NUTS AND BOLTS: POSSESSION CLAIMS
(II): Evicting squatters: principles and procedure

INTRODUCTION

1. This paper is primarily addressed to those who represent landlords. I will therefore focus on how to bring successful claims for possession against trespassers. For those more interested in helping maximise the amount of time in which trespassers can remain in a property – instead of treating this paper as a checklist of things to do, it can be used as a checklist by which to scrutinise and defeat claims.

2. I am going to divide this paper into two sections. Part 1 consists of procedural points which, although dry, are important. Far more claims for possession fail because of a failure to follow the correct procedure than fall down on tricky questions of law. I will then move onto discuss some particular 'legal' issues which frequently arise in trespasser actions.

PART 1: PROCEDURE

3. The procedure for possession claims is laid down by CPR Part 55. Claims against trespassers have their own rules within that Part. It is, largely, a self –contained code for such claims.

What is a claim against trespassers?

4. CPR 55.1(b) provides that:

"a possession claim against trespassers" means a claim for the recovery of land which the claimant alleges ***is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not;"***

5. So, if your claim is against someone who has, without any basis to for doing so, remained on land after the expiry of a tenancy – even though they have 'remained on land without consent', the claim will not be a 'claim against trespassers' for the purposes of CPR Part 55. The 'standard' procedural rules would apply to such a claim, not the trespasser rules. However, the trespasser procedural rules do apply in respect of licensees who have remained on land following the lawful determination of their licence.

6. The CPR Part 55 procedure is mandatory for possession claims against trespassers (CPR 55.2(b)), unless the Claimant seeks an interim possession order (CPR55.2(2)(c)), which I will consider later.

Starting the claim

7. The claim is commenced using form N5 (PD55A para 1.5). Additional (non-possession) claims may be brought within the same proceedings (PD55A, para 1.7).

8. Claims should be started in the County Court rather than the High Court, unless the *"exceptional circumstances"* specified in PD55A apply. If so, a certificate must accompany the claim form stating the reasons for issuing in the High Court,

verified by a statement of truth (CPR55.3(2)). Factors which could justify issuing in the High Court include (PD55A para 1.3):

a. Complicated disputes of fact;
b. Points of law of general importance;
c. The claim is against trespassers and there is a substantial risk of public disturbance or serious harm to persons or property which require immediate determination.

9. Paragraph 1.4 of the PD cautions that whilst *"the value of the property and the amount of any financial claim may be relevant circumstances…these factors alone will not normally justify starting the claim in the High Court."* In other words, just because your building happens to be in Mayfair, that does not mean you can jump the queue. Paragraph 1.2 further warns that where claims are brought in the High Court inappropriately the Court will usually strike the claim out or transfer it to the County Court, ordinarily with the costs of having proceeded in the High Court disallowed.

10. The claim form must be filed and served together with the Particulars of Claim (CPR55.4). The requirements for the Particulars of Claim are specified in PD55.4 paragraph 2.1, namely *"the particulars of claim must"*:

a. identify the land to which the claim relates;
b. state whether the claim relates to residential property;
c. state the ground on which possession is claimed;
d. give full details about any mortgage or tenancy agreement; and
e. give details of every person who, to the best of the claimant's knowledge, is in possession of the property.

11. Particulars of claim should also comply with CPR16 and so contain a concise statement of the facts upon which the claim is based.

12. Additionally, paragraph 2.6 of the PD requires that, if the claim is a possession claim against trespassers, *"the particulars of claim must state the claimant's interest in the land or the basis of his right to claim possession and the circumstances in which it has been occupied without licence or consent."*

13. These requirements should be taken seriously: I have, in the past, been against counsel who have applied (albeit unsuccessfully) to strike out particulars of claim which do not comply with these requirements.

14. A common feature of possession actions against trespassers is that the land owner will not know the identities of those persons in occupation, or will only know some of them. In those circumstances, in addition to any named defendants, the claim must be brought against 'persons unknown' (CPR55.3(4)).

Service of the claim and the defence

15. The County Court will fix a hearing date when it issues the claim form (CPR55.5(1)).

16. In possession claims against trespassers the defendant must be served with the claim form, particulars of claim and any witness statements:

    a. in the case of residential property, not less than 5 days before the hearing date; and
    b. in the case of other land, not less than 2 days before the hearing date.

    (CPR 55.5(2) In both cases, 'days' means 'clear days')

17. It should be noted that, although witness statements are not expressly required, if they are to be relied upon they must be served together with the claim form and particulars of claim (CPR55.8(6)). It is normally a good idea to include a witness statement, which is a convenient place to set out the background, how the occupation was discovered etc. I have, in the past, encountered judges who refuse to grant possession (and, instead, adjourn the case) on the basis that the evidence is not contained within a witness statement, merely within the particulars of claim, notwithstanding that PD55A paragraph 5.1 expressly provides that "*each party should wherever possible include all the evidence he wishes to present in his statement of case, verified by a statement of truth*"!

18. Defence forms should also be served along with the claim form, particulars and witness statement.

19. The requirement for, at most, 5 clear days' notice means that claims against trespassers can proceed much faster than ordinary possession actions, where the hearing must be a minimum of 28 days from the date of issue (CPR55.5(5)). The hearing can, in fact, be expedited still further, and the 5 day and 2 day notice periods shortened in accordance with CPR3.1(2)(a): to do so would require a N244 Application Notice supported by appropriate reasons, submitted together with the claim form and particulars.

20. Where one of the defendants in a possession claim is 'persons unknown', special rules for service apply. They are found in CPR55.6 and require that the claim form, particulars of claim and any witness statements be served *"on those persons"* by:

a. Attaching copies of the claim form, particulars and any witness statements *"to the main door or some other visible part of the land so that they are clearly visible"* and

b. "if practicable, inserting copies of those documents in a sealed transparent envelope addressed to "the occupiers" through the letter box; or

c. 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 statement in a sealed transparent envelope addressed to *"the occupiers"*.

21. If the court is to effect service, the Claimant must provide the Court with sufficient stakes and transparent envelopes (PD55A para 4.1). In practice, claims against persons unknown are almost always served by the Claimant. If so, CPR55.8(6) requires the Claimant to "*produce at the hearing a certificate of service of those documents"*.

22. Possession claims most often get derailed by issues with the certificate of service. Where the occupiers do not attend, the Court will want to ensure that, before it grants possession, it can be sure the service provisions have been fully complied with. A common issue with certificates of service is they say things like *"I served the documents by attaching them to stakes…"*: by not stating which documents were served, the Court cannot be sure CPR55.5(2) has been complied with. Another favourite of judges is to adjourn proceedings where the certificate of service fails to deal with whether the documents were placed through the letter box. The safest course is for certificates of service to list all those documents served, together with copies, and use the wording of CPR55.6 in stating how service was performed.

23. In claims against trespassers, CPR15.2, which requires a defendant who wishes to defend all or part of a claim to file a defence, does not apply (CPR55.7(2)). Commonly, the occupiers will attend court on the hearing date and raise defences then.

Hearing the claim – the initial fixed hearing

24. The initial fixed hearing will usually end up as one of many within a busy 'possession list', in some cases, the Court may have 20 or so such hearings to get through in a day. CPR55.8(1) provides that at the fixed hearing the court may decide the claim or give case management directions.

25. In view of the number of cases in the court list, the court will be looking to resolve those claims which are straightforward and to adjourn off those which are not (in other words, those which raise arguable defences). In such cases, directions will commonly include the defendant providing a written defence or the service of further evidence. CPR55.8(2) further provides that "*Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under paragraph (1)(b) will include the allocation of the claim to a track or directions to enable it to be allocated.*"

26. Except where the claim is allocated to the fast track or the multi-track (or the court orders otherwise), any fact that needs to be proved by the evidence of witnesses at the initial or adjourned fixed hearing may be proved by evidence in writing (CPR55.8(3)). In effect, this means that the Court can accept the evidence contained within the Particulars of Claim and any witness statement without the need to hear live evidence.

27. Claimants would be wise to not rely too much on rule 55.8(3). Whilst its effect is that claims can succeed at the fixed hearing without the need for witnesses to attend, paragraph 5.4 of the PD provides that if the maker of a witness statement does not attend a hearing, and the other party disputes material evidence contained in his statement, *"the court will normally adjourn the hearing so that oral evidence can be given."* Many trespasser occupiers are alive to this rule and take issue with facts contained in the witness statements. Where a witness is present, a court will often be willing to hear short live evidence to resolve the issue. If they are not present, the claim will be adjourned.

28. Where the Court does decide to adjourn and allocate the claim to a track, in determining the track the Court is required to have regard, amongst other relevant circumstances, to the matters listed at CPR55.9 which include the importance of vacant possession to the claimant and the alleged conduct of the defendant. The court will only allocate possession claims to the small claims track if all the parties agree (CPR55.9(2)). Even where it does so, special provisions on costs apply (CPR55.9(3)).

Terms of the Order

29. For many years, the standard order in successful possession claims against trespassers has been an order for possession forthwith (in other words, immediate possession). Indeed, for over 40 years, following the Court of Appel decision of McPhail v Persons Unknown [1973] Ch. 447 the position has been that the Court has no jurisdiction to grant the trespassing occupier more time to leave the premises, even if it wanted to.

30. The rationale behind the decision in McPhail is set out by Lord Denning MR at p.457. The courts should give as speedy and effective a remedy as self-help. The remedy of self-help would be instant. Therefore, the court should not grant a squatter time to leave the premises. Lord Denning MR held:

> *Seeing that the owner could take possession at once without the help of the courts, it is plain that, when he does come to the courts, he should not be in any worse position. The courts should give him possession at once, else he would be tempted to do it himself. So the courts of common law never suspended the order for possession.*

31. The decision in McPhail has come under sustained attack in recent years on the basis that it is not compatible with Article 8 of the ECHR. I will return to Article 8 later. For the moment, it suffices to observe that:

    a. This is a developing area of jurisprudence;
    b. For the moment, McPhail, at least for private land owners, continues to be good law. Although, in obiter remarks, Lord Justice Ward indicated he would be minded to depart from it in Malik v Fassenfeld [2013] EWCA Civ 798, those comments were not endorsed by the other members of the Court and were further doubted by the Court of Appeal in McDonald v McDonald [2014] EWCA Civ 1049;
    c. The position appears to have changed for public body landowners by virtue of the Human Rights Act, following the decision of the Supreme Court in Manchester City Council v Pinnock [2011] UKSC 6, where it was held that the Court could, in exceptional circumstances, refuse public bodies possession orders, or suspend them, on the basis of Article 8 ECHR;
    d. It should be noted that the applicability of McPhail turning on whether the landowner is a private or public body was criticised by HHJ Pelling QC in Manchester Ship Canal [2014] EWHC 645 (Ch), but, for the

moment, that seems to be the position and was reinforced (in the context of the landlord and tenant relationship) by the Court of Appeal in McDonald v McDonald [2014] 2 P & CR 20;

e. Even if McPhail is subject to the effects of Article 8, it may be that the squatters cannot show that the land in question constitutes their home, or that it would be disproportionate to grant an immediate possession order. A 'home' is an autonomous convention concept and requires the occupier to show a "sufficient and continuous link with the land in question". The land can amount to a home even if the occupation is unlawful.

Costs

32. In most claims against trespassers, the client's objective is to recover possession of the property as quickly as possible. In these cases, costs is often a secondary issue and, particularly where the identity of the trespassers is not known, it will rarely be cost effective to seek to enforce any order for costs.

33. Nevertheless, as a matter of principle, costs incurred in possession claims against trespassers are recoverable. Further, as such claims will not include a claim for arrears of rent (CPR45.1(2)(d)) and the Defendant will not normally have surrendered possession (CPR45.1(2)(c)), such claims will not be caught by the fixed costs rules and full costs should, in theory, be recoverable. It should be borne in mind, however, that judges can be hostile to attempts to obtain costs orders against trespassers.

Service of the Order

34. It is noteworthy that, although the claim form, particulars and witness statement must be served in accordance with CPR55.6, there are no equivalent provisions for the service of the court order. Whether or not to rely on the Court to serve the possession order in due course, or serve the order personally, will depend on the speed at which the Claimant needs to enforce order.

Enforcement

35. Orders for possession are enforceable through use of County Court bailiffs. However, this can take a long time (and can vary as between courts). It is possible to use High Court enforcement mechanisms, which are faster, albeit more expensive. In order to do so, the matter must be transferred to the High Court.

A quicker way? Interim Possession Orders

36. Section III of Part 55 provides for the Interim Possession Order regime, which is intended to provide a rapid means of recourse against squatters. Essentially, a possession claim is brought as normal, but an application for an IPO is made, in form N130. This must be supported by a witness statement, in form N133.

37. An IPO can be granted only where possession is the sole claim. The Claimant must have an immediate right to possession, and must have had such a right throughout the period of alleged unlawful occupation.

38. There are strict requirements as to service of the IPO in CPR 55.23. The application must be served within 24 hours of being issued, in accordance with CPR55.6(a).

39. Where an IPO is sought, then there will be a two-stage process: the hearing of the IPO hearing, and then a final hearing if the IPO is granted.

40. If the IPO is granted and lawfully served, then it will be a criminal offence for squatters to remain in the property. The final hearing is therefore likely to be something of a formality, since the squatters are likely to have left the property. However, the police are not always willing to take action against squatters.

41. The witness making the witness statement will generally give undertakings (CPR 55.25(1)):

(a) if, after an IPO is made, the court decides that the claimant was not entitled to the order to –

(i) reinstate the defendant if so ordered by the court; and

(ii) pay such damages as the court may order; and

(b) before the claim for possession is finally decided, not to –

(i) damage the premises;

(ii) grant a right of occupation to any other person; and

(iii) damage or dispose of any of the defendant's property.

42. If the conditions for making an IPO are satisfied, the requirements as to service have been complied with, and the undertakings are given, then the court should make the IPO (CPR 55.25(2).

43. Although the IPO procedure appears fast and favourable to claimants, there are a number of disadvantages. IPOs are not popular with some County Court judges. The procedural loopholes are somewhat treacherous, and this can increase, rather than decrease, delay in the litigation. The police may not be willing to take action

when faced with a breach of the IPO. Therefore, careful thought should be given as to whether an IPO is necessary, or whether it would be wiser just to press ahead with the usual summary possession proceedings.

PART 2: LEGAL ISSUES

Which land to include in the claim

44. A possession claim should include only the land which is occupied by trespassers. The procedure should not be used where there is a mere threat to occupy land: in this situation, the correct procedure to use is to apply for an injunction. However, where the occupation relates to part of an area of land with which it forms a contiguous whole, then possession proceedings can be brought for the whole: see Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] 1 WLR 2780.

Who can bring a claim?

45. In Manchester Airport Plc v Dutton [2000] 1 Q.B. 133, the Court of Appeal considered whether the right to bring possession proceedings was restricted to those with a legal estate in the property, or included licensees. After reviewing the history of actions for ejectment (the predecessor of possession actions) and the restrictions that applied to such actions, Laws L.J. concluded that:

> *"…the court today has ample power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence…*
>
> *In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys. This is*

the same principle as allows a licensee who is in de facto possession to evict a trespasser. There is no respectable distinction, in law or logic, between the two situations. An estate owner may seek an order whether he is in possession or not. So, in my judgment, may a licensee, if other things are equal. In both cases, the plaintiff's remedy is strictly limited to what is required to make good his legal right. The principle applies although the licensee has no right to exclude the licensor himself. Elementarily he cannot exclude any occupier who, by contract or estate, has a claim to possession equal or superior to his own. Obviously, however, that will not avail a bare trespasser."[1]

46. The issue of standing in possession actions was revisited by the Supreme Court in Secretary of State for the Environment v Meier and Others [2009] 1 WLR 2780. Lord Roger began by recognising that:

"Most basically, an action for recovery of land presupposes that the claimant is not in possession of the relevant land: the defendant is in possession without the claimant's permission. This remains the position even if, as the Court of Appeal held in Manchester Airport plc v Dutton [2000] QB 133, the claimant no longer needs to have an estate in the land... To use the old terminology, the defendant has ejected the claimant from the land; the claimant says that he has a better right to possess it, and he wants to recover possession. That is reflected in the form of the order which the court grants: -"that the claimant do forthwith recover" the land - or, more fully, "that the said AB do recover against the said CD possession" of the land"[2]

47. Against this background, the standing requirements have been recently reviewed by the Court of Appeal in Mayor of London v Hall [2011]1 WLR 504). In that case, the title to the square opposite the Houses of Parliament was vested in the

[1] Page 150 B-C, emphasis added.
[2] Paragraph 6.

Crown but, under section 384(3) of the Greater London Authority Act 1999, the care, control, management and regulation of the square rested with the Mayor of London. The issue for the Court of Appeal was whether the Mayor of London had standing to commence possession proceedings. Considering the issue at paragraphs 21-35 of his judgment, Lord Neuberger M.R. noted that:

> *"…the argument is this: a claim for possession of land, if made by a person who has been put out of possession, can only be successfully maintained if that person can establish title of some sort to a legal estate in the land. In particular, it is insuffcient for such a person to maintain such a claim, if he is merely relying on an interest or right, falling short of a legal estate, which gives him a claim or right to use and control of the land."*[3]

48. After referring to actions for ejectment and the decision in Meier, rejecting the above argument, Lord Neuberger continued that:

> *27 However, there is obvious force in the point that the modern law relating to possession claims should not be shackled by the arcane and archaic rules relating to ejectment, and, in particular, that it should develop and adapt to accommodate a claim by anyone entitled to use and control, effectively amounting to possession, of the land in question - along the lines of the views expressed by Laws LJ in Dutton's case [2000] QB 133 and by Baroness Hale of Richmond JSC in Meier's case…"*

49. One potential situation which can arise in the context of squatter claims is where land has been transferred to a claimant, but not yet registered. Prior to registration, the transferee will be the owner in equity, but not in law. A possession action should quintessentially be brought by the legal owner. If the legal owner (the transferor) is not willing to assist, having no further interest in

[3] Paragraph 22.

the property, then the transferee must do as much as possible to prove its interest in the land (such as including the TR1/TP1 with the claim form.

50. Whilst the law in this area is clearly in a process of travel rather than having reached a final destination, it is relevant to consider in this context that a squatter will inevitably have no lawful interest in the land. A judge is unlikely to accept an argument regarding a claimant's title from an admitted squatter, where a claimant has some form of lawful interest in the land.

Defending claims on the basis of Article 8 ECHR

51. This topic has been alluded to above in the context of McPhail v Persons Unknown. The major cases to be aware of in the context of squatters are:
    i) Malik v Fassenfelt;
    ii) Manchester Ship Canal;
    iii) McDonald v McDonald.

52. In Malik, Sir Alan Ward held (obiter) that Article 8 could be available as a defence to possession proceedings brought by a private individual. Even though the private individual was not a public body for the purposes of the Human Rights Act, the court was such a body and should take into account human rights ('horizontal effect').

53. The other members of the Court of Appeal declined to offer a view on this point, given that it was not necessary for their decision and had not been fully argued.

54. In Manchester Ship Canal, HHJ Pelling QC, sitting as a Judge of the High Court, noted that Sir Alan Ward did not have the support of his brethren in Malik, but

nevertheless decided to follow Sir Alan Ward's approach. He held that Article 8 could apply between private parties. However, he held on the facts of the case that the defendants had not established that the land in question was their home.

55. In McDonald, the Court of Appeal held that an Article 8 defence should not be available to a tenant where the landlord is a private individual. Although this was in the context of the landlord and tenant relationship, this reasoning applies with equal force to the squatting context.

56. There is a respectable basis for private landowners to argue that squatters should not, as a matter of law, be entitled to rely on Article 8 rights. However, even if the landowner loses this argument, the squatters will have to cross the further thresholds of showing that a) the land in question has become their home so as to give rise to Article 8 protection, and b) making the order would be a disproportionate interference with those Article 8 rights. Given the human rights of the landowner under Article 1 of Protocol 1, these will be difficult hurdles for squatters to overcome as against private landowners.

Residential properties and criminal offences

57. Section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 makes it a criminal offence for a squatter to occupy a residential premises as his or her home, knowing that he or she is trespassing. Conviction can give rise to a term of imprisonment, or a fine, or both.

> **144 Offence of squatting in a residential building**
> (1) A person commits an offence if—
> (a) the person is in a residential building as a trespasser having entered it as a trespasser,
> (b) the person knows or ought to know that he or she is a trespasser, and

(c) the person is living in the building or intends to live there for any period.
(2) The offence is not committed by a person holding over after the end of a lease or licence (even if the person leaves and re-enters the building).
(3) For the purposes of this section—
(a) "building" includes any structure or part of a structure (including a temporary or moveable structure), and
(b) a building is "residential" if it is designed or adapted, before the time of entry, for use as a place to live.

58. Where the squatters occupy a residential premises, the police will usually be willing to act and evict them. In practice, very few squatters occupy solely residential buildings for this reason. Although building is defined to include part of a building, experience shows that the police are extremely reluctant to get involved where the property is mixed use, for example, a pub with flats above it.

CONCLUSIONS

59. To end where I began, CPR Part 55 is clear and comprehensive code for possession claims against trespassers. Provide Claimants take care to follow its provisions, they should not go far wrong.

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