St Ives CHAMBERS

An analysis of lifting the PD51Z stay through *Arkin v Marshall* [2020] EWCA Civ 620 , *London Borough of Hackney v Okoro [2020] EWCA Civ 681* , *Copeland v Bank of Scotland Plc [2020] EWHC 1441 (QB)* and *Bromford Housing Association Ltd v Nightingale & Anor [2020] EWHC 1532 (QB)*

The announcement that the stay on possession proceedings and the provisions of PD51Z would be extended until 23rd August 2020 was likely met with minimal surprise by Housing Practitioners. Despite the extensive backlog of cases that are surely building up in Judicial annals, the decision has been made and our hands remain stoically tied in relation to taking any further steps in any CPR 55 possession claim, save for filing unenforceable agreed case management directions.

***Arkin v Marshall* [2020] EWCA Civ 620**

The highly anticipated Court of Appeal decision in *Arkin v Marshall* [2020] EWCA Civ 620 held that whilst the courts do in principle have power to lift the stay imposed by PD51Z, such a power ought only to be exercised in the most exceptional circumstances. Indeed the Court held that it had "*great difficulty in envisaging*" a case where it would be appropriate to do so.

As is often the way with authoritative Civil jurisprudence, little to no guidance was provided as to what constituted such exceptionality of circumstance. The furthest *Arkin* went was to suggest that the exceptionality envisaged would be of the kind which "*operated to defeat the expressed purposes of PD 51Z itself and endanger public health* [42]." The expressed purposes of PD 51Z in the 117th Practice Direction update states, as its intent, "*the need to ensure that the administration of justice, including the enforcement of orders, is carried out so as not to endanger public health* [44]." Upon reading *Arkin,* I similarly found it near impossible to envisage circumstances where a lifting of such a stay would be in line with the Court of Appeal's rationale.

London Borough of Hackney v Okoro [2020] EWCA Civ 681

The subsequent Court of Appeal decision in *London Borough of Hackney v Okoro [2020] EWCA Civ 681* that PD51Z does apply to the hearing of appeals as much as to first instance possession proceedings. Prior to *Okoro*, many practitioners and Judges remained of the view that whilst PD51Z instigated a stay on all proceedings for possession brought under CPR Part 55, civil appeals were not brought pursuant to CPR 55 but CPR 52. This was certainly the view of a number of District, Circuit and High Court Judges who had continued to hear and hand down judgments in appeals brought under CPR 52 but arising from original CPR 55 possession proceedings.

Okoro however, held that "*As a matter of ordinary language, we think that proceedings brought under CPR Part 55 are still "brought under CPR Part 55", even if they are under appeal. It is true that the procedure governing the appeal is contained in CPR Part 52, but the proceedings remain proceedings brought under CPR Part 55* [25]"

It is of significance to note that neither *Arkin* nor *Okoro* suggested that the stay could be lifted merely to allow judgement to be handed down when it would have minimal impact upon the administration of justice during a pandemic or in layman's term, not require additional court time.

Indeed the Court of Appeal in both of those cases chose to focus on the policy rationale of PD 51Z and favour cerebral interpretive arguments over the pragmatic.

Despite the intent of PD51Z being to ensure that the administration of justice was carried out in a manner as not to endanger public health, the Court of Appeal has taken a much wider interpretation of the same. The *Okoro* appeal was listed to be heard virtually, with no additional individuals present in any court buildings. As many of us have experienced over the last weeks, such hearings take place remotely with the Judge, legal representatives and parties all signing into a telephone or video call from their own respective homes. There is nothing to suggest that such an hearing would be capable of endangering public health. Indeed, it can rightly be argued, as it was by those representing the London Borough of Hackney in *Okoro* that the intent of PD51Z can be wholly upheld by allowing such an appeal to proceed as it would permit the administration of justice with no danger to public health.

The Court of Appeal clearly did not see it that way and in *Okoro*, like *Arkin*, no exceptional circumstances where it might be appropriate to lift the stay for the purposes of hearing an appeal were highlighted.

Copeland v Bank of Scotland Plc [2020] EWHC 1441 (QB)

The subsequent 4th June 2020 judgment in *Copeland v Bank of Scotland Plc [2020] EWHC 1441 (QB)*, which involved a mortgagee's application, made out of time, for permission to appeal/appeal to follow a refusal to set aside a possession order, however took a slightly wider interpretation of the circumstances in which the stay was capable of being lifted.

On 26th February 2020, Freedman J heard, in person, the rolled up permission to appeal/appeal hearing brought by Ms Copeland. Judgement was reserved. Whilst a confidential draft of the judgment was sent to the parties prior to PD51Z coming into force, the stay shortly followed. Mr Justice Freedman was appraised by the parties of the stay and the authorities of *Arkin* and *Okoro* were brought to his attention. He proceeded to hand down judgment on 4th June 2020 and considered whether he was able to lift the stay as a preliminary point.

Freedman J concluded, much in the way that was argued and dismissed in *Okoro*, that "*it is undesirable in this case, when following a heavily contested appeal, where there is a reserved judgment ready to be handed down following extensive preparation, to postpone hand-down of the judgment until such time as PD 51Z ceases to have effect. That may be towards the end of June, or it may be much later if PD 51Z is extended thereafter* [6]."

The Judge noted that "*It is important that the hand-down of the judgment does not have an effect inimical with PD 51Z* [7]." However, how this amounted to an exceptionality of circumstance of the kind that gave the Court of Appeal "*great difficulty*" in envisaging is not truly addressed. Indeed on my own reading, the lifting of a stay to hand down judgment on an already heard appeal, regardless of whether it was hear prior to or after the stay, appears to be precisely the type of circumstance the court in *Arkin* and certainly *Okoro* would routinely have envisaged. It would appear that the High Court has certainly, in *Copeland*, taken the more pragmatic view of the real impact on the Courts should the stay be lifted, as opposed the Court of Appeal's seeming focus on preventing all

administration of justice in possession proceedings as opposed to only that which endangered public life.

I would argue that the view taken by Freedman J in *Copeland* was a welcome application of the rather widespread, blanket attitude to enforcing a strict stay in *Arkin* and *Okoro*, if it were not for two reasons.

The first arises from the *Copeland* judgment itself which states that "*is not intended to inform any other Court about what to do in connection with a reserved judgment in another case: it is a course of action taken by reference only to the circumstances of this case* [6]."

Bromford Housing Association Ltd v Nightingale & Anor [2020] EWHC 1532 (QB)

The second reason is a brief judgment handed down in *Bromford Housing Association Ltd v Nightingale & Anor [2020] EWHC 1532 (QB)* in which I have represented the Claimant/Respondent throughout and did so before Cavanagh J in a High Court appeal.

The larger proceedings relate to possession under CPR 55, arising from the service of s.21 notice. An appeal lodged by the Defendants/Appellants relating to a discrete issue of having been refused permission to rely upon late served evidence was heard by Mr Justice Cavanagh on 28th April 2020. The hearing was conducted over Skype for business. The hearing took place after the imposition of the PD51Z stay but prior to the authorities of *Arkin* or *Okoro*, and the parties were in agreement that the hearing should proceed but with judgment reserved. This was duly done and upon later being notified of the *Arkin* and *Okoro* decisions, the Court held on 28th May 2020 that judgment would remain reserved until the end of the stay period.

Upon publication of the *Copeland* decision, Mr Justice Cavanagh was invited to consider the application of that decision to the appeal in *Nightingale*. In a short judgment handed down on 12th June 2020 he found that the key difference was that the hearing in *Copeland* had taken place prior to the stay, whereas in the matter of *Nightingale*, it had occurred subsequently. Cavanagh J observed that "*If the parties and I had enjoyed the benefit of seeing the Court of Appeal judgments in Arkin and Okoro at the time of the hearing, the proceedings would inevitably have been stayed and the hearing would not have taken place. In those circumstances, I think that it is important, and in keeping with the spirit of the stay, that the parties are given a further opportunity make submissions after the stay is lifted and before I hand down my judgment* [7]."

Whilst is *Copeland* the appeal related to an actual order for possession made in the court below and where, save for the stay, the practical effect of refusal of permission or loss in the appeal would result in an eviction, in *Nightingale* no possession order has yet been made and the issue of whether Bromford Housing Association are entitled to possession of the Property remains subject to a future trial. The only effect that lifting the stay and handing down judgment could have, would be to allow parties to agree future directions for that trial, either with or without the additional evidence subject to the appeal.

Concluding Remarks

It is perhaps somewhat difficult to understand the common thread of rationale that is influencing this recent body of case law.

In *Arkin* and *Okoro* a linguistic interpretation and a wide view of public endangerment, strongly advocated only exceptional, difficult to envisage circumstances would give rise to the lifting of a stay.

In *Copeland* a pragmatic approach was taken and the stay lifted as (i) the handing down of judgment was an administrative act which would not serve to further endanger public life and (ii) such a lifting, despite having the potential of resulting in a final order for possession, could not be enforced due to PD51Z and therefore would cause no prejudice.

Alternatively in *Nightingale* the approach was again more cerebral and based on the position that *if* the cases of *Arkin* and *Okoro* had been heard and decided at the date of the initial hearing, virtual court time would not have been taken up by the hearing of such an appeal, which would have been subject to the stay. However, some might consider that the reality that the appeal *was* heard and that the impact upon the administration of justice has already taken place was somewhat overlooked.

In grand conclusion, it would seem that *Copeland*, despite its promise, has seriously limited application to any hearings or appeals which were conducted after the imposition of the stay but are awaiting judgment. I am however reliably informed that the Court of Appeal, late last week, was hearing yet another case on the issue of when it might be appropriate to lift the stay, so watch this space!

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