

Towards a New Normal?

Possession Claims in the Brave New World

Dealing with a case justly and at proportionate cost includes, so far as is practicable –

...

(b) saving expense;

...

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

(CPR 1.2)

Introduction

The government has confirmed that the stay that has been in place on virtually all possession claims will not be the subject to a further extension.

Accordingly, as from 23 August ⁽¹⁾ existing claims will be able to proceed and new claims can be issued and served.

At present ⁽²⁾ there is no guidance or information as to how these claims will be managed. However, we can be confident that it will not be 'business as usual'. This article aims to consider what advisors can do now and in the short-term to put their clients at an advantage or at least are not at a disadvantage.

The Problem

It is estimated ⁽³⁾ that over 60,000 cases were stayed.

Furthermore, few cases have been issued during the stay. The reasons are varied but unless there were looming 'date specific' issues (e.g. limitation or automatic conversion of an Introductory tenancy to fully secure) there was little incentive to pay an issue fee when the claim would be subject to an immediate stay. Many social landlords are acutely conscious of the adverse publicity that bringing a claim during the pandemic could bring.

1. A Sunday, perhaps the intimidated 'extended hours' are being pre-figured!

2. 20 July 2020

3. ARLA

The capacity of the courts will be severely constrained for some time to come. Anecdotally those civil courts that are functioning are doing so at less than 30% capacity. The days of block possession listings with several judges considering more than a dozen cases per hour may never return.

Nevertheless, possession cases aren't going to decline. Landlords will still want, or need, to recover possession, whether for rent arrears, anti-social behaviour or simply a desire to sell with vacant possession. Tenants will still have legitimate claims that they have paid the rent and they are the victims, rather than perpetrators of anti-social behaviour.

Solutions?

When the stay was extended in June it was announced that the Master of the Rolls had formed a working group to review how proceedings would be conducted once the stay was lifted. Similarly, the Civil Justice Council reported in June on the impact of COVID-19 on civil proceedings.⁽⁴⁾

Local court user groups are also actively seeking views on how best to resume possession claims.

As yet there are no concrete proposals, but a number of rumours have gained traction:

- A new possession protocol, extending to all landlords, not just social landlords.

My own view is that unless any protocol has 'teeth' so a failure to comply can result in effective sanctions this is simply 'window dressing'. Depriving a landlord of costs he had no chance of recovering anyway is not a threat nor is ordering a publicly funded tenant to pay costs.

However, such a protocol then creates the risk of satellite litigation consuming scarce resources

- A Housing Disputes Service or Housing Court.

This is often trotted out as a panacea to all sorts of problems. My personal view is that creating a new Tribunal will create more problems than it solves. Housing law draws on (and has made significant contributions to) many diverse areas such as: Insolvency Law ⁽⁵⁾; Equalities ⁽⁶⁾; & Human Rights ⁽⁷⁾. Specialist expertise is all very well but which specialisation?

4. <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf>

5. *PFP v Sharples* [2011] EWCA Civ 813

6. *Aster Communities v Akerman-Livingstone* [2015] UKSC 15

7. *Manchester CC v Pinnock* [2010] UKSC 45

The Family Court already deals with housing law e.g. applications under the Family Law Act 1996 to transfer tenancies on relationship breakdown. Which court would assume jurisdiction under any new system?

The uses of Powers of Arrest to enforce injunctions would also pose problems. Buildings with secure facilities would be needed (we call them courts at the moment) as would judge's familiar with the contempt jurisdiction. The chaos caused by giving magistrates the power to deal with minors who breach injunctions ought to be a salutary warning.

Finally, several areas of housing law address conduct deemed to be criminal e.g. the regulation of HMOs, unlawful eviction and fire safety.

It will be brave politician who following a major disaster states that a Tribunal is adequate. I would support a Housing Court on the lines of the Family Court i.e. a specialist list within the existing system but it is difficult to see what this adds to what we already have. A 'new' court might all too easily be perceived as private and attract less public funding than now.

- New Courts. While the imitative to bring extra capacity 'on stream' by means of Nightingale Blackstone courts is to be applauded not one has opened yet.

Some social landlord are already looking at creating a hub and spoke court. The existing court estate would be used by the judge ('the hub') but the landlord would make available facilities ('the spoke') to tenants and advisors (as well as their own advisors) which have audio-visual facilities, interview rooms, adequate space for social distancing. 'Possession days' could might then be possible.

- Extended Hours. This is being promoted by central government. The Lord Chancellors statement that it had the 'overwhelming support' of the professions was rapidly contradicted by the Chair of the Bar and the Law Society. Ignoring, for one moment, the legitimate personal concerns of the professions, this faces significant obstacles.

Making more intensive use of a court room by more people will increase the need for cleaning and disinfection. Pre-lockdown few courts were in line for a five-star hygiene rating.

It is not simply lawyers who have caring responsibilities so do tenants and housing officers who may find attendance difficult if not impossible especially when schools are open only intermittently. A challenge under the Equality Act 2010 to an extended hours regime is all but inevitable.

Practical Measures

The quote at the head of this article is from the Overriding Objective. In view of reduced court capacity, it is likely that “an appropriate share of the court’s resources” will assume greater importance than before. Those who are not ready to proceed or ‘don’t know’ if they can take a step are likely to find their cases delayed or subject to procedural sanctions such as unless or debarring orders.

Advisors whether for landlords or tenants need to take advantage of the ‘pause’ that the stay has given to assess existing files.

Files will need to be updated. What are the current rent arrears, what is the benefits position, have there been further incidents of anti-social behaviour?

Directions will be needed, timetables will have to be reset. The current stay does not preclude agreed directions being made ⁽⁸⁾ before the stay is lifted so this can be considered now. It is likely that those who refuse to engage with sensible proposals may receive little judicial sympathy if this means an ‘unnecessary’ hearing is required.

As a practical matter this may be easier for landlords than tenants’ advisors as they will not have to wait for any funding decisions and should have systems that are regularly updated. However, if tenants have been accused of breaching injunctions during the stay or have made contact about benefit issues now is the time to update the possession file.

Consideration also needs to be given to the type of hearing required. Most interim matters are suitable for fully remote hearings if both sides are represented.

However, unrepresented parties are likely to require at least hybrid hearings.

Attended hearings whether hybrid or fully face to face will need to be timetabled (some courts limit numbers in the building and all have limits on the court rooms and conference rooms) so that witnesses arrive and leave on schedule.

Documents need to be prepared in advance and submitted electronically. Guidance to court staff discourages passing paper from person to person. Bundles will need to be prepared, agreed (if possible) and lodged in good time. Even if the court require hard-copy they are likely to require e-bundles as well. All divisions of the High Court as well as the Business and Property Courts have already produced guidance on e-bundles so consideration needs to be given to adapting this to possession cases.

Conclusions

We live in 'interesting times.' Personally, a prolonged period of routine would be welcome. However, normality is not on the horizon. Those who provide the best service to their clients will be those ready to meet the challenges following the lifting of the stay.

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Law is correct as at 20 July 2020



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