Cardiff v Lee Update

Many of you will no doubt recall the stir caused at the end of last year by the Court of Appeal judgment in *Cardiff County Council v Lee (Flowers)* [2016] EWCA Civ 1034; the implications of which are that landlords must now seek the permission of the court before requesting a warrant of possession in cases where it is said that the terms of a suspended possession order have been breached. The case threw out the window that which had been previously understood by most to be the correct procedure - and certainly the usual practice – whereby, upon breach, the landlord would simply apply for a warrant using Form N235, that would be issued on the papers and thereafter if the defendant wished to challenge he/she could do so via a stay application.

For those that didn't read it at the time (or are just very keen) a copy of the judgment on baillii can be found here.

If, however, reading the judgment is a little too much effort, the case was covered by our excellent Editor, Andy Lane, in several newsflashes (click here) and also in the November edition of our newsletter (click here).

Considerable concern has inevitably been raised by housing providers and their representatives about the increased costs and delay from having an extra stage in the eviction process and one which will likely require witness evidence to be filed (when in the past that would probably only have been done if a stay application was subsequently made) and may potentially involve an additional hearing.

The Court of Appeal judgment did provide some reassurance to landlord's in that, where there has been genuine error in using the incorrect procedure (i.e. the procedure that pretty much everyone was using before) and there is no prejudice to the defendant, then the court can exercise its power under CPR 3.10 to remedy the error and thus come to the landlord's 'rescue'. That, however, is only likely to be a solution for cases where applications had already been made before the judgment, or a short time after it, as the courts will clearly expect landlords (particularly large housing providers) to be aware of the proper procedures. Indeed, the Court of Appeal made it clear that social landlord's should put in place systems and update procedures to ensure they did not get in wrong in future.

So is that it then? Well no, not quite.

Update

The implications of this judgment not only have an impact on housing providers but also on the court system, which as we all know is hardly short of work. The judgment is therefore not the end of the story.

The Court of Appeal indicated in the judgment that the Civil Procedure Rule Committee ("the Rule Committee") should consider the wording on form N325. The Rule Committee has duly done so and at the end of December reported that it would be consulting in early 2017 on the current rules and the safeguards available to tenants and occupiers. It is understood that the intention is to be able to come up with a solution and issue new guidance by April 2017.

Ok great, but where does that leave things before that then?

Well, in the interim, the court service has introduced 'a work around' which takes the shape of new forms N325A and an amended N445 (reissue of warrant). Those were published in the online court form finder in early January and are have been in use since then.

Where a SPO has been granted in an arrears case (either rent or mortgage arrears) and the terms are breached, the landlord must make their request for issue of a warrant on the new Form N325A. For reissue of a warrant the amended Form N445 must be used.

In both instances a statement of the payments due and those made must be attached to the N325A or N445 and the new forms have an additional sentence certifying that, as follows:

> "*(3) a statement of the payments due and made under the judgment or order is attached to this request.†† (for rent arrears cases only).*

The intention is therefore clearly to avoid the need for a separate Part 23 application for permission on the basis that the attached rent statement ought to satisfy the evidential requirements. Thus, in effect, the new form serves both as the application for permission and the request for a warrant in one application form.

The request will be considered by a Judge on the papers and if it is determined that the warrant can be issued then an order will be drawn and the warrant issued. The Judge could call it in for hearing if there were any doubts.

It is important to note that these requests cannot be made through PCOL and therefore if a claim has been started on PCOL and gets to the stage of requesting a warrant the it will be necessary to do that on paper to the appropriate County Court hearing centre using the new forms.

For the avoidance of any doubt, the new form should only be used for cases where the order is a SPO. Requests for issue of a warrant where an outright possession order was made will continue to be made using the standard ('old') N325.

It has been made clear that this work around interim solution only applies to arrears cases. The position in respect of suspended orders for non-arrears case (e.g. ASB cases) is not changed and therefore, at least for the time being, *Cardiff v Lee* still applies and it will be necessary to make a Par 23 application for permission to request a warrant, accompanied with appropriate witness evidence.

The outcome of the Rule Committee consultation remains to be seen so it will continue to be necessary to 'watch this space' on this one; however for now at least there is at least a little clarity.

Zoë Whittington
Cornerstone Barristers
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