Development Disputes

Current issues for property litigators

The limits of possession claims

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Introduction

In a straightforward possession claim, an order for possession, together with an order for the payment of rent arrears where appropriate, is likely (subject to enforcement) to provide an adequate remedy for the claimant. Typically, the occupier is unlikely to attempt to re-enter the disputed land, or other portions of the claimant's land, or to disrupt the claimant's lawful activities upon the land once evicted. Again, in a straightforward case, the parcel of land to which the dispute relates is likely to be well defined (a house, shop or office block, for example), and the identity of the occupiers known.

This article considers a more complex type of possession case that has become more common in recent years, namely a case in which wrongful possession is used as a means of protest, or as part of a 'movement'. In such a case, protestors may seek to draw attention to a particular cause, to target a particular landowner or developer, or to prevent a controversial development from going ahead.

Cases of this nature present particular difficulties. There may, for example, be uncertainty about the extent of the land wrongfully 'possessed', uncertainty about who the occupiers are, and a concern that when evicted from one parcel of land, the occupiers or their associates may seek to occupy or interfere with other land owned or controlled by the claimant.

The purpose of this article is to examine some of these difficulties, and to provide some guidance as to how they might be overcome in practice. While much of the litigation in this area has involved public bodies (for example the St Paul's Cathedral and Parliament Square protests, and cases between local authorities and travellers), this article focuses on the position of private landowners, where public law concepts do not feature.

Property developers are a high risk group of private landowners in this regard, as large, vacant sites may be attractive to protestors and travellers. Where the proposed development is controversial, perhaps for environmental or political reasons, those adverse to the development going ahead may seek to take direct action by occupying the land to disrupt the planned works.

The nature of a claim for possession

At common law an action for possession is ordinarily based upon title: the claimant, A, can 'eject' the occupant, B, by establishing that he, A, has a better title to possession than B. Title is a relative concept in English law. It does not matter that a third person, C, who is not a party to the claim has an even better title to possession than A: provided A has a better title than B, he will succeed against B.

The remedy granted to A is an order that A shall have possession (and that B shall give up possession). An order for possession is enforced by a writ or warrant of possession, which authorises the sheriff or bailiff to evict any person found in occupation of the premises. Accordingly, the order for possession will be enforceable against persons in occupation even if they were not named in the order or made parties to the claim: it is good against the whole world.[1]

Who can bring the claim?

As mentioned above, a claim for possession of land can be brought by anyone with better title than the defendant. In the case of development land, however, circumstances may arise in which a developer needs to remove trespassers from land to which he has no title. Large-scale developments

1 *R v Wandsworth County Court, Ex p Wandsworth London Borough Council* [1975] 1 WLR 1314 and see further below.

often require the developer or his contractors to obtain temporary access to, or to work upon, neighbouring land. This will be done pursuant to a license.[2] The situation may, therefore, arise where the person with an immediate interest in the development going ahead (e.g. a contractor on site, or a developer on the neighbour's land) is frustrated by unlawful occupation on that land, whilst the person with title to that land (who has no direct interest in the development) is unwilling or reluctant to bring proceedings against trespassers.

Such a situation was considered in *Manchester Airport v Dutton*.[3] In that case, a number of protestors occupied woodland near Manchester Airport with the intention of obstructing tree-felling works by the Airport's contractors that were required to reduce the height of obstacles on the flight path. The woodland was owned by the National Trust, which had previously granted the Airport and its contractors a licence permitting them to occupy the woodland in order to undertake the tree-felling works. The contractors had not, however, gone into occupation of the land.

The Airport successfully brought a claim for possession against the protestors. The summons was expressed to be a summons under Order 113,[4] rule 1 of which read:

> *"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his license or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."*

The question on appeal was whether the Airport had standing to bring the proceedings; in other words, whether the license granted to the Airport gave it a sufficient interest in the land to enable it to bring a possession claim. It was not doubted that a claim for possession could have been brought had the Airport or its contractors actually been in occupation, at least if they had been in effective control of the land.[5]

Chadwick LJ (dissenting) said that he would have allowed the appeal. He drew a distinction between claimants already in possession, and those who wish to enter into possession but need to evict the pre-existing occupiers first. Referring to the decision of the Judge below, Chadwick LJ said:[6]

> *"She did not make the distinction, essential in cases of this nature, between a plaintiff who is in possession and who seeks protection from those who interfere with that possession, and a plaintiff who has not gone into possession but who seeks to evict those who are already on the land. In the latter case (which is this case) the plaintiff must succeed by the strength of his title, not on the weakness (or lack) of any title in the defendant."*

Laws LJ and Kennedy LJ disagreed with this approach. Laws LJ identified the principal objection to the grant of relief to a licensee who was not yet in occupation as being, *"that it would amount to an ejectment, and ejectment is a remedy available only to a party with title to or estate in the land; which*

2 Indeed in many cases a developer's right to gain access to the development site itself will arise only under a 'building licence', though in such a case a well-drawn development agreement ought to contain provisions requiring the landowner to assist the developer in clearing the land of trespassers. If not, the developer might need to consider whether it can bring a possession claim on the basis considered here.

3 [2000] QB 133

4 The predecessor to CPR Part 55

5 Per Laws LJ at 147C

6 At 146-147

as a mere licensee the airport company plainly lacks".[7] While Laws LJ recognised this proposition as representing the *"old law"*, in this he said he *"heard the rattle of mediaeval chains"*. Reviewing the *"old law"*, Laws LJ concluded that it *"demonstrates only that the remedy of ejectment was simply not concerned with the potential rights of a licensee"* and that the assumption that a claimant must bring himself within the old law of ejectment in order to found a claim for possession was incorrect.

Thus, Laws LJ held 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 license. If, as here, that requires an order for possession, the spectre of history (which, in the true tradition of the common law, ought to be a friendly ghost) does not stand in the way. The law of ejectment has no voice in the question; it cannot speak beyond its own limits…*
>
> *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."*[8]

For Kennedy LJ, the key factor was that:

> *"The plaintiff does have a right to possession of the land granted to it by the license. It is entitled to "enter and occupy" the land in question. The fact that it has only been granted the right to enter and occupy for a specific purpose and that… the grant does not create an estate in land giving the plaintiff a right to exclusive possession does not seem to be critical."*[9]

Following *Manchester Airport v Dutton* there is potentially greater flexibility as to who may bring a claim for possession in respect of development land. A licence to occupy land is sufficient to enable the licensee to bring such a claim. In the event that the licensee is minded to do so, however, it will be important to check the precise terms of the license since it has been held that a mere contractual right *of access* to land, falling short of a right *to occupy*, is not sufficient to found a possession claim.[10] Relief will only be granted to vindicate those rights granted by the license.

The physical scope of a possession order

A successful claim for possession will give rise to an order of the Court that the claimant recovers from the defendants (named or "persons unknown") possession of the land described in the Particulars of Claim.[11] It is obviously essential that the claim and the order should properly describe the land, possession of which is to be recovered.

In most cases, the requirement to describe 'the relevant land' - the property over which possession is sought - causes no difficulty. The property may be an office block, for example, or a house and its garden. Often it will be registered land with a single title number. Indeed, in most cases the exact physical extent of the possession order will not be controversial, as once it is enforced the occupiers will simply move on.

7 At 147
8 At 149-150
9 At 151
10 *Countryside Residential (North Thames) Ltd v T* (2001) 81 P&CR 2
11 Which must be served with the Claim Form – CPR r. 55.4.

In a case where protestors or travellers occupy open land, however, the requirement to describe the property over which the possession order is sought can give rise to problems – both conceptual and practical. The temptation for claimants is to seek a possession order over as wide an area as possible, such as the whole of a development site covering many acres. This is not only for simplicity of description, but also to guard against the risk that if the possession order only covered the portion of the site in fact occupied, then the trespassers would simply move elsewhere on the site once that possession order was enforced. Indeed, there may be a risk that the trespassers may move to quite separate land owned by the claimant.

In an attempt to address those risks, claimants have sometimes sought possession orders covering these additional portions of land as well. As explained below, however, there are limits to this attractively 'broad brush' approach.

The impossibility of possession orders over unoccupied property

Consider the situation where a claimant is concerned that, upon eviction from one of its properties, the occupiers will move to an entirely separate property owned by the same claimant. In such circumstances claimants have sought what are essentially 'pre-emptive' possession orders in the sense that they require possession of land in anticipation of it being occupied in the future.

At one time, the Courts appeared to be willing to grant pre-emptive possession orders in appropriate cases. In *Secretary of State for the Environment, Food and Rural Affairs v Drury*,[12] the Secretary of State brought possession proceedings against travellers, who were wrongfully occupying woodland near Corby known as Fermyn Woods. As well as seeking possession of Fermyn Woods, the Secretary of State sought an order for possession over 30 other areas of woodland separate from Fermyn Woods, within about a 20 mile radius. The wide order for possession was sought because of a concern that the travellers would move on to occupy one or more of the other woods once they had left Fermyn Woods. There was evidence in support of this concern; the other woods had been occupied by travellers in the past.

At first instance, the Judge granted the Secretary of State the wide order for possession sought. On appeal, counsel for the travellers argued that there was no jurisdiction to grant such a wide order for possession; rather the appropriate remedy was a possession order over Fermyn Woods and an injunction restraining entry into the other woods.

The Court of Appeal disagreed. Wilson J, giving the leading judgment, took a pragmatic approach to the difficulties facing those in the Secretary of State's position. Recognising the availability of an injunction as a remedy to protect against the risk of the travellers moving, he said:

> *"But in such circumstances an injunction is a useless remedy. It is enforceable by committal; and it would be wholly impracticable for the claimant to seek the committal to prison of a probably changing group of not easily identifiable travellers, including establishing service of the injunction and of the application. In relation to the second area, as to the first, the only effective remedy is an order for possession, enforceable against the land itself by the claimant's issue… of a writ (or, in the county court, …of a warrant) of possession, which requires the court enforcement officer to clear the land of all wrongful occupants (whether parties to the proceedings for the order or otherwise: R v Wandsworth County Court, Ex p Wandsworth London Borough Council [1975] 1 WLR 1314)."*[13]

12 [2004] EWCA Civ 200
13 At [19]

So, Wilson J continued (emphasis added):

> *"In my view the key to this case indeed lies in the law's recognition that even an anticipated trespass sometimes gives rise to a right of action. But, where it does so, it should offer an effective remedy: otherwise the right is nugatory. Thus, if a claimant entitled to an order for possession of a certain area of land contends that its occupants are likely to decamp to a separate area of land owned by him, the separate area should in my view be included in the order for possession if, but only if, he would be entitled to an injunction quia timet against the occupants in relation to the separate area."*[14]

The latter requirement was said by Wilson J to have the effect that such extended possession orders would be made only *"exceptionally"*.[15] Wilson J said that it would likely require either evidence of an express intention to decamp to the other area, or evidence of a history of movement between the two areas, from which repetition of behaviour could be inferred.

In seeking an effective remedy to a real problem facing landowners such as the Secretary of State, Wilson J recognised that a *"paradox"* and risk of injustice arose; but that the law ought to tolerate both in the interests of avoiding a succession of separate possession proceedings in relation to separate parcels of land.

The *"paradox"* was that a landowner could not obtain a possession order against someone who had never trespassed on his land, notwithstanding a clear statement of intent to do so. An injunction would have to do.

The *"risk of injustice"* was that an individual who trespassed onto the second plot of land covered by the wide possession order, in complete ignorance of the proceedings that had gone before, could be met immediately *"by an enforcement officer flourishing an order for possession"*. Such an individual could seemingly be evicted without the protection of the procedures under CPR Part 55, and without having had the opportunity to present a defence.

In the event, the Court of Appeal did allow the appeal in part, overturning the wider pre-emptive order for possession, on the ground that there was insufficient evidence against the defendants to order a *quia timet* injunction over the other woods (which, again, was, in Wilson J's judgment, necessary for the grant of a wider possession order).

Support for the Court of Appeal's decision that the jurisdiction was available was taken in part from *Ministry of Agriculture, Fisheries and Food v Heyman*,[16] where Saville J made an extended, or pre-emptive, possession order against trespassers on the basis of the landowner's fear that the travellers would move to nearby land when evicted. The travellers were not represented at the hearing, however, and so the point was not fully argued.

The *"permissible physical ambit"* of possession orders and the interrelation between possession orders and injunctions was re-examined by the Supreme Court in *Secretary of State for the Environment, Food and Rural Affairs v Meier*,[17] which concluded that pre-emptive possession orders are not available as a matter of principle.

14 At [20], emphasis added
15 At [21]
16 (1989) 59 P&CR 48
17 [2009] UKSC 11

The facts in *Meier* were similar to those in *Drury*. A number of travellers, including the defendants, had occupied woodland at Hethfelton Wood, near Wool in Dorset. The wood was owned by the Secretary of State and managed by the Forestry Commission. Some of the defendants had previously occupied other areas of woodland in the surrounding area, and had moved to Hethfelton Wood following earlier possession proceedings brought in relation to those other parcels of land.

The Secretary of State and the Commission were concerned that, if and when an order for possession was made over Hethfelton Wood, the defendants would travel on to other woods instead. The Secretary of State therefore sought possession not only of Hethfelton Wood, but also of more than 50 other of the Forestry Commission's woods. Subsequently, the number of woods over which a possession order was sought was reduced to 13; but these woods were still spread over part of Dorset covering an area of 25 by 10 miles. The Secretary of State also sought injunctions restraining the defendants from re-entering Hethfelton Wood, or the other woods.

At first instance, the Recorder made an order for possession over Hethfelton Wood. He considered that he had jurisdiction to make the wider possession order sought, but declined to do so as he found that the Forestry Commission had not properly followed 2004 guidance issued by the Deputy Prime Minister on how local authorities should manage unauthorised camping. He also refused to grant an injunction.

The Court of Appeal, following *Drury*, unanimously granted the wider pre-emptive possession order. It was held that the failure to follow the 2004 guidance did not go to the question of whether the order should be made (though it may have been taken into account in deciding whether the order should be enforced). Arden LJ and Pill LJ also held that the first instance Judge was wrong to refuse the injunction, but Wilson LJ dissented on this point, on the ground that it would be disproportionate to grant the injunction alongside the possession order.

The travellers appealed the Court of Appeal decision. The question of whether *Drury* had been correctly decided was considered by the Supreme Court. Lord Rodger, Baroness Hale JSC and Lord Neuberger MR all gave substantive judgments.

Lord Neuberger considered the development of the jurisdiction to grant possession orders and the wording of CPR r. 55.1:

> *"(a) 'a possession claim' means a claim for the recovery of possession of land (including buildings or parts of buildings); (b) '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."*[18]

The important point, Lord Neuberger considered, *"is that a possession claim against trespassers involves the person "entitled to possession" seeking "recovery" of the land"*. An order that the claimants recover their land was said to be the *"mirror image"* of an order for possession. Consequently:

> *"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 seems to me to be*

18 At [62]

> *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."*[19]

As Lord Neuberger put it, the difficulty with the extended possession order is that it requires the defendants to do something that they are not able to do, that is, to give up possession of land of which they are not in fact in possession.

Lord Rodger agreed:

> *"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."*[20]

> *"The real objection is that the Court of Appeal's extended order… is inconsistent with the fundamental nature of an action for recovering land because there is nothing to recover: the Commission were in undisturbed possession of those parcels of land."*[21]

Lord Rodger was not persuaded by the claimed justification for pre-emptive possession orders, namely that they were the only remedy which would be effective, an injunction being much weaker. He considered that a Court should be slow to assume that an injunction was a useless remedy, and if there was such a widespread concern on this point, changing the procedures for the enforcement of injunctions was the solution. In this regard, he placed reliance[22] on the judgment of Lord Bingham in *South Bucks District Council v Porter*:[23]

> *"When granting an injunction the court does not contemplate that it will be disobeyed… Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there is not one law for the law-abiding and another for the lawless and truculent."*

Baroness Hale stated that she too would allow the appeal (to the extent of setting aside the wider possession order made in the Court of Appeal), but only on the narrow ground that the form of the order granted below (the usual order) was not properly tailored to the facts of the specific case, and was *"scatter-gun"* in its approach.[24] While Baroness Hale recognised that the more 'natural' remedy where there were facts similar to those in *Drury* and *Meier* would have been an injunction, she *"could see no reason in principle"* why, following an *"incremental approach"* (as apparently sanctioned in the *Drury* case) a remedy such as granted in *Drury* could not be appropriate – provided that the order was properly tailored against known individuals.

The ease with which possession orders can be enforced, and the fact that warrants for possession must be executed against everyone on the land, was no doubt why they were sought by the Secretary

19 At [64]
20 At [6]
21 At [21]
22 At [17]
23 [2003] 2 AC 558
24 See [40] to [41]

of State in preference to an injunction. They would be an attractive remedy to many landowners. Indeed, in *Drury*, the efficacy of these orders to achieve the landowner's desired effect was apparently a reason in favour of such an order being granted. Notwithstanding Baroness Hale's apparent willingness in *Meier* to see their development in future, it is now clear that such extended, or pre-emptive, possession orders are not available. An injunction is the proper remedy. The principles relating to the availability of injunctions in such a situation, and some questions of procedure and practice, are considered further below.

How wide an order is permissible?

Although it is now clear that an order for possession cannot be obtained in relation to a wholly separate parcel of unoccupied land, it is less clear to what extent an order can be obtained against unoccupied parts of a contiguous parcel of land. As Baroness Hale commented in *Meier*, the Courts *"would be disinclined to hold that if trespassers set up camp in a large garden the householder can obtain an order enabling them to be physically removed only from that part of the garden which they have occupied, even if it is clear that they will then simply move their tents to another part of the garden"*.[25]

On the other hand, one can well imagine a situation where protestors are occupying a small portion of a large open development site in a way that does not impact at all upon activities elsewhere on the site. In such a situation, it is difficult to see (following *Meier*) how a possession order over the whole of the site could be justified. In respect of the bulk of the site, it does not make sense to talk about 'recovering' possession: possession has not been lost.

This issue arose in *University of Essex v Djemal*.[26] In Djemal, student protestors had previously occupied part of the administrative offices at the University of Essex campus. Possession proceedings were brought, and the University recovered possession of that portion of the campus. The students then moved to another part of the campus – 'Level 6' of part of the university buildings – and fresh possession proceedings were brought. This time, the University sought a possession order over *"the premises at the University of Essex"*.

The first instance Judge refused to grant the wider order sought, and made an order only in respect of the property that was actually being occupied. The University successfully appealed that decision. In considering the extent of the Court's jurisdiction, Buckley LJ said:

> *"The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession. In my judgement the jurisdiction to make a possession order extends to the whole of the owner's property in respect of which his right of occupation has been interfered with, but the extent of the field of operation of any order for possession which the court may think fit to make will no doubt depend upon the circumstances of the particular case."*[27]

Agreeing, Shaw LJ said:

> *"The title to the site and building of the University of Essex is vested in the university… Its right of possession seems to me to be indivisible. If it is violated by*

25 At [25]
26 [1980] 1 WLR 1301
27 At 1304

> *adverse occupation of any part of the premises, that violation affects the right of possession of the whole of the premises. It follows that those circumstances would in general justify an order… that they do recover possession of the premises at the University of Essex… without any geographic limitation."*[28]

The facts of *Djemal* might therefore be distinguished from those of *Drury* or *Meier* to this extent: in *Djemal* it appears that the 'campus' was considered as an indivisible whole. That concept plainly does not apply in the case of distinct woods that are geographically separated. The test as to what constitutes an 'indivisible whole' might appear to be this: does trespass on one part of the property affect the use and occupation of the whole of the premises? One can see that a 'yes' answer could be given to a test in those terms in the case of possession of a portion of a large garden, or the occupation of one room of a house.

It would appear that that test was considered to have been met in *Djemal*, although not expressly. The correctness of this decision may be doubted. While the precise layout of the campus is not clear from the judgment, one would be surprised if the occupation of one floor of one university building could interfere with the use and occupation of quite separate buildings on the campus.

Indeed, while Lord Neuberger MR in *Meier* did not think it was the occasion to consider the correctness of the decision, he did cast some doubt upon it:

> *"…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."*[29]

The other Justices of the Supreme Court were more positive about the decision in *Djemal*. Lord Collins JSC summarised the opinions:

> *"…University of Essex v Djemal… represented a sensible and practical solution to the problem faced by the university, and was correctly decided. I agree, in particular, that it can be justified on the basis that the university's right to possession of its campus was indivisible, as Lord Rodger says, or that the remedy is available to a person whose possession or occupation has been interfered with, as Lady Hale puts it. Where the defendant is occupying part of the claimant's premises, the order for possession may extend to the whole of the premises."*[30]

Even so, there remain problems in defining 'premises' for these purposes. In *Djemal*, Shaw LJ placed emphasis on the extent of the University's *title*. Such an approach is unlikely to be appropriate in many instances, however. One can imagine circumstances in which a whole title would be too *wide* for an order of possession to be appropriate, for example where there was a small, well defined area of land which was being occupied by trespassers, with no impact at all on the owner's right to make use of the remainder of the title.

The opposite situation may also arise. As Baroness Hale pointed out in *Meier*:

> *"[T]he usual rule is that possession of part is possession of the whole, thus begging the question of how far the 'whole' may extend. It was suggested during argument*

28 At 1305
29 At [69] to [70]
30 At [97]

> *that it might extend to all the land in the same title at the Land Registry. … But this is artificial when a single parcel of land may well be a combination of several different registered titles."*[31]

The approach of the claimants in *EDF Energy v Clark & others*[32] is illustrative. In that case, a group of environmental protestors occupied land at Hinkley Point in Dorset where EDF were proposing to construct a new nuclear power plant. The aim of the protest was to prevent planned ground-works on the site, which was the first phase of the planned construction.

The geography of the land was important in that case. The proposed development site covered over 200 hectares, and primarily consisted of open farmland which was criss-crossed by public footpaths. There were a few derelict barns on the site, and a number of small areas of woodland. The site spanned (some or all of) approximately 10 Land Registry title numbers, which were owned by two companies within the EDF group. In most instances, the boundaries to the titles did not correspond with any physical features on the land.

The protestors took possession of an area within a temporary metal fence around one of the derelict barns towards the centre of the site. While their occupation was largely limited to that fenced-in area, the protestors strayed into the surrounding fields to gather firewood, ferry supplies to and from cars on the nearest approach road and to challenge the claimants' contractors who were engaged in felling trees. In addition, smaller 'tree-protests' had taken place in the previous weeks in two of the small woods – where protestors had set up camp in trees, until they were removed by specialist climbing teams.

All of these activities, however, had been contained within a relatively small portion of the much larger development site. The claimants had enjoyed undisturbed use and possession of the remainder. In bringing the claim for possession, therefore, the claimants had to decide over what area of land a possession order should be sought. Too wide, and there was a chance the relief sought would not be granted, or there would be a delay in proceedings. Too narrow, and the protestors might simply set up camp in the next field. In addition, and for the possession order to be workable in practice, it was necessary for its extent to be clear on the ground.

The claimants eventually sought, and were granted (by Floyd J, who endorsed the claimants' approach), a possession order over approximately half of the development site. The area over which possession was obtained was drawn widely enough to cover the fenced-in barn area, and the sites of the protestors' other activities on the land. It was extended (where possible) up to identifiable features on the land, such as fences, hedgerows and footpaths. Importantly, it was drawn widely enough to cover a route from the occupied barn where the protestors were based to a lay-by on a public road, from where the protestors could depart. This would enable the bailiffs to ensure that the protestors were evicted from the claimants' property, rather than from just one portion of it.

The claimants also sought, and were granted, an injunction restraining the current protestors from returning to the *whole of* the development site (i.e. a wider area than was covered by the possession order).

In *Hackney LBC v Persons Unknown,*[33] the claimant local authority (successfully) took a perhaps bolder approach. In that case, a large number of Occupy London protestors had wrongfully occupied

31 At [37]
32 (Unreported) 27 February 2012 (ChD)
33 (Unreported) 27 June 2012 (QBD)

parts of a park in Hackney. The local authority sought a possession order over the *whole* of the park, and an order for possession on those terms was granted. *Djemal* was applied. A park, however, is perhaps more readily viewed as an 'indivisible whole' than a large development site, comprising a number of different fields (or, indeed, a university campus).

In practice, therefore, it will be important for a claimant in such a situation to consider carefully the precise extent of the land of which possession is sought when drafting the claim form and draft order. The temptation is to aim wide, with a possibility of narrowing the area later if needs be. While the risk that a possession claim would be struck out for aiming too wide must be considered low, there is a more real risk that having to seek to redefine the area during a hearing could lead to delay. If an order for possession over a comparably small and well-defined area would suffice, it would be safer to adopt that course.

If a possession order is sought over a large area, it will be important to have at the hearing evidence justifying its extent. Evidence of disruption to works on the whole of the site, for example, is likely to be cogent evidence that the claimant's right to possession is being disturbed. In the event that there is real doubt about whether the Court will be willing to grant an order over the wide area sought, it will be important to have an alternative, narrower, suggestion available at the hearing (with appropriate plans etc.) so as to minimise the risk of an adjournment.

Post-trespass possession orders?

It is not uncommon for the mere commencement of possession proceedings to prompt occupiers to leave. If this occurs, a claimant may still wish to proceed to the Court hearing in order to guard against the risk of return (and because, by that stage, a significant proportion of the legal costs have already been incurred).

While *Drury* remained good law, there was nothing objectionable in theory about possession orders being granted in such circumstances ('post-trespass possession orders'). If a possession order could be made in respect of land not yet occupied, but potentially under threat, why not in respect of land *previously* occupied, and potentially under threat of re-occupation? The position post-*Meier* is less clear.

In both *Djemal* (which pre-dated *Drury*) and Hackney (which post-dated *Meier*) the defendants had ceased occupation between commencement of the possession proceedings and the hearing. Indeed, by the time of both the first instance hearing in Hackney and the appeal in *Djemal*, the occupiers had stated that they had no intention of returning.

In neither instance does it appear that the fact occupation had ceased caused real concern as to the propriety of an order for possession. Considering the situation presented to the first instance Judge in *Djemal*, Buckley LJ said:

> *"[T]here was… a threat to take what is described as "further direct action,"… which might be taken in respect of any part of the university property. In those circumstances it would, in my judgment, have been open to the judge to have made an order extending to the whole of the university property…"*[34]

Considering the fact that the occupiers had since stated that they were to cease pursuing a campaign of direct action, Buckley LJ continued:

> *"If that is the position, the order which I would make… namely, a possession order extending to the whole property of the university and enforceable against the*

34 At 130F-G

> *defendants or any other person who might be in unauthorised adverse possession of any part of the university property, will not in fact incommode the students in any way because,… they disavow any intention to pursue that policy in future."*

Shaw LJ referred in his judgment to the *"danger of actual violation of many, or a succession of, parts of the premises"* and appeared content to make a possession order in such circumstances.

In *Hackney*, it appears that McCombe J was initially attracted by Occupy London's submission that a possession order was not required as they had left the park and had no intention of returning. Apparently following *Djemal*, however, the Judge held that these submissions could not be accepted in light of the protestors' history – such that the order sought should be granted.

In both cases, therefore, it appears that the *risk* of future occupation in respect of the *same parcels* of land as had previously been occupied (even if not exactly the same areas) was sufficient for an order for possession to be granted in respect of those parcels.

That reasoning seems difficult to reconcile with the reasoning in *Meier*. It is difficult to see a principled distinction between a pre-emptive possession order in respect of land which might in future be wrongfully possessed, but has not yet been occupied (which *Meier* makes clear is impermissible), and possession orders in respect of land which has previously been wrongfully possessed, but is not any more (as *Hackney*, following *Djemal*, seems to permit). It is clear that in both *Hackney* and *Djemal* the Court was basing its decision on the facts as at the date of the hearing, and was not simply looking at the facts as at the date of the claim form. In other words, the judgments were given in full knowledge that the trespass had ceased.

If one is looking at *future* threats to land, whether from previous occupiers or otherwise, then, following *Meier*, a *quia timet* injunction is surely the appropriate remedy (the principles relevant to such orders are considered further below). Otherwise, as was held to be objectionable in *Meier*, the defendants will be ordered to give up possession of land of which they are not themselves in possession.

There may, depending on the particular facts of the case, be some justification for the approach adopted in *Djemal* and *Hackney*. For example, notwithstanding the statements from the occupants, it may not be clear to the claimant whether or not anyone remains on the land. It may be that the occupants have left possessions on the land, and the claimant seeks certainty about its position. In times of such uncertainty, it might be said that the defendants' actions continued to 'interrupt' the claimant's possession of its land.

There is no suggestion that any such features were present in *Djemal* or *Hackney*, however. Rather, the Courts seem to have sought to reach a practical solution to a real problem facing the claimant in each case. In the light of *Meier* (which was apparently not cited in *Hackney*) there must be real doubts as to whether *Hackney* was correctly decided.

Notwithstanding the potential risks post-*Meier*, a claimant may wish to press ahead with a possession claim even where occupiers have left after commencement of proceedings in the hope that *Hackney* would be followed. If there is any real prospect of recovering costs against the occupiers, proceeding to the final hearing may be desirable in order to obtain an order for costs.

The availability of injunctions

In the case of threatened trespass, a possession order is not available (unless, perhaps, it is threatened trespass on land previously occupied). Injunctive relief is, instead, the appropriate remedy. The

injunction sought, being in respect of a *threatened* wrong is a *quia timet* injunction, which may be sought on an interim or final basis.

The hearing of a claim for a final injunction may be heard alongside a claim for possession. This might typically happen when the relief sought is possession over one portion of land and an injunction restraining trespass to other portions of land once the occupiers leave the occupied land. In such a case, the claim should be brought in accordance with CPR Part 55 (which allows for additional remedies to be sought under that procedure).

The Courts approach final injunctions according to the following principles. First, in order to obtain a final injunction, it will be necessary to demonstrate that there is a real danger of trespass to land owned by the claimant. A strong case must be established; *"no one can obtain a quia timet order by merely saying 'Timeo'"*.[35] Thus, it will not be enough simply to say, for example, that there is a risk that trespassers *may* move to other land owned by the claimant when evicted from the present site. To succeed, evidence of a direct statement of intention or a history of trespass in the past is likely to be required.

Second, unlike in other contexts, it is not a strict requirement for the claimant to show that it will suffer damage to obtain an order restraining trespass,[36] although plainly if damage can be shown that will assist in the claim.

Third, as observed by Lord Neuberger MR in *Meier*,[37] the Court will be slow to make an order which it does not intend, or will be unable, to enforce. In particular, it may be inappropriate to make an order if the Court would not be willing to enforce it by committal if breached. A Court should not refuse to make an order just because it is likely that it will be disobeyed, however, and it may think an order appropriate because of the deterrent effect.

In the same context, Lord Neuberger expressed the view that, *"if the only reason for granting an injunction restraining the defendant from trespassing in other woods was to assist the Commission in obtaining possession… should the defendant camp in them, it seems to me that this could be catered for by declaratory relief"*.[38]

Where trespass is threatened by persons not yet occupying any of the claimant's land, and an injunction is sought to prevent that trespass, it is likely that *interim* relief will be required – potentially on an urgent basis. In such interim situations, however, it is unlikely that the *American Cyanamid*[39] principles will be of much relevance as interim relief would typically dispose of the whole dispute. Essentially, therefore, the question in an application for an interim injunction is the same as in a claim for a final injunction: is the claimant able to show a real threat and intention on the part of the defendant(s) to trespass upon the claimant's property?

Where the threatened trespass is imminent such that there is real urgency, interim relief may be sought without notice (although, even then, the claimant ought to give the defendants such notice as he is able), and prior to any claim being issued. Where a claim has not been issued, the Court

35 Per Lord Dunedin in *Att-Gen for the Dominion of Canada v Ritchie Contracting and Supply Co Ltd* [1919] AC 999 at 1005.
36 See, e.g. *Harrow LBC v Donohue* [1995] I EGLR 257, CA.
37 At [80]-[85]
38 At [82]
39 [1975] AC 396

will give directions requiring a claim to be issued.[40] There will also usually be provision for an urgent application to discharge the order.

As in the case of final injunctions, while it is not always necessary to show that a threatened trespass will cause damage in order to obtain an interim injunction, if the claimant is unable to depose to a belief that significant damage is likely to occur to the property (for example because development work has not yet started on a site or the existing buildings are due to be demolished), the appropriateness of interim injunctive relief (even if technically available) might be doubted. The Court is unlikely to be sympathetic to a developer who seeks urgent injunctive relief to restrain trespass where, in practice, the trespass will cause no damage and there will be a simple summary procedure to remedy it.

A developer in that situation might be better advised to see if the threatened trespass actually takes place and, if it does, simply bring possession proceedings to which the trespassers will have no defence. That is likely to be a simpler, less risky and cheaper course of action. In a possession claim against trespassers in non-residential property, only two day's notice of proceedings need be given to the trespassers.[41]

Injunctions against 'persons unknown'?

In the case of trespassers, or those threatening trespass, it is likely that a claimant will be unaware of the names of some or all of the proposed defendants. For possession claims, this causes no difficulty – proceedings can be brought against "persons unknown" under CPR Part 55 in addition to any named defendants.[42] Furthermore, as explained above, a possession order against a named defendant will be good against the whole world when it is executed.

Injunctions, however, cannot be brought 'against all the world' in such a manner. Not knowing the identity of those to be subject to the proposed injunction is no longer a bar to obtaining one, however. What is required, instead, is that the defendants are described with sufficient particularity that one could, in theory, determine who is subject to the order and who is not.

Hampshire Waste Services v Intending Trespassers upon Chineham Incinerator Site[43] concerned a threat by environmental protestors to demonstrate at waste incineration sites operated by the claimant. The claimant applied for an injunction restraining these protests. Sir Andrew Morritt VC held that the grounds for an injunction were clearly made out, save for the complication that the claimant was unable to name any of the protestors who may be involved.

The Vice Chancellor in *Hampshire*[44] referred back to a previous judgment in which he had granted an injunction against unknown individuals who had illegally obtained a yet-to-be published copy of the latest Harry Potter book, and were offering it to major newspapers. Considering potential procedural objections, the Vice Chancellor had said in the Harry Potter case:

> *"The failure to give the name of the defendant cannot now invalidate the proceedings, both because they are started by the issue of the claim form at the request of the claimant and because, unless the court thinks otherwise, [CPR] Rule*

40 White Book 2012, Vol 1, [25.2.4]

41 And even this may be abridged in an urgent case, such as where there is violent conduct or serious damage threatened – see CPR 55.5(2)(b), [3] of PD55 and 3.1(2)(a).

42 Indeed, where the claimant does not know the names of all of the people on the land, the possession claim *must* be brought in this manner – CPR 55.3(4).

43 [2004] EWHC 1738 (Ch)

44 At [8]

> *3.10 [i.e. that a procedural error does not invalidate any step taken unless the court so orders] so provides. The obligations the overriding objective casts on the court are inconsistent with an undue reliance on form over substance. The proper application of Rule 3.10 is incompatible with a conclusion that the joinder of the defendant by description rather than name is for that reason alone impermissible."*

So, the Vice Chancellor continued in the Harry Potter case:

> *"The crucial point, as it seems to me, is that the description used must be sufficiently certain so as to identify both those who are included and those who are not. If that test is satisfied, then it does not seem to me to matter that the description may apply to no one or to more than one person, nor that there is no further element of subsequent identification whether by service or otherwise."*

The description of the defendants put forward by the claimant in *Hampshire Waste* was: "*Persons intending to trespass and/or trespassing upon incinerator sites at [six addresses] in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around July 14, 2003."*

The Vice Chancellor was prepared to grant such an injunction, subject to two amendments. First, he considered the use of the legal conclusion 'trespass' as inappropriate to describe the defendants. Second, he considered the use of 'intending to trespass' as too subjective and liable to change to be appropriate.

Thus, the description of the defendants adopted for the injunction was: *"Persons entering or remaining without the consent of the claimants, or any of them, on any incinerator sites at… ."*

The Vice Chancellor also referred to having had some difficulty with the question of whether an injunction was the appropriate remedy in circumstances where it may be difficult to enforce. Ultimately, he was satisfied that the question of enforcement was not a ground to withhold an injunction which should otherwise be granted.[45] This is in accordance with the guidance of Lord Neuberger MR in *Meier*.

Procedural difficulties

As well as giving rise to difficult questions of principle, possession claims against protesters often generate equally difficult questions of procedure. Some of these are considered further below.

Where to commence proceedings

Where the relevant property in an anticipated possession claim is a substantial and valuable development site, and trespass is threatening to cause costly disruptions, the temptation and desire may be to bring proceedings in the High Court.

By CPR 55.3, however (emphases added):

> *"(1) The claim must be started in the county court for the district in which the land is situated unless paragraph (2) applies…*
>
> *(2) The claim may be started in the High Court if the claimant files with the claim form a certificate stating the reasons for bringing the claim in that court verified by a statement of truth… ."*

45 See [11]

Paragraph 1.2 Practice Direction 55A states that if a case is improperly started in the High Court, it will either be struck out or transferred to the appropriate County Court (which will inevitably lead to delay). The costs occasioned will normally be disallowed. Paragraph 1.3 states that (emphases added):

> *"Circumstances which may, in an appropriate case, justify starting a claim in the High Court are if-*
> *(1) there are complicated disputes of fact;*
> *(2) there are points of law of general importance; or*
> *(3) the claim is against trespassers and there is a substantial risk of public disturbance or of serious harm to persons or property which properly require immediate determination."*

As set out in paragraph 1.4 of Practice Direction 55A, the value of the property is unlikely of itself to provide sufficient justification.

In the case of protestors, especially where the protest is large, there may well be a substantial risk of public disturbance at the site. If direct action is being taken to prevent construction works continuing, that may be sufficiently dangerous to give rise to a substantial risk of serious harm to the protestors or others, or damage to property.

In *EDF v Clarke*, the claimant's decision to issue in the High Court was not challenged. That decision was taken in circumstances where there had been verbal clashes between the protestors and security personnel and contractors on the site, the claimants stated that there was a risk of falling masonry from the derelict barn by which the protestors were camping and there were children present on the site.

Service of possession claims

In possession claims brought against non-trespassers, or trespassers who are named defendants, the usual provisions as to service under the Civil Procedure Rules apply. CPR r. 55.6 makes special provision for the service of possession claims brought against trespassers who are persons unknown. The combination of these provisions can cause a potential difficulty where a possession claim is being brought against some named and some unnamed defendants in a hurry.

By CPR r. 55.5(2)(b), defendants to a possession claim must be served not less than two clear days before the hearing. Where the trespassers are persons unknown, a specific method of service must be used (in the case of open land, by attaching the relevant documents in transparent envelopes to stakes in *"places where they are clearly visible"*[46]). As this service method is *outside* CPR Part 6, the deeming provisions for service seemingly do not apply.[47] If so, it would seem that service is effected when the stakes are in place.

On the other hand, where the trespassers are *not* persons unknown, the normal service provisions in CPR Pt 6 apply – including the deeming provisions under CPR r.6.14. So, if (for example) personal service of a claim form is effected on named defendants, service will not be deemed effective until the second business day after the "relevant step".

There is scope, therefore, for confusion and a disjoint as to when the practical steps for service need to take place in respect of named and unnamed defendants. This cannot be avoided by simply bringing a claim against 'persons unknown', as paragraph 2.1(5) of PD55 to CPR Part 55 requires the claimant to give, *"details of every person who, to the best of the claimant's knowledge, is in possession of the property"*.

46 CPR r. 55.6(b)
47 CPR r. 6.1

In a non-urgent case, these difficulties may be overcome relatively easily. Difficulties may arise, however, where the Court lists the hearing *too* promptly to allow proper service to be effected. While the Court will shorten the period for service in an appropriate case (for example where there is a risk of assault or damage to property), difficulties of service are unlikely to justify the shortening of the notice period.

In some cases, there may be dangers (such as a risk of assault) in personally serving defendants at the property in question, or difficulties in identifying who is who. In such cases, it will be necessary to apply for an order for service by an alternative method under CPR r.6.15 (this can be made without notice and operate retrospectively).

Leaving copies of the documents at conspicuous places clearly addressed to the named defendants is likely to suffice; but if such an approach is adopted it will be important to have clear evidence of what steps were taken to bring the claim to the occupier's attention. Photographic evidence will be helpful in showing how conspicuous the documents were – especially in the case of open land.

Abridgment of time and urgency

In the event that trespassers move from one site to another upon eviction, that may be a ground for the abridgement of time to bring subsequent possession proceedings (whether or not there was an injunction preventing the trespassers from so doing).[48]

The time for service can, in an appropriate case, be shortened very dramatically. In S*un Street Property v Persons Unknown*[49] owners of a commercial property brought an urgent 'without notice' application for an interim injunction restraining further access to an empty office block and a claim for possession. An injunction and order were obtained within hours of the trespass occurring.

A large number of persons, acting as a 'community arts collective', accessed the property in the early hours of a Friday morning. At about 6.45pm, the property owner sought and obtained an injunction prohibiting further persons from entering onto or remaining on the property, and put before the Court a claim for possession and an application to abridge time for service to 45 minutes. The Court granted that application and ordered that service may be effected by fixing the order and documents to conspicuous places around the property. The reason for the abridgment of time was the potentially dangerous state of the building; in that the gas and electricity supplies, and the lifts, had not been tested for some time. Service was effected at 9.10pm.

At 10pm, Proudman J conducted a telephone hearing (in the absence of any of the occupiers appearing outside the Court) and made an order for possession.

The occupiers applied to set aside the order for possession on the basis that no effective notice of the hearing had been given. The application was heard by Roth J. He accepted the submission that insufficient notice had been given. He found that the claimant's solicitors had not taken proper steps to bring the second hearing to the occupiers' attention. The relevant information was buried in a substantial file of documents which had been served, and there was no conspicuous telephone number which would have enabled the occupiers to get in touch with either the Court or those solicitors. Roth J found that the notice was wholly inadequate. Roth J did not, however, set aside the possession order because there was no defence and by the time of the set-aside application, the occupiers had had proper notice.

48 See Meier at [82]
49 [2011] EWHC 3432

In practice, therefore, when abridgment of time for service of a possession claim is sought and granted, it will be incumbent upon the claimant's solicitors to ensure that the defendants have as much notice of the claim as is possible in the circumstances and are provided with the relevant information in a clear and obvious manner.

Service of injunctions

As the Vice Chancellor observed in *Hampshire Waste*, it is one thing for an injunction to be granted, and another for it to be enforced. It now appears to be the position that anticipated difficulties in enforcing an injunction should not be a bar to it being granted; it is to be assumed that people obey the law, and, in practice, the very existence of an injunction may have a deterrent effect on intending trespassers. For that reason alone, it may be a useful remedy, even if it is unenforceable in practice.

If enforcement is to be contemplated (by sequestration or committal, or perhaps in another manner (as to which see further below)), it is first necessary for the injunction to be served on those enjoined. Plainly, in a case where the identity of the defendants is unknown, 'usual' methods of service will be ineffective. An order for substituted service ought therefore be obtained.[50] It should be noted that such an application must be supported by evidence, but can be made without notice.[51] In the event that such an order is sought, care should be taken to ensure that the order specifies three things: the alternative method of service; that such service will be good and proper service against those enjoined; and the time when deemed service shall occur if the method is used.[52]

The method of service ordered in *Hampshire Waste* was to affix the documents to posts at 'conspicuous places' at each of the sites. In practice, one may wish to be even more specific, so as to avoid scope for future argument about whether service was effective.

In the *EDF* case, the claimant was granted an injunction against named occupiers of the area around the barn and *"persons, or any of them, occupying the building known as Langsborough Barn, Hinkley Point, Somerset and the open spaces in the immediate vicinity of that building"*. The injunction prevented those defendants from entering onto or remaining on the whole of the development site without consent (save for lawful use of public footpaths), or otherwise interfering with EDF's activities on the site.

Given the very large size of the site a requirement for the injunction to be staked at 'conspicuous places' risked being too vague. Thus, the claimants sought (and were granted) an order for substituted service that provided for the documents to be affixed to the metal fence surrounding the occupied barn and to be staked, by reference to a plan attached to the order, at each point where a public footpath crossed the boundary of the development site. The order provided that such service would be good and proper service against all defendants, and that deemed service would occur when these steps were taken.

As in *Hampshire Waste*, the order in EDF also made provision for any person affected by the order to apply to set it aside, subject to giving advanced written notice to the claimant's solicitors.

Where organised protestors are involved, it is likely that they will have some on-line presence (websites, twitter accounts, etc.). In those situations, consideration might be given to serving Court

50 Pursuant to CPR r 6.8
51 CPR r. 6.8(2)
52 CPR r. 6.8(3)

documents via those electronic means, especially if it is reasonable to think that they will come to the attention of the members of such groups by so doing.

Writs of possession

As set out above, a writ or warrant of possession is a method of enforcement which allows the sheriff or bailiffs to recover possession of the land for the benefit of the claimant, and allows the sheriff or bailiffs to remove whoever they find on the land, whether or not they were a named defendant to the possession claim. If the writ or warrant of possession is issued within three months of the date of the order, the Court's permission is not required. The Court has no power to stay a writ of possession as against a trespasser.[53]

Of course, in the case of an injunction restraining trespass, the developer with the benefit of the injunction is unlikely to be interested in bringing committal or sequestration proceedings in the event the injunction is breached. What the developer would like is to be able to enforce the injunction by means of a writ of possession. Lord Neuberger gave this possibility some consideration in *Meier*:

> *"[T]he thinking of the Court of Appeal in the Drury case proceeded on the basis that an injunction restraining trespass to land could only be enforced by sequestration or imprisonment. In light of the terms of CPR Sch 1, RSC Ord 45, r 5(1), this may very well be right… it is hard to see how a warrant of possession in the county court or a writ of possession in the High Court could be sought by a claimant, where such an injunction was breached.*
>
> *However, where, after the grant of such an injunction (or, indeed, a declaration), a defendant entered on to the land in question, it is, I think, conceivable that, at least in the High Court, the claimant could apply for a writ of restitution, ordering the sheriff or bailiffs to recover possession of the land for the benefit of the claimant. Such a writ is often described as one of the "writs in aid of" other writs… Restitution is normally the means of obtaining possession against a defendant who has gone back into possession after having been evicted pursuant to a court order. It appears that it can also be invoked against a claimant who has obtained possession pursuant to a court order which is subsequently set aside… Historically at any rate, a writ of restitution could also be sought against a person who had gone into possession by force… So there may be an argument that such a writ may be sought by a claimant against a defendant who has entered on to the land after an injunction has been granted restraining him from doing so, or even if a declaration has been made that the claimant is, and the defendant is not, entitled to possession. It may also be the case that it is open to the county court to issue a warrant of restitution in such circumstances."*[54]

There does not appear to be any reported case in which this argument has been run. To cater for the possibility that such an argument would succeed, however, it may be advisable to seek to have the injunction record that the claimant shall be at liberty to take out a writ/warrant of restitution for the enforcement of the injunction. Lord Neuberger suggested that the Civil Procedure Rules Committee may want to consider this question. For as long as Lord Neuberger's suggested solution is unavailable the attractions of injunctive relief are limited. As he put it himself in *Meier*:

53 *McPhail v Persons Unknown* [1973] Ch 447
54 At [93] to [94]

> *"Where a person threatens to trespass on land, an injunction may well be of rather little, if any, real practical value if the person is someone against whom an order for sequestration or imprisonment is unlikely to be made, and an order for possession is not one which is open to the court."*[55]

The new criminal offence of squatting

A very recent, high profile and somewhat controversial development in this area has been the criminalisation of 'squatting' in *residential property*. This followed the Ministry of Justice's formal consultation on the options for dealing with squatters, published on 26 October 2011.[56]

The new offence is contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, at sub-section 144(1) (which came into force on 1 September 2012):

> *"A person commits an office 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."*

Sub-section 144(3) provides the following definitions:

> *"(a) "building" includes any structure or part of a structure (including a temporary and 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."*

Sub-section 144(8) amends section 14 of the Police and Criminal Evidence Act 1984, so as to allow a police officer to enter premises and arrest persons who are occupying the premises in breach of section 144.

It is too soon to know how effective this new law will be, or whether the police will use their newly granted powers. In any event, the fact that the offence is limited to residential property means that, in many cases, property developers will have to continue to rely on the available civil remedies.

Conclusions

CPR Part 55 provides landowners (and, in certain cases, even licensees) with an efficient summary remedy to remove trespassers from their land. It is a flexible procedure, which can accommodate possession claims which are 'out of the ordinary', provided that careful thought is given to the practical application of the rules.

Unfortunately, landowners and property developers are in a much weaker position when it comes to threatened trespass aimed at disrupting lawful activities on the land. Injunction proceedings may be brought in respect of such threatened trespass, and difficulties in identifying and serving the relevant defendants are not insurmountable. The problem is that, unless the Courts are willing to adopt the possibility raised by Lord Neuberger in *Meier* of granting a writ or warrant of restitution to enforce

55 At [94]

56 In fact, squatting was already a criminal offence under s.7 of the Criminal Law Act 1977 - but only in the event that the squatter remained in occupation when requested to leave by a displaced residential occupier or a "protected indenting occupier".

an injunction, an injunction is unlikely to provide an effective remedy, beyond some deterrent effect. In many instances, property developers may decide simply to accept the risk of trespass, and bring possession proceedings promptly in the event that the threat actually materialises.