



Occupational hazard

**James Fieldsend
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ask: when is
trespass not a
trespass?

Part 55 of the CPR deals exclusively with possession claims, providing for two forms of possession claim. First, general possession claims, and, second, possession claims against trespassers. The most significant distinction between the two is the date on which the court will list a first hearing.

The ordinary rule for the listing of general possession claims is that the hearing will be not less than 28 days for the date of issue; the standard period between the issue of the claim and the hearing will be not more than eight weeks; and the defendant must be served with the claim form and particulars of claim not less than 21 days before the hearing date (CPR rule 55.5(3)).

In a possession claim against trespassers there is no explicit restriction on the listing of hearing. The occupier is, however, entitled to minimum period of notice: in the case of residential property the claim form and particulars of claim must be served not less than five days before the hearing and in the case of other land (for example, commercial property) service must be not less than two days before the hearing (CPR rule 55.5(2)).

There is therefore clear benefit to a landlord to be able to bring its claim as a possession claim against trespassers.

CPR rule 55.1 defines "a possession claim against trespassers" as meaning: "A claim for the recovery of land which the claimant alleges is occupied by a person(s) 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."

A claim against a former licensee can be brought as a possession claim against trespassers. Curiously, however, other actions

against 'trespassers' properly so called (cases where the occupier has no right to possess the land) may be excluded from the definition.

Where an owner of land permits another to enter upon and occupy that land under one of the following, the landowner will be entitled to immediate possession upon the expiry of the tenancy by effluxion of time in the first two examples and on demand in the third. If the occupier thereafter fails to give up possession he (the occupier) will be a trespasser:

- Non-assured residential tenancy (the number of these cases will have significantly reduced following the threshold being raised from £25,000 to £100,000 per annum with effect from 1 October 2010).
- Commercial tenancy excluded from the protection given by the Landlord and Tenant Act 1954.
- Tenancy at will.

The occupier, however, is a former tenant and therefore the landowner is excluded from bringing his claim as a possession claim against trespassers. No doubt the landowner will be surprised to learn that, despite having agreed with the occupier a form of tenancy with limited security, if the occupier does not deliver up possession at the end of his tenancy he (the landowner) will have to wait some eight weeks for a hearing date on his claim for possession and then maybe a further three or four weeks for a bailiff's appointment to enforce his order.

This is less of a problem in the case of excluded commercial premises. Property that is not let as a dwelling is not subject to section 3 of the Protection from Eviction Act 1977.

Consequently, possession can be recovered by peaceful re-entry and the changing of the locks.

Getting in early

If the landowner must recover possession through the courts, how can he, in the types of case referred to, obtain an early hearing date for his claim despite the claim not being a possession claim against trespassers? Two means appear to commend themselves:

- Endorsing the claim form with the ground for possession being 'trespass'.
- Making an application to shorten time.

In each of the types of case identified, when the tenancy comes to an end the claimant has a right to possession and the occupier who holds over is a 'trespasser' even though the claim to be brought is not "a possession claim against trespassers" within the meaning of part 55.

In the claim form N5, the 'ground' for possession must be identified. Courts when listing possession claims will generally give an earlier hearing date to claims where the 'trespass' box is ticked. It is certainly arguable that in the types of case identified the 'trespass' ground can legitimately be checked. While it would not be appropriate to use form N121 for the particulars (particulars of claim – trespass), as paragraph 2 of the form requires a statement that the defendant has never been a tenant of the land, the cause of action, the 'ground' for possession, is nevertheless trespass.

If by marking the ground as 'trespass' on the claim form the court lists the hearing earlier than it would ordinarily do so for a general possession claim (having regard to the timings referred to already), the claimant will have to apply at that hearing for an order retrospectively shortening the required time periods.

Alternatively if the 'trespass' ground is not checked, or the court is not willing to give an early listing, an application can be made at the time of issue or immediately thereafter for the court to shorten the time periods and bring forward the hearing date.

Whether the application is made retrospectively at the hearing or prospectively in advance, the court is empowered to shorten time or bring forward a hearing date by CPR rule 3.1(2)(a) and (b). While paragraph 3.2 of the practice direction to part 55 gives an example of a case when that power might be used (where there has been or there is the threat of an assault) the discretion to shorten time is not fettered and where it is appropriate to do so the court will exercise the power.

If the claimant is making the application at the time of the possession hearing the court will no doubt wish to examine what, if any, defence there is to the claim. If there is no genuine defence the stronger the argument for granting the application.

If the application is being made at the time of issue or immediately thereafter, the

"Any uncertainty in the way that the claim has been pleaded can be relied upon by the defendant as a reason for not shortening the prescribed time periods"

Possession claims against trespassers: key points

A possession claim against trespassers within the meaning of part 55 does not apply to all cases where the cause of action is in trespass.

- Where the cause of action is 'trespass' (but the claim is not 'a possession claim against trespassers' under part 55), by checking the trespass ground on the claim form N5 an earlier hearing date than that ordinarily given for general possession actions may be obtained.
- If an early hearing date is given, the claimant will need to address the court on the need for an order retrospectively shortening time.
- If the court does not give a sufficiently early return date on issue, an application can be made for an order without notice and without a hearing (and in the alternative inviting the court to make an order of its own motion) shortening time and directing an earlier listing.
- If as a claimant an early hearing date is to be requested or justified, the claimed right to possession must be fully and clearly set out in the particulars of claim.

evidence in support must deal with the need for an early hearing and explain why it is appropriate for the application to be dealt with by the court without notice and without a hearing (CPR rule 23.4 and 23.8). Clearly the claimant will want to emphasise that it has an absolute right to immediate possession and the defendant is a trespasser.

Shortening time

It is advisable as an alternative to that application to invite the court (by raising the point in the application notice or in the evidence) to make the order shortening time of its own motion (rule 23.8(c)). Whether it is made on application or of the court's own motion, the order must comply with CPR rule 23.10 (direct that the defendant may within seven days of service apply to set aside or vary the order).

When considering by how much the court is being asked to shorten time, reference must be had to CPR rule 6.14 and the deemed date for service of a claim form.

In allowing the claim to be listed early the court will in all likelihood need to shorten the time periods for the following:

- The listing of the hearing of the claim earlier than the minimum 28 days from the issue of the claim.
- The time for service of the claim from the minimum of 21 days from service of the particulars of claim.
- The time for service of a defence from the minimum of 14 days from service of the particulars of claim.

Shortening the time for service of a defence is perhaps the most significant order. If the application to shorten time is being made at the hearing and the matter is being heard within 14 days of service on the defendant of the particulars of claim, the court will effectively be asked to hear the case without the defendant having had the opportunity of putting in a defence.

The counter-argument of course is that if there is a defence to the claim the defendant can identify it orally at the hearing; if there is no defence then the defendant is not prejudiced by not having been afforded the usual time in which to file one.

Nevertheless if the defendant is to be deprived of the usual period allowed for the filing of a defence it is essential that the claimant gives full and clear particulars in his particulars of claim of the facts and matters upon which the possession claim is based. Any uncertainty in the way that the claim has been pleaded can be relied upon by the defendant as a reason for not shortening the prescribed time periods.

If the court is considering the application to shorten time at the hearing and concern is expressed as to the exercise of the power, a balance might be struck by inviting the court to order possession but for the claimant to consent to the order not being enforced by a bailiff before a fixed date.

Consent could be given to the order for possession not taking effect before a fixed date (arguably up to six weeks from the date of the hearing on the grounds of exceptional hardship – section 89 of the Housing Act 1980); however, a warrant for possession cannot be applied for until after the possession date, and there may be delay of up to three to four weeks for a bailiff's appointment.

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