SUMMARY POSSESSION ORDERS
- current practical and legal issues

A paper for the Property Litigation Association

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by

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The 2014 edition of Chambers & Partners directory describes Katharine as *"a formidable presence on her feet*" and that "*her ability to get to the heard of a dispute never ceases to impress. She is amazingly helpful, particularly on urgent matters"*. The 2013 edition describes her as "*simply astonishing to watch on her feet.*" "*She's dedicated, user-friendly and a fierce advocate".* Other recent directory references have included:-"*Sources agree that Holland dazzles in court, saying she is "astonishing to watch on her feet - she is razor-sharp and one of the best cross-examiners around" "her ability to devour a lengthy and complex brief and summarise it in a few short paragraphs is mindblowing." "a firm favourite of countless solicitors, who agree that "she is phenomenal and delivers consistently time and again." "A fearsome fighter," "Katharine is a hugely committed barrister. When you are up against it and need someone to really knuckle down there is no-one with more commitment or energy"* "*retains a first tier ranking with plaudits: can't praise her enough, a team player, extremely knowledgeable, her paperwork is excellent, a barrister you want on your side, especially if you expect to go twelve rounds with the other side" and "a superb fast-thinking trial advocate and ferocious cross-examiner*" "*pulls out all the stops to win your case and is recognised by instructing solicitors and opponents as a superb, fast-thinking trial advocate*",

Katharine has acted in many reported cases at all levels and in many high profile disputes, involving Wembley Stadium, the London Eye, various football clubs and celebrities and lengthy group litigation nuisance claims. She is also well known for her expertise in civil trespass cases, having acted in *Hampshire Waste v Persons Unknown*, in which the first injunction against 'persons unknown' was granted in the context of trespass.

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Introduction

1.1 The ability to apply to the Court for a summary order for possession pursuant to CPR Part 55 against "persons unknown" is a well-known and established procedure. It is intended to provide a quick and easy scheme for a landowner to recover possession of property from unwanted and unauthorised occupiers. Nevertheless, the urgent circumstances in which such orders have often been obtained may not have been the best of contexts for the development of a clear and consistent body of jurisprudence or guidance on this important summary procedure. This is particularly unfortunate, given that the cases which been the subject of this procedure have often involved some fundamental legal questions, such as how the rights of a private landowner in relation to trespassers may be affected by the European Convention on Human Rights.

1.2 The purpose of this paper is to provide a summary of some of the most recent guidance from the Courts on the following topical issues:-

- Scope of the order
- Relevance of Articles 10 and 11 of the European Convention on Human Rights
- Relevance of Article 8 of the European Convention on Human Rights
- Writs of restitution and extensions to the warrant for possession

Scope of the order

2.1 It is now well-established from cases decided in a number of different contexts that where trespassers are located on just one part of a larger parcel of land, the inclusion of the whole parcel of the land in the possession order will usually be justified.

2.2 In *Secretary of State for Environment, Food and Rural Affairs v Meier and others* [2009] UKSC 11 [2009] PLSCS 335 [2009] 49 EG 70 (CS), the Supreme Court held that it was appropriate to make an order for possession in relation to one composite area of woodland even though only part of it was occupied by

the travellers in that case. Historically, in *University of Essex v Djemal* [1980] 1 WLR 1301 an order for possession extending to the whole property of a university was made notwithstanding that only part of the site was occupied. In *Meier*, Lady Hale said:-

> *"Mr Drabble, for the defendant appellants, has never resisted an order covering the whole of Hethfelton Wood, nor does he invite us to disagree with Djemal. Being a sensible man, he recognises that we 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.*
>
> ....
>
> *If we accept that the remedy should be available to a person whose possession or occupation has been interfered with by the trespassers, as well as to a person who has been totally dispossessed, a case like Djemal becomes completely understandable, as does the order for possession of the whole of Hethfelton Wood in this case. Nor need we be troubled by the form of the order, that the claimant "recover" the land. His occupation of the whole has been interfered with and he may recover his full control of the whole from those who are interfering with it."*

Lord Collins said:-

> *".. in my opinion University of Essex v Djemal [1980] 1 WLR 1301 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"*

2.3 Such principles have been applied in the last few years in relation to such areas of land as a University campus, an entire future development site, an entire office park and a potential fracking site.

Relevance of Articles 10 and 11 of the European Convention on Human Rights

3.1 It is now clear that, save for the most exceptional of cases, these Articles do not give rise to any arguable defence to a summary possession claim and do not provide any support for any potential adjournment applications. There is now a strong body of case law to such effect.

3.2 Article 10 provides as follows:-

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinion and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

3.3 Article 11 provides as follows:-

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are presented by law and are necessary in a democratic society, in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of

> health or morals, for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or the administration of the state."

3.4 The first and most fundamental point to make in this context is that the right to possession of property is not incompatible with Article 10 and/or 11:-

> '[Article 10] notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, **the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (Government offices and ministries, for instance)**. Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example.'
>
> *Appleby v United Kingdom* (2003) 37 E.H.R.R. 38 at 47.

3.5 The point which is of critical importance in this regard is that there is no unqualified right to freedom of expression under Article 10. There is likewise no unqualified right under Article 11 to peacefully protest in whatever manner and wherever the protesters wish. Article 10 gives a qualified right which may be interfered with in accordance with Article 10(2) and Article 11 gives a qualified right which may be interfered with in accordance with Article 11(2). Accordingly, when considering the proportionality of the interference under Article 10(2) and 11(2), it is relevant to consider:

- the landowner's property rights;
- that the defendants are trespassing;

- that by the relief sought, in the form of a possession order, there is no question of a blanket ban on the right to protest; and
- the interference caused to other legitimate users of the land and to the landowner.

3.6 That Articles 10 and 11 disclose no arguable defence to the claim finds support in a number of domestic decisions since the decision in *Appleby v United Kingdom*. A succinct summary was provided in one of the earliest of these cases, namely the decision of Mr Justice Henderson in *School of Oriental and African Studies v Persons Unknown* [2010] PLSCS 303 [2010] 49 EG 78 (CS), in which protestors had staged an occupational protest on university property:-

> "… In *Appleby* the applicants were an environmental group who were collecting signatures and had attempted to set up stands in a private shopping mall. They were prevented from doing so by the Landlord because the private owner took a strictly neutral stance on political issues, although the manager of one shop had allowed them to set up a stand in his shop this consent was subsequently revoked. The applicants relied upon Articles 10 and 11; they also relied upon Article 13 although for present purposes I can ignore that Article. The court held by 6:1 that there was no violation of Article 10 and 13.
>
> At paragraphs 39 and 40 the Court dealt with the relevant general principles. Firstly, the importance of the freedom of expression, secondly that there may be a requirement to take positive measures and thirdly that a fair balance must be struck between the general interest of the community and the rights of the individual.
>
> Turning to the application of these principles the Court summarised the facts and stated that the nature of the convention right was an important consideration, however it was also important to have regard to property rights under Article 1 of Protocol number 1. The court considered arguments that the shopping centre had the character of a quasi-public space and considered that there was inconclusive American authority on this point.

The court expressed their conclusions at paragraph 47 as follows

> 'That provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example.'

That paragraph appears to me to be clear authority that Article 10 does not give any general freedom to exercise the right on private land. It is only in exceptional circumstances where the Court considered that the inability to exercise the right on private land would prevent any expression of the right.

In the present case it is entirely fanciful to suggest that preventing the students exercising rights in the Brunei Suite would prevent them from exercising their rights of expression.

The proposition that the law requires the property rights of SOAS to be overridden in their own building is unarguable.

Similar considerations apply in relation to Article 11, paragraphs 51-52 of the judgment. It is equally fanciful to suggest that Article 11 requires the court to override the property rights of SOAS.

…

I am not persuaded that there is any defence which offers a realistic prospect of success and it would be wrong to adjourn to allow the Defendants to seek other grounds of defence."

3.7 The same approach as shown in this early decision can be seen in the subsequent cases of *Sun Street Property Limited v Persons Unknown* [2011] EWHC 3432 [2011] EWCA Civ 1672, *City of London Corporation v Samede and others* [2012] EWCA Civ 160 (a case regarding highway land), *Olympic Delivery*

Authority v Persons Unknown [2012] EWHC 1114 (in the context of an injunction) and *University of Sussex v Persons Unknown* [2013] EWHC 862 (Ch).

3.8 More recently, the fact that no Article 10 or 11 defence is applicable on facts such as those which arise here has been reinforced by the decision of His Honour Judge Pelling QC in *Manchester Ship Canal Developments Ltd v Crane & Others* [2014] EWHC 645, in which a possession order was granted against trespassers protesting against fracking. His Honour Judge Pelling QC said:-

> *"34. In my judgment Articles 10 and 11 do not even arguably provide the 2nd and 5th Defendants with a defence to the Claimants' possession claim. My reasons for reaching that conclusion are as follows. First, the land in respect of which possession is claimed is land owned otherwise than by a public authority. To permit the Defendants to occupy that property would be a plain breach of domestic law, because neither defendant has the licence or consent of the Claimants to be or remain on the land. It is also an interference with the Claimants' A1P1 rights in relation to their property. Although Mr. Johnson submitted that this factor was circular and had the effect of defeating the Defendant's Article 10 and 11 rights, I reject that argument. I do not regard the points as being of themselves decisive. They are two factors that have to be weighed in the balance with others. Nonetheless they are powerful factors because if effect is not given to them then the result will be to deprive a property owner of its entitlement to enjoy its property without interference. As Appleby (ante) demonstrates, it will only be in exceptional circumstances in which such an outcome could be justified, particularly in relation to privately owned land.*
>
> *35. Secondly, the continued presence of the Defendants and, more importantly, all those others coming within the scope of the phrase "Persons Unknown" is a source of interference with other legitimate users of the land concerned. At the outset of this judgment I explained that Barton Moss Road is an important source of access for third parties with properties and businesses located on and around it. Although the Defendants deny that there is any interference with third party users or occupiers, other than Igas, that is not the effect of the evidence……*

36. Thirdly, the protest has been ongoing and escalating since last November. The length of the protest is a relevant consideration as Sales J demonstrated in University of Sussex v. Persons Unknown and others (ante). Whilst this factor may not be a particularly weighty one it is nonetheless of importance when considered with the others I have so far mentioned.

37. The final and key point is that there is absolutely nothing to prevent the protesters from carrying on their protest elsewhere and/or by other means that does not involve interfering with the A1P1 rights of the Claimants, their licensees and visitors. There is no evidence offered by the Defendants on this issue. Rather what is said is that the camp is the most effective means of protest available to them – see in this regard the evidence of the 2nd Defendant at Paragraphs 14, and 26 – 30; that of Mr. Pitfield at Paragraphs 21-22; and that of Mr. Burke at Paragraph 11. This may be so but is not the point as the ECtHR held in Appleby (ante) as Roth J explained in Sun Street (ante) at the part of his judgment set out in Paragraph 33 above. This point is probably decisive because as the ECtHR said in Appleby (ante), Articles 10 and 11 will only provide a defence to a claim for possession of privately owned land if the effect of requiring the protesters concerned to give up possession would be to prevent "… any effective exercise of freedom of expression …" or would be that " … the essence of the right has been destroyed …". This hurdle is obviously and intentionally a high one that the Defendants do not even arguably clear on the facts of this case. As I have said, this factor is probably decisive but is clearly so when viewed in combination with the other factors I have mentioned above"

Relevance of Article 8 of the European Convention on Human Rights

4.1 Reliance has sometimes also been placed by trespassers on Article 8 of the European Convention on Human Rights.

4.2 Article 8 provides as follows:-

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well–being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

4.3 Most of the cases to date have involved argument on the following three questions:-

(a) Is Article 8 engaged when the claim is by a private landowner?

(b) If Article 8 is engaged, would the possession order sought interfere with the right to respect for a '"home" so as to be within the scope of Article 8?

(c) If Article 8 is engaged and the defendant's home is on the land in question, are there 'exceptional circumstances' which would justify any postponement of the order for possession pursuant to Article 8?

4.4 The first question of whether Article 8 is engaged at all when the claim is by a private landowner has been hotly debated. In *Amsprop Limited v Persons Unknown* (June 2015 unreported), Mr Justice Morgan considered that Article 8 was not engaged in relation to possession claims by private landowners following the Court of Appeal decision in *McDonald v McDonald* [2014] EWCA Civ 1049. In that case, the Court of Appeal held that in relation to a claim for possession under section 21 of the Housing Act 1988 by a private landlord, Article 8 was not engaged and even if it was, the rights of the tenant would not outweigh the rights of the private landlord to its property. It is true that, prior to this decision, there was support for the approach that, as the court is itself a public authority and cannot act incompatibly with an article of the European Convention on Human Rights, such rights become directly applicable between private parties in court proceedings. Such an approach was accepted by Her

Honour Judge Walden-Smith in the *Malik* case and in the Court of Appeal, Sir Alan Ward expressed the view at paragraph [8] that although "*a private landowner is not a public authority and is, therefore not obliged to respect the trespasser's human rights .. section 6(3) of the Act makes it plain that the court is a public authority … [and thus] obliged to act in a way which is compatible with Convention rights"*. This was followed by His Honour Judge Pelling in *Manchester Ship Canal Developments Ltd v Crane & Others* [2014] EWHC 645 at paragraph 46. However, in the light of the decisions in *McDonald v McDonald* and *Amsprop Limited v Persons Unknown*, it is likely that such an approach will no longer be taken.

4.5 Thus, it appears that it is only where the claimant is a public body that Article 8 will be capable of being relied upon by trespassers in summary possession proceedings. It is quite possible that the result of this will be that there will be a greater degree of focus and scrutiny on the question of whether the claimant can in any way be described as a public body. For example, in *BBC v Persons Unknown* (August 2014 unreported), authorities were produced to show that even though the claimant is subject to public functions under its Royal Charter, the management of the land from which it carries out its operations is not a public function, with the effect that the land in question is to be treated as private land and the BBC was to be treated as a private landowner for the purposes of the possession proceedings.

4.6 In those cases where Article 8 is engaged in relation to a claim, it is only where a person's "home" is under threat that Article 8 comes into play. The Strasbourg Court has stated a "sufficient continuing links" test for determining whether someone has a right to a "home" for the purposes of Article 8. This was first formulated in *Gillow v United Kingdom* (1986) 11 EHRR 335, paragraph 46 (and see *Buckley v United Kingdom* (1996) 23 EHHR 101 paragraph 54). It is therefore not surprising that in relation to temporary protestors, occupation for a

few months was not held not to be occupation as a "home" in *Manchester Ship Canal Developments Ltd v Crane & Others* [2014] EWHC 645 at paragraph 51.

4.7 In relation to (c), it appears that where Article 8 is engaged, then it is clear from the *Malik* case, that 'exceptional circumstances' would have to be established. This will be very difficult for a trespasser to establish. It will be exceptionally onerous for a protestor to show that the occupation is sufficiently exceptional to cause the Claimants' right to peaceful enjoyment of the land to yield to any Article 8 rights, even if they had any: see, for example, *Manchester Ship Canal Developments Ltd v Crane & Others* [2014] EWHC 645 at paragraph 51.

Extensions to the warrant for possession

5.1 Where a Writ of Possession has been enforced, a claimant may be entitled, in the event of further occupational incidents, to apply for a writ of restitution under CPR 83.13(5) (formerly under RSC Order 46(3)). This is because it has been held that the court has power, following the recovery of possession pursuant to a writ of possession, to issue a writ of restitution even if not all the people in possession were in possession when the original order was made, provided that there is a "plain and sufficient nexus" between the original recovery of possession and the need to effect recovery of the same land: see *Wiltshire County Council v Fraser (No 2)* [1986] 1 WLR 109.

5.2 In cases where summary possession orders have been obtained, it is often the case that enforcement is never actually carried out because the protest simply comes to an end. However, frequently subsequent recurrences of essentially the same protests are feared. That raises the question of whether it is necessary to start all over again and commence new summary proceedings (even though there is an unused writ of possession on file) or whether the writ of possession could be extended, in order to be enforced in the event of a re-occurrence of the protest.

5.3 The relevant procedural rules on this were formerly to be found in RSC Order 46 and since 6 April 2014 they have been contained in CPR 83. Under both sets of rules, for the purposes of execution, a writ of possession is valid in the first instance for a period of 12 months beginning with the date of issue. The new rules on validity and duration are, for present purposes, very similar indeed and are to be found in CPR 83.3(3)-(5) and (10):-

> "(3) Subject to paragraph (4), for the purposes of execution, **a writ or warrant will be valid for the period of 12 months beginning with the date of its issue**.
>
> (4) **The court may extend the relevant writ or warrant from time to time for a period of 12 months at any one time.**
>
> (5) If the application is made before the expiry of the period of 12 months any period of extension will begin on any day after the expiry that the court may allow.
>
> ….
>
> (7) before a relevant writ that has been extended is executed –
>
> (a) the court will seal the writ; or
>
> (b) the applicant for the extension order must serve a notice sealed as described in subparagraph (a) on the relevant enforcement officer informing that officer of the making of the extension order and the date of that order
>
> …
>
> (10) The production of the following will be evidence that the relevant writ or warrant has been extended-
>
> (a) the writ sealed in accordance with paragraph 7(a);
>
> (b) the notice sealed in accordance with paragraph 7(b);
>
> (c) …" *[Emphasis added]*

5.4 It is now clear that the Courts are willing to extend the original writ of possession in circumstances where there is evidence of the likelihood of a similar protest in the near future. In *Birmingham University v Persons Unknown* [2014] EWHC 544, there had been a series of protests in 2014 and on one

occasion a warrant of possession had been obtained but not enforced. His Honour Judge Purle QC took account of the fact that under the principles in *Wiltshire,* where there are reoccurring protests, a writ of restitution could be issued and, by parity of reasoning, he concluded that it would be appropriate to extend the earlier writ of possession for another 12 months, given the disruption to University life which was brought about on the occasion of each protest.

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