

## STAY? MAYBE STAYED? NO STAY?



Without, hopefully, being too flippant, the above are, essentially, the questions that the Court of Appeal will be considering tomorrow in relation to Practice Direction 51Z, in *Arkin v Marshall*.

### Practice Direction 51Z

By press release on March 26, 2020, MCHLG announced that, following a decision by the Master of the Rolls, with the Lord Chancellor's agreement, the court service would suspend all ongoing housing possession actions, with effect from March 27, for a period of 90 days (which period could be extended if needed). The press announcement went on to explain that neither cases currently in the system or any about to go into it would progress to the stage where somebody could be evicted.

PD 51Z states that it was made under rule 51.2 of the Civil Procedure Rule – discussed further below.

Paragraph 2 of PD 51Z states, simply, that all possession proceedings brought under CPR 55 (broadly, claims for possession of land) and all proceedings to enforce a possession order, “are stayed” for a period of 90 days (expiring on June 24). Paragraph 3 of the PD sets out limited exceptions to the stay. The PD itself ceases to have effect on 30 October 2020.

### ***Arkin v Marshall***

*Arkin v Marshall* is claim for possession brought by a receiver, issued under CPR 55. It was due in court on March 26, 2020, for a case management conference. The CMC did not take place, but the parties were able to agree directions. Those directions provided for the disclosure to take place during the 90-day stay period, and for witness statements on June 26, 2020.

4-5 Gray's Inn Square  
London  
Gray's Inn  
London WC1R 5AH  
DX 1029 LDE  
+44 (0)20 7404 5252

Birmingham  
2nd Floor  
Two Snow Hill  
Birmingham B4 6GA  
+44 (0)121 231 7430

clerks@4-5.co.uk  
[www.4-5.co.uk](http://www.4-5.co.uk)

4-5 Gray's Inn Square Ltd  
Registered office is, 5 Luke Street,  
London, EC2A 4PX  
Company number: 8685154  
VAT number: 163895665

A dispute arose between the parties as to the progression of the case during the stay period, which dispute came before HHJ Parfitt, whose judgment summarised the argument for the claimant as follows:

- (i) There was no increased risk to public health caused by the parties complying with the agreed directions so it would be a nonsense for the 90-day stay to apply to the proceedings which had moved beyond the usual Part 55 starting point;
- (ii) Whilst it was not said that there was a conflict between PD51Z and any primary legislation or rule, it was nonetheless contended that the Practice Directions was a curtailment of the court's power to stay cases.

In rejecting the second argument, the Judge said that, rather than representing a curtailment of the court's power to stay, the stay under PD51Z was an exercise of that power and one of general application.

In conclusion, HHJ Parfitt held that, in accordance with the Court of Appeal's decision in *Secretary of State for Communities v Bovale Ltd* [2009] 1 WLR 2274, Practice Direction 51Z was binding and provided no room for discretion: the Court was required to implement the stay.

In pursuing the appeal, it is understood that the Claimant is raising 3 lines of argument:

- (i) whether the 3-month stay is unlawful/ultra vires;
- (ii) whether it applies to the requirement to comply with case management directions in all cases;
- (iii) whether the stay should be lifted in individual cases.

### **Discussion**

In relation to argument that PD 51Z is a curtailment to court's power to stay, PD51Z seems to me to be a direction to the court in relation

**4-5 Gray's Inn Square**  
**London**  
Gray's Inn  
London WC1R 5AH  
DX 1029 LDE  
+44 (0)20 7404 5252

**Birmingham**  
2nd Floor  
Two Snow Hill  
Birmingham B4 6GA  
+44 (0)121 231 7430

clerks@4-5.co.uk  
**www.4-5.co.uk**

4-5 Gray's Inn Square Ltd  
Registered office is, 5 Luke Street,  
London, EC2A 4PX  
Company number: 8685154  
VAT number: 163895665



to Part 55 cases which come before it, to stay the progression of such cases in accordance with the practice direction. The case of *Bovale* is clear: practice directions are binding on the court to which they are directed. HHJ Parfitt was (in my view) correct in his conclusion: there was no discretion left to the court in terms of case progression, the possession proceedings had to be stayed.

PD51Z is based on Part 51.2 of the CPR, which (so far as relevant) states that practice directions may modify or disapply any provision of the CPR for specified periods during the operation of “pilot schemes for assessing the use of new practices and procedures in connections with proceedings”. The phrase “pilot scheme” is not one that would obviously be used to describe the 90-day stay. That said, it is conceivable that 51.2 could be construed so as to cover it. There does not seem to have been much discussion about this before HHJ Parfitt. The Judge, however, focussed on the question of whether PD51Z was a practice direction for the purposes of s.5 of the Civil Procedure Act 1997, which – of course – in his view it was and was, accordingly, lawful.

The word “stay” is well-understood in civil litigation. The Glossary to the CPR explains that: “A stay imposes a halt on proceedings apart from taking any steps allowed by the Rules or the terms of the stay.” Elsewhere a stay has been described to halt or freeze the proceedings, so that “in general terms, no steps in the action, by either side are required or permitted during the period of the stay”<sup>1</sup>. Plainly, in using the word “stay” without qualification, it was the intention of the Master of the Rolls to be clear: possession proceedings issued under CPR 55 are stayed. It does not seem to me that, save where it expressly said otherwise, PD51Z was intended to apply in some respects but not others.

Since HHJ Parfitt decided the dispute in *Arkin v Marshall*, PD51Z has been amended (with effect from April 20, 2020). The amendment sets out very limited exceptions to the stay. Exempted is “an application

**4-5 Gray's Inn Square**  
**London**  
Gray's Inn  
London WC1R 5AH  
DX 1029 LDE  
+44 (0)20 7404 5252

**Birmingham**  
2nd Floor  
Two Snow Hill  
Birmingham B4 6GA  
+44 (0)121 231 7430

clerks@4-5.co.uk  
[www.4-5.co.uk](http://www.4-5.co.uk)

4-5 Gray's Inn Square Ltd  
Registered office is, 5 Luke Street,  
London, EC2A 4PX  
Company number: 8685154  
VAT number: 163895665

<sup>1</sup> *Grant v Dawn Meats* [2018] EWCA Civ 2212, [18].



for case management directions which are agreed by all the parties”. Although very far from clear, it seems to me that this means that directions agreed before the stay period, which require compliance during that period, are stayed, but that an application for a directions issued during the stay period can result in an order for directions, if those directions are agreed by the parties.

Doubtless, we will know more once the Court of Appeal has handed down its judgment in *Arkin*, which is likely to be handed down promptly, given the questions raised.

Annette Cafferkey

April 29, 2020.

**4-5 Gray's Inn Square  
London**

Gray's Inn  
London WC1R 5AH  
DX 1029 LDE  
+44 (0)20 7404 5252

**Birmingham**

2nd Floor  
Two Snow Hill  
Birmingham B4 6GA  
+44 (0)121 231 7430

clerks@4-5.co.uk

**www.4-5.co.uk**

4-5 Gray's Inn Square Ltd  
Registered office is, 5 Luke Street,  
London, EC2A 4PX  
Company number: 8685154  
VAT number: 163895665