

Enforcement of suspended orders – alignment of procedures in the County Court and High Court

This is a consultation exercise by the Civil Procedure Rule Committee

This consultation begins on Wednesday 28 June 2017

This consultation ends on Wednesday 30 August 2017

Introduction

The Civil Procedure Rule Committee (CPRC) is considering whether amendments are required to rules and forms in light of the Court of Appeal judgment in *Cardiff City Council v Lee (Flowers)* [2016] EWCA Civ 1034

(<http://www.bailii.org/ew/cases/EWCA/Civ/2016/1034.html>).

The consultation is aimed at all users and potential users of the civil justice system in England and Wales, and in particular at legal professionals, businesses, individuals and advice agencies in England and Wales.

A list of the main professional bodies and representative groups that are being consulted is set out at the end of the document. This list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

Contact details/How to respond

The CPRC invites written responses from users and potential users of the civil justice system in England and Wales. In particular responses from legal professionals, businesses, individuals and advice agencies in England and Wales are welcome.

Responses to be received no later than 5pm on Wednesday 30 August 2017. Responses to the consultation can be made by email or by post, the details are as follows:

Email to: CPRCconsultation@justice.gov.uk. Please note "Enforcement" in the subject line of your email.

Post to: Jane Wright, Secretary to the Civil Procedure Rule Committee

Post Point 3.42, Ministry of Justice, 102 Petty France, London SW1H 9AJ

Please Note:

Submission format: If you intend sending a PDF document it would be helpful if you could send a word document as well to assist in analysing the responses. Only The PDF document will be retained as the response document.

Complaints or comments: If you have any complaints or comments about the consultation process you should contact the secretary to the CPRC at the address given above.

Circulation and additional copies: Copies of the consultation document are being sent to various stakeholders, a list is included at the end of this document. The list is not exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject. Further copies can be obtained from the secretary as above.

Representative groups: Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality: Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the CPRC. The CPRC will process your personal data in accordance with the DPA and in the majority of circumstances; this will mean that your personal data will not be disclosed to third parties.

The principles that public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492132/20160111_Consultation_principles_final.pdf

Background

In *Cardiff v Lee (Flowers)* [2016] EWCA Civ 1034

(<http://www.bailii.org/ew/cases/EWCA/Civ/2016/1034.html>) the claimant landlord had obtained a possession order against the defendant secure tenant on the grounds of breach of the terms of the tenancy agreement prohibiting anti-social conduct. The order was suspended for two years on condition that the tenant complied with the provisions of his tenancy agreement, which contained covenants against causing a nuisance or annoyance to neighbours. Following further complaints from neighbours of the tenant, the landlord applied for the issue of a warrant of possession. It did so by lodging form N325, following the administrative procedure set out in CPR 83.6.

The warrant was issued and the bailiff served notice of the date of intended eviction. The tenant's application to stay execution of the warrant was dismissed by the District Judge and his subsequent appeal was dismissed by the Circuit Judge.

On appeal to the Court of Appeal it was common ground that the landlord ought to have sought permission to apply for the issue of the warrant as required by CPR 83.2. In short, CPR 83(2) states that a 'relevant writ or warrant' (which includes a warrant of possession)

must not be issued without the permission of the court in any of the circumstances specified in CPR 83.2(3)(a)-(f).

In particular, CPR 83.2(3)(e) provides that permission to apply for the issue of a warrant of possession is required where “under the judgment or order, any person is entitled to a remedy subject to the fulfilment of any condition, and it is alleged that the condition has been fulfilled.”

At paragraph 7 of the judgment in *Cardiff v Lee*, Arden LJ said –

“it is not strictly an issue before us whether the judge was right on CPR 83.2 but I would take the view that he was clearly right to apply that rule for the reason that he gave. In other words, when the respondent obtained possession it became entitled to the remedy of possession subject to the fulfilment of the condition that the tenant did not comply with the terms of suspension. In my judgment, that is how that rule should be read.”

Thus the rule affords what Arden LJ described as an important safeguard for tenants by requiring landlords to demonstrate to the court through a process involving judicial (and not merely administrative) scrutiny that the condition upon which the landlord’s right to recover possession rested is satisfied before embarking on the administrative process under CPR 83.6 for the issue of a warrant.

Prior to the case of *Cardiff v Lee* none of those involved in the process of enforcement of possession orders had recognised the significance of CPR 83.2(3)(e) in relation to possession orders suspended simply on terms as to payment of rent or mortgage instalments and arrears. The “important safeguard” afforded by this rule was one of which tenants and borrowers were unaware, consequently no applications were made for permission and warrants were issued as of right.

It should be noted that CPR 83.2 applies to warrants (but not writs) of possession. The corresponding rule, dealing with writs of possession is CPR 83.13 which provides that a writ of possession to enforce a judgment or order for the giving of possession of any land will not be issued without the permission of the court save as provided in sub-paragraphs (3) (trespassers) and (6) (mortgagees).

Thus in the High Court the requirement for permission affords a measure of protection akin to that identified in *Cardiff v Lee* to a tenant regardless of whether the possession order was suspended.

It is clear from the judgment in *Cardiff v Lee* that an application to enforce a right of possession in the County Court by means of the issue of a warrant of possession on the basis that the terms of a suspended possession order have been breached must be made in accordance with CPR 83.2 and that failure to obtain the court's permission to issue the warrant is a procedural irregularity, albeit one which renders the warrant voidable rather than void and is capable of cure by means of the exercise of the court's discretion under CPR 3.10.

CPR 83.2(4) provides that an application for permission may be made by way of Part 23 application (N244) and that the landlord must –

“give such...information as is necessary to satisfy the court that the applicant is entitled to proceed to execution on the judgment or order, and that the person against whom it is sought to issue execution is liable to execution on it.”

The issue raised by *Cardiff v Lee* is not confined to suspended possession orders. The definition of “relevant writ or warrant” in CPR 83.2 includes not just warrants of possession but also –

- writs and warrants of control;
- writs of execution, and
- warrants of delivery.

Thus the requirement for permission to issue a warrant applies to an order for delivery up of goods acquired by way of hire purchase or conditional sale where the order is suspended, for example, upon condition that the defendant pays the monthly contractual monthly instalments and a sum in respect of arrears. Indeed, it is arguable that the requirement for permission also arises in relation to proposed enforcement of any money judgment payable by instalment as the judgment creditor's entitlement to the remedy of immediate recovery of the entire judgment debt is, by reason of the provision for payment

by instalments, rendered subject to the fulfilment of a condition, namely payment of the instalments as they fall due.

Part 83 Writs and Warrants – General Provisions is attached and can be seen at (<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-83-writs-and-warrants-general-provisions>). Forms N323, N324, N325, and N445 can be seen at <https://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do> and prescribed form of notice as set out in The Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations 2010 is attached. The full Regulations can be seen at <http://www.legislation.gov.uk/ukxi/2010/1809/contents/made>.

Consultation

Background

CPR Part 83 *Writs and Warrants – General Provisions* introduced in April 2014 consolidated and updated most High Court and County Court rules on enforcement contained in Schedules 1 and 2 to the CPR and took into account the changes to enforcement brought about by the Tribunals, Courts and Enforcement Act 2007.

In a case proceeding in the High Court permission is required to issue a writ following a possession order, except in respect of claims against trespassers and mortgagees. In a matter proceeding in the County Court, the effect of CPR 83.2(3)(e) is that permission is required where the judgment or order, is suspended on condition and it is alleged that the condition has been fulfilled.

The majority of claims in which an order suspended on terms is made are issued in the County Court and where enforcement follows it is usually through the County Court. A small number of such claims are issued in the High Court and may be enforced through the High Court. An order for possession (other than against trespassers) made in the County Court may only be enforced in the High Court with the permission of the County Court.

Following issue of a warrant of possession, the defendant (and any other occupier) is notified of the date of eviction by the bailiff thereby affording the defendant or occupier the opportunity to make an application to the court to suspend the warrant. Any such application will incur a fee unless the defendant is able to claim a fee remission.

Where permission is required to issue a writ of possession, such permission will not be granted unless it is shown that every person in actual possession of the whole or any part of the land ('the occupant') has received such notice of the proceedings as appears to the court sufficient to enable the occupant to apply to the court for any relief to which the occupant may be entitled.

The Court of Appeal decision makes it clear that where the court has made an order for possession suspended on terms, the requirement for judicial scrutiny of any application to enforce the order affords an important measure of protection, particularly for vulnerable tenants, against the actions of an unscrupulous landlord.

At the same time, the Court of Appeal recognized that in making the order for possession the Court has already determined that the claimant's right to possession. Suspension of the order does not detract from the substance of the remedy, rather it simply delays execution of the order.

Where the order is suspended solely on terms as to the payment of rent or mortgage instalments (or, in the case of a return of goods claim, contractual payments) and arrears, the claimant's right to recover possession may have been deferred for a significant period and a breach if the order will have resulted, inevitably, in further arrears having accrued. In any such case, where the conditions for the suspension of the order have not been met, the question for determination is that of how the claimant is to be required to establish their right to enforce their remedy.

An application pursuant to Part 23 for permission to issue a writ or warrant involves payment of a court fee (currently £100 for an application made without notice and £255 for

an application made on notice). This fee is payable in addition to the fee payable for issue of the warrant or writ itself (currently £110 for a warrant of possession). Where the breach of the terms of suspension is a failure to pay money, the prospects of recovery of this outlay are likely to be remote and thus represent an additional and potentially irrecoverable financial burden on the party seeking to enforce their right to possession. Almost invariably these fees are added to the existing judgment debt thereby increasing the financial burden on the defendants, many of whom are amongst the most vulnerable in society and least able to pay.

The requirement for a permission stage, with concomitant costs and delay may act as a disincentive to landlords to agree to suspend orders and encourage them to seek an immediate possession order.

An assertion of failure to make monetary payments is easily demonstrable, whereas determination of whether a party has failed to comply with other conditions such as refraining from nuisance behaviour is likely to require a full hearing.

A defendant in respect of whom a warrant is issued may apply to the court either for suspension of the warrant on terms, or by way of challenge to the claimant's assertion that the terms of the suspension have not been fulfilled. There is a fee to make such an application to court, but the fee remission scheme is in place for those unable to meet the fees.

The majority view of the CPRC members is that a distinction should be made between cases where an order is suspended on monetary terms and those where other conditions are imposed. Where an order is suspended on purely monetary terms it is not considered that the claimant's having to seek permission is necessary to provide real protection for a defendant.

Conversely the committee's view is that in respect of any order suspended on terms other than monetary payment, the requirement for an application for permission to issue a warrant is appropriate and should be preserved.

Issue of possession claims, orders made and evictions executed, County Court 2015

	Mortgage claims	Landlord claims (social and private claims)	Total
Claims issued	19,852	153,691*	173,543
Possession orders made	14,015	118,467	132,482
Immediate Order for Possession (% of orders made)	7,984 (57%)	71,365 (60%)	79,349 (60%)
Suspended order for possession (% of possession orders made)	6,031 (43%)	47,096 (40%)	53,127 (40%)
Possession warrants issued (multiple warrants may be issued per claim)	23,220	77,618	100,838
Possession warrants executed by County Court Bailiffs	5,592	36,508	42,100

Private and social landlord possessions (County Court)

*of the 153,691 private and social landlord possession claims made, 38,402 were accelerated possession claims, 20,712 were private landlord possession claims, and 94,577 were social landlord possession claims.

Of the total of 118,461 possession orders made, 31,651 are accelerated possession orders. Reducing the total number of landlord possession orders by the accelerated possession orders leaves 86,810 possession orders and the number suspended 47,096. Suspended orders as a percentage of the number of orders excluding accelerated possession orders is 54%.

Possession claims and orders in the High Court

Data for the High Court is not as comprehensive. In 2015, 1,248 writs of possession were issued and 52,004 writs of control.

The CPRC seeks the views of respondents on the following:

1. Permission requirement in respect of suspended orders

The requirement for permission applies to all relevant writs and warrants, thus the problem identified in *Cardiff v Lee* arises not only in relation to suspended possession orders but in any case in which the entitlement to the remedy specified in the judgment or order is subject to the fulfilment of a condition. This would, therefore, include an order for the delivery up of goods (e.g. a motor car subject to an HP or conditional purchase agreement) suspended on terms as to payment of contractual instalments and arrears and may extend to any order where the entitlement to enforce payment of a judgment debt is suspended on terms as to payment by instalments.

The issues for consideration arising from *Cardiff v Lee* are thus -

- Should there be a requirement for permission in all instances where there is a suspended order or should there be a distinction between –

(a) orders suspended where the condition is payment of monies and

(b) those orders where the order is suspended on other terms, e.g. undertaking to take an action, refraining from anti-social behaviour/nuisance etc.?

- Should the difference between the requirement for permission in the High Court and County Court remain?

For example, permission is required before issue of writ in respect of property or land except in certain circumstances (CPR 83.13). Cases issued in the High Court that may concern complex issues, and cases involving rent possession cases, are only very exceptionally issued in the High Court. There has been an increase in the number of cases transferred to the High Court for enforcement. It has been suggested that the reason for this is because of the different powers of the High Court Enforcement Officer and the speedier execution of the writ of possession, despite the additional permission stage in some cases. The rule requiring permission applies to cases transferred into the High Court.

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

Please give your reasons.

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

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

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

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

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

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

2. Applications for permission

The current rule CR 83.2(4) provides that if permission to issue a writ or warrant of possession is required -

*“An application for permission **may** be made in accordance with Part 23 and must....”*

The permissive wording does not provide certainty for court users as to the steps that should be taken to seek permission.

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

3. Other safeguards for tenants and occupiers

Mortgagee and Rent Possession cases

Mortgagees are required to serve notice at the mortgaged property at least 14 days before the date on which eviction is scheduled. [A copy of the notice required by The Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations 2010 is attached.]

Where a warrant of possession is being executed in the County Court the bailiff must make a preliminary visit to the property, or make alternative arrangements in discussion with the Bailiff Manager. The visit to the property will be combined with delivery of the Notice of eviction (N54). The N54 must be given to the occupants or left at the address in an envelope addressed to the occupants by name and “any other occupiers”. The notice gives them the date and time of the impending eviction; and this also inform them of their rights.

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

If you have any other comments on the process, the CPRC would be pleased to hear them.

Attached: Forms N54,N323, N324 N325, N445 and prescribed form of notice as set out in The Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations 2010

Thank you for responding.

Response document

CIVIL PROCEDURE RULE COMMITTEE CONSULTATION

Enforcement of suspended orders – alignment of procedures in the County Court and High Court

28 June 2017 – 30 August 2017

The Civil Procedure Rule Committee would welcome responses to the following questions set out in this consultation paper. Please email your completed form to <mailto:CPRCconsultation@justice.gov.uk> or send it to Jane Wright, Post Point 3.42, Ministry of Justice, 102 Petty France, London SW1H 9AJ

About you

Full name :

Job title or Job capacity in which you are responding (eg member of the public etc):

If “other” please specify:

Company name/organisation (if applicable):

Postal address and postcode:

Email address:

If you would like an acknowledgement of receipt (other than the automatic response sent on receipt of a response sent by email) please tick this box.

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent:

Date:

Response to Questions

Permission requirement in respect of suspended orders

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

Yes

No

Please give your reasons:

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

Yes
 No

Please give your reasons:

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

Yes
 No

Please give your reasons:

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

<input type="checkbox"/>	Yes
No	<input type="checkbox"/>

Please give your reasons:

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

<input type="checkbox"/>	Yes
No	<input type="checkbox"/>

Please give your reasons:

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

Yes
 No

Please give your reasons:

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

Yes
 No

Please give your reasons:

Applications for permission

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

Yes
 No

Please give your reasons:

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

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

Yes

No

Please give your reasons:

Other comments you wish to make:

Thank you for responding

Consultation

ACAS

Access to Justice Action Group

Acumension

Advice Now

Advice Services Alliance

Advice UK

AM Trust Group

Antony Hodari

APIL

Arrow Global

Ascent

Association of HM District Judges

Bar Council

Blake Turner

BLM Law

British Chambers of Commerce

British Property Federation

BSF Solicitors

BWB

Cabot Financial

Capsticks

CBTC solicitors

Chartered Institute of Credit Management

Christians Against Poverty

Cicero Group

Citizens Advice Bureau

Civil Court Users Association

Civil Justice Council

Clarke Willmott

Consumer Credit Association

Consumer Finance Association

Corbetts

Costs Experts

Council of Mortgage Lenders

Court Funds Office

Court of Appeal

Credit Services Association

DAC Beachcroft
Department of Communities and Local Government
DG Legal
DWF Law

Federation of Private Residents Association
Federation of Small Businesses
Finance and Leasing Association
FLA
FOIL

Gadsby Wicks
Guildhall Chambers

HCE Group
High Court Enforcement Officers Association
Hill Dickinson
HMCTS
Homes and Communities Agency
Housing Law Practitioners Association
HSF
Hudgells Solicitors

Institute of Credit Management
Institute of Legal Executives
Institute of Money Advisors
Institute of Paralegals

Joseph Rowntree Foundation
Judiciary
Justice
Justice Committee

Landlords Association
Lane and Co
Law Centres Network
Law for Life
Law Society

Local Government Association
London Landlords Accreditation Scheme
Lovetts

Lowell Group
Lucas Credit Services

Marstons
Media organisations
Minister Law
Ministry of Justice
MishCon
MJT Costs UK
Money Advice Service
Money Advice Trust
Mortimer Clarke

National Association of Licensed Paralegals
National Association of Local Councils
National Consumer Council
National Council of Mortgage Lenders
National Homeless Association (awaiting email address)
National Housing Federation
National Landlords Association
National Organisation of Residents Associations

Obsborn Clarke
OFGEM
OUP
Oyez

Personal Support Units
Phoenix legal Services
Phoenix Legal Services
PM Law
Practical Law
Practico
Proddow Mackay

Registry Trust
Residential Landlords Accreditation Scheme
Residential Landlords Association
Restons

Shelter
Shoosmiths
SJ Berwin

Slater Gordon
Stepchange
Supreme Court

The Tenant's Voice
Trade Union Congress
Walker Morris
Welsh Government
Whiteheads