

1. The *Housing in Lockdown* series hosted by members of St Ives Chambers' Housing group continues to provide a unique forum for housing practitioners from across the country to explore and attempt to address the significant challenges resulting from (i) the Covid-19 pandemic generally (ii) the relevant provisions of the Coronavirus Act 2020 (ii) PD 51Z (iii) the HMCTS operational position during the coronavirus pandemic and (iii) the listing priorities of the civil courts. Each session has led to robust, insightful and engaging discussions/debates in relation to an array of legal and practical challenges housing practitioners have faced, and continue to face, when attempting to litigate effectively during lockdown. Examples of some of the challenges are as follows:
 - Effectively tackling anti-social behaviour during Covid-19.
 - The impact Covid-19 has had on the ability of housing practitioners to properly and effectively represent their client's interests.
 - The difficulties encountered by HMCTS in adapting to the challenges faced by Covid-19.
 - The impact PD 51Z has had on practitioners involved in possession proceedings.
 - Practical and legal difficulties in relation to obtaining gas and access injunctions.
 - The differing approaches and practices adopted by court centres nationwide.
 - Dealing with disrepair issues in light of (i) the impact Covid-19 has had upon resources and (ii) tenants who are shielding or self-isolating.
2. This article does not purport to provide a solution to the unique challenges currently faced by housing practitioners. However, it is hoped that the article will assist housing practitioners who will need to continue to engage in effective litigation and case management during the challenging practical and legal landscape created by the Covid-19 pandemic.

Key articles.

3. For helpful background reading, attention is drawn to the following key articles written by members of St Ives Chambers' Housing group:
 - Case Law Update: Challenge to PD51Z ARKIN V MARSHALL – Court of Appeal Decision by Lucinda Willmott-Lascelles. To view the full article, please click [here](#)
 - “Justice Delay is Justice Denied” - The Covid-19 Effect by Michelle Caney. To view the full article, please click [here](#)
 - COVID-19 – trespasser possession and injunction proceedings – Application of the new Civil Procedure Rule Practice Direction 51Z by Jane Talbot. To view the full article, please click [here](#)

Taking stock – the impact of Covid-19.

4. The legal and practical implications of Covid-19 may have fundamentally changed the complexion and the direction of a number of cases. Thus, practitioners will need to adopt a dispassionate and litigation savvy approach when reviewing such cases. Such an approach will ensure the matter is trial or application 'ready' when the stay is lifted. Some relevant considerations may include:
 - a. The need for further evidence, including up-to-date witness statements.
 - b. Practitioners may wish to enquire whether, in cases where there have been previous offers/discussions regarding settlement, there remains appetite for a resolution.
 - c. Realistic Part 36 Offers may need to be considered.
 - d. Cases may require further expert evidence on a single issue or a number of issues.

- e. Attempting to narrow factual and legal issues. In the context of a possession case, practitioners may have to consider whether the tenant has made sufficient admissions to enable the parties to agree a factual matrix/schedule of admissions. Further, there may be cases where concessions may need to be made in relation to reasonableness arguments. Practitioners who will be able to demonstrate that they have conducted a robust analysis of the legal and factual issues and that such analysis has led to a reduction in the the time estimate for a case, may find they are able to secure an earlier court date once the stay is lifted.

Agreeing directions in possession cases.

5. PD 51Z does not apply to applications for case management directions which are agreed by all the parties. It is of course possible that parties may, for genuine reasons, be unable to agree case management directions. However, practitioners are entitled to make robust enquiries in relation to the reasons advanced for objecting to directions and to challenge the same. Indeed, such an approach is entirely consistent with the Overriding Objectives of the CPR. Practitioners may wish to rely upon correspondence at any post-stay application hearing for the purposes of dealing with revised directions and/or any arguments in relation to costs.

Access to support services.

6. The difficulties encountered when attempting to obtain support and access to services from Local Authorities, the Community Mental Health Team and targeted services for substance misuse in the context of possession and injunction proceedings have often been a source of much frustration for tenants and landlords alike. Indeed, engagement with key primary and support services may be instrumental in ensuring a tenant is able to abide by the terms of their tenancy agreement. Sadly, it has been widely reported that the current lockdown measures have had a chilling effect on the availability

of, and access to, key support services. Accordingly, where relevant, practitioners will have to consider the extent to which the Covid-19 pandemic has prevented a tenant from accessing key support services that would otherwise be available. To illustrate the point, it may be said by a tenant that he/she would need to support from key services in order to address the conduct which has led to possession proceedings, thereby resisting the landlord's claim for possession. In turn, it may be properly argued by the landlord that a tenant is unlikely to access and/or effectively engage in such services. An objective consideration of matters may lead to the irresistible conclusion that the Covid-19 pandemic has denied a tenant the opportunity to properly advance their defence to a possession action by demonstrating their engagement with support services. Accordingly, when considering case management directions, practitioners may wish to consider how the tenant may be given the opportunity to engage with the relevant support services.

Cases involving arrears of rent.

7. It is entirely possible that the cogent factual and legal reasons for pursuing possession on the basis of rent arrears may need to be revisited in light of the Covid-19 pandemic. Practitioners may need to consider questions such as: (1) Has the Covid-19 pandemic prevented a tenant from addressing their arrears of rent? If so, in what way? (2) Is the tenant a 'serial non-payer' or has he/she fallen into arrears due to the Covid-19 pandemic? (3) To what extent is a landlord's policy in relation to dealing with arrears of rent consistent with the unique features of the current public health emergency? Practitioners will note that on 4th May 2020 Robert Jenrick MP (Secretary of State for Housing, Communities and Local Government) announced plans to introduce a pre-action protocol in relation to rent arrears which will take effect when the stay is lifted, observing that that the new pre-action protocol will provide "an added degree of protection for tenants". Set against this background and the Covid-19 pandemic generally, it is likely that judges will apply a greater level of scrutiny to possession cases involving arrears of rent.

Possession cases - Breaches in the context of Covid-19.

8. Practitioners will undoubtedly keep the factual matrix of any possession case under regular review during the Covid-19 pandemic. Indeed, for a number of reasons, a tenant's conduct during the current public health emergency may have a significant impact on the final outcome of proceedings issues against him/her. Practitioners may wish to consider the following:

- Has there been a significant reduction or cessation in the conduct that led to proceedings being issued? If so, is it possible to demonstrate whether this is a short-term/'situational change' or an indication of the tenant 'turning a corner?' To illustrate the point, a tenant may face eviction due to conduct involving late night parties, noise nuisance and permitting their visitors to engage in anti-social behaviour. Set against a background of this familiar state of affairs, a landlord may wish to consider the following:
- Whether the change in the tenant's conduct during lockdown adds weight to the argument that he/she is capable of complying with the terms of an SPO. In short, a tenant who has a history of failing to heed previous warnings may now be in a position to argue that 'when it mattered' he/she was able to demonstrate their ability to adhere to a robust set of requirements and to significantly transform their behaviour.
 - Whether the unique circumstances of the lockdown measures left the tenant with little option but to 'behave' in order to avoid unwanted attention from the police and, ultimately, their landlord. In addition, adopting the example of the tenant who enjoys late night parties, it may be the case that their visitors have simply decided not to attend the property in question until the lockdown measures have been removed or eased. In short, practitioners may need to consider whether the pattern of the

tenant's past breaches is a better guide to the future than the absence of recent breaches.

- a. Has a tenant used the current public health emergency and the increased protection from eviction to continue their conduct with perceived impunity?
 - b. It has been widely reported that Covid-19 has, for a number of reasons, had a greater impact on vulnerable members of society. Accordingly, a vulnerable tenant or a tenant with a disability may find the lockdown measures particularly challenging, leading to a continuation or even an escalation of the conduct which initially brought him/her to the attention of their landlord.
9. The above factors will be crucial in relation to arguments concerning whether it is reasonable to make an order for possession and if so, on what terms.

Gathering evidence and access to representation.

10. In light of the Covid-19 pandemic, many landlords will simply not have the 'boots on the ground' to investigate and monitor alleged tenancy breaches. Thus, in the context of allegations of anti-social behaviour, landlords may have to adopt a creative approach to their evidence gathering by (a) using noise monitoring equipment to capture instances of noise nuisance (b) encouraging tenants to use their smart phones to record instances of tenancy breaches and (c) using online meeting apps/video calling to conduct meetings and to take statements from key witnesses.
11. Tenant Solicitors are also facing significant challenges on a number of fronts. Indeed, the Housing Law Practitioner's Association, who intervened in *Arkin and Marshal*, cite an "overwhelming response from their members to their call for information which outlined real challenges faced by tenant solicitors".

It is clear that the landlords must be alert to the challenges faced by tenants as a result of the Covid-19 pandemic. Indeed, it is likely that requests by tenants for (i) adjournments to obtain legal advice and (ii) longer periods to comply with case management directions will be viewed favourably by the courts.

Proportionality and PSED assessments.

12. It is very likely that practitioners will have to consider whether previous proportionality and PSED assessments are now “stale” in light of Covid-19. To illustrate the point, landlords may have conducted PSED/proportionality assessments at each key stage before and after possession proceedings are issued. Indeed, a case may be ‘trial ready’ but unable to proceed due to the PD 51Z. It is clear that landlords will need to conduct an up-to-date PSED and proportionality assessments and, if necessary, such assessments may need to be considered through the spectrum of the Covid-19 pandemic.

13. Landlords who may be concerned that they have (i) failed to undertake proportionality and/or PSED assessments or (ii) prepared assessments that are deficient may now have an opportunity to address these concerns.

Injunctions.

14. For entirely understandable reasons, “pre-Covid-19” a landlord may have concluded that possession proceedings are the only effective way of addressing a tenant’s conduct. However, in light of the current legal landscape, landlords may have to look again at whether injunctive relief is now a more proportionate and effective way of addressing tenancy breaches. Indeed, in the context of anti-social behaviour, an injunction may be the only effective option open to a landlord who needs to restrain a tenant’s conduct (there is nothing to prevent the court from dealing with (a) applications for

gas and access injunctions and (b) injunction proceedings against a tenant, even if possession proceedings have been issued as long as the injunction proceedings are not ‘ancillary’ to the claim for possession), particularly in light of the fact that (a) the lockdown measures prevent neighbours from taking steps to escape or seek respite from the anti-social behaviour of another tenant (b) the conduct may include breaches of the lockdown rules and (c) a tenant who continues to engage in anti-social behaviour may be relying upon the current public health emergency, the stay set out in PD 51Z and the stretched resources of police and landlord in order to ‘protect’ themselves from any action that would otherwise be taken against them. It is highly likely that the matters outlined in (a) – (c) will be relevant to the exercise of the court’s discretion as set out in s.1 (3) of the Anti-social Behaviour, Crime and Policing Act 2014 (the “just and convenient” test).

A brief look at disrepair

15. St Ives Chambers will be hosting a bespoke Zoom session entitled, Housing: a spotlight on Disrepair. To book your place at the event, please click here.

16. The current government guidance outlines the following key factors:
 - a. Landlords’ repair obligations have not changed.
 - b. In these unprecedented times, tenants and landlords should take a pragmatic, common-sense approach to non-urgent issues which are affected by COVID-19 related restrictions.
 - c. Where reasonable, safe for tenants and in line with other Government guidance, the Government recommends that tenants allow local authorities, landlords or contractors access to their property in order to inspect or remedy urgent health and safety issues.

17. The HSE has provided some extremely guidance (13th May 2020) to landlords who are dealing with the challenges obtaining access injunction. The

guidance may be found here: <https://www.gassaferegister.co.uk/help-and-advice/covid-19-advice-and-guidance/landlords/>. The guidance is extremely helpful as it sets out how landlords can meet their gas safety obligations during Covid-19. However, the guidance is equally useful to landlords facing challenges in discharging their repair obligations. The key points are:

- a. Each property should be considered on a case-by-case basis.
- b. Landlords must make reasonable attempts to secure alternative engineers if their usual engineers are unavailable.
- c. The guidance sets out real-life examples to help landlords in relation to what may be considered reasonable steps to demonstrate compliance with their duties.
- d. The guidance “strongly advises” that landlords “keep records of communication and correspondence with the tenant, including emails and text messages if applicable”.



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