

Investment in UK real estate remains strong, despite the pandemic. However, whether looking to make new investments or managing an existing portfolio, family offices need to know about the way commercial and residential property possession claims are currently being dealt with by the UK courts.

Compliance with the new rules in relation to existing tenants, and knowing what to look for if new investment is on the cards, is critical in order for family offices to avoid costly mistakes in relation both to issuing proceedings and progressing new acquisitions.

Background to the Stay

In response to the ongoing impact of 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 stay ended on September 20, 2020, and from that date, a new Practice Direction (PD55C) has applied. PD55C was due to apply to possession proceedings until March 28, 2021, but this has been extended and it will now remain in force until July 30, 2021.

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

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

Claims Brought Before August 3, 2020

For these claims, parties are required to file a "reactivation notice"; otherwise, the case will not be listed, relisted, heard or referred to a judge. For those cases where a reactivation notice was not filed and served before 4 p.m. on April 30, 2021, they were automatically stayed. However, if a reactivation notice was not served by April 30, 2021, 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, relisted, heard or referred
- Except for an appeal, what knowledge the party has of the effect of the COVID-19 pandemic on the defendant or its 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 September 20, 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 September 20, 2020
 - A draft order setting out additional or alternative directions or a statement that no new directions are required and that an existing hearing date can be met

Claims Brought on or After August 3, 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 September 14, 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 addressed the challenges as the stay came to an end. On September 17, 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** – The court 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 it is, or is claimed to be, a direct consequence of COVID-19. This device has a number of aims, including highlighting suitability for settlement, assisting with monitoring and the court's case management.
- **Introduction of a 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. There is also a new Housing Possession Mediation Pilot Scheme for housing possession cases, which launched on February 1, 2021. The parties can agree to refer a case to the scheme if agreement is not reached at the review stage.
- **Prioritization** – Cases to be listed with priority include cases involving alleged antisocial behavior, 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 From an Investor Perspective

Prior Due Diligence

As evidenced, measures introduced due to COVID-19 mean possession proceedings can be a complex and lengthy process. Further, there are still restrictions in place that prevent possession being obtained where possession is sought due to rent arrears in the commercial property context and, more generally, in relation to residential property.

Accordingly, for an investor looking to enter the UK property market, due diligence on the property in question is going to be key before any purchase and/or investment where tenants are *in situ*. Questions to ask should include whether any possession proceedings are currently underway and, if so, whether they are stayed. Further, investors should check tenants' rent payments are up to date and whether there have been issues with the tenant, such as breaches of other lease covenants that might mean possession proceedings are necessary.

For investors who have already committed to property investments and possession issues have since arisen, relevant considerations include:

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

The Overall Arrangements make it clear that parties are expected to try to 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. This is also reflected in the introduction of the Housing Possession Mediation Pilot Scheme. 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

Investing 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 recognize 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 prioritized list, which may impact on its approach to try to 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 prioritized list, including unlawful subletting or abandonment. In addition, cases where there are extreme rent arrears are 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 June 30, 2021. In addition, for residential property, there are restrictions in place until May 31, 2021, which prevent attendance at a dwelling house for the purpose of executing a writ or warrant of possession, or delivering a notice of eviction, subject to limited exemptions.

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 when the claim was brought; in particular, if a claim was initially brought before August 3, 2020, a party should ensure it has filed and served a reactivation notice, as the courts will take no further action on the claim until this is done. 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 stay on possession proceedings has been lifted, there are many restrictions on enforcement still in place as the COVID-19 pandemic continues. The current restrictions should not prevent investment in the UK property market, but overseas investors should ensure sufficient due diligence on property is undertaken and those who have already committed to a purchase should be clear as to the current legislative framework in place for possession proceedings.

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