Applications to stay possession orders and/or warrants or writs of possession

Introduction

Possession claims can be brought in the High Court, but this is rare due to CPR 55.3(1), PD 55 1.1 (a claim can only be brought in the High Court in exceptional circumstances: there must be a certification to that effect (CPR r. 55.3(2)), absent which a claim ought to be transferred, or struck out (PD55 para 1.2)).

Some possession claims cannot be brought in the High Court due to statutory provisions to that effect:

(1) Possession Claims under section 3 of the Protection from Eviction Act 1977 (occupiers of dwellings who had previously held a tenancy, which has expired, and which is not statutorily protected).
(2) Possession Claims under Schedule 10 of the Local Government and Housing Act 1989 (tenancies at a low rent).

You are therefore unlikely to be dealing with a High Court possession claim; if you are you might consider the issue of a transfer to the County Court.

If a possession order has been obtained, and the person in possession of the property has failed to vacate by the date specified in the order, the landlord/owner must usually apply for a *"warrant of possession"* before the possession order may be enforced in the County Court. In the High Court, the landlord/owner must obtain a *"writ of possession"*. In both cases, enforcement is carried out by duly appointed court agents – known as 'bailiffs' or 'sheriffs' respectively - on the date specified in the warrant or writ of possession. The rules relating to enforcement are still set out in the old Rules of Court, which are preserved, and reproduced, in the CPR at Schedules 1 and 2: see, in particular, CCR Orders 25 and 26 and RSC Orders 45 and 46.

This note assumes that a possession order has been made, and that the question of its enforcement is before the High Court. That question can arise in two contexts

(1) Where a possession order has been made, and there is a pending appeal or application to set it aside under CPR r. 3.1
(2) Where a possession order has been made, and the order itself is not challenged, but the defendant wishes to have more time.

(1) Jurisdiction To Stay Where Order Is Challenged

(i) Stay in Aid of an Appeal: CPR 52.7

The fact of an appeal does not operate to stay the order under appeal. A stay must be requested under CPR r. 52.7, from either the lower court or the appeal court.

A stay under r. 52.7 can only be requested in the High Court if:

(1) The High Court is the proper Appeal Court. A High Court Judge will only be the "Appeal Court" for 52.7 purposes where the order was made in non-multi-track proceedings by a Circuit Judge or a Master of the High Court. This is exceedingly unlikely but possible. CPR r 52.7 does not allow a High Court Judge to stay an order where there is a pending appeal to the Circuit Judge or to the Court of Appeal.

(2) The order was made by a district judge in the County Court and the High Court can be persuaded that the County Court proceedings should be transferred to it pursuant to section 41(1) of the County Courts Act 1984 (again unlikely)

(3) The High Court is the "lower Court" because proceedings were properly issued there or subsequently transferred there.

(ii) *Setting Aside Order and Stay of Order under CPR r 3.1*

A possession order made in the absence of a party can be set aside (rather than merely appealed) under CPR r.3.1(2)(m), by analogy with CPR r.39.3.

The Court has the ability to stay the whole or any part of any proceedings or judgment under CPR r.3.1.(2)(f), however it is considered that this power is only exercisable by the Court which is seised of the proceedings in question. In other words, it is not considered that a Defendant subject to a possession order made in the County Court can apply to have it stayed or set aside in the High Court.

<u>(2) Jurisdiction to Stay where More Time is Required</u>

<u>A. Jurisdiction</u>

Residential Tenants

In the case of certain kinds of tenancy, Parliament has given the courts specific powers to stay possession orders and/or their enforcement, with the imposition of conditions relating to payment of arrears and future rent/mesne profits (as the case may be). It is to be noted that the County Court has principal jurisdiction under the following Acts, but the jurisdiction is not to the exclusion of the jurisdiction of the High Court.

The main cases are:

(1) Rent Act 1977, s.100(2), protected and statutory tenants (but not if possession has been ordered on the basis of any of the mandatory cases in Part II of Schedule 15 to that Act). The High Court has concurrent jurisdiction, but if the County Court is already seised of proceedings the High Court is unlikely to intervene without good reason. There is a costs sanction for issuing in the High Court (section 141);

(2) Housing Act 1985, s.85, secure tenants (but not if possession has been ordered on the basis of any of the grounds in Part II (alternative accommodation) of Schedule 2 to that Act): jurisdiction as under the Rent Act above (see HA s.110); and

(3) Housing Act 1988, s.9(2), assured tenants (but not if possession has been ordered on the basis of any of the mandatory grounds in Part I of Schedule 2 to that Act, though in practice the County Courts does sometimes exercise power to adjourn hearings): jurisdiction as under the Rent Act above (see HA, s.40).

These provisions give the Court the discretion to stay, suspend or postpone the date for possession in appropriate cases at any time before the possession order is actually enforced. Reference should be made to these sections for their more detailed provisions.

> *Sheffield City Council v Hopkins* [2001] EWCA Civ 1023; [2002] HLR 12 sets out the main principles that are relevant to the exercise of the judge's discretion in such cases. It also makes it clear that the court is not limited to considering the grounds on which the possession order was originally made.

In considering whether to grant a stay under any of these provisions, the court also has a power (which it must exercise in specified circumstances) to impose conditions upon the making any such order: these include conditions which regard to payment of arrears, as well as rent or mesne profits going forward. However, if there is a substantial dispute about whether the tenant has complied with the terms of any suspended order, or the amount of rent due, the matter should be adjourned so that the true position can be established: *Haringey LBC v Powell* (1996) 28 HLR 798, CA.

Residential mortgagors

In the case of residential mortgagors, the court has a statutory power to stay or suspend execution or postpone the date for delivery of possession at any time before the execution of the judgment or order under section 36 of the Administration of Justice Act 1970 (see also section 8 of the Access to Justice Act 1973). However, the court can only exercise this power if *"it appears to the court that…the mortgagor is likely to be able within a reasonable period to pay any sums due".* In most cases this means the arrears, not the whole debt.

Commercial tenants

Where a lease has expired, the tenant may be able to argue security of tenure under the LTA 1954, if the premises were occupied for business purposes and not validly "contracted out". 1954 Act protection does not stop forfeiture, but then the tenant

may apply for relief from forfeiture. If there is a claim proceeding on the basis of rent arrears in the County Court, the jurisdiction is found in section 138 of the County Courts Act 1984. If the claim is based on breach of covenant, the jurisdiction is found in Law of Property Act 1925, s.146. If there has been an eviction without court order, there is jurisdiction at common law in the High Court (and under CCA s.139 in the County Court) to grant relief on application made within 6 months of the eviction.

Trespassers

The High Court does have an inherent jurisdiction to deal with trespasser claims. It would seem that the rights of trespassers to a stay depend entirely on whether or not they are able to formulate an argument under Article 8 ECHR, if applicable. The common law position that there was no jurisdiction to make any order other than a forthwith possession order appears to have been superseded to that extent.

B. Fall-Back Provisions

If you do not fall into any of the above categories, you may still be able to rely upon the following provisions: CPR r. 3.1(2)(f) gives the Court the power to *"stay the whole or part of any proceedings or judgment either generally or until a specified date or event"*. By r. 3.1(1) this power is expressly stated to be additional to any other powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have. The power is conferred as part of the court's general powers of case management and applies in the County Court and the High Court alike.

In order to persuade the court to grant a stay under this heading, you will need to show how doing so would further the overriding objective. See the notes to this rule in the White Book, vol. 1 (Until the revisions to the CPR in 2013, there was a checklist of factors which the court would have regard to in considering applications under the old rule 3.9. The checklist no longer applies. However, it gives some indication of the sorts of considerations which many consider are likely to be relevant to applications under the new CPR rule 3.). It is open to question whether these provisions can be used over and above express statutory powers, however any such discretion would probably be limited be section 89 of the Housing Act 1980 in any event: see below.

Secondly, if a "home" is at stake, there is an open question as to whether suspension is required for the purposes of protecting the occupier's Article 8 rights. Those arise in relation to occupiers even if they are in their home without a lawful right, i.e. are trespassers: see Malik, discussed below. This arises because the Court is a public authority under the Human Rights Act 1998,

C. Restrictions on Suspension

Section 89 of the Housing Act 1980 applies in both the County Court and the High Court: see Boyland v Rand [2006] EWCA Civ 1860. It is to be noted that it will not

affect the Court's powers to stay when it is doing so under its appellate function under CPR Part 52: see Admiral Tavers (Cygnet) v Daniel [2008] EWCA Civ 1501

> "(1) Where a court makes an order for the possession of any land in a case not falling within the exceptions mentioned in subsection (2) below, the giving up of possession shall not be postponed (whether by the order or any variation, suspension or stay of execution) to a date later than fourteen days after the making of the order, unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up by that date; and shall not in any event be postponed to a date later than six weeks after the making of the order.
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> (2) The restrictions in subsection (1) above do not apply if—
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> (a) the order is made in an action by a mortgagee for possession; or
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> (b) the order is made in an action for forfeiture of a lease; or
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> (c) the court had power to make the order only if it considered it reasonable to make it; or
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> (d) the order relates to a dwelling-house which is the subject of a restricted contract (within the meaning of section 19 of the 1977 Act; or
>
> (e) ……"

It is to be noted that section 89 operates so as to cut down any discretion to postpone that might exist. It does not confer on the Court a power to postpone which it does not otherwise have

D. Transfer of proceedings to county courts

If proceedings are pending in the High Court it may be beneficial to consider whether they ought to be transferred to the County Court. Possession proceedings ought not really to be in the High Court in the first place unless there are good reasons for this, and an appropriate certificate ought to have been filed at the outset justifying the same: CPR 55.3(1) (claims should be started in the County Court); 55.3(2) (certificate necessary for issuing the High Court); PD55 paragraph 2.1 (contents of a certificate).

Such a transfer *might* provide further assistance. For example, section 88 of the County Courts Act 1984 is also potentially relevant, at least in cases involving money. It provides as follows:

> *"*If at any time it appears to the satisfaction of the court that any party to any proceedings is unable from any cause to pay any sum recovered against him (whether by way of satisfaction of the claim or counterclaim in the

proceedings or by way of costs or otherwise), or any instalment of such a sum, the court may, in its discretion, stay any execution issued in the proceedings for such time and on such terms as the court thinks fit, and so from time to time until it appears that the cause of inability has ceased."

E. Repeated Applications for a Stay

In general, there is no limit to the number of applications that can be made to stay or suspend a warrant of possession: in *Ealing LBC v Richardson* [2005] EWCA Civ 1798; [2006] HLR 13, the tenant made 9 successful applications to suspend. But once a warrant has been executed, and eviction has taken place, the court has no further discretion to stay, suspend or set aside the warrant under the legislation referred to above: *Jephson Homes v Moisejevs* [2001] 2 All ER 901. However, the warrant may still be set aside, even after the tenant has been evicted, if (i) the possession order is, itself, set aside; or (ii) the warrant was obtained by fraud or there was an abuse of process or oppression in its execution.

Procedure

Form N244 is the standard form for applications to the court and it can be used in the case of applications to stay possession orders and/or their enforcement. (Form N245 may also be used in appropriate cases). The forms are freely available on the Internet; the court may also be able to supply you with a copy.

The relevant form should be filled in and should be accompanied, ideally, by a witness statement in support. Otherwise the applicant should set out all of the evidence on which he proposes to rely under paragraph 10 of the form.

Unless the matter is urgent, any application to stay a possession order or a warrant/writ of possession should be made on at least 3 days' notice to the landlord/owner. If it is not possible to give 3 days notice, the tenant may ask for time to be abridged under CPR r. 3.1(2)(a).

Applications to stay the execution of a warrant are normally heard by a district judge in the County Court. By CCR Order 25 r. 8 a District Judge has the power to stay the execution of a warrant, although the power may, in certain circumstances, also be exercised by a proper officer of the court.

Sources of further information

Defending Possession Proceedings, (7th edn.) Legal Action Group (2010), Jan Luba QC, John Gallagher, Derek McConnell and Nic Madge (eds.)

Residential Possession Proceedings (9th edn.) Sweet & Maxwell (2013), Webber and Dovar (eds).

Tolley's Claims to the Possession of Claim (looseleaf) Lexis Nexis