

Changes to the way commercial and residential property possession claims are to be dealt with by the courts will apply from 20 September 2020, which will impact all possession claims that are currently stayed and any new claims.

This article summarises the key changes that are coming into force and provides a practical overview of some of the key issues that parties engaged in possession claims must consider to comply with the new rules.

## Background to the Stay

In response to the ongoing impact of the coronavirus disease 2019 (COVID-19), on 27 March 2020, Practice Direction 51Z (PD51Z) came into effect and placed a stay on all possession and enforcement proceedings for 90 days. The extent of the stay was amended on 22 April 2020, whereby possession proceedings could be brought in limited circumstances.

On 25 June 2020, CPR 55.29 came into force as the stay imposed by PD51Z was due to expire. CPR 55.29 extended the stay on possession proceedings to 20 September 2020 subject to the same limited exceptions as applied under PD51Z.

## The Process Post-Stay

The current stay ends on 20 September 2020 and, from that date, a new Practice Direction (PD55C) will apply until 28 March 2021.

Possession claims are treated differently under PD55C depending on whether they were brought:

- a. Before 3 August 2020
- b. On or after 3 August 2020 or in either case where a final order for possession has been made

## Claims Brought Before 3 August 2020

For these claims, a “reactivation notice” will need to be filed and served by 4 p.m. on 24 January 2021. If a reactivation notice is not filed before 24 January 2021, the claim is automatically stayed. If a reactivation notice is not served by this date, a party may still apply to court to lift the automatic stay.

A recommended form of reactivation notice has been published and must include:

- Confirmation that the party filing and serving wants the case to be listed, re-listed, heard or referred
- Except for an appeal, what knowledge the party has of the effect of the COVID-19 pandemic on the defendant or their dependents
- If based on rent arrears and the proceedings do not relate to an appeal, an up-to-date rent account for the past two years

- If case management directions were made before 20 September 2020, the reactivation notice needs to be accompanied by:
  - A copy of the last directions order together with new dates for compliance taking account of the stay before 20 September 2020
  - A draft order setting out additional or alternative directions or a statement that no new directions are required and that existing hearing date can be met

## Claims Brought on or After 3 August 2020 or if Final Order for Possession Has Been Made

A reactivation notice is not required for these claims. Instead, claims will be listed to be heard and the claimant is required to bring to the hearing two copies of a notice, which confirms:

- It has complied with the requirements of the Pre-Action Protocol for Possession Claims by Social Landlords (where the Protocol is applicable)
- Its knowledge of the effect of the COVID-19 pandemic on the defendant or its dependents

This notice must be served on the defendant at least 14 days before the hearing. Further, if the claimant is using the accelerated procedure, its knowledge of the effect of COVID-19 on the defendant and its dependents must be filed with the claim form.

## Guidance From the Master of the Rolls Working Group

On 14 September 2020, the Master of the Rolls Working Group on Possession Proceedings published guidance on the Overall Arrangements for Possession Proceedings (the Overall Arrangements). The Overall Arrangements address the challenges as the stay comes to an end. On 17 September 2020, the Master of the Rolls also published a guidance note on priority cases reflecting the comments in the Overall Arrangements.

A summary of the key principles and arrangements is set out below:

- **Re-starting and starting cases** – Cases should not be restarted and no new claim brought without careful efforts to reach a compromise.
- **Listing** – Courts will not generally fix a date when it issues a claim form and the court should give at least 21 days’ notice of a hearing in a stayed claim listed or relisted in response to a reactivation notice.

- **Introduction of COVID-19 case marking** – A case may be COVID-19 marked to highlight that is, or is claimed to be, a direct consequence of COVID-19 and this device has a number of aims, including highlighting suitability for settlement, assisting with monitoring and the court’s case management.
- **Introduction of review stage** – Introduced for all cases and fixed for at least 28 days before any substantive hearing – essentially it involves a review by the judge of the papers of the case.
- **Prioritisation** – Cases to be listed with priority include cases involving alleged antisocial behaviour, extreme rent arrears (meaning (i) 12 months’ rent or (ii) nine months’ rent where that amounts to more than 25% of a private landlord’s total annual income from any source), squatters/illegal occupation, domestic violence, fraud/deception, unlawful subletting and abandonment of property. Further, there may be other circumstances warranting priority and priority will be given to cases issued before the stay commenced in March 2020.
- **Notice of eviction** – Where an order for possession is made, at least 14 days’ notice of eviction is now required both in the County Court and in the High Court.

## Practical Considerations on the Process Post-stay and Pitfalls to Avoid

### 1. Parties Should Fully Consider Their Positions and the Option to Settle

The Overall Arrangements make it clear that parties are expected to try and reach a compromise before starting or restarting a possession claim. It appears that the courts will take a dim view of parties that have failed to comply with this step and may take it into account in regard to costs. Accordingly, it is suggested that now more than ever, attempts to settle, and evidence of such attempts, will be key for any possession claim that a party decides to start or restart.

### 2. Priority of Cases, COVID-19 Marking and Impact of Coronavirus Act 2020

Parties should also be aware of the priority of cases and COVID-19 marking in order to be realistic as to when and how cases will be dealt with. While the Overall Arrangements recognise that there might be other circumstances that warrant priority, unless a case falls within the priority list, it is likely that hearings of such claims will face delays. A claimant should check whether its case falls within the prioritised list, which may impact on its approach to try and resolve cases without recourse to final hearings, particularly where delays in cases may be substantial.

In relation to commercial property cases, certain types of cases are included in the prioritised list, including unlawful sub-letting or abandonment. In addition, cases where there are extreme rent arrears are also included. However, the ability to pursue possession action in such cases is currently restricted as the moratorium on forfeiture of commercial leases for non-payment of rent under s 82 Coronavirus Act 2020 has been extended to 31 December 2020.

## 3. Logistics of Proceeding With Stayed Claims

For any party intending to proceed with a stayed claim, it must follow the new procedures under PD55C, including the following key points:

It should be clear on the distinctions that apply depending on whether the claim was brought before or after 3 August 2020 and whether a final order for possession has been made. In particular, if a claim was initially brought before 3 August 2020, a party should ensure it promptly files and serves a “reactivation notice” as, given the length of the stay, the courts are likely to be faced with a multitude of these notices.

Further, under PD55C, the court can vacate any trial date set before 27 March 2020 if a party has failed to comply with this practice direction, including filing a reactivation notice, at least 42 days prior to the hearing date, which is a risk the claimant will want to avoid. Finally, on all stayed claims, at some stage, the claimant will need to provide its knowledge of the effect of the COVID-19 pandemic on the defendant or its dependents.

## Summary

In summary, while the current stay on possession proceedings is being lifted, it will be interesting to see how PD55C and the Overall Arrangements are applied in practice and how they continue to be developed in response to the ongoing COVID-19 pandemic.

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