Possession after Meier & Hall

Toby Watkin

Landmark CHAMBERS

1. Introduction

1.1. For those regularly engaged in recovering possession of property from protestors, or from those who have occupied public or development sites, the two recent decisions of the Supreme Court in *Secretary of State for Environment, Food and Rural Affairs v. Meier & Others [2009] UKSC 11* and *Hall & Others v. Mayor of London [2010] EWCA Civ 817* are of real practical significance, as well as legal interest.

1.2. In *Meier* the Supreme Court considered the issue of when, and to what degree, a possession order may be sought which extends to land which is not the precise land occupied by a trespasser.

1.3. In *Hall* the Court of Appeal grappled again with the circumstances in which a person who is not simply the relevant title-holder of land can recover possession of it.

1.4. A full understanding of both cases is essential before advising clients seeking to obtain the maximum protection from disturbance by trespassers.

2. Summary of the Meier decision

2.1. In 2007, a number of travellers established an unauthorised camp in Hethfelton Wood, near Wool in Dorset; one of numerous woods managed by the Forestry Commission on behalf of the Secretary of State for the Environment ("the SSE"). The SEE brought proceedings for possession against various named individuals, and against others named only as "Persons Unknown".

2.2. SSE sought possession of Hethfelton Wood **and** of other woodland managed by the Forestry Commission in Dorset in an area approximately 25 miles by 10 miles. The aim

was to prevent the travellers from simply moving to another area of woodland in the immediate vicinity.

2.3. The SEE also sought injunctions against the same parties restraining them from re-entering Hethfelton Wood, or entering the other woods.

First Instance

2.4. At first instance Mr Recorder Norman granted a possession order in respect of Hethfelton Wood, but declined to make possession orders in respect of other woods, or to grant the injunctions. The Recorder accepted that he had jurisdiction to make the possession order over wider land, and that the SSE had established a *"real danger"* that the trespassers would decamp to other land. However, he held that he had a discretion whether extend the order to other land and/or to grant an injunction. He refused to do either because the SSE had not taken into account the relevant governmental guidance (in particular the requirement to consider the likelihood that such action would lead to regular and rapid evictions), because an injunction was disproportionate act, and because the criminalisation of travellers was undesirable.

Court of Appeal

2.5. The Court of Appeal allowed the SSE's appeal (*[2004] EWCA Civ 200*), holding that:

2.5.1. (following the earlier decision in *Drury v. Secretary of State for the Environment, Food and Rurual Affairs [2004] EWCA Civ 2000)* an order for possession of land made against trespassers could, in appropriate cases, extend to land not forming part of, or contiguous with, or even near to, the land actually occupied;

2.5.2. where a real danger that such sites would be occupied was shown, the court should only exercise the discretion to refuse a possession order over the land at risk in 'exceptional circumstances';

2.5.3. whilst 'exceptional circumstances' could include a failure to perform a public law obligation – such as the SSE's obligation to consider the acceptability of the

particular encampment, once it had occurred – such considerations applied only to the particular site, and not any other possible sites, and should be considered at the date of enforcement, rather than in granting possession.

2.5.4. that (Wilson LJ dissenting) the injunctive relief was a complementary remedy to that of the possession orders and should be granted to prevent a threatened invasion unless some sufficiently weighty factor was present to displace that general rule.

The Supreme Court

2.6. The central question on the appeal to the Supreme Court was whether the court had the power to grant a possession order in respect of land of which the trespassers were not in occupation at the time, although the Court also considered the appropriateness of the injunctive relief sought.

2.7. In summary, the Supreme Court held that a possession claim against trespassers involved the party entitled to possession seeking 'recovery' of the land. There was therefore no legitimate basis for making a possession order in respect of land that was not occupied by the travellers, which could not sensibly be described as 'recovery'. It could not be said that the travellers 'occupied' or 'possessed' land many miles from that which they actually were physically occupying, and of which the landowner in fact continued to enjoy uninterrupted possession.

2.8. Although the Supreme Court accepted the principle that an order for possession could be made in respect of the whole of land of which the trespasser occupied only a part (for example, the whole of a building of which the trespassers occupied only a floor) that reasoning could not legitimately be extended to apply to land that was wholly distinct from, or miles distant from, the occupied land.

2.9. As to the issue of an injunction, the Supreme Court held that this would always turn on the facts. Where a trespass was threatened (and particularly where it was being committed, or had been committed in the past) an injunction to restrain the threatened

trespass would be appropriate unless there were good reasons to the contrary. Although the court should not make orders that it did not intend, or would be unable, to enforce, even in cases where there was little prospect of enforcing the injunction (for example, because the persons likely to be in breach had no assets and were women and children who the court might be unlikely to imprison) it might still be appropriate to grant the injunction if the same would have real deterrent effect.

2.10. Accordingly, the Supreme Court allowed the appeal in respect of the wider possession orders, but did not interfere with the injunctions as granted by the Court of Appeal.

3. When can possession orders now be sought beyond the precise land occupied?

3.1. In *University of Essex v. Djemal [1980] 1 WLR 1301* the defendant students, who had previously taken over, and had been removed from, certain administrative offices of the University of Essex, had been occupying other parts of the university building known as "Level 6". The Court of Appeal made an order for possession extending to the whole property of the University – in effect the campus.

3.2. The Supreme Court appears to have accepted that it would still be appropriate, upon such facts, to order possession of the entire campus. However, Lord Neuberger expressed concern about granting possession orders where third parties (or the landowner itself) was in occupation of part of the property:

> *"67..... I have no difficulty with the fact that the possession order made at first instance in this case extended to the whole of Hethfelton [Wood], even through the defendants occupied only a part of it.*
>
> *68. The position is more problematical where a defendant trespasses on part of land, the rest of which is physically occupied by a third party, or even by the landowner...."*

3.3. Lord Neuberger considered *Djemal* to be a *"thoroughly practical"* decision and that this was *"not the occasion formally to consider the correctness of the decision in Djemal... which was not put in issue by either of the parties"*.

3.4. Lord Rodger expressly accepted the justification for the decision given by the Court of Appeal:

> *"10.... The Court of Appeal made an order for possession extending to the whole property of the university – in effect the whole campus. This was justified because the university's right to possession of its campus was indivisible:* "If it is violated by adverse occupation of any part of the premises, that violation affects the right of possession of the whole of the premises""

3.5. Baroness Hale also concluded that *Djemal* was correctly decided. As Baroness Hale stated:

> *"31 If we accept that the remedy [of a possession order] should be available to a person whose possession or occupation has been interfered with by the trespassers, as well as to a person who has been totally dispossessed, a case like Djemal becomes completely understandable, as does the order for possession of the whole of Hethfelton Wood in this case. Nor need we be troubled by the form of the order, that the claimant "recover" the land. His occupation of the whole has been interfered with and he may recover his full control of the whole from those who are interfering with it."*

3.6. Lord Collins also accepted that *Djemal* was correctly decided, adopting the reasoning of both Baroness Hale and Lord Rodger (para 97).

3.7. Lord Walker, with his usual grace, agreed with everyone (para 20).

3.8. Since *Meier,* a 'university campus' case has again come before the courts in *University of Sussex v. Protesters (3.3.10).* Having considered the effect of *Meier* Vos, J granted a possession order over the entire campus, commenting:

> *"9...it is appropriate, particularly in the circumstances that I have described, where a moving body of protestors is drifting between University buildings, that a possession order should be made not only in respect of the buildings that have been occupied up to now, but in respect of buildings over the entirety of the campus.*

3.9. Accordingly, whilst issues of 'fact and degree' will arise, where possession is sought over an area of land that can sensibly be thought of as one unit, and which is owned by a single landowner, possession can be sought over all of it.

3.10. A particular problem area which, however, remains is the issue of areas of land which are one geographical unit, but which are in the ownership of more than one party, so that (for example) a business park may sensibly be considered a single unit but may have a number of different landowners. It seems likely that the reasoning of *Djemal* would not extend this far. However, the decision of *Hall v. The Mayor of London*, and the earlier decision of *Manchester Airport PLC v. Dutton* may provide a possible means of dealing with this further difficulty.

4. Summary of the *Hall* decision

4.1. On 1 May 2010 four separate groups (intended to represent the Four Horsemen of the Apocalypse) marched to Parliament Square, in London, and set up a camp upon the grassed central area, which they called the "Democracy Village". Parliament Square was described by the judge at first instance, Griffith Williams, J thus:

> *"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.... [it] 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 Heritage's Register of parks and gardens with special historical interest. It provides world renowned views of both the Palace of Westminster and Westminster abbey:*

4.2. Already on a pavement on the eastern side of the square (a part of the highway controlled by Westminster City Council) were Brian Haw and Barbara Tucker, who have been protesting there since 2001[1]. Mr Haw had also, at some point, erected a tent on the grassed area itself.

4.3. The Mayor of London (on behalf of the Greater London Authority) brought proceedings for possession of the garden within the square, but not the road[2], and injunctive relief.

[1] Despite a failed attempt by the last administration to remove them by primary legislation.
[2] Which was owned by Westminster City Council.

First instance

4.4. After hearing argument and evidence, Griffith Williams, J made an order for possession and granted injunction against the great majority of defendants, although not all of them.

Court of Appeal

4.5. The appeal raised many issues, including whether the original hearing had infringed the demonstrators' right to a fair trial (Article 6), and whether the byelaws governing the square and the orders for possession and injunction infringed the demonstrators' rights to freedom of expression (Article 10) and to peaceful assembly (Article 11) to a disproportionate extent.

4.6. However, of more general importance were the comments of Lord Neuberger (with whom Arden LJ and Stanley Burnton LJ agreed) on the issue of who can bring possession proceedings, and on the principle of when possession orders can be sought against properties only part of which are in the possession of trespassers.

(a) Who can sue for possession?

4.7. By statute[3], the legal title to Parliament Square vests in the Queen *"as part of the hereditary possessions and revenues of Her Majesty"*. However, by the same provisions the *"care, control, management and regulation of"* the Garden forming part of Parliament Square were functions of the Authority, which is under a duty to take care of it. The Authority has power to make (and has made) Byelaws in relation to it, one of which makes it an offence to fail to comply with a direction given by an authorised person to leave the Square.

4.8. The defendants argued that the only person with title to sue for possession was the Queen, in her personal capacity. Accordingly, the Mayor (on behalf of the Authority) had no right to claim possession of the square.

[3] Greater London Authority Act 1999, s. 384

4.9. The Mayor argued:

(a) That the Authority was in possession before being ousted by the Democracy Village, and so had a right to possession against the whole world, other than the holder of the legal title;

(b) That, in any event, on the basis of the decision in *Manchester Airport PLC v. Dutton [2000] 1 QB 133*, because of the extent of the Authority's powers of control over the square, it was entitled to sue for possession, even though it held no legal estate in the land and whether or not it was in possession of the land.

4.10. Lord Neuberger began by making some rather disturbing remarks about the possibility of a claim for possession by an ousted occupier being defeated by proof that someone else had better title than the Claimant. However, fortunately that element of his judgment was not the basis of his decision and need not concern us.

4.11. As to the second argument, it is necessary to remind ourselves of the basis of the decision in the *Dutton* case.

Manchester Airport PLC v. Dutton

4.12. In the *Dutton* case the Court of Appeal upheld (by a majority[4]) a possession order granted by a district judge and upheld by Steel, J, against protesters who had occupied Arthur's Wood, Styal. The wood was owned by the National Trust. The Trust had granted Manchester Airport Plc "*a licence to enter and occupy*" the wood, for the purposes of reducing tree heights to leave a clear path to the new second runway.

4.13. Manchester Airport Plc was not the landowner, and had not been granted a legal interest in the land – they were clearly not tenants. The majority of the Court of Appeal held and that a mere licensee who had been granted a right to occupy had a sufficient interest to be entitled to seek possession, at least against a person whose occupation was obstructing that occupation. The majority concluded that a court had *"ample*

[4] Laws and Kennedy LLJ, Chadwick LJ dissenting,

power to grant a remedy to a licensee which will protect, but not exceed, his legal rights by a licence". In the words of Laws LJ, possession may be granted:

> *"...if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys."*

Kennedy LJ simply concluded that a person who is entitled to occupy land has a right of possession of land (!).

Back to Hall

4.14. So, on the basis of *Dutton*, the Authority argued in *Hall* that its powers of control and its duties in respect of the square were sufficiently extensive for it to be entitled to sue for possession, even though the landowner was the Queen.

4.15. The Defendants responded that *Dutton* was inconsistent with a long line of earlier authority to the effect that to seek an order for possession a party requires a *legal* estate in land entitling him to possession, and with the reasoning in *Meier*. Lord Neuberger found that there was *"obvious force"* in the Defendants' analysis of the law prior to *Dutton*, but avoided the need to consider whether *Dutton* was correctly decided by holding that the relevant statute granted the Mayor an *"implicit"* right to seek possession, given all powers of control and duties of management had been vested by the statute in the Authority. Since it was conceded that Parliament was capable of granting a statutory right to possession, that was enough.

4.16. Accordingly, *Dutton* seems still to remain the law, at least for now and below the Court of Appeal. However, given Lord Neuberger's comments in *Hall*, it may not be long before a case arises where *Dutton* is properly reconsidered.

4.17. Therefore, as matters stand, in order to determine whether a person who is <u>not</u> the relevant title-holder is able to seek a possession order, an analysis is required of the nature of the rights and duties of the proposed claimant over the land <u>and</u> the nature of the occupation of the trespasser and how it interferes with the rights/duties of the proposed claimant:

(1) Where a licensee has a right of occupation and that right cannot be given effect without recovering possession from the trespassers, a possession order can be sought.

(2) Even where a licensee has no express right of occupation, but possession is nevertheless in practice required to fulfil the purposes of the licence:

(a) an implicit right may be found to have been granted by virtue of the duties and powers that are expressed in the licence (by analogy with the reasoning in *Dutton* and to some extent *Hall*); and

(b) As a fall back, reliance can always be placed upon the conclusion of Laws LJ that the court has ample power to find a remedy to permit a licensee to lawfully enjoy his rights.

The doctrine "where there is a right; there is a remedy", and an approval of the principle of seeking to achieve *"practical justice"* feature repeatedly in the judgements of *Meier* and *Dutton*.

5. How does all this fascinating legal analysis help?

5.1. Drawing together all the threads, the following practical points emerge:

(1) A possession order will still be granted to the relevant title-holder[5] over an entire property, where the trespasser is only in occupation of part, and even where the property is still partially occupied by the landowner, or his lawful licensees.

(2) A possession order may be granted to someone who is not the relevant title-holder if that person has a licence granting him a right of occupation, or possibly if his rights and duties under the licence cannot be exercised without possession being recovered.

(3) A possession order cannot be granted in respect of land which is:

[5] Which really means the person who currently has the right of possession by reason of his legal estate. So, the freeholder unless the property is tenanted, in which case it is the tenant.

(i) Not yet occupied by the trespassers;

(ii) Is not part of a larger unit which is so occupied.

(4) However, an injunction may be granted in respect of land where there is a *"real danger"* of a trespass in the future.

5.2. Where there are a number of different title-holders affected or at risk, by acting in combination an effective remedy may be still obtainable for all of them, but careful thought will have to be given to the issue of who can claim what.

5.3. Four examples:

An entire home: where trespassers occupy part of a garden, possession can be obtained in respect of the whole property.

A university campus: (as the *University of Sussex* case demonstrates) where protestors occupy only one part of a campus, possession may be granted over the whole.

A farm: where trespassers occupy one field forming part of a small farm, it should be possible to obtain possession of the whole farm.

A business park: If there is a single landowner for all, and travellers occupy the car park of one business unit, possession may be obtained of the whole park.

If the park has been demised to separate owners:

(a) Where the relevant title-holder has the right of exclusive possession of a greater area than the land actually occupied, it can seek possession of the whole are comprised in its legal estate;

(b) A title-holder of land none of which is yet occupied, but who can show a "real risk" that the travellers will simply move onto that land, can obtain an injunction to prevent it;

(c) In addition, if a single entity has retained sufficient rights or duties over areas which have been demised to separate tenants, that entity may also be entitled to possession of the whole of the area over which its rights/duties extend.

TOBY WATKIN

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