The End is in Sight – but what then?

The stay of possession proceedings (which started on 27 March 2020) comes to an end on 23 August 2020 and the courts and government have been working on plans how to resume possession cases after that date. Michael Singleton gave his thoughts in his recent article and now it seems we have some answers (which also raise many questions).

On Friday 17 July 2020 the Civil Procedure (Amendment No 3) (Coronavirus) Rules 2020 and Civil Procedure (Amendment No 4) (Coronavirus) Rules 2020 were laid in Parliament. Number 3 is significant to housing practitioners as it amends CPR Part 83 in relation to evictions. Number 4 amends the CPR to add a new Practice Direction 55C which has the effect of temporarily modifying Part 55. The Practice Direction will apply until 28 March 2021 and will be reviewed during its operation. Both come into effect on 23 August 2020.

Practice Direction 55C

A "stayed claim" means a claim which was brought on or before 22 August 2020 (including an appeal from a decision in such a claim) and the following rules apply. In stayed claims brought before 3 August 2020 but where no possession order had been made before the stay, either party must file and serve a "reactivation notice" and then the case can be listed, relisted, heard or referred. More on the workings of the reactivation notice later. However, at this point, it has to be queried why the date of 3 August is used when the stay extends to 23 August 2020. That would mean that claims issued after 3 August 2020 would be treated as new claims and parties required to comply with PD55C when it is not yet in force.

A reactivation notice must:

a) confirm that the party filing and serving it wishes that the case be listed, relisted, heard or referred; and

b) set out what knowledge that party has as to the effect of the pandemic on the Defendant and their dependants (this does not apply to appeals); and

c) If the possession proceedings related to rent arrears, the Claimant must provide a 2 year rent account with the notice (this does not apply to appeals).

Where a trial date was set prior to the stay coming into force, that trial will be vacated and the case stayed unless a party complies with the provision to serve a reactivation notice not less than 42 days prior to the trial.

If no reactivation notice is served in relation to a stayed claim by 29 January 2021 then that claim will be automatically stayed. However, it is confirmed that a stay is not a sanction for breach and an application to lift the stay is accordingly not an application for relief from sanctions.

Once a reactivation notice is filed and served, the parties must be given 21 days notice of a hearing listed in response to it.

PD55C modifies Part 55.5 (rules re hearing date) and disapplies the usual rule that a possession hearing must be heard within 8 weeks from issue.

In a stayed claim where directions were made before 23 August 2020, the reactivation notice must also include:

a) a copy of the last directions order together with new dates for compliance and; either
    I. a draft order; or
    II. a statement that no new directions are required and that an existing hearing date can be met.
b) A statement in writing whether the case is suitable for hearing by video or audio link.

If the other party does not agree with position then they must file written objections within 14 days of service of the reactivation notice.

If parties do not comply with the above requirements, the case will be stayed after 29 January 2021 and it is again confirmed that such as stay is not a sanction for breach to which a relief from sanctions application is necessary.

The final part of the PD relates to new claims and stayed claims brought after 3 August 2020 and requires the Claimant to:

a) bring to the hearing two copies of a notice –
    I. in a claim to which the pre action protocol for possession claims applies, confirmation how it has complied; and
    II. in all claims, setting out what knowledge that party has as to the effect of the pandemic on

the Defendant and their dependants;

b) And serve on the Defendant not less than 14 days prior to the hearing the notice.

In relation to claims issued under the accelerated route for assured shorthold tenancies, the Claimant must serve, with the claim form, a notice setting out what knowledge that party has as to the effect of the pandemic on the Defendant and their dependants.

There is no prescribed form for the reactivation notice.

Some issues arise from this PD. First, there is no requirement on a landlord to make enquiries of the tenant to complete the information about how the pandemic has affected them so a legitimate answer to that point could be "not known" which seems to be contrary to what the PD is trying to achieve. What information is the court looking for? Health, financial? Why is the onus not on the tenant to provide that information prior to a hearing when it is within their knowledge?

What will be the effect if a landlord fails to comply with the requirements and files a defective notice? There are no sanctions in PD55C. Would it be the case that the claim remains stayed until a correct notice is provided? I would expect to see sanctions for non-compliance contained within the PD to give it "teeth".

Even if enquiries are made and information provided to the court it will be of limited use. It can only be relevant to cases where the Court has discretion whether to order possession not to cases under ground 8 or accelerated possession. The rumours of those being made (temporarily) discretionary have yet to materialise as is the suggestion that the pre action protocol be extended to the private rented sector.

As Michael Singleton comments in his article, it is estimated that over 60,000 cases were stayed and there is still a month to run of the current stay so that is likely to be increased.

What this PD does not do is address the social distancing issues relating to block listing and general capacity of the courts to cope with the old levels of work. There still needs to be thought around how to increase capacity to get through the inevitable backlog in all areas of law and deal with the usual levels of

work thereafter.

Amendments to Part 83

A new 83A(2) amends the rules that relate to evictions. As it stands, county court bailiffs give notice to a tenant of the eviction date but High Court Enforcement Officers do not have to give such notice. In some cases, possession orders in the County Court are transferred up to the High Court for enforcement (as it is quicker than the weeks it can take for a bailiff appointment). Whilst this is permissible, it has always been a concern of district judges that the requirement for notice of an eviction is removed and therefore many judges are reluctant to make such an order in relation to residential property.

The new section will mean that for all evictions whether in the county court, High Court or transferred cases, 14 days notice must be given to residential occupiers by inserting the eviction notice through the letterbox or affixing it to the premises. A prescribed form will need to be used. This does not apply to trespasser cases or where the High Court has given express dispensation for such a notice.

There was confusion when PD51Z was amended to exclude "trespassers" from the stay to possession proceedings as to whether it meant that the stay did not apply to only "persons unknown" (as the exception referred to the service provisions in 55.6) or whether to the wider definition of trespasser is 55.1. This seems to have been considered here and the wording at 83.8A(6) states

"this rule does not apply to writs or warrants of possession to enforce possession orders against trespassers, other than possession orders against persons who entered or remained on the premises with the consent of a person who, at the time consent was given, had an immediate right to possession of the premises." That "should" mean that cases against named individuals will be treated as trespassers if no consent has been given for occupation.

Conclusions

These proposals go some way to dealing with the "new normal" (at least until spring next year) but fall very short of dealing with the enormous issues facing the justice system. It is also likely to be of little comfort to renters facing eviction as, at best, it delays matters.

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Law is correct as at 24 July 2020

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