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**COVID-19 & Civil Procedure rules**

**Practice Directions 51Y, 51Z and 51ZA**

**PRACTICE NOTE**

***Oliver Newman of Goldsmith Chambers has drafted a briefing note for Civil Litigation Solicitors to summarise the changes to the Civil Procedure Rules due to Covid-19 and assist in considering the practical impact of the changes.***

**Summary**

* Parties will be expected to make remote hearings work. Although the Courts may be struggling on their end, if parties do not wish to proceed with remote trials and hearings, persuasive reasoning will be required beyond simply that a party would prefer to delay due to Covid-19, or that a remote trial might be more difficult than a trial in normal circumstances.
* Although possession proceedings under CPR 55 are stayed, this does not affect claims against trespassers, applications for interim orders, applications for agreed case management directions or claims for injunctive relief.
* Parties can agree extensions of time to comply with orders for up to 56 days.
* Extensions beyond 56 days still require applications to the court and will be considered on the papers. When making the application, consideration should be given to:
  + Detailed explanations as to why Covid-19 has caused problems leading to delay
  + Who else could have done the work (if the issue was illness)
  + What steps were taken to work from home or use technology to overcome the issue
  + What length of delay is required, bearing in made the interests of justice and the need to keep the process moving forward
  + Obtaining medical evidence where the issue is the specific vulnerability of a witness
* Key “dos and don’ts” set out at the end of the article.

**Remote Hearings (CPR PD 51Y)**

1. Per the Civil Justice in England and Wales Protocol regarding remote hearings 20th March 2020:

The current pandemic necessitates the use of remote hearings whenever possible. This protocol applies to hearings of all kinds, including trials, applications and those in which litigants in person are involved in the County Court, High Court and Court of Appeal (Civil Division), including the Business and Property Courts.

The method by which all hearings, including remote hearings, are conducted is always a matter for the judge(s), operating in accordance with applicable law, Rules and Practice Directions. Nothing in this protocol derogates from the judge’s duty to determine all issues that arise in the case judicially and in accordance with normal principles.

1. CPR PD51Y is intended to deal with the issues around the recording of hearings and the holding of hearings in private which might otherwise be held in public. The key point is that [PD51Y(2)]:

Where the court directs that proceedings are to be conducted wholly as video or audio proceedings and it is not practicable for the hearing to be broadcast in a court building, the court may direct that the hearing must take place in private where it is necessary to do so to secure the proper administration of justice.

1. Perhaps the biggest point to take away is that made by the Deputy High Court Judge in *Re Blackfriars Limited* [2020] EWHC 845:

“There is, in my judgement, a clear and consistent message which emerges from the material I have referred to, the message that as many hearings as possible should continue and they should do so remotely as long as they can be done safely.”

1. And by Mr Justice Teare in *National Bank of Kazakhstan & Others v The Bank of New York Mellon & Ors*:

“The courts exist to resolve disputes and, as I noted this morning, the guidance given by the Lord Chief Justice is very clear. The default position now, in all jurisdictions, must be that hearings should be conducted with one, more than one or all participants attending remotely.”

1. There is an expectation, as advanced and reflected in the Practice Direction, that the Parties will be expected to work with the courts and make remote hearings work.

**Possession Proceedings (CPR PD 51Z)**

1. Per CPR PD51Z(2) all proceedings seeking to enforce an order for possession by a warrant or a writ of possession are stayed for 90 days from 27th March 2020.
2. It is important to note that this has been amended and clarified per the changes coming into force on 17th April 2020 CPR PD51Z(2A), such that it does not apply to claims against trespassers, applications for interim possession or applications for agreed case management directions. The changes clarify that claims for injunctive relief are not subject to the stay and the fact that a claim will be stayed does not prevent it being issued.

**Extension of Time Limits (CPR PD 51ZA)**

1. CPR 3.8(4) allows parties by prior written agreement to extend the time limits in orders by 28 days provided that to do so does not risk the hearing date. Per CPR PD51ZA(2), this limit is extended to 56 days until 30th October 2020 (when the practice direction ceases to have effect).
2. Any agreement to extend beyond 56 days still requires the permission of the court, the application being considered on the papers (CPR PD51ZA(2)). The impact of this change is therefore unlikely to be dramatic when it looks likely that the current lockdown will continue for some time and the number of problems increase. This likely means that courts will be inundated with applications to consider on the papers. As such, it will be more important than ever before to proactively consider where problems might arise, be realistic about the timeline for resolving them and make applications for extensions as soon as it is clear there is a problem that will take significant time to resolve.
3. When considering an application for the extension of time, the adjournment of hearings and applications for relief from sanctions the court will take into account the impact of Covid-19, in so far as compatible with the proper administration of justice (CPR PD51ZA(4)). As such, although Covid-19 will clearly not be a complete excuse or justification for missed time limits, it is highly likely to take a party at least part way towards the granting of relief. Consideration will have to be given to the specific problems created and what attempts were made to resolve them. The Courts will likely be expecting remote working and that efforts will be made to try and resolve issues like remote access to papers. Simply citing Covid-19 is unlikely to be enough.
4. Some indication as to how this will work in practice can be taken from *Heineken Supply Chain BV v Anheuser-Busch Inbev SA* [2020] EWHC 892 (Pat) where the Judge had to consider issues about timetabling and whether a trial should be postponed. He stated that [para XIII]:

“It is desirable where cases have been listed, that attempts are made to keep to the directions timetable where it is realistically possible to do so, without prejudicing safety or risking injustice as a result.”

1. He did however have some sympathy with the argument that the disruption from Covid-19 had caused problems with the preparation of witness statements, stating that [para XIX]:

“While it is true that the evidence is not very specific as to why the disruption means that compliance with the original timetable would be impossible, the impact of the crisis has been to require individuals to re-organise aspects of their lives, professional and personal. Preparing documents and evidence has been made somewhat harder…”

1. But also placed these issues into context, stating [para XXVIII]:

“In considering this issue, it is however necessary to bear in mind, particularly in the current circumstances, that while lawyers are preparing expert evidence, some of their often much less well-remunerated compatriots may be putting themselves and their families at risk in saving lives, working long hours in inhospitable conditions. The guidance to which I have referred strongly suggests that, where it can be safely done and without risks to the integrity of the legal process, the wheels of justice should keep turning at their pre-crisis rates. It is not unreasonable to expect that lawyers concerned with keeping cases on track may need on occasion to push a little harder to enable that to be achieved.”

1. An extension of time was granted but for less time than sought, and altered the trial timetable a little.
2. If you are making an application to delay a trial or extend a deadline by a considerable amount due to the vulnerabilities of a witness, then consideration should be given as early as possible to obtaining medical evidence as it is likely to be required and likely to take time to obtain.
3. It is well worth noting the limits of these changes. The most obvious, and important, is that there is no extension to the limitation periods and so these will still need to be complied with. Equally, there is nothing explicit in relation to the service of pleadings by email rather than the usual methods.
4. There is currently no definite answer as to whether the 56 day extension applies to the ability under CPR 15.5 for the parties to agree to extend the time for filing the defence by 28 days. It is likely that the reference in CPR 15.5 would be regarded as a re-statement of the rule in CPR 3.8 and so the extension of the period in CPR 3.8 would equally apply to CPR 15.5, particularly given the stated purpose of the new practice direction, namely to “ensure that the administration of justice is carried out so as not to endanger public health”. It seems unlikely the intent was to exclude from the extension of time the filing of a defence which will bring with it similar issues to witness statements in the current climate.

**Key Do’s & Don’ts**

**DO** ensure that you are complying with limitation periods, they have not been changed.

**DO** plan proactively as to where there are likely to be delays and difficulties with meeting the timetables set out in orders.

**DO** ensure that any medical evidence to support any application to push back dates or adjourn a trial is sought well in advance.

**DO** try to liaise with the other side, test audio and visual links and allow time for remote conferences between counsel and witnesses before a hearing.

**DON’T** assume you can serve by email, unless you have explicit agreement in writing continue to serve by post but email the documents as well to prevent arguments about delay in receipt.

**DON’T** assume a hearing will not go ahead. Although in practice, currently many are not, you will face little sympathy if cases are not prepared on the assumption it will not happen.

**DON’T** assume that citing Covid-19 will automatically lead to the court allowing an extension of time. An application to extend time will need to be backed by an explanation of *why* Covid-19 has caused problems and what attempts have been made to overcome those problems.

**DON’T** assume that nothing can be done on a possession case, claims can still be issued and progressed via agreed case management directions.

This note is for general information only and is not and is not intended to constitute legal advice on any general or specific legal matter. For legal advice on particular cases please contact Alice Martin, Civil Team Clerk, on 0207 427 6821 to discuss instructing Counsel.

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