IN THE HIGH COURT OF JUSTICE **Claim No:KB-2024-BHM-000107**

BIRMINGHAM DISTRICT REGISTRY

KING'S BENCH DIVISION

B E T W E E N:

THE UNIVERSITY OF NOTTINGHAM

Claimant

-and-

(1) MX JOEL BUTTERWORTH

(also known as RIVER BUTTERWORTH (they/them))

~~**(2) MR SAMEH ESMAILZADAH**~~
~~**(3) MR JOHN ELDRIDGE**~~
(4) ~~**MS ARADHYA NEGI**~~
(5) Non students/staff: PERSONS UNKNOWN, BEING PERSONS IN AN ENCAPMENT OCCUPATION OF LAND ON THE JUBILEE CAMPUS AT THE UNIVERSITY OF NOTTINGHAM WHO ARE NOT CURRENTLY STUDENTS, STAFF OR EMPLOYEES OF THE CLAIMANT
(6) Students/staff: PERSONS UNKNOWN, BEING PERSONS IN AN ENCAPMENT OCCUPATION OF LAND ON THE JUBILEE CAMPUS AT THE UNIVERSITY OF NOTTINGHAM WHO ARE CURRENTLY STUDENTS, STAFF OR EMPLOYEES OF THE CLAIMANT

Defendants

SKELETON ARGUMENT ON BEHALF OF THE CLAIMANT

FOR THE HEARING ON FRIDAY 5 JULY 2024

The Hearing

1.1 The hearing on 5 July 2024 is the adjourned hearing of the Claimant's application for a summary order for possession, pursuant to CPR Part 55.

1.2 The time estimate for the hearing is 1 day.

Background

2.1 This Claim is a claim for possession against trespassers in respect of an unlawful occupational encampment at the University of Nottingham.

2.2 The background to the Claim is set out in the Witness Statement of Jason Carter dated 14 May 2024 and in the Skeleton Argument dated 16 May 2024 of the Claimant's Counsel, Ms Michelle Caney.

The Hearing on 17 May 2024

3.1 At the first hearing on 17 May 2024, the Court made various orders which were set out in the Order dated 20 May 2024. These included an order for possession in respect of the land edged red on the plan attached to the order against Persons Unknown who were neither students nor staff of the University, and also various directions for an adjourned hearing on 21 May 2024.

3.2 Some of the directions set out in that Order were the subject of variations in an Order dated 22 May 2024 (as amended under the slip rule on 24 May 2024).

The Hearing on 7 June 2024

4.1 At the hearing on 7 June 2024, a number of variations were made to the earlier Order pursuant to two Orders dated 10 June 2024.

4.2 For present purposes, the material provisions of the second of these Orders included a slightly revised order for possession in respect of the land edged red on the plan attached against Persons Unknown who were neither students nor staff of the University, and various revised directions applicable to a proposed adjourned hearing on 19 June 2024.

Developments since the Hearing on 7 June 2024

5.1 Since the hearing on 7 June 2024, there have been the following developments:

5.1.1 Bindmans solicitors, as solicitors on the record for the First Defendant, have filed and served the following:

(a) Acknowledgement of Service on 11 June 2024

(b) Defence on 12 June 2024

(c) Witness Statement of the First Defendant on 11 June 2024

(d) Witness Statements of various witnesses on 11 June 2024.

5.1.2 The Claimant has served evidence in response in the form of a Witness Statement of Dr Paul Greatrix dated 14 June 2024.[1]

5.1.3 By an Order dated 18 June 2024, the hearing on 19 June 2024 was adjourned, on the basis that the time allowed for the hearing was only half a day.

5.2 By paragraph 3 of Order (2) dated 10 June 2024, the Court ordered that any acknowledgements of service, admissions or defences should be served by 4pm on 12 June 2024. All that the Claimant has received is the Acknowledgment of Service and Defence from the First Defendant. It is therefore only the First Defendant who is defending this Claim.

5.4 The hearing is now to take place in London on 5 July 2024.

The claim to a summary order for possession

6.1 This is a claim for possession of land, in respect of which the remedy is an order 'in rem'. No claim to an injunction is sought, which would be directed at specific persons and to which the remedy of contempt would be applicable if the order was breached.

6.2 Unlike the procedure for injunctions against 'persons unknown', the summary possession procedure specifically allows for the description of defendants to be 'persons unknown' where the names of the occupiers are not known: see CPR 55.3(4). The First Defendant, however, is an occupier who is 'known of' and is therefore a named defendant to the Claim.

6.3 This is a claim which is appropriate for a summary order for possession. The need to deal with matters quickly and cost effectively in this sort of case is exactly the reason why there is a specific summary procedure in CPR Part 55 (following on from the procedure that used to be in RSC Order 113).

6.4 The approach of granting a summary order for possession in this context of unauthorised occupations by students (as originally decided in *University of Essex v Djemal* [1980] 1 WLR 1301) has been expressly endorsed by the Supreme Court in

[1] C will be seeking permission to rely upon updating evidence in the form of a Second Witness Statement of Dr Paul Greatrix, due to events associated with the encampment during recent open days on 28 and 29 June 2024.

Secretary of State for the Environment, Food and Rural Affairs v Meier and others [2009] UKSC 11 [2009] 1 WLR 2780: see [7], [10] (per Lord Rodger), [23] (per Baroness Hale), [69] (per Lord Neuberger) and [97] (per Lord Collins).

6.5 Accordingly, it is to be noted that the contention in paragraph 24 of the Defence that a possession order is not the appropriate form of relief in the present case is clearly wrong and runs contrary to these statements of principle in Supreme Court. The whole purpose of this claim is so that the Claimant can recover possession of the land, because the taking of possession of land is not something which any students are entitled to do, for all the reasons set out in this Skeleton Argument below. A possession order will authorise the court official to remove persons from the land and the order for possession will therefore put the Claimant back into possession: see *McPhail v Persons Unknown* [1973] Ch 447, 457 per Lord Denning MR; *Meier* [2009] 1 WLR 2780 at [33] to [36] per Baroness Hale; and *Wolverhampton City Council v London Gypsies and Travellers* [2024] 2 WLR 45 at [166] per Lord Reed PSC, Lord Briggs JSC and Lord Kitchin.

6.6 For the reasons explained below, the purported defences put forward in this case are without merit and it will be submitted that it would therefore be contrary to principle and the overriding objective for this matter not to be determined at this stage and for there to be further delay by the grant of any further case management directions.

The 'Defences' put forward by the First Defendant

7.1 Paragraph 23 of the Defence of the First Defendant indicates that the First Defendant will seek to rely upon three purported defences:

> *"i) The First Defendant has an express and/or implied licence to enter and remain on the Occupied Land which has not been validly revoked and is not a trespasser on the Occupied Land ("Licence Defence").*
>
> *ii) The Claimant has failed to comply with its duties and obligations under statute, public law and its own policies ("Public Law Defence").*
>
> *iii) The granting of the possession order sought constitutes a disproportionate interference with the First Defendant's rights under Articles 10 and 11 ECHR ("Human Rights Defence")."*

7.2 The test of whether a claim is *"genuinely disputed on grounds which appear to be substantial"* is the same as that for summary judgment: *Global 100 Ltd v Lavela* [2021] EWCA Civ 1835, namely a real prospect of success has been shown. The defence must be more than "arguable". The court is not obliged to take at face value and without analysis everything said: *ED&F Man Liquid v Patel* [2003] EWCA Civ 472 at [10].

7.3 It is submitted that none of the above purported defences has any realistic prospect of success by way of defence to the order for possession sought.

The 'Human Rights Defence'

8.1 The purported 'Human Rights Defence' is set out in paragraphs 43 to 45 of the First Defendant's Defence. In summary, it is claimed that the Claimant is a public authority, such that it is required to act compatibly with the First Defendant's rights under Articles 10 and 11 ECHR – and that the Court is similarly required to consider such rights in assessing the proportionality of granting relief in the present claim.

8.2 For the reasons set out below, it is submitted that this purported defence is without any merit for the following reasons:

8.2.1 The First Defendant's actions are not done in exercise of the rights conferred by Articles 10 or 11.

8.2.2 The Claimant is not a public authority.

8.2.3 There has been no interference which has not been prescribed by law, the interference is in pursuit of a legitimate aim and is necessary in a democratic society.

(1) The First Defendant's actions are not an exercise of Article 10 or 11 rights

8.3 It is submitted that the Human Rights Defence fails at this first hurdle. The taking of possession of land in this type of student encampment case is not an expression of free speech nor an exercise of the right of assembly. It goes much further in two respects. First, it is an act which excludes the owner from his rightful possession of property.

Secondly, it goes beyond expression or assembly in that it is specifically being undertaken in order to pressurise the Claimant to surrender to certain demands.

8.4 In relation to the first of these points, there is clear law supporting the contention that the setting up of an occupational encampment on the University's land is not to be regarded as the exercise as any right conferred by Article 10 or 11. Even in the case of highway land to which the public do have a right of access, it has been held that Articles 10 and 11 do not allow individuals to set up a camp. As Lord Clyde said in *Director of Public Prosecutions v Jones* [1991] 1 AC 240 at 280D *"While the right may extend to a picnic on a verge, it would not extend to camping there".* In the student sit-in context, in *School of Oriental and African Studies v Persons Unknown* [2010] EWHC 3977, Henderson J held at [28] that the rights of the students *"do not extend to conducting a sit-in which excludes SOAS from the premises"*.

8.5 In relation to the second point, there is a fundamental difference in the first instance between simple protest and direct action. Unlike the former, the latter involves as its aim the deliberate disruption and frustration of a person's lawful activity. The distinction has been treated in the case law as a distinction between seeking to *persuade* on the one hand and seeking to *compel* others to act in a way you desire. As Leggatt LJ explained in *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 at [94]:

> "… the disruption caused was not a side-effect of protest held in a public place but was an **intended aim of the protest**... this is an important distinction. …intentional disruption of activities of others is not "at the core" of the freedom protected by article 11 of the Convention …. one reason for this [is] that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others… …**persuasion is very different from attempting** (through physical obstruction or similar conduct) **to compel others to act in a way you desire**." (emphasis added)

8.6 In *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC (QB) 1215, the context was different but the same essential distinction applied as the conduct which led to the proceedings in that case had as its aim (rather than as a side-effect) intentional unlawful interference with the claimant's activities (see Johnson J at [61] to [62]).

8.7 This is simply not a case in which Articles 10 and 11 are applicable. It is expressly averred at paragraph 12 of the First Defendant's Defence that *"The First Defendant has engaged in this protest in order to **put pressure** on the University of Nottingham..."*

(emphasis added). That can be seen specifically from the evidence in this case which shows the "demands" of the occupiers (see the Witness Statement of Jason Carter dated 14 May 2024 at paragraphs 8, 26 and 27 and Exhibit JC4). The fact that the First Defendant is deliberately engaging in means which are intended to put *"pressure"* on the Claimant, as a distinct methodology from *"peaceful protest"*, is made very clear in their Witness Statement dated 11 June 2024 at paragraphs 5 to 7.

8.8 The reality of the position here is that the occupiers have taken up occupation on an area of land and put up camps there in order to seek to force the University to surrender to certain demands. It is submitted that direct action of this nature is not – and should not be – within the scope of 'freedom of expression' or 'freedom of assembly' for the purposes of Articles 10 and 11. The unauthorised occupation is not for an 'expression' of opinion. It is specific direct action to interfere with the activities of the University and other students and staff in order to force the University to give in to its demands. This is not something which Articles 10 or 11 protect.

(2) The Claimant is not a public authority

8.9 Even if it could be established that there was an exercise of Article 10 or 11 rights, the 'Human Rights Defence' also fails at this stage. The University is not a 'public authority' for these purposes. It is noted that the First Defendant merely asserts in paragraph 43 of the Defence that the University is a "public authority" for the purposes of the 1998 Act but does so without providing any authority to support this assertion. As explained below, the assertion is clearly wrong.

8.10 In order for section 6 of the Human Rights Act 1998 to apply and for there to be a *requirement* to act compatibly with Articles 10 and 11, the relevant body must be a "public authority". There are two categories of public authority. First, there are "core" public authorities, that is persons or bodies all of whose functions are of a public nature. In relation to such bodies, section 6 can apply to all of their functions. Secondly, there are "hybrid" public authorities, certain of whose functions may be of a public nature. With such a body, it is necessary to make an assessment both of the functions of the body as a whole (to ascertain whether it is a public authority at all) and of the particular act in issue. Most importantly, section 6(5) of the 1998 Act states that:

"a person is not a public authority by virtue of sections 3(b) if the nature of the act is private".

8.11 It is clear law that universities are not "core" public authorities. Universities are not to be equated with central or local government: see *Duke v University of Salford* [2013] EWHC 196 (QB) per Eady J at [3] to [4]. Universities are also expressly recognised as autonomous institutions, whose autonomy is protected by section 2 of the Higher Education and Research Act 2017. There is ample authority establishing that universities are not to be treated as "public authorities" in all of their activities: see *R v University of Nottingham, ex parte K* [1997] 1 WL 1105891 (see Auld LJ and Simon Brown LJ), *Evans v The University of Cambridge* [2002] EWHC 1382 (per Scott Baker J at [13]), *The Chancellor, Master & Scholars of the University of Cambridge* [2009] EWHC 1382 (per The Chancellor at [47]) and *Piepenbrock v London School of Economics and Political Science* [2022] EWHC 2421 (KB).

8.12 The function of recovering possession of its privately owned land is a clear example of where a university is not to be regarded as engaging in a function of a public nature. In particular in this case:

8.12.1 The Claimant clearly holds its property in a private capacity.

8.12.2 The Claimant, like many other universities, is an exempt charity. The Claimant therefore has a duty to safeguard University assets.

8.12.3 The land is not only registered as in private ownership but there is no question of the land being the subject of public access. The absence of public rights of access is a critical feature in this context: see Aston *Cantlow and Wilmcott with Billeselt Parochial Church Council Wallbank* [2004] 1 AC 546 per Lord Scott at [130] and *R (on the application of Beer (t/a Hammer Trout Farm) v Hampshire Farmers Market Ltd* [2004] 1 WLR 233 per Dyson LJ at [33].

8.12.4 The fact therefore that the existence of the university may be regarded as being of public benefit is nothing to the point here. It is fundamental to the test of identifying a "public authority" that *"the fact that a service can fairly be said to be to the public benefit cannot mean, as a matter of language, that it follows that providing the service itself is a function of a public nature"*. Nor does it

follow as a matter of logic or policy: *YL v Birmingham City Council* [2008] 1 AC 95 per Lord Neuberger at [135].

8.13 That the recovery of possession of land is not the exercise of any public function by a university is clearly reflected in the long line of cases in which summary orders for possession have been made in relation to student occupations: see, for example, *School of Oriental and African Studies v Persons Unknown* [2010] EWHC 3977 per Henderson J at [20] to [28] and the *University of Manchester and Others v Persons Unknown* (unreported) 20 March 2023, per His Honour Judge Pearce (High Court) at [13] and [14].

8.14 There is a specific consequence of the Claimant not being a public authority; there is no realistic scope for Articles 10 or 11 providing any defence to the claim for possession. It is only when the right to freedom of expression or the right of assembly would be barred or essentially destroyed that Articles 10 or 11 could ever constitute a defence to the claim for possession.

8.15 The important point is that a protestor cannot say, by way of defence, that their protest is more 'effective' if there is an unauthorised encampment on premises. Articles 10 and 11 do not operate in that way. That is clear law arising from the *Appleby v UK* (2003) 37 EHRR 38. Articles 10 and 11 do not confer any right to trespass on private property and thereby override the rights of private landowners: *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 at [36] to [37] (Longmore LJ) and *Director of Public Prosecutions v Cuciurean* [2022] QB 888 (DC), at [40]-[50] and [77]. Unless there is no other means of expressing an opinion or exercising a right of free assembly, Articles 10 or 11 cannot provide any defence. The fact that a protest might be more effective if there is an encampment is nothing to the point. Nor is any distinction to be drawn in the principles by reference to the nature of the protest or the person or body to whom the protest is directed.

8.16 This position has been reflected in the long line of case law on student occupations:

8.16.1 In *School of Oriental and African Studies v Persons Unknown* [2010] EWHC 3977 at [20] to [28], Henderson J held that it was "entirely fanciful" to suggest that preventing the students from exercising their rights in the particular building in question would prevent them from exercising their rights of

expression and similarly, Article 11 did not require the court to override the property rights of the university:

> "25. On the facts of the present case, it seems to me entirely fanciful to argue that preventing the students of SOAS from exercising their Article 10 rights in the Brunei Suite would in any way impinge upon the effective exercise of their right of freedom of expression. There are many other places and ways in which that right can be exercised, and as the events of the last few days have shown there are indeed may ways in which it has been exercised. The proposition that Article 10 requires the law to override the property rights of SOAS in its own buildings is, in my view, unarguable and offers no prospects of success at trial.
>
> 26. Similar considerations apply to Article 11… So, for the same reasons, it would be equally fanciful to suppose that the Article 11 right to freedom of peaceful assembly required the court to override the property rights of SOAS in its own premises.
>
> 27. The case of Appleby [v UK] appears to me to be plainly and squarely against the proposition which was advanced to me yesterday by Mrs Hamilton, and was further advanced to me today by Mr Slatter to the effect that there may be an arguable defence based upon Articles 10 and 11.
>
> 28 In those circumstances, I am not persuaded that there is any defence to the possession proceedings which offers any realistic prospect of success, and I therefore think that it would be wrong to allow any further adjournment for the defendants to look around for other possible grounds of defence. I cannot myself think of any grounds upon which they might be able to rely, given the incontrovertible property law principles which are relied upon by the claimant. The simple truth of the matter is that SOAS is the leasehold owner of the property and has the right to immediate possession of it. The students are entitled to use it in accordance with their contracts with SOAS and for the purposes of their education but those rights do not extend to conducting a sit-on which excludes SOAS from the premises." (emphasis added)

8.16.2 In *University of Sussex v Persons Unknown* [2013] EWHC 862 (Ch) Sales J decided that a possession order ought to be made because *"the continuation of the protest, denying the University its property rights would be a plain breach of domestic law…"*. He was clear at [14] that it could not be said *"that the protestors would be prevented from any effective exercise of freedom of expression"* if the order was granted.

8.16.3 In *University of Manchester v Persons Unknown* (unreported) 20 March 2023, His Honour Judge Pearce (High Court) made a clear finding that:

> "…this is, whether the defendants like it or not, private land and it is clear from the judgment of the Divisional Court in the Director of Public Prospections and Cuciurean [2020] QB 888, that Articles 10 and 11 do not bestow any right to interfere with the property rights of those who have the right to possession of land" with the result that there was "no argument of the expression of rights to protest or freedom of speech or similar such rights to balance against the claimant's rights to the possession of the land." (emphasis added)

(3) There has been no interference which has not been prescribed by law, the interference is in pursuit of a legitimate aim and is necessary in a democratic society

8.17 In domestic law, the approach of granting a summary order for possession against 'persons unknown' in the context of unauthorised occupations by students (as originally decided in *University of Essex v Djemal* [1980] 1 WLR 1301) has been adopted on many occasions and expressly endorsed by the Supreme Court in *Secretary of State for the Environment, Food and Rural Affairs v Meier and others* [2009] 1 WLR 2780.

8.18 Against this background, the First Defendant's challenge on the basis that an order for possession would be contrary to Articles 10 and 11 of ECHR is wrong for a number of reasons, as explained further below.

8.19 Even if the Claimant was "public authority" and even if the Defendants were exercising their Article 10 or 11 rights, there is clear domestic law establishing that the Claimant has a right to possession. It is further important at the outset to emphasise that both Articles 10 and 11 are only qualified rights. Equally important are the Claimant's qualified rights under Article 1 of the First Protocol:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"

8.20 If any balancing exercise had to be undertaken, it would fall squarely in favour of granting an immediate order for possession. Interferences with Articles 10 and 11 can be justified where they are necessary and proportionate to the need to protect the

claimant's rights. Proportionality is assessed by considering if (i) the aim is sufficiently important to justify interference with a fundamental right, (ii) there is a rational connection between the means chosen and the aim in view, (iii) there is no less intrusive measure which could achieve that aim, and (iv) a fair balance has been struck between the rights of the defendants and the general interest of the community, including the rights of others: *DPP v Ziegler* [2022] AC 408 per Lord Sales JSC at [125].

8.21 All four stages of the proportionality exercise point to a possession order being made:

8.21.1 The aim is to protect the Claimant's right to possession of its own land and enable it to carry on the activities of the University and prevent disruption to other members of the University's community. Whilst the Defendants may assert that their aims are important, it is not for the court, on this application, to adjudicate on the important underlying political and policy issues raised by these protests (*Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC (QB) 1215 per Johnson J at [57]).

8.21.2 The Claimant is entitled to ask the court to uphold and enforce its legal rights, including its right to engage in a lawful business without tortious interference. Those rights are prescribed by law and their enforcement is necessary in a democratic society. The aim of the possession claim is therefore sufficiently important to justify interferences with the defendants' rights of assembly and expression: *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 per Morgan J at [105] and *Cuadrilla* per Leggatt LJ at [45] and [50].

8.21.3 There is plainly a rational connection between the possession order sought and the aim that it seeks to achieve. It is only seeking to prevent unauthorised occupation of the Claimant's land and to put the Claimant back into possession of its own land. For the reasons explained above, the Defendants simply have no right to be in possession of the land.

8.21.4 The possession order strikes a fair balance between the rights of the defendants to assembly and expression, and the rights of the Claimant. It does not remove the rights of the Defendants to freedom of expression or assembly or to undertake a legitimate protest (of which there are many forms). The making of a possession order does not prevent activities that are "at the core" of Articles

10 or 11 or which form "the essence" of such rights – see *DPP v Cuciurean* [2022] EWHC 736 per Lord Burnet of Maldon CJ at [31], [36] and [46].

8.21.4 All that the Claimant is seeking a remedy to protect itself from is deliberate tortious conduct (i.e. trespass) being carried out with the intention of disrupting the Claimant's lawful business interests. It would not strike a fair balance between the competing rights to simply leave the Claimant without any remedy.

8.22 Any interference is therefore clearly in pursuit of a legitimate aim and is necessary in a democratic society. The Court is referred to the Witness Statements provided by Mr Jason Carter and Dr Paul Greatrix. The position is even clearer than the position was held to be in the case of public highway case of *City of London Corporation v Samede* [2012] PTSR 1624 at [60] to [65], in which the judge at first instance had held that the factors for granting the order for possession "easily" outweighed the factors against it and that to have withheld relief would have simply been *"wrong"*: see [19]. The Court should not consider that any points raised by the First Defendant lead to the claim being *"genuinely disputed on grounds which appear to be substantial"* within the meaning of these words in CPR 55.8(2). It is submitted that any other approach would by the type of disproportionate and non-expeditious approach which was expressly disapproved of by the Court of Appeal at [60] to [65]. It would also undermine the procedural remedy provided by CPR Part 55, which was designed as a summary procedure to be relied upon to remove trespassers from land without undue delay.

The 'Public Law Defence'

9.1 The 'Public Law Defence' is set out in paragraphs 31 to 41 of the Defence. The First Defendant relies upon two provisions in educational legislation and the Claimant's Free Speech Policy to assert that there is a public law defence to the claim for possession.

9.2 This contention is without merit for the reasons detailed below.

The Education (No 2) Act 1986

9.3 This provides as follows:

"43. Freedom of speech in universities, polytechnics and colleges

(1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and visiting speakers.

(2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, so far as is reasonably practicable that the use of any premises is not denied to any in individual or body of persons on any ground connected with –

(a) The beliefs or views of that individual or of any member of that body; or

(b) The policy or objectives of that body"

9.4 This section does not afford any defence to the claim for possession for the following reasons:

Section 43(1)

9.4.1 In relation to section 43(1), the duty to take such steps as are reasonably practicable to ensure freedom of expression does not extend so far as a positive obligation to allow occupation to be taken of university premises. As explained above, this is not an expression of opinion; it is a taking of possession.

9.4.2 In similar vein, section 43(1) is not worded in any way which could be interpreted as conferring upon persons a right to possess property. In any event, that would clearly be in direct contradiction of the Claimant's own AIP1 rights in that it would be a deprivation to the Claimant of its own property.

9.4.3 In any event, the provision affords significant discretion as to how the Claimant takes steps. The Claimant has taken reasonably practicable steps to ensure freedom of expression. There is ample evidence of this (see the Witness Statement of Dr Paul Greatrix dated 14 June 2024 at paragraphs 17 to 22).

Section 43(2)

9.4.4 In relation to section 43(2), the objective of that provision concerns the denial of the use of premises on any ground connected with the belief or views or policy or objectives. The provision therefore concerns actions by a university which are taken because of a person's beliefs. It ensures that a university must

not permit use of its premises in a way which favours or disfavours particular points of view.

9.4.5 The Claimant is not denying the Defendants use of land for any reason connected with their beliefs, policy or objectives. This possession claim is due to the fact that the Defendants have unlawfully taken over occupation of its land and the impact of the encampment on the running of the University.

9.4.6 There is therefore no basis for asserting the Claimant has breached this provision. The purpose of this provision has nothing to do with conferring a right of occupation. This negative obligation cannot be transmuted into a positive obligation on the part of a university to divest itself of its property interests, which is what would be the position here if the Claimant could not restore its right to possession and the occupiers were allowed to stay.

9.4.7 Furthermore, there is no question of the order for possession denying use of premises based upon beliefs, views, policies or objectives. There are many ways in which the Defendants can exercise their right of free speech lawfully without taking over occupation of the Claimant's land (see *SOAS* at [25], *Appleby* at [48], *Director of Public Prosecutions v Cuciurean* [2022] QB 888 (DC) at [46]).

The Higher Education (Freedom of Speech) Act 2023

9.5 "1 Duties of registered higher education providers In the Higher Education and Research Act 2017, before Part 1 insert

"Part A1

PROTECTION OF FREEDOM OF SPEECH

Duties of registered higher education providers

A1 Duty to take steps to secure freedom of speech

(1) The governing body of a registered higher education provider must take steps that, having regard to the importance of freedom of speech, are reasonably practicable for it to take in order to achieve the objective in subsection (2).

(2) That objective is securing freedom of speech within the law for –

(a) staff of the provider,

(b) members of the provider,

(c) students of the provider, and

(d) visiting speakers"

9.6 Section A1 of the 2017 Act is not yet in force and therefore cannot affects the rights or obligations of the parties. In any event, the same points as set out above in relation to the Education Act (No 2) 1986 would apply.

9.7 Neither section 43 nor section A1, when it comes into force, will impose any duty on the Claimant to permit an occupational encampment on its premises, which would contrary to the Claimant's own rights under Article 1 Protocol 1.

Free Speech Policy

9.8 Even if the Claimant were to be considered a public body for the purpose of these proceedings (which is denied for the reasons at paragraphs 9.8 to 9.15 above), the First Defendant's reliance upon the Free Speech Policy does not advance their defence.

9.9 The First Defendant's Defence fails to point to any provision in the Free Speech Policy which has allegedly been breached by the Claimant. On the contrary, the First Defendant has wholly failed to particularise how the Claimant is alleged to failed to comply with the policy. Notably, the Free Speech Policy does not impose any positive obligation on the Claimant to permit an occupational encampment on its premises.

9.10 The First Defendant is not seeking to exercise a right of free speech covered by the Free Speech Policy. This is not an expression of opinion; it is a taking of possession. Furthermore, as their Defence at paragraph 12 and Witness Statement at paragraphs 5 and 7 make clear, the First Defendant is seeking to exert "pressure" on the Claimant. The First Defendant's actions therefore do not constitute the exercise of free speech.

9.11 Indeed, it is pertinent to note that this is not the first time that the Claimant has been required to bring possession action against the First Defendant due to them engaging in unauthorised occupational encampments on its land (see the Witness Statement of Jason Carter dated 14 May 2024 at paragraphs 36 to 38, Exhibit JC6 and Exhibit JC7 and the Witness Statement of Dr Paul Greatrix dated 14 June 2024 at paragraphs 32 to 35).

9.12 It is in fact the First Defendants and other unknown occupiers who are in breach of the Claimant's Code of Practice. Throughout their period of unauthorised occupation of the Jubilee Campus, the Defendants have hosted, or been affiliated with, numerous events at the encampment without the Claimant's permission. The Second Witness Statement of Dr Paul Greatrix details the most recent disruption and unlawful activities associated with the encampment during the University's open days on 28 and 29 June 2024.

9.13 In the circumstances, it is submitted that any argument to the effect that no reasonable public body would seek to recover possession of the land is devoid of prospects of success. As Henderson J said when dealing with a potential argument to that effect in *School of Oriental and African Studies v Persons Unknown* [2010] EWHC 3977 at [27]:

> "The suggestion was that it might be possible to show that the decision to seek the possession order was one that no reasonable public body could have taken. I will assume for present purposes, without deciding, that SOAS might be regarded as a public body for that purpose. The problem is that the argument appears to me wholly devoid of any prospects of success, because in view of the clear law laid down in Appleby it is simply impossible to conclude that no reasonable public body could have sought to regain possession of the Brunei Suite. Indeed, it seems to me almost self evident that it was an eminently reasonable decision for the SOAS authorities to take, given the concerns expressed in the witness statements of Mr Poulson both yesterday and today."

The 'Licence Defence'

The Argument

10.1 This purported Defence is the subject-matter of paragraphs 26 to 30 of the Defence. The First Defendant puts their case in two ways on this point:

10.1.1 The First Defendant claims that they have an express and/or implied licence to enter upon University land "*for the purpose of education, studying (whether inside or outside campus buildings), reading, attending and organising events (whether or not subject to prior approval by the Claimant), engaging in activities including protesting, campaigning, debating and engaging with the wider student population"* and that the scope of the licence must be interpreted in accordance with the Claimant's policies on free speech.

10.1.2 The Claimant can only revoke a licence *"in accordance with all duties under statute, policy and common law"* which it allegedly has not done.

Submissions

10.2 The cause of action which arises in relation to unauthorised student occupations is that of trespass. This is the cause of action which confers the entitlement to the summary order for possession discussed above.

10.3 The right to an occupational encampment is not within the scope of the right of freedom of expression and is not within the scope of the licence granted to students. This goes back again to the point that freedom of expression is a qualified right only. It does not take priority over the Claimant's own property rights.

10.4 The Claimant cannot be obliged to relinquish possession of its property because (a) possession of land is not about freedom of speech and (b) because this would involve a deprivation of its own property assets.

10.5 The approach contended for on behalf of the First Defendant seeks to treat the right to freedom of expression as a right to an unauthorised occupation and a right which takes priority over all the Claimant's own property interests – and indeed, the rights of other students and members of the University.

10.6 In this case, the Claimant has taken reasonable steps to protect the right of freedom of expression in the context of its own property interests and the interests of others by having a Free Speech Policy and a Code of Practice on Meetings or Other Activities on University Premises. This is an effective and fair balance of the relevant interests.

10.7 The Code of Discipline for Students (which every student is bound by under the Key Terms of their Student Contract) specifically prohibits disruption of, or improper interference with, the academic, administrative, or other activities of the University (clause 8.3(1)) and misuse or unauthorised use of University premises (clause 8.3(14)).

10.8 Engaging in an occupational encampment without the Claimant's consent or permission constitutes unauthorised use of University premises and disrupts, or improperly interferes with, the academic, administrative, or other activities of the Claimant (see the Witness Statements of Jason Carter dated 14 May 2024 at paragraphs 22 to 32 and 41 to 48 and Dr Paul Greatrix dated 14 June 2024 at paragraphs 30 to 31 and 49 to 50).

10.9 There is a very straightforward and clear trespass in this case. The students do not have the licence or consent of the Claimant for an occupational encampment. The point was

discussed at some length by Henderson J in *School of Oriental and African Studies v Persons Unknown* [2010] EWHC 3977 at [5] to [8] and he stated his conclusion at [28]:

> "The simple truth is that SOAS is the leasehold owner of the property and has the right to immediate possession of it. The students are entitled to use it in accordance with their contracts with SOAS and for the purposes of their education, but those rights do not extend to conducting which excludes SOAS from the premises."

10.10 Similarly in *The University of Manchester v Persons Unknown* (unreported) 20 March 2023, His Honour Judge Pearce (siting as Judge of the High Court) articulated the position in clear terms as set out at paragraph 7.3 above.

> "The grounds on which possession are sought are very straightforward. The claimants say that they have the right to possession of the land. They say the defendants occupy and notwithstanding being as asked to leave it, and therefore are trespassers on the land. They draw my attention to regulation 17 of the university's regulations, which define misconduct. Of conduct, it speaks of the misuse or unauthorised use of university premises as being an example thereof. This occupation was commenced without consent, it continues without consent, and the claimants therefore have no difficulty in demonstrating in principle the right to possession of their land."

10.11 These principles clearly apply in this case.

10.12 The Claimant has, in any event, served notices making it clear to the Defendants that: they had no licence to occupy the land; they were trespassers; and that they were required to leave the land immediately (see the Witness Statement of Jason Carter dated 14 May 2024 at paragraph 33 and Exhibit JC5). There is no question of such termination notices having been unlawful.

10.13 On any view, therefore, the Defendants are trespassers and the Claimant is entitled to an immediate possession order: *McPhail v Persons Unknown* [1973] Ch 447, 460E.

The Possession Order sought in relation to the Jubilee Campus

11.1 As explained above, the application of the Part 55 summary procedure in the case of student occupations and the grant of 'campus wide' orders has been expressly endorsed by the Supreme Court in *Secretary of State for the Environment, Food and Rural Affairs*

v Meier and others [2009] 1 WLR 2780: see [7], [10] per Lord Rodger), [23] (per Baroness Hale), [69] (per Lord Neuberger) and [97] (per Lord Collins).

11.2 Furthermore, it is also apparent from the decisions in *Djemal* and *Meier,* that in the context of unauthorised student occupations, there is a special reason for granting an order for possession in respect of the entirety of the University's land. As Shaw LJ put it in *Djemal* at 1305C-D:

> "The title to the **site and** building of the University of Essex is vested in the university, which has been incorporated for some years by Royal Charter, Its right of possession seems to me to be indivisible. If it is violated by adverse occupation of any art of the premises, that violation affects the right of possession of the whole of the premises. It follows that those circumstances would justify an order in the terms prayed …. namely that they do recover possession of the premises at the University of Essex….. without any geographic limitation". [emphasis added]

11.3 The grant of an order for possession in respect of the campus, as opposed to just the area occupied by students, was described by Lord Collins in Meier at [97] as *"sensible and practical solution to the problem faced by the university"*. Furthermore, as Lord Neuberger put it at [69], the grant of an order for possession in respect of the University's land as a whole when the students were occupying a relatively small part was *"a thoroughly practical decision"* because *"[t] here was an obvious fear that , if an order for possession was limited to the rooms occupied by the student trespassers, they would simply move to another part of the campus."*

11.4 This approach has therefore been followed in subsequent reported cases: see, for example, *School of Oriental and African Studies v Persons Unknown* [2010] EWHC 3977, *University of Sussex v Protestors* [2010] PLCSC 105, *University of Sussex v Persons Unknown* [2013] EWHC 862 (Ch) and *University of Manchester and Others v Persons Unknown* (unreported) 20 March 2023.

11.5 In the present case, this is not the first time that the Claimant has been required to seek relief against the First Defendant and other unknown individuals due to them engaging in unauthorised occupational encampments on its land: see the Witness Statement of Jason Carter dated 14 May 2024 at paragraphs 36 to 38, Exhibits JC6 and JC7 and the Witness Statement of Dr Paul Greatrix dated 14 June 2024 at paragraphs 32 to 35.

11.6 The "obvious fear" which Lord Neuberger described in *Meier*, namely that if an order for possession was simply made in respect of the part occupied, the occupiers would just move elsewhere is clearly applicable on the facts of this case.

Conclusion

12.1 The cause of action which arises in relation to the unauthorised student occupation is that of trespass. This is the cause of action which confers the entitlement to the summary order for possession. The claim to possession is an exercise of the Claimant's A1P1 rights and it is a clear and straightforward trespass in this case. The students do not have the licence or consent of the Claimant for an occupational encampment. And they do not have any other right by which they are entitled to conduct this type of occupational encampment. Neither the nature of the land in question nor the use of the land in question is relevant: where there is a trespass, there is an immediate right to possession: *McPhail v Persons Unknown* [1973] Ch, 444, 457 per Lord Denning MR.

12.2 Accordingly, the Claimant respectfully invites the Court to make the orders for possession sought.

KATHARINE HOLLAND KC

MICHELLE CANEY

1 July 2024