

Housing Possession in the Time of Pandemic

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Introduction

The COVID-19 pandemic has had a profound effect on household debt evidenced by a significant increase in rent and mortgage arrears.¹ In response, the landscape of eviction in England and Wales has changed fundamentally. Lenders, landlords, regulators and the court system have all introduced measures designed to mitigate the impact of the pandemic on households in an effort to assist them in keeping their homes, for now.² While all possession hearings were suspended between 27 March 2020 and 20 September 2020, landlords and mortgagees are now able to bring claims for possession under new rules known as the 'Overall Arrangements' (OA).³ In addition, a new 'Housing Possession Mediation Pilot Scheme' (HPMPS), intended to run for six months, was introduced on 1 February 2021. These initiatives are designed to increase opportunities for the parties to reach agreement and avoid the need for a substantive court hearing, thereby reducing the number of evictions and relieving pressure on the already overburdened court system.

In assessing the potential effectiveness of these new temporary measures, this article will begin with a detailed account of the OA and the HPMPS, the aims that underlie them and the extent to which they have transformed the possession process. While evidence relating to their implementation and effectiveness is necessarily scant given their recent introduction, recourse to the literature on the use of remote hearings and mediation in other areas of the civil justice system offers a means by which to assess their potential effectiveness.⁴ What this review reveals is that some but certainly not

*Please note that all websites were accessed on 28 April 2021.

¹ Judge, for example, estimates that 'over 750,000 families were behind with their housing payments in January 2021, 300,000 of which contained dependent children', see L. Judge, *Getting ahead on falling behind Tackling the UK's building arrears crisis*, Resolution Foundation Briefing, February 2021, p. 3. See also, D. Brady, 'Housing association rent arrears rise as COVID-19 economic impact bites' (2020) *Inside Housing* available at <https://www.insidehousing.co.uk/news/news/housing-association-rent-arrears-rise-as-covid-19-economic-impact-bites-68802>, Legatum Institute, 'Poverty during the Covid-19 crisis', 30 November 2020, available at <https://li.com/reports/poverty-during-the-covid-19-crisis/> and W. Wilson, H. Cromarty and C. Barton, 'Mortgage arrears and repossessions (England)' (12 February 2021) *House of Commons Library: Briefing Paper*, Number 04769.

² See Wilson et al (n 1) and Ministry of Justice, 'Mortgage and landlord possession statistics: October to December 2020', February 2021, Section 9: Annex, available at <https://www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-october-to-december-2020/mortgage-and-landlord-possession-statistics-october-to-december-2020>

³ The OA operate from 20 September 2020 until 30 July 2021. See The Master of the Rolls Working Group on Possession Proceedings, 'Overall Arrangements for Possession Proceedings in England and Wales', 17 September 2020: Version 1.0, available at <https://www.judiciary.uk/wp-content/uploads/2020/09/Possession-Proceedings-Overall-Arrangements-Version-1.0-17.09.20.pdf>

⁴ See, for example, Nuffield Family Justice Observatory, 'Remote hearings in the family justice system: a rapid consultation', 2020, available at https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo_remote_hearings_20200507-2-.pdf, Mr Justice MacDonald, 'The Remote Access Family Court', Version 5, 26 June 2020 available at <https://www.judiciary.uk/wp-content/uploads/2020/06/The-Remote-Access-Family-Court-Version-5-Final-Version-26.06.2020.pdf>, and R. Susskind, *Online Courts and the Future of Justice* (Oxford University Press: Oxford, 2019). A useful source of

all aspects of these new temporary arrangements should be considered for retention into the post-pandemic era.

Responding to the COVID-19 Pandemic

On 27 March 2020, the Master of the Rolls and the Lord Chancellor initiated a general stay on possession proceedings until 20 September 2020.⁵ The resumption of proceedings has taken place under what are known as the OA.⁶ Introduced by the Master of the Rolls Working Group on Possession Proceedings, the OA are designed to reduce the number of cases that need to come before the courts, account for the effect of the pandemic and maintain confidence in the outcome of legal cases.⁷

It should be noted at this stage that other measures were also introduced in response to the pandemic. As regards tenants, these included a ban on bailiff enforced evictions (other than in the most serious cases),⁸ until 31 May 2021 in England,⁹ and 30 June 2021 in Wales¹⁰ and the extension of notice periods (other than in exceptional cases),¹¹ to six months for notices served between 29 August 2020 and 31 May 2021 in England,¹² and 24 July 2020 and 30 June 2021 in Wales.¹³ While these measures (as well as the OA and HPMPs) apply equally in England and Wales, the different date applied under each regime is not the only significant difference. One other relates to cases involving serious rent arrears.

writing on the experience of using remote hearings around the world can be found here <https://remotecourts.org/>

⁵ Practice Direction 51Z see Courts and Tribunals Judiciary, '117th Practice Direction Update to the Civil Procedure Rules – Coronavirus Pandemic related, Announcements', 27 March 2020 available at <https://www.judiciary.uk/announcements/117th-practice-direction-update-to-the-civil-procedure-rules-coronavirus-pandemic-related/>. PD51Z was replaced on 25 June 2020 by CPR 55.29.

⁶ Public Health (Coronavirus) (Protection from Eviction) (England) (No. 2) Regulations 2021; as amended by Public Health (Coronavirus) (Protection from Eviction) (England) (No. 2) (Amendment) Regulations 2021 SI 2021/362.

⁷ The Master of the Rolls Working Group on Possession Proceedings (n 5), para. 4.

⁸ Public Health (Coronavirus) (Protection from Eviction) (England) (No. 2) Regulations 2021 SI 2021/164 and Public Health (Protection from Eviction) (No. 2) (Wales) (Coronavirus) Regulations 2021 SI 2021 No. 325 (W. 84).

⁹ Reg 2(1) of Public Health (Coronavirus) (Protection from Eviction and Taking Control of Goods) (England) Regulations 2020 SI 2020/1290 and Reg 2 of Public Health (Coronavirus) (Protection from Eviction) (England) Regulations 2021 SI 2021/15, from 22 February 2021 Public Health (Coronavirus) (Protection from Eviction) (England) (No. 2) Regulations 2021 as amended by Public Health (Coronavirus) (Protection from Eviction) (England) (No. 2) (Amendment) Regulations 2021 SI 2021/362.

¹⁰ Reg. 3(2) of Public Health (Protection from Eviction) (No. 2) (Wales) (Coronavirus) Regulations 2021 SI 2021 No. 325 (W. 84).

¹¹ See Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020 SI 2020/914 and Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Wales) Regulations 2020.

¹² Sch 29, para. 7 of the Coronavirus Act 2020, as amended by Reg. 2(2) of Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2021. For a useful guide to the complex web of rules and provisions relating to the protection of tenants during the pandemic see Shelter's guide at https://england.shelter.org.uk/legal/housing_options/covid-19_emergency_measures/rent_arrears_and_eviction#1

¹³ Sch 29, para. 7 of the Coronavirus Act 2020, as amended by Reg. 2 of Coronavirus Act 2020 (Residential Tenancies: Extension of Period of Protection from Eviction) (Wales) Regulations 2021. For a useful guide to notice periods see MHCLG, 'Understanding the possession action process: guidance for landlords and tenants', 7 April 2021, Annexe A, available at <https://www.gov.uk/government/publications/understanding-the-possession-action-process-guidance-for-landlords-and-tenants>

In England, the ban on bailiff enforced evictions and the extended six-month notice period do not apply to possession based on illegal occupation, false statement, anti-social behaviour, perpetrators of domestic abuse, where a property is unoccupied following death of a tenant, and serious rent arrears.¹⁴ So, for example, in relation to an Assured Shorthold Tenancy in England, rent arrears equivalent to six or more months' rent requires only four weeks' notice,¹⁵ and a bailiff enforced eviction is permitted.¹⁶ In Wales, the ban on bailiff enforced evictions and the extended six-month notice period do not apply to similar grounds,¹⁷ *except* for serious rent arrears, in these cases notice remains extended to six months.

As for mortgagors across England and Wales, the Financial Conduct Authority (FCA) introduced measures including payment deferrals,¹⁸ tailored guidance for the treatment of customers experiencing payment difficulties due to the pandemic,¹⁹ and a moratorium on the *enforcement* of possession proceedings until 1 April 2021,²⁰ although mortgagees were still permitted to seek a possession order.²¹ It would seem also, although it is not entirely clear, that the temporary ban on bailiff enforced evictions extends to mortgagors.²²

In summary, landlords and mortgagees have, since 20 September 2020, been able to bring new or to reactivate²³ existing possession claims but, only in exceptional circumstances will any household be evicted from their home before 1 June 2021 in England and 1 July 2021 in Wales. In order to understand the process under which those claims must proceed, the following section explores the aims underlying the OA, how the new rules attempt to achieve those aims and the extent to which these new arrangements differ from the pre-COVID process.

The Overall Arrangements (OA)

The main theme underlying the OA and associated measures,²⁴ is to avoid the need for court proceedings by encouraging pre-action communication and compromise. This approach is reiterated

¹⁴ See Public Health (Coronavirus) (Protection from Eviction) (England) (No. 2) Regulations 2021 SI 2021/164 and Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020 SI 2020/914.

¹⁵ Reg 3(7) of Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020 SI 2020/914.

¹⁶ Reg 3 of Public Health (Coronavirus) (Protection from Eviction) (England) (No. 2) Regulations 2021 SI 2021/164.

¹⁷ These are possession sought on grounds of illegal occupation, anti-social behaviour, eviction of perpetrators of domestic abuse where the victim is housed elsewhere, and where the property is unoccupied following the death of a tenant. See Public Health (Protection from Eviction) (No. 2) (Wales) (Coronavirus) Regulations 2021 SI 2021 No. 325 (W. 84) and Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Wales) Regulations 2020.

¹⁸ For a review of the measures introduced, see Wilson et al (n 1) p. 3.

¹⁹ Financial Conduct Authority, 'Mortgages and Coronavirus: Tailored Support Guidance', Finalised Guidance, March 2021, available at <https://www.fca.org.uk/publication/finalised-guidance/mortgages-and-coronavirus-tailored-support-guidance.pdf>

²⁰ *Ibid*, para. 7.2.

²¹ *Ibid*.

²² There appear to be no regulations relating to mortgage cases but guidance from the MHCLG states that, 'Legislation is in place to ensure bailiffs do not serve eviction notices or carry out evictions (including mortgage repossessions)...', see MHCLG (n 15), section 2.

²³ Claims made before 3 August 2020 require the claimant to send the court a 'reactivation notice' in order to signify the wish to restart the claim, The Master of the Rolls Working Group on Possession Proceedings (n 5), para. 8.

²⁴ See The Master of the Rolls Working Group on Possession Proceedings (n 5), para. 5.

by the FCA in respect of regulated mortgagees,²⁵ the National Residential Landlords Association (NRLA),²⁶ and guidance published by the Ministry of Housing, Communities and Local Government (MHCLG).²⁷ Under the OA claimants are, for example, encouraged to make efforts to resolve the dispute before initiating or reactivating a claim for possession.²⁸ This is not new as regards social landlords and mortgagees who are subject to Pre-Action Protocols which demand that possession is seen as a last resort.²⁹ The call for careful consideration before making a claim must therefore be targeted at private landlords, with the NRLA also publishing a pre-action plan that encourages private landlords to try to avoid court action through negotiation and mediation.³⁰

If the claimant considers it necessary to initiate a claim for possession then, unlike under pre-COVID conditions when only one hearing was scheduled, a new two-stage process comes into operation. The first is constituted by the Review or 'R date' followed, if necessary, 28 days later by the Substantive or 'S hearing'. The R date provides an opportunity for the parties to provide each other and the court with information relevant to the claim, for the defendant to receive free legal advice under the Housing Possession Court Duty Scheme (HPCDS) and for the parties to reach agreement.³¹ The provision of information includes the provision of an electronic bundle of material by the claimant to the court and the defendant 14 days before the R date.³² In addition to the usual information required (such as the claim form and particulars of claim) and in an effort to account for the impact of the COVID-19 pandemic on the parties, the bundle provided by the claimant must include 'enhanced information', namely 'what knowledge the claimant has as to the effect of the pandemic on the defendant and dependants.'³³ Guidance published by the MHCLG expands on the type of information required from both social and private landlords which includes any knowledge they have of the tenant's 'vulnerability, disability and welfare benefit position.'³⁴

An important point to note here is that claimants are not *required* to enquire about the impact of the COVID-19 pandemic on the defendant but rather, must *consider* whether to make such enquiries.³⁵ As regards information provided by the defendant, courts are encouraged to inform

²⁵ Financial Conduct Authority (n 21).

²⁶ National Residential Landlords Association, 'Pre-Action Plan: Managing arrears and avoiding possession claims', September 2020, available at <https://www.nrla.org.uk/resources/ending-your-tenancy/pre-action-plan-avoiding-possession-claims>

²⁷ MHCLG (n 15), section 2 and MHCLG, 'Understanding the possession action process: A guide for social landlords in England and Wales', 7 April 2021 available at <https://www.gov.uk/government/publications/understanding-the-possession-action-process-guidance-for-landlords-and-tenants/understanding-the-possession-action-process-a-guide-for-social-landlords-in-england-and-wales>

²⁸ The Master of the Rolls Working Group on Possession Proceedings (n 5), paras. 7 and 10.

²⁹ See 'Pre-Action Protocol for Possession Claims by Social Landlords' available at <https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-possession-claims-by-social-landlords> and 'Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property' available at https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha.

³⁰ National Residential Landlords Association (n 28).

³¹ The Master of the Rolls Working Group on Possession Proceedings (n 5), para. 50.

³² *Ibid*, para. 49.

³³ *Ibid*, para. 25. See Civil Procedure Rules 1998 (CPR) Practice Direction (PD) 55C, 6.1(ii) and 6.2.

³⁴ MHCLG (n 15) and MHCLG (n 29).

³⁵ S. Mullings, and S. James, *Housing Possession Duty Desk: A Practical Guide*, (Legal Action Group, London: 2021), para. 2.18.

defendants that, if they have difficulty completing a defence form,³⁶ then they are able to provide a short statement explaining their circumstances and why an order for possession should not be made.³⁷

Private landlords, tenants and mortgagors are invited to mark the material they provide as a 'COVID-19' case. This requires the parties to declare any particular hardship they have encountered as a result of the pandemic such as being unable to work or being extremely clinically vulnerable.³⁸ The marking of cases in this way is intended to alert the claimant to cases that may require special consideration, to assist the court with listing cases and to inform the judge's decision in cases in which they are able to exercise discretion.³⁹ In particular, where a defendant marks their information as a 'COVID-19' case, both private and social landlords are encouraged to consider alternatives to seeking possession such as 'agreeing a repayment plan for any rent arrears.'⁴⁰

If no alternative can be found, then the R date will proceed and it is at this stage that we begin to see a fundamental change to the possession process. Prior to the pandemic, changes to the provision of legal aid meant that funded legal advice was available only to those at immediate risk of losing their home, that is, at the court on the day of their possession hearing.⁴¹ The provision of free-at-the-point-of-use legal advice continues under the OA but importantly, is available at an earlier stage than was previously the case. Under the new arrangements, legal advice is made available on the R date, that is, at least 28 days before the S hearing at which a possession order might be made.⁴² The OA suggests also that the much maligned 'advice deserts' so familiar within the post-2012 legal aid landscape have been addressed through the extension of contracts by the Legal Aid Agency.⁴³

The provision of information prior to the R date (which the court will make available to the duty solicitor if they have not already received it)⁴⁴ coupled with the provision of legal advice to the defendant is intended to allow the parties to reach compromise on the R date and thereby avoid the need for any further legal proceedings. The means by which this is to be achieved, however, remains somewhat vague. The OA makes no mention of the manner in which the parties are to arrange the meeting while the MHCLG guidance to landlords and tenants indicates that '... if the tenant also confirms that they can attend, a meeting will be arranged on the date of the review between your tenant and their duty solicitor or adviser.'⁴⁵ There is no indication as to who is responsible for arranging the meeting and there appears to be no provision for court time or resources to be made available to the parties. The only requirement is that the claimant must confirm to the court that they will be available on the R date to discuss the case with the defendant and/or the duty solicitor

³⁶ For an example of the defence forms see, Form N11R for rented property, available at <https://www.gov.uk/government/publications/form-n11r-defence-form> and N11M for mortgaged property available at <https://www.gov.uk/government/publications/form-n11m-defence-form-mortgaged-residential-premises>

³⁷ The Master of the Rolls Working Group on Possession Proceedings (n 5), para. 28.

³⁸ Ibid, Fn to para. 30.

³⁹ Ibid, para. 29.

⁴⁰ MHCLG (n 15) and MHCLG (n 29).

⁴¹ For a detailed account of the HPCDS see S. Bright and L. Whitehouse, *Information, Advice and Representation in Housing Possession Cases*, (April 2014), p. 58 et seq, available at https://www.law.ox.ac.uk/sites/files/oxlaw/housing_possession_report_april2014.pdf.

⁴² The Master of the Rolls Working Group on Possession Proceedings (n 5), para. 39.

⁴³ Ibid, para. 47. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced fundamental changes to the provision of legal aid.

⁴⁴ The Master of the Rolls Working Group on Possession Proceedings (n 5), para. 50.

⁴⁵ MHCLG (n 15).

by telephone if necessary.⁴⁶ The OA, however, require the notice of listing to include information about the availability of non-means-tested advice from the HPCDS and the arrangements for accessing this advice.⁴⁷ This, it is presumed, allows for locally tailored arrangements to be employed by each court. The R date advice can be delivered in a variety of forms including face-to-face or remotely.⁴⁸

The implication appears to be that on the R date, the parties will attempt via remote means to reach compromise and if successful, this will then be made known to the judge. This is made apparent by the provision in the OA of a 'very short' (five minute) appointment to be listed at the end of the R date during which a Judge will undertake a review of the paperwork with none of the parties in attendance.⁴⁹ The OA suggests that any resolution or directions agreed by the parties on the R date will be communicated by the duty solicitor to the usher and thence on to the judge.⁵⁰ In practice, however, it appears that each court has a dedicated email address that can be used by all the parties to facilitate communication and to inform the judge of any agreement reached between them.⁵¹

If no agreement is reached on the R date, then the judge will consider the material provided and if appropriate, proceed to the second stage of the new process known as the 'S' hearing which will be scheduled 28 days later.⁵² It is at this stage, however, that a new and additional opportunity for the parties to resolve the case arises in the form of the HPMPs. If referred for mediation, it will take place within ten days of referral,⁵³ that is, before the S hearing so that no delay is occasioned by the willingness to take part.

The Housing Possession Mediation Pilot Scheme (HPMPS)

Continuing a trend evident since the 1990s,⁵⁴ the increased use of digitisation and alternative dispute resolution (ADR) mechanisms has become a key feature of the current Master of the Rolls' tenure.⁵⁵ It is perhaps not surprising therefore that a pilot mediation scheme has been introduced to reduce the number of substantive cases coming before the courts. It is for the duty solicitor to refer the case for mediation but only if both parties agree.⁵⁶ While the original plan was for duty advisers

⁴⁶ The Master of the Rolls Working Group on Possession Proceedings (n 5), para. 49(d).

⁴⁷ Mullings and James (n 37), para. 2.29.

⁴⁸ *Ibid*, para. 2.31.

⁴⁹ The Master of the Rolls Working Group on Possession Proceedings (n 5), para. 51.

⁵⁰ *Ibid*, para. 52.

⁵¹ Mullings and James (n 37), para. 2.40.

⁵² The Master of the Rolls Working Group on Possession Proceedings (n 5), para. 39.

⁵³ MHCLG, 'Housing Possession Mediation Service', 7 April 2021, available at <https://www.gov.uk/government/publications/housing-possession-mediation-service/housing-possession-mediation-service>

⁵⁴ For a useful summary see M. Whitehouse, 'Regulating civil mediation in England and Wales: towards a "win-win" outcome' (2017) 2:1 *Mediation Theory and Practice* 69-83, 71. See also Civil Justice Council, 'Online Dispute Resolution for Low Value Civil Claims' (2015), available at <https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> M. Briggs, 'The Online Solutions Court. Affordable Dispute Resolution for All: A Reform Case Study', (2016) Tom Sargant Memorial Lecture 2016 available at <https://files.justice.org.uk/wp-content/uploads/2016/10/06170710/Lord-Justice-Briggs-JUSTICE-lecture-Oct-2016.pdf> and the Woolf Report, 'Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (HMSO: London, 1996).

⁵⁵ The European Law Institute, 'The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution: Report of the European Law Institute and of the European Network of Councils for the Judiciary', (European Law Institute: Brussels, 2018), available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ADR_Statement.pdf

⁵⁶ *Ibid*, para. 2.41.

to act as mediators on cases referred by other duty advisers, the scheme was eventually put out for tender with the Society of Mediators winning the bid.⁵⁷ The first referral was received on 6 February 2021 but any further information regarding the number of referrals to date has not yet been made known.⁵⁸

Information regarding the workings of the scheme remains patchy but practitioners have indicated that duty advisers have been asked to identify cases on the R date that they think are suitable for mediation. They then approach the claimant and defendant to explain the mediation process and to ask whether they are willing to take part. If they are, the duty adviser emails the claim number to a dedicated email address.⁵⁹ It is perhaps presumptive albeit probably realistic to suggest that duty solicitors will not have been enamoured of this extra unpaid work,⁶⁰ with Mulling and James describing it as 'extremely unwelcome'.⁶¹ Once the referral is made, however, the process is then administered by Her Majesty's Courts and Tribunals Service and the Society of Mediators, with mediation taking place over the telephone.⁶²

If the mediation proves 'successful',⁶³ then any further hearings will not be necessary. If it is not successful, then the process proceeds as planned and the parties move to the second stage, the S hearing.

The Substantive or 'S' hearing

The S hearing proceeds in much the same manner as a pre-COVID hearing, with the expectation that the hearing will be face-to-face at court with duty advice available on the day.⁶⁴ Remote hearings are possible where the parties agree,⁶⁵ or legal representatives may appear by video link⁶⁶ and/or the parties may appear by video link or telephone.⁶⁷ Rather than being listed every five minutes, as was the case before March 2020, S hearings are listed for fifteen minutes, with five minutes in between hearings to allow for COVID-19 safety measures to be implemented.⁶⁸ Unlike pre-COVID hearings however, the defendant may have already received R date advice and been through the process of mediation. The judge is not to take these matters into account and is, in fact, not informed if mediation has taken place unless a successful outcome was reached which would mean that the S hearing would not in any case be necessary.⁶⁹ The idea being that a judge should consider the case on its merits and not assume any adverse inference from the failure to reach agreement on the R date or the occupier's failure to follow the R date advice.

⁵⁷ For more on the Society of Mediators see <https://www.societyofmediators.com/>

⁵⁸ The Society of Mediators, 'Possession Mediation Scheme begins - first of 10,000 cases received!', 6th February 2021, available at <https://www.218strand.com/story/2021/02/06/possession-mediation-scheme-begins-first-of-10-000-cases-received-/127/>

⁵⁹ Mullings and James (n 37), Appendix 8, p. 323.

⁶⁰ Ibid, Appendix 8, p. 324.

⁶¹ Ibid.

⁶² MHCLG (n 15).

⁶³ Questions regarding how 'success' is to be defined in this context have been raised by practitioners, see Mullings and James (n 37), Appendix 8, p. 324 and Sergides, M., 'The Housing Mediation Pilot', Blog, 23 February 2021 available at <https://gardencourtmediation.co.uk/the-housing-mediation-pilot/>

⁶⁴ The Master of the Rolls Working Group on Possession Proceedings (n 5), para. 46(b).

⁶⁵ Ibid, para. 15(c).

⁶⁶ Ibid, para. 20.

⁶⁷ Ibid, para. 21.

⁶⁸ Ibid, para. 56.

⁶⁹ Mullings and James (n 37), para. 2.52.

The case will proceed as before COVID but with more time for consideration of the facts although fifteen minutes may still not be sufficient for the judge to consider complex cases or proposed defences. This is recognised within the OA which state that, 'where the issues are complex or the evidence or argument requires, these directions may be towards a fuller substantive hearing with an individual time estimate and listing.'⁷⁰ Additionally, the question of adjournment can be considered by the judge, without the need for an application to adjourn, where no advice has yet been made available to the defendant and where the order may lead to serious consequences as a result of the pandemic.⁷¹

New Listing Practices

Prior to the stay on proceedings, cases were 'block listed' in the courts.⁷² This meant that several cases would be scheduled to be heard during the morning or afternoon session, with no specific start time allocated. Research suggests that cases were allocated approximately five minutes each,⁷³ with Hunter et al finding that in some courts up to 30 possession cases could be listed each hour.⁷⁴ The parties would be expected to attend court and wait for their case to be called. This gave the impression that cases were allocated very little significance and time in the court day (for example, 2 minutes per hearing) but research has found that the amount of time spent on each case can vary regardless of the amount of time it is listed for.⁷⁵ Under the OA, there is no 'block listing',⁷⁶ rather hearings on R dates (i.e. a judge considering the paperwork without the parties in attendance) are scheduled for five minutes at the end of the day,⁷⁷ with around ten scheduled in one day,⁷⁸ and S hearings are listed for fifteen minutes.⁷⁹ The intention is for cases to be listed according to the type of claimant,⁸⁰ with priority given to more 'serious' cases.⁸¹

Numbers of Claims and Possessions

The impact of the measures put in place in response to the COVID-19 pandemic become obvious upon a review of the number of claims dealt with by the courts during October to December 2020. Compared to the same quarter the previous year, mortgage possession claims are down 96% and repossessions are down 99%, with only 29 orders for possession and 7 repossessions.⁸² As regards landlords, possession claims have decreased by 67% and repossessions by 93%, with 2,195 orders for possession and 548 repossessions.⁸³ As regards landlord claims, a shift has been seen in the proportion of claims made by social and private landlords. Whereas in October to December 2019,

⁷⁰ Ibid, para. 57.

⁷¹ Ibid, para. 58.

⁷² Mullings and James (n 37), para. 2.1.

⁷³ Bright and Whitehouse (n 44), pp. 41-43.

⁷⁴ C. Hunter, S. Blandy, D. Cowan, J Nixon, E. Hitchings, C. Pantazis and S. Parr, 'The Exercise of Judicial Discretion in Rent Arrears Cases' (London: Department for Constitutional Affairs, Research Series 6/05, October 2005), p.29.

⁷⁵ See, for example, Mullings and James (n 37), para. 2.11 and L. Whitehouse, S. Bright, and M.K. Dhani, 'Improving Procedural Fairness in Housing Possession Cases', *Civil Justice Quarterly*, (2019) 38:3 *Civil Justice Quarterly* 351, 359.

⁷⁶ The Master of the Rolls Working Group on Possession Proceedings (n 5), para. 34.

⁷⁷ Ibid, paras. 51 and 52.

⁷⁸ Mullings and James (n 37), para. 2.8.

⁷⁹ The Master of the Rolls Working Group on Possession Proceedings (n 5), paras. 55 and 56.

⁸⁰ Ibid, para. 41.

⁸¹ These include allegations of anti-social behaviour and extreme alleged rent arrears (for example, twelve months' rent), see *ibid*, paras. 43(a) and (b).

⁸² Ministry of Justice, (n 2), Section 3.

⁸³ *Ibid*, Section 5.

17% of all landlord possession claims were by private landlords, this increased to 43% in October to December 2020.⁸⁴

For the better?

In assessing the effectiveness of these new temporary measures it should be recognised that the COVID-19 pandemic has placed unprecedented demands on the court system and has required a speed of response never before seen within legal reform. It would be churlish therefore to critique these new measures without recognition of the context within which they were introduced. Having said that, peoples' homes and livelihoods are at risk and it remains vitally important to ensure that access to justice and due process are maintained for both defendants and claimants.⁸⁵

In assessing the extent to which the OA and HPMPs meet these demands recourse can be had to earlier research which has called for reform of the possession process. Research by Bright and Whitehouse for example emphasised the importance of early and meaningful engagement by both parties in avoiding the need for court action.⁸⁶ The emphasis given to pre-action communication and negotiation within the OA and related measures is therefore to be welcomed. While the motivation underlying this may well be to avoid the court system being overwhelmed with possession claims, it nevertheless has the potential to assist some households in avoiding the anxiety associated with court proceedings and the threat of home loss.⁸⁷

Both Bright and Whitehouse and Whitehouse et al have been critical of the lack of 'joined up thinking' within the pre-COVID process, particularly in respect of the information requested by the court.⁸⁸ The behaviour required under the Pre-Action Protocols (particularly for social landlords) for example, may lead to the claimant having detailed knowledge of the defendant's circumstances. However, this information is rarely conveyed to the court via the particular of claims form,⁸⁹ which tends to focus almost entirely on the defendant's financial circumstances. Similarly, it seems relatively rare for a defendant to submit a completed defence form,⁹⁰ and even if they do, the

⁸⁴ Ibid.

⁸⁵ For more on due process see, D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press, 1996), A. Saunders and R. Young, 'The Rule of Law, Due Process and Pre-Trial Criminal Justice' (1994) 47(2) *Current Legal Problems* 125–156 and T.M. Scanlon, 'Due Process' (1977) 18 *Nomos* 93–125. For a definition of access to justice in this context, see N. Byrom, S. Beardon, and A. Kendrick, *The impact of COVID-19 measures on the civil justice system* (Civil Justice Council and Legal Education Foundation, May 2020), para. 5.80.

⁸⁶ Bright and Whitehouse (n 44), pp. 14-15.

⁸⁷ See, for example, Mind, 'Still in the Red: Update on Debt and Mental Health' (2011), at <https://www.mind.org.uk/media-a/4348/still-in-the-red.pdf>; Royal College of Psychiatrists and the Money Advice Trust, 'Debt Collection and Mental Health: Ten Steps to Improve Recovery' (November 2010); and S. Nettleton, 'Losing a Home through Mortgage Repossession: The Views of Children' (2001) 15 *Children and Society* 82.

⁸⁸ Bright and Whitehouse (n 44), p. 76 and Whitehouse et al (n 80), pp. 359-362.

⁸⁹ Form N119 for rented property <https://www.gov.uk/government/publications/form-n119-particulars-of-claim-for-possession> and Form N120 for mortgaged property available at <https://www.gov.uk/government/publications/form-n120-particulars-of-claim-mortgaged-residential-premises>

⁹⁰ Concerns regarding the low rate of return of defence forms in all types of possession claims have been noted for some time, see Bright and Whitehouse (n 44), pp. 38-39. Whitehouse et al note the lack of recorded data on this but in their survey they found that defence forms were submitted in only 10 per cent of the cases they reviewed, Whitehouse et al (n 80), p. 362.

forms⁹¹ do not target information relevant to the judge's exercise of discretion (for example, whether the defendant has a disability or other protected characteristic which might give rise to a defence under the Equality Act 2010).⁹²

The OA, however, in requiring claimants to provide 'enhanced information' as well as the ability of both parties to mark the case as a 'COVID-19' case has the potential to supply the court with additional information. Similarly, the ability of defendants to provide a short statement explaining their circumstances and why an order for possession should not be made⁹³ is perhaps a nod to the low response rate and the difficulties, identified by researchers, that some defendants have in completing the court forms.⁹⁴ By encouraging the provision of more detailed information and opening up the means by which that information can be provided the OA may assist in ensuring that the judge is able to make an informed decision (in cases where discretion is exercisable) based on the circumstances of the case, a key element in ensuring due process and access to justice.⁹⁵

As regards changes to the legal process of possession, research by Hunter et al⁹⁶ and Whitehouse et al,⁹⁷ noted that a large proportion of pre-COVID possession claims tended to result in an adjournment. The reasons for this are numerous but one persistent reason relates to unresolved welfare benefit claims.⁹⁸ In response, proposals for reform have included the introduction of an 'administrative filter' designed to weed out cases prior to a substantive hearing that are very likely to be adjourned.⁹⁹ It would seem that the introduction of the R date and requirement for 'enhanced information' from the claimant may serve the same purpose by identify cases that are not yet S hearing ready. Assuming the parties are engaging with the R date process then this appears to be a win-win for the defendant, who avoids having to attend the S hearing, the claimant whose expectations are not dashed by an unforeseen adjournment and the court, which avoids the need to list a S hearing.

Perhaps one of the most notable benefits of the OA is the provision of free legal advice at an earlier stage in the process than was previously the case. Researchers have for many years been emphasising the importance of advice and its potential to prevent eviction for some households.¹⁰⁰ In particular, concerns have been raised regarding the potential for some households to miss out on raising legitimate defences to possession due to the lack of advice or the lack of time available for meaningful advice.¹⁰¹ Under the pre-COVID system, duty advisers would literally have minutes to gather information from the defendant and to offer advice (sometimes achieved while walking towards the court room). Coupled with hearings scheduled for two minutes, the opportunity for defendants to identify and argue a defence were minimal. With the introduction of the R date and the advice that goes with it as well as the listing of S hearings for fifteen rather than two minutes,

⁹¹ Form N11R for rented property, available at <https://www.gov.uk/government/publications/form-n11r-defence-form> and N11M for mortgaged property available at <https://www.gov.uk/government/publications/form-n11m-defence-form-mortgaged-residential-premises>

⁹² Whitehouse et al (n 80), p. 360.

⁹³ The Master of the Rolls Working Group on Possession Proceedings (n 5), para. 28.

⁹⁴ See, for example, J. Nixon, C. Hunter, Y. Smith and B. Wishart, *Housing Cases in the County Courts* (The Policy Press: London, 1996), pp.20–21 and Bright and Whitehouse (n 44), p.34.

⁹⁵ See Byrom et al (n 92), para. 5.80 and Whitehouse et al (n 80).

⁹⁶ Hunter et al (n 79).

⁹⁷ Whitehouse et al (n 80).

⁹⁸ *Ibid*, pp. 364-365.

⁹⁹ *Ibid*, pp. 370-371.

¹⁰⁰ Bright and Whitehouse (n 44).

¹⁰¹ Whitehouse et al (n 80), p. 361.

the hope is that more households will be able to take advantage of raising a defence and avoiding loss of home.

This is of course dependent on defendants engaging with the R date process but, concerns have been raised over the last several years about low levels of engagement by occupiers in the possession process.¹⁰² While data on the number of defendants who attended hearings pre-COVID is not available,¹⁰³ evidence from a range of sources suggests that less than half of all occupiers attended their possession hearing,¹⁰⁴ with a 2017 study finding that tenants were present in no more than 35% of the cases studied.¹⁰⁵ The reasons for this are not known, with occupiers in debt and at threat of losing their home a hard to reach demographic. Given that the R date does not have the 'force' of a substantive court hearing behind it, questions must be raised regarding the likelihood of a large proportion of occupiers engaging with it. Anecdotal evidence from duty advisors suggests that the proportion of defendants engaging with the R date has so far been low. This is necessarily an issue of concern but without effective data regarding the use of remote means of communication and attendance rates in respect of both claimants and defendants it is impossible to make any claims regarding the 'success' of the R date innovation.

There are also some concerns regarding the use of remote hearings in housing possession hearings. While the expectation is that S hearings will be 'face-to-face', there is the option to hold it remotely. The literature on the use of remote hearings in other areas of the civil justice system notes issues not only with the use of technology (for example, audio problems) but more substantively with the ability of lay people to access the technology necessary to participate effectively.¹⁰⁶ Particular concerns have been raised in relation to the extension of remote hearings to housing possession cases due to the disproportionate number of 'vulnerable' defendants in these cases.¹⁰⁷ Shelter, for example, have commented that, 'there is a serious risk that possession orders will be made which would not have been made at a physical hearing because the defendant has been unable to explain his/her circumstances fully, either to a duty adviser or to the court.'¹⁰⁸ There are however some benefits to remote hearings including the financial savings in terms of no travel being required,¹⁰⁹ and the removal of any anxiety the defendant may have about attending court. Byrom et al, however, writing before the introduction of the OA, cautioned against the extension of remote hearings to possession cases.¹¹⁰ It is perhaps these concerns that explain the expectation within the AO that the parties will attend *in person* at the S hearing.

HPMPS - A Success?

¹⁰² See, for example, Bright and Whitehouse (n 44), p. 58 et seq, [L. Whitehouse, and S. Bright, 'Losing a home: does the current housing possession process provide effective access to justice?'](#), (2014) 164/7611 *New Law Journal* 16-17; and Whitehouse et al (n 80).

¹⁰³ Whitehouse et al (n 80), p. 362.

¹⁰⁴ Hunter et al (n 79), pp.16–17 and 24–25 and Ministry of Justice, 'Solving disputes in the county courts: creating a simpler, quicker and more proportionate system', March 2011, CP6/2011, Cm 8045, para. 98, available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228973/8274.pdf

¹⁰⁵ Whitehouse et al (n 80), p. 362.

¹⁰⁶ Byrom et al (n 92), para. 1.22.2.

¹⁰⁷ *Ibid*, para. 8.16.

¹⁰⁸ *Ibid*, para. 8.17.

¹⁰⁹ *Ibid*, para. 8.15.

¹¹⁰ *Ibid*, para. 1.23.

There is, of course, a vast amount of literature on mediation and its effectiveness as an alternative to more traditional adjudicatory forms of dispute resolution.¹¹¹ Given the extent of this literature, focus will be given here to that which relates to the civil justice system in the UK and particularly, housing disputes. The introduction of the HPMPs will have been welcomed by those who believe that mediation has the potential to resolve housing disputes in a way that preserves long term relationships, as the charity JUSTICE note, 'negotiation and mediative methods of dispute resolution, which might be more successful in sustaining tenant-landlord relationships than adversarial methods, need to be encouraged more strongly.'¹¹² While there is evidence that mediation can prove more effective than traditional forms of dispute resolution in terms of encouraging compliance with the outcome and resolving disputes into the long term,¹¹³ much of the commentary on the use of mediation in housing disputes is largely negative, with the HPMPs in particular having been described as 'controversial'.¹¹⁴ The Housing Law Practitioners' Association, for example, is critical of proposals to replace traditional forms of dispute resolution with less formal procedures. This is due to the lack of legal representation available under ADR, 'it is only by providing legal advice and assistance to the tenant, homeless person, or other occupier of housing that fairness can be achieved. To remove that representation is to create serious injustice.'¹¹⁵

These concerns arise in part as a result of the imbalance in the power relationship between the claimant and defendant,¹¹⁶ a feature explored in some depth in the ADR literature.¹¹⁷ While differentials in the power dynamic may not necessarily impact adversely on the suitability or effectiveness of mediation,¹¹⁸ 'these imbalances may not be mitigated and unfair settlement can result.'¹¹⁹ Also, occupiers with little knowledge of complex housing law and who are not represented at mediation may agree to outcomes that may not be in their best interests.¹²⁰ As Sergides notes, 'tenants may feel that the way to avoid a possession hearing is to make unrealistic offers regarding the repayment of rent arrears.'¹²¹

Criticism of the move to mediation in housing possession cases arises also from the political concern that it is driven by an attempt to reduce costs, as Mullings and James make clear, 'there is a great concern that moves towards mediation are designed to further erode the legal aid for tenants and therefore erode tenants' legal rights.'¹²² The point has been reiterated by the President of the Law

¹¹¹ See, for example, L. Fuller, 'Mediation – its form and functions', (1970) 44 *Southern California Law Review* 305, H. Genn, *Judging Civil Justice* (Cambridge University Press: Cambridge, 2010), K.J. Hopt and F. Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press: Oxford, 2013), S. Roberts and M. Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (Cambridge University Press: Cambridge, 2009).

¹¹² JUSTICE, 'Solving Housing Disputes A Report by JUSTICE,' 2020, para. 5.2, available at <https://justice.org.uk/wp-content/uploads/flipbook/29/book.html>

¹¹³ Social Research: Crime and Justice, 'An International Evidence Review of Mediation in Civil Justice' Scottish Government, 2019, available at: <https://www.gov.scot/publications/international-evidence-review-mediation-civil-justice/pages/9>

¹¹⁴ Mullings and James (n 37), Appendix 8, p. 322.

¹¹⁵ JUSTICE (n 119), Annexure B: Dissenting report of the Housing Law Practitioners Association members of the Working Party, p. 131.

¹¹⁶ Mullings and James (n 37), Appendix 8, pp. 322-323.

¹¹⁷ See, for example, J. Kurtzberg and J. Henikoff, 'Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation,' (1997) 1 *Journal of Dispute Resolution* 53-118, p. 56.

¹¹⁸ *Ibid.*

¹¹⁹ Social Research: Crime and Justice (n 120), p. 44.

¹²⁰ *Ibid.*, pp. 4-5.

¹²¹ Sergides, (n 67).

¹²² Mullings and James (n 37), Appendix 8, pp. 322-323.

Society who noted that, 'mediation has an important place in dispute resolution, however housing is such an essential life requirement that mediation cannot replace the usual routes of access to justice through the courts or take money from schemes that facilitate that access.'¹²³

Others are concerned about the resources allocated to a process that appears to hold little potential to resolve a large number of cases.¹²⁴ Given only those cases that cannot be resolved on the R date and in respect of which the claimant is willing to go to mediation will be referred, it seems unlikely that private landlords in particular will agree to mediation for, 'it is hard to see how a landlord's wish to evict a tenant can be resolved by mediation,'¹²⁵ or whether a landlord who has issued a possession order would be prepared to change their mind.¹²⁶ There is concern therefore that the HPMPs has the potential to be 'a bit of an Icarus.'¹²⁷

While specific concerns have been voiced regarding the use of mediation in housing possession cases, others view the move to mediation and others forms of ADR more generally as evidence of a 'troubling anti-adjudication rhetoric... that locates civil justice as a private matter rather than as a public and socially important good.'¹²⁸ Noting concerns raised by a number of senior members of the judiciary, Genn argues that, 'those concerns are well-founded. As a byproduct of economic expedience and the relentless movement away from public adjudication to private dispute resolution, we are not merely losing the courts and access to them; we are losing the language of justice in relation to a very wide range of issues affecting the lives of citizens.'¹²⁹

Overall, the consensus appears to be that some but not all housing cases might be suitable for mediation. Both JUSTICE¹³⁰ and the Law Commission¹³¹ have noted the potential suitability of mediation in cases that involve housing relationships that are intended to continue beyond the resolution of the dispute. For those that involve loss of home, however, adjudication appears to be the preferred approach, as the Civil Justice Council makes clear, 'we believe that in respect of cases which have a serious effect upon the wellbeing of the individual – and few cases can have greater significance than those which may result in a person's eviction from his or her home – the authority of a court is required to sanction a possession order or provide an appropriate remedy.'¹³²

Despite the lukewarm reception afforded to the HPMPs, it is important to await evidence of its operation before attempting an assessment of its success, or otherwise.

Conclusions

While we await further research into the effectiveness of the OA and HPMPs, it seems clear from a comparison with the pre-COVID process that there is much to commend the new arrangements. The

¹²³ The Law Society, 'Housing mediation pilot must not replace the usual routes to access justice', Press release, 08 Feb 2021, available at <https://www.lawsociety.org.uk/en/contact-or-visit-us/press-office/press-releases/housing-mediation-pilot-must-not-replace-the-usual-routes-to-access-justice>

¹²⁴ G. Peaker, 'Misc – possession and mediation, money and remediation', *Nearly Legal: Housing Law News and Comment*, 12 February 2021, available at <https://nearlylegal.co.uk/2021/02/misc-possession-and-mediation-money-and-remediation/>

¹²⁵ Mullings and James (n 37), Appendix 8, pp. 322-323.

¹²⁶ Law Commission, *Housing: Proportionate Dispute Resolution*, Law Com No 309, May 2008, para. 4.72.

¹²⁷ Peaker (n 131).

¹²⁸ Genn, H., 'What Is Civil Justice For? Reform, ADR, and Access to Justice', *Yale Journal of Law and the Humanities* (2013) 24 (1) 397-417, p. 13.

¹²⁹ *Ibid*, p. 19.

¹³⁰ JUSTICE (n 119). para. 3.47.

¹³¹ Response from Shelter in Law Commission (n 133), para. 4.54.

¹³² Law Commission (n 133), para. 5.31.

opportunity for the defendant to obtain legal advice at an earlier point in the process, enhanced opportunities for pre-action negotiation and an increase in the time allocated to S hearings may well prove effective in avoiding ‘unnecessary’ court hearings and most importantly, in assisting households in avoiding the loss of their home. What seems less clear is the potential for mediation to serve as meaningful a purpose in housing possession cases as it does in other areas of the justice system. Given the ‘daunting prospect’¹³³ of the predictable backlog of cases waiting in the wings,¹³⁴ the question is whether these arrangements will remain a feature of the post-pandemic era and, in particular, whether they will be sufficient to prevent the court system from being overwhelmed. While some of the measures bode well in this regard, as is true of so much during these unprecedented times, we will simply have to wait and see.

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¹³³ Judge (n 1), p. 4.

¹³⁴ Byrom et al (n 92), para. 4.6.