

## TRESPASS

# Common Law eviction

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Obtaining possession of one's land from someone in unlawful occupation has been a problem heightened of late by concerns at the increasing numbers of traveller encampments. The position under the common law used to be relatively straightforward, but in recent times statute and regulation has superimposed several matters which require attention.

The Department for Communities and Local Government (DCLG) has recently intervened, concerned at reports that local authorities and the police were not being seen to be doing enough to stop unauthorised traveller encampments and setting out that it was vital that communities see that the law applies to everyone effectively and that they should be confident that local agencies are able to deal with such issues.

### Policy vs common law

However, the position regarding common law eviction was not referred to and there must therefore be a concern that the police and local authorities remain uninformed in that respect. It is to be hoped that recent guidance will help to ensure that appropriate action is taken by public authorities and it is not left to private land owners to secure eviction by exercising their common law rights.

Until October 2000, when the European Convention on Human Rights (ECHR) was brought into English law by the Human Rights Act 1998 (the 1998 Act), an owner was entitled to a certain degree of autonomy. Lord Denning, in *McPhail v Persons unknown*, *Bristol Corporation v Ross and anor*,<sup>1</sup> said: "The owner

is not obliged to go to the courts to obtain possession. He is entitled ... to take the remedy into his own hands."

This was never a remedy to be undertaken lightly because of the disturbance which might follow, but it is clear that trespassers, if they enter "with a strong hand", are not only guilty of a criminal offence under the Forcible Entry Act 1381, but also the civil wrong of trespass, which continues so long as they remain. The owner, being entitled to possession, is entitled forcibly to turn them out: *Brown v Dawson*.<sup>2</sup>

Even if the owner himself should use force then, so long as he uses no more force than is reasonably necessary, he is not himself liable either criminally or civilly. Criminally, it was said in olden times that none of the statutes of forcible entry apply to the expulsion by the owner of a tenant at will and, further, the statutes only apply to the expulsion of one who is lawfully in possession and not, therefore, to a trespasser. Civilly, an owner has the right to turn out a trespasser, using no more force than is reasonably necessary: *Hemmings v Stoke Poges Golf Club*.<sup>3</sup>

### Human rights questions

The ECHR, however, has brought other considerations to bear. It was considered by Sir Alan Ward in *Imran Malik v Keith Fassenheit and ors*.<sup>4</sup> He found that although a private land owner, not being a public authority, was not bound by the 1998 Act, s.6, to act compatibly with the ECHR, the court was so obliged by dint of *ibid*, s.6(3).

Thus the provisions of art.8, ECHR – the right to freedom from interference with "private and

family life, home and correspondence" otherwise than in accordance with law "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" – bore on the case because the trespassers had established their homes on the land.

The majority of the Court of Appeal in *Malik* concluded that the *McPhail* case (above) continued to state the law in respect of trespassers, simply because the applicability of art.8 had not been challenged in the court below, but the minority expressed the view that art.8 would apply. Only in exceptional circumstances, however, would eviction be a disproportionate means of enforcing the land owner's rights.

There is authority in the High Court – *Manchester Ship Canal Developments Ltd. and ors v Persons unknown*<sup>5</sup> – that a proportionality test was to be undertaken in respect of the art.8 rights of the trespasser and the rights of the owner, provided that the owner should not be deprived of his possessions except in the public interest and subject to the conditions provided by domestic and international law.

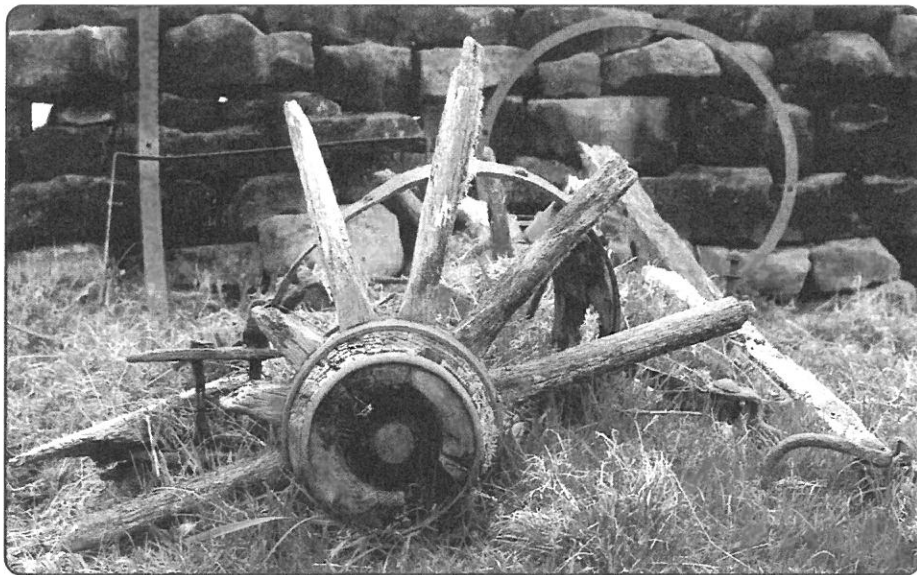
(The Court of Appeal found in *McDonald v McDonald and ors*<sup>6</sup> that that proportionality test did not apply to the case of a possession order under the Housing Act 1998, s.21, in respect of recovery of possession following an assured shorthold tenancy.)

### Other restrictions

There are other restrictions which apply to the exercise of the common law right to eviction. The right applies only where the initial entry onto the land was unlawful. Where a trespasser's presence was originally lawful – for example, as a tenant or licensee under an arrangement which has now expired – it is not available.

In cases of residential property, the Protection from Eviction Act 1977 requires a Court Order to evict most former tenants and some former licensees, although it is technically possible for a homeowner lawfully to eject squatters who were not given permission to enter, provided the homeowner was resident in the property until excluded by the trespassers.

The Criminal Law Act 1977, s.6(1), makes it an offence to use or threaten violence to secure entry into any premises if to the knowledge of that person there is someone present on those



premises who is opposed to the entry unless the person seeking entry is a "displaced residential occupier" or a "protected intending occupier" or someone acting on behalf of such an occupier. "Premises" for these purposes includes part of a building under separate occupation or any ancillary land. It also applies to any structure which is not moveable and to any moveable structure, vehicle or vessel (such as a houseboat or mobile home) designed or adapted for use for residential purposes.

A "displaced residential occupier" is any person who was occupying any premises as a residence immediately before being excluded from occupation by anyone who entered those premises, or access to those premises, as a trespasser.

A "protected intending occupier" is a freeholder or leaseholder (with no less than two years left to run) or certain other interest-holders, who needs the premises for own occupation or residence, is excluded from occupation or access to the premises by a person who entered as a trespasser and who (or the person acting for him) holds a written statement signed by the intending occupier in the presence of and witnessed by a justice of the peace or commissioner for oaths specifying his interest in the premises and that he requires them as a residence.

In practice, residential squatters tend to occupy unoccupied residential premises and generally know that if they make it clear that they are opposed to re-entry. It will be necessary for the owner to obtain a possession order to evict them.

## Current guidance

The current guidance from the Gypsy and Traveller Unit at the Home Office was published in 2006. In respect of unauthorised encampments, it states:

### "Common Law Powers

- "All land owners can use their common law rights to recover land (i.e. the tort of trespass against property). This allows the person in possession of land to evict an individual from their land, seek damages for their trespass on their land and/or seek an injunction to prevent the trespass from occurring again.
- "Case law has established that a trespasser who enters land peaceably is entitled to a request to leave the land before being forcibly removed, while a trespasser who has entered land with force and violence may be removed without a previous request to depart.

## “Land owners should not carry out an eviction without the use of certificated bailiffs who know the relevant law and procedure and act within them”

- "If the trespasser does not leave the land the possessor of the land may use no more force than is reasonably necessary to evict him or her. Certificated bailiffs may be used to carry out the eviction. The use of what is "reasonable force" is a question of fact to be decided in each individual case, however it must be a honestly held belief that in the particular circumstances the force that is used is reasonable, rather than excessive. Use of excessive force could give rise to a claim against a land owner by the trespasser.
- "Whenever a land owner is considering the use of common law rights he/she should notify the police of his/her intentions so that police officers can be present to prevent any breach of the peace.
- "If the police advise that, in the particular circumstances, it is inappropriate to attempt an eviction, action should always be delayed until such time as the police believe that it is safe to continue.
- "Parliament provides strong statutory powers to Local Authorities to enable them to deal with incidents of unauthorised camping under Section 77 of the Criminal Justice and Public Order Act 1994. The civil courts also offer an avenue to deal with unauthorised camping under the Civil Procedure Rules Part 55"

As noted above, the DCLG has recently written to Council leaders, Police and Crime Commissioners and Chief Constables in England. The letter states: "Public bodies should not gold-plate human rights and equality legislation".

Councils and the police have been given strong powers to deal with unauthorised encampments and the letter goes on to set out matters which they might wish to consider when deciding whether to take action, in particular the harm that such developments can cause to local amenities and the local environment, potential interference with peaceful enjoyment of neighbouring property, the need to maintain public order and safety and protect health e.g. by deterring fly tipping and criminal damage, any harm to good community relations and "that the state may enforce laws to control the use of

an individual's property where that is in accordance with the public interest".

The authors specifically address the ECHR question and seek to allay concerns that the authorities may have about infringement. They are keen to see the authorities working with local agencies to address the problem of unauthorised encampments. A document was attached to the letter summarising the statutory powers of local authorities and the police and post-site clean-up powers. That document would also be helpful to land owners and others involved with illegal and unauthorised encampments.

## Operational shortcomings

There have been recent failures on the part of the police to support certificated bailiffs when conducting an eviction. Land owners should certainly not carry out an eviction without use of certificated bailiffs who know the relevant law and procedure and will act within those laws. He will also know how to conduct a risk assessment and follow health and safety procedures before and during the eviction as well as having the necessary resources and manpower available

Hopefully, the recent guidance will mean that the police and local authorities are better informed than they previously were, but in the event of difficulty, the police should be referred to page 9 of the powers set out in the Home Office's Guide to Effective Use of Enforcement Powers in relation to unauthorised encampments. Not only are they set out in plain language, but also the recommendation of notification of the police of the land owner's intention so that police officers can be present to prevent any breach of the peace is referred to.

Whilst recovering one's land from trespassers may not be as simple as shouting "Get off my land", with care and proper planning it can in some cases be achieved without the intervention of judicial process.

<sup>1</sup> CA [1973] Ch 447

<sup>2</sup> (1840) 12 Ad. & El. 64

<sup>3</sup> [1920] 1 KB 720

<sup>4</sup> [2013] EWCA Civ 798

<sup>5</sup> [2014] EWHC (Ch) 645

<sup>6</sup> [2014] EWCA Civ 1049