

The Right Honourable Sir Terence Etherton
Master of the Rolls and Head of Civil Justice

By email

8 April 2020

Dear Master of the Rolls

PRACTICE DIRECTION 51Z – STAY OF POSSESSION PROCEEDINGS AND EXTENSION OF TIME LIMITS - CORONAVIRUS

We are writing to you jointly on behalf of the Property Bar Association (PBA) and Property Litigation Association (PLA) in relation to the new Practice Direction 51Z, which was made on 26 March 2020.

The Practice Direction was originally announced as relating only to housing possession proceedings, both by the Courts and Tribunals Judiciary and the Government.

However, the announcement from the Judiciary was subsequently amended, and the Practice Direction states: "*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 are stayed for a period of 90 days*". This would not appear to be limited to housing possession proceedings but also stays possession proceedings relating to: (a) claims against trespassers (as defined in CPR 55.1(b)); (b) claims against former tenants of commercial premises (where the expired tenancy is not covered by the 1954 Act); and (c) claims against former tenants of agricultural holdings.

PBA and PLA members have raised concerns about the lawfulness of the Practice Direction, given that, as stated in the Judiciary announcement: "*It follows the Coronavirus Act 2020 emergency legislation and complements the provisions herein to prevent imminent evictions and delay possession proceedings*". Section 81 of the Coronavirus Act 2020 (CA 2020) protects certain residential tenants from eviction. The relevant species of residential tenancy, and the protections afforded such tenants – principally by the extension of notice periods – are set out in Schedule 29 to the CA 2020. The CA 2020 does not, therefore, protect squatters from eviction, and the Practice Direction goes beyond the circumstances for which Parliament has seen fit to legislate.

Further, section 82 of the CA 2020 prevents a landlord of business tenancies from exercising a right of re-entry or forfeiture for non-payment of rent, but does not otherwise restrict the landlord's rights on the expiry of a business tenancy.

Insofar as this was intentional, it would appear that the Practice Direction is aimed at securing a substantive result (protecting squatters from eviction, or limiting the movement of people) rather than case management, despite the fact that it is expressed to be made under CPR 51.2, which relates to pilot schemes "*for assessing the use of new practices and procedures in connection with proceedings*".

PBA and PLA members' concern is that the Practice Direction in effect constitutes a 3 month licence to trespass. Squatting in residential premises is, of course, a criminal offence under Section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. However, this does not apply

to commercial properties (many of which will be empty during the Coronavirus crisis and/or more difficult to protect against trespass) or open land. Members currently involved in such possession proceedings are already finding that the Courts are automatically staying the proceedings, in circumstances which they (and their clients) do not consider fair.

Whilst the Practice Direction provides that claims for injunctive relief are not subject to the stay, this does not help a property owner who must wait until the property is being damaged, or such damage is imminent, and the harm to them will be irreparable, before interim relief is justified.

Rather than assist in limiting the movement of people, the Practice Direction as drafted may actually act as an encouragement for squatters intentionally to move into empty premises or open land, knowing that they cannot be evicted for 3 months. Any such movement brings with it an inherent risk of further transmission of the virus.

Moreover, well-advised landowners may have no alternative other than to exercise their common law right to use reasonable force to recover possession of commercial premises, again with a risk of transmission of the virus.

We assume that none of these practical consequences were intended by the Practice Direction.

In addition, the effect of a stay on all possession proceedings, including those relating to commercial premises (other than forfeiture for non-payment of rent) and agricultural holdings, is at odds with the "business as usual" approach otherwise being taken by the Business and Property Courts during the pandemic. Whilst there might be good public health grounds for limiting the enforcement of possession orders against former tenants of commercial premises in the manner set out in the Practice Direction, this ought not to prevent a commercial landlord from establishing that a former tenant no longer has an entitlement to occupy premises. Alternatively, in the event that the right to possession is disputed, it ought not to prevent a former tenant being required to serve a defence and other case management directions being followed. If the progress of all possession claims through the stages of pleadings, disclosure, evidence and trial is stopped for three months, it is likely that there will be substantial delays in the progress of these and new claims after the stay is lifted, which is not in the interests of justice.

We would, therefore, be grateful for urgent clarification as to whether the automatic stay imposed by Practice Direction 51Z was intended to apply to claims against trespassers, and respectfully request that there be an immediate amendment to the Practice Direction making clear that it does not. We would also suggest that claims against former tenants of commercial premises be excluded from the Practice Direction (save perhaps for that part which relates to the enforcement of a warrant or writ of possession).

Yours faithfully



Joanne Wicks QC

Chair of the Property Bar Association



Mathew Ditchburn

Chair of the Law Reform Committee of the
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