PROTESTORS AND GYPSIES & TRAVELLERS: POSSESSION AFTER MEIER

PROCEDURAL PITFALLS

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Introduction

1. Where property is occupied by trespassers, whether protestors, gypsies & travellers, or the increasingly common "squatters", regaining possession as quickly as possible is usually the key priority. Part 55 provides a swift, summary procedure for obtaining possession which applies (albeit with appropriate modifications in any given case) to mass protests and small squats alike. Although the procedure may appear straightforward, there is still scope for error, and this paper seeks to identify some of the more common procedural pitfalls which can be exploited by the Defendants to slow down the process.

A 'standard' claim under Part 55

2. For a 'normal' claim for possession against trespassers under Part 55 I, the procedural requirements are relatively straightforward, but not without scope for sometimes fatal errors.

3. In summary:

   (i) The Particulars of Claim must:

   - Identify the land to which the claim relates;
   - State the Claimant's interest in the land;
   - State the circumstances in which it was occupied without licence or consent

(ii) Documents (in the case of proceedings against "persons unknown") must be served in accordance with r.55.6, by:

- Attaching copies of the same to the main door or some other part of the land so that they are clearly visible and
- If practicable, inserting copies of those documents in a sealed transparent envelope addressed to "the occupiers" through the letter box.
- Or, by placing stakes in the land in places where they are clearly visible and attaching to each stake copies of the claim form, particulars of claim and any witness statements in a sealed transparent envelope addressed to "the occupiers".

(iii) The documents should be served at least 2 days before the hearing (in respect of non-residential property) and 5 days before the hearing (in respect of residential property), including the witness statements relied on by the Claimant, and a certificate of service produced at the hearing. (r.55.5)

<u>Potential Pitfalls:</u>

The Particulars of Claim

4. The greatest scope for error lies in identifying the land of which possession is sought and to which the Claimant asserts an immediate right to possession. Two of the most common errors concern:
   (i) The description of the land in the Particulars
   (ii) The red line on any plan used to identify the land

5. Particular care needs to be taken when describing the property or land of which possession is sought – a message reinforced by ***<u>Meier</u>***. A classic example is where possession is sought of a unit which extends across more than one building - eg a shop known as 1-3 High Street – but where the buildings known as 1 and 3 High Street contain other units, often residential units on upper floors. A possession order in respect of '1 – 3 High Street' would technically require

possession of the entirety of those buildings and such a claim may have undesirable consequences for the Claimant.

6. Firstly, as the Claimant is unlikely to be entitled to possession of the entirety of those buildings (at least on grounds of trespass) the Claim should fail – unless it is amended. An application to amend at the hearing may result in an adjournment, if the Judge takes the view that the error is so fundamental that the proceedings should properly be re-served on the occupants prior to determining the claim.

7. Secondly, it is not unlikely that a tenant of the upper parts may well find it necessary to attend the hearing, or instruct someone to do so on their behalf, to protect their interest. This is likely to result in a costs sanction for the Claimant. If it is realised prior to the hearing that such an error has been made, it is advisable to make it known as soon as possible to the occupants of all parts of the building that the Claimant will be applying to amend the Claim, and identifying the more limited extent of the property of which possession is sought. .

8. There may also be other undesirable consequences in the event that such an error is not realised and remedied before the Order is made – particularly in the event of a warrant being executed against the other parts of the building, and especially if the Claimant is the immediate landlord of those other parts.

9. In respect of claims for possession not limited to an identifiable building or part thereof, it is common practice to identify the land by reference to a red lined plan. Care must be taken to ensure that the land identified does not extend too far, or include land in respect of which the Claimant does not have an immediate right to possession – e.g. because other parts are occupied by tenants. Whilst there may be concerns that the trespassers will move from one grass verge on an industrial estate to another, the tenants are unlikely to take kindly to a claim for possession where the entire industrial estate is red-lined on the plan.

10. Care also needs to be taken where the trespassers are occupying not only unit or part of a building but also some outside space used with the same. If the Claimant is a tenant of part only of the building, it will be important to check what interest or rights are held over that outside space: it may well be that there is only an easement or lease granted by the lease or

lessor, such that the Claimant has no immediate right of possession in respect of the same. In such cases, it would be advisable to consider joining the landlord (or whoever retains the interest in that area) to the claim to seek possession of that part.

Immediate entitlement to possession

11. As well as the extent of land to which the Claimant claims to be entitled to possession, issues may also arise as to the Claimant's right to possession, *per se.*

12. One of the most common defences used by trespassers (at least at the first hearing) is that "someone" has granted them a right to stay at the property in question. With a sympathetic judge, and a 5 minute hearing, this may be enough to result in an adjournment. Unfortunately there is little that can be done about such defences. However, when preparing any witness statements in support of the Claim, and depending on the circumstances of the case, it may be of assistance to add to the standard line of the Claimant not having granted any right to enter, use or occupy the Property etc a statement to the effect that no other person has been granted authority, or been held out by the Claimant has having authority, to deal with the property on his / her / its behalf. Whilst not guaranteed to satisfy the Judge to grant the Order at that first hearing despite the purported defence, it does at least set the factual basis for whoever is attending the hearing to argue that any such purported grant cannot bind the Claimant and thus provide a defence to the Claim as a matter of law.

13. Similarly, it is not unknown for trespassers to seek to assert that there is – or might be – some continuing tenancy or licence in respect of the Property, such that someone other than the Claimant is entitled to possession. This can be based on something as spurious as an envelope addressed to another individual. Whilst it is not for the Claimant to prove a negative, if there have previously been licences/tenancies of the Property, and again depending on the circumstances of the case, it may be advisable to confirm that all licences/tenancies have been terminated (and approximately when).

14. One other situation in which the Claimant's entitlement might be called into question is whether the Claimant's interest in the property is one requiring registration under s.27 LRA 2002 to take

effect as a matter of law. In theory, this should cause no problems for the Claimant – *Manchester Airport v.Dutton* [2000] QB 133 makes it clear that the Claimant does not necessarily have to have a legal estate or interest in the land to succeed on a claim for possession. However, forewarned if forearmed, and if the entitlement to possession does rest on such an interest, it would be advisable for whoever is attending the hearing to be alive to such an argument potentially being taken, and prepared to knock it out of the ballpark a.s.a.p.

Service

15. Issues may also arise with service:

(i) Timing: it may be that overly efficient court listing means that there is not quite enough time to serve in accordance with r.55.5 - although as long as service has been effected expeditiously, it is to be hoped a Judge would treat an application to abridge time sympathetically. Further, if in doubt as to whether the land may be residential or non-residential (particularly depending on the user by the trespassers), err on the side of caution.

(ii) Non-compliance with r.55.6: how this is viewed is likely to depend on the Judge. However, provided that service has been effected in such a way that the proceedings should have come to the attention of the occupiers, then hopefully r.3.10 (or r.6.15(2)) can be relied on to prevent an adjournment.

(iii) Ensuring all necessary documents are included: r.55.6 stipulates service of the claim form, particulars of claim, and witness statements. However, it is worth noting that Part 55 does not appear to exclude CPR r.7.8 requiring forms for defence, etc, to be served with the claim form/particulars. Whilst omission may not be fatal – given that there is no requirement to file a defence in trespassers' claims – there is no guarantee a Judge will not take the view that such an omission is not a fundamental error, and adjourn the Claim for service to be re-effected.

Enforcement

16. Whilst not a procedural pitfall which may result in the Claim being delayed or dismissed, two matters which may be of serious concern to the Claimant are delays in the Court drawing up the Order for service on the Defendants, and delays in execution of a warrant of possession caused by bailiffs' waiting lists. As to the former, little can be done – other than to attempt to persuade the Court staff to draw the Order up then and there, thus placing service back in the Claimant's control. As to the latter, it is worth bearing in mind that orders for possession against trespassers can be enforced in the High Court without formal transfer or further application (other than for the writ of possession) – The High Court and County Courts Jurisdiction Order 1991/724 Art 8B.

Interim Possession Orders

17. A more draconian method than the 'normal' Part 55 possession claim, the severity of the sanctions attached for non-compliance with an IPO means the courts demand strict compliance with the requirements of Part 55 III.

18. In particular, it is important to ensure:

    (i) The Claim Form, Application Notice, Written Evidence and Defence Forms are all in the forms prescribed in PD 55[1] (r.55.22(2));

    (ii) The written evidence is given by the Claimant personally – or authorised officer if the Claimant is a corporate body (r.55.22(4));

    (iii) Service is effected within 24 hours of issue of the proceedings (r.55.23);

    (iv) That all documents required to be served by r.55.23 are served – in particular the defence form - and a certificate of service filed at or before the hearing (r.55.23(3)); and

    (v) Once the IPO is made, it is served, with all documents specified by r.55.26, within 48 hours after it is sealed (r.55.26)

19. As the time limits set out for certain steps are strict, then the time documents were served at the property should be marked on the same – and evidence given as to time, as well as date and method of service (i.e. in accordance with r.55.6(a))

[1] N5 (Claim form) N130 (Application Notice and Written Evidence), and N133 (Blank Defence form)

20. Further, it would be advisable for whoever attends the hearing to ask the Judge to make an Order in the specified form – i.e. N134 (IPO) and N136 (Final order for possession).

Conclusion

21. In theory, recovering possession from trespassers should be a relatively straightforward process – subject always to the surprises which may be sprung on the day. Whilst not even the most carefully preparation can ever guarantee that the Order will be granted at first hearing, if the more obvious procedural pitfalls can be avoided, then this should at least severely deplete the trespassers' toolbox of tricks.

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