Neutral Citation Number: [2020] EWCA Civ 833

Appeal No: A3/2019/2049

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
PROPERTY, TRUSTS AND PROBATE LIST
HHJ DAVIS-WHITE QC sitting as a deputy judge of the High Court

Royal Courts of Justice
The Rolls Building
London, EC4A 1NL

Date: 02/07/2020

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LADY JUSTICE ASPLIN
and
LORD JUSTICE ARNOLD

Claim No. PT-2017-00099

B E T W E E N:

TFS STORES LIMITED

Claimant/Appellant/Tenant

and

(1) THE DESIGNER RETAIL OUTLET CENTRES (MANSFIELD) GENERAL PARTNER LIMITED
(2) BRITISH OVERSEAS BANK NOMINEES LIMITED
(3) WGTC NOMINEES LIMITED

Defendants/Respondents/Landlords

Claim No.PT-2018-000035

AND BETWEEN:

BMG (ASHFORD) LIMITED
UK OM (LP2) (GP) LIMITED
UK OM (LP2) LIMITED
THE DESIGNER RETAIL OUTLET CENTRES (YORK) GENERAL PARTNER LIMITED

UK OM (LP3) (GP) LIMITED
UK (OM) (LP3) LIMITED

Claimants/Respondents/Landlords

and

TFS STORES LIMITED

Defendant/Appellant/Tenant

Ms Joanne Wicks QC and **Mr Mark Galtrey** (instructed by **DLA Piper**) for the **Appellants/Tenants**

Mr Wayne Clark and **Mr Joseph Ollech** (instructed by **Shoosmiths LLP**) for the **Respondents/Landlords**

Hearing date: 24 June 2020

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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 14:00pm on 02 July 2020.

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. This is the third in a rapid succession of Court of Appeal cases concerning the effect of the automatic stay imposed by Practice Direction 51Z ("PD 51Z"), which originally came into force on 27 March 2020, and was amended with effect from 20 April 2020. The first was *Arkin v. Marshall* [2020] EWCA Civ 620 ("*Arkin*"), in which the court gave judgment on 11 May 2020. The second was *London Borough of Hackney v. Okoro* [2020] EWCA Civ. 681 ("*Okoro*"), in which judgment was delivered on 27 May 2020. This case was listed for the hearing of the substantive appeal just 4 weeks later on 24 June 2020.

2. Coincidentally, the stay imposed by PD 51Z was due to expire on 25 June 2020, the second day of the hearing. But the Civil Procedure (Amendment No. 2) (Coronavirus) Rules 2020 (the "2020 Rules") introduced a new CPR Part 55.29, which extended the stay from its expiry until 23 August 2020.

3. The substantive appeal listed before us was an appeal against an order made by HHJ Davis-White QC sealed on 18 July 2019 (the "Order") in two actions concerning 6 separate tenancies. The tenant is the same for each, but the landlords are different. The judge declared that the 6 leases in issue in the two actions were properly and lawfully excluded from the protections in sections 24-28 of the Landlord and Tenant Act 1954 (the "1954 Act"), and made possession orders against the tenant of two properties in the first action numbered PT-2017-000099 (the "first action"), and against the tenant in respect of 3 of the 4 properties in the second action numbered PT-2018-000035 (the "second action"). The tenant trades as the Fragrance Shop from each of the premises in question, though it has, of course, not been able to do so for much of the period of lockdown. The detailed background can be seen from the judge's judgment at [2019] EWHC 1363 (Ch).

4. The form of each of the two actions is important to what we have to decide.

5. The tenant issued the first action on 3 November 2017 claiming a declaration that the tenancies had not been validly excluded from the protection of the 1954 Act, and an injunction preventing the landlord from taking possession. The landlords counter-claimed for possession in the first action.

6. The landlords issued the second action on 11 January 2018 claiming a declaration that the tenancies were not protected by the 1954 Act, rather than possession because the terms had not then expired. By the time of the judge's judgment, however, the terms of three of the four tenancies had expired, and the parties agreed thereafter that there should be orders for possession to give effect to the decision that the judge had made. The landlords' claim was, however, never formally amended to claim possession.

7. Arnold LJ granted the appellant tenant in both actions permission to appeal from the judge's decision on 8 November 2019.

8. Against this background, the tenant first applied by letter dated 26 May 2020 to adjourn the hearing of the appeal fixed to commence on 24 June 2020 on the grounds of hardship

caused by the Covid-19 pandemic. After the decision in *Okoro*, the tenant wrote again on 29 May 2020 contending that the appeal was automatically stayed under PD 51Z.

9. On 10 June 2020, Lewison LJ refused the tenant's applications on paper for the following reasons:-

> "I do not consider that the automatic stay under PD51Z applies to this appeal. [PD 51Z] is restricted to "proceedings for possession brought under CPR Part 55". [*Okoro*] decides that "proceedings brought under CPR Part 55" includes appeals, but does not otherwise expand the scope of [PD 51Z]. The court emphasised that what was important was how the proceedings were initiated. According to the report of [HHJ Davis-White's decision in this case] the claim was brought by Part 7 claim: not under Part 55. If, as is suggested the possession claim was made by way of counterclaim, that would not have required separate initiation under Part 55.
>
> The guidance given by the CA in *Re Children (Remote Hearing: Care and Placement Orders)* [[2020] EWCA Civ 583] was principally concerned with [a] hearing at which evidence would be given. In the present case (a) there will be no evidence (b) the parties are legally represented (c) the hearing is not a long one (d) there is adequate technology to enable the parties to attend remotely if they wish to, although their attendance is not required (d) if the press wish to attend they can do so remotely (e) the court is now used to conducting appeals remotely (f) preparation for the hearing is at an advanced stage (g) it appears that the stores will be reopening (or at least be permitted to reopen) from 15 June (h) there is significant prejudice to the landlord in further delay (i) the hearing date was listed in December 2019; lockdown has been in place for nearly three months, yet this application has only just been made (j) if the adjournment were granted the hearing date would be lost; there would be inadequate time to replace it in the court list and there may be significant further delay in relisting".

10. The tenant submits that Lewison LJ was wrong to hold that PD 51Z did not apply to these appeals. If the court accepted that submission, Ms Joanne Wicks QC, leading counsel for the tenant (leading Mr Mark Galtrey), contended that the court should not lift the stay so as to enable the substantive appeals to proceed. She relied, in particular, on *Arkin* at [42] where the court had said:-

> "In our view PD 51Z cannot be read as formally excluding the operation of CPR [Part] 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".

11. Mr Wayne Clark (leading Mr Joseph Ollech), counsel for the respondent landlords, relied on [25] in *Okoro* where the court said this:-

> "In our judgment, however, the words of paragraph 2 of PD 51Z are broader than Mr Paget submitted. They stay "all proceedings for possession **brought** under CPR Part 55". We have emphasised the word "brought", because it focuses on how the proceedings were initiated. As a matter of ordinary language, we think that proceedings brought under CPR Part 55 are still "brought under CPR Part 55", even when they are under appeal. It is true that the procedure governing the appeal is contained in CPR Part 52, but the proceedings remain proceedings brought under CPR Part 55".

His point was that neither action was "brought" under CPR Part 55. The first action was an action by the tenants for a declaration as to the application of the 1954 Act, with a free-standing counterclaim for possession. CPR Part 20.3(1) provided that "[a]n additional claim shall be treated as if it were a claim for the purposes of these Rules …". The second action was a claim by the landlord for declarations only. The proceedings were never amended to claim possession, even if the parties agreed that such an order should be made to give effect to the judgment. Delay would prejudice the landlords. The enforcement of any possession order would obviously await the end of the stay in any event. If a stay were in place in one case and not the other, the landlords accepted that it was preferable to stay both so that they were determined together. In the course of argument, Arnold LJ suggested that, on any basis, the tenant's claim in the first action was not stayed, so that could proceed alone to determine the substantive issue on whether the leases were protected by the 1954 Act without lifting the stay on any claim for possession at all. The landlords adopted that approach.

12. In addition, the landlords pointed to a nuanced change to the purpose of the stay from PD 51Z, which was issued with a view to the pandemic peaking, to the 2020 Rules, which was issued as it was waning.

13. The purpose of the 2020 Rules appears from various paragraphs of its Explanatory Statement. Most importantly for our purposes, paragraph 13 deals with "regulating small business" making clear that "[t]he legislation applies to activities that may be undertaken by small businesses as landlords or tenants", and that "[t]he policy intention is to extend the stay on possession proceedings and the Ministry acknowledges that this may act to the detriment of some small businesses and to the advantage of others". Paragraph 7.1 points to concern that the expiry of the original stay "may lead to an increase in possession cases which could result in increased homelessness at a time of continuing lockdown and public health risk". It explains that "[u]rgent collaborative work is being undertaken to agree arrangements to manage carefully the eventual resumption of possession cases in the courts and the resulting potential for eviction". Paragraph 12.3 makes clear that it was understood that "[t]he extended stay on possession proceedings will have an impact on landlords who are unable to pursue proceedings for eviction". It says that: "given the wider circumstances of the public health implications of Covid-19 and the need to prevent homelessness, and the arrangements that have been put in place to support the rented sector, the government believes that an extension is a necessary and proportionate response".

The provisions of PD 51Z

14. PD 51Z, as amended, is in the following terms:-

> "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".

15. As I have said, the stay under PD 51Z expired on 25 June 2020, but the 2020 Rules extended it until 23 August 2020.

The issues

16. Against this background, it seems to me that this court has to address three issues:-

i) Does the automatic stay imposed by PD 51Z operate so as to stay the appeals in the first and/or the second action?

ii) If the stay only operates on one of, or part of, the appeals before the court, should there be an immediate hearing?

iii) In any event, should the stay be lifted in whole or in part?

Issue 1: Does the automatic stay imposed by PD 51Z operate so as to stay the appeals in the first and/or the second action?

17. There are some straightforward starting points.

18. First, the first action for declarations as to whether or not the two tenancies were excluded from the protection of the 1954 Act and for an injunction to restrain the landlords from taking possession[1] were not, it seems to me, "proceedings for possession brought under CPR Part 55" or "proceedings seeking to enforce an order for possession" within the meaning of paragraph 2 of PD 51Z.

19. Secondly, the landlords' counterclaims in the first action were, equally clearly, "proceedings for possession brought under CPR Part 55" within the meaning of paragraph 2 of PD 51Z. Accordingly, at the very least, the counterclaim in the first action and the appeal from the orders for possession made by the judge in the first action are stayed automatically by PD 51Z. I will return to the more difficult question of what impact this has on the hearing of the appeal from the judge's decision in the first action as a whole.

20. Thirdly, the landlords' claim in the second action, as issued, for declarations that the 4 ongoing tenancies were excluded from the protection of the 1954 Act, is clearly not affected by the automatic stay. The claim, as pleaded, was not a proceeding "for possession brought under CPR Part 55" nor was it a proceeding "seeking to enforce an order for possession" within the meaning of paragraph 2 of PD 51Z.

21. Again, the more difficult question is as to the effect of what happened to the second action after judgment. By that time, the contractual terms of three of the four affected

[1] See paragraph 3 of PD 51Z.

tenancies had come to an end. The judge at [164] invited "the parties to agree a form of order to give effect to this judgment, or so much of an order as they are able". The parties have referred us to the detail of the exchanges which then occurred. But, in essence, what happened was that the landlords said that, unless the tenant agreed to possession orders, they would apply to amend the claim form and Particulars of Claim in the second action to claim possession in addition to the declarations they had originally sought. The tenant, therefore, agreed to possession orders being made, seeing that it was otherwise inevitable that such an amendment would be allowed.

22. In these circumstances, there are two contentious questions that arise under the first issue: (a) How does the counterclaim in the first action affect the stay of the appeal in the first action, and (b) How does the inclusion, by consent, of the possession orders in the judge's Order relating to three of the four properties in the second action affect the stay of the appeal in the second action?

The Order under appeal and the Appellant's Notice

23. The Order began by declaring that all the tenancies were properly and lawfully excluded from the protections of the 1954 Act, and then declared the dates on which 5 of the 6 tenancies in issue in the two actions had terminated, and that the tenant had remained in occupation thereafter as a trespasser. The Order then dismissed the tenant's claims in the first action and counterclaims in the second action (for declarations that all the tenancies were protected by the 1954 Act), and made possession orders in respect of 5 of the 6 tenancies together with ancillary orders as to mesne profits, other matters and costs. The judge refused permission to appeal.

24. The tenant's Appellant's Notice covers both actions and makes clear that it seeks a declaration that all 6 tenancies are protected by the 1954 Act, and to reverse the orders for possession and the ancillary orders made.

How does the counterclaim in the first action affect the stay of the appeal in the first action?

25. As I have said, it was suggested in argument, that, because the claim in the first action did not attract the automatic stay, the tenant's appeal from the judge's dismissal of that claim could go ahead. I do not agree.

26. In my judgment, as soon as the counterclaim for possession was brought by the landlords in the first action, the entire action became "proceedings for possession brought under CPR Part 55" and so were caught by the stay when it was imposed in March 2020. As explained in *Okoro* at [21]-[27], those words also encompass any appeal from such proceedings. Any other conclusion would defeat the purposes of the stay explained in both *Arkin* and *Okoro.*

27. I accept that, without the counterclaim, the first action was not "brought under CPR Part 55", but once the counterclaim was initiated, CPR Part 55 was engaged. CPR Part 55.2(1) is in mandatory terms. It provides that "[t]he procedure set out in this Section of this Part must be used where the claim includes – (a) a possession claim brought by

a – (i) landlord (or former landlord) …". The CPR Glossary[2] defines a counterclaim as a "claim brought by a defendant in response to the claimant's claim, which is included in the same proceedings as the claimant's claim". This indicates that the entire first action must have become "proceedings for possession brought under CPR Part 55" when the counterclaim was initiated. CPR Part 20 does not seem to me to cut across this conclusion. All CPR Part 20.3(1) provides is that a counterclaim is to be treated as it were a claim for the purposes of the CPR. Here, the counterclaim for possession attracts all the rigours of CPR Part 55 and PD55A to the first action.

28. This analysis also fits with the reality of the situation more generally. The tenant started the first action to resolve the legal issue that underlay the question of whether or not it was entitled to remain in possession of the two properties. It was inevitable that the landlords would counterclaim for possession, which was itself the inevitable consequence of their position. This is the case in many types of landlord and tenant dispute. Underlying legal issues need to be resolved, but their determination leads to the conclusion that the landlord either will or will not be entitled to recover possession from the tenant. That is why it would, in my view, be so inappropriate to salami slice the first action in order to allow the appeal against the tenant's claim to go ahead, whilst acknowledging that the counterclaim for possession and the appeal from it is stayed. If we did that here, it would reduce the efficacy of the blanket stay that the Master of the Rolls and now the legislature has imposed.

29. I accept that I am disagreeing with Lewison LJ's view, but it does not seem that he had access to the pleadings and other papers or to the detailed argument that has assisted us.

How does the inclusion, by consent, of the possession orders in the judge's Order relating to three of the four properties in the second action affect the stay of the appeal in the second action?

30. In the light of what I have already said, this question answers itself. I do not see how one can have an order for possession, without there having first been proceedings for possession. As I have already pointed out, CPR Part 55 is mandatorily applicable to possession claims brought by landlords. Accordingly, even though the consensual approach encouraged by the judge employed a short cut that abrogated the need for a formal amendment of the landlords' claim in the second action, the proceedings on which the judge made his Order must properly be regarded as "proceedings for possession brought under CPR Part 55". The judge could not otherwise properly have made the Order. In addition, the position was confirmed when the tenant appealed against those possession orders. As *Okoro* makes clear, an appeal from a possession order is still to be regarded as "proceedings for possession brought under CPR Part 55".

31. Again, if any other analysis were adopted, there would be a risk that some appeals from possession orders would be excluded from the automatic stay, cutting across the purposes of that stay and engendering uncertainty.

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[2] Which is stated to be "a guide to the meaning of certain legal expressions as used in these Rules, but it does not give the expressions any meaning in the Rules which they do not otherwise have in the law".

32. I conclude, therefore that the automatic stay imposed by PD 51Z and now the 2020 Rules operates to stay the appeals in both the first and the second action.

Issue 2: If the stay only operates on one of, or part of, the appeals before the court, should there be an immediate hearing?

33. In the light of my decision on issue 1, this issue does not arise. I would, however, emphasise the undesirability of any approach that allows claims or appeals that are part and parcel of possession claims to be continued despite the automatic stay. As Ms Wicks correctly emphasised and, as we said in *Arkin* at [42], the purpose of the stay "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". At [44], we said that "[t]he blanket stay has been imposed to protect public health and the administration of justice generally" and "[t]he approach of a blanket stay reflects the balance struck …, and makes clear that possession claims are not to be dealt with on a normal case by case basis during the stay".

34. I do not think that the Explanatory Statement for the 2020 Rules expresses any different purpose than I have described. It is clear that the policy intention was to extend the stay on possession proceedings, even though that might "act to the detriment of some small businesses", for example these landlords. It would send entirely the wrong message if we were to continue to hear an appeal in what must properly be regarded as possession proceedings on the technical ground that a part of the claim is for a declaration as to the law underlying that claim for possession.

Issue 3: In any event, should the stay be lifted in whole or in part?

35. It will already be apparent that I do not think that we should lift the stay. I accept the force of the case management reasons explained so powerfully by Lewison LJ. I accept also that it would have been preferable if the tenant had raised the point much earlier so that the time and expense of preparing for this appeal could have been avoided. It is not, however, for the court to second guess the policy that lies behind either PD 51Z or the 2020 Rules. The blanket stay must be given effect. As we said in *Arkin* at [42], "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".

36. I should mention in passing the decision of Freedman J in *Copeland v. Bank of Scotland plc* [2020] EWHC 1441 (QB) at [4]-[7], where he lifted the stay for the purposes of delivering a reserved judgment and making consequential orders in a case where it was acknowledged that the automatic stay applied. I do not agree that that was the appropriate course. A stay means what it says. If the proceedings are stayed, nothing can happen in court at all (see *Arkin* at [51]). The exceptions to the stay are spelt out in paragraph 2A of PD 51Z, and none of them applies to the delivery of a reserved judgment. I repeat for the avoidance of doubt that I have great difficulty in envisaging any circumstances in which it would be appropriate to lift the automatic stay (see *Arkin* at [42]). Possession proceedings can and will resume once the stay is lifted.

Conclusion

37. We informed the parties at the conclusion of the argument on the stay that we would not proceed with the hearing of the substantive appeal on the ground that the automatic stay operated upon it. This judgment gives my reasons for that decision.

38. For the reasons I have given, the hearing of the appeal is vacated on the grounds that it is automatically stayed under PD 51Z and the 2020 Rules. It can be re-listed after the stay ends (or before that if the parties agree under paragraph 2A(c) of PD 51Z), and dealt with at that time in the usual course. We did say in the course of the hearing that, if Court of Appeal business allows, it would be desirable (but not imperative) for this constitution to be reconvened to hear the ultimate appeal, since we have already undertaken the necessary preparation.

Lady Justice Asplin:

39. I agree with the Chancellor for the reasons he has given.

40. As he points out, although the counterclaim for possession in the first action is treated as if it were a claim for the purposes of the CPR (CPR Part 20.3(1)), as soon as it is brought it is included in the same "proceedings" as the claimant's claim. In my view, as a result, the entirety of the first action must become "proceedings for possession brought under CPR Part 55" and falls within PD 51Z.

41. This is consistent with the fact that the legal issues raised in the tenant's claim in the first action form the basis of the defence to the counterclaim. This is the norm in many types of landlord and tenant dispute. It seems to me, therefore, that it is impossible to separate out the claim from the counterclaim in order to allow the appeal in relation to the tenant's claim to go ahead despite the fact that the counterclaim for possession and the appeal from it is stayed and that it would be wrong to do so. Furthermore, such a result would be highly artificial. It would also seriously undermine the stay and lead to uncertainty.

42. The same is true in relation to the second action. It would be both highly artificial and, in my view, wrong to decide that it was not "proceedings for possession brought under CPR Part 55" because the pleadings were not formally amended to include a claim for possession. The parties merely took a short cut to avoid the need and expense of an application to amend which would have been allowed. Possession orders were made, and the tenant appealed those orders. An appeal from a possession order is to be regarded as "proceedings for possession brought under CPR Part 55": see *Okoro*.

43. In my view, therefore, the automatic stay imposed by PD 51Z and thereafter, by the 2020 Rules operates to stay the appeals to both the first and second actions.

Lord Justice Arnold:

44. Practice Direction 51Z paragraph 2 stayed "all proceedings for possession brought under CPR Part 55". CPR rule 55.29(1), inserted by the Civil Procedure (Amendment No. 2) (Coronavirus) Rules 2020, stays "all possession proceedings brought under this Part". Accordingly, this wording now has the approval of Parliament.

45. This Court held in *Okoro* at [25] that the word "brought" "focuses on how the proceedings were initiated". Thus the stay applies to (i) possession proceedings (ii) initiated under Part 55.

46. The stay does not apply to all proceedings in which a claim to possession is made. If that had been the intention, it would have been easy to say so.

47. As was noted in *Okoro* at [5], there are at least five types of case in which a possession order can be made outside proceedings brought under Part 55, and which are therefore not caught by the stay. Counsel for the landlords submitted that there were additional examples to those listed in *Okoro*, such as orders for possession made in the context of boundary disputes. As was noted in *Okoro* at [27], PD 51Z para 2 prevented enforcement of possession orders made under rules other than Part 55; and the same is now true of r. 55.29(1).

48. The term "possession proceedings" is not defined in r. 55.29 or elsewhere in Part 55. By rule 55.2(1), the procedure set out in Section I of Part 55 must be used where the claim "includes (a) a possession claim brought by a (i) landlord (or former landlord); (ii) mortgagee: or (iii) licensor (or former licensor); …; or (c) a claim by a tenant seeking relief from forfeiture" save where the claimant uses the procedure in Sections II or III of Part 55, which are not relevant for present purposes. Rule 55(1) defines a "possession claim" as "a claim for the recovery of possession of land (including buildings and parts of buildings)". It follows that the Part 55 procedure must be used by a tenant seeking relief from forfeiture, but such a claim is not a "possession claim". In my judgment it follows that such a claim is not covered by the expression "possession proceedings".

49. Thus the stay does not apply to claims for possession brought outside Part 55, nor does it apply to proceedings brought under Part 55 which are not possession proceedings.

50. These limitations are explained by the purpose of the stay of proceedings originally imposed by PD 51Z, as explained in *Arkin* at [42]:

> "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."

51. I would add, and I am sure the Court intended to say, that the purpose was not merely to protect the judges and staff of the County Court, but also its users. This is confirmed by what the Court said in *Okoro* at [22]:

> "There are some 138,000 possession claims brought every year in the County Court … Many defendants to possession claims are vulnerable and unrepresented, and only realise that action is required from them very late in the day."

52. The Explanatory Statement quoted by the Chancellor indicates that the same purposes underlie the stay of proceedings imposed by r. 55.29. It also confirms that, as one would

expect, the purposes underlying the stay of enforcement of possession orders imposed by r. 55.29 are somewhat different.

53. Turning to the present case, the first action brought by the tenant neither included a possession claim nor was it brought under Part 55. The claim form was issued by the tenant in the High Court, Business and Property Courts, Property Trusts and Probate List, seeking a declaration that its tenancies of retail premises in Bridgend and Mansfield had not been excluded from Part II of the Landlord and Tenant Act 1954 and an injunction restraining the landlords from attempting to gain possession of the premises otherwise than in accordance with 1954 Act. In its Particulars of Claim, the tenant contended, in short, that the landlords had not properly complied with the "contracting out" requirements in Schedules 1 and 2 of the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003.

54. By their Defence and Counterclaim, the landlords sought (among other relief) orders for possession of the Bridgend and Mansfield premises. Thus the counterclaim plainly included possession claims, and proceedings on the counterclaim were plainly possession proceedings. Was the counterclaim "brought under Part 55"? Counsel for the landlords submitted that the answer to this question was no, and that the counterclaim was brought under Part 20.

55. As counsel for the landlords pointed out, Part 55 is a separate code which uniquely regulates all stages of a claim issued under it. The claimant may make the claim at any County Court hearing centre, but may start the claim in the High Court if it files a certificate verified by a statement of truth justifying that course in accordance with Practice Direction 55A (r. 55.3(1)-(3)). The claim form and the form of defence sent with it must be in the forms set out in PD 55A (r. 55.3(5)). The particulars of claim must be filed and served with the claim form (r. 55.4). PD 55A sets out certain requirements for the particulars of claim, depending on the type of claim (paras 2.1-2.7). A first return date is immediately set upon issue of the claim which will be not less than 28 days nor later than eight weeks from the date of issue (r. 55.5(1),(3)). There are specific requirements as to service of claims on trespassers and others (rr. 55.5(2) and 55.6). The defendant is not required to file an acknowledgement of service, a failure to file a defence does not preclude the defendant taking part at any hearing and default judgment is not available (r. 55.7). The court has the power to determine the claim summarily at the first hearing (r. 55.8).

56. In my judgment the landlords' counterclaim in the first action could not have been fitted into the prescriptive procedural code set out in Part 55. Quite simply, Part 55 does not envisage possession claims being brought by counterclaim to a Part 7 claim. (Perhaps it should do; but that is a matter for the Civil Procedure Rules Committee on another day.) In any event, no attempt was made by the landlords to bring the counterclaim within Part 55 at the time. To take a simple illustration, the landlords did not file a certificate justifying bringing the counterclaim in the High Court, for the obvious reason that the action was already in the High Court. The counterclaim was simply brought under Part 20 in the ordinary way. Accordingly, the counterclaim was not "brought under Part 55".

57. Even if, contrary to my view, the counterclaim was "brought under Part 55", I do not agree that that had the effect of transforming the tenant's claim into "possession proceedings brought under Part 55". A counterclaim is a form of additional claim: see

rr. 20.2(2)(a), 20.4(1) and 20.5(1). An additional claim is to be treated as if it were a claim for the purposes of the CPR, except as provided by Part 20: r. 20(3)(1). Additional claims, including counterclaims, are distinct to claims. Thus a claim will continue if the counterclaim is discontinued, and vice-versa; and a claim may be struck out or summary judgment granted without that necessarily affecting the counterclaim, and vice-versa. When the glossary to the CPR (which is only a "guide to the meaning of certain legal expressions": r. 2.2(1)) refers to a counterclaim being "included in the same proceedings as the … claim", it simply means that the claim and counterclaim form parts of the same action. Accordingly, in my opinion, the bringing of the landlord's counterclaim did not convert the tenant's claim into possession proceedings, still less possession proceedings brought under Part 55.

58. Turning to the second action, the landlords' claim form sought a declaration that leases of retail premises in Ashford, Cheshire Oaks, Swindon and York were excluded from the security of tenure provisions in sections 24-28 of the 1954 Act. The claim was again brought in the High Court. By its Defence and Counterclaim the tenant counterclaimed for a declaration that the leases were protected by those provisions. There was no claim by the landlords for possession of the premises prior to judgment.

59. After judgment, the tenant agreed to orders for possession being made in respect of the Ashford, Cheshire Oaks and York premises (the lease for the Swindon premises not having expired). Although there was no application by the landlords to amend their Particulars of Claim, it is plain that the parties agreed that the need for such an application would be waived. It follows that, as a matter of substance and reality, there was a claim by the landlords for possession in respect of the Ashford, Cheshire Oaks and York premises (but not the Swindon premises). To that extent, therefore, the proceedings became possession proceedings at that point. But were they "brought under Part 55"? Counsel for the landlords again submitted that the answer to this question was no.

60. In my judgment, it would not have been straightforward to fit the landlords' notionally amended claim in the second action into the procedural code set out in Part 55 even if it was possible to do so. Again, however, no attempt was in any event made by the landlords to do so at the time. The claim was simply treated as if the Particulars of Claim had been amended pursuant to Part 17 in the ordinary way.

61. Nor do I see that the policy objectives pursued by PD 51Z, and now r. 55.29, point to the stay of proceedings, as opposed to the stay of enforcement of possession orders, applying to these actions. In both actions, the tenant relied upon technical legal arguments concerning the requirements imposed by the 2003 Order, which is no doubt why both actions were issued in the High Court. The actions were heard at a trial lasting four days at which the parties were represented by two counsel on each side instructed by well-known firms of solicitors. (Although the trial took place well before the Covid-19 lockdown, I see no reason to think that it could not have proceeded during that period, when as I understand it the Business and Property Courts managed to deal with 85% of their normal caseload; still less that it could not proceed under the current circumstances.) The judge delivered a reserved judgment running to 162 paragraphs dealing with a number of issues. I granted permission to appeal to this Court on one of those issues. On the appeal, the parties were again represented by four counsel instructed by solicitors. Counsel, solicitors and clients were all able to participate in the remote hearing. As I see it, this is not the sort of case which the stay of proceedings, as

opposed to the stay of enforcement, imposed by r. 55.29 is intended to cater for. That being so, the courts should continue to administer justice.

62. Turning to the question of lifting the stay if it applies, I agree that exceptional circumstances would be required for the reasons explained in *Arkin* at [42]-[46]. If, therefore, both actions are fully caught by the stay, then I agree that the case management considerations relied upon by the landlords were not enough to justify lifting it. If it were the case, however, that the tenant's claim in the first action was not subject to the stay, but the landlords' counterclaim in the first action and the landlords' possession claim in the second action were subject to the stay, then that would seem to me to represent exceptional circumstances justifying this Court in lifting the stay, having regard to (i) the fact the tenant's claim would enable the legal questions arising on the appeal to be decided, (ii) the fact that the landlords' possession claim in the second action did not include the Swindon premises, (iii) the case management considerations listed by Lewison LJ and (iv) the additional factors mentioned below.

63. Lewison LJ's order was made on 10 June 2020. At that time, the hearing of the appeal was fixed for 24-25 June 2020. The tenant's application for reconsideration was not made until sometime during the evening of 16 June 2020. By that time, the case had been allocated to this constitution, which was starting its preparation for the hearing. Although the landlords submitted their written response expeditiously on 18 June 2020, it was almost inevitable by that time that the Court would do what it did, which was to list the reconsideration application for oral hearing immediately prior to the substantive appeal, on the footing that the Court would proceed to hear the substantive appeal if the application was unsuccessful. Thus the parties had to prepare for the substantive appeal anyway. Justice delayed is justice denied, but delay is worse if it involves additional expense, as it will do in this case.

64. For the reasons given above, I would have dismissed the application for reconsideration and proceeded to hear the substantive appeal.