



Possession proceedings and COVID-19

By Beatrice Graham and Reanne MacKenzie

With the government ordering people to stay at home during the COVID-19 global pandemic, questions necessarily arise for those whose “home” is a rented property. What does this mean for landlords and tenants alike? Broadly, whilst the Government made loud promises about banning evictions, the Coronavirus Act 2020 makes more ‘watered down’ provision, giving greater comfort to landlords but potentially leaving tenants mired in uncertainty.

What measures have been brought in to deal with possession proceedings?

1. The Coronavirus Bill received Royal Assent on 25 March 2020 less than a week after a first draft was presented to the House of Commons. In these unprecedented times, it has unprecedented implications for day-to-day life.
2. Landlords and tenants alike will be eager to know how residential and business possession proceedings will be affected. Even early in the COVID-19 crisis, the press reported that possession proceedings would be halted even if other court business continued as usual.
3. There are clear ethical and public interest arguments: evicting tenants who are currently self-isolating as a precaution or because they have the virus would have public health implications; there is a tension between the Prime Minister requiring all UK residents to remain at home and the court ordering a tenant to give up vacant possession; litigants in person might not be able to access the free legal advice that would normally be available to them through entities such as the CBA and duty solicitors; many tenants, whether paying rent out

of earnings or with the assistance of state benefits, are likely to find their household income reduced as a result of the virus and the Government is specifically alive to the fact that people should not lose their homes as a result.

4. Where does this leave landlords and lawyers?

Coronavirus Act 2020

5. Section 81 simply redirects the reader to Schedule 29 which provides protection from eviction for those with residential tenancies in England and Wales.
6. Section 82 considers the position of business tenants.

Residential Proceedings

7. Schedule 29 deals with a raft of different types of tenancy, including protected tenancies under the 1977 Rent Act and secure tenancies under the 1985 Housing Act. Of greatest interest are paragraphs 6 and 7 of Schedule 29 dealing with assured and assured shorthold tenancies: the most common types of tenancy for private renters.
8. Sections 6 and 7 respectively extend the notice period after service of a section 8 or 21 notice from the standard two months to an extended three months. After the expiry of three months, if the tenant has not given up vacant possession, the landlord can still apply to the court in the usual way.
9. Landlords may be relieved to note this is much less stringent than the Government's promise of a "*complete ban on evictions and additional protections for renters*" affected by coronavirus. There will be no new possession claims for three months. However, even without COVID-19, there would no new

possession proceedings for two months (i.e. claims would not be brought until the notices had expired in the usual way).

10. Accordingly, what sounded like a radical policy is, in practice, simply an extension of one month with nothing preventing landlords from serving notices. Any tenant served with a section 8 or 21 notice will take little comfort from the fact that they could still be evicted in three months, and that, in the interim, rent arrears might stack up.
11. Section 13 of Schedule 29 contains a carve out allowing the extension to be increased to six months. Depending on how the situation unfolds, this might well be used.
12. Ultimately, the government appears to be relying on landlords and tenants showing compassion and understanding in these turbulent times, especially after the three-month period expires. Before serving an eviction notice, the landlord should contact their tenant to discuss the situation. It is not impossible to imagine that County Court judges will want to see evidence that this has taken place, especially where a landlord seeks an order for possession on one of the section 8 discretionary grounds.
13. Critics have argued that this legislation fails to deliver on the government's promise and landlords should be alive to the fact that there might still be changes.

Business Proceedings

14. Between 25 March 2020 and 30 June 2020 (the 'relevant period') the following apply to relevant business tenancies (tenancies protected under part 2 of the Landlord and Tenant Act 1954 or tenancies to which that part would apply if the relevant occupier were a tenant):

- a. A right of re-entry or forfeiture for non-payment of rent cannot be enforced;
 - b. However, only an express waiver in writing will constitute waiver of the right of re-entry or forfeiture (i.e. conduct cannot imply such a waiver);
 - c. The High Court must not make an order for possession to be given up before 30 June 2020. Where the High Court has ordered possession before 30 June 2020 and the tenant applies to vary the order, the High Court must ensure the tenant does not have to give up possession before 30 June 2020;
 - d. The County Court must not make an order for possession where the period for possession to be given up (under section 138(4) of the County Courts Act 1984) expires before 30 June 2020. Where the County Court has ordered possession to be given up in a period expiring before 30 June 2020, the period is to be treated as extended to that date;
 - e. Failure to pay rent during the relevant period is to be disregarded for the purposes of section 30(1)(b) of the Landlord and Tenant Act 1954: persistent delay in paying rent which has become due as a ground to oppose an application for a new business tenancy.
15. In briefest terms, the relevant period, which may be extended by Parliament beyond 30 June 2020, is a hiatus in which business possessions will rarely happen (unless already ordered and the tenant does not apply for variation) and delay in paying rent cannot be used as evidence in future opposed business tenancy applications.

Practical considerations at the County Court level

16. Whilst the Coronavirus Act 2020 was progressing through Parliament, some County Courts took matters into their own hands.

17. A member of Henderson recently had the following order made of the court's own initiative for a hearing that had been due to take place in May 2020:

Upon noting the public health emergency from Covid 19 and its actual or likely economic consequences on the continued occupation of residential dwellings by those who have not or cannot meet the charges associated with occupation

Upon noting the declared intention of the Government to pass emergency legislation to prevent evictions of 'renters'

And upon noting that the Government has invited the support of lenders to borrowers by way of 'mortgage holidays'

But without a hearing

IT IS ORDERED THAT

- 1. The hearing of possession proceedings listed on 6 May 2020 is vacated;*
- 2. The proceedings will be re-listed on the first open date after 19 June 2020, unless by no later than 4pm on 12 June 2020 the court makes a further order;*
- 3. Because this order has been made without a hearing, any party may apply to set aside or vary this order upon sending to the court and the other parties (whether by email, or first class post) by 2pm on 27 March 2020 a notice of application together with a witness statement to be relied upon in support.*
- 4. Any application made pursuant to paragraph 3 above will be listed for hearing by telephone as urgent business not earlier than the third day and not later than the seventh day after the application is received by the court.*

18. It is clear that one of the practical problems that will present itself to landlords is the availability of hearings, remote or otherwise, even once the extended notice requirements have been complied with

19. The court system is rapidly making changes to the way it functions and remote hearings taking advantage of a range of video conferencing technology are being used. The issue for possession claims, especially given the prevalent use of PCOL, is that possession lists are notoriously busy. Managing the volume of cases in possession lists, safely and with a high number of Litigants in Person, will be difficult.
20. It seems that the court which made the order above, felt that blanket vacation of hearings to a later date was preferable to managing the complexities of a possession list remotely.
21. Indeed from today, 27 March, following a decision by the Master of the Rolls with the Lord Chancellors agreement the court service will suspend all ongoing housing possession actions for 90 days. This will be of some comfort to tenants who have already had possession proceedings commenced against them.
22. The situation is developing and it remains to be seen what will happen to other claims which currently have listings.

UPDATE

23. As lockdown has continued so too the situation has developed.
24. Most importantly the Court of Appeal has confirmed the lawfulness of CPR PD 51Z (*Arkin v Marshall* [2020] EWCA Civ 620) and that the stay imposed by PD 51Z will only be lifted in exceptional circumstances. The case concerned whether the stay imposed by PD 51Z could or should be lifted in a claim for possession brought by a receiver. Direction had been agreed, including a trial window of October 2020 to January 2021 on the same day that PD 51Z came into force. The Respondents took the view that this meant all they did not have to comply with the directions, the Appellants thought the opposite.

25. On the papers HHJ Parfitt determined that the proceedings were stayed, that he had no power to lift the stay and amended the timetable to continue after the stay imposed by PD 51Z. The Appellants appealed: this was leapfrogged to the Court of Appeal
26. Sir Geoffrey Vos gave the unanimous decision of the court. Whilst the court accepted that as a matter of strict jurisdiction a judge retains a theoretical power to lift any stay, it would almost always be wrong in principle to use it. There may be exceptional circumstances in which such a stay could be lifted (such as if it operated to defeat the expressed purposes of PD 51Z itself), but this case demonstrated no such exceptionalism.
27. Similarly the Court of Appeal has also confirmed that the automatic stay on possession proceedings also applies to appeals against possession orders (*London Borough of Hackney -v- Okoro* [2020] EWCA Civ 681).
28. These decisions may give some further comfort to tenants as they leave no room for doubt that as long as CPR PD 51Z remains in place, possession proceedings cannot proceed.

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