

Operations Managers
Clerkenwell & Shoreditch Family and County Court
29-41 Gee Street, London EC1V 3RE

27th May 2020

Dear Operations Managers,

RE: ARRANGEMENTS FOR LISTING POSSESSION CLAIMS AFTER 25 JUNE 2020

1. This is a reply to the letter dated 20.05.20 sent by the Operations Managers of Clerkenwell & Shoreditch County Courts and Stratford Housing Centre concerning arrangements for hearings in possession lists, urgent business lists and the general lists after the end of the stay imposed by PD 51Z, potentially from Monday 29.06.20.
2. This reply is sent on behalf of the Housing Team at Garden Court Chambers. We are one of the largest teams of specialist housing law barristers in the country, acting predominantly for tenants and in many cases funded by Legal Aid. We responded to the Civil Justice Council's Rapid Consultation on the impact of Covid-19 on the civil justice system here: <https://www.gardencourtchambers.co.uk/coronavirus-legal-news-views/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system>.
3. Our position is that there should be a return to in person, face-to-face Court hearings as soon as circumstances allow. We understand the public health reasons for limiting those hearings at present. Justice and safety should not be in conflict. Once the pandemic emergency has lifted, we advocate a return to in person Court hearings as the norm and as the most effective form of open, accessible and fair justice.
4. We have seen the draft response prepared by the Housing Law Practitioners Association, which we anticipate will have been sent by other housing practitioners and is copied at the end. We endorse and adopt the points it makes.
5. The introduction to the letter states that most possession hearings until the Autumn will take place remotely, but the actual proposals are to list all hearings in the first instance by telephone or video calls by BT Meetme, Skype or Microsoft Teams. A significant proportion of our clients are vulnerable for a range of reasons and have difficulty using technology. We are concerned that they will not be able to participate in hearings and so their effective access to justice will be highly limited.

6. We are also concerned that they may not have the opportunity to obtain legal representation and/or give instructions prior to attending the hearing.
7. We note that the proposals suggest revising notices to advise defendants to seek early legal aid assistance and that there is an expectation of parties to engage with one another before the hearing date more than previously. It is unrealistic that there will be any significant change in behaviour. Many of our clients have great difficulties in engaging with their landlords. We are aware from those that assist, under the housing possession duty scheme, that many tenants attend hearings having already unsuccessfully contacted a list of housing law firms. It is only likely to be more difficult for them to obtain representation given the difficulties faced by housing law advisers due to ongoing social distancing.
8. Our view is therefore that if possession hearings are to restart, it is essential that this must be accompanied by an effective duty scheme to which all tenants with hearings listed on that day have access.
9. It is also essential that tenants who are not practically able to access technology to participate in the hearing remotely away from the court have some method of participating by attending the court on the day.
10. We would expect that the Courts have undertaken an equality impact assessment in relation to the ability to participate in remote hearing for persons with disabilities and those with child-care or other caring responsibilities, whether those people are lawyers or parties.
11. We conclude by emphasising that applications for adjournments and for stay should be readily granted where: a party says that he or she wishes to obtain legal representation and cannot do so because of the current restrictions; a party is prohibited from leaving home or attending court because of the restrictions and risk to that person's health; a party indicates that he or she cannot participate in remote hearings for technological reasons.

Yours

Liz Davies, Joint Head of Chambers
Justine Compton and Marina Sergides, co-convenors Housing Team

APPENDIX: HLPAs Response

Response to Consultation – “Arrangements for listing Possession Claims at this Court After 25 June 2020”

Preliminary point

Although the stakeholder letter of the 21st May 2020 invites views on the proposals for resuming possession hearings, we do not recognise the basis for proceeding with cases without the HPCDS being in place. We are aware that contemporaneous discussions have taken place with the MoJ and, although no decisions have yet been made, proceeding with possession cases without the HPCDS in place form no part of this.

Your numbered points

We see considerable difficulties for a significant number of tenants in being able to adequately manage remote hearing by telephone or video technology. We refer to the evidence produced by Housing Law Practitioners’ Association in *Arkin v Marshall* available to view at www.hlpas.org.uk and in particular please see <http://www.hlpas.org.uk/cms/2020/05/arkin-v-marshall-pd51z/>. The same difficulties will not in general be faced by landlord representatives.

It is without doubt that there will be significant difficulties in tenants being able to manage arrangement of this kind. If a hearing was to proceed remotely we do not think that a judge could adequately assess many of the cases that come before her or him in half an hour, assuming (as you do) that there will not be a duty adviser to assist. The judge could dispose of cases in half an hour but that is not the same of properly hearing cases in half an hour with all the usual difficulties of benefits and vulnerabilities plus the overlay of Covid-19 related difficulties.

See “2” above

See “2” above

a. what happens if you don’t get them? Is that a “non-attendance” and therefore the claim will be considered “undefended”? We regard that as unconscionable.

b. we refer to the evidence in *Arkin v Marshall* for evidence of the intense difficulties faced by advisers and tenants in complying with directions at this time

c. welcome, but there are simply not the resources currently for this to be fulfilled

d, it is not acceptable for housing possession lists to proceed without duty advice. The government has spent the last few years formalising the duty scheme. It did so because the duty scheme is necessary in order that possession lists approach some measure of fairness. In the current crisis in

which tenants are likely to be the most affected group of people, the need for duty advice and assistance is greater than ever. Many tenants are often unrepresented because of the lack of legal aid solicitors and the inability to privately pay. The Duty Scheme is a safety net, providing them with some vital access to legal advice at the point at which they may lose their homes. The Court's desire to progress cases should not be at the expense of a tenants right to legal advice.

e. this is partly already provided for in practice directions but is "policed" differently from judge to judge. In order to work this would need strengthening of the PDs

f. last minute documentation may be crucial to both parties' cases. Is this not a prime indicator that the court is not ready to yet hear these case?

6. See all answers above. Landlords will clearly not face the difficulties outlined above and the proposals give rise to an inequality of arms between the parties.

Following paragraphs

Your "least worst" formulation is an honest representation of you proposals. But given we are talking about people's homes and we are in the midst of a pandemic crisis with little idea of the shape of the crisis, then it is not acceptable to proceed with the "least worst" arrangements when the option to stay proceedings further remains available.

While it is for the Master of the Rolls to decide whether to extend PD51Z, it remains, as you say, a judicial decision as to whether and when to list hearings.

The discussion between tenants and their landlords and preferably with a duty adviser involved is the bedrock upon which possession claims have been justly dealt with previously. It is telling that possession claims have a completely separate code from other sorts of claims with no default judgment provisions (except arguably in the accelerated procedure). Those safeguards are not there because landlords need protecting. They are there in recognition that tenants need protecting from litigation procedures as much as possible. These proposals go against that grain and demote equality of arms.

In relation to the contention that judges will be alert to ensure that vulnerable tenants are not prejudiced, we would need to see much more details on any guidance issued to judges but in any event fear that the proposals will not equip judges with sufficient knowledge of the background to cases to have any idea of how vulnerable the tenant might be.



It is unfortunately naïve to suggest that the vast majority of defendants will have any chance of obtaining assistance to complete defence form in advance of hearings. Again we refer you to the evidence in Arkin v Marshall at <http://www.hlpa.org.uk/cms/2020/05/arkin-v-marshall-pd51z/>

Legal Aid

The proposals amount to the Judiciary and HMCTS setting legal aid policy by fait accompli. It damages tenants'/defendants' access to justice and violates their right to a fair trial. Furthermore, reducing the availability of legal advice and representation to those on the brink of home loss, will lead directly to entirely avoidable evictions and to increased homelessness – just at a time when the public health imperative is 'stay home'.

The duty solicitor desk must not be a contingent on the court's convenience. Enabling it should be a fundamental condition for the operation of every possession list, and we expect MoJ to stand by this. I would suggest that this is included in public guidance specifying minimal conditions and overarching principles for all possession schemes.

