be listed.

HELD IN FIRST INSTANCE: The claims were stayed for a period of 90 days. Practical suggestion about how the parties might adjust the existing directions to ensure they are ready for a trial within the window have been made and once the stay is over it is hoped that such adjustments can be made. An order was made moving the Telephone Listed Appointment for the trial to after the stay is over and the start date for the existing trial was pushed back by 4 weeks.

The Claimant appealed the decision of HHJ Parfitt. By an order dated 15 April 2020 Kerr J granted permission to appeal and transferred the appeal to the Court of Appeal pursuant to CPR Part 52.23.

The Judgment in the Court of Appeal was handed down on 11 May 2020 at 13:30.

HELD: Appeal dismissed.

The grounds of appeal were analysed as follows:

- (1) Does this court have jurisdiction to consider the vires of PD 51Z, and should it do so?
- (2) If so:
 - (a) Was the making of PD 51Z properly authorised by CPR Part 51.2 as a pilot scheme “for assessing the use of new practices and procedures in connection with proceedings”?
 - (b) Is PD 51Z inconsistent with or rendered unlawful by the provisions of the Coronavirus Act 2020?
 - (c) Is PD 51Z inconsistent with article 6 of the European Convention on Human Rights or the principle of access to justice?
- (3) Does PD 51Z apply to cases allocated to the multi-track in which case management directions had been given before it was introduced?
- (4) Does the court have jurisdiction to lift the stay imposed by paragraph 2 of PD 51Z?
- (5) If so, should the Judge have lifted the stay in this case?

Dealing with each ground, as detailed above, the Court of Appeal concluded the following:

Was the making of PD 51Z properly authorised by CPR Part 51.2 as a pilot scheme “for assessing the use of new practices and procedures in connection with proceedings”?

This is dealt with in paragraphs 19-26 of the Judgment and concludes that the making of PD51Z was properly authorised by CPR Part 51.2 as a pilot scheme. The Court made the following comments:

The starting point for the analysis is paragraph 1 of PD 51Z itself, which provides that it “is intended to assess modifications to the rules and [PDs] that may be necessary during the Coronavirus pandemic and the need to ensure that the administration of justice, including the enforcement of orders, is carried out so as not to endanger public health”.

It is first said to be intended to assess modifications to the rules and PDs that may be necessary during the Coronavirus pandemic. It was not suggested that the pandemic was likely to have concluded by 25 June 2020, which is the last day of the 90-day period of stay imposed by paragraph 2. In those circumstances, it may reasonably be assumed that the intention was to assess future modifications that might need to be made to the CPR during an epidemic that might last months or even years.

A stay of possession proceedings is being trialled in order to assess whether it is effective to ensure that the administration of justice, specifically the ongoing conduct of possession proceedings in a pandemic, and the enforcement of possession orders in a pandemic, does not endanger public health.

Is PD 51Z inconsistent with or rendered unlawful by the provisions of the Coronavirus Act 2020?

This is dealt with in paragraphs 27-28 of the Judgment and concludes that there is no conflict between PD51Z and the Coronavirus Act 2020. They make separate and different provisions. The Act changes the substantive law, and PD 51Z imposes a temporary stay to protect and manage County Court capacity, and to ensure the effective administration of justice without endangering public health during a peak phase of the pandemic.

Is PD 51Z inconsistent with article 6 of the European Convention on Human Rights or the principle of access to justice?

This is dealt with in paragraphs 29-34 of the Judgement. The Court rejected the Appellant’s submission that PD 51Z is incompatible with either Article 6 or the fundamental principle of access to justice. It was held that the *short delay* to possession litigation enshrined in PD 51Z is amply justified by the

exceptional circumstances of the coronavirus pandemic. As paragraph 1 makes clear, there is a need to ensure that neither the administration of justice nor the enforcement of possession orders endanger public health by the unnecessary transmission of the virus. PD 51Z creates no risk that persons will “effectively be prevented from having access to justice”.

Does PD 51Z apply to cases allocated to the multi-track in which case management directions had been given before it was introduced?

This is dealt with in paragraph 35 “This issue was not really pursued in the light of the amendment to PD 51Z which provided by paragraph 2A(c) that paragraph 2 was not to apply to an application for agreed case management directions”.

Does the court have jurisdiction to lift the stay imposed by paragraph 2 of PD 51Z?

This is dealt with in paragraphs 36 – 46 of the Judgment

The Judgment is clear, when paragraph 2A(c) says that paragraph 2 does not apply to “an application for” agreed case management directions, it means what it says – that is, that if the parties agree directions, they can apply to the court to have the directions in question embodied in an order.

There is an obvious value in the parties agreeing, and obtaining the court’s endorsement of, directions which will take effect on a date or dates post-dating the end of the stay: they will come out of the end of the stay with an already-established timetable, and avoid a potential rush to make applications immediately the stay is lifted. There is also value in the parties agreeing, and obtaining the court’s endorsement of, directions which take effect during the stay albeit they cannot be enforced during its currency: we see no reason why parties cannot for example, get on with agreed directions for disclosure on a voluntary basis during the stay, and thereafter, seek to adjust any post-stay case management timetable by reference to steps agreed to be taken during the period of the stay.

Regarding whether or not the court has the power to lift the stay, the Court of Appeal stated the following:

“CPR Part 3.1 sets out the court’s general powers of case management. Part 3.1(1) provides that “[t]he list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have”. CPR Part 3.1(2)(f) provides

that “[e]xcept where these Rules provide otherwise, the court may... (f) stay the whole or part of any proceedings or judgment either generally or until a specified date or event”.

PD 51Z cannot be read as formally excluding the operation of CPR 3.1. As a matter of strict jurisdiction, therefore, a judge retains the power to lift the stay which it imposes. But the proper exercise of that power is informed by the nature of the stay and the purposes for which it was evidently imposed. PD 51Z imposes a general stay on proceedings of the kind to which it applies, initially subject to no qualification at all, and subsequently qualified only in the limited and specific respects provided for in paragraph 2A.

It 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. Thus, while we 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, we have great difficulty in envisaging such a case.

It follows that we do not think that any normal case management reasons could be enough to justify an individual judge lifting the stay imposed by PD 51Z. We would strongly deprecate parties troubling the court with applications that are based only on such reasons and which are in truth bound to fail.

If so, should the Judge have lifted the stay in this case?

This is dealt with in paragraphs 47-53 and concludes “ In our judgment, the circumstances of this case do not allow the court to lift the stay imposed by PD 51Z.

The fact that the parties agreed directions before PD 51Z came into force does not point towards the need to lift the stay. The parties are capable of complying with the directions they agreed whether or not the stay is lifted.



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