

## Trespassers and Human Rights - Where are we now?

Those who act for private sector landlords in residential possession proceedings will be familiar with the decision of the Supreme Court in McDonald v McDonald [2017] AC 273, which was argued successfully by Stephen Jourdan QC and Ciara Fairly of Falcon Chambers. In McDonald, the Supreme Court was asked to decide whether a tenant in summary possession proceedings could require the court to consider the proportionality of making a possession order, having regard to Article 8 of the European Convention on Human Rights (ECHR): the well-known right to respect for private and family life. In particular, the Court was required to decide whether a private landlord's mandatory right to possession of her property under section 21 of the Housing Act 1988 could be curtailed or defeated entirely by invoking Article 8.

The Supreme Court held that it could not. Though the Court considered that Article 8 of the ECHR might be *engaged* when a judge made an order for possession of a tenant's home in a claim brought by a private sector landlord, it held that it was not open to the tenant to contend that Article 8 could justify a different order from that which the parties' contractual relationship mandated, at least where such a relationship was entered into against a backdrop of statutory provisions which Parliament had decided properly balanced the competing interests of private sector landlords and residential tenants: see [40]. Any other conclusion would have involved the ECHR having "horizontal effect" between private parties, contrary to the scheme of the Human Rights Act 1998 (HRA), under which only "public authorities" (as defined in sections 6(3) and 6(5) of the HRA) are required to act compatibly with the Convention rights of others.

Since McDonald, there has been a tendency to cite the Supreme Court's decision as establishing a somewhat broader principle: that whenever possession proceedings are commenced by someone other than a "public authority", there can be no scope for a defendant's Convention rights under the ECHR to affect the claimant's right to an order for possession. McDonald has, for instance, in the author's experience been deployed in possession claim against **trespassers** as authority that defendants in trespasser proceedings simply cannot invoke the ECHR to prevent an order for possession being made.

Unfortunately, however, the position is not as simple as this. In a trespasser case, a landowner seeks an order for possession of land not pursuant to a statutory or contractual right to possession, but rather as a remedy for a common law tort. At paragraph 46 of the judgment in

McDonald, the Supreme Court distinguished cases in which a claimant's cause of action arose from a contractual arrangement between two private parties from "*tortious or quasi-tortious relationships, where the legislature has expressly, impliedly or through inaction, left it to the courts to carry out the balancing exercise.*" The *ratio* of McDonald was carefully circumscribed: the Supreme Court appeared to suggest, albeit *obiter*, that civil proceedings between two private parties founded solely upon a common law cause of action, such as trespass, might require the Court to consider the question of the proportionality of any interference with the tortfeasor's Convention rights when determining the dispute.

Though it did not say so explicitly, the Court was concerned here with what is sometimes called the "**indirect horizontal effect**" of the Human Rights Act: the court's duty *as a public authority* under section 6(1) of the HRA (by reason of s.6(3)(a)) to *itself* act compatibly with litigants' Convention rights when determining civil disputes. The scope of the indirect horizontal effect of the HRA remains very ill-defined. It is tolerably clear that when an appellate court is asked to determine an appeal raising a point of law in relation to a common law tort, the court is required to test the content of the common law – considered in the abstract somewhat divorced from the facts of the case in question – against the "*values*" encapsulated in the Convention rights, and to "*absorb the rights protected*" by the Convention into the common law cause of action if necessary. The most well-known example is the House of Lords' development of the tort of breach of confidence into a cause of action for invasion of privacy in Campbell v Mirror Group Newspapers [2004] 2 AC 457, where the court's duty under section 6(1) was described in this manner: see [17], per Lord Nicholls. This is the cause of action to which the Supreme Court made reference in McDonald at [46].

It has thus been said that the appellate courts must "have regard" to the requirements of the ECHR when developing common law causes of action: see Flood v Times Newspapers [2012] 2 AC 23 at [46], per Lord Phillips (concerning the common law of defamation). In doing so, the English courts must take as their starting point domestic legal principles rather than the judgments of the European Court of Human Rights: Osborn v Parole Board [2013] UKSC 61 at [57]-[63], per Lord Reed. So it seems clear that a substantial degree of latitude is afforded to the domestic court as to if, and how, it ought to modify the common law in order to bring it into a more harmonious relationship with the ECHR. Whether the courts' duty under section 6(1) extends beyond that, or indeed is of any application in proceedings before a court incapable of creating binding precedent, such as the County Court, remains unknown. The duty on the court under section 6(1) therefore remains a nebulous one, its nature and ambit little explored and understood.

It is interesting that the English courts have made no qualification to the common law doctrine of trespass since the entry into force of the HRA. A private landowner remains entitled<sup>1</sup> to refuse to grant or to revoke a licence to occupy land within her ownership without needing to provide reasons or justification. In CIN Properties Ltd v Rawlins (Court of Appeal, 1 February 1995), the Court of Appeal rejected the call of a Justice of the Supreme Court of Canada to develop the law of trespass so to provide a “*new legal framework for new social facts*” in an era of mass privatisation of public space. The law remains unchanged since then.

Moreover, notwithstanding the *dicta* in McDonald, there remains no binding authority determining that, in a possession claim against trespassers, the Court is entitled or required to consider whether granting the landowner a possession order would amount to a disproportionate interference with any of the trespassers’ Convention rights. In all reported High Court cases concerning a ‘horizontal’ dispute between a landowner and trespassers, the Court has either failed to consider whether the trespassers’ Convention rights were in fact engaged, or else has simply assumed the position one way or the other without deciding the question, usually on the basis that any balancing exercise would invariably come down in the landowner’s favour.<sup>2</sup> The recent decision in Europa v Persons Unknown [2017] EWHC 403 (Ch), concerning trespass by protestors opposed to exploratory drilling for shale gas, is an example; the issue was skirted by Chief Master Marsh at [16]-[17].

In a number of these cases, the High Court has made reference to the jurisprudence of the European Court of Human Rights in Strasbourg, which has recognised only a very limited positive obligation on the state to protect the exercise of individuals’ rights under Article 10 of the ECHR (freedom of expression) in this context. In Appleby v United Kingdom (2003) 37 EHRR 38, Strasbourg decided that the right to freedom of expression did not bestow any freedom of forum for the exercise of that right. The state would only be required to protect trespassers’ access to private property in circumstances where where a denial of access would prevent any effective exercise of the right to freedom of expression or where the essence of the right would thereby be destroyed. The example of a corporate town, where the entire municipality was controlled by a private body, was offered as an example. The English courts

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<sup>1</sup> Absent the existence of an estoppel or in other very narrow circumstances where a private landowner enjoying a natural monopoly in the provision of utilities or public services invites the public at large onto the land. These exceptions are beyond the scope of this article.

<sup>2</sup> See School of Oriental and African Studies v Persons Unknown [2010] EWHC 3977 (Ch) at [27], per Henderson J; Sun Street Property Ltd v Persons Unknown [2011] EWHC 3432 (Ch) at [28], per Roth J; University of Sussex v Persons Unknown [2013] EWHC 862 (Ch) at [11]-[14], per Sales J; Jones v Persons Unknown [2014] EWHC 4691 (Ch) at [17], per HHJ Hodge QC; Manchester Ship Canal Developments Ltd v Persons Unknown [2014] EWHC 646 (Ch) at [34], per HHJ Pelling QC; Dutton v Persons Unknown [2015] EWHC 3988 (Ch) at [33], per Judge Hodge QC; and RMC LH Co Ltd v Persons Unknown [2015] EWHC 4274 (Ch) at [24]-[31], per Carr J.

have, on a number of occasions, taken the view that where this threshold is not met, it is inevitable that any question of the proportionality of the interference with trespassers' Convention rights will be resolved in the landowner's favour.<sup>3</sup>

In the author's view, it remains open to private landowners to argue that trespassers simply cannot put human rights in issue in trespasser possession proceedings, save before an appellate court where the trespasser asks the tribunal to modify the entire doctrine of trespass at common law so as to make it compliant with the ECHR. Alternatively, landowners might argue that only where the "Appleby threshold" is met is the court entitled to intervene in a horizontal dispute to determine that trespassers' Article 10 and 11 rights can take priority over a landowner's right to peaceful enjoyment of her possessions under Article 1 of the First Protocol to the ECHR. But merely citing McDonald v McDonald as authority for either proposition will not suffice.

The practical reality is that claimants have little incentive to pursue these lines of argument, given that the courts almost invariably conclude that even if a proportionality assessment were required, it would be resolved in the landowner's favour. This is particularly in cases where the trespassers' conduct is violent or dangerous: the recent decision in INEOS Upstream Ltd v Persons Unknown [2017] EWHC 2945 (Ch), in which I acted, is but one such example.

The take home point is that private landowners and those acting for them should not blithely assume that trespasser possession proceedings brought by a private sector landowner cannot be defended on human rights grounds. Unless and until a higher court fills in the gaps left by McDonald v McDonald, or clarifies the extent of the courts' duty under section 6(1) of the HRA when determining civil disputes between private parties, these claims remain potentially susceptible to such arguments being made, and landowners should be prepared for the fight.

Gavin Bennison  
Barrister, Falcon Chambers  
May 2018

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<sup>3</sup> See School of Oriental and African Studies v Persons Unknown (above) at [21]-[25], per Henderson J; Sun Street Property Ltd v Persons Unknown (above) at [29]-[33], per Roth J; University of Sussex v Persons Unknown [2013] EWHC 862 (Ch) at [11]-[19], per Sales J; and Manchester Ship Canal Developments Ltd v Persons Unknown (above) at [29]-[34], per HHJ Pelling QC.