Neutral Citation Number: [2010] EWCA Civ 817

Case No: A2/2010/1603,1592,1598,1609,1602,1604,1605 & 1614

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
Mr Justice Griffith Williams
2010 EWHC 1613

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2010

Before :

THE MASTER OF THE ROLLS
LADY JUSTICE ARDEN
and
LORD JUSTICE STANLEY BURNTON

- -

Between :

(1) REBECCA HALL **Appellants**
(2) BRIAN HAW
(3) BARBARA TUCKER
(8) CHRIS COVERDALE
(11) FRIEND (ALSO KNOW AS IAN ROBERT HOBBS)
(12) STUART HOLMES
(15) PEACE LITTLE
(20) PERSONS UNKNOWN

- and -

THE MAYOR OF LONDON (ON BEHALF OF THE GREATER LONDON AUTHORITY) **Respondent**

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- -

Jan Luba QC, Mark Wonnacott, Stephanie Harrison and Jon Beckley (instructed by Bindmans) for the 1st Appellant
Martin Westgate QC and Paul Harris (instructed by **Birnberg Pierce & Partners**) for the **2nd Appellant**
Barbara Tucker, Chris Coverdale, Friend, Stuart Holmes, Peace Little and Persons Unknown all appeared In Person
Ashley Underwood QC and David Forsdick (instructed by **Eversheds LLP**) for the Respondent

Hearing date : 9 July 2010

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Approved Judgment

Lord Neuberger MR:

1. There are before us applications for permission to appeal, which have been ordered to be heard on the basis that, if permission is given, the hearing of the appeal should follow immediately. We have heard the matter on a "rolled up" basis; in other words, the application and the projected appeal have been, in effect, argued together.

2. There are two orders which are sought to be appealed, and they were made by Griffith Williams J, following a hearing spread over eight days between 14 and 24 June 2010, with judgment given on 29 June - [2010] EWHC 1613 (QB). Both orders were made in favour of the claimant, the Mayor of London, suing "on behalf of the Greater London Authority". The first was an order for possession of Parliament Square Gardens London SW1 ("PSG"), against seventeen out of nineteen named defendants and "Persons Unknown". The second order was an injunction requiring fourteen out of the nineteen defendants and "Persons Unknown" (a) to dismantle any structures on, (b) (save in the case of three of the defendants, Mr Haw, Mrs Tucker and Ms Sweet) to cease to organise assemblies on, and (c) to leave, PSG.

The legislative background

3. The principal statutory provision governing the ownership and control of PSG is section 384 of the Greater London Authority Act 1999 ("section 384"), which is in the following terms:

> "(1) The land comprised in the site of the central garden of Parliament Square (which, at the passing of this Act, is vested in the Secretary of State for Culture, Media and Sport) is by this subsection transferred to and vested in Her Majesty as part of the hereditary possessions and revenues of Her Majesty.
>
> (2) Nothing in subsection (1) above affects—
>
> > (a) any sewers, cables, mains, pipes or other apparatus under that site, or
> >
> > (b) any interest which was, immediately before the passing of this Act, vested in London Regional Transport or any of its subsidiaries.
>
> (3) The care, control, management and regulation of the central garden of Parliament Square shall be functions of the Authority.
>
> (4) It shall be the duty of the Authority well and sufficiently to light, cleanse, water, pave, repair and keep in good order and condition the central garden of Parliament Square.

> (5) The functions conferred or imposed on the Authority by this section are in addition to any other functions of the Authority.
>
> (6) In consequence of the preceding provisions of this section, any functions of the Secretary of State under or by virtue of section 22 of the Crown Lands Act 1851 (duties and powers of management in relation to the royal parks, gardens and possessions there mentioned), so far as relating to the whole or any part of the central garden of Parliament Square, shall determine.
>
> (7) Subsections (3) and (4) above shall have effect notwithstanding any law, statute, custom or usage to the contrary.
>
> (8) Any functions conferred or imposed on the Authority by virtue of this section shall be functions of the Authority which are exercisable by the Mayor acting on behalf of the Authority.
>
> (9) In this section 'the central garden of Parliament Square' means the site in Parliament Square on which the Minister of Works was authorised by the Parliament Square (Improvement) Act 1949 to lay out the garden referred to in that Act as 'the new central garden'."

4. It is also relevant to refer to the next section of the same Act ("section 385") which provides as follows, so far as is relevant:

> "(1) The Authority may make such byelaws to be observed by persons using Trafalgar Square or Parliament Square Garden as the Authority considers necessary for securing the proper management of those Squares and the preservation of order and the prevention of abuses there.
>
> (2) Byelaws under this section may designate specified provisions of the byelaws as trading byelaws.
>
> (3) A person who contravenes or fails to comply with any byelaw under this section shall be guilty of an offence and liable on summary conviction—
>
> > (a) if the byelaw is a trading byelaw, to a fine not exceeding level 3 on the standard scale, or
> >
> > (b) in any other case, to a fine not exceeding level 1 on the standard scale.
>
> ….."

5. It is also convenient to set out some of the Trafalgar Square and Parliament Square Gardens Byelaws 2000 ("the Byelaws"), made pursuant to section 385(1):

> "3. No person shall within the Squares …

> (6) fail to comply with a reasonable direction given by an authorised person to leave the Squares; …
>
> 5. Unless acting in accordance with permission given in writing by …the Mayor …no person shall within the Squares
>
> (1) attach any article to any tree, plinth, plant box, seat, railing fence or other structure;
>
> (2) interfere with any notice or sign;
>
> (3) exhibit any notice, advertisement or any other written or pictorial matter; ….
>
> (7) camp, or erect or cause to be erected any structure, tent or enclosure; …
>
> (9) make or give a public speech or address; …
>
> (10) organise or take part in any assembly, display, performance, representation, parade, procession, review or theatrical event; …
>
> (13) go on any shrubbery or flower bed. …"

The factual background to the projected appeal

6. The basic facts giving rise to these proceedings are well summarised in the opening five paragraphs of the Judge's judgment:

> "1. … PSG … comprises the central area of Parliament Square around which runs the public highway, including in places pavement. To the east is the Palace of Westminster, to the south Westminster Abbey, to the west the Supreme Court and to the north, Whitehall and various government buildings. It is a highly important open space and garden at the heart of London and our Parliamentary democracy; it is an area of significant historic and symbolic value worldwide.
>
> 2. PSG is part of the Westminster Abbey and Parliament Square conservation area and a UNESCO Designated World Heritage Site … . It is classified as Grade II on English Heritages Register of parks and gardens with special historic interest. It provides world renowned views of both the Palace of Westminster and Westminster Abbey.
>
> 3. On 1 May 2010, four separate groups said to represent the Four Horsemen of the Apocalypse and which had formed up at different locations across London arrived and set up a camp which they named their 'Democracy Village'. Their then stated intention was to remain until 6 May 2010, the date of the General Election but they have continued to occupy PSG and (on the evidence of a number of the defendants …) have every intention to do so for the foreseeable future.

> 4. Brian Haw (the second defendant) has been camping lawfully since 2001 on a pavement on the eastern side of PSG - a part of the highway controlled by Westminster City Council. He was joined some years later by Barbara Tucker (the third defendant). They have been conducting their own protest for Love, Peace, Justice for All. They and those associated with them are in no way a part of the Democracy Village.
>
> 5. The defendants who are a part of the Democracy Village are demonstrating variously in respect of a number of causes – these include the war in Afghanistan, the war in Iraq, genocide, war crimes and world wide environmental issues."

7. As this attenuated summary suggests, the full factual background, particularly in the view of the defendants, is wide-ranging and involves very fundamental issues indeed. This was clear from the Judge's summary of the evidence he read and heard, and it was brought home to us by the eloquent oral submissions we received from some of the defendants, revealing their strong feelings of moral and ethical outrage at various issues of undoubted public importance, identified in paragraph 5 of the judgment below. Bearing in mind the fundamental nature of these issues, and the location where the defendants are gathered, the centrality of the two freedoms, which are undoubtedly engaged in these proceedings, freedom of expression and freedom of assembly, could not be placed under a sharper focus.

8. Mr Haw, the second defendant, (represented at first instance by Mr Harris, who was led in this court by Mr Westgate QC) has been a virtually permanent fixture on the pavement area on the east of PSG, facing the Houses of Parliament, since 2001. While some might regard his presence with his placards as an eyesore in the face of Parliament, others see him as something of a national treasure, embodying the right of free speech in the very eye of the democratic storm. There have been various attempts to remove him from the pavement area, but none have so far succeeded, and the present proceedings do not seek to remove him from there, at least directly. At some point, he erected a tent on the grassed area of PSG ("the grassed area") immediately adjoining his pitch on the pavement; there is some dispute as to when that started, he says in 2001, the evidence on behalf of the Mayor is much later. The fourth defendant, Ms Tucker, who represented herself, has joined Mr Haw from time to time, as has the fifth defendant, Ms Sweet.

9. The other defendants have been on PSG for all, or much, of the time since Democracy Village started up at the beginning of May 2010. Of those defendants, Ms Hall, the first defendant, and a member of Democracy Village, was represented by Mr Luba QC, Mr Wonnacott, Ms Harrison and Mr Beckley. The other named defendants are members of Democracy Village, and, insofar as they took part in the proceedings below, they acted in person. All of them were added as named defendants on their application, as the proceedings originally identified only three named defendants, as well as "Persons Unknown".

10. After hearing argument and evidence, the Judge made the order for possession and granted the injunction against the great majority of the named defendants, although he excluded two defendants from each order. In particular, the Judge decided that no injunction should be granted against Ms Hall, although she was included in the order for possession.

11. The application for permission to appeal was made by a number of the defendants, and Smith LJ ordered that the application be heard in open court, with appeal to follow if permission was granted. I have already referred to the fact that Mr Haw was represented before us; Mrs Tucker represented herself. Of the Democracy Village occupiers, I have already mentioned that Ms Hall was represented; other members of Democracy Village, Mr Coverdale, Friend, Mr Holmes, Mr Knight, and Peace Little (to all of whom the injunction and the order for possession extended) made oral submissions on their own behalf.

The issues on this appeal

12. A number of issues have been raised. First, whether the trial below was fair - whether it complied with article 6 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"). Secondly, whether the claim for possession was properly constituted. Thirdly, whether the order for possession and the injunction complied with articles 10 and 11 of the Convention in terms of proportionality. Fourthly, whether an injunction was a permissible remedy in the light of section 385 and the Byelaws. Fifthly, there are issues concerning costs.

13. Mr Haw (together with Mrs Tucker) raises three arguments specific to his case, one relating to the speed of the proceedings, the second to the form of the possession application and order against him, and the third relating to proportionality.

14. I shall take these various issues in turn, save that those relating to Mr Haw will be discussed before the question of costs.

Did the defendants have a fair trial?

15. The gap between the issue of these proceedings, 26 May 2010, and the commencement of the hearing before Griffith Williams J, 14 June 2010, was undoubtedly very short. However, so far as the domestic procedural aspect is concerned, CPR Part 55 understandably envisages an abbreviated procedure in relation to "a possession claim against trespassers", and that procedure is mandatory in a case such as the present. Injunctive relief, if justified, should, as a matter of principle, be available speedily.

16. Having said that, this was an unusual case, and it is right to consider whether the defendants were afforded a fair trial which complies with the domestic law and with article 6 (although it would be a rare case where the two requirements would not march together). There is no reason to think that there are any areas of law or fact which could be raised other than those identified in paragraph 12 above: if there had been, no doubt Mr Luba or Mr Westgate would have drawn them to our attention. The second and fourth issues principally involve legal argument and have been fully canvassed by counsel. The only area where it is, at least on the face of it, conceivable that more time would have been needed to gather evidence or argument would be on proportionality. However, having heard the arguments and read the evidence and the judgment, I am quite satisfied that no prejudice whatever was caused to any of the defendants (other than Mr Haw) in relation to the presentation of their respective cases on this issue, whether in the form of evidence or arguments, by the short time between the issue of proceedings and the hearing of the claims.

17. The principal concerns expressed by the defendants who pursued this argument related to the importance attached to the issues which those defendants who participated in the Democracy Village stood for (and, in Mrs Tucker's case, the issues which Mr Haw stood for). Those issues are of prime public importance, and in the first rank of topics which article 10 is concerned to respect, in that they are political in nature. The importance of having an unrestricted right to express publicly and strongly a controversial view on a political, or any other, topic cannot be doubted: it is of the essence of a free democratic society and should be vigilantly protected by the legislature, the executive and the judiciary. Accordingly, it was unnecessary for the defendants in this case to expand on their views, with which many may agree strongly and many may disagree strongly, relating to the environment, alleged genocide, the wars in Iraq and Afghanistan, and more specific issues such as the use of depleted uranium.

18. It is true that Mr Holmes (and possibly other defendants) has applied for legal aid, and there has not been the time to have their applications processed. However, in my view, no prejudice has been caused to him as a result of his having to represent himself. The issues have been fully canvassed with the assistance of six barristers, and their instructing solicitors, acting for Mr Haw and Ms Hall, and the factual issues have been fully aired in the form of the evidence put before the Judge. Indeed, without in any way intending to criticise anyone (as it is inevitable where so many defendants separately advance their respective cases), the issues were aired more fully below than they would have been if the unrepresented defendants had been represented.

19. It is also right to mention that this was not a case where the parties were forced to present their respective cases on the first occasion that the case came before a judge for hearing. The case came before Maddison J on 3 June, when he gave certain directions, and it came before him again on 7 June, when he gave further directions. The defendants therefore had significantly more time to prepare their respective cases than the minimum which they could have been given under the CPR – and quite rightly in the circumstances. This was not a case where they can

have been taken by surprise at the hearing proceeding on the 14 June. Further, because Griffith Williams J heard evidence from any party who reasonably wished to give evidence, there was time for further consideration to be given to arguments and evidence during the ten days over which the hearing was spread.

20. Accordingly, even ignoring the point that the Court of Appeal is, as a matter of principle, reluctant to interfere with a judge's case management decision (a point of very considerable importance, I should add), it seems to me that Griffith Williams J was not merely entitled, but was positively correct, in deciding to proceed with the hearing and to refuse an adjournment. If the Mayor was entitled to any of the relief which he was seeking, it would be wrong to delay the proceedings for any time greater than was needed to ensure that the defendants had a fair trial.

Does the Mayor have the right to claim possession?

21. The powers and duties relating to PSG and conferred on the Greater London Authority (which I shall treat as conferred on the Mayor, both in the light of section 384(8) and for the sake of convenience) are in sections 384(3) and (4), 385(1) and (2), and the Byelaws. In my view, those provisions, as can be seen from the control which the Mayor actually exercised (gardening, refuse collection, patrolling, enforcement of by-laws), inevitably lead to the conclusion that the Mayor was, at any rate until 1 May, in possession of PSG. As the majority of the Australian High Court put it, a person has possession of certain land if he can "control access to the [land] by others, and, in general, decide how the land will be used" - *Western Australia v Ward* (2002) 213 CLR 1, paragraph 52. Of course, the grassed area of PSG is not fenced off, as it is intended to be available for general public access, but the precise nature of the acts and rights required to amount to possession varies with the nature of the land and all the circumstances – see e.g. *West Bank Estates Ltd v Arthur* [1967] AC 665, 678B-C.

22. The argument advanced by Mr Luba and Mr Wonnacott on this first issue is simply stated, and is based on clear, if somewhat historical, principles, although, at least on its face, the argument seems absurd. Simply stated the argument is this: a claim for possession of land, if made by a person who has been put out of possession, can only be successfully maintained if that person can establish title of some sort to a legal estate in the land. In particular, it is insufficient for such a person to maintain such a claim, if he is merely relying on an interest or right, falling short of a legal estate, which gives him a claim or right to use and control of the land. The reason I describe the argument as apparently absurd is that it amounts to saying that the mere fact that a person can establish that he has a right to use and control, which effectively amounts to possession, of land does not entitle him to maintain a claim for possession of that land even against someone on that land who is undoubtedly a trespasser.

23. The basis of this argument, in very summary terms, is that (i) a claim for possession of land is the modern equivalent of a claim for ejectment (see the discussion in *Secretary of State for the Environment v Meier* [2009] UKSC 11; [2009] 1 WLR 2780, paragraphs 6-7, 26-33, and 59-61); (ii) a claim for ejectment (as opposed to a claim for an injunction in trespass) could only be maintained by someone who could establish a legal estate in the land (see e.g. per Lord Mansfield CJ, and Aston and Willes JJ in *Roe v Harvey* (1769) 4 Burr 2484, 2487, 2488 and 2489 respectively, and per Bayley J in *Harper v Charlesworth* (1825) 4 B & C 574, 589); and (iii) it would represent an unprincipled departure, fraught with inconsistencies and unforeseeable problems and conundrums, to depart from this rule (as the Supreme Court of New South Wales decided in *Georgeski v Owners Corporation* [2004] NSWSC 1096).

24. This argument is inconsistent with the majority decision of this court in *Manchester Airport PLC v Dutton* [2000] 1 QB 133, where the plaintiff's case was weaker than the Mayor's case here, as the Mayor has actually enjoyed possession, and his right is statutory in origin. However, it is said by Mr Luba that the reasoning of the majority in *Dutton* [2000] 1 QB 133 is inconsistent with authority not cited to the court in that case (such as *Hill v Tupper* (1863) 2 H & C 122), and that it is inconsistent with the more principle-based approach of the House of Lords in *Meier* [2009] 1 WLR 2780, although *Dutton* [2000] 1 QB 133 was referred to without adverse criticism by Lord Rodger at paragraph 6.

25. Mr Underwood QC, who appeared with Mr Forsdick for the Mayor, argued that, as the Mayor had been in possession before the defendants wrongly dispossessed him, authority showed that, even under the arcane rules relating to ejectment proceedings, he could properly seek possession. That is true, but it is because a claimant's previous possession is evidence of his title (or, strictly speaking, of his prior seisin), but it is rebuttable evidence, and if rebutted by other evidence, the right to claim possession dissolves: see *Asher v Whitlock* (1865) LR 1 QB 1. In this case, therefore, the defendants argue, the presumption of the Mayor's right to claim possession arising from his previous possession dissolves once one looks at section 384(1), which makes it clear that the Mayor has no title, as the freehold is vested in the Crown.

26. As at present advised, at least if one ignores the full effect of sections 384 and 385, I think that there is real force in the defendants' argument, the erudition of whose contents was matched by the clarity and crispness of its presentation. Certainly, if the law governing the right to claim possession is governed by the same principles as those that governed the right to maintain a claim in ejectment, the argument seems very powerful.

27. However, there is obvious force in the point that the modern law relating to possession claims should not be shackled by the arcane and archaic rules relating to ejectment, and, in particular, that it should develop and adapt to

accommodate a claim by anyone entitled to use and control, effectively amounting to possession, of the land in question – along the lines of the views expressed by Laws LJ in *Dutton* [2000] 1 QB 133 and by Lady Hale in *Meier* [2009] 1 WLR 2780. Further, it is only my opinion in *Meier* [2009] 1 WLR 2780, paragraphs 60-69, which can be said plainly to support the argument that a possession order may be subject to the same principles as those that applied to ejectment, and even my opinion was concerned with a very different aspect of a possession order from that raised here, as the claimant's title was not in issue. Lord Rodger at [2009] 1 WLR 2780, paragraphs 6 and 7, can be said to provide only a little, and then only very indirect, support for the argument, and any such support is rather undermined by his uncritical citation of *Dutton* [2000] 1 QB 133. The effect of the brief speeches of Lord Walker and Lord Collins is neutral on the argument, save that they can be said to have adopted a relatively orthodox approach to the concept of possession. Lady Hale's observations at [2009] 1 WLR 2780, paragraphs 26-36 are rather against the argument.

28. However, even assuming that Mr Luba and Mr Wonnacott are right as a matter of general principle, the answer in this case lies in the relevant statutory provisions. As Stanley Burnton LJ pointed out, and as Mr Luba realistically accepted, it would be open to Parliament to confer by statute the power to claim possession of land on a person who has no title to that land. Although it is true that there is nothing in the 1999 Act which, in express terms, gives the Mayor the right to seek possession of PSG in his own name, I have reached the conclusion that it is implicit in sections 384 and 385 that he has that right.

29. In the two sections, the legislature has distributed different aspects of ownership and control between the Crown and the Mayor. Title is undoubtedly vested in the Crown by section 384(1), but every aspect of ownership and possession is vested in the Mayor, as part of his own statutory duty and statutory right, and not as an agent of the Crown: he has complete control and regulation of PSG. The only satisfactory reason which was advanced at the hearing for vesting title to PSG in the Crown, rather than the Mayor, is symbolic: Parliament Square (like Trafalgar Square, which enjoys the same regime) is a place of premier national significance and importance.

30. While the Crown has no function other than that of bare ownership, the Mayor decides what activities can occur on PSG, how it is to be laid out and maintained, what statues and other structures are to be erected there, who can come onto PSG, in what circumstances, what they can and cannot do when they are there, and when they have to leave. It is common ground that, if, as I consider is clear, the Mayor is the person entitled to lawful possession of PSG, he could obtain an injunction, such as that which he has obtained, as a claimant seeking an injunction in trespass only has to show that he is entitled to (or even only that he enjoyed) possession – see per Chadwick LJ, dissenting in *Dutton* [2000] 1 QB 133, 146-147. In fact, the only thing which

the Mayor cannot do in relation to PSG, on the defendants' case, is to seek possession.

31. Mr Luba argued that Parliament must have appreciated, or, more accurately, must be taken to have appreciated, the law, and that, by vesting the freehold of PSG in the Crown, it must have envisaged that only the Crown (presumably by relator action through the Attorney General) could bring proceedings for possession if PSG was invaded by squatters. He suggested that this was reinforced by the absence of a provision such as is found in section 1(2) of the Crown Estates Act 1961, which specifically bestows on the Crown Estates Commissioners the ability to perform "all such acts as belong to the Crown's rights of ownership".

32. It seems obvious that, in order for the scheme envisaged by sections 384 and 385 to work properly, the Mayor should have the ability to seek possession in his own name of PSG. It cannot have been envisaged that he would have to ask the Attorney General to bring proceedings, with the delay, uncertainty and cost which such a course would involve. Indeed, the Attorney General would have a discretion whether to bring a relator action, and, for reasons which seemed good to him, he might refuse to seek an order for possession. It would be scarcely consistent with the powers and duties conferred on the Mayor by sections 384 and 385 if he could be denied the ability to obtain possession of PSG. The national importance of PSG underlines the need for minimum delay and maximum certainty and simplicity where summary action is required.

33. Reading the two sections together, they show that while bare title to PSG is vested in the Crown, the Mayor is given the power to do everything in relation to the land. The Mayor can, in my view, rely on the two sections to show not merely that he has a statutory right to possession of PSG, and indeed a statutory duty to enforce that right, but, crucially for present purposes, to demonstrate that while they confer title to PSG on the Crown, it is a title which it is his right to enforce, and, bearing in mind his duties under sections 384 and 385, his obligation to enforce, in his own name. In other words, far from those two sections undermining his title to sue, they support it.

34. As to the 1961 Act, the Crown Estates Commissioners are the agents of the Crown, so it is understandable why there is specific reference to their powers in section 1(2). However, it goes a little further than that: as Arden LJ said, given the provisions of section 1(2) of that Act and the reference to the 1851 Act in section 384(6), it seems very unlikely that Parliament envisaged that the Crown would have to bring proceedings for possession of PSG in its own name.

35. It is right to refer to the fact that the possession proceedings in *Meier* [2009] 1 WLR 2780 were brought by the freehold title owner, the Secretary of State, rather than the Forestry Commission, in whom the management of the land

was vested. The powers given to the Mayor under sections 384 and 385 are considerably wider than those conferred on the Forestry Commissioners by the Forestry Act 1967. This would explain why the claimant was not the Forestry Commissioners, but the Secretary of State, to whom Crown woodlands had devolved through the Minister of Works. There was a similar line of devolution of the PSG through the Minister of Works to the Secretary of State for Culture, Media and Sport, but the 1999 Act extinguished all those powers. Those powers included all the rights of the Crown in respect of the PSG: hence the need for section 384(1) to revest title in the Crown. It is significant that this was done by extinguishing and not recreating in the Crown Estate Commissioners the wide powers to manage that they have in relation to Crown lands: those powers enable the Crown Estate Commissioners to exercise all the rights of ownership in Crown lands: see section 1(2) of the 1961 Act, referred to above.

Articles 10 and 11 of the Convention and proportionality

36. As I have already said, there can be no doubt that the defendants should have the right to express the views which they wish to express; similarly, there is no doubt that they should enjoy the right to assemble together. Such rights are, of course, specifically protected by, respectively, articles 10 and 11 of the Convention. However, as articles 10(2) and 11(2) of the Convention emphasise, these rights, vitally important though they are, must be subject to some constraints, and those constraints include "restrictions" provided they are, *inter alia*, "prescribed by law and necessary in a democratic society in the interests of … public safety, for the prevention of disorder or crime, … for the protection of the [under article 10, 'reputation or'] rights ['and', under article 11, 'freedoms'] of others".

37. 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.

38. Having said that, the greater the extent of the right claimed under article 10(1) or article 11(1), the greater the potential for the exercise of the claimed right interfering with the rights of others, and, consequently, the greater the risk of the claim having to be curtailed or rejected by virtue of article 10(2) or article 11(2).

39. The Byelaws themselves cannot be said to fall foul of articles 10 and 11: they envisage demonstrations, speeches, camping, placards and the like being permitted subject to the Mayor's consent. In this case, the Mayor considered and refused an application (or, strictly, a letter which he treated as an application) for the establishment and continuance of the Democracy Village on PSG, and he refused it for reasons given in a fairly detailed letter dated 20 May 2010. That letter included the observation that

> "[T]he effect of the Democracy Village is to prevent the public from exercising their rights over a very significant part of PSG for a prolonged and indefinite period [and] one impact of the Democracy Village has been to exclude others from exercising their right to protest there. The extent and duration of the impact of the Democracy Village on the lawful, reasonable and ordinary activities on PSG is the primary reason for refusing consent".

The letter also said that "The Mayor is seriously concerned about the substantial damage which is being caused by the Democracy Village to PSG", and that "the cost of reparation to return the Square to its former condition is substantial". The letter went on to state that

> "Permissions for other peaceful protests and rallies on Parliament Square Garden are normally limited to a maximum of 3 hours, in order to allow for proper management, to ensure that the day-to-day business of the city is not impeded, and to allow the maximum number of groups or individuals to use the space to exercise their democratic right to peaceful protest. As this period will be extended in appropriate cases, the Mayor is not prepared to permit camping by significant numbers for a prolonged period."

40. The Democracy Village defendants are plainly trespassers on PSG: rightly, that is no longer in contention, although it was debated before the Judge. The defendants' presence on PSG is also in breach of the Byelaws, as the Mayor's consent to their occupation has been refused. Although those are factors to be weighed against them, particularly after what is now more than two months of effectively exclusive occupation, the Democracy Village defendants are still entitled to have the proportionality of both the making of the possession order and the granting of the injunction sought by the Mayor assessed by the court as articles 10 and 11 are engaged, not least because it is the Mayor, the person seeking the relief who could authorise them remaining lawfully on PSG.

41. This is not a case like *Kay v Lambeth London Borough Council* [2006] 2 AC 465 or *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367, where (at least in the view of the majority of the House of Lords in each

case) article 8 could not be invoked by an occupier of a residential property in support of his case against his landlord's claim for possession. That was because the domestic law had already taken into account, and balanced, the public interest in a public authority landlord obtaining possession and the tenant's right to respect for his home. No such legislative balancing exercise has been carried out here. In any event, it can be argued that recent Strasbourg jurisprudence could be invoked to suggest that the reasoning of the majority in those two cases should no longer hold good (an issue which has just been argued before the Supreme Court on appeal from *Manchester City Council v Pinnock* [2009] EWCA Civ 852).

42. Quite apart from this, when freedom of assembly, and, even more, when freedom of expression , are in play, then, save possibly in very unusual and clear circumstances, article 11, and article 10, should be capable of being invoked to enable the merits of the particular case to be considered. Thus, in *R(Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, paragraphs 36 and 37 Lord Bingham of Cornhill made it clear that state authorities have a positive duty to take steps to ensure that lawful public demonstrations can take place, and that any prior restraint on freedom of speech requires "the most careful scrutiny".

43. Given, therefore, that articles 10 and 11 are in play, it seems to me that the decision on the balancing, or proportionality, issue is ultimately one for the court, not the Mayor – see *R(SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100 and *Belfast City Council v Miss Behavin Ltd* [2007] UKHL 19; [2007] 1 WLR 1420. Further, when carrying out that balancing exercise, the court must consider the facts, and, particularly when it comes to article 10 (and article 11), focus very sharply and critically on the reasons put forward for curtailing anyone's desire to express their beliefs – above all their political beliefs – in public.

44. In that connection, it is clear both from the evidence before the Judge and from some of the argument before us that the factual basis for some of the reasoning in the Mayor's letter of 20 May, refusing Democracy Village the right to occupy PSG, was challenged. In particular, it was said by some of the defendants that the presence of the Democracy Village on PSG had plainly not prevented at least three significant demonstrations in Parliament Square and its vicinity since 1 May, and that, far from putting off people from visiting PSG, whether or not for the purpose of demonstrating, the Democracy Village actually encouraged people to come to Parliament Square to express or discuss the views which the defendants supported.

45. The Judge received written and oral evidence from Simon Grinter, the Head of Greater London Authority's Facilities and Squares Management (who was closely cross-examined by or on behalf of a number of the defendants), which included a written note from Syed Shah (a PSG warden). He also read witness statements from nine of the defendants, and from various public figures in

support of the defendants' case, and heard oral evidence from about fifteen of the defendants and a number of supporting witnesses. The effect of that evidence is pretty fully summarised at [2010] EWHC 1613 (QB), paragraphs 23-74.

46. The Judge concluded at [2010] EWHC 1613 (QB), paragraph 133 that there was "a pressing social need not to permit an indefinite camped protest on PSG for the protection of the rights and freedoms of others to access all of PSG and to demonstrate with authorisation but also importantly for the protection of health - the camp has no running water or toilet facilities - and the prevention of crime - there is evidence of criminal damage to the flower beds and of graffiti". He went on to say that he was "satisfied the GLA and the Mayor are being prevented from exercising their necessary powers of control management and care of PSG and the use of PSG by tourists and visitors, by local workers, by those who want to take advantage of its world renowned setting and by others who want to protest lawfully, is being prevented."

47. In my view, insofar as those conclusions amounted to findings of fact, they were, to put it at its lowest, findings which were open to the Judge on the evidence before him. Once those findings were made, there are no grounds for attacking the conclusion reached by the Judge in the following paragraph, namely that "[w]hile the removal of the defendants … would interfere with their article 10 and article 11 rights, that is a wholly proportionate response and so no defendant has a convention defence … to the claim for possession."

48. It is important to bear in mind that this was not a case where there is any suggestion that the defendants should not be allowed to express their opinions or to assemble together. The claim against them only relates to their activities on PSG. It is not even a case where they have been absolutely prohibited from expressing themselves and assembling where, or in the manner, in which they choose. They have been allowed to express their views and assemble together at the location of their choice, PSG, for over two months on an effectively exclusive basis. It is not even as if they will necessarily be excluded from mounting an orthodox demonstration at PSG in the future. Plainly, these points are not necessarily determinative of their case, but, when it comes to balancing their rights against the rights of others, they are obviously significant factors.

49. 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, 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 nonetheless 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 seventy days to make their point.

50. As to the suggestion that removing all the Democracy Village defendants was an overreaction, Mr Underwood pointed out that this was very much an "all or nothing" situation: either all the Democracy Village defendants go, or none of them do. He said, with force, that it was not fair, principled or practical to distinguish between the defendants (save, perhaps, Mr Haw, Mrs Tucker and Ms Sweet, the fourth defendant) when considering whom to evict. There is no good reason to let some of them stay while requiring others to leave: it would involve arbitrary selection; it would encourage other, new, supporters of Democracy Village to join the camp; it would be unlikely to achieve the ends which the mayor is seeking, and entitled, to achieve. He also made the point that the Mayor needed to recover possession in order to control the use of PSG and bring to an end the "first come first served anarchy" which currently prevailed.

51. The defendants relied on the reasoning of Laws LJ in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, where this court held an attempt by the Government to prevent a protest camp being held at Aldermaston to be unlawful. However, as the Judge pointed out, 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.

The injunction should not have been granted in aid of the criminal law

52. The defendants argue that the Judge should not have granted the injunction, because, as a matter of principle, it was wrong to invoke the civil law to enforce Byelaws which have their own criminal sanction – see section 385(3). As a matter of principle, there is clear authority for the proposition that, particularly where "Parliament has legislated in detail", the courts should at least "in general" leave the matter to be dealt with as Parliament intended, save perhaps in exceptional circumstances" – *Birmingham City Council v Shafi* [2009] 1 WLR 1961, paragraph 44, following the principles laid down by Lord Templeman in *Stoke-on-Trent City Council v B & Q Retail Ltd* [1984] AC 754, 776, and Bingham LJ in *City of London Corporation v Bovis*

Construction Ltd [1992] 3 All ER 697, 714. Further, it is clear that Parliament has legislated relevantly on two fairly recent occasions - namely in the 1999 Act, which, in sections 384 and 385, relates to activities on PSG, and also in the Serious Organised Crime and Police Act 2005, which, in sections 132 and 134, contains rather controversial provisions creating criminal offences out of unauthorised demonstrations and similar activities within a specified distance of the Palace of Westminster.

53. There are, in my view, two answers to this argument. The first is that the Mayor is entitled, in his capacity of the person in possession of PSG, to maintain an injunction to remove those in unlawful occupation. Even on the assumption that, as contended by Mr Luba and Mr Wonnacott, the Mayor is not entitled to maintain a claim for possession, it is accepted that, if he is entitled to use and control, effectively amounting to possession, he is entitled, in that capacity, to enjoin those in occupation of PSG from remaining there. If, as I have concluded, he is entitled to maintain a claim for possession, then, if the facts justify it, he is entitled to an injunction in support of the enforcement of that claim (a view which receives support from the thrust of the reasoning in *Meier* [2009] 1 WLR 2780).

54. In this case, the need to ensure that the defendants remove their tents and placards and do not return was, to my mind, plainly established to the Judge's satisfaction. He concluded that the great majority of the defendants would not be deterred by the threat of criminal proceedings in the Magistrates' Court from continuing to breach the Byelaws. It must follow from this that, if not entitled to sue for possession, the Mayor, as the person entitled to possession, was justified in seeking injunctive relief, and that, if he was entitled to sue for possession, he was entitled to seek injunctive relief in support.

55. Furthermore, the Judge's finding that the criminal procedures provided for in section 385(3) would not operate as a deterrent to the defendants justified his decision to grant an injunction in aid of the enforcement of the Byelaws. On this point, the Judge said this at [2010] EWHC 1613 (QB), paragraph 143:

> "Whereas the standard of proof required in civil proceedings is the balance of probabilities, I am, in fact, sure that these applications (subject to the exercise of the court's discretion) must succeed. I am satisfied, for the reasons which follow that this is an exceptional case:
>
> • The identities of most of those taking part in the Democracy Village are unknown – but for their insistence in being joined as defendants to these proceedings, the identities of defendants 5 to 19 would not have been ascertained;
>
> • It would impose an undue burden on the Claimant to institute proceedings against all the occupiers, with the complicating factor that some of those taking part move in and

> out of occupation; effecting service would not be straight forward;
>
> • Proceedings in the magistrates' courts would have to be by way of summons, a sometimes prolonged procedure;
>
> • The refusals, hitherto, of those taking part in the Democracy Village to obey lawful instructions gives no grounds for optimism that there will be future compliance; indeed a number of the defendants made it clear they have no intention of obeying a court order for possession."

56. Given these conclusions, which were ones which were plainly open to him on the evidence (to put it at its lowest), I consider that the Judge was entitled to grant the injunction that he did, even ignoring the fact that it was sought by the person entitled to possession of the land concerned. In *B & Q* [1984] AC 754, 714J, having said that the court should, in principle, be "reluctant" to grant an injunction in aid of the criminal law which provided for penalties for Sunday trading, Lord Templeman said that "the council were entitled to take the view that the appellants would not be deterred by a maximum fine which was substantially less than the profits which could be made from illegal Sunday trading". So here: the Judge found that, albeit for reasons more admirable than money-making, the defendants would not have been deterred from continuing to breach the Byelaws by a level 1 fine in the Magistrates' Court.

57. Quite apart from this, I do not think that the Byelaws were framed with a view to applying to a long term, or even indefinite, and exclusive, or near-exclusive, occupation of PSG. Although the words of Byelaws 5(a),(7), (9) and (10), taken together, cover the sort of operation involved in the Democracy Village, I consider that that sort of exclusive long term arrangement was not within the contemplation of those who drafted the Byelaws. Although I would not suggest that this is a separate reason for upholding the Judge's decision to grant an injunction, it is a point which underpins the two reasons which I do consider justify that decision.

Mr Haw's arguments

58. Separate arguments are raised on procedural aspects, on the possession application and order, and on proportionality, by Mr Westgate on behalf of Mr Haw, and, at least arguably, by Mrs Tucker who has joined in his demonstration, and by Miss Sweet, who has also done so, albeit to a lesser extent. As explained above, his longstanding presence on the pavement on the east side of Parliament Square is not challenged in these proceedings. What is challenged is his encroachment onto a small adjoining part of PSG, where he has pitched a tent.

59. Mr Haw makes the general point that he is entirely separate from the other, Democracy Village, defendants. He has pitched his tent on what is only a very small part of the grassed area, and has done so since about 2001 (albeit that he has also pitches it on the pavement where he demonstrates) and there is no suggestion that his presence, unlike that of the Democracy Village defendants, has discouraged other visitors or demonstrators to PSG or has damaged the flowers on PSG.

60. The first of Mr Haw's arguments that it is convenient to consider is that the application and order for possession against Mr Haw both extend to the whole of PSG, and not just the small part which he occupies. At first sight that submission derives some support from the decision in *Meier* [2009] 1 WLR 2780, which underlines the point that possession can only be sought of the land occupied by the defendant. However, where only part of what can fairly be described as one piece of land is occupied by a defendant, it is clear that the owner of the land can claim possession of the whole piece. The point is most clearly made by Lord Rodger at [2009] 1 WLR 2780, paragraph 10, where he refers to the right to possession of a piece of land as being "indivisible" (and see also paragraphs 67 and 97). Further, where, as here, the whole piece of land is occupied by trespassers, and it is difficult precisely to identify who occupies what part, it is particularly unrealistic to expect the claimant to identify which part each defendant occupies, and practicality is a relevant factor, as the decision in *University of Essex v Djemal* [1980] 1 WLR 1301 establishes.

61. The other arguments raised on behalf of Mr Haw both rely on the contention that his health requires him, or at least makes it better for him, to sleep on the relatively softer grass rather than the pavement, because of an acute medical condition from which he suffers. At first sight, that is answered by Mr Underwood's point that he can get a mattress, but it is said in response that the pavement slopes in a way that prevents sleeping on the pavement being feasible in the light of his medical condition.

62. Mr Haw contends that the application for possession and for the injunction came on speedily because of factors which applied to the other, Democracy Village, defendants, and which had no application to him, as summarised in paragraph 59 above, and that this caused him prejudice, because he was unable to obtain medical reports to support his case that he needed to be able to sleep on the grass. He says that this is very important because, if he has to remove the tent and restrain his presence and activities to the pavement, it would be an unfair and disproportionate interference with his presence and activities on the pavement.

63. This contention is not only based on his medical condition, but it is also based on his alleged need to sleep on the grass for reasons of safety, as he is less likely to be hit by traffic or attacked by thugs than if he sleeps on the pavement. I have some doubts about this: if pitched on the grass, his tent

would be very close to the western edge of the eastern pavement, and therefore would be not much further from the traffic and would be equally accessible to thugs. And there is no evidence of his having been harmed in any traffic accident.

64. Mr Haw's argument on proportionality goes wider, in that he says that, while the Judge appeared to accept that he was in a different position from the Democracy Village defendants when embarking on the discussion of proportionality (at [2010] EWHC 1613, paragraph 119), he did not distinguish between him and the other defendants when actually considering that issue. For the reasons identified in paragraph 59 above, he says that his claim to remain on the very small part of PSG occupied by his tent at least deserved separate consideration from the claim against the other, Democracy Village, defendants – particularly when it came to the issue of proportionality.

65. I accept that Mr Haw is in a different position from that of the Democracy Village defendants. He and his demonstration are quite separate from them and theirs, he has been demonstrating for far longer, and his demonstration "pitch" is not under attack in these proceedings. Further, his demonstration has not put off visitors or other demonstrators (one rather suspects that the reverse may be the case), and there is no question of his having damaged the flora on PSG. The evidence as to when he first pitched his tent on the grass, and how often it was pitched there is in dispute, but it does seem as if he has been encamped on PSG for a significantly longer time than the Democracy Village.

66. Mr Underwood's argument that it is wrong for the Mayor to try and distinguish between the various occupiers of PSG has, as I have mentioned, great force in relation to all the Democracy Village defendants. While I accept that it can also be applied to Mr Haw, it appears to me that it has much less force in his case, essentially for the reasons identified in the preceding paragraph. Those reasons may well justify treating Mr Haw differently from the other defendants, as a matter of principle.

67. The Judge did not make any findings of fact as to the effect of making an order for possession or granting an injunction against Mr Haw on his ability to maintain his demonstration or on his rights under article 10 or article 11. Nor did he expressly consider Mr Haw separately from the other defendants when considering the proportionality under articles 10 and 11 of making the orders against him sought by the Mayor, although he did consider Mr Haw separately on the issue of the likelihood of his being deterred by Magistrates' Court proceedings (see [2010] EWHC 1613, paragraph 148). Further, although the Judge received the medical report on Mr Haw before he gave judgment, it was only received on the last day of the hearing and Mr Haw had very limited opportunity to consider its contents and to make submissions about it.

68. With considerable hesitation, I have reached the conclusion that the question of whether it was proportionate to make an order for possession and to grant an injunction against Mr Haw should be remitted for reconsideration by the High Court. Although the case against him was weaker than that against the Democracy Village defendants, for the reasons already mentioned, it was still a strong case in the sense that he had no defence to the claims for possession or an injunction other than the argument based on articles 10 and 11. In addition, in an important respect, his argument based on those articles is weaker than that of the other defendants: the orders are not intended to interfere with his desire to continue with his demonstration in Parliament Square. However, he argues that they would make it more difficult, even medically very difficult, for him to do so, because he will have to pitch his tent on the pavement.

69. I entertain very significant doubts whether Mr Haw will be able to persuade a Judge that he should be able to maintain a tent on the grassed area of PSG, even if he establishes that, for the medical or other reasons, his being prevented from doing so would render it significantly harder for him to maintain his demonstration on the pavement facing the Houses of Parliament. His right to express his views is not being challenged, and it is by no means clear that, if he had to sleep elsewhere, he would be precluded from maintaining his pitch where it is. Even if his ability to maintain his pitch is, albeit indirectly, under challenge, it might well be stretching his article 10 rights too far to say that he should be entitled, particularly after having done so for so long, to maintain his demonstration in the precise location of his choice, by trespassing on adjoining public property. However, I think that he is entitled to have his case decided on the basis of the medical and other evidence he wishes to put before the court, and to have a reasoned judgment on the issue.

Issues relating to costs

70. The main argument on costs was that of Ms Hall, who was ordered to pay the costs of the possession proceedings, but not of the injunction proceedings, as the Judge accepted that she would not disobey the possession order, and would be deterred by Magistrates' Court proceedings. She said it was illogical that she should have to pay the costs of the possession proceedings and not receive the costs of the injunction proceedings. When Stanley Burnton LJ put to him the point that it would be simpler to make no order for costs as between her and the Mayor in relation to the whole proceedings, Mr Underwood realistically and fairly said that he had no submission to make.

71. So far as the other defendants are concerned, it was submitted that it was unfair that each of them should potentially be liable for the costs of an eight day action, with two directions hearings. I have some sympathy with that view, but the Judge did find that the Democracy Village defendants were, as it were, in it together. At [2010] EWHC 1613, paragraph 138, he said that "on

the evidence and the balance of probabilities I am satisfied in the case of each defendant that he or she knew of such breaches by others who were part of Democracy Village and for the purposes of the criminal law aided and abetted the commission of such breaches". In the light of that finding, I consider that it is hard for the Democracy Village defendants to object to an order which effectively renders each of them jointly and severally liable for the costs of these proceedings. Nonetheless, I would limit the extent of those costs to 80% of the total costs, as part of the costs related to Mr Haw, Mrs Tucker, and Ms Sweet, whose case was separate, and anyway is being remitted.

Conclusions

72. On the various substantive issues which have been raised, I would grant Mr Haw (and Mrs Tucker and Ms Sweet) permission to appeal on the issue whether it is proportionate to make an order for possession or to grant an injunction against him, grant his appeal, and would remit that issue to the High Court. Otherwise, I would refuse permission to appeal on all other substantive issues, save that the order for possession against the other defendants will have to be amended to exclude the area occupied by Mr Haw's tent.

73. I would grant Ms Hall permission to appeal on costs, allow her appeal, and substitute for the partial order for costs against her, a direction that there be no order for costs as between her and the Mayor. I would also grant permission to the Democracy Village defendants to appeal on costs. As I have indicated, I would allow their appeal to the extent of limiting their liability to 80%, rather than 100%, of the Mayor's costs on a standard basis.

74. No doubt counsel can prepare an appropriate form of order. The order should include directions to ensure that the rehearing of the claims against Mr Haw is disposed of very speedily.

75. Finally, I would like to express my appreciation to all those, whether lawyers or defendants, who addressed the court orally or in writing: this was a case involving a large number of parties and two significant legal issues, as well as other points, and it was disposed of efficiently and fairly in a day. Our task was also greatly assisted by the quality of the oral and written submissions and the judgment below.

Lady Justice Arden:

76. I agree.

Lord Justice Stanley Burnton:

77. I also agree.