

## **Property Law and Coronavirus: a view from the Bar**

### **Introduction**

On 23 March 2020, at the Second Reading of what was then the Coronavirus Bill, the Secretary of State for Health and Social Care (i.e. Matt Hancock) said *“Coronavirus is the most serious public health emergency that has faced the world in a century...To defeat it, we are proposing extraordinary measures of a kind never seen before in peacetime.”* (HC Deb. 23 March 2020, vol. 674 col. 35). Little surprise, therefore, that practitioners of property law (and their clients) are affected.

### **Practice Direction 51Z**

Perhaps the most striking innovation is this short new Practice Direction. In substance it imposes a stay of 90 days from the date on which it came into force (i.e. 27 March 2020) on all proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by a warrant or writ of possession.

Paragraph of the new PD confirms, for the avoidance of doubt, that claims for injunctive relief are not subject to the stay.

However, there appear to be no exceptions so far as possession proceedings are concerned; no alternative position in respect of trespassers and no express residual judicial discretion in unusual or exceptional circumstances. That is not to say that it is impossible to think of circumstances in which one party might try to persuade a court to lift the stay in a specific case, perhaps using its case management powers under CPR Part 3. For example, imagine that exceptional circumstances exist so as to justify starting a claim in the High Court rather than County Court, for instance, a claim against trespassers with a substantial risk of public disturbance or of serious harm to persons or property which properly require immediate determination (PD 55A paragraphs 1.1 – 1.3). It would be surprising, in such circumstances, if the High Court simply refused to entertain the claim until the expiry of the 90 day stay.

### **Residential Tenancies**

By virtue of s. 81 and Schedule 29 of the Coronavirus Act 2020 (“the Act”), statutory provisions relating to the giving of notice have been amended. In effect, it will be a lengthier process before a landlord is entitled to bring possession proceedings by virtue of the changes.

Amendments are made to the Rent Act 1977, the Housing Act 1985, the Housing Act 1988 and the Housing Act 1988 as well as to statutory instruments prescribing the forms of various notices.

By way of example, s. 21 of the Housing Act 1988 is to be read, in relation to notices given under subsection (1) or (4) of that section during the relevant period, as if in subsections (1)(b), (4)(a) and (4E)(b) for “two months” there were substituted “three

months". For the purposes of Schedule 29, "the relevant period" means the period beginning with 26 March 2020 and ending with 30 September 2020.

It should be noted that, by virtue of Schedule 29, paragraph 13, there is power to alter (by statutory instrument) a reference to three months into a reference to a period of up to and including six months. In other words, the effect of the changes made by the Act in response to the present crisis may be extended beyond their currently enacted scope. Whether such an extension would render invalid hitherto valid notices is not, at this stage, clear.

It is not unreasonable to suppose that, unable to evict even the most difficult of tenants, landlords will increasingly consider whether they can seek injunctive relief to enforce tenancy obligations.

### **Business Tenancies**

Wide-ranging changes to the law of forfeiture are introduced by s. 82 of the Act. In particular:

- A right of re-entry or forfeiture, under a relevant business tenancy, for non-payment of rent may not be enforced, by action or otherwise, during the relevant period (where "relevant business tenancy" means (a) a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies, or (b) a tenancy to which that Part of that Act would apply if any relevant occupier were the tenant; and "the relevant period" means the period beginning with 26 March 2020 and ending with 30 June 2020 or such later date as may be specified by statutory instrument);
- During the relevant period, no conduct by or on behalf of the landlord, other than giving an express waiver in writing, is to be regarded as waiving a right of re-entry or forfeiture for non-payment of rent;
- Where proceedings have commenced before the relevant period to enforce a right of re-entry or forfeiture, neither the High Court nor the County Court can order possession to be given before the end of that period;
- Where proceedings have commenced before the relevant period and an order has already been made (requiring possession to be given up before the end of the relevant period) there is a distinction drawn between the High Court and the County Court. In the High Court, the onus is on the tenant to make an application to vary the order, and, having done so, the High Court must ensure that the tenant does not have to give up possession before the end of the relevant period. In County Court proceedings the period specified in an order is simply treated as extended under s 138(4) of the County Courts Act 1984 so that it expires at the end of the relevant period.

Plainly, the changes enacted do not abrogate the tenant's responsibility to pay the rent. Rather, they go to the extent to which the landlord may take action in the event

of default (even if that default arose before the Act came into force).

Separately, for the purposes of determining whether the ground mentioned in s. 30(1)(b) of the 1954 Act (persistent delay in paying rent which has become due) is established in relation to a relevant business tenancy, any failure to pay rent during the relevant period is to be disregarded.

## **Mortgages**

At first glance it may be thought surprising that the Act does not make specific provision for possession proceedings brought by a mortgagee on the basis of arrears. However, it has to be borne in mind: i) PD 51Z has imposed a stay on all proceedings for possession brought under CPR Part 55; ii) the range of measures, including a three month moratorium on possession action, announced by UK Finance on 17 and 18 March 2020; and iii) the wide discretion (where the mortgaged land consists of or includes a dwelling-house) available to the Court under s 36 of the Administration of Justice Act 1970.

## **Conclusions – the calm before the storm?**

In addition to the Act and PD 51Z, there has been an array of national and regional announcements and directions from the judiciary. The combined effect has been to put the brakes on civil litigation in general and property litigation in particular. For as long as the present crisis continues, that position is likely to subsist. Inevitably, however, when life begins to return to normal it is probable that as well as a backlog of existing cases there will be a deluge of new litigation thrown up the extraordinary times in which we live.

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