



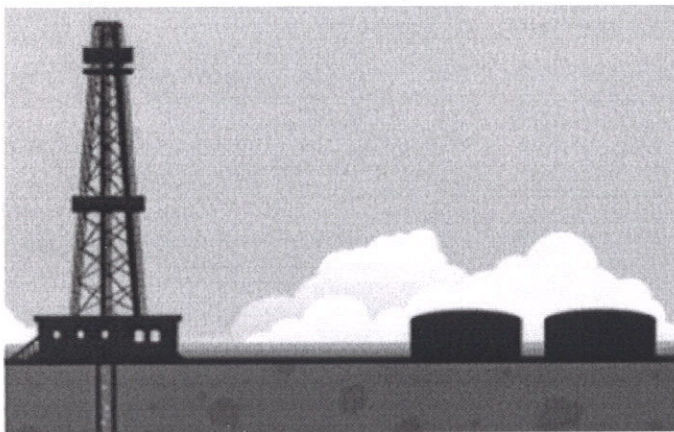
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### Fracking & protestors

Nicholas Asprey addresses the issues  
arising in claims against protestors



#### IN BRIEF

- It seems likely that as a fracking industry develops the protests will increase.
- Protestors are well organised & know how to exploit the law, especially Arts 8, 10 & 11 of the European Convention on Human Rights.
- Legal proceedings to recover possession of land occupied by protestors should begin as soon as possible.

The growing search for shale oil and gas is supported and encouraged by the government because it believes that the exploitation of these reserves has the potential to provide the UK with greater energy security, growth and jobs. The only way to find out whether the reserves are technically and economically recoverable is by exploratory drilling. This is an expensive, long and uncertain operation and the government has been at pains to remove unnecessary legal obstacles which might discourage exploration companies from proceeding.

Thus the government has amended the planning procedures so that companies applying for planning permission for the winning and working of oil or natural gas are no longer required to serve notice on the owners of land which is to be used solely for underground drilling (The Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment No 2) Order 2013 (SI 2013/3194)). In May it issued a consultation paper on a proposal to grant

automatic access rights for drilling below a depth of 300 metres. The consultation period has now closed and the government's decision is awaited. Finally, in July it opened the bidding process in a new round of applications for exploration licences.

Despite the many safeguards, and the benefits to be gained from exploitation, the government's policy is controversial. It seems likely that as the industry develops the protests will increase. The protestors are well organised and know how to exploit the law. They set up camp on publicly or privately owned land at or near drilling sites and remain in occupation until they are removed. This article concerns the legal issues that are likely to arise in claims for possession brought against them.

#### The relevant law

Two recent cases are of particular significance and will be discussed below. They are *Malik v Fassenfeldt* [2013] EWCA Civ 798, [2013] All ER (D) 44 (Jul) and *Manchester Ship Canal Developments Ltd v Persons Unknown* [2014] EWHC 645 (Ch), [2014] All ER (D) 93 (Mar). They summarise the law as it has developed since the European Convention on Human Rights (the Convention) was incorporated into English law in October 2002. The law seems now to be reasonably well settled although one important issue has still only been resolved at first instance and may yet be reconsidered by a higher tribunal. It is unnecessary to consider the previous law except to remind readers that under English domestic law a landowner was

entitled to a summary order for possession against squatters with immediate effect even though the names of the squatters were unknown and as one squatter left another arrived: see *McPhail v Persons, Names Unknown* [1973] Ch 447, [1973] 3 All ER 393. This principle now has to be considered in the light of Arts 8, 10 and 11 of the Convention.

Article 8 provides that everyone has the right to respect for his home; Art 10 provides that everyone has the right to freedom of expression; and Art 11 provides that everyone has the right to freedom of peaceful assembly. Protesters who set up camp on land belonging to others have become accustomed to relying on these fundamental rights in an endeavour to prolong their protests.

One important question is whether Art 8 applies to privately owned land. In *Malik* Sir Alan Ward concluded that it does, but his judgment was obiter and Lord Justice Toulson and Lord Justice Lloyd declined to decide the issue. In *Manchester Ship Canal* the deputy judge agreed with Sir Alan. Her decision may well be right but the issue may not be finally settled. It does not arise under Arts 10 and 11, which have always applied to both publicly and privately owned land.

#### The issue of proportionality

Each fundamental right is set out in para 1 of the Article and the conditions upon which it is legitimate for a public authority, which includes a court, to interfere with that right are set out in para 2. In each case the conditions provide that there shall be no interference with the exercise of the right unless the interference is in accordance with the law and is necessary for the protection of the rights and freedoms of others.

In determining whether it is necessary to interfere with the right the issue is whether the interference is proportionate to the legitimate aim. This derives from the margin of appreciation given to the domestic law. In a claim against protestors the issue is likely to be whether an order for possession with immediate effect is proportionate to the aim of protecting the rights of the landowner.

This question is fact sensitive and enables the defendants to argue, for example, that the land was abandoned or derelict, that they are doing no harm, or have nowhere else to protest. The court will consider all the circumstances. But the principle of English domestic law, enshrined in *McPhail*, that an owner is entitled to an order for possession with immediate effect, weighs heavily in this context; and Art 1 of the First Protocol itself provides that every person is entitled to the peaceful enjoyment of his possessions.





Although the issue is fact sensitive the courts will not hesitate to grant a summary order for possession if a defence on grounds of disproportionality is not seriously arguable. Any such defence must be pleaded and particularised to show that it reaches the threshold of being seriously arguable. The court will consider at an early stage whether on the pleaded facts it reaches this threshold. If it does not, it will be struck out or dismissed.

#### Article 8

Paragraph 1 of Art 8 provides that everyone has a right to respect for his "home"; and para 2 provides that there shall be no interference with the exercise of this right except such as is in accordance with the law "and is necessary...for the protection of the rights and freedoms of others".

For this right to be engaged a defendant must prove that he has established a "home" on the land. The test is whether in all the circumstances the defendant has established the existence of sufficient and continuous links with the land. This too is fact sensitive but the burden is on the defendant.

In *Manchester Ship Canal* the defendants were protesting against fracking and set up camp near a drilling site. Two of them claimed to have established a home on the land. Only one had a credible case. He lived on the land in a tent and eventually in a caravan. He had other rented accommodation, from which he expected to be evicted, at which point the caravan would become his only home.

The judge held that these facts were insufficient to establish the existence of sufficient and continuous links with the land. He pointed out that the loss of the defendant's rented property had nothing to do with his camping on the land, and then said this: "Resisting on the land for the more efficient conduct of the protest does not constitute a sufficient connection with the land for these purposes. It is not now and never has been his intention to remain on the land on an indefinite or permanent basis."

It is hard to dispute this reasoning, and it shows that protesters, as opposed to ordinary squatters who can show that they intended to stay indefinitely, will find it hard to succeed on this point (cf *Malik*, where the squatters were not protesters and went to great lengths to reinstate the land and the buildings in which they lived and were held at first instance to have established a home on the land).

Turning to proportionality, Sir Alan Ward stated in *Malik* that the court must approach a claim made by a private landowner in a similar way to a claim

brought by a public authority, the test being whether an order for possession is a proportionate means of achieving a legitimate aim. He then said this: "The fact that the landowner has a legal right to possession is a very strong factor in support of proportionality: it speaks for itself and needs no further explanation."

Echoing the words of Lord Neuberger (in *Manchester City Council v Pinnock* [2011] UKSC 6, [2011] 2 AC 104, [2011] 2 All ER 586) he went on to say this: "Thus, even if the defendants have established a home on the land but where they have otherwise no legal right to remain there, it is difficult to imagine circumstances which would give the defendant an unlimited and unconditional right to remain. The circumstances would have to be exceptional."

It is notable that in *Malik* the judge at first instance, despite the extensive work done by the defendants to reinstate the land and buildings, nevertheless made an order for possession with immediate effect, having pointed out that they were experienced squatters and knew exactly what they were doing when entering onto the land, as will be the case with protesters generally. The Court of Appeal declined to interfere with her decision.

In *Manchester Ship Canal* the judge came to the same conclusion regarding the only defendants who managed to show that Art 8 was engaged. He said there was "nothing sufficiently exceptional" in the facts to justify the conclusion that the claimants' right to peaceful enjoyment of their land should yield to the defendant's Art 8 rights or be postponed by the making of anything other than an immediate possession order.

#### Articles 10 & 11

Paragraph 1 of Art 10 provides that everyone has the right to freedom of expression. This includes freedom to impart information and ideas without interference by public authority. Paragraph 2 provides that the exercise of this freedom is subject to such restrictions as are prescribed by law and are necessary for the prevention of disorder and for the protection of the rights of others.

Paragraph 1 of Art 11 provides that everyone has the right to freedom of peaceful assembly, and para 2 provides that no restrictions may be placed on the exercise of these rights other than such as are prescribed by law and are necessary for protection of the rights and freedoms of others.

Protesters who set up camp to protest against fracking will find it hard to establish an arguable defence on these grounds, whether the land which they occupy is publicly or privately owned or is

open land (such as a highway) to which the public have access. The key point is that an order for possession will not generally prevent the defendants from carrying on their protest elsewhere and Arts 10 and 11 do not give the protester a right to any particular forum.

Apart from *Manchester Ship Canal*, the two most significant cases are *The Mayor of London v Hall* [2010] EWHC 1613 (QB), [2010] All ER (D) 254 (Jun) and *The Mayor and Commonalty and Citizens of London v Samede* [2012] EWCA Civ 160, [2012] 2 All ER 1039, which concern the Parliament Square and St Paul's Cathedral protests. In *Samede*, the Master of the Rolls said this: "The essential point in *Hall*...and in this case is that, while the protesters' Art 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."

In *Manchester Ship Canal* the land was privately owned and the occupation by the defendants was not disruptive as in *Hall* or *Samede*, yet the deputy judge held that Arts 10 and 11 did "not even arguably" provide the defendants with a defence to the claim for possession.

#### Comment

The cases show that where the defendants occupy land to protest against fracking a defence based on their Art 8, 10 or 11 rights is unlikely to succeed, or even to be seriously arguable. But a word of caution must be added, namely that a landowner, whether public or private, should start the claim for possession immediately.

The reason is not only to prevent loss and damage but to prevent the occupation from acquiring an air of permanence such as might give credence to a contention that the defendants have established a home on the land or should be given time to give up possession. Famously the owners in the Parliament Square and St Paul's Cathedral cases were slow to issue proceedings, which then went to a full trial. If the claim is issued as soon as possible the chances of getting it struck out at an early stage will be greatly enhanced. NLI

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