

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

This is a consultation exercise by the Civil Procedure Rule Committee

This consultation begins on Wednesday 28 June 2017

This consultation ends on Wednesday 30 August 2017

Introduction

The Civil Procedure Rule Committee (CPRC) is considering whether amendments are required to rules and forms in light of the Court of Appeal judgment in *Cardiff City Council v Lee (Flowers)* [2016] EWCA Civ 1034 (<http://www.bailii.org/ew/cases/EWCA/Civ/2016/1034.html>).

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

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

Contact details/How to respond

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

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

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

Post to: Jane Wright, Secretary to the Civil Procedure Rule Committee
Post Point 3.42, Ministry of Justice, 102 Petty France, London SW1H 9AJ

Please Note:

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

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

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

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

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

The principles that public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492132/20160111_Consultation_principles_final.pdf

Response document

CIVIL PROCEDURE RULE COMMITTEE CONSULTATION

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

28 June 2017 – 30 August 2017

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

About you

Full name : Francesca Compton

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

Company name/organisation (if applicable): The Chancery Bar Association

Postal address and postcode: Flat 46, 4 Grand Avenue, Hove, BN3 2LE

Email address: admin@chba.org.uk

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

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

The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of some 1,300 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists

primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

Chancery work is that which was traditionally dealt with by the Chancery Division of the High Court of Justice, but from 2 October 2017 will be dealt with by the Business and Property Courts, which sit in London and in regional centres outside London. The B&PC attracts high profile, complex and, increasingly, international disputes.

Our members offer specialist expertise in advocacy, mediation and advisory work including across the whole spectrum of company, financial and business law. As advocates members are instructed in all courts in England and Wales, as well as abroad.

Date: 15th August 2017

Response to Questions

Permission requirement in respect of suspended orders

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

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

Please give your reasons:

The requirement for judicial oversight in all cases is unnecessary and burdensome, both for the claimant and the court. Where the breach of a condition is capable of being established simply by documentary evidence, e.g. a breach of a condition to make payments off rent/mortgage arrears can be established by the production of an up-to-date rent/mortgage account, judicial oversight is unnecessary; the production of the relevant account (and certification) is sufficient. The starting point is that the defendant's rights have already been considered and judicially determined by the original order. The claimant is merely seeking the execution of that order.

The requirement for an application with supporting evidence and judicial oversight should remain applicable to orders which are suspended on terms other than the payment of money. In such cases there is invariably a question of fact to be determined and evidence

should be provided in order that the defendant is aware of the details of the allegation and can respond.

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

X	Yes
	No

Please give your reasons:

As stated above in answer to question 1, cases where the condition relates SOLELY to repayment of a money debt, the breach of which can be established simply by the production of an account, e.g. rent or mortgage account, should be excluded, as should warrants of specific delivery.

In those cases the additional safeguard is unnecessary (save, possibly, the exception below) as the fact of the breach *per se* is unlikely to be in dispute.

The exception is tenants who are in receipt of state benefits in relation to their housing liabilities, in particular Housing Benefit or the housing cost element of Universal Credit. Where it is known by the claimant that all or part of the rental liability is being met by payment of benefit this should be flagged up for judicial attention on the Request for Warrant of Possession Form (N325).

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

X	Yes
	No

Please give your reasons:

The requirement for evidence in all requests and applications is basic good practice. Such a requirement is not an onerous one in cases of suspension on terms of payment of

monies, as the evidence should be readily available in the form of a rent/mortgage/repayment account in any event. If it is not so readily available, it must be questionable how the claimant knows and can establish the breach relied upon for enforcement.

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

X	Yes
	No

Please give your reasons:

The certification on the request form is sufficient. It is a succinct statement of the claimant's "claim". If the defendant disputes what is stated, the burden is on him/her to apply to the court and present their evidence.

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

X	Yes
	No

Please give your reasons:

Where there is no immediate judicial oversight, the bailiff's office is carrying out a purely administrative function – as under the current county court system (*Southwark v St. Brice* [2001] EWCA Civ 1138; [2002] 1 W.L.R. 1537 *per* Chadwick LJ at [32]). The responsibility for asserting that s/he has a right to the remedy claimed (the execution of an order) must lie with the claimant and it is both useful and correct that the claimant is required, not only to certify the substantive issue (the breach/debt owed) but that they have considered and fulfilled all procedural requirements. The requirements are not onerous and would be set

out on the form for the purposes of certification. A requirement of certification would also act as a reminder to the claimant that permission may be required and thus prevent a defective request being made. It is also in the defendant's interest to have the assurance that the matter is being procedurally correctly dealt with.

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

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

Please give your reasons:

Such a requirement would almost definitely lengthen the process needlessly. The production of drawn orders in some courts is now taking in excess of 3-4 weeks. Certification as suggested in answer to question 5 above should be sufficient.

That said, there is always a risk that unscrupulous claimants will certify that permission is not required or has been granted, when that is not correct. A possible 'half-way house' suggestion (between a copy of the drawn order and certification) would be:

- a) a requirement to state the case number and date of the permission order (which could then be checked by court staff on the system); and/or
- b) .a clear statement that an error in certification will result in the warrant being set aside.

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

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

Please give your reasons:

The main reasons for issuing claims of the type which would be enforced by writ in the High, rather than warrant in the County, Court are the value and/or complexity of the *claim* rather than any difference in the remedy sought.

There is no obvious reason why the rules for the issue of warrants/writs should or need to be different. Where the rules can be simplified without loss of substance, they should be. Having different regimes invites unnecessary applications for transfer between courts (usually from the County to the High Court). There is also potential for the defendant, particularly if acting in person, to be confused by having to respond to a High Court writ following a County Court action.

Applications for permission

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

X	Yes
	No

Please give your reasons:

The permissive nature of the current rule at CPR 83.2(4) assists no one and is a recipe for confusion. If the application is not made “in accordance with Part 23” how should it be made? Specifying the Part and the form – N244 – simplifies and clarifies the matter for everyone.

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

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

Yes

No

Please give your reasons:

In addition to the current information provided, two additional safeguards should be introduced. First, the Notice of Eviction, the N54, should contain a clearer and more prominent notice to the effect, "You are strongly encouraged to seek legal advice in particular about making an application to court." Secondly, a copy of the application form, the N244, should be included with the N54. The latter suggestion is particularly important. There is a relatively short window within which the application must be made. Further, the recent closure of a number of county court buildings, and the practice, being increasingly adopted, of requiring appointments to be made at court offices, make access to the court and the lodging of an application to suspend a warrant more difficult. Being given a copy of the relevant form in advance would go a little way to ameliorate those difficulties.

Other comments you wish to make:

Thank you for responding

Consultation

ACAS
Access to Justice Action Group
Acumension
Advice Now
Advice Services Alliance
Advice UK
AM Trust Group
Antony Hodari
APIL
Arrow Global
Ascent
Association of HM District Judges

Bar Council
Blake Turner
BLM Law
British Chambers of Commerce
British Property Federation
BSF Solicitors
BWB
Cabot Financial
Capsticks
CBTC solicitors
Chartered Institute of Credit Management
Christians Against Poverty
Cicero Group
Citizens Advice Bureau
Civil Court Users Association
Civil Justice Council
Clarke Willmott
Consumer Credit Association
Consumer Finance Association
Corbetts
Costs Experts
Council of Mortgage Lenders
Court Funds Office
Court of Appeal
Credit Services Association

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

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

Gadsby Wicks
Guildhall Chambers

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

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

Joseph Rowntree Foundation
Judiciary
Justice
Justice Committee

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

Local Government Association
London Landlords Accreditation Scheme
Lovetts

Lowell Group
Lucas Credit Services

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

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

Obsborn Clarke
OFGEM
OUP
Oyez

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

Registry Trust
Residential Landlords Accreditation Scheme
Residential Landlords Association
Restons

Shelter
Shoosmiths
SJ Berwin

Slater Gordon
Stepchange
Supreme Court

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