

Housing Possession in the Time of Pandemic: Part 2

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Introduction

The response to the COVID-19 pandemic in housing possession cases in England and Wales formed the subject of an article (known here as Part 1) in an earlier volume of this journal.¹ Having offered a summary of the measures introduced, including the Overall Arrangements (OA),² Pt 1 concluded that, compared with the pre-COVID process, there was “much to commend the new arrangements”.³ The 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 substantive hearings held the potential to avoid “unnecessary” court hearings. Ultimately, however, the conclusion was that, while the measures bode well, it was necessary to await further research before an assessment of their effectiveness could be undertaken.

Based on a nine-month investigation into the operation of the OA,⁴ generously funded by the Economic and Social Research Council, this article (Pt 2) is now able to offer that assessment. It does so by supplementing existing research with original first-hand accounts from those most closely associated with the possession process, namely, occupiers, debt advisers, landlords (private and social), legal practitioners (who represent landlords and mortgage lenders) and Housing Possession Court Duty Scheme (HPCDS) providers. What the findings reveal is that some, but certainly not all, of the temporary measures introduced between March 2020–November 2021 could prove useful in assisting the civil justice system in meeting the challenges posed by the impact of the COVID-19 pandemic.

This article begins with a brief overview of the methodology employed in gathering the data on which it is based. This is followed by a brief summary of the temporary measures introduced in response to the pandemic. The final sections

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¹ L. Whitehouse, “Housing Possession in the Time of Pandemic” (2021) 85:2 Conv 197–212.

² 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://drive.google.com/file/d/1_y5yCXBCMid1kiKyrSh7sIznJFsSwbtl/view?usp=sharing [Accessed 28 April 2022].

³ L. Whitehouse, “Housing Possession in the Time of Pandemic” (2021) 85:2 Conv 197–212, 212.

⁴ The project ran from 26 April 2021 to 13 December 2021 (an extension to the original six-month deadline having been granted due to unforeseen circumstances that caused delays in the early stages). The findings and recommendations of the project can be found at L. Whitehouse, “Assessing the Court System’s Response to the COVID-19 Pandemic in Housing Possession Cases in England and Wales” (2022) available at <https://tinyurl.com/yckswm99> [Accessed 28 April 2022].

of the work offer an evaluation of their effectiveness based on both primary and secondary research data.

Methodology

The project employed a multi-disciplinary, mixed methods research approach that utilised both secondary and primary research methods. The analysis of social science material and available data was supplemented by the collection of unique primary data, both quantitative and qualitative. Adopting a “participatory action research approach”,⁵ the project drew on and embedded the participation, views and experience of stakeholders in order to capture practitioners’ and occupiers’ experiences of the arrears and possessions process. There was, for example, an expert Advisory Group, consisting of representatives of Her Majesty’s Courts and Tribunals Service (HMCTS), the Ministry of Justice (MoJ), legal practitioners, members of the judiciary, academics, housing providers, and debt advice agencies, which assisted in the design and implementation of the project.

Due to the difficulties posed by the COVID-19 pandemic, it was not possible to conduct face-to-face interviews. Instead, the project used online survey tools to conduct both random and purposeful sampling of respondents in order to gather quantitative data and qualitative data. The surveys were directed at key players in the possession process, namely, occupiers, debt advisers, landlords (private and social), legal practitioners (who represent landlords and mortgage lenders) and HPCDS providers. In total, 176 respondents completed the surveys, a pleasing result given the small scale and time restricted nature of this project. However, these are, of course, insufficient to qualify as being representative of the groups canvassed or the population generally. Having said that, given the sparsity of data in this area, the data collected makes a valuable contribution to existing knowledge, especially when combined with similar projects such as those conducted by Byrom and others,⁶ the Bureau of Investigative Journalism (the BIJ),⁷ Generation Rent,⁸ and Birmingham and York Universities.⁹ The responses to the survey were:

- The debt adviser survey ran from 15 June to 31 July 2021 and initiated 43 responses from debt advisers located in England and Wales.
- The duty adviser survey ran from 16 June and 31 July 2021 and initiated 35 responses from duty advisers all of whom were based in England.
- The legal practitioner survey ran from 14 July to 15 August 2021 and initiated 27 responses from legal practitioners located in England

⁵ See, e.g. A. McIntyre, *Participatory Action Research* (London: Sage Publications, 2008).

⁶ 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 available at <https://www.judiciary.uk/wp-content/uploads/2020/06/FINAL-REPORT-CJC-4-June-2020.v2-accessible.pdf> [Accessed 28 April 2022].

⁷ M. McClenaghan, “Evicted in Less Than 10 Minutes: Courts Fail Tenants Broken By Pandemic” *The Bureau of Investigative Journalism*, 23 September 2021 available at <https://www.thebureauinvestigates.com/stories/2021-09-23/evicted-in-less-than-10-minutes-courts-fail-tenants-broken-by-pandemic> [Accessed 28 April 2022], p.2 and M. McClenaghan and C. Boutaud, “Big Banks Resume Push for Repossessions in Wake of Pandemic” *The Bureau of Investigative Journalism*, 3 November 2021, p.3 available at <https://www.thebureauinvestigates.com/stories/2021-11-03/banks-repossessions-pandemic-mortgages> [Accessed 28 April 2022], p. 3.

⁸ See <https://ventyour.rent/split> [Accessed 28 April 2022].

⁹ See <https://covidrealities.org/learnings/write-ups> [Accessed 28 April 2022].

and Wales. Of those, 20 dealt with private landlords, five with public landlords and two with mortgage lenders.

- The landlord survey ran from 5 August to 5 September 2021 and initiated 56 responses from landlords (47 private, four local authority representatives, four non-profit registered providers, one non-profit unregistered provider and one for-profit registered provider). Their properties were located in Wales and all areas of England.
- The occupier survey ran from 11 August to 14 November and initiated 15 responses. The survey was distributed via social media, through emails sent to GPs surgeries, food banks, mutual aid organisations and others. Debt advisers were asked to make their clients aware of the survey and Shelter were kind enough to publicise the survey on their social media sites. While the number of usable responses to the occupier survey proved disappointing, it highlights the difficulty of accessing occupiers with experience of housing debt.

By combining the collection and analysis of this unique data with existing datasets and research, this article aims to remedy information deficits and to contribute to an improved understanding of the possession process which may assist in tackling the challenges posed by the pandemic. The next section begins with a very brief summary of the temporary measures introduced in response to the pandemic.

A summary of the court system’s response

Background

This article offers a snapshot of the housing possession process in England and Wales during an extraordinary period of turmoil and change. Measures that would previously have been considered “blue sky thinking” were introduced with uncharacteristic speed in response to the COVID-19 pandemic. It is not the aim of this article to offer a detailed description of those measures, that can be found in Pt 1 (a summary of them is, however, provided below). Rather, this article offers an assessment of their effectiveness. The measure of “effectiveness” used here derives from the objectives set out by the architects of the court system’s response, namely, the Master of the Rolls Working Group on Possession Proceedings (the Working Group). Those objectives were:

- reducing volume in the system by enabling earlier advice and increasing settlement;
- taking account, within limits that the law has imposed, of the effect of the pandemic on all parties; and
- maintaining confidence in the fairness of outcomes.¹⁰

¹⁰ 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, para.4.

In addition to these COVID specific objectives is the overriding objective of the Civil Procedure Rules (CPR), which is to enable the courts to deal with cases justly and at proportionate cost.¹¹

The Overall Arrangements (OA)

Initially all possession hearings were suspended between 27 March 2020 and 20 September 2020. Landlords and mortgagees were then able to bring claims for possession under new rules known as the OA. Those rules ushered in a number of procedural changes to the process. Unlike under pre-COVID conditions, for example, when only one hearing was scheduled, a new two-stage process came into operation. The first was constituted by the Review or R date followed, if necessary, 28 days later by the Substantive or S hearing.

The Review date (R date)

The R date provided 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 HPCDS and for the parties to reach agreement.¹² The important point to note here is that the provision of free legal advice was made available at an earlier stage than was previously the case. Under the OA, legal advice was available at least 28 days before the S hearing at which a possession order might have been made.¹³ Previously, advice would have been accessed on the day of the hearing.

The R date was intended to operate on the basis that the defendant (occupier) would contact the duty adviser on a scheduled date with the advice delivered either face-to-face or remotely.¹⁴ The claimant (landlord/lender) was also expected to be available on the R date so that negotiation could take place.¹⁵ Any resolution or directions agreed by the parties on the R date would then be communicated to a judge.¹⁶ The judge would undertake a “very short” (five minute) appointment at the end of the day on which R dates had taken place during which, a review of the paperwork would be undertaken with none of the parties in attendance.¹⁷ The judge would consider the material provided and if appropriate, proceed to the second stage of the temporary process known as the “S hearing” which would be scheduled 28 days later.¹⁸

¹¹ CPR Pt 1—Overriding Objective, 1.1(1).

¹² 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, para.50.

¹³ 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, para.39.

¹⁴ S. Mullings, and S. James, *Housing Possession Duty Desk: A Practical Guide* (London: Legal Action Group, 2021), para.2.31.

¹⁵ 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, para.49(d).

¹⁶ 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, para.52.

¹⁷ 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, para.51.

¹⁸ 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, para.39.

The Substantive or S hearing

Unlike pre-COVID hearings, where cases were “block listed”,¹⁹ leading to cases being scheduled for only a few minutes each, S hearings were scheduled for 15 minutes, with five minutes in between hearings to allow for COVID-19 safety measures to be implemented.²⁰ Other than that, they operated in much the same way as under pre-COVID rules.

“Enhanced information”

Under the OA, claimants were required to provide an electronic bundle of material to the court and the defendant 14 days before the R date.²¹ 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 had to include “enhanced information”, namely “what knowledge the claimant has as to the effect of the pandemic on the defendant and dependants”.²² An important point to note here is that claimants were not *required* to enquire about the impact of the COVID-19 pandemic on the defendant but rather, had to *consider* whether to make such enquiries.²³

Post-OA

As of 1 November 2021, the OA came to an end and the process reverted to the pre-COVID ways of doing things.²⁴ The only measure retained is the aspect of the CPR which requires claimants to bring two copies of a notice that sets out what knowledge that party has as to the effect of the COVID-19 pandemic on the occupier and their dependants.²⁵ The question, addressed in the next section, is whether these measures proved effective in meeting the objectives set out for them.

¹⁹ 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, para.34. For more on block-listing see S. Mullings, and S. James, *Housing Possession Duty Desk: A Practical Guide* (London: Legal Action Group, 2021), para.2.1; D. Renton, *Jobs and Homes: Stories of the Law in Lockdown* (London: Legal Action Group, 2021), p.12; S. Bright and L. Whitehouse, *Information, Advice and Representation in Housing Possession Cases* (April 2014) available at https://www.law.ox.ac.uk/sites/files/oxlaw/housing_possession_report_april2014.pdf [Accessed 28 April 2022], pp.41–43; and 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.

²⁰ 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, para.56.

²¹ 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, para.49.

²² 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, para.25. See Civil Procedure Rules 1998 (CPR) Practice Direction (PD) 55C, 6.1(ii) and 6.2.

²³ S. Mullings, and S. James, *Housing Possession Duty Desk: A Practical Guide* (London: Legal Action Group, 2021), para.2.18.

²⁴ See Statement from the Master of the Rolls: The end of the “overall arrangements for possession proceedings” at <https://www.judiciary.uk/announcements/statement-from-the-master-of-the-rolls-the-end-of-the-possession-proceedings-overall-arrangements/> [Accessed 28 April 2022] and G. Peaker, “Possession proceedings—end of the ‘overall arrangements’” *Nearly Legal: Housing Law News and Comment* 4 November 2021 available at <https://nearlylegal.co.uk/2021/11/possession-proceedings-an-unannounced-announcement/> [Accessed 28 April 2022].

²⁵ For claims issued on or after 1 December 2021 and up to 30 June 2022, PD 55C paras 6.1 and 6.2 will continue to apply. See G. Peaker, “Possession News” *Nearly Legal: Housing Law News and Comment* 12 November 2021 available at <https://nearlylegal.co.uk/2021/11/possession-news/> [Accessed 28 April 2022].

Did the OA reduce volume in the system?

R dates

Evidence to date suggests that the temporary measures introduced in response to the COVID-19 pandemic did not reduce the number of cases entering the legal system but rather delayed them.²⁶ This was particularly the case in respect of the R date process. The BIJ, for example, found that:

“... lawyers and judges told the Bureau that review hearings were not working: they were rarely attended and often just delayed proceedings, causing debts to mount up further. Data obtained under freedom of information law from the Ministry of Justice showed that in the majority of courts (72%), only two people or fewer a month had accessed legal aid funding for a review hearing.”²⁷

These findings are supported by the data supplied by respondents to this project:

“It just wasted more time and extended the time for tenants to stay and not pay anything.” Private Landlord #39

“It is not an improvement. It has no function other than to increase delay and costs.” Legal Practitioner #16

“They cause an unnecessary delay to the whole process and place a great burden on the landlord in terms of pulling together bundles of information to be served on the tenant and the court.” Social Landlord #8

“It is an utterly pointless waste of Court time and public money.” Legal Practitioner #9

The success of the R date process was hindered in particular by the lack of engagement by occupiers, a theme that ran throughout the findings of the project.²⁸ A majority of duty advisers (23 out of 35) and legal practitioners (seven out of 10) said that the occupier had engaged in 0–10% of the R dates they had been involved with:

“I have not yet had a claim where there has been engagement by a defendant at the review stage.” Legal Practitioner #8

“I would say that it is rare to be contacted by more than two or three defendants where there are 10 on the list for any given day.” Duty Adviser #10

“... most tenants do not attend a review hearing and therefore the process only delayed the inevitable of awarding a possession order.” Social Landlord #4

²⁶ See, e.g. L. Whitehouse, “Were ‘Review Dates’ an Effective Part of the Response to the COVID-19 Pandemic in Housing Possession Cases in England and Wales? Views from the Frontline: Part 1” *Housing Law Journal* forthcoming.

²⁷ M. McClenaghan, “Open Justice? The Closed Doors of Possession Courts” The Bureau of Investigative Journalism available at <https://www.thebureauinvestigates.com/stories/2021-11-09/evictions-open-justice-possession-courts> [Accessed 28 April 2022].

²⁸ L. Whitehouse, “Assessing the Court System’s Response to the COVID-19 Pandemic in Housing Possession Cases in England and Wales” (2022) available at <https://tinyurl.com/yckswm99> [Accessed 28 April 2022].

S hearings

It is perhaps not surprising, given the lack of participation by occupiers in R dates that a significant number of duty advisers (28 out of 33) and legal practitioners (nine out of 10) said that the majority of cases they dealt with proceeded to a S hearing. This is supported by data supplied to the project as part of a successful application to HMCTS' Data Access Panel which suggest that during September 2020-September 2021, 72% of R dates proceeded to a S hearing. This was due in the main to the fact that the occupier had not engaged with the R date leaving no option but for the matter to proceed to a formal hearing. The question then arises as to whether occupiers attended the S hearing.

While data on the number of occupiers who attended hearings pre-COVID is not available,²⁹ evidence from a range of sources suggests that less than half attended their possession hearing,³⁰ with a 2017 study finding that tenants were present in no more than 35% of the cases studied.³¹ More recently, the BIJ, as part of their investigation into the court system's response to the pandemic, observed 115 mortgage possession hearings. In 78% of those hearings, the occupier did not attend and in 81%, the occupier had no legal representation.³² Of the 555 possession hearings they observed involving rented accommodation, just under 60% involved no attendance by the tenant nor their representative.³³ The lack of attendance by occupiers was noted by one duty adviser:

“Previously cases were block listed but only 10–20% of defendants attended so you had time to deal with them all. Now ... there are only six cases in the list so typically only one person turns up (same percentage as before) so much time is wasted, and the scheme is not economically viable.” Duty Adviser #9

The outcome of non-engagement is that the judge will have to make a decision without hearing the occupier's side of the story. This is highly significant for it means that the judge may not receive information relevant to the decision-making process and it omits an opportunity for occupiers to exercise “voice” which “plays a key role in ensuring dignity and respect for the person and achieving long-term solutions to disputes”.³⁴

²⁹ L. Whitehouse, S. Bright and M. K. Dhani, “Improving Procedural Fairness in Housing Possession Cases” (2019) 38:3 *Civil Justice Quarterly* 351–375, 362.

³⁰ 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, 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 [Accessed 28 April 2022].

³¹ L. Whitehouse, S. Bright and M. K. Dhani, “Improving Procedural Fairness in Housing Possession Cases” (2019) 38:3 *Civil Justice Quarterly* 351–375, 362.

³² M. McClenaghan and C. Boutaud, “Big Banks Resume Push for Repossessions in Wake of Pandemic” The Bureau of Investigative Journalism, 3 November 2021, p.4.

³³ M. McClenaghan, “Evicted in Less Than 10 Minutes: Courts Fail Tenants Broken By Pandemic” The Bureau of Investigative Journalism, 23 September 2021, p.3.

³⁴ L. Whitehouse, S. Bright and M. K. Dhani, “Improving Procedural Fairness in Housing Possession Cases” (2019) 38:3 *Civil Justice Quarterly* 351–375, 355. See also T. R. Tyler, “Procedural Justice and the Courts” (2007-2008) 44(1) *Court Review (Special Issue on Procedural Fairness)* 26, 27; J. L. Mashaw, “Administrative Due Process: The Quest for a Dignitary Theory” (1981) 61 *Boston Univ. L. Rev.* 885–893; and R. Summers, “Evaluating and Improving Legal Procedure: A Plea for Process Values” (1974) 60 *Cornell L. Rev.* 1–52.

S Hearings—was the extra time used effectively?

A major criticism levelled at the pre-COVID housing possession process by practitioners and researchers was the amount of time dedicated to each hearing as part of the “block-listing” system.³⁵ By virtue of this system, several cases would be scheduled to be heard during the morning or afternoon session, resulting in cases being allocated approximately five minutes each.³⁶ The allocation of 15 minutes to S hearings was therefore a welcome move. The question is whether it proved effective in practice.

Overall, duty advisers felt that the time was being used effectively in most cases. There were, however, concerns raised regarding logistical issues and the impact on the outcome for some defendants:

“On occasion additional time allows issues to be explored. However, this can be to the disadvantage of the defendant as cases which previously would be adjourned are being determined at the first hearing as the judge has more time.” Duty Adviser #30

“It is less rushed which means you can put your arguments forward in a more structured and thoughtful way.” Duty Adviser #36

“For a duty solicitor it is a disaster. The time involved in travelling and being at Court for little or no remuneration because of lack of attendance means the whole scheme in my view is not viable for legal aid lawyers.” Duty Adviser #15

Claimant representatives felt that the time was being used effectively, albeit only sometimes. In the main, comments suggest that the lack of attendance by the defendant made the extra time unnecessary:

“Few cases are truly defended in any serious way, so the additional time is often wasted.” Legal Practitioner #2

“... some hearings need more time and some need less. Again, this is a waste of Court time and public money and is causing a substantial backlog.” Legal Practitioner #9

Landlords, however, thought that the time wasn’t being used effectively. In particular, as one social landlord noted, the extra time led to fewer cases being heard and hence a backlog was being created:

“Where arrangements have been made with the customer in advance and/or where the customer does not attend, the hearings take the same few minutes as previously. As a result of more time being set aside for Substantive hearings there are fewer hearings taking place resulting in long waits for court dates.” Social Landlord #8

Overall, it would seem that most respondents considered the extra time allocated to S hearings to be unnecessary, specifically, in cases of non-engagement by

³⁵ See above.

³⁶ S. Bright and L. Whitehouse, *Information, Advice and Representation in Housing Possession Cases* (April 2014), pp.41–43.

occupiers. It is perhaps for this reason that the BIJ, as part of their investigation into the court system's response to the pandemic, found that in the 115 mortgage possession hearings they observed, it took on average nine minutes for a possession order to be granted.³⁷ In the 555 possession hearings involving rented accommodation, a third of cases where a possession order was granted took five minutes or less.³⁸

The apparent failure on the part of the OA to reduce the volume of cases in the system was due in the main to the non-participation of occupiers. Understanding why occupiers do not engage, however, is a difficult task.

Occupier engagement

Concerns have been raised over the last several years about low levels of engagement by occupiers in the arrears and possession process.³⁹ Despite the home being at risk, evidence suggests that a small proportion of occupiers with rent or mortgage arrears engage with their housing provider or lender during the arrears management process.⁴⁰ The reasons for non-engagement are difficult to assess without the voice of occupiers being heard in these research studies but an earlier study by Bright and Whitehouse asked duty advisers what they thought the barriers to court attendance were. The research employed the categories set out in an earlier study of the HPCDS by Myers-Wilson.⁴¹ In response, duty advisers ranked the categories in the following order of importance:

- burying of heads in the sand;
- little point attending as nothing could be done;
- landlords and housing officers told defendants there was no need to attend;
- fear or misunderstanding of the legal system;
- the cost and difficulty of attending;
- general apathy; and
- the acceptance of what is perceived as an unfair system.

These findings are supported by the data obtained during this study. The main reason offered by respondents as to why tenants do not engage was “burying their head in the sand”:

“Fear, head in the sand — ‘it won’t happen’, have already left/abandoned the tenancy.” Social Landlord #56

“Sometimes they don’t really know what’s going on and head in sand seems to be very common with my clients.” Debt Adviser #1

³⁷ M. McClenaghan and C. Boutaud, “Big Banks Resume Push for Repossessions in Wake of Pandemic” The Bureau of Investigative Journalism, 3 November 2021, p.4.

³⁸ M. McClenaghan, “Evicted in Less Than 10 Minutes: Courts Fail Tenants Broken By Pandemic” The Bureau of Investigative Journalism, 23 September 2021, pp.4–5.

³⁹ See, e.g. S. Bright and L. Whitehouse, *Information, Advice and Representation in Housing Possession Cases* (April 2014), pp.58 onwards, 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 L. Whitehouse, S. Bright and M. K. Dhami, “Improving Procedural Fairness in Housing Possession Cases” (2019) 38:3 *Civil Justice Quarterly* 351–375.

⁴⁰ S. Bright and L. Whitehouse, *Information, Advice and Representation in Housing Possession Cases* (April 2014).

⁴¹ Myers-Wilson, “Legal Services Commission, Improving access to advice in the Community Legal Service, Report on Evaluation Research on Alternative Methods of Delivery” July 2004, p.43.

“Burying head in sand, fear of being judged, feeling of hopelessness and ‘what can I do about it’ attitude, refusal to believe that they will be evicted.” Social Landlord #32

For some landlords, however, it seemed clear that many tenants were simply “playing the system”:

“Two reasons, head in the sand and no idea what to do or serial debtor that go from one landlord to the next leaving arrears they know how to work the system.” Private Landlord #12

“Some have no intention [of paying] because they can get one-two years’ free rent then walk away with the law doing nothing about it ...” Private Landlord #26

“They do not engage as they know the ‘system’ and how long it takes to remove them.” Private Landlord #27

Whatever the reason for the non-participation of occupiers, the delay to cases occasioned under the OA is of concern given the prediction that the adverse impact of the pandemic on household finances⁴² will lead to the court system being flooded by a “tsunami”⁴³ of possession claims and hearings.⁴⁴ As the Resolution Foundation notes, “this raises the important question of how the system will cope with both the backlog of ‘normal’ cases that has built up over the last ten months, as well as the ‘excess’ caseload ...”⁴⁵ What this research demonstrates is that the R date and S hearing initiatives, in the form adopted between September 2020 and November 2021, would not offer an effective answer to that question. An alternative, however, may be the use of remote hearings.

Remote hearings

The use of remote hearings was a common response to the COVID-19 pandemic. Most of the research offering an evaluation of their effectiveness focuses on the family justice system.⁴⁶ In addition, Byrom and Beardon’s detailed report in June

⁴² Judge, e.g. 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, Bank of England, “Household debt and Covid” Quarterly Bulletin 2021 Q2 25 June 2021, p.10 available at: <https://www.bankofengland.co.uk/quarterly-bulletin/2021/2021-q2/household-debt-and-covid> [Accessed 28 April 2022], R. Derricourt, C. Hann and G. Byrne, “New year, same arrears: How the pandemic is leaving private renters with unmanageable debt” Citizens Advice, January 2021, p.3 available at <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Housing%20Publications/New%20year,%20same%20arrears.pdf> [Accessed 28 April 2022] and StepChange, “Tackling the coronavirus personal debt crisis” November 2020, p.11 available at <https://www.stepchange.org/Portals/0/assets/pdf/tackling-the-coronavirus-personal-debt-crisis.pdf> [Accessed 28 April 2022].

⁴³ M. McClenaghan, “Evicted in Less Than 10 Minutes: Courts Fail Tenants Broken By Pandemic” The Bureau of Investigative Journalism, 23 September 2021, p.15 and D. Renton, *Jobs and Homes: Stories of the Law in Lockdown* (London: Legal Action Group, 2021), p.117.

⁴⁴ See, e.g. 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.4.6 and L. Judge, “Getting ahead on falling behind Tackling the UK’s building arrears crisis” Resolution Foundation Briefing, February 2021, p.4.

⁴⁵ L. Judge, “Getting ahead on falling behind Tackling the UK’s building arrears crisis” Resolution Foundation Briefing, February 2021, p.16.

⁴⁶ See, e.g. 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 [Accessed 28 April 2022], 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> [Accessed 28 April 2022], and R. Susskind, *Online Courts and the Future*

2021 offers an assessment based on survey data provided by 1507 judicial office holders who preside over tribunals.⁴⁷ Most recently, HMCTS released its report on the use of remote hearings across a range of jurisdictions during the pandemic.⁴⁸ Drawing on 8328 survey respondents and 180 qualitative interviews, the report, like most of the research to date, paints a complex picture of the appropriateness and fairness of hearings conducted remotely.⁴⁹ Byrom and Beardon, in particular, found that remote hearings raise a significant number of issues and concerns that need to be addressed before confidence can be had in their use. These issues range from the technical,⁵⁰ to the substantive,⁵¹ “a number of respondents expressed concerns that the rapid transition to remote hearings (both telephone and video) had made arriving at a fair decision harder”.⁵²

Within the housing possession process, remote meetings and hearings were employed in the early stages of the operation of the OA and outside of the legal process. Most debt advisers who responded to the survey (38 out of 43) for example, experienced a change in the methods used to provide advice due to the pandemic, often moving from face-to-face to fully remote means. Similarly, duty advisers were expected to conduct R dates over the phone and some S hearings were conducted remotely. In line with the emerging literature on the use of remote hearings in other areas of the civil justice system,⁵³ respondents noted 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. Debt advisers in particular were concerned about the ability of their clients to make use of the technology needed to engage effectively in remote meetings:

“Clients do not often have access to platforms such as Zoom. We have considered whether it would be possible for clients to attend council offices/libraries to use a computer in an interview room but insufficient offices are open.” Debt Adviser #4

of Justice (Oxford University Press: Oxford, 2019). A useful source of writing on the experience of using remote hearings around the world can be found at <https://remotecourts.org/> [Accessed 28 April 2022].

⁴⁷ N. Byrom and S. Beardon, “Understanding the impact of COVID-19 on tribunals The experience of tribunal judges” Tribunals Judiciary and the Legal Education Foundation, June 2021 available at <https://research.thelegaleducationfoundation.org/wp-content/uploads/2021/05/FINAL-Tribunal-Judges-Survey-Report-02-June-2021-.pdf> [Accessed 28 April 2022].

⁴⁸ J. Clark, “Evaluation of remote hearings during the COVID 19 pandemic: Research report” HMCTS, December 2021 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1039926/Evaluation_of_remote_hearings_v20.pdf [Accessed 28 April 2022].

⁴⁹ e.g. the HMCTS report notes that “vulnerable individuals who attended remotely were less likely than other remote users to feel that their hearing was appropriately formal and official (76% compared to 85%)”, see J. Clark, “Evaluation of remote hearings during the COVID 19 pandemic: Research report” HMCTS, December 2021, p.70.

⁵⁰ See, e.g. N. Byrom and S. Beardon, “Understanding the impact of COVID-19 on tribunals The experience of tribunal judges” Tribunals Judiciary and the Legal Education Foundation, June 2021 paras 7.59–7.61 on effective communication and Nuffield Family Justice Observatory, “Remote hearings in the family justice system: a rapid consultation” 2020 s.4.4.

⁵¹ The Nuffield Family Justice Observatory, e.g. note a number of concerns regarding the “fairness” of remote hearings, see Nuffield Family Justice Observatory, “Remote hearings in the family justice system: a rapid consultation” 2020 s.3.

⁵² N. Byrom and S. Beardon, “Understanding the impact of COVID-19 on tribunals The experience of tribunal judges” Tribunals Judiciary and the Legal Education Foundation, June 2021, para. 1.33.

⁵³ 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. 1.22.2.

“Some clients are not particularly experienced with electronic communication, so it had made it somewhat harder for some people to receive the help that they need.” Debt Adviser #6

“Telephone advice does not work for the most vulnerable service users which make up 99% of our work. A lot of clients cannot read or access online facilities which causes huge delays. The whole process is based on trust, and this is hard to establish over the phone.” Debt Adviser #16

Duty advisers expressed concerns regarding their ability to represent their clients effectively, a finding replicated in Byrom and others recent report, in which “respondents also emphasised that many defendants in possession proceedings are unlikely to be able to access the technology needed to participate in remote hearings or provide instructions to solicitors where they were represented”⁵⁴.

“I am seriously concerned about the access to justice issues that have arisen with virtual hearings ... vulnerable tenants would be better off reverting to in person hearings, which at least were clearer.” Duty Adviser #8

“We don’t think that remote hearings are an adequate substitution for in person hearings. It is almost impossible to take instructions during the hearing and the remoteness means that the tenant does not get to meet their landlord. This can be very valuable particularly where the landlord is a social landlord and relationships have broken down between the parties.” Duty Adviser #35

“I think remote hearings can be really useful especially for urgent applications such as for warrant suspensions. It saves everyone a lot of time. However, I have had substantive hearings for existing clients by telephone and have not been able to assist for technological reasons.” Duty Adviser #27

While there may be some obvious benefits to the use of remote hearings, including the financial savings of no travel being required,⁵⁵ and the removal of any anxiety the defendant may have about attending court, particular concerns have been raised in relation to the extension of remote hearings to housing possession cases.⁵⁶ This is due, in part, to the disproportionate number of “vulnerable” defendants in these cases.⁵⁷ As Byrom and others found in their report, “many respondents specialising in both housing law and the experience of vulnerable people expressed the view that remote hearings were unsuitable for possession cases”.⁵⁸ Others are concerned that adverse outcomes could arise. As Shelter note:

⁵⁴ 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.8.18 p.80.

⁵⁵ 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.8.15.

⁵⁶ 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.1.23.

⁵⁷ 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.8.16.

⁵⁸ 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.4.6 pp.22–23.

“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.”⁵⁹

It would seem therefore that the use of remote hearings may not be appropriate as a means of tackling the predicted rise in possession claims. If they are to be used then, at the very least, further detailed investigation is required into how they can be made accessible to all parties.

Did the OA prove effective in taking account of the effect of the pandemic on all parties?

The OA, in requiring claimants to provide “enhanced information” as well as the ability of both parties to mark the case as a “COVID-19” case was intended to supply the court with additional information and to enable the court to take into account the effect of the pandemic on all parties. This had the potential to address what Bright and Whitehouse and Whitehouse and others have described as the lack of “joined up thinking” within the pre-COVID process.⁶⁰ By virtue of the Pre-Action Protocols for mortgage lenders,⁶¹ and social landlords,⁶² details regarding the occupier’s circumstances are often made known to the housing provider or lender. However, this information is rarely conveyed to the court via the particular of claims form,⁶³ which tend to focus almost entirely on the occupier’s financial circumstances. Similarly, it seems relatively rare for an occupier to submit a completed defence form,⁶⁴ and even if they do, the forms⁶⁵ 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).⁶⁶

According to the responses received in this project’s surveys, the requirement for “enhanced information” as part of the OA was seen as an improvement, in principle. However, the extent to which it enabled the court to take into account the effect of the pandemic on all parties appears to be questionable. Half of the

⁵⁹ Quoted in 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.8.17.

⁶⁰ S. Bright and L. Whitehouse, *Information, Advice and Representation in Housing Possession Cases* (April 2014), p.76 and L. Whitehouse, S. Bright and M. K. Dhani, “Improving Procedural Fairness in Housing Possession Cases” (2019) 38:3 *Civil Justice Quarterly* 351–375, 359–362.

⁶¹ See 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 [Accessed 28 April 2022].

⁶² 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> [Accessed 28 April 2022].

⁶³ Form N119 for rented property at <https://www.gov.uk/government/publications/form-n119-particulars-of-claim-for-possession> [Accessed 28 April 2022] and Form N120 for mortgaged property available at <https://www.gov.uk/government/publications/form-n120-particulars-of-claim-mortgaged-residential-premises> [Accessed 28 April 2022].

⁶⁴ Concerns regarding the low rate of return of defence forms in all types of possession claims have been noted for some time, see S. Bright and L. Whitehouse, *Information, Advice and Representation in Housing Possession Cases* (April 2014), pp.38–39. Whitehouse and others note the lack of recorded data on this but in their survey, they found that defence forms were submitted in only 10% of the cases they reviewed, L. Whitehouse, S. Bright and M. K. Dhani, “Improving Procedural Fairness in Housing Possession Cases” (2019) 38:3 *Civil Justice Quarterly* 351–375, 362.

⁶⁵ Form N11R for rented property available at <https://www.gov.uk/government/publications/form-n11r-defence-form> [Accessed 28 April 2022] and N11M for mortgaged property available at <https://www.gov.uk/government/publications/form-n11m-defence-form-mortgaged-residential-premises> [Accessed 28 April 2022].

⁶⁶ L. Whitehouse, S. Bright and M. K. Dhani, “Improving Procedural Fairness in Housing Possession Cases” (2019) 38:3 *Civil Justice Quarterly* 351–375, 360.

duty advisers, for example, thought that the judge now receives more information compared to pre-COVID cases. In particular, there was praise for the electronic bundle of “enhanced information”, as one duty adviser noted:

“The provision of the court bundle is a massive improvement on the pre-COVID situation and very helpful to duty advisors.” Duty Adviser #3

A majority of the claimant representatives (11 out of 15) thought that the judge received the same amount of information as in pre-COVID cases. While there was again praise for the electronic bundle of “enhanced information”, most claimant representatives criticised the PD55C notices (these require claimants to set out what knowledge they have as to the effect of the Coronavirus pandemic on the defendant and their dependants),⁶⁷ as one claimant representative commented:

“Unnecessary procedural steps (PD55C notices) are a pointless overcomplication.” Legal Practitioner #12

It is perhaps interesting to note that it is the PD55C notices are the only aspect of the OA that have been retained after 1 November 2021.⁶⁸

The important point to note here is that while judges may have received more information as a result of the “enhanced information” provisions, this may not necessarily have influenced the decision-making process. While the OA altered the process of possession, no changes were made to the substantive law. As Renton notes, “the legislation did not change, but the guidance did, creating an additional occasion for the parties to seek settlement”.⁶⁹ In some cases therefore, the impact of the pandemic on the parties would simply not be relevant to the decision, for example, where possession was on mandatory grounds.⁷⁰

In these cases, provided the claimant can demonstrate that the notice was properly served or that the requisite level of arrears has accumulated then the judge has very little discretion other than to order possession. The question arises as to the proportion of cases that involve a mandatory possession order. Official figures are not available but of the 555 possession hearings involving rented accommodation observed by the BIJ, 63% involved Ground 8,⁷¹ and 20% involved a section 21 notice.⁷² This suggests that the majority of cases during the summer of 2021 did not allow the judge discretion and hence the enhanced information was largely irrelevant. It should be noted that following the removal of the stay on possession proceedings, priority was (supposedly) to be given to urgent cases such as those

⁶⁷ PD55C Coronavirus: Temporary Provision in Relation to Possession Proceedings, paras 6.1 and 6.2, available at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-55c-coronavirus-temporary-provision-in-relation-to-possession-proceedings> [Accessed 28 April 2022].

⁶⁸ For claims issued on or after 1 December 2021 and up to 30 June 2022, PD 55C paras 6.1 and 6.2 will continue to apply. See G. Peaker, “Possession News” *Nearly Legal: Housing Law News and Comment* 12 November 2021.

⁶⁹ D. Renton, *Jobs and Homes: Stories of the Law in Lockdown* (London: Legal Action Group, 2021), p.155.

⁷⁰ For information on grounds for eviction see the Shelter website. For the s.21 procedure see https://england.shelter.org.uk/professional_resources/legal/possession_and_eviction/notices_in_possession_proceedings/section_21_notices_for_assured_shorthold_tenancies [Accessed 28 April 2022] and for Ground 8 see https://england.shelter.org.uk/professional_resources/legal/possession_and_eviction/grounds_for_possession/assured_tenancy_mandatory_grounds_for_possession#title-10 [Accessed 28 April 2022].

⁷¹ M. McClenaghan, “Evicted in Less Than 10 Minutes: Courts Fail Tenants Broken By Pandemic” *The Bureau of Investigative Journalism*, 23 September 2021, p.7.

⁷² M. McClenaghan, “Evicted in Less Than 10 Minutes: Courts Fail Tenants Broken By Pandemic” *The Bureau of Investigative Journalism*, 23 September 2021, p.2.

involving high rent arrears.⁷³ It is perhaps not surprising therefore that the cases observed by the BIJ involved claims made on the ground of serious arrears.

Overall, it seems that the electronic bundle of enhanced information proved most useful as a means of ensuring that more informed advice could be provided to occupiers by duty advisers. There is some question over the extent to which judges did or were able to take this information into account. Given the OA changed some of the procedure for handling possession claims but not the substantive law, the impact of the pandemic on the parties could have no influence over the judge's decision in cases involving mandatory grounds for possession.

Did the OA maintain confidence in the fairness of outcomes?

The obvious question that arises here is how “fairness” is to be defined in this context. While it might be possible to draw on the literature relevant to concepts such as “due process”⁷⁴ and “procedural fairness”,⁷⁵ there is simply not room here to undertake such an analysis. What it is possible to do, however, is to focus on the language used within the OA which asks not whether outcomes were “fair”, as such, but rather whether *confidence* in them was maintained. One measure that might be used therefore is to assess the perceptions of those involved in these cases as to the “fairness” of the outcome. While respondents were not asked this question directly, it became clear from responses received from a majority of the private landlords that they believed the reforms favoured tenants to the detriment of landlords and, as a result, their confidence in the legal system had been undermined. As one private landlord commented:

“[I have] lost confidence in the British justice system.” Private Landlord #41

The inability of landlords to recover rent arrears or to recover their properties during the pandemic had a significant impact on some of them, with some considering selling up and getting out of the rental market. Rugg and Wallace found in their detailed report of property supply to the lower end of the private rented sector (which included detailed qualitative interviews with 55 landlords) that many landlords were considering selling up as a result of, “six interconnected themes: demography; taxation; the introduction of Universal Credit; the ‘regulatory burden’; hassle; and risk”.⁷⁶ Private landlords who responded to this project’s survey noted the adverse impact the pandemic had on their finances, mental health, and future plans:

“The longer the process the worse it is in the long run for tenants. Landlords scarred by the experience (e.g. me) are selling up therefore not providing a good home to a deserving family.” Private Landlord #14

⁷³ D. Renton, *Jobs and Homes: Stories of the Law in Lockdown* (London: Legal Action Group, 2021), p.155.

⁷⁴ See, e.g. A. Saunders and R. Young, “The Rule of Law, Due Process and Pre-Trial Criminal Justice” (1994) 47(2) *Current Legal Problems* 125–156.

⁷⁵ See, e.g. D. J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press, 1996), p.xvii; T. Scanlon, “Due Process” (1977) 18 *Nomos* 93–125.

⁷⁶ J. Rugg and A. Wallace, “Property supply to the lower end of the English private rented sector” Nationwide Foundation and University of York 2021, p.108 available at <https://www.york.ac.uk/media/chp/documents/Sustainable-Private-Rented-Sector.pdf> [Accessed 28 April 2022].

“This is our first eviction we have had to do. We have found it very difficult to go through this process. Mentally it has destroyed us and hoped it would not come to Court.” Private Landlord #30

“I am on the verge of selling my rental properties as the stress caused is becoming unmanageable, no thought for the landlords and what we go through. This cannot continue.” Private Landlord #33

It would seem that, rather than maintaining confidence in the fairness of outcomes, the temporary measures introduced in response to the pandemic were viewed by private landlords as yet another example of the perceived preference shown towards tenants within the private rented sector, leading to:

“... an escalation of rent arrears and claimants who are evermore resentful.”
Duty Adviser #20

Conclusions

An analysis of existing research, combined with the unique data collected for this project, suggests that the objectives underlying the OA, albeit commendable, were ultimately not fulfilled in practice. While the measures introduced, at least on paper, appeared to offer an effective response to the multiple demands of an unforeseen global crisis, their success was thwarted by a pre-existing and fundamental flaw in the process, namely, that large numbers of occupiers, for whatever reason, do not engage in the process. Key to the success of any proposals for reforming the housing possession process going forward therefore must be the development of an understanding of occupier engagement.

Decades of research have hinted that the reasons why occupiers do not engage are due to a “head in the sand” response, fear of attending court and the hope that the threat of eviction will simply disappear if it’s ignored.⁷⁷ More structural issues have also been mooted such as non-user-friendly court forms, lack of knowledge of the court process and advice deserts.⁷⁸ These reasons may well go some way in explaining why occupiers do not take advantage of opportunities to obtain advice and possibly retain their home, but we simply do not have sufficient, credible and generalisable data to offer an informed analysis. Only by understanding the obstacles to engagement can we begin to tackle them. It is crucial therefore that innovative research is conducted in an effort to learn more about occupier engagement. Without it, like the OA that came before them, any reforms that attempt to address the inevitable adverse impacts of the pandemic will struggle to create a housing possession process that is “just, and proportionate and accessible to everyone”.⁷⁹

⁷⁷ S. Bright and L. Whitehouse, *Information, Advice and Representation in Housing Possession Cases* (April 2014).

⁷⁸ See, e.g. S. Bright and L. Whitehouse, *Information, Advice and Representation in Housing Possession Cases* (April 2014) and M. Fouzder, “News focus: Red alert on legal advice deserts” *The Law Society Gazette*, 4 October 2021 available at <https://www.lawgazette.co.uk/news-focus/news-focus-red-alert-on-legal-advice-deserts/5110020.article> [Accessed 28 April 2022].

⁷⁹ The Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, “Transforming Our Justice System” September 2016, p.4 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/533261/joint-vision-statement.pdf [Accessed 28 April 2022].