August 2017

CJC response to the Civil Procedure Rule Committee consultation on ENFORCEMENT OF SUSPENDED ORDERS – ALIGNMENT OF PROCEDURES IN THE COUNTY COURT & HIGH COURT

General remarks

The Court of Appeal's judgment in Cardiff City Council v Lee (Flowers) ruled that residential landlords had to apply for the court's permission before being able to apply for an eviction warrant if a Suspended Possession Order (SPO) had been breached. This upheld the process set out in the civil procedure rules, but not the practice that had been broadly adopted by social and other landlords in SPO cases.

The CJC recognises that the court's decision sought to give effect to a protection for tenants - that a landlord's case that the conditions of the SPO had been breached received some form of judicial scrutiny. From the landlords' perspective the effect of the decision has been to increase costs and delays by adding effectively an additional stage to the eviction process (and thus adding to the workload of the County Court). Landlords have pointed to the fact that, by making an order of possession, the court has already determined the claimant's right to possession. The context is that there are around 47,000 SPOs made per annum.

However, from a tenant's perspective there is a concern about the support and advice available to tenants for proceedings in which so much is at stake (their home), and the degree of judicial oversight which can be provided (see comments in answer to question 2).

The Rule Committee's consultation is a welcome and timely initiative and will help to bring clarity for all concerned.

Answers to specific questions

Permission requirement in respect of suspended orders

Question 1: Do you think that additional safeguards (namely a requirement for an application with supporting evidence and judicial oversight) should apply in all cases where a suspended order is made and the claimant wishes to enforce the order?

Question 2: Should certain types of case be excluded from the additional safeguard (e.g. possession orders suspended on condition of payment of rent or mortgage instalments and arrears, return of goods orders etc.). If so, which types of cases do you think should be excluded and why?

We are supportive of the view reached by a majority of Rule Committee members, that a distinction should be drawn between those where the order was suspended on condition of payment of monies, and those where suspension is for other reasons e.g. anti-social behaviour/nuisance. The breach of a condition as to the payment of money can be

(The CJC's Vice-Chairman, Lord Justice Briggs, was not involved in the preparation of this response in view of his having sat in the Court of Appeal on this case and his role on the Rule Committee)

evidenced more easily than breach of some other condition and a form of request attaching a schedule of payments and verified by a statement of truth should suffice.

We see force in the point that there is a danger that making the additional application step universal may mean landlords will decline to agree to suspend orders and press for immediate possession orders. This would have a serious adverse effect on tenants, especially those battling and offering to make some sort of financial arrangement.

However, we also respect the view of specialists in the advice sector who argue the additional safeguard is necessary to increase accountability and to avoid unfairness, given that what is at stake is the loss of a person's home. They point to the fact that few tenants complete the defence form and that most courts operate block listing, allocating only 5-10 minutes for each case. Indeed in some courts less than five minutes allocated to each case at the first hearing.

Question 3: If you do not think that a permission stage for issue of a writ or warrant is required in respect of possession orders suspended on terms as to payment of monies, do you think the rules should require that evidence of the breach of those terms must be included with the request to issue?

A simple certificate that the defendant has not complied with the terms of the suspended monetary possession order should suffice.

Question 4: If you do not think that a permission stage for issue of a writ or warrant is required in respect of orders (other than possession order) suspended on terms as to payment of monies, do you think the certification required on the request form is sufficient or should further assurances that a breach has been committed be provided by the claimant?

N/A.

Question 5: Should the request for an issue of a warrant or writ include certification by the claimant as to whether permission is required to issue and/or if permission is required to include certification that an order for permission has been made and the date of that order? Please give your reasons.

It would presumably assist the court for a claimant to indicate whether they consider permission will be required. Whether that should be by way of certification should be determined by the Rule Committee as a technical issue in the light of consultation responses.

Question 6: Should an order giving permission be filed with the request to issue a writ or warrant?

This may not be strictly necessary as the court should have a record, but it would make the processing of claims quicker.

Question 7: Do you think that the rules for issue of warrants in the County Court and writs in the High Court should be aligned in respect of permission requirements? Please give your reasons.

In general it is sensible and desirable for rules to be aligned in the County Court and High Court, and in this area claimants move between the County Court and High Court on enforcement matters, increasing the logic of close alignment.

Question 8: Should the rule be modified to make it clear that where permission to issue the relevant writ or warrant is required, an application for permission to issue a relevant writ must be made by way of application under Part 23?

This would be the logical consequence of the modification of the rule, and would offer the clarity that is needed. This would entail claimants having to pay an additional court fee, but this reflects the additional work for the court of processing the application.

We note with concern that in effect this places an additional financial burden on tenants who will already be an economically vulnerable condition (or often in practice to social landlords unable to recover the fees).

Other safeguards for tenants and occupiers - Mortgagee and Rent Possession cases

Question 9: Do you think the current provisions which require a mortgagee to serve notice at the mortgaged property at least 14 days before the date on which eviction is scheduled to take place and, in the case of both mortgagees and tenants, the visit of the bailiff and use of N54 where appropriate provide sufficient protection to the defendant or other occupiers and allow them sufficient opportunity to make an appropriate application to court should they wish to do so?

These are well established practices, but consultation respondents with greater experience of the process will be better placed to advise on their operation.

We would support the visit of the bailiff and the use of form N54 – these do provide some information to tenants on their rights and how they can seek assistance, as well as explaining the process.

Whether this offers sufficient opportunity is another question, residents in these circumstances may be ignoring all correspondence, and not seeking advice or assistance (or be aware of what help may be available).