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CHAMBERS

THE EVEN LONGER ARM OF PD51Z: AN UPDATE

*Following on from my earlier article concerning the reach of PD51Z in light of Arkin and Okoro (**here**), a third case (actually two conjoined cases) has been decided by the Court of Appeal - TFS Stores Limited v The Designer Retail Outlet Centres and ors* [2020] EWCA Civ 833 - *concluding that even those cases that are not purposefully initiated under Part 55 are likely to be caught by the stay.*

In the conjoined cases, the tenant (TFS Stores Limited) was the same, but the landlord was different. The tenant will be better known to many as The Fragrance Shop, and the cases at first instance focused on whether the leases in the actions were excluded from the 1954 Act protections. According to HHJ Davis-White QC, they were, and possession orders were made in respect of 5 of the 6 premises caught up in proceedings.

The first claim was issued by the tenant, seeking a declaration that the tenancies benefitted from protection under the 1954 Act. The landlord counterclaimed for possession. The second claim was issued by the landlords, seeking a declaration that the tenancies were not protected by the 1954 Act, and the parties agreed at the time of judgment that orders for possession should be made in respect of 3 of the 4 leases caught up in the second claim, as the terms had expired by the date of judgment. The second claim was not formally amended to include possession, though would have been had the possession orders not been agreed. In neither case was the Part 55 procedure followed.

The tenant applied to adjourn the substantive appeal hearing, first on the grounds of hardship, then in light of *Okoro*. In respect of this latter request, Lewison LJ refused the application on the basis that he did not consider PD51Z applied to these proceedings; they had not been initiated under Part 55 and *Okoro* had emphasised the importance of the manner in which proceedings were initiated.

In the majority view (held by Lady Justice Asplin and Sir Geoffrey Vos, Lord Justice Arnold dissenting) the claim in the first action was not caught by Part 55, but the counterclaim was so caught ([19]). This view relied on the mandatory nature of the wording of r 55.2(1), which 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…"* The CPR Glossary defines a counterclaim as a "*claim brought by a defendant in response to the claimant's claim, which is included in the same set of proceedings as the claimant's claim."* This was also deemed to fit with the reality of the situation: the tenant sought to

resolve a legal question as to whether it was entitled to remain, inevitably the landlord counterclaimed for possession.

Having reached such a conclusion, the answer in respect of the second claim presented itself: Part 55 was of no application until the parties agreed the possession orders. The agreement was reached in a situation where, if none had been reached, it was said the landlords would seek formal permission to amend their claim. Lady Justice Asplin stated that it would be highly artificial to form the view that Part 55 did not apply, simply because the parties had taken a short cut (at [42]).

Having reached such a determination the substantive appeal was stayed, it was not appropriate to "*second guess the policy that lies behind either PD51Z or the 2020 Rules. The blanket stay must be given effect"* ([35]). The court's view in *Arkin* (that it was difficult to envisage when it would be appropriate to lift a stay imposed by PD51Z) was reiterated, and Sir Geoffrey Vos briefly commented (at [36]) that, in his view, Freedman J was wrong to lift the stay for the purpose of delivering a reserved judgment and making consequential orders in *Copeland v Bank of Scotland plc* [2020] EWHC 1441 (QB). This view might be borne in mind by those inclined to think that their case is worthy of an exception being made; it probably isn't.

Dissenting, Lord Justice Arnold considered the requirements of Part 55, noting that in respect of the first claim, no steps had been taken as required by the prescriptive procedural code of Part 55, which "*does not envisage possession claims being brought by counterclaim to a Part 7 claim. (Perhaps it should so; but that it a matter for the Civil Procedure Rules Committee on another day)"* ([56]). Further, in respect of the first claim, Lord Justice Arnold did not agree that a counterclaim (even if he was wrong and it was brought under Part 55) transformed the tenant's claim into possession proceedings brought under Part 55. A counterclaim, in his view, is an additional claim, distinct from the claim ([57]). In respect of the second claim, whilst proceedings became (by agreement), proceedings for possession, again it would be difficult to shoehorn them into Part 55, with no aspect of its procedural requirements being observed.

So, a divisive decision, both sides of which are likely to attract admirers and detractors alike. However, going forward, the important point to take away is that, for the near future, it is worth considering the substance of the claim and whether it involves a claim (or counterclaim) for possession; it will not be enough to consider whether the procedure of Part 55 has been applied, as seemed to be the position following *Okoro*.