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Case No: QB-2021-002448

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2021

MR JUSTICE CHAMBERLAIN

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Between:

LONDON BOROUGH OF LAMBETH — **Claimant**

- and –

(1) CAUL GRANT
(2) KAYLEE
(3) PERSONS UNKNOWN — **Defendants**

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- -

Mark Tempest, Counsel (instructed by **London Borough Lambeth Legal Department**) for the **Claimant**
Namaste, Paige Dennis and Caul Grant for the **Defendants**

Hearing dates: 9 and 12 July 2021

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Approved Judgment

Mr Justice Chamberlain::

Introduction

1 The London Borough of Lambeth ("the Council") brings this claim as freehold owner of Clapham Common. A small part of the Common is being occupied by individuals who have set up a camp. Two groups are involved. One is the Campaign for Truth and Justice. The other is called "Lovedown". The groups are co-operating. The camp was first established on 18 June 2021 by individuals who had been evicted from Shepherd's Bush Green. Others have joined them since. Lambeth says that the camp is generating complaints from local residents and seeks to recover possession.

2 The First Defendant, Caul Grant, established the Campaign for Truth and Justice and is regarded by some of the occupiers as a leader or spokesman for them. The Second Defendant, Kaylee, is another member.

The procedural history

3 When it was first established, the camp was in a wooded area on the southside of the Common. When Lambeth's Parks Operations Manager, Christopher Jude, attended on 22 June, he found approximately 30 tents and about 25 individuals. The camp was well organised and there were separate sleeping and eating facilities. There were two open fires.

4 Someone gave Mr Jude a document which asserted the right of the occupants to seize the land as a partial remedy for the ongoing violation of the law committed by the judiciary and other branches of the state. Reference was made to "Clause 61 of Magna Carta 1215 and Article 7 of the Human Rights Act 1998". The document asserted that, as members of the Campaign for Truth and Justice, the occupants were immune from any form of law enforcement. The document concluded with these words:

> "Let it be known that any attempt to interfere with any member, their family or their property will be in direct contravention of the Rule of Law and will be met with any resistance deemed necessary by ourselves.
>
> Ignorance of the law is no defence.
>
> You have been WARNED."

The document was signed by Caul Grant and dated 17 June 2021.

5 This claim was issued on 24 June 2021.

6 By 25 June, the camp had moved to a new site near "Long Pond", close to the junction between Rookery Road and Clapham Common South Side.

7 There was a hearing before Master McCloud on 29 June. That resulted in an order in which she set a timetable for witness evidence from the Defendants by 19 July and reply evidence from the Claimant by 26 July 2021, leading to a final hearing on 27 August.

8 After the hearing, there was a social media post from an account called “lovedown_ftp” in these terms:

> “SOME GREAT NEWS AND FINALLY A VICTORY FOR LOVEDOWN. THE JUDGE HAS GIVEN US UNTIL 27TH AUGUST TO COME UP WITH A CONVINCING ARGUMENT AS TO WHY WE SHOULD STAY AND MORE DETAIL ON EXACTLY WHY WE ARE HERE. THIS IS HUGE. JUST IMAGINE WHAT WE CAN ACHIEVE WITHIN THAT TIME. NOW WE NEED THE TEACHERS, DOCTORS AND LAWYERS ETC TO COME AND JOIN US. WE ARE GOING TO CHANGE THE COURSE OF HISTORY AND WE NEED TO COME TOGETHER.
>
>
>
>
> LOVEDOWN NOT LOCKDOWN”

9 In a note appended to her Order prior to sealing, Master McCloud said this:

> “The Court is aware that on the internet there have been suggestions that because of the delay whilst statements are being drafted and then the matter coming back to court, the protesters may want to grow the size of the camp and that in some sense the court had granted permission to stay. The Parties should in fairness be made aware that the court has not granted permission, the delay is simply routine delay due to the progress of the case and the judge’s absence on holiday for part of it, and most importantly that if the circumstances change on the ground to the point where the Claimants feel that the position is now beyond doubt beyond what is proportionate and demands an urgent hearing and eviction because the interference with the protesters rights is now plainly proportionate, the matter can under the court rules always be brought back if need be at very short notice before Master McCloud or a different Master as an urgent application for eviction based on the changed circumstances.”

10 On 1 July, the Judge in Charge of the QB Lists decided that this matter was suitable for hearing before a High Court Judge. Responsibility for the claim was allocated to me.

11 On 2 July, having considered the papers on file, I made an order of my own motion in which I fixed a hearing on 9 July. As I made clear in my Order, its purpose was to determine:

(a) whether to vary Master McCloud’s Order so that the hearing of the claim for possession can proceed immediately; and

(b) if the Master’s Order is so varied, the claim for possession.

12 I gave directions that the Defendants should by 4pm on Tuesday 6 July serve any evidence relevant to:

(a) the proposal that the hearing of the claim should take place on 9 July; and

(b) their defence to the claim.

13 I directed that the Claimant serve my Order on the Defendants by the means set out in CPR r. 55.6 and that any application to vary or discharge my Order should be referred to me. I gave these reasons:

> "Responsibility for this claim has been transferred by the Judge in Charge of the QB lists from the QB Masters to a QB High Court Judge and the papers were allocated to me.
>
> It is apparent from the claim papers and the Order that the timetable was set with regard to the availability of the Master, who at that stage was to hear the claim. Since the claim is now to be heard by a High Court Judge, it is appropriate for the timetable to be revisited.
>
> It appears from the papers that the Claimant alleges that the Defendants are trespassers and that the land they are occupying is not 'residential property'. Accordingly, the provisions of CPR r. 55.5(2)(b) apply. Although that rule does not prescribe any particular timetable, it appears to support the proposition that a shorter timetable may be appropriate in such cases.
>
> The matters referred to in the note appended to the Order indicate that there may be a public interest in the claim being determined more quickly than the timetable set out in the Order envisages. The new timetable set out in this Order reflects this.
>
> If the Defendants consider that there are substantial reasons why the hearing cannot take place on Friday 9 July 2021, they must explain those reasons in writing by 4pm on Tuesday 6 July 2021. They should not, however, assume that I will accept these reasons. If I do not, I am likely to go on to determine the claim on Friday 9 July 2021. This means that the Defendant would be well advised also to file any evidence in response to the claim by 4pm on Tuesday 6 July 2021."

14 CPR r. 55.5, to which I referred, governs the fixing of a hearing date in possession claims. In general, the hearing date is set not less than 28 days from the issue of the claim form. However, where the claim is against trespassers, by virtue of CPR r. 55.5(2), different time limits apply: in the case of residential property, the hearing must take place not less than 5 days from issue of the claim form and in other cases not less than 2 days after that date. These are minimum notice periods. But they are an indication that, in claims against trespassers, a shorter timetable may be appropriate, provided always that such a timetable is compatible with a fair opportunity for the defendants to state their case.

15 I have seen a statement of service from Jon Wood, a process server, on behalf of the Claimant. This indicates that, on the morning of Saturday 3 July 2021, he attended the camp and affixed a copy of my Order with a covering letter from the Claimant in a transparent envelope on a large wooden stake at three positions close to the camp. Members of the group ripped these down and put them in a bin, but the process server told them that there was to be a hearing on 9 July and, as will become clear, the occupiers were clearly aware of that.

16 On 5 July 2021, the documents were served by email on Caul Grant and the Campaign for Truth and Justice.

17 The Council filed a witness statement dated 7 July from its Head of Parks and Leisure Service, Ian Ross. Mr Ross indicated that, by 30 June, the camp had grown to some 60 tents and by 1 July to 70 tents. By 2 July, there were around 70 to 80 tents and by 6 July approximately 90. The camp now included larger tents like gazebos and a soup kitchen, which suggested the occupants were settling in. Some communal activities were seen, such as a martial arts class. Mr Ross added this:

> "The Council has received a large number of complaints from residents in relation to the encampment. 26 complaints were received by the Council just on 5 July 2021. The complaints include local people expressing serious concerns about the large fires being burnt on public land where children play and near a main road and in breach of byelaws. One resident also complained that every time they walked by they smelt 'weed' and have also heard loud 'sweary' presentations while young families are passing by. Other residents have complained about people from the encampment swimming and washing in the pond, about an increase in rubbish in the area, of loud music being played by a band and of the campers shouting or hollering at them.
>
> Another resident has complained that the encampment is terrorising the elderly community and that she herself is now afraid to walk in that part of the Common. Many residents have said that they feel intimidated by the campers who make them feel uncomfortable walking in the Common. Many have rightfully asserted that the Common is for the use and enjoyment of everybody but because of the campers they are avoiding the area of the encampment and cannot enjoy it.
>
> A number of residents have also expressed health concerns given the ongoing Covid-19 pandemic."

18 On 6 July, a Council official emailed Mr Grant asking questions about his and the group's intentions. Mr Grant's response included this:

> "(1) Whilst we do not intend for the camp to get much bigger, as it is a means of protests, it is impossible to guarantee that it won't.
>
> (2) It is possible that the recent announcement made by the government that all Covid restrictions will be lifted on the 19th July 2021, that this may or may not have an influence on the length of time for the camp."

19 On the evening of 6 July, the camp was moved again, this time only a very short distance, to a new site a short distance closer to Clapham Common South Side.

20 At an inspection on the morning of 7 July, a smouldering firepit was seen and there was a smell of smoke in the air. A new open fire was observed fully alight. Later that day, Mr Ross attended and noted that the group appeared to have split into two because of a disagreement. The main group's camp had a firepit in a metal bin raised on bricks and a

stockpile of wood and debris to burn. There was also a power generator, which suggested to Mr Ross that the occupiers were settling in.

The hearing on 9 and 12 July

21 The hearing proceeded just after 10.30am on Friday 9 July, as listed. Mr Mark Tempest appeared for the Claimant. Initially no-one attended for the Defendants. Shortly after Mr Tempest had begun his submissions, a number of individuals came in. The first to address me was Namaste, who had also addressed Master McCloud. Namaste told me that Mr Grant had applied to adjourn this hearing because he had a prior engagement with someone who had come from Birmingham, which he had already rearranged once. Namaste in due course produced an email showing that a communication had been made to the court.

22 After checking with Court staff, I ascertained that an application to adjourn had indeed been filed on Sunday 4 July 2021, though it had not been referred to me as directed in my Order. I was provided with the application, which sought to set aside my Order of 2 July 2021. The first reason was that Mr Grant "had another engagement set for Friday 9thJuly 2021 which has already been postponed from a previous booking". The application went on to say that the timetable set by Master McCloud should stand and that it would be unjust and unfair to shorten that timetable "without us having any input".

23 I refused the adjournment. I was satisfied that my Order of 2 July had been properly served and that the persons occupying the camp were all on notice that I would be likely to proceed to a hearing of the claim unless substantial reason could be shown why I should not do so. Mr Grant was plainly on notice of that, given his application. The fact that a party has a "previous engagement", even one that has been rearranged, is not, without more, a sufficient reason for adjourning a court hearing.

24 I indicated, however, that the refusal of the adjournment did not mean that I would necessarily determine the claim immediately. Whether to do so was one of the questions I would need to consider, having heard submissions. Because I would not be in a position to give a decision until Monday 12 July anyway, I said that I would be prepared to hear from Mr Grant at 10.30am on that day. This would give him an opportunity to address the court, if he wished to do so, both on whether Master McCloud's Order should be varied and on whether, if so, I should grant a possession order.

25 I heard submissions from Mr Tempest for the Council and from Namaste and Paige Dennis for the Defendants, before adjourning the hearing until Monday 12 July. After doing so, I made an Order adjourning the hearing until 10.30am on Monday and directed that it be served as soon as possible by the same means as my Order of 2 July.

26 On 12 July, I heard submissions from Caul Grant and from Namaste and some very brief submissions in reply from Mr Tempest.

Submissions for the Council

27 For the Council, Mr Tempest submitted that it was clear that the occupiers were trespassing and that the Council as freeholder had the private law right to recover possession. Only if there was a public law defence could that right be defeated. Given

that neither Magna Carta nor Article 7 ECHR was relevant, the only potential reason for refusing to grant possession would be to avoid a disproportionate interference with the rights of the occupiers under Articles 10 and/or 11 ECHR.

28 It was unclear whether the group as a whole was in occupation as part of a protest at all. Mr Grant's stance, as explained in the document given to Mr Jude and in submissions before Master McCloud, was that he was entitled to seize the land by way of remedy for past wrongs done to him by judges or other agents of the State in the past. This appeared to be an assertion of legal right, rather than a protest directed at any political aim.

29 If the occupiers' rights under Articles 10 and/or 11 were engaged, it would be necessary to balance these rights against those of the Council and the wider public. Such a balancing exercise would, of course, have to be based on a proper understanding of the circumstances. However, ample time had been given for the occupiers to file witness statements and explain their position. The court could proceed on the evidence now available.

30 Having heard the submissions of Namaste and Paige Dennis, Mr Tempest made some concessions on behalf of the Council. It was agreed that the current number of tents was about 32 or 33. The Council was prepared to proceed on the basis that the maximum number had been 63. It was prepared to accept that the litter was not a significant problem and when individuals associated with the group had become argumentative they had been asked to leave. There was no evidence of actual or likely disorder. It was accepted that some members of the local community and public were supportive of the occupation.

31 As to the substance, and assuming that Articles 10 and 11 were indeed engaged, Mr Tempest addressed the factors set out by Lord Neuberger in *City of London Corporation v Samede* [2012] EWCA Civ 160, [2012] PTSR 1624, [39], and recently endorsed in *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [71], as follows:

(a) *The extent to which the continuation of the protest would breach domestic law.* The occupiers are in breach of Lambeth's Byelaws, which were made under s. 164 of the Public Health Act 1875 and ss. 12 and 15 of the Open Spaces Act 1906 and apply to Clapham Common among other parks, commons and open spaces. Byelaws 9 and 10 prohibit the erection and use of tents and lighting fires respectively. Since there is evidence that the Defendants are doing both, they are also committing offences: see byelaw 48.

(b) *The importance of the precise location to the protesters.* Clapham Common has no particular significance to any protest in which the occupiers are involved.

(c) *The duration of the protest.* The protest, if it is one, has been ongoing for 24 days.

(d) *The degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public*. Mr Tempest said that the position was similar to that in *Samede*, where at [49] Lord Neuberger said:

> "It is difficult to see how Articles 10 and 11 rights could ever prevail against the will of the landowner when protestors are continuously and exclusively occupying public land, breaching not just the owner's property rights and certain statutory provisions, significantly interfering with the public and Convention rights of others, and causing other problems (connected with health, nuisance, and the like), particularly in circumstances where the occupation has already continued for months, and is likely to continue indefinitely."

32 The absence of any engagement by the occupiers with the police or local authorities concerned was an additional factor.

33 Taking these factors together, the grant of a possession order would not be disproportionate. There was no need for further evidence, which would not add materially to the assessment of the relevant factors.

Submissions for the occupiers

34 At the hearing on 9 July, three of the occupiers came to address the Court: Namaste, Minister Emerven and Paige Dennis. On 12 July, I heard from Caul Grant.

Namaste

35 In measured submissions, Namaste explained that the camp presently consisted of around 30 tents. Generally, there has been no abuse or intimidation. The group sought to promote peace, love, unity and respect of humanity, the surrounding community and the land and nature. If and when there was any disorder, the individuals responsible would be asked to leave. The aim was to engage respectfully with those in the local community and others passing by. Some members of the local community have been supportive, bringing food every day. People were welcome to join the group, but there was no particular aim to increase its size.

36 Namaste said at first that the occupiers were not engaged in a protest, but in an act of lawful rebellion. Later, however, Namaste said that "we do act out some protests" against what is being done by the government and to demand the repeal of the Coronavirus Act, which enables the country to be in a state of emergency. The group took objection to the requirement to wear masks and to the promotion of coronavirus vaccines, which he said were in fact experimental gene therapy drugs.

37 Namaste said that the timetable set by the Master was appropriate because it gave time for the occupiers to gather evidence from the local community, many of whom were supportive.

Minister Emerven

38 Minister Emerven did not recognise the Court's authority or jurisdiction and at one point told me that he was placing me under arrest pursuant to the "universal law". He was accompanied by others who sat in the public gallery. All initially remained standing as an act of defiance to the court, but later sat when I made clear that they would otherwise be removed. Minister Emerven did not make any substantive submissions.

Paige

39 Paige Dennis introduced herself as "Paige" and made a series of clearly and moderately expressed points. As she saw it, the occupiers were very much protesting, in particular against the restrictive measures introduced to address the Covid-19 pandemic.

40 Paige accepted that not all of the occupiers had the same aims. Paige's view was that they were camping out indefinitely and would move to different towns and cities to engage with people there. It was possible that the relaxation of restrictions on 19 July would mean that the protest was no longer necessary, but the occupiers knew the restrictions would return. For the moment, they felt it right to protest.

41 The evidence supporting the Council's claim for possession was weak. There was nothing to show that the Council's Byelaws prohibited the erecting of tents. There was nothing to show that any member of the public had been harmed. The Court should not accept the contents of the Council's witness statements, since the Council was part of the government, against which they were protesting.

42 I asked Paige to identify which parts of the Council's witness statements were wrong. She indicated that the number of tents had never exceeded 63; there was no physical or verbal abuse by any of the occupiers towards members of the public; although there had been a call for doctors, lawyers and other professionals to come and joint the group, there was no particular ambition to grow the size of the camp; and the group had been careful to keep the land tidy, disposing of litter and avoiding damage to the grass.

43 Paige said she did not really care about the date of the final hearing. Mr Tempest's submissions showed that the protest was succeeding: they had been at court six times in the past three weeks and had had a chance to air their concerns. (It appears that one of these was to attend a hearing which did not take place.)

44 Paige said that, when the group had been evicted from Shepherd's Bush Green, excessive force had been used. Large numbers of police officers from the "TSG", by which I understand her to mean the Territorial Support Group, had attended. She indicated that complaints were being or would be made about this. She said that it could not be right for such force to be used against peaceful protestors.

Caul Grant

45 Mr Grant began by saying that, by dealing myself with his application to adjourn the hearing on Friday 9 July, I have acted in violation of Article 6 ECHR, because a judge cannot fairly consider whether to vary his own order.

46 Next, he said that he had suffered a series of wrongs at the hands of various emanations of the State and legal professionals. These began with the death of his baby at the age of 15 months on 4 September 1994. There had been litigation for medical negligence arising out of that. Mr Grant was dissatisfied with the way the litigation was handled. He had spray painted the offices of the lawyers involved. There was a series of legal proceedings, some brought against him and others brought by him. He was aggrieved by the outcome of these and considered the judiciary as an institution to be corrupt.

47 Mr Grant had filed a claim against the Ministry of Justice and the Secretary of State for the Home Department seeking compensation of £150 million for these wrongs. Enquiries with the court office revealed that, on 2 December 2020, it was struck out by Master Dagnall as totally without merit.

48 Mr Grant relied on Article 7 ECHR, which he said was inspired by the principles underlying Article 61 of Magna Carta. The land being occupied had been seized as a partial remedy for the wrongs he claimed to have suffered. If he were compensated for those wrongs, he would be prepared to return the land.

49 Reliance was also placed on ss. 6 and 7 of the Human Rights Act 1998 ("HRA").

Discussion

50 As I made clear in my Orders of 2 and 9 July, there are two separate questions for me to determine: first, whether to vary Master McCloud's Order so that the hearing of the claim for possession can proceed immediately; second, if the Master's Order is so varied, whether to make an order for possession. Before I deal with these issues, however, I should briefly address Mr Grant's submission that I acted contrary to Article 6 ECHR when I refused his application for an adjournment of the hearing on Friday 9 July.

Article 6 ECHR

51 Article 6 provides that, in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing by an independent and impartial tribunal. In our legal system, court orders are sometimes made on paper without a hearing. There is no principle which prevents a judge from hearing an application to set aside his own order. When the order in question was made on paper without a hearing, it is both convenient and common for an application to set the order aside to be heard by the same judge. This does not give cause for doubting the independence or impartiality of the judge, because reasonable people would understand that judges can and do change their minds when faced with cogent argument. Insofar as Mr Grant's submission amounted to an application that I recuse myself, I decline to do so.

Variation of Master McCloud's Order

52 I have carefully considered the detailed judgment handed down on 5 July 2021, in which Master McCloud gave reasons for making her Order: see [2021] EWHC 1857 (QB). The reasons for setting a relatively relaxed timetable for the exchange of evidence, leading to a hearing on 27 August 2021 were two: first, the need to gather adequate evidence on which to perform the necessarily fact-sensitive balancing exercise required by Articles 10 and 11 ECHR; and second her own availability. It was understandable that she took the latter into account, given that at that stage she was due to hear the claim.

53 After transfer of responsibility for the case to me, the second reason does not now apply. As to the first, the procedure to be adopted in a possession claim is more flexible than in some other kinds of proceedings. Thus, as noted at para. 14 above, in a case where a claimant seeks possession of land that is not residential property and is occupied by trespassers, CPR r. 55.5(2) enables a first hearing to be set only 2 clear days after service

of the claim form. At that hearing, CPR r. 55.8 enables the court either to decide the claim there and then or to give case management directions. In *Mayor of London v Hall* [2010] EWCA Civ 817, [2011] 1 WLR 504, Lord Neuberger MR (with whom Arden and Stanley Burnton LJJ agreed), noted at [15] that: "CPR Pt 55 understandably envisages an abbreviated procedure in relation to 'a possession claim against trespassers'".

54 Of course, most claims against trespassers will not involve Article 10 and/or 11 balancing exercises. But even where they do, the appropriate case management directions will vary greatly depending on the scope of the dispute and the judge's initial assessment of the merits. Even where there is a significant factual dispute, it may well be possible to gather the necessary evidence over a period of days rather than weeks. In *Hall*, the Court of Appeal rejected the submission that a timetable similar to the one in this case had prejudiced the defendants: see at [15]-[20]. In that case, the hearing took much longer than this one, but there was a greater number of complex legal issues and several parties were represented.

55 It is also important to be aware that the practical consequence of setting a relatively relaxed timetable for the submission of evidence is that the claimant (and any third parties who are adversely affected) will be without a remedy while the evidence is being prepared. In some cases, that may mean that the occupiers have achieved their aim before the claim can be adjudicated. The courts must be astute to avoid a situation in which the need to assess proportionality under the ECHR becomes a *de facto* licence to trespassers to occupy public (or private) land.

56 In a case such as the present, it was certainly appropriate that there should be some time for the occupiers to file evidence, if they wished to do so. But they have now had more than a week since my Order of 2 July was served on them and several days before that following Master McCloud's Order. No evidence has been filed; and none of those who addressed me identified any particular witness upon whose evidence the occupiers wished to rely, but could not because of lack of time. Mr Grant told me that he had not had time to read everything served on him, but the papers were modest in volume and Namaste and Paige had clearly read them carefully.

57 Moreover, in the light of the helpful discussion in court on Friday 9 July 2021, it is clear that there are no significant areas of factual dispute. The current size of the camp (about 33 tents) is agreed. Mr Tempest is prepared to proceed on the basis of what Namaste, Paige and Mr Grant have said about the maximum number of tents in the past (63) and about the aims and objectives of the occupiers. He does not invite me to find as a fact that there have been any significant verbal or physical altercations with the public or any significant litter or damage to the land. He does not invite me to decide the case on the basis that the camp poses a significant public health risk.

58 It is therefore clear that the dispute between the parties turns on the legal consequences of a largely agreed set of facts. In those circumstances, I am satisfied that the information before me is sufficient to enable me to perform any balancing exercise required by Articles 10 and 11 ECHR.

59 I shall accordingly revoke the directions given by Master McCloud on 29 June and proceed to determine the claim.

60 Given that the essential facts are not in dispute, it is also not necessary for me to hear oral evidence.

The claim

The occupiers as trespassers

61 The Claimant has established by evidence that it is the freeholder of Clapham Common. Although it is a public authority, it is entitled to enforce its private law rights.

62 The occupiers may have entered Clapham Common lawfully, but their permission to remain was not unlimited. Byelaw 9 provides as follows:

> "No person shall without the consent of the council erect a tent or use a vehicle, caravan or other structure for the purpose of camping."

63 Park byelaws have occasionally troubled legal philosophers. But there is no room for doubt that the occupiers have erected and are using tents for the purpose of camping. Subject to the points made by Mr Grant, they are occupying the land as trespassers, because they do not have the permission of the landowner to camp there: see by analogy the reasoning in *Hall*, at [40]. They are also in breach of byelaw 10, which prohibits the lighting of fires.

64 Clause 61 of Magna Carta conferred certain rights and powers on the barons who forced King John to issue Magna Carta in 1215. It was removed when the Charter was reissued in 1216 and has never been part of English statute law. It is not in force and does not confer any rights on the occupiers at all.

65 Mr Grant relies on Article 7 ECHR, which is scheduled to the HRA. That is entitled "No punishment without law" and provides at paragraph 1 as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

66 This applies when someone is charged with a criminal offence. None of the occupiers is so charged at the present time. If any of them were charged with an offence, Article 7 would require only that the act or omission said to constitute the offence was criminal at the time committed. Article 7 is therefore not relevant.

67 Mr Tempest for the Council told me that these arguments have been considered before by other judges in cases involving the defendants (most recently by Master Eastman, who granted a possession order in respect of Shepherd's Bush Green) and that they have been held to be totally without merit. I would endorse that description.

68 In his submissions today, Mr Grant made reference to s. 6(1) HRA, which makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, i.e. a right guaranteed by the ECHR. By s. 6(6) an act includes an omission. Mr

Grant is right that these provisions are relevant to this claim. Their effect is to prevent the Court from granting a remedy which would be incompatible with the occupiers' Convention rights.

69 Section 7(1) HRA enables a person to rely on Convention rights in any legal proceedings relating to an unlawful act if the person is, or would be, a victim of it. This too is relevant. There is no dispute that, if a possession order would breach the occupiers' Convention rights, they would be "victims" for the purposes of the HRA. This means that Mr Grant and the other occupiers can rely on their Convention rights.

70 The question for me is whether a possession order *would* be incompatible with the occupiers' Convention rights.

Articles 10 and 11 ECHR: the law

71 Articles 10 and 11 ECHR guarantee respectively the right to freedom of expression and the right to freedom of peaceful assembly and free association with others. In each case, a public authority may interfere with the right if the interference is "prescribed by law" and "necessary in a democratic society" for "the prevention of disorder or crime" or "the protection of the… rights of others" (Article 10) or "the protection of the rights and freedoms of others" (Article 11).

72 In *Hall*, the Court of Appeal was considering appeals against orders for possession and associated injunctive relief relating to Parliament Square Gardens, opposite the Palace of Westminster, where a group called Democracy Village had set up camp. At [37], Lord Neuberger said this:

> "The right to express views publicly, particularly on the important issues about which the defendants feel so strongly, and the right of the defendants to assemble for the purpose of expressing and discussing those views, extends to the manner in which the defendants wish to express their views and to the location where they wish to express and exchange their views. If it were otherwise, these fundamental human rights would be at risk of emasculation. Accordingly, the defendants' desire to express their views in Parliament Square, the open space opposite the main entrance to the Houses of Parliament, and to do so in the form of the Democracy Village, on the basis of relatively long-term occupation with tents and placards, are all, in my opinion, within the scope of articles 10 and 11."

73 At [43], Lord Neuberger noted that, where Articles 10 and 11 are in play, the question whether any interference is "necessary in a democratic society" for one of the permitted purposes (i.e. whether it is proportionate) is for the court, not the public authority seeking possession.

74 At [49], Lord Neuberger said this:

> "The importance of Parliament Square as a location for demonstrations and the importance of the right to demonstrate each cut both ways in this case. It is important that the Democracy Village members are able to express their views through their encampment on PSG [Parliament Square Green], just

> opposite the Houses of Parliament. However, as Arden LJ rightly said, it is equally important to all the other people who wish to demonstrate on PSG that the Democracy Village is removed, in the light of the judge's finding, in line with the mayor's view, and (it should be added) the preponderance of the evidence, that the presence of the Democracy Village impedes the ability of others to demonstrate there. Additionally, there are the rights of those who simply want to walk or wander in PSG, not perhaps Convention rights, but none the less important rights connected with freedom and self-expression. The fact that Democracy Village have been effectively in exclusive occupation of PSG for over two months is also relevant, especially as there is no sign of the camp being struck, as the defendants have, it may be said, had some 70 days to make their point."

75 In an earlier decision, *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, the Court of Appeal had held an attempt by the Government to prevent a protest camp at Aldermaston to be unlawful. As Lord Neuberger noted at [49] of his judgment in *Hall*, however:

> "the facts of that case were very different from those in this case. The protest camp was on a piece of land adjoining the highway by Aldermaston, and the protest was held one weekend every month, and had taken place for over 20 years; further, there was no evidence of any significant obstruction of the highway or to any other public, or indeed private, right; in addition, no attempt had been made by the Secretary of State to enforce his right, whether to possession or anything else, for all that time. Further, in that case, the need to balance the rights of the defendants to demonstrate against the rights of others to demonstrate did not arise, as of course it does here."

76 In *Hall*, the Court of Appeal refused permission save in relation to one protestor who was not part of the main group, who had been present on Parliament Square for a much longer time and where the balancing exercise fell to be performed afresh: [71].

77 *Samede* [2012] EWCA Civ 160, [2012] PTSR 1624, was about an encampment established by the "Occupy Movement" at St Paul's Cathedral churchyard in the City of London in 2011. In that case, the first instance hearing of the City Corporation's claim for a possession order took five days. The possession order was granted.

78 In the Court of Appeal, Lord Neuberger MR (with whom Stanley Burnton and McFarlane LJJ agreed) noted at [39] that any analysis of the proportionality of the interference with Article 10 and 11 rights had to include a careful factual analysis encompassing all relevant factors. These factors included but were not limited to

> "the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public."

79 At [40]-[41], Lord Neuberger identified two further factors: (a) whether the views giving rise to the protest relate to "very important issues" and whether they are "views which many would see as being of considerable breadth, depth and relevance"; and (b) whether the protesters "believed in the views they were expressing".

80 This list of factors was recently cited with approval by Lords Hamblen and Stephens in their joint judgment for the Supreme Court in *Ziegler*. That was a criminal case in which protestors against the arms trade had chained themselves to objects on a highway leading to a major arms fair. They were removed after about 90 minutes and later charged with the offence of wilful obstruction of a highway. The question was whether they had a "lawful excuse".

81 At the end of [72], Lords Hamblen and Stephens noted that "it is hard to conceive of any situation in which it would be proportionate for protesters to interfere with the rights of others based on views in which the protesters did not believe." At [73]-[77], he considered the importance of the place where the protest takes place. This was relevant both to the extent of the impact on the rights of others and to the significance of the protest site to the objects of the protestors. In the *Samede* case, the site was significant because it was in the centre of the City of London and the protest was against capitalism. In the *Ziegler* case, the site was significant because it was close to the arms fair against which the protest was directed.

Articles 10 and 11: are they engaged in this case?

82 In the paradigm case where Articles 10 and 11 are engaged, the group against whom action is being taken will share a single, clearly identified political objective. That was so in *Ziegler*, where the protesters were opposed to the arms trade and had chosen the site of their protest because there was an arms fair taking place nearby and they wanted to draw attention to what was happening there and disrupt deliveries to it: see [1] of the judgment of Lords Hamblen and Stephens. Similarly, in *Tabernacle*, the Aldermaston protestors were manifesting their long-standing opposition to nuclear weapons and the site of their protest (near an Air Force base) was chosen accordingly.

83 The protection of Articles 10 and 11 is not, however, limited to cases where the protestors all share a single, focussed political objective. Cases such as *Hall* and *Samede* show that it extends also to cases where the objectives of the protestors are more diffuse and wide-ranging. Even very generalised expressions of opposition to the institutions of the State, or the political system, or an ideology said to underpin it (such as "capitalism"), can qualify. So too can protests where individual protestors with different concerns come together under a broad banner.

84 Here, it is clear from the submissions I heard that the members of the group in occupation have a variety of aims and objectives. As Master McCloud noted, those of Paige were plainly within the paradigm of relatively focussed political protest. She understood the group to be protesting against Government policy in relation to Covid-19. There is no doubt that such a protest falls squarely within the protections of Articles 10 and 11. There is a strong public interest in allowing those who believe that the Government has unjustifiably restricted the rights and freedoms of the public to communicate and manifest that view. (Of course, there is an equal public interest in permitting the

manifestation of views supportive of the Government's policy on this topic, or views that the Government has not gone far enough.)

85 Namaste initially said that the group was not involved in a protest but an act of rebellion. Namaste's submissions indicated a much broader range of concerns than Paige's, but when they are considered as a whole, it is plain that Namaste understood the occupation to be, in part at least, an expressive act. If the aims and objective of the protestors in *Hall* and *Samede* attracted the protection of Articles 10 and 11, so do those of Namaste.

86 Mr Grant's position fits less easily into the Article 10 and 11 paradigm. He did not say that he was seeking to manifest his views with the aim of persuading others. His notice (see para. 4 above) and submissions to me (see paras 45 to 49 above) suggest that he sees the occupation as a lawful seizure of land, rather than an act of expression or protest. At first blush, it might be said that a court hearing a possession claim against a person claiming to occupy land as of right should confine itself to determining whether the entitlement is made out (which, as I have shown, it is not). But, having considered Mr Grant's submissions as a whole, that is too narrow an analysis. In my judgment, Mr Grant can be characterised both as asserting a legal right to occupy the land and, at the same time, as engaged in an expressive act of protest against the institutions of the State by whom he believes he has been wronged. In his case, the protest is not focussed on a single political objective, but it still attracts the protection of Articles 10 and 11 ECHR.

87 In the light of this analysis, it is necessary to consider whether the grant of a possession order is "necessary in a democratic society" for one of the permitted purposes.

Articles 10 and 11: the balancing exercise

88 In performing the balancing exercise required by Articles 10 and 11 ECHR, I have started by considering the factors identified by Lord Neuberger in *Samede* at [39] and endorsed by Lord Hamblen and Stephens in *Ziegler* at [17]. It is for me to perform the exercise, and not simply review the performance of that exercise by the Council: see *Hall*, [43]. This means that the exercise must be performed as at today's date, rather than the date when the claim was filed.

89 The first of Lord Neuberger's factors is the extent to which the continuation of the protest would breach domestic law. In this case, continued camping is prohibited by the Byelaws, as is the lighting of fires. The authorities make clear that this cannot be determinative, but it is a starting point and, in my judgment, an important one. The fact that a particular activity has been prohibited by a duly constituted and democratically accountable authority, acting under powers conferred by Parliament, should not be lightly brushed aside.

90 The second factor is the importance of the precise location to the protestors. As I have said, in *Tabernacle*, *Hall*, *Samede* and *Ziegler*, the site was for one reason or another significant. In all those cases, the expressive force of the protest would have been much diminished if the protestors had been required to leave the site and protest elsewhere. Here, by contrast, Mr Tempest was right to submit that there was no evidence at all that Clapham Common had any special significance to the occupiers. Having moved from Shepherd's Bush Green, Clapham Common was just a convenient place on which to pitch their tents and engage with the public. An order for possession will not prevent them

from continuing to express their views and engage with the public. Indeed, it will not even prevent them from doing so on Clapham Common if they so choose. It will simply mean that they cannot continue to camp there. That substantially reduces the extent to which a possession order will interfere with their Article 10 and 11 rights.

91 The third factor is the duration of the protest. In this regard, the difference between the outcomes in *Tabernacle* and *Hall* is instructive. In *Taberncale*, the protest was not continuous. It had taken place on one weekend every month for over 20 years. In *Hall*, by contrast, the protestors were in continuous occupation and the fact that they had been there for 70 days meant that they had a fair chance to make their point: see at [49]. Similarly, in *Samede*, it was relevant that the "the occupation has already continued for months": see at [49]. This case, like *Samede*, is a case of continuous occupation. The period of occupation is somewhat shorter, but the protestors have nonetheless been on Clapham Common for the best part of a month. Given that their aims and objectives have no connection with the site of the protest, they have had ample opportunity to make their points by camping on Clapham Common. As Paige and Mr Grant pointed out, they have also used the various public hearings connected with these and previous proceedings to publicise their causes.

92 There was a suggestion by Paige that the protesters may decide that there was no need to continue after 19 July. But it is right to record that when she made this suggestion she was immediately contradicted by someone else in court, who shouted that the Prime Minister's announcement about the relaxation of restrictions had already been "cancelled". Mr Grant's email of 6 July was expressly non-committal on the question whether the changes slated for 19 July would make any difference. Given the difference in aims, objectives and approach between the various individuals from whom I heard, I am sure that it would be wrong to place any weight on Paige's suggestion. I must proceed on the basis that, unless I grant the order sought or the occupation is brought to end by some other means of enforcement, it may last for a further substantial period.

93 The fourth factor requires consideration of the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public. As to this, Mr Tempest accepted that, in the light of the submissions made by Namaste and Paige, he did not need to put his case on the basis that the camp gave rise to significant concerns in terms of public order or public health. He could not contend that there was a significant litter problem or that significant damage was being done to the land. The protestors are not obstructing a highway (as in *Ziegler*) or impeding access to a place of worship (as in *Samede*). The camp occupies a relatively small piece of land. Members of the public can still use other parts of the Common.

94 The size of the camp is presently relatively small, as the 33 or so tents are pitched quite close together. However, the size has fluctuated over time. Even on the basis advanced by Paige and Namaste, there were at one time 63 tents. It is also relevant that the occupiers are publicly asserting that they have seized part of the Common. Although members of the public can still use other parts of it, the establishment of a camp of this kind, of fluctuating size, by occupiers claiming to occupy it as of right, in my judgment represents a significant interference with the rights of the public to use and enjoy the Common.

95 As Lord Neuberger recognised in *Hall,* at [49], the rights of those "who simply want to walk or wander" may not be Convention rights, but they are "none the less important rights connected with freedom and self-expression". That statement was, of course, made long before the start of the Covid-19 pandemic. Experience since then demonstrates that public parks and open spaces are vital amenities, particularly for those not lucky enough to have outside space of their own. When stringent restrictions were in force, they were often in practice the only outdoor places where people could go for exercise and (when permitted) recreation. Fewer restrictions are now in place and the Government has announced a further substantial relaxation of the remaining ones on 19 July. Nevertheless, at a time when infection rates and hospitalisations are increasing again, public parks and open spaces have real importance to people who are vulnerable to Covid-19 or anxious about it and who wish to meet friends or family members in the open air. A protest which prevents members of the public from using even part of a public park or open space therefore has a significant impact on the rights of the public. That impact must be taken into account in the balancing exercise.

96 Moreover, the effect of the occupation goes beyond the physical impediment it presents to members of the public wishing to use the part of the Common on which the camp has been established. Even on the agreed footing that the occupiers are not themselves aggressive or abusive, they are exceeding their permission as licensees and acting contrary to the Byelaws and therefore unlawfully (subject to Articles 10 and 11 ECHR). Byelaws and other regulations governing the use of public space are the mechanism by which society ensures that a particular individual or group does not curtail the public's right to enjoy that space. Other users of the Common are therefore understandably likely to be wary and resentful of those acting in contravention of the Byelaws, particularly where – as here – they are claiming to do so as of right. It is not surprising that the Council has received a significant number of complaints from local residents. If a group is permitted to flout the byelaws with impunity for extended periods, other users will feel justifiably aggrieved and respect for the byelaws may start to break down. This impact too must be given weight in the balancing exercise.

97 Taking all of these matters into account, I conclude (in summary) as follows:

(a) The grant of the possession order sought would interfere with the Article 10 and 11 rights of the occupiers.

(b) However, the extent of the interference is limited given that:

(i) they have already been able to express their views through continuous occupation of the site for the best part of a month;

(ii) there is no evidence that Clapham Common had any special significance to them; and

(iii) an order for possession would not prevent them from continuing to express their views and engage with the public by means other than camping on the Common.

(c) Against the interference with the occupier's Article 10 and 11 rights, it is necessary to weigh the facts that the occupation:

(i) interferes with important rights of the public to use and enjoy part of a public open space, which have been and are of special significance in the context of the Covid-19 pandemic;

(ii) is in breach of Byelaws made by a democratically accountable authority under powers conferred by Parliament; and

(iii) is likely to make other users of the space understandably resentful and aggrieved and to undermine respect for the Byelaws more generally.

(d) These matters taken together justify the conclusion that there is a "pressing social need" to make the possession order. The limited interference with the occupiers' Article 10 and 11 rights is justifiable and proportionate.

Conclusion and disposal

98 For these reasons, the Council is in my judgment entitled to an order for possession. Although none of the occupiers invited me to make any order other than one granting full possession forthwith, I have nonetheless considered of my own motion whether any lesser order would suffice, in accordance with the principles in *Samede* at [51]-[55].

99 I considered whether I should make an order permitting the occupation to continue until 19 July on the basis that the occupiers might perceive its continuation to be unnecessary after that date. But, even if the planned relaxation of restrictions on 19 July goes ahead as announced, there can be no certainty that any of the occupiers would ultimately take the view that it was unnecessary to continue the occupation after that date. On the basis of the submissions made to me, it seems very unlikely that all of them would.

100 Similarly, because the occupiers have differing aims and approaches and are a constantly shifting group, it would not be practically possible for undertakings to be given which bound them all. In any event, an order granting anything less than full possession would give rise to very substantial enforcement difficulties, with concomitant public costs.

101 This means that, in my judgment, there is no realistic alternative to the order sought by the Council.

102 I have been favourably impressed by the level-headed and reasonable submissions from some of those in occupation. I very much hope that they and their colleagues will recognise that their points have been heard and their rights and interests taken into account, even though the rights and interests of others have prevailed. It would be in everyone's interests if they were now to leave the camp peacefully and of their own accord. Ultimately, however, orders of the Court must be obeyed and can be enforced.