Landmark CHAMBERS

Common Pitfalls in Possession Claims Against Trespassers…

… And how to avoid them!

Tom Morris

Introduction

Common pitfalls:

1) Miss-describing the land so that possession is sought of land which is leased.
2) Claims by licensees with no title to the land.
3) Obtaining possession orders where a trespasser leaves before the hearing.
4) Obtaining possession orders against ice-cream vans and other weekend trespassers.
5) Asking for possession of land not yet trespassed upon.
6) Service of the order.

Secretary of State for Environment, Food and Rural Affairs v Meier [2009] UKSC 11: some encouraging dicta…

"*If a group of people come on to my land without permission, I shall want the law to provide a speedy way of dealing with the situation."* Per Lord Roger at [1].

"It seems clear that the modern possession action is there to protect the right to physical occupation of the land against those who are wrongfully interfering with it. The right protected, to the physical occupation of the land, and the remedy available, the removal of those who are wrongfully there, should match one another." Per Lady Hale at [35].

"…it is clear that judges should strive to ensure that court procedures are efficacious, and that, where there is a threatened or actual wrong, there should be an effective remedy to prevent it or remedy it. Further, as Lady Hale points out, so long as landowners are entitled to evict trespassers physically, judges should ensure that the more attractive and civilised option of court proceedings is as quick and efficacious as legally possible." Per Lord Neuberger at [58].

Conceptual points

(1) A possession claim is a claim by a title-holder to be put back into possession of land, where that title-holder has *either* been dis-possessed of their land entirely, *or* where their right to possession of that land is interfered with by an adverse occupier whose occupation falls short of possession.

(2) An order for possession binds only parties to the proceedings in which that order is obtained, but a bailiff or sheriff is obliged to execute a warrant or writ of possession against *all those in occupation*.

Pitfall 1: Correctly identifying the land of which possession is sought

As a general rule, the only person who can sue in trespass is the person in possession of the land, especially since a possession claim is a claim to be put back in uninterrupted possession of land.

Where property is let to a tenant, the landlord has no entitlement to issue proceedings for possession: *Baxter v Taylor* (1832) 4 B. & Ad. 72.

"*He could not maintain an action of trespass in his own name, because he was not in possession of the land.*" (per Taunton J)

Describing the land: practical pointers

(1) Describe the land with great care in the particulars of claim so that:
   (a) it includes *only* land of which the owner is entitled to possession; and
   (b) it does not include any part of the land which is let to tenants.

   E.g. where *Blackacre* consists of a house let to a tenant and a garden retained by the landlord and a trespasser occupies the garden: the landlord can sue for possession but the particulars should specify "*The garden to the rear of Blackacre",* instead of just "*Blackacre".*

   Were the trespasser to occupy any part of the house itself, only the tenant could sue for possession.

(2) Where the particulars of claim refer to a plan on which the land is identified by a red line, the red line must not include any buildings or other land let to tenants. Where the trespass is to part of an industrial estate or retail park, this is especially important.

(3) Where the register does not make clear what land is leased, consider attaching copies of any leases and accompanying plans to establish clearly that the owner is entitled to possession of what is claimed.

The risks of miss-describing the land

(1) Since the landlord is not usually entitled to possession of land let to tenants, the claim may fail or at least be adjourned so that it can be amended. Conversely, where a tenant seeks possession of a building *and* outside space which is retained by the landlord.

(2) It is not impossible that a tenant may attend to defend their interest, resulting in costs sanctions for the claimant.

(3) As Lord Neuberger pointed out in *Meier*, a possession order only binds parties to the proceedings, but a warrant must be executed against anyone on the land. There may be practical problems executing warrants where an order is made against tenanted land without the difficulty being spotted.

(4) It is even possible that imprecise definitions of the land may include parts outside of the claimant's ownership.

E.g. *Whiteacre* consists of a warehouse and adjoining yard. A tenant leases the warehouse, but the landlord retains the yard. Travellers occupy the warehouse and part of the yard, and the tenant sues for possession of "*Whiteacre*". The tenant has no right to claim possession of the yard.

Possible solutions

(1) An application to amend prior to the hearing will require re-service and is unlikely to be desirable given the tight time-frames of the claim. The better approach is to attend the hearing armed with an amended plan and ask for the order to be made with reference to that plan.

(2) Make an application to amend the particulars there and then, on the basis that no prejudice has been caused to the tenants of demised land wrongly included, or to the trespasser who in any event has no right to possession of the demised land, and that prejudice would be caused to the owner if the claim were dismissed or adjourned.

(3) Alternatively, if the facts allow, rely on the principle that a landlord may sue at once without waiting until his future estate falls into possession *where the trespass has caused a permanent injury to the land affecting the landlord's reversionary interest.*

Pitfall 2: claims by licensees

- What happens where the freeholder of a commercial site is a remote company and day-to-day management of the land is undertaken by an agent? Can the managing agent bring the claim?
- In *Manchester Airport PLC v Dutton* [2000] 1 QB 133, the National Trust was the freeholder of an area of woodland, but granted Manchester Airport Plc 'a licence to enter an occupy' the land to reduce tree heights in the flightpath of a second runway. Trespassers occupied the wood, and Manchester Airport Plc brought a claim.
- The Court of Appeal held by a majority that a licensee could, in certain circumstances, bring the claim.

Manchester Airport v Dutton

"*Now, I think it is clear that if the airport company had been in actual occupation under the licence and the trespassers had then entered on the site, the airport company would have obtained an order for possession; at least if it was in effective control of the land.(…) The airport company's claim for possession would not, were it in occupation, fall in my judgment to be defeated by the circumstances that it enjoys no title or estate in the land, nor any right of exclusive possession as against its licensor.*"

- Per Laws LJ at 147D-G.

NOTE: a licensee can sue for possession even when it has not even gone into occupation of the land:

"*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… In every case the question must be what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment.*" Per Laws LJ At 149H – 150E.

Manchester Airport v Dutton: practical lessons

- The decision may provide assistance where it is more convenient for the managing agent of – say – an industrial estate to bring a claim. Where the estate is in the ownership of a number of different title-holders, this may be a practically easier course to take – provided that the agent can demonstrate a contractual entitlement from all of the relevant title-holders to effective control of the land occupied by the trespassers.
- However, for a possession claim in the county court, there is an obvious risk of encountering a district judge unfamiliar with claims against trespassers who is less than impressed by the complexity of the resulting claim.
- However, where a claim is brought by a managing agent instead of a title-holder, *Manchester Airport v Dutton* suggests that the claim may still succeed.

Pitfall 3: the trespasser leaves before the hearing

"The real objection is that the Court of Appeal's extended order that "the Commission do recover the parcels of land set out in the Schedule hereto" is inconsistent with the fundamental nature of an action of recovering land because there is nothing to recover: the Commission were already in undisturbed possession of those parcels of land. And the law is harmed rather than improved if a court grants orders which lay defendants, knowing the facts, would rightly find incomprehensible. How, the defendants could well ask, can the Commission "recover" parcels of land which they already possess? How, too, are the defendants supposed to comply with the order? Only a lawyer could understand and explain that the order "really" means that they are not to enter and take possession of the other parcels of Commission land." - Meier, per Lord Roger at [12]].

"…the essence of an order for possession, whether framed in ejectment or recovery, is that the claimant is getting back the property from the defendant, whether by recovering the property form the defendant or because the claimant had been wrongly ejected by the defendant. As stated by Wonnacott, in Possession of Land (2006), page 22, "an action for recovery of land (ejectment) is an action to be put into possession of an estate of land. The complaint is that the claimant is not currently 'in' possession of it, and… wants… to be put 'in possession of it." - Per Lord Neuberger at [60].

"*Whatever else a possession order may be or have been, it has always been a remedy for a present wrongful interference with the right to occupy. There is an intrusion and the person intruded upon has a right to throw the intruder out."* - Per Lady Hale, at [38].

The problem

- What happens where a trespasser who is served with proceedings then packs up and vacates the site before the hearing?
- A client may still want to go ahead with the hearing and obtain an order for possession '*in case the trespasser returns*' – especially where they a have already spent money on issue and service.
- Strictly speaking, applying Meier, a claimant has no right to an order for possession in such circumstances, and their representative is in no position to attend a possession hearing and ask for one – especially if instructed that the trespassers have left. Given that judges often ask whether the trespasser is still there at the start of a hearing, this can put a lawyer in a very difficult position.
- The proper remedy is an injunction – but what if this is not pleaded and the evidence necessary to justify an injunction has not been put in?

Solutions

- It is established that it is a trespass to place anything on or in land in the possession of another – including dumping rubbish: *British Waterways Board v Severn Trent Water Ltd* [2001] EWCA Civ 276.
- Accordingly, where a trespasser vacates before the hearing but leaves rubbish or detritus on the land, then it is possible to argue that the claimant's right to possession is still being interfered with – the trespasser has not strictly speaking returned possession to the claimant. It can also be argued on the same basis that it is unclear to the claimant whether the defendant has really vacated, or whether they intend to return.
- Although strictly speaking an injunction requiring the defendant to remove the rubbish from the land would be a more appropriate remedy, a sympathetic judge might be inclined on this basis to make an order for possession even where the trespassers are not there in person on the day of the hearing.
- Clients should be advised of the risk of encountering an unsympathetic judge!

Pitfall 4: evicting ice-cream vans and other occasional trespassers not present on the day of the hearing

- What if someone operates an ice-cream van on private land – like a shopping centre car park?
- If they are there on weekdays, then at the time of the hearing the claimant can say that their right to possession is interfered with.
- But if the ice-cream van is there only on weekends and bank holidays, then the claimant will not be able to show any right to a possession order at the hearing – they will be in undisturbed possession of their land.
- Similarly, where a homeless person occupies a site regularly but is not there on the day of the hearing, what can a claimant do?

The authorities

"*If a group of people come on to my land without my permission… if they leave but come back repeatedly, depending on the evidence, I shall be able to obtain an interlocutory and final injunction against them returning.*" *Meier*, per Lord Roger at [1].

"*Obviously, the decision whether or not to grant an order retraining a person from trespassing will turn very much on the precise facts of the case. Nonetheless, where a trespass to the claimant's property is threatened, and particularly where a trespass is being committed, and has been committed in the past, by the defendant, an injunction to restrain the threatened trespass would , in the absence of good reasons to the contrary, appear to be appropriate.*" *Meier*, per Lord Neuberger at [79].

Solutions

- In such a case, the claim can be issued as a possession claim against trespassers under part 55, but the claimant should also seek an injunction restraining the defendant from returning to the land in question.
- 55APD para 1.7 states that "*A claim which is not a possession claim may be brought under the procedure set out in Section I of Part 55 if it is started in the same claim form as a possession claim which, by virtue of rule 55.2(1) must be brought in accordance with that Section"* and notes that "*rule 7.3 provides that a claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings."*
- That has the advantage of the short time period between service and the hearing.
- Witness evidence will be necessary in order to establish clearly the existence of the threatened trespass – even though this may mean that it will be necessary to delay issue for a period of weeks or months so that sufficient evidence of a pattern of behaviour can be established.

Pitfall 5: asking for possession of too much

- What happens where trespassers are in occupation of only part of a larger piece of land?
- What happens where trespassers are in occupation of one piece of land, but there is a high likelihood of them moving into occupation of another piece of land owned by the same claimant if a possession order is enforced against the first piece of land?
- These were the facts in *Meier*, which has now broadly settled the relevant principles.

The decision in *Meier*

In 2007 a number of travellers entered into unlawful occupation of Hethfelton Wood in Dorset, managed by the Forestry Commission on behalf of the Secretary of State for the Environment.

The Secretary of State commenced proceedings for an order for possession of Hethfelton Wood *and* other woodland nearby which was also managed by the Forestry Commission, on the basis that the travellers would simply relocate to another area of woodland if the order was enforced against Hethfelton Wood.

Meier cont.

"*The notion that an order for possession may be sought by a claimant and made against defendants in respect of land which is wholly detached and separated, possibly by many miles, from that occupied by the defendants, accordingly seems to me to be difficult, indeed impossible, to justify. The defendants do not occupy or possess such land in any conceivable way, and the claimant enjoys uninterrupted possession of it. Equally, the defendants have not ejected the claimant from such land. For the same reasons, it does not make sense to talk about the claimant recovering possession of such land, or to order the defendant to deliver up possession of such land.*"

- Lord Neuberger at [64].

Meier cont.

"*This does not mean that, where trespassers are encamped in part of a wood, an order for possession cannot be made against them in respect of the whole of the wood (at least if there are no other occupants of the wood), just as much as an order for possession may extend to a whole house where the defendant is only trespassing in one room (at least if the rest of the house empty).*"

- Lord Neuberger at [65].

The Supreme Court effectively approved the Court of Appeal's decision in *University of Essex v Djemal* [1980] 1 WLR 1301, where it was held that the universities right to possession of its campus was indivisible: "*If it is violated by adverse occupation of any part of the premises, that violation affects the right of possession of the whole of the premises.*" (per Shaw LJ at 1305C-D).

An evolving area of jurisprudence?

In spite of his conclusion, Lord Neuberger expressed some concern at [67] – [71] about whether *Djemal* was correctly decided:

"*I have no difficulty with the fact that the possession order made at first instance in this case extended to the whole of Hethfelton, even though the defendants occupied only a part of it.*

The position is more problematical where a defendant trespasses on part of land, the rest of which is physically occupied by a third party, or even by the landowner. Particular difficulties in this connection are, to my mind, raised in relation to a wide order for possession in a claim within CPR 55.1(b). Such a "claim" may be brought "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… consent…". Given that such a claim is limited to "land…occupied only by" trespassers, it is not immediately easy to see how it could be brought, even in part, in relation to "land… occupied only by" trespassers."

Doubts on Djemal

"As already mentioned, given that there is the alternative remedy of self-help, the court should ensure that its procedures are as effective as lawfully possible. Nonetheless, there is obviously great force in the argument that the fact that areas of the campus in that case were lawfully and exclusively occupied by academic staff, employees and students should have precluded a claim and an order for possession in respect of those areas, both in principle and in the light of the wording of RCS Order 113 rule 1.

However, this is not the occasion formally to consider the correctness of the decision in Djemal,"

The correctness of *Djemal* was accepted by Lord Roger, Lord Collins and Lady Hale (Lord Walker agreeing with everyone…) and accordingly there is little doubt that *Djemal* presently remains good law.

Likewise, it remains standard practice to apply for possession of a site with other lawful occupiers present and the courts are happy to make orders in those terms.

Meier: the rights of other lawful occupiers of the land

What happens where there are other licensees on the land? Example: the freeholder of an industrial estate sells licenses to ice-cream vans wishing to trade in its car park. Two vans operators obtain licenses and lawfully trade, but a third does so without a licence.

"*It was held in R v Wandsworth County Court, ex parte Wandsworth London Borough Council [1975] 1 WLR 1314, that a bailiff executing a possession warrant is entitled to evict anyone found on the premises whether they were party to the judgment or not. However, there is nothing to prevent the order distinguishing between those who are and those who are not lawfully there, provided that some means is specified of identifying them. No-one would suggest that an order for possession of Hethfelton Wood would allow the removal of Forestry Commission workers or picnickers who happen to be there when the bailiffs went in. In principle, court orders should be tailored to fit the facts and the rights they are enforcing rather than the other way around."* Per Lady Hale at [36].

An order can be sought stating e.g. "*Not to be enforced against…*" *"Only to be enforced against…"*

Practical lessons from *Meier*

(1) A possession order *can* be made in respect of an entire property where the trespasser is only in occupation of part, even where the landowner remains in occupation of the remainder. In practical terms, this is likely to be particularly relevant where trespassers occupy part of a university campus, or part of an industrial estate.

(2) That order can be made in respect of an entire property even where there are other licensees of the claimant in occupation.

(3) Where the larger part of the land is spread over a number of different registered titles, this is unlikely to be an issue provided that all of the plots form part of a single and recognisable 'site' – e.g. an industrial estate.

(4) Where those different plots are in the possession of different title-holders, either because different owners own smaller parts of the whole, or because parts of the whole are let to tenants, then all of those title holders whose land is affected by the trespass should be joined as claimants.

(5) A possession order will not be granted in respect of a site which is a distinctly separate piece of land which has not yet been occupied by the trespassers, no matter how great the risk that they will occupy it if an order is enforced against them. This is question of fact and degree.

(6) Where the evidence establishes that there is a "real danger" of such a trespass, however, then an injunction may be granted in respect of that land.

Pitfall 6: waiting for the court to serve the order

- A final practical point: an order for possession against trespassers will be an order for possession forthwith: *McPhail v Persons Unkown* [1973] 3 WLR 71.
- Part 55 is silent on the service of the possession order. In practical terms, the claimant will usually serve the order.
- Where possession is sought urgently, it is often sensible for a process server or other representative of the claimant to attend the hearing and to invite the court to seal the order immediately. The process server can then serve the order immediately. Where the claim is in the high court, that means that a writ can be executed on the same day.
- Being polite to court staff goes a long way!

Summary: practical tips

(1) Check the register of title to see if any of the land is leased. If it is not clear from the register which parts are leased, it may be necessary to investigate the registered leasehold titles to see if the plans shed any light. If not, it may be necessary to refer to the leases themselves.

(2) Beware unregistered leases: check with landowners to see if there are any short-term leases not requiring registration – especially in the residential context – and check *how much* is leased.

(3) Ensure that the particulars of claim describe the land clearly so that leased areas are excluded.

(4) Ensure that accompanying plans clearly define the extent of any demised land.

(5) Where the extent of the land retained by the landlord is unclear from the registers of title, consider attaching all of the relevant leases or lease plans to the claim so that the court will be in no doubt as to the owner's entitlement to possession.

(6) Consider whether it is possible to apply for an order on terms that it is only to be enforced against an identifiable party, or not to be enforced against licensees also lawfully in occupation. It may be sensible to obtain the licensees' consent to the landowner bringing a claim to avoid complications, and drafting an order these terms may be reassuring.

(7) Consider whether the claimant has sufficient title to bring a claim for possession of the area trespassed upon, or whether it is necessary to join other claimants – or whether a licensee with sufficient control of the land might bring the claim.

(8) Where the trespasser is an occasional or weekend occupier, consider whether a possession claim is appropriate or likely to succeed, and whether an injunction be claimed as an alternative or instead.

Landmark CHAMBERS

Tom Morris

9th July 2018

Tmorris@landmarkchambers.co.uk