Neutral Citation Number: [2012] EWCA Civ 160
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
THE HON MR JUSTICE LINDBLOM
Case No HQ11X04327

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 22nd February 2012

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE STANLEY BURNTON
and
LORD JUSTICE McFARLANE

- -

Between:

THE MAYOR COMMONALTY AND CITIZENS OF LONDON	**Respondents**
- and -	
(1) TAMMY SAMEDE (a representative of those taking part in a camp at St Paul's Churchyard, London EC4)	**Appellants**
(2) GEORGE BARDA	
(3) DANIEL ASHMAN	
(4) PAUL RANDLE-JOLLIFFE	
(5) STEPHEN MOORE	
(6) PERSONS UNKNOWN	

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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John Cooper QC and Michael Paget (instructed by **Kaim Todner**) for **Ms Samede**
Felicity Williams (instructed by) for **Mr Barda** (who also made submissions)
Mr Ashman (assisted by **Mr Steven Rushton**) **in person**
Mr Randle-Jolliffe (assisted by **Michael Upstone**) **in person**
Mr Moore (assisted by **Malcolm Blackman**) **in person**

David Forsdick and Zoe Leventhal (instructed by **Andrew Colvin, the Comptroller and City Solicitor, City of London Corporation**) for **the City of London**

Hearing date: 13 February 2012

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Judgment

The Master of the Rolls:

This is the judgment of the court to which all members have contributed

1. On 18 January 2012, Lindblom J handed down a very full and careful judgment, following a five day hearing the previous month. Having heard consequential arguments, he then made orders in favour of the Mayor Commonalty and Citizens of the City Of London ('the City'), against three named defendants Tammy Samede (who had been appointed by the court as a representative defendant), George Barda, and Daniel Ashman and 'Persons Unknown'. If implemented, the effect of these orders would be to put an end to the camp ('the Camp') which has been located in the St Paul's Cathedral churchyard in London since 15 October 2011, and has received much publicity.

The factual background

2. The Camp was described by the Judge in his judgment at [2012] EWHC 34 (QB), para 4 in these terms:

> 'It consists of a large number of tents, between 150 and 200 at the time of the hearing, many of them used by protestors, either regularly or from time to time, as overnight accommodation, and several larger tents used for other activities and services including the holding of meetings and the provision of a "university" (called "Tent City University"), a library, a first aid facility, a place for women and children, a place where food and drink are served, and a "welfare" facility. The size and extent of the camp has varied over time. Shortly before the hearing its footprint receded in some places. At an earlier stage some adjustments had been made to it in an effort to keep fire lanes open.'

3. Many of the occupiers of the Camp have designated their organisation the 'Occupy Movement'. The concerns of the Occupy Movement were summarised by the Judge at [2012] EWHC 34 (QB), para 155 as:

> 'largely centr[ing] on, but … far from being confined to, the crisis – or perceived crisis – of capitalism, and of the banking industry, and the inability – or perceived inability – of traditional democratic institutions to cope with many of the world's most pressing problems. They encompass climate change, social and economic injustice, the iniquitous use of tax havens, the culpability of western governments in a number of conflicts, and many more issues besides. All of these topics, clearly, are of very great political importance, and are to do with what they perceive as the excesses of capitalism. They say that the protest is part of a worldwide movement (extending *inter alia* to cities in North America, the UK and mainland Europe). The protest also includes those concerned about the Arab spring.'

4. The concerns of those in the Camp are well summarised in that passage, and they were well articulated before us. In particular, Mr Barda, Mr Ashman and the Mr Randle-Jolliffe, in powerful, eloquent and concise submissions, advanced the causes which the Occupy Movement and the Camp stand for, with a passion, which was all

the more impressive given the restraint and humour with which their arguments were presented.

5. The majority of the area occupied by the camp consists of a piece of highway land owned by the City, but the occupied area also includes other open land which is owned by the Church. The City's claim was for orders for (i) possession of the highway land which it owns and which is occupied by the Camp, (ii) an injunction requiring the removal of the tents from that land, and restraining the erection of tents thereon in the future, (iii) an injunction requiring the removal of the tents from the land owned by the Church, and restraining the erection of tents thereon in the future, (iv) possession of adjoining highway land and open space land owned by the City and onto which it was feared that the Camp would move, and (v) an injunction restraining the erection of tents on the adjoining land in the future. Apart from its right to possession of the land referred to in (i) and (iv), the City principally relied on its power to seek injunctive relief under section 130(5) of the Highways Act 1980, as the Camp obstructs the highway, and under section 187B of the Town and Country Planning Act 1990, as the Camp breaches planning control and an enforcement notice has been served.

The judgment of Lindblom J

6. At [2012] EWHC 34 (QB), para 1, the Judge identified the general issue which these proceedings involved as being 'the limits to the right of lawful assembly and protest on the highway', which, as he said, '[i]n a democratic society [is] a question of fundamental importance.' More specifically, the Judge said that these proceedings raised the question whether the limits on the rights of assembly and protest:

> 'extend to the indefinite occupation of highway land by an encampment of protestors who say this form of protest is essential to the exercise of their rights under Articles 10 and 11 of the European Convention on Human Rights, when the land they have chosen to occupy is in a prominent place in the heart of the metropolis, beside a cathedral of national and international importance, which is visited each year by many thousands of people and where many thousands more come to exercise their right, under Article 9 of the Convention, to worship as they choose?'

7. At [2012] EWHC 34 (QB), para 13, the Judge correctly identified the three main issues for him as being:

> '[F]irst, whether the City has established that it is entitled to possession of [the areas it owns], so that, subject to the court's consideration of the interference with the defendants' rights under Articles 10 and 11 of the Convention, an order for possession ought to be granted; second, whether, again subject to the court's consideration of the interference with the defendants' rights, the City should succeed in its claim ….; and third, whether the interference with the defendants' rights entailed in granting relief would be lawful, necessary and proportionate.'

8. In the following two paragraphs, he recorded that the City did not dispute that the defendants' rights under Articles 10 (freedom of expression) and 11 (freedom of assembly) of the Convention were engaged. He then stated that the City contended that the orders it was seeking did not prevent the defendants from exercising those

rights, and that they would amount to a 'justified interference' with those rights. He also mentioned that the City's case, in summary terms, was that the defendants could not rely on Articles 10 and 11 of the Convention to justify occupying land as 'a semi-permanent campsite', particularly bearing in mind that such occupation was in breach of a number of statutory provisions, infringed the property rights of the City and the Church, and also impeded other members of the public from enjoying their rights, most notably the right of access to the Cathedral to worship, which engages Article 9 of the Convention (freedom of religion), and obstructed the use of the highway by members of the public generally.

9. The Judge then explained at [2012] EWHC 34 (QB), paras 17-100 in some detail the evidence which he had heard from witnesses called on behalf of the City and on behalf of the defendants, and some of the distinguished people who had provided written evidence in support of the views supported and propagated by the Occupy Movement. In the next thirteen paragraphs, he summarised the arguments which had been advanced to him. At [2012] EWHC 34 (QB), paras 114-152, the Judge then discussed the various issues which had been raised under three headings, which reflected the three main issues which he had identified.

10. Under 'Possession' at [2012] EWHC 34 (QB), paras 114-126, the Judge concluded that the defendants were in occupation of the areas of land owned by the City and had no domestic law defence to the City's possession claim. Under the heading 'Injunctive and declaratory relief', in the next seventeen paragraphs, the Judge concluded that the Camp was 'undoubtedly' an 'unreasonable obstruction of the highway' and a breach of planning control, both of which the City had a duty to enforce, and which applied to the area of land owned by the Church.

11. In those circumstances, as the Judge said, the only basis upon which the defendants could hope to succeed in resisting the relief sought by the City was under the third heading, 'Human rights', which he dealt with at [2012] EWHC 34 (QB), paras 144-164. We shall describe his analysis in those paragraphs in a little more detail.

12. He began by discussing the arguments raised by the defendants. They relied on 'the fundamental importance in a democratic society of the rights under Articles 10 and 11 of the Convention', which was, as the Judge accepted, a good point – as far as it went. The defendants also relied on the fundamental importance of the concerns which motivated them. As to that, the Judge said, '[t]he Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command.' However, he accepted that he should 'give due weight not only to the defendants' conviction that their protest is profoundly important but also to their belief that it is essential to the protest and to its success that it is conducted in the manner and form they have chosen for it – by a protest camp on the land they have occupied in St Paul's Churchyard' – [2012] EWHC 34 (QB), para 155.

13. It was next contended by the defendants that 'some inconvenience to other members of the public would be likely to result even from a lawful protest on this part of the highway.' The Judge said at [2012] EWHC 34 (QB), para 156 that, in his view,

> '[T]he harm caused by this protest camp, in this place, is materially greater than the harm that would be likely if the protest were conducted by the

> same protestors, assembling every day but without the tents and all the other impedimenta they have brought to the land.'

He went on to reject the 'suggestion that the City's main concerns could be met by an injunction stipulating that no tents were to be occupied between certain hours' on the ground that it was 'wholly unconvincing'. He doubted that it could be enforced. Anyway, he said, 'it would not serve to remove the obstruction of the highway' or 'overcome the problems attributable to the presence of the camp, including the damage being done to the work of, and worship in, the cathedral, to the amenity of the cathedral's surroundings, and to local businesses'.

14. The defendants also relied on the fact that they had been prepared to negotiate after the City resorted to litigation. The Judge was unimpressed with that, not least because the defendants and their representatives had not come up with any clear proposals. Finally, the defendants submitted that 'many of the protestors have done everything they can to limit the impacts of the protest camp' – [2012] EWHC 34 (QB), para 158. However, the Judge said, even accepting that was true, 'the defendants have not been able to prevent the camp causing substantial harm', namely obstruction of the highway, nuisance by noise, and 'disruption to the exercise by others of their Convention rights, including the Article 9 rights of those who wish to worship in St Paul's Cathedral'.

15. The Judge then turned to the five arguments raised by the City which he described as being, in his view, 'very strong' – [2012] EWHC 34 (QB) para 159. First, he thought he should give 'considerable weight to the fact that Parliament has legislated to give highway authorities powers and duties to protect public rights over the highway land vested in them, and local planning authorities powers to enforce planning control in the public interest.' He then referred to section 2 of the Local Government Act 2000, sections 130 and 137 of the Highways Act 1980 Act, sections 178, 179 and 187B of the Town and Country Planning Act 1990, section 269 of the Public Health Act 1936, and section 2 of the Ecclesiastical Courts Jurisdiction Act 1860. He said that the significant point was that:

> '[T]he continued presence of the protest camp on this land is plainly at odds with the intent and purpose of th[ose] statutory schemes … . The corollary is this. For Parliament's intention in enacting those statutory schemes to be given effect it is necessary for the relief sought by the City to be granted'.

16. Secondly, as the Judge accepted, 'it would be impossible … to reconcile the presence of the camp with the lawful function and character of this land as highway'. He drew support from what was said in this court in *Mayor of London (on behalf of the Greater London Authority) v Hall and others* [2011] 1 WLR 504, para 48.

17. Thirdly, the Judge was 'convinced that the effects of [the] protest camp … have been such as to interfere seriously with the rights, under Article 9 of the Convention, of those who desire to worship in the cathedral' – [2012] EWHC 34 (QB), para 162. He explained that:

> '[D]uring the camp's presence, and, in my view, largely if not totally as a result of its presence, there has been a drop of about two fifths in the numbers of those worshipping in the cathedral. About the same fraction has

been lost in the number of visitors, an important source of funds for the upkeep of the building and for its ministry'.

He also took into account of 'the effects of the presence of the Camp on the work and morale of the cathedral staff as a significant factor in the balancing exercise', referring to the fact '[n]oise from the camp has been a persistent problem', that 'members of the cathedral's staff have been verbally abused', and that '[g]raffiti ha[ve] been scrawled on the Chapter House and on the cathedral itself'.

18. Fourthly, at [2012] EWHC 34 (QB), para 163, the Judge explained that the Camp caused other problems. By interfering with the public right of way, and reducing pedestrian traffic, the Camp had, he thought, 'damaged the trade of local businesses'. Also, as the Judge found, it had resulted in a 'loss of open space that the public can get to', 'has strained the local drainage system beyond capacity', 'has caused nuisance by the generation of noise and smell', and 'has made a material change in the use of the land for which planning permission would not be granted'. The Judge also thought that, albeit perhaps only indirectly, the camp had resulted in 'an increase in crime and disorder around the cathedral'. Fifthly, the Judge said, 'the length of time for which the camp has been present is relevant', citing *Hall* [2011] 1 WLR 504, para 49.

19. The Judge therefore concluded at [2012] EWHC 34 (QB), paras 165-6 that 'when the balance is struck, the factors for granting relief in this case easily outweigh the factors against', that the City had 'undoubtedly' 'convincingly established a pressing social need not to permit the defendants' protest camp to remain in St Paul's Churchyard, and to prevent it being located elsewhere on any of the land to which these proceedings relate', and that it would 'undoubtedly' not be 'disproportionate to grant the relief the City has claimed'. He was clear that the orders the City was seeking represented 'the least intrusive way in which to meet the pressing social need, and strikes a fair balance between the needs of the community and the individuals concerned so as not to impose an excessive burden on them', and that to withhold relief would simply be 'wrong'.

These applications

20. After hearing argument as to the form of order which he should make, Lindblom J concluded that he should make (1) orders for possession in respect of the two areas of land owned by the City at St Paul's Churchyard and occupied by the defendants, (2) an injunction requiring the defendants (a) to remove forthwith all tents in the area currently occupied by the Camp, (b) not to impede the City's agents from removing such tents, and (c) not to erect tents on the other areas around the Cathedral the subject of the proceedings, and (3) declarations that the City could remove tents from all those areas.

21. Lindblom J refused permission to appeal, but the three named defendants, Ms Samede, Mr Barda, and Mr Ashman, then applied for permission to appeal from this court. Their written applications came before Stanley Burnton LJ, who ordered that the applications be heard in court with the appeals to follow if permission to appeal is granted.

22. The hearing of those applications took place on 13 February and lasted a full day. Ms Samede and Mr Barda were respectively represented by Mr Cooper QC and Mr Paget and by Ms Williams (who were acting *pro bono*, and should be commended for that), and Mr Ashman represented himself. Many other members of the Occupy Movement attended (and unfortunately the court room was not big enough to accommodate all of them). Two of them, Mr Randle-Jolliffe and Mr Moore, made submissions in support of an appeal, and they were added as parties.

23. Having heard the arguments we decided to reserve judgment on the question of whether to allow the projected appeals to proceed, and if so, on what points. We have decided that permission to appeal should be refused, for the reasons which follow.

Are Articles 10 and 11 engaged?

24. Stanley Burnton LJ raised the question whether it was clear that the City was right to concede that Articles 10 and 11 of the Convention were engaged. Strasbourg court jurisprudence establishes that it was. In that connection, it is worth referring to *Sergey Kuznetsov v Russia*, (App. No. 10877/04) [2008] ECHR 1170, where the Strasbourg court considered the case of an applicant who took part in a small demonstration which, for a short time, obstructed access to a public court building. The court at para 35:

> 'reiterate[d] at the outset that the right to freedom of assembly covers both private meetings and meetings on public thoroughfares, as well as static meetings and public processions; this right can be exercised both by individual participants and by those organising the assembly….'

25. As for Article 10, it is clear from the Strasbourg court's decision in *Lucas v UK* (App No 39013/02), 18 March 2003, 'that protests can constitute expressions of opinion within the meaning of Article 10 and that the arrest and detention of protesters can constitute interference with the right to freedom of expression'.

26. In *Appleby v UK* (App No 44306/98) (2003) 37 EHRR 38, the Strasbourg court held that Article 10 and Article 11 raised the same issues in a case where a group of people were banned from seeking to collect signatures for a petition from shoppers in a privately owned shopping centre. It was held that there was no infringement of the Convention because the ban did not have 'the effect of preventing any effective exercise of freedom of expression or [of destroying] the essence of the right', not least because they could carry out their activities elsewhere – (2003) 37 EHRR 38, paras 47 and 48.

27. Domestic law is consistent with this view. Thus, in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, paras 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 the same view was taken by this court in *Hall* [2011] 1 WLR 504. *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 is also worth mentioning. In that case, bye-laws preventing the maintenance of the long-standing, one weekend a month, Aldermaston Women's Peace Camp, protesting on Government-owned open land against nuclear weapons, were held to breach the protesters' Convention rights. As Laws LJ said at [2009] EWCA Civ 23, para 37, 'the camp has borne consistent, long-standing, and peaceful

witness to the convictions of the women who have belonged to it', and, to the protesters, '"the manner and form" *is* the protest itself'.

28. It is clear from the Judge's findings, and from what was said by the defendants who addressed us, that the Occupy Movement seeks to propagate the views summarised by Lindblom J in the passage set out in para 3 above, to educate members of the public about those views, and to engage in dialogue with others about those views. It is also clear that this aim is sought to be achieved through the activities, leaflets, books, newspapers and speeches at the Camp, reinforced by its attendant publicity, which is partly attributable to its large size and prominent location, not merely in the City of London (the heart of the financial world), but in the churchyard of St Paul's Cathedral. In those circumstances, it seems clear that Articles 10 and 11 of the Convention are engaged – i.e. the defendants can invoke their rights under those provisions of the Convention in relation to the maintenance of the Camp. (During the hearing it was suggested that at least some of the defendants might also be entitled to invoke Article 9; it is unnecessary to decide the point, as it can take matters no further in the same way as Article 11 took matters no further over Article 10 in *Appleby* (2003) 37 EHRR 38, para 52).

The argument that the Judge should have dismissed the City's claim

29. With the exception of Ms Samede, the defendants making the present applications are seeking to set aside all the orders made by Lindblom J, on the basis that they contend that the Judge ought not to have found for the City at all, but should have dismissed the claim and allowed the Camp to continue in place. It is convenient to deal first with one or two rather esoteric arguments raised by Mr Randle-Jolliffe.

30. First, he challenged the judgment on the ground that it did not apply to him, as a 'Magna Carta heir'. But that is a concept unknown to the law. He also says that his 'Magna Carta rights' would be breached by execution of the orders. But only chapters 1, 9 and 29 of Magna Carta (1297 version) survive. Chapter 29, with its requirement that the state proceeds according to the law, and its prohibition on the selling or delaying of justice, is seen by many as the historical foundation for the rule of law in England, but it has no bearing on the arguments in this case. Somewhat ironically, the other two chapters concern the rights of the Church and the City of London, and cannot help the defendants. Mr Randle-Jolliffe also invokes 'constitutional and superior law issues' which, he alleges, prevail over statutory, common law, and human rights law. Again that is simply wrong – at least in a court of law.

31. Another ground he raised was the contention that the City had no *locus standi* to bring the proceedings 'as the current Mayoral position has been previously usurped by the Guilds and Aldermen in Contravention of the City of London's 1215 Royal Charter'. We do not understand that point, not least because both the Lord Mayor and the Aldermen and Guilds (through the Commonalty and Citizens) are included in the claimants.

32. Three arguments raised by Ms Williams on behalf of Mr Barda, and supported by Mr Ashman, can also be taken shortly. First, it was said that the City's arguments based on the breach of the various statutes identified in the judgment, and the public rights and the City's powers and duties under the statutes referred to, are not of themselves

enough to render the Judge's decision proportionate. Even if that is right (and we rather doubt whether it is) these concerns were only the subject of the first of the five reasons, which, when combined, persuaded the Judge to reach the conclusion that he reached.

33. Secondly, it was said that the Judge was wrong to take into account the increase in crime at [2012] EWHC 34 (QB), para 163. It is true that the evidence showed that the police considered that those responsible for the Camp had done their best to minimise the risk of criminal activity, but there was evidence that crime had increased in the area, so there was evidence which justified the Judge's view. But the point can be said to cut both ways: there is no guarantee that the admirable care to ensure that criminal activity is kept to a minimum would continue. Anyway, it is fanciful to suggest that the Judge would not have reached the conclusion that he did if he had thought that the evidence or arguments did not satisfy him that he should take this factor into account.

34. Thirdly, it was said that the Judge ought not to have found, as he did at [2012] EWHC 34 (QB), para 162, that there was any interference with the rights of those who wished to worship at St Paul's Cathedral, given that (a) no worshipper gave evidence, and (b) the Occupy Movement stands for the same values as the Church of England. As to (a), the Judge was plainly entitled to reach the conclusion that he arrived at. He had figures which showed a very significant reduction in worshippers at, and visitors to, the Cathedral since the Camp had arrived, and evidence of opinion from the Cathedral Registrar that the reduction was caused by the Camp. While there were some other possible explanations for the reduction, the Judge was, to put it at its lowest, entitled to reach the view that he did. As to point (b), it is true that some prominent members of the Church of England have expressed support for the Camp, but that is no answer to the Judge's concern about the interference by the Camp with the access of people who wish to worship in the Cathedral.

35. Mr Ashman had two further criticism of the judgment. First, he complained that the Judge wrongly referred to the Camp as a 'protest' camp. We accept that the aims of Occupy London are not by any means limited to protesting in the familiar sense of, say, a protest march. The aims of the Movement, as implemented in the Camp, include education, heightening awareness and fostering debate. However, the Judge was plainly aware of this, as the passages in his judgment quoted in paras 2 and 3 above demonstrate. Further those activities do include protesting; indeed they may be said to be based on protesting, in the sense that the Occupy Movement's *raison d'etre* is, at least to a substantial extent, based on its opposition to many of the policies, especially economic, financial, and environmental policies, adopted by the United Kingdom Government.

36. Secondly, it is said that the defendants intend to strike the Camp, possibly by the end of this month. It is by no means clear that this would happen voluntarily. Indeed, the impression given by Mr Ashman, when he was asked about this, was that the Camp would only be struck when the Occupy Movement believed that i had had a definite effect in the form of some sort of change of Government policy. All in all, it appears improbable that the Camp will cease voluntarily within the next few months. If the Judge was otherwise right to make the orders which were made, it would have required a very clear commitment by the defendants to vacate the churchyard in the

very near future before there could even have been any possibility of justifying the Judge not making the orders.

37. The broadest argument in support of the contention that the orders made by Lindblom J should simply be set aside is rather more fundamental. That argument is that, assuming the correctness of all the findings of fact made, and the relevant factors identified, by the Judge in his judgment, it was an unjustified interference with the defendants' Convention rights to make any order which closed down the Camp. This argument amounts to saying that Articles 10 and 11 effectively mandated the Judge to hold that the Camp should be allowed to continue in its current form, presumably for the foreseeable future. The basis of this argument is that, on the facts of this case, there was an insufficiently 'pressing social need in a democratic society' to justify the orders which the Judge made, bearing in mind the defendants' Article 10 and 11 rights.

38. This argument raises the question which the Judge identified at the start of his judgment, namely 'the limits to the right of lawful assembly and protest on the highway', using the word 'protest' in its broad sense of meaning the expression and dissemination of opinions. In that connection, as the Judge observed at [2012] EWHC 34 (QB), para 100, it is clear that, unless the law is that 'assembly on the public highway *may* be lawful, the right contained in article 11(1) of the Convention is denied' – quoting Lord Irvine LC in *DPP v Jones* [1999] 2 AC 240, 259E. However, as the Judge also went on to say at [2012] EWHC 34 (QB), para 145:

> 'To camp on the highway as a means of protest was not held lawful in *DPP v Jones.* Limitations on the public right of assembly on the highway were noticed, both at common law and under Article 11 of the Convention (see Lord Irvine at p 259A-G, Lord Slynn at p 265C-G, Lord Hope of Craighead at p 277D-p 278D, and Lord Clyde at p 280F). In a passage of his speech that I have quoted above Lord Clyde expressed his view that the public's right did not extend to camping.'

39. As the Judge recognised, the answer to the question which he identified at the start of his judgment is inevitably fact-sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.

40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because, as the Judge said at [2012] EWHC 34 (QB), para 155:

> '[I]t is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command. … [T]he court cannot – indeed, must not – attempt to adjudicate on the merits of the

> protest. To do that would go against the very spirit of Articles 10 and 11 of the Convention. … [T]he right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.'

41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case, the Judge accepted that the topics of concern to the Occupy Movement were 'of very great political importance' - [2012] EWHC 34 (QB), para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in *Kuznetsov* [2008] ECHR 1170, para 45:

> 'Any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means'.

The Judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate.

42. In *Appleby* (2003) 37 EHRR 38, the Strasbourg court accepted that the applicants' Article 10 and 11 rights were engaged, but held that there was no infringement of those rights because '[r]egard must also be had to the property rights of the owner of the [privately owned] shopping centre', and there were other places where the applicants could exercise their Article 10 and 11 rights. While St Paul's churchyard is a particularly attractive location for the Movement, in view of its prominence in the City of London, the Judge's orders clearly do not prevent the Movement protesting anywhere other than the churchyard. And there are many 'rights' with which the Camp interferes adversely.

43. The level of public disruption which a protest on public land may legitimately cause before interference with Article 10 and 11 rights is justified was discussed by the Strasbourg court in *Kuznetsov* [2008] ECHR 1170, para 44. After explaining that the demonstration in that case had lasted about half an hour, and had blocked the public passage giving access to a court-house, the court emphasised that a degree of tolerance is required from the State, and then said this:

> 'The Court considers the following elements important for the assessment of this situation. Firstly, it is undisputed that there were no complaints by anyone, whether individual visitors, judges or court employees, about the

> alleged obstruction of entry to the court-house by the picket participants. Secondly, even assuming that the presence of several individuals on top of the staircase did restrict access to the entrance door, it is creditable that the applicant diligently complied with the officials' request and without further argument descended the stairs onto the pavement. Thirdly, it is notable that the alleged hindrance was of an extremely short duration. Finally, as a general principle, the Court reiterates that any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance Accordingly, the Court is not satisfied that the alleged obstruction of passage, especially in the circumstances where the applicant gave evidence of his flexibility and readiness to cooperate with the authorities, was a relevant and sufficient reason for the interference.'

44. In that case, the demonstration amounted to a trespass and blocked a public right of way, but it not only lasted only 30 minutes, but it appeared to interfere with no public rights in practice, and ended as soon as the police requested it to end. In this case, by the time that Lindblom J came to give his judgment, the Camp was, and had been for three months, (i) trespassing in St Paul's churchyard, (ii) substantially interfering with the public right of way and the rights of those who wished to worship in the Cathedral, (iii) in breach of planning control, and (iv) causing strain on public health facilities, and some damage to local businesses. In those circumstances, far from it not being open to the Judge to make the orders that he made, it seems to us that there is a very powerful case indeed for saying that, if he had refused to make any order in the City's favour, this court would have reversed him.

45. The facts of this case are a long way from those in *Tabernacle* [2009] EWCA Civ 23,where (i) members of the public (and therefore, at least *prima facie* the protesters) had the right to pitch tents where the protest was camped, (ii) the protest camp was in place only one weekend a month, and (iii) there was no interference with any third party rights, (iv) the very object of their protest was on adjoining land owned by the same public landowner, and (v) the protest had continued for twenty years with no complaint. On the other hand, in one respect, the defendants' case is stronger than that of the applicants in *Appleby* (2003) 37 EHRR 38 in that the land involved here is publicly owned; against that, the activities of the applicants in *Appleby* (2003) 37 EHRR 38, unlike those of the defendants here, did not involve possessing the land concerned, or interfering with its use by other people, or with the enjoyment of other peoples' Convention rights.

46. The contrast between the facts of this case and those in *Kuznetsov* [2008] ECHR 1170 is very marked. In that case, the period of occupation of the public passage way by the protesters was less than an hour, during which the protesters accommodated the requests of the authorities, there was no evidence of any actual obstruction of anyone else's rights, and there was no suggestion of the breach of any statutory provisions or of any nuisance or public health implications. It is true that the Convention rights of the protesters in *Kuznetsov* [2008] ECHR 1170 were held to be infringed, but the way in which the Strasbourg court expressed itself (as quoted at para 43 above) is not

helpful to the defendants in this case, to put it mildly. That point is reinforced by the fact, pointed out by the Judge at [2012] EWHC 34 (QB), para 145, that 'complaints brought against evictions in cases where a protest on a far smaller scale than [the Camp] has blocked a public road or occupied a public space have been held inadmissible [by the Commission]' - see *G v Germany* (Application no. 13079/87) *G and E v Norway* (Application nos. 9278/81 and 9415/81) (1984) 6 EHRR 357.

47. It is worth referring in a little more detail to the Commission's decision in *G v Germany* (Application no. 13079/87), not least because it was cited with approval by the Strasbourg court in its judgment in *Lucas* (App No 39013/02). *G v Germany* (Application no. 13079/87) concerned a sit-in, which was a protest against nuclear arms, and which obstructed a highway, which gave access to a US army barracks in Germany, for twelve minutes every hour. Consistently with all the relevant authorities, the Commission said that it considered that 'the right to freedom of peaceful assembly is secured to everyone who organises or participates in a peaceful demonstration.' However, it went on to say that:

> '[T]he applicant's conviction for having participated in a sit-in can reasonably be considered as necessary in a democratic society for the prevention of disorder and crime. In this respect, the Commission considers especially that the applicant had not been punished for his participation in the demonstration … as such, but for particular behaviour in the course of the demonstration, namely the blocking of a public road, thereby causing more obstruction than would normally arise from the exercise of the right of peaceful assembly. The applicant and the other demonstrators had thereby intended to attract broader public attention to their political opinions concerning nuclear armament. However, balancing the public interest in the prevention of disorder and the interest of the applicant and the other demonstrators in choosing the particular form of a sit-in, the applicant's conviction for the criminal offence of unlawful coercion does not appear disproportionate to the aims pursued.'

48. The domestic case with the greatest similarity to this case is *Hall* [2011] 1 WLR 504, which was concerned with a protest camp, known as the Democracy Village, on Parliament Square Gardens ('PSG'), opposite the Houses of Parliament in London. In that case, this court held that it was 'to put it at its lowest … open to the Judge' to conclude 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 … and the prevention of crime' as well as to enable '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' - [2011] 1 WLR 504, paras 46-7.

49. It would be unhelpful to attempt to determine whether, in these proceedings, the City had a stronger or weaker case than the Mayor of London in *Hall* [2011] 1 WLR 504. Indeed, if the court entered into such a debate, it would risk trespassing into the forbidden territory discussed by the Judge in the passages referred to in para 12 above. The essential point in *Hall* [2011] 1 WLR 504 and in this case is that, while the protesters' Article 10 and 11 rights are undoubtedly engaged, it is very difficult to see how they could ever prevail against the will of the landowner, when they are

continuously and exclusively occupying public land, breaching not just the owner's property rights and certain statutory provisions, but significantly interfering with the public and Convention rights of others, and causing other problems (connected with health, nuisance, and the like), particularly in circumstances where the occupation has already continued for months, and is likely to continue indefinitely.

50. During the hearing of the applications, reliance was placed on the fact that the Camp was also used as a place where the homeless could be accommodated. That is a new argument, not raised below. Further, although it may add Article 8 of the Convention into the issues, in that it might be said that the orders made below would involve evicting the formerly homeless from their homes, we do not think that the point can possibly assist the defendants. It must be doubtful whether the very temporary sleeping facilities at the Camp afforded to some homeless people results in their Article 8 rights being engaged. Even if it does, the defendants' Article 10 and 11 (and possibly Article 9) rights are not nearly close enough to balancing the factors in favour of making Lindblom J's orders, for the relatively weak Article 8 rights in play to have any possibility of tipping the balance the other way.

The argument that the Judge should have made more limited orders

51. In reliance on the principle that, even where it concludes that it is appropriate to make an order which interferes with an individual's Convention rights, the court should ensure that it identifies the least intrusive way of effecting such interference, Mr Cooper contends that the orders made by the Judge were too extreme. The Judge could, and should, he argues, have made an order which was less intrusive of the defendants' Convention rights than the orders which he made.

52. The first problem with that argument, is that only one possible alternative to maintaining the Camp in its current state was put to the Judge, namely that which he discussed in para 13 above. The Judge rejected that possibility for reasons which appear to us to be plainly good, and which were not challenged by Mr Cooper. However, says Mr Cooper, the Judge was nonetheless under a duty to investigate, effectively, it would appear, on his own initiative, whether there was an order which he could make which would be less intrusive than those that he did make. Furthermore, says Mr Cooper, in reliance on what Lord Bingham of Cornhill said in *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 44, if the Judge did not perform that duty, the Court of Appeal should do so.

53. We are prepared to assume that in some cases, a court may have a duty to investigate whether there is a less intrusive order which could be made, even though this would involve the court taking the point itself (although that assumption seems arguably inconsistent with what the Supreme Court said, albeit on a slightly different point in *Manchester City Council v Pinnock* [2011] UKSC 6, [2011] 2 WLR 220, para 61). However, as already mentioned, the point was in fact taken by the defendants, and justifiably rejected by the Judge. Assuming that the Judge's duty nonetheless required him to consider the question further, it seems to us that it cannot have required him to do more than to raise the issue with the defendants. If they were then to persuade him to make any less intrusive order than he did, they would have had to come up with a specific arrangement which (i) would be workable in practice, (ii) would not give rise, at least to anything like the same degree, as the breaches of statutory provisions and

other peoples' rights, as the current state of affairs, and (iii) would be less intrusive of the defendants' Convention rights as the orders made by the Judge.

54. The defendants did not put forward a proposal which satisfied any of those criteria to the Judge; nor did they put forward any such proposal to the Court of Appeal. In our view, therefore, it was not open to the Judge, and it would not be open to the Court of Appeal to make any such less intrusive order. If we had been presented with a proposal which was said to satisfy the three requirements referred to at the end of the previous paragraph, then we would have had to consider whether it was arguably capable of doing so, and if it had been, we would have considered allowing permission to appeal on the basis that the case would be sent back to Lindblom J.

55. However, it is only right to add that we are very sceptical as to whether any such proposal could realistically have been put forward in this case (which may well explain why it has not happened). It is not merely that the tents appear to be an integral part of the message (to use a compendious word) which the Occupy Movement is seeking to maintain through the medium of the Camp, and it is impossible to see how they could remain in Saint Paul's churchyard. It is also that we think it unlikely that any scheme which satisfied the second and third of the three requirements would have much prospect of satisfying the first.

Mr Moore's application

56. Mr Moore's position is rather different. Although he occupies one of the tents in the Churchyard, he is not a member of the Occupy Movement, and is a member of a different, smaller group, albeit one whose principles are similar to those of the Movement. His case is simply that, although bound by the orders as one of the 'Persons Unknown' or as a result of Ms Samede representing all those in occupation of the Churchyard, he should be allowed to appeal as neither he nor his tent was served with the City's claim form.

57. There is telling evidence to support the view that his tent was served, but the issue is sufficiently debatable for this court to accept that it cannot be decided without proper evidence. However, despite that, we do not consider that Mr Moore has a good argument for setting the orders made aside, at least so far as they relate to him.

58. First, he saw all the papers relating to the proceedings, and clearly must have appreciated that the City was claiming possession of the land occupied by his tent, and was seeking removal of his tent. That is because, as he fairly told us, he is not unfamiliar with legal proceedings, and had advised the Occupy Movement about the City's claims for possession orders and injunctive relief, for which purpose he was supplied with all the court papers.

59. Secondly, essentially for the reasons contained in this judgment as to why permission to appeal should be refused to the other defendants, it seems to us that he would have no reasonable prospect of persuading the Court of Appeal that he could possibly succeed in defending the proceedings if they were reheard as against him.

Concluding remarks

60. For these reasons, we would refuse all the defendants permission to appeal against the orders made by Lindblom J. There is no chance that any of the criticisms raised by each of the defendants, or even all of those criticisms taken together, could persuade an appellate court that his decision was wrong. Like Griffith-Williams J in *Hall* [2011] 1 WLR 504, in a very clear and careful judgment, Lindblom J reached a conclusion which, to put it at its very lowest, he was plainly entitled to reach. Indeed, as Mr Forsdick put it on behalf of the City, this was, on the Judge's findings of fact and analysis of the issues, not a marginal case.

61. The hearing of this case took up five days and resulted in a conspicuously full and careful judgment. The hearing at first instance in *Hall* [2011] 1 WLR 504 took eight days and also resulted in a detailed and clear judgment – see at [2010] EWHC 1613. Each case has now also resulted in a full judgment on the application for permission to appeal. There is now, therefore, guidance available for first instance judges faced with cases of a similar nature; indeed, that is part of the purpose of this judgment.

62. Of course, each case turns on its facts, and where Convention rights are engaged, case law indicates that the court must examine the facts under a particularly sharp focus. Nonetheless, in future cases of this nature (where the facts involve a demonstration which involves not merely occupying public land, but doing so for more than a short period and in a way which not only is in breach of statute but substantially interferes with the rights of others), it should be possible for the hearing to be disposed of at first instance more quickly than in the present case or in *Hall* [2010] EWHC 1613.

63. For instance, in each case, a significant amount of court time was taken up by the defendant protesters explaining to the court the views they were seeking to promote. In strict principle, little if any court time need be taken up with such evidence. The contents of those views should not be in dispute, and, as we have sought to explain, they are very unlikely to be of much significance to the legal issues involved. Of course, any judge hearing such a case will not want to be thought to be muzzling defendants, who want to explain their passionately held views in order to justify their demonstration (and, at least where the defendants are as they are in this case, it is informative and thought-provoking to hear those views). Accordingly, while it would be wrong to suggest that in every case such evidence should be excluded, a judge should be ready to exercise available case management powers to ensure that hearings in this sort of case do not take up a disproportionate amount of court time.

64. We recognise, of course, that it is one thing for the Court of Appeal to make that sort of observation about a hypothetical future claim, and that it can be quite another thing for a trial judge, faced with a difficult actual claim, to comply with it. Nonetheless, with the benefit of the guidance given in two first instance judgments and two judgments of the Court of Appeal (and the Strasbourg and domestic decisions referred to above), it is not unreasonable to hope that future cases of this sort will be capable of being disposed of more expeditiously.

65. Not least for that reason, this judgment, like that in *Hall* [2011] 1 WLR 504, may be cited as an authority, notwithstanding that it is a decision refusing permission to appeal.