



Neutral Citation Number: [2020] EWCA Civ 620

Claims numbered: F00HF362 and F00HF363

Case No: B2/2020/0620-1

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON**  
**HH Judge Parfitt**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/05/2020

**Before:**

**SIR GEOFFREY VOS**  
**(Chancellor of the High Court)**  
**LORD JUSTICE UNDERHILL**  
**(Vice-President of the Court of Appeal (Civil Division))**  
and  
**LADY JUSTICE SIMLER**  
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**Claim No: F00HF362**

**Between:**

**MEHMET ARKIN (AS FIXED  
CHARGE RECEIVER OF LODGE FARM)**

**Claimant/Appellant**

**-and-**

**GARY RONALD MARSHALL**

**Defendant/Respondent**

**-and-**

**THE LORD CHANCELLOR**

**Interested Party**

**-and-**

**HOUSING LAW PRACTITIONERS ASSOCIATION**

**Intervener**

**Claim No: F00HF363**

**And Between:**

**GARY RONALD MARSHALL (ACTING BY MEHMET ARKIN AS FIXED  
CHARGE RECEIVER OF THE COTTAGE AND THE BARN)**

**Claimant/Appellant**

-and-

(1) MR BRETT MARSHALL  
(2) KIM BEVERLEY MARSHALL

Defendants/Respondents

-and-

THE LORD CHANCELLOR

Interested Party

-and-

HOUSING LAW PRACTITIONERS ASSOCIATION

Intervener

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Mr Philip Rainey QC and Mr Michael Walsh (instructed by Collyer Bristow LLP) for the  
Appellant

Mr Stephen Knafler QC and Mr Julian Gun Cuninghame (appearing by direct access) for  
the Respondents

Mr Jonathan Auburn (instructed by the Government Legal Department) for the Interested  
Party

Mr Martin Westgate QC and Mr Daniel Clarke (instructed by Edwards Duthie Shamash)  
for the Interveners

Hearing date: 30<sup>th</sup> April 2020

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## Approved Judgment

**Covid-19 Protocol: This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 1pm on 11 May 2020.**

**Sir Geoffrey Vos, Chancellor of the High Court, giving the judgment of the Court:**

INTRODUCTION

1. These two appeals raise issues about the effect of Practice Direction 51Z, “Stay of Possession Proceedings – Coronavirus” (“PD 51Z”), which was made on 26 March 2020 in response to the Covid-19 pandemic and which came into force on the following day, and of the amended version which came into force on 20 April 2020.
2. It is unnecessary to say much about the details of the underlying claims, which relate to adjacent properties at Lodge Farm in Welwyn, Hertfordshire – the main house, which is occupied by Gary and Kim Marshall; the Cottage, which is occupied by their son Brett; and the Barn, which is said to be unoccupied. All three properties are the subject of a mortgage securing a loan to Gary Marshall. The mortgagees assert that sums due under the loan agreement are in arrears and/or that Gary Marshall is in breach of other terms of the agreement. The Appellant was appointed as receiver by the mortgagees. On 24 September 2019 he commenced two sets of possession proceedings in the Hertford County Court against Gary Marshall in F00HF362 and against his son and persons unknown in F00HF363 under Part 55 of the Civil Procedure Rules (“CPR”). Kim Marshall was later substituted as second defendant to F00HF363. The claims are contested. The nature of the issues can be sufficiently seen from the agreed Case Summaries as follows.

In claim number F00HF362, the issues are:

- “1. Does [the Appellant] have a right to possession of the property?
2. Does the [Consumer Credit Act 1974 (“the CCA”)] apply to the loan agreement and, if so, is [the Appellant] a creditor within the meaning of [the CCA]?
3. If the [CCA] does apply to the loan agreement and [the Appellant] is a creditor within the meaning of [the CCA], is the loan agreement unenforceable without a court order for failure to be in the form and content required by s. 60 of the CCA and regulations under that section?
4. If sections 140A to 140C of [the CCA] apply, does the loan agreement give rise to an unfair relationship?
5. Is the loan agreement and/or the legal charge a sham and/or illegal and, if so, what is the effect?”

In claim number F00HF363, the issues are:

- “1. Does the Receiver [the Appellant] have the necessary power to bring these proceedings and take possession of the Properties?
2. If so:

(a) Does D1 [Brett Marshall] have a lifetime licence to occupy The Cottage and, if so, does the lifetime licence take priority over the mortgages so that C is not entitled to possession. Was the lifetime licence properly terminated by the letter dated 16 September 2019?

(b) Is D2 [Kim Marshall] in occupation of The Barn and, if she is, does she have a beneficial interest in The Barn which would take priority over the mortgages so that C is not entitled to a possession order?"

3. The claims were allocated to the multi-track and transferred to the Central London County Court. A case management conference was listed before HHJ Parfitt on 26 March 2020. It did not in fact take place, for reasons into which it is unnecessary to go, but the parties were able to agree directions on that day. Those directions were incorporated in an order sealed by Judge Parfitt on 27 March 2020 – the day that PD 51Z came into force. They required various procedural steps including disclosure by 1 May 2020, inspection by 15 May 2020 and exchange of witness statements by 26 June 2020. The trial window was between 5 October 2020 and 8 January 2021. There was provision for a telephone listing appointment, on a date to be notified to the parties in due course.
4. PD 51Z was issued, as the 117<sup>th</sup> Practice Direction Update, on, as we have said, 26 March 2020. It was made by the Master of the Rolls, with the approval of the Lord Chancellor. It reads:

“This Practice Direction supplements Part 51

1. This practice direction is made under rule 51.2 of the [CPR]. It is intended to assess modifications to the rules and Practice Directions that may be necessary during the Coronavirus pandemic and the need to ensure that the administration of justice, including the enforcement of orders, is carried out so as not to endanger public health. As such it makes provision to stay proceedings for, and to enforce, possession. It ceases to have effect on 30 October 2020.

2. All proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by a warrant or writ of possession are stayed for a period of 90 days from the date this Direction comes into force.

3. For the avoidance of doubt, claims for injunctive relief are not subject to the stay in paragraph 2”.

It should be noted, because it is fundamental to the issues which follow, that the Practice Direction purports to be made under powers conferred by rule 51.2 of the CPR.

5. The Respondents took the view that the effect of paragraph 2 of PD 51Z was to discharge the parties of the obligation to take any of the steps required by the agreed directions within the 90-day period, and also that the listing appointment would not

occur during that period. The Appellant did not accept that the stay applied to the proceedings at all, but he contended that if it did it could and should be lifted.

6. By agreement between the parties that issue was determined by Judge Parfitt on the basis of written submissions from counsel – Mr Michael Walsh for the Appellant and Mr Julian Gun Cuninghame for the Respondents. By a clear and succinct judgment handed down on 15 April 2020 he held that the proceedings were stayed and that he had no power to lift the stay. By paragraph 4 of his order he pushed back the dates for the directions that had been agreed to corresponding dates after the lifting of the stay. In particular, he ordered that the telephone listing appointment be listed for the first open date after that date.
7. This is an appeal against that decision. Normally such an appeal would lie to the High Court, but by an order dated 15 April 2020 Kerr J granted permission to appeal and transferred the appeal to this Court pursuant to CPR Part 52.23.
8. The Receiver’s grounds of appeal read as follows:
  - “1. Practice Direction 51Z was made *ultra vires*.
  2. Alternatively, the learned judge was wrong to find that [PD 51Z] was intended to apply to all proceedings under Part 55, even if they had proceeded past the stage of being allocated to the multi-track and had been given case management directions.
  3. The learned judge was wrong to decide that the court had no power to lift the stay on a case-by-case basis.”

The challenge to the *vires* of PD 51Z advanced in ground 1 was not raised below and there is an issue whether such a challenge can be raised otherwise than by way of judicial review.

9. The Lord Chancellor applied for permission to intervene in the appeal. We have granted permission, though in the event it seems to us that he is more properly to be regarded as an interested party because of the challenge to the *vires* of the PD 51Z. Permission has also been granted to the Housing Law Practitioners Association (“HLP A”) to intervene by way of written submissions.
10. The Appellant has been represented by Mr Philip Rainey QC, leading Mr Walsh, the Defendants by Mr Stephen Knafler QC, leading Mr Gun Cuninghame, and the Lord Chancellor by Mr Jonathan Auburn. HLP A’s written submissions were settled by Mr Martin Westgate QC and Mr Daniel Clarke.
11. As noted at paragraph 1 above, with effect from 20 April 2020 PD 51Z was amended by the addition of a paragraph 2A, which reads:

“Paragraph 2 does not apply to—

- (a) a claim against trespassers to which rule 55.6 applies;
- (b) an application for an interim possession order under Section III of Part 55, including the making of such an

order, the hearing required by rule 55.25(4), and any application made under rule 55.28(1); or

- (c) an application for case management directions which are agreed by all the parties”.

Paragraph 2 was consequentially amended so as to start with the words “subject to paragraph 2A”, and the words “and the fact that a claim to which paragraph 2 applies will be stayed does not preclude the issue of such a claim” were added at the end of paragraph 3.

12. The issues raised by the grounds of appeal, as developed in the submissions before us, can be analysed as follows:
- (1) Does this court have jurisdiction to consider the *vires* of PD 51Z, and should it do so?
  - (2) If so:
    - (a) Was the making of PD 51Z properly authorised by CPR Part 51.2 as a pilot scheme “for assessing the use of new practices and procedures in connection with proceedings”?
    - (b) Is PD 51Z inconsistent with or rendered unlawful by the provisions of the Coronavirus Act 2020?
    - (c) Is PD 51Z inconsistent with article 6 of the European Convention on Human Rights or the principle of access to justice?
  - (3) Does PD 51Z apply to cases allocated to the multi-track in which case management directions had been given before it was introduced?
  - (4) Does the court have jurisdiction to lift the stay imposed by paragraph 2 of PD 51Z?
  - (5) If so, should the Judge have lifted the stay in this case?

#### ISSUE 1: SHOULD THE VIRES CHALLENGE BE CONSIDERED?

13. Mr Knafler submitted that the Appellant should not be permitted in this appeal to raise a challenge to the *vires* of PD 51Z, both because it had not been raised below and, more fundamentally, because it should have been advanced by way of judicial review. As to the latter point, he referred, unsurprisingly, to *O’Reilly v. Mackman* [1983] 2 AC 237. The challenge was to very recent legislation of considerable public importance. If it were to be challenged, that both could and should have been done head-on by distinct proceedings in the High Court under CPR Part 54 against the persons responsible for that legislation. By seeking to raise the point in the way that he had the Appellant was circumventing a number of important procedural steps. If he had proceeded under CPR Part 54 he would have had to obtain permission to apply for judicial review. The Master of the Rolls and the Lord Chancellor would have been parties, indeed the primary defendants, from the start: they would have pleaded a proper response and given appropriate disclosure. This court would have had the benefit of a reasoned judgment

of the High Court. Mr Auburn supported that submission. Although the Lord Chancellor was now a party (and, he acknowledged, appropriately represented the Master of the Rolls), that had occurred only at the last minute. He had had to take instructions and file written submissions on an extremely abbreviated time-scale, with very limited time for reflection and no opportunity to adduce evidence – or indeed, a point which Mr Auburn properly emphasised, for those advising the Lord Chancellor to ensure that they had satisfied their duty of candour to the court.

14. Those points were well made, but we do not believe that they should prevail in the very particular circumstances of this appeal.
15. The starting point is that it is acknowledged in *O' Reilly v. Mackman* itself, and has been illustrated in a string of cases since *Wandsworth London Borough Council v. Winder* [1985] AC 461, that there are circumstances in which considerations of justice and pragmatism may make it appropriate for a public law challenge – including a challenge to the validity of secondary legislation – to be determined in the context of private law proceedings. This was accepted by both Mr Knafler and Mr Auburn, who both proceeded on the basis that the essential question was whether the Appellant's failure in the circumstances of the present case to follow what would normally be the appropriate procedure constituted an abuse of the court's process. We do not believe that it is necessary to embark on any general analysis of the case-law.
16. No doubt in a perfect world those advising the Appellant would have identified from the start the possibility of a *vires* challenge. It is fair to say, however, that their failure to do so was venial. PD 51Z, so to speak, came out of nowhere, and they had to prepare submissions as a matter of urgency in a novel situation. If the point had occurred to them, a case might still have been made that the issue could have been properly determined in the existing County Court proceedings. Those were private law proceedings into which the issues raised by the PD 51Z had been unexpectedly thrust; and the challenge to its validity was in that sense entirely collateral. Nor were the issues which it raised exclusively of a public law character: on the contrary, there were questions as to the scope and meaning of PD 51Z as well as in relation to its validity, and there was indeed a degree of overlap between those issues. Having said all that the correct course would probably still have been to seek a stay or transfer of the County Court proceedings so that the *vires* challenge could be raised by judicial review, albeit with some creative case management so as to ensure that all the issues were heard in the same forum.
17. However, in the circumstances of this case the Appellant's failure to take that course has not produced any real unfairness nor created any insuperable difficulty for this court. It is inevitable that permission to apply for judicial review would have been granted, so the Appellant has not stolen a procedural march. The Lord Chancellor is now, however belatedly, a party: indeed the clarity and comprehensiveness of Mr Auburn's submissions somewhat undermined his reliance on the difficulties caused by the late joinder. He has, it is true, not had the opportunity to put in evidence (though he has, very properly, disclosed two internal documents preceding the making of the Practice Direction); but the issues are not of a kind on which evidence, or factual findings at first instance, is essential. Taken with the other circumstances of the case referred to in the previous paragraph, those points might or might not be sufficient to justify our entertaining the issue, but what is in our view conclusive is that there is a strong public interest in an early and authoritative ruling as to the validity of PD 51Z.

Having had full argument on that issue we believe that we are in a position to give such a ruling despite the imperfections in the procedural history, and we should do so.

18. We should emphasise that the circumstances of the present case are unusual. We should not be taken to be endorsing any departure from previous case-law about the circumstances in which a challenge of this kind can be raised otherwise than by way of judicial review.

ISSUE 2 (a): WAS PD 51Z PROPERLY AUTHORISED AS A PILOT SCHEME?

19. In opening his case on the *vires* of PD 51Z, Mr Rainey said that the question was whether there was the power to make it under CPR Part 51.2. That, he said, was “the beginning and the end of it”.
20. CPR Part 51.2 provides as follows

“Practice directions may modify or disapply any provision of these rules –

  - (a) for specified periods; and
  - (b) in relation to proceedings in specified courts,

during the operation of pilot schemes for assessing the use of new practices and procedures in connection with proceedings”.
21. The fundamental question, therefore, is whether there is any scheme or any “new practices and procedures” for which PD 51Z can properly be said to facilitate assessment. The Appellant submits that there is no such scheme and that PD 51Z is not properly to be regarded as a pilot at all. The Respondents and the Lord Chancellor submit that PD 51Z is a pilot for future practices and procedures that may be introduced to deal with the continuing problems caused by Covid-19 or other pandemics or in other emergencies. They submit that the Master of the Rolls may well wish, on the basis of experience gained as a result of PD 51Z, to make a permanent rule providing for similar stays, or other measures, to be imposed in future crises.
22. In our judgment, the starting point for the analysis is paragraph 1 of PD 51Z itself, which provides that it “is intended to assess modifications to the rules and [PDs] that may be necessary during the Coronavirus pandemic and the need to ensure that the administration of justice, including the enforcement of orders, is carried out so as not to endanger public health”.
23. We have received no other evidence about the purpose of PD 51Z. In those circumstances, we accord due weight to what the Master of the Rolls has said on its face that PD 51Z is intended to achieve. It is first said to be intended to assess modifications to the rules and PDs that may be necessary during the Coronavirus pandemic. It was not suggested that the pandemic was likely to have concluded by 25 June 2020, which is the last day of the 90-day period of stay imposed by paragraph 2. In those circumstances, it may reasonably be assumed that the intention was to assess future modifications that might need to be made to the CPR during an epidemic that might last months or even years.



24. Secondly, PD 51Z states on its face that it is intended to assess the need to ensure that the administration of justice, including the enforcement of orders, is carried out so as not to endanger public health. The meaning of that language is plain. A stay of possession proceedings is being trialled in order to assess whether it is effective to ensure that the administration of justice, specifically the ongoing conduct of possession proceedings in a pandemic, and the enforcement of possession orders in a pandemic, does not endanger public health.
25. Before one comes to consider the nature of the stay that has been imposed, we take the clear view that the pilot nature of PD 51Z is plain from its first paragraph. We can see no reason why it is not reasonable to envisage that the stay imposed by paragraph 2 may be shown to be effective: (a) to relieve pressures on the administration of justice during the pandemic, (b) to reduce the risks of spreading the virus occasioned by enforcing possession orders and thereby forcing citizens to move home rather than stay at home as the Government has advised, and/or (c) to abrogate court hearings, whether remotely or face to face, in possession proceedings, thereby avoiding the need for court staff and litigating parties to risk transmission of the virus. Once that has been assessed, we cannot see why it may not be appropriate for the Master of the Rolls to consider putting in place a permanent rule or PD that imposes a limited stay on possession proceedings when and if the pandemic peaks again.
26. The Appellant submitted that PD 51Z could not be a pilot because, amongst other things, it restricts access to justice and excludes the courts' management powers. We think these points are better dealt with as discrete issues below. But we can say at once that the submission is a *non sequitur*. The pilot may be objectionable on the grounds contended for. But those grounds do not impact on whether or not it is properly to be regarded as a pilot. For the reasons we have given, we think it is.

#### ISSUE 2 (b): THE CORONAVIRUS ACT 2020

27. The Appellant's basic submission here is that sections 81-2 and schedule 29 of the Coronavirus Act 2020, which came into force after PD 51Z, are inconsistent with it. Paragraph 2(3) of schedule 29 includes a new requirement in the Rent Act 1977 to serve three months' notice of intention to commence proceedings against statutory tenants, and the new section 3(4B) gives landlords a right to apply to the court to dispense with the new notice requirement if the court considers it "just and equitable to do so". It is submitted that PD 51Z renders that right nugatory, because any proceedings commenced to resolve such an issue would be stayed immediately. The Appellant gives other examples.
28. In our judgment, these submissions are not well founded. Imposing notice requirements and giving power to lift them are one thing; a blanket stay of all possession proceedings is another. They are not inconsistent. The Coronavirus Act 2020 will last for two years (subject to extensions), but the pilot stay only lasts for 90 days. It is true that some of the provisions of schedule 29 will have greater significance once the pilot stay comes to an end, but the argument that the Coronavirus Act 2020 renders PD 51Z unlawful is not tenable. There is simply no conflict between them. They make separate and different provisions. The Act changes the substantive law, and PD 51Z imposes a temporary stay to protect and manage County Court capacity, and to ensure the effective administration of justice without endangering public health during a peak phase of the pandemic.

ISSUE 2 (c): ARTICLE 6 AND THE PRINCIPLE OF ACCESS TO JUSTICE

29. The applicable law under this issue was common ground. Article 6 of the European Convention on Human Rights and Fundamental Freedoms provides that “[i]n the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...”.
30. The UK Supreme Court made it clear in *R (Unison) v. Lord Chancellor* [2017] UKSC 51, [2017] ICR 1037, that a piece of delegated legislation would be *ultra vires* if there were “a real risk that persons will effectively be prevented from having access to justice” (per Lord Reed at [87]). He also said at [78] that “impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible. More recent authorities make it clear that any hindrance or impediment by the executive requires clear authorisation by Parliament” and that “[t]he court’s approach in these cases was to ask itself whether the impediment or hindrance in question had been clearly authorised by primary legislation” [79], and that “[e]ven where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question” [80].
31. In *Al-Rawi v. Security Service* [2011] UKSC 34, [2012] 1 AC 531, Lord Dyson said at [22] that “[t]he basic rule is that (subject to certain established and limited exceptions) the court cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice”. Lord Hope at [72] said: “I have always believed that a court of unlimited jurisdiction is the master of its own procedure. But that does not mean that the court can do what it likes. Everything that it does must have regard to the fundamental principles of open justice and of fairness. The principle of legality demands nothing less than that”.
32. On the other hand, it is also common ground that, in assessing whether legal proceedings have been unreasonably delayed, the European Court of Human Rights takes into account all the circumstances of the case, so that court delays are normally viewed as compatible with Article 6 unless they are extreme (see, for example, *Buchholz v. Germany* (7759/77, 6 May 1991) at [49]-[51]).
33. In our judgment, the short delay to possession litigation enshrined in PD 51Z is amply justified by the exceptional circumstances of the coronavirus pandemic. As paragraph 1 makes clear, there is a need to ensure that neither the administration of justice nor the enforcement of possession orders endanger public health by the unnecessary transmission of the virus. PD 51Z creates no risk that persons will “effectively be prevented from having access to justice”. Moreover, it was not seriously suggested that PD 51Z did not have the clear authorisation of Parliament, provided, of course, CPR Part 51.2 was properly applicable to it, as we have held it is. CPR Part 51.2 is authorised by primary legislation in the form of Part 1 of Schedule 2 to the Constitutional Reform Act 2005 and section 5 of the Civil Procedure Act 1997.
34. In the circumstances, we reject the Appellant’s submission that PD 51Z is incompatible with either Article 6 or the fundamental principle of access to justice.

ISSUE 3: DOES PD 51Z APPLY TO CASES ALLOCATED TO THE MULTI-TRACK IN WHICH CASE MANAGEMENT DIRECTIONS HAD BEEN GIVEN BEFORE IT WAS INTRODUCED?

35. This issue was not really pursued in the light of the amendment to PD 51Z which provided by paragraph 2A(c) that paragraph 2 was not to apply to an application for agreed case management directions.

ISSUE 4: DOES THE COURT HAVE JURISDICTION TO LIFT THE STAY?

36. It is useful, in considering this question, to recite the amended PD 51Z as follows:-

“This Practice Direction supplements Part 51

1. This practice direction is made under rule 51.2 of the [CPR]. It is intended to assess modifications to the rules and [PDs] that may be necessary during the Coronavirus pandemic and the need to ensure that the administration of justice, including the enforcement of orders, is carried out so as not to endanger public health. As such it makes provision to stay proceedings for, and to enforce, possession. It ceases to have effect on 30 October 2020.
  2. Subject to paragraph 2A, all proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by a warrant or writ of possession are stayed for a period of 90 days from the date this Direction comes into force
  - 2A. Paragraph 2 does not apply to-
    - (a) A claim against trespassers, to which rule 55.6 applies;
    - (b) An application for an interim possession order under section III of Part 55, including the making of such an order, the hearing required by rule 55.25(4), and any application made under rule 55.28(1); or
    - (c) An application for case management directions which are agreed by all the parties.
  3. For the avoidance of doubt, claims for injunctive relief are not subject to the stay in paragraph 2, and the fact that a claim to which paragraph 2 applies will be stayed does not preclude the issue of such a claim”.
37. The Appellant made two main submissions under this head. First, he submitted that paragraph 2A(c) was to be construed as meaning that any case management directions agreed by the parties should be carried into effect notwithstanding the stay. Secondly, he submitted that the court must have a general discretion to lift the stay imposed by paragraph 2 taking into account: (a) the impossibility of implicitly disapplying CPR Part 3.1(1) and (2)(f) and section 49(3) of the Senior Courts Act 1981, (b) the cases that

show that other pilot schemes have been disapplied in particular cases, and (c) the fact that, if the parties can agree to disapply the stay by agreeing directions, the court must be able to do so too.

38. The construction point is easily dealt with. In our view when paragraph 2A(c) says that paragraph 2 does not apply to “an application for” agreed case management directions, it means what it says – that is, that if the parties agree directions, they can apply to the court to have the directions in question embodied in an order. Mr Rainey submitted that that would be an empty right if the agreed directions themselves remained subject to the stay, and that the provision should be construed as lifting the stay so far as agreed directions are concerned. We do not agree. In the first place, that is not what paragraph 2A(c) says. Secondly, giving the words used their literal meaning does not produce an empty result. There is an obvious value in the parties agreeing, and obtaining the court’s endorsement of, directions which will take effect on a date or dates post-dating the end of the stay: they will come out of the end of the stay with an already-established timetable, and avoid a potential rush to make applications immediately the stay is lifted. Thirdly, there is also value in the parties agreeing, and obtaining the court’s endorsement of, directions which take effect during the stay albeit they cannot be enforced during its currency: we see no reason why parties cannot for example, get on with agreed directions for disclosure on a voluntary basis during the stay, and thereafter, seek to adjust any post-stay case management timetable by reference to steps agreed to be taken during the period of the stay. Fourthly, if Mr Rainey’s construction were to be of value parties would presumably have to be entitled to apply to the court during the currency of the stay if the agreed directions were not complied with; but that is precisely the kind of activity which the stay is evidently intended to prevent. Finally, as to the construction of paragraph 2A(c), we note that the drafters could easily have said that “paragraph 2 does not apply to case management directions agreed by the parties”, but they did not do so. The carve out, as drafted, is obviously directed at allowing the court to embody agreed directions in a court order notwithstanding the stay, and nothing more.
39. As to the power to lift the stay, CPR Part 3.1 sets out the court’s general powers of case management. Part 3.1(1) provides that “[t]he list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have”. CPR Part 3.1(2)(f) provides that “[e]xcept where these Rules provide otherwise, the court may... (f) stay the whole or part of any proceedings or judgment either generally or until a specified date or event”. Section 49(3) of the 1981 Act provides that “[n]othing in this Act shall affect the power of the Court of Appeal or the High Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings”. The power to impose a stay necessarily includes the power to lift it.
40. The Appellant placed particular reliance on *Bovale v. Secretary of State for Communities and Local Government* [2009] EWCA Civ 171, [2009] 1 WLR 2274, where the Court of Appeal held that a judge had wide powers in an individual case to depart from the CPR and PDs in the exercise of general case management powers and to further the overriding objective (Waller and Dyson LJJ at [24]). Nonetheless, it also held that the wide powers in CPR Part 3.1 could not “be construed ... as giving the power to individual judges or any court simply to vary the rules or practice directions

generally” [26]. Waller and Dyson LJJ added that “[t]here are powers under the rules ... to apply case management powers in particular cases but otherwise practice directions must ... be binding on the court to which they are directed”, and “it cannot be open to [a judge] to ignore that practice direction or to suggest in a judgment that a practice direction should no longer be followed in that court” [28].

41. The Appellant pointed to *White Winston Select Asset Funds LLC v. Mahon* [2019] EWHC 1014 (Ch), where the deputy judge decided that he had power to depart in a particular respect from the disclosure pilot in PD 51U. We would not want to be thought to be approving that decision, not having heard full argument on the point.<sup>1</sup> The Appellant also relied on the absence of any express indication that the stay in PD 51Z could not be lifted on appropriate grounds.
42. In our view PD 51Z cannot be read as formally excluding the operation of CPR 3.1. As a matter of strict jurisdiction, therefore, a judge retains the power to lift the stay which it imposes. But the proper exercise of that power is informed by the nature of the stay and the purposes for which it was evidently imposed. PD 51Z imposes a general stay on proceedings of the kind to which it applies, initially subject to no qualification at all, and subsequently qualified only in the limited and specific respects provided for in paragraph 2A. The purpose was that during the 90-day period the burden on judges and staff in the County Court of having to deal with possession proceedings, which are an immense part of its workload, would be lifted, and also that the risk to public health of proceeding with evictions would be avoided. That purpose is of its nature blanket in character and does not allow for distinctions between cases where the stay may operate more or less harshly on (typically) the claimant. It would be fatally undermined if parties affected by the stay were entitled to rely on their particular circumstances – however special they might be said to be – as the basis on which the stay should be lifted in their particular case. Thus, while we would not go so far as to say that there could be no circumstances in which it would be proper for a judge to order that the stay imposed by PD 51Z should be lifted in a particular case, we have great difficulty in envisaging such a case. The only possible such case canvassed before us was where the stay would operate in such a way as to defeat the purposes of PD 51Z and endanger public health. The decision of Judge Freedman in *Bernicia Group v. Mark Mann* (17 April 2020; D4PP284A; County Court at Newcastle) may have been of that character, but we do not know enough about the circumstances of the case to say so definitively.
43. The fact that there is no express inhibition on lifting the stay takes the matter no further. In our judgment, the Master of the Rolls must be taken to have been fully cognisant of the wide case management powers we have mentioned. The stay is nonetheless unconditional. The fact that the parties are permitted to agree case management directions in the way we have mentioned neither itself involves a lifting of the stay, nor points to a general power in the court to lift the stay.
44. It follows that we do not think that any normal case management reasons could be enough to justify an individual judge lifting the stay imposed by PD 51Z. The reasons for it make it clear that they go far beyond any individual relationship of landlord and tenant or mortgagee and mortgagor. The blanket stay has been imposed to protect

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<sup>1</sup> The Appellant also referred to *Ventra Investments Ltd v. Bank of Scotland Plc* [2019] EWHC 2058 (Comm) at [36]-[40]. Both decisions must be read subject to the decision of the Chancellor in *UTB LLC v. Sheffield United Ltd & Ors* [2019] EWHC 914 (Ch) as to the applicability of the disclosure pilot.

public health and the administration of justice generally. The approach of a blanket stay reflects the balance struck by the Master of the Rolls, and makes clear that possession claims are not to be dealt with on a normal case by case basis during the stay. We would strongly deprecate parties troubling the court with applications that are based only on such reasons and which are in truth bound to fail.

45. Of course it remains possible, if the Practice Direction can be shown to be operating unfairly in a particular class of case, for interested persons to make representations to the Master of the Rolls asking him to make a further amendment to PD 51Z. We were told that it was representations by the Property Bar Association and the Property Litigation Association which led to the amendment in April 2020.
46. We would, in these circumstances, hold that, although 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. We do not, however, rule out that there might be the most exceptional circumstances in which such a stay could be lifted, in particular if it operated to defeat the expressed purposes of PD 51Z itself.

#### ISSUE 5: SHOULD THE JUDGE HAVE LIFTED THE STAY IN THIS CASE?

47. The Appellant's main point here is that the directions were agreed before PD 51Z came into force, and then on 20 April 2020, after the stay had been in place for some three weeks, the new paragraph 2A(c) was introduced, apparently validating agreed directions. Against that background, the Appellant understandably submits that the Respondents should be held to what they agreed.
48. All that said, however, the question here is not whether it would be desirable for the Respondents to comply with the directions they agreed. It is whether the case meets the standard of exceptionality which we have just explained.
49. In our judgment, the circumstances of this case do not allow the court to lift the stay imposed by PD 51Z.
50. The fact that the parties agreed directions before PD 51Z came into force does not point towards the need to lift the stay. The parties are capable of complying with the directions they agreed whether or not the stay is lifted. The stay simply means that neither party will be able to apply to the court to enforce compliance with the agreed directions whilst it remains in place. If either party fails to do what it agreed to do during the period of the stay, the other party will, no doubt, be able to rely on that circumstance once the stay is lifted. It will be able to ask the court, at that stage, to take the conduct of the other party into account in making revised directions. A party to a claim that has been stayed under PD 51Z cannot, however, as we have said, apply to the court to enforce compliance with agreed directions, even if those directions have been made under the express exclusion in paragraph 2A(c).
51. We were referred in this connection to a passage in the judgment of Coulson LJ in *David Grant v. Dawn Meats UK* [2018] EWCA Civ 2212 at [18], where he said that "a stay operates to 'halt' or 'freeze' the proceedings. In general terms, no steps in the action, by either side, are required or permitted during the period of the stay. When the stay is lifted, or the stay expires, the position as between the parties should be the same as it was at the moment that the stay was imposed. The parties (and the court) pick up

where they left off at the time of the imposition of the stay”. We agree with all that Coulson LJ said there, save that we think that it may be going too far to say that the parties to a stayed action are not *permitted* to take any steps at all. In the circumstances envisaged by PD 51Z, at least, the parties would certainly be at liberty to undertake any steps they agreed, when an order has been made pursuant to paragraph 2A(c).

52. That deals with the point of substance. There is, however, a further procedural point. The judge made his order on 15 April 2020 (before PD 51Z was amended) postponing the agreed directions until after the expiry of the stay. What the judge did by paragraph 4 of his order on 15 April 2020 (before PD 51Z was amended) was positively to postpone the agreed directions until after the expiry of the stay. We think that at that stage he should not have done so, because he should not have countenanced any application at all in contradiction of the stay. He should simply have dismissed the application for a declaration and to lift the stay. The parties had, at that stage, to wait until the end of the stay to make any application to the court, because there was no paragraph 2A(c) in force. Had the parties applied for agreed case management directions after paragraph 2A(c) came into force, the judge could have made them, even if they envisaged steps being taken by agreement during the stay. But, in the absence of agreement, no directions could or should be made.
53. The Appellant was particularly concerned that the telephone listing appointment should take place before the stay ends. He submitted that otherwise the trial will be that much delayed, whilst cases of other types take precedence. We are afraid to say that that is a natural and intended consequence of the stay imposed by PD 51Z. The judge should not even have made the directions in paragraph 4 of his order, to which we already have referred, even if they were agreed, because paragraph 2A(c) was not then in force. In point of fact, however, it is not quite clear from his judgment whether paragraph 4 of the order was agreed. Judge Parfitt ends his judgment by saying: “I will make an order moving the [telephone listing appointment] for the trial to after the stay is over and also assist by pushing back the start of the existing trial window by 4 weeks. I would ask Counsel please to draft an appropriate order”. Insofar as these directions can now be agreed, we would be prepared to allow them to remain in place under paragraph 2A(c). If they are not now agreed, paragraph 4 of the judge’s order must be deleted.

## CONCLUSIONS

54. For the reasons we have given, we will dismiss the appeal, save that paragraph 4 of the judge’s order making postponed directions will be deleted insofar as it cannot now be agreed.