"*Almost as of course*"? Injunctions restraining trespass, the stay on possession claims and the decision in *University College London Hospitals NHS Foundation Trust v MB*

Introduction

The current coronavirus crisis has paralysed possession proceedings, by means of the general stay imposed by paragraph 2 of the new practice direction PD51Z. The decision in *University College London Hospitals Foundation Trust v MB* [2020] EWHC 882 (QB), in which Chamberlain J granted an injunction requiring a hospital inpatient to vacate her ward, therefore sparked surprise and comment.

The decision relies on an exemption to the stay on possession proceedings – at paragraph 3 of the new PD51Z – which continues to allow injunctive relief to be claimed. That provision, however, gives to the following potential difficulty. If, by obtaining an injunction requiring MB to vacate her hospital room (and not to return) after her permission to remain there had been terminated, the claimant hospital effectively obtained possession, has the hospital not essentially achieved by the back door that which paragraph 2 of PD51Z prevented it obtaining from the front? For more practical purposes, does the *MB* decision give rise to a general invitation to sue for an injunction as an alternative means of obtaining possession, at least in the trespass context?

The question as to whether the continuing availability of injunctive relief has the ability to create unintended consequences becomes all the more relevant when one considers a further line of authority stemming from *London Borough of Harrow v Donohue* [1995] 2 EGLR 257, which was not expressly cited in the *MB* decision. In that case, the Court of Appeal held that, where a clear trespass is established which amounts to dispossession of the claimant, an injunction will follow effectively as of right, with little discretion on the part of the Court. In circumstances where possession orders are not currently available, that raises the further question as to whether these cases might be relied upon to obtain a *de facto* possession order under a different name.

In what follows, we conclude that, despite the initial attractiveness of the *Donohue* line of case law, those cases are in fact likely to be of limited utility in the extraordinary circumstances of the current crisis. In our view, save on special facts, an injunction may well be refused and, although *Donohue* might suggest to the contrary in its particular factual context, discretionary

considerations will continue to loom large. In other words, the *MB* decision is an example of the extraordinary; it is not the 'new normal'.

The relationship between possession orders, trespass and injunctions

The jurisdiction to grant an interim injunction to restrain trespass, where a possession order is not otherwise available, has been established since the decision in *Manchester Corporation v Connolly* [1970] Ch 246. The principle was re-asserted relatively recently in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11.

In ordinary times, however, when it comes to which remedy to choose, the question of jurisdiction is less important than the practical considerations relating to enforcement. Where a possession order is obtained, although the order operates *in personam* against a named defendant, it is well-settled that the bailiff is entitled to enforce the order against whoever he finds on the land (unless the order specifically provides to the contrary): see *R v Wandsworth County Court ex parte Wandsworth Borough Council* [1975] 1 WLR 1314. An injunction, however, is enforceable by proceedings for contempt of court and is therefore only an indirect method of obtaining compliance with the order. It does not automatically result in vacation of the relevant land, but rather imposes a threat of imprisonment against anyone who fails to vacate.

PD51Z: a stay on all possession proceedings

Practice direction PD51Z came into force on 27 March 2020, shortly after the Prime Minister's announcement regarding restrictions on free movement during the COVID-19 crisis.

Paragraph 2 provides that: *'All proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by a warrant or writ of possession are stayed for a period of 90 days from the date this Direction comes into force.'*

Paragraph 3 provides that: *'For the avoidance of doubt, claims for injunctive relief are not subject to the stay in paragraph 2'.*

With effect from 18 April, PD51Z was amended to introduce a new paragraph 2A. The formal amendments were referenced in a response by the Master of the Rolls to a joint open letter from the Property Bar Association and Property Litigation Association. That response suggested that

injunctive relief had been specifically exempted from the general stay because of its availability in proceedings against squatters and trespassers. Nevertheless, to avoid any differences of view on that matter, an express exception has been introduced: the general stay does not apply to *'a claim against trespassers to which rule 55.6 applies'*. A second amendment permits applications for interim possession orders (for which specific provision is made in section III of Part 55). A third and final amendment provides that agreed applications for case management directions may also now be made, to allow uncontested case management to continue. Otherwise, all possession proceedings remain stayed.

The reference to rule 55.6 is an unusual one, as that rule sets out the method of service required in claims issued against 'persons unknown'. The definition of 'a possession claim against trespassers' is contained in rule 55.1(b), and is not limited to claims issued against persons unknown. It may well be that only claims against defendants whose names are not known are outside the scope of the general stay (as has been explored in greater depth in an article by Cecily Crampin and Julia Petrenko, available here: https://www.falcon-chambers.com/publications/articles/staying-for-clarification). This may create practical problems, however, in cases brought against both persons unknown and other named defendants, as was the case in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11. We discuss this further below.

If trespass claims against unnamed defendants are the only ones now able to proceed to a final possession order, then MB's case – heard in any event before the amendments came into effect – would still be subject to the general stay. If it is the case, however, notwithstanding the above, that possession claims against named trespassers are not stayed (which seems unlikely given the reference to CPR r55.6), then an ordinary claim for possession would now be possible in MB's scenario. It should be noted in this respect that whilst a claim against a former tenant is expressly excepted from the definition of 'a possession claim against trespassers' in CPR r55.1(b), the same is not true of a claim against a former licensee.

NHS v MB

In *MB* itself, the claim was brought by an NHS Foundation Trust against an inpatient (whose identity was protected by court order) on a ward designed to provide short-term care for patients requiring acute neuropsychiatric care. MB, who suffers from a complex constellation of mental and physical health conditions, was admitted to the claimant's hospital in February 2019, and

attempts were made to arrange her future care. In October, a property which would be suitable for her was identified. MB was told that the property would be ready for her to move into in mid-March 2020, following works to adapt it specifically for her needs, and that she would be provided with a 24-hour care plan. Notwithstanding a written discharge notice and notices terminating her licence to remain in the hospital, MB refused to leave the ward.

The NHS Trust issued proceedings on 2 April 2020, after PD51Z came into force, seeking possession of the bedroom MB was occupying. The proceedings were issued urgently because of the enhanced need to secure space for other patients during the coronavirus pandemic, as well as the increased risk of MB contracting the disease while remaining in the hospital.

The case came before Chamberlain J, at a telephone hearing, on the day of issue. After the judge alerted the parties to the existence and impact of PD51Z, the claimant issued an application for an interim injunction on 3 April.

Following a further telephone hearing on 6 April, which resulted in the NHS Trust being given permission to file further evidence, Chamberlain J heard the Trust's application for an interim injunction on 9 April. He noted that, although he could not make a possession order, he was still able to grant an injunction:

> *"Ordinarily, the Claimant would be entitled to seek an order for possession pursuant to CPR Pt 55 […]. That is not currently possible because of the general stay on possession claims effected by CPR 51Z PD. The stay does not, however, affect claims for injunctions: see para. 3 of the Practice Direction. A property owner is in general entitled to an injunction to enforce its rights as against a trespasser […] A hospital is no different from any other proprietor in this regard."*

He further noted that the effect of granting an interim injunction in this case would be tantamount to final relief because MB's bed would immediately be passed to a new patient. That, however, did not preclude the Court from granting such an order, as long as it was satisfied that there was clearly no defence to the claim.

The defence advanced on MB's behalf addressed possible breaches of article 3 and article 8 ECHR, and numerous other public law arguments, as well as whether there should be an

adjournment for further evidence to be filed. Chamberlain J's judgment deals in some detail with the requirements for MB's care and whether they would be met by the 24-hour care plan which would be provided for her by Camden LBC, the relevant local authority.

The judge came to the conclusion that it was clear that there was no sustainable public law defence to the claim. In any event, even if the defences asserted had had a reasonable prospect of success, the balance of convenience was weighted heavily in favour of the NHS Trust, which needed the bed for other patients during the current public health emergency. Further, MB would not be left without care as the result of an injunction. Accordingly, the judge granted an interim injunction requiring MB to leave the hospital by noon the following day.

The earlier authorities

In *MB*, Chamberlain J clearly had jurisdiction to grant an injunction to restrain MB's trespass, but not – given the general stay – to grant a possession order. The practical effect of the two remedies was, however, the same. Does the practice direction have unintended consequences?

That question is thrown into particular relief when one considers the earlier Court of Appeal decision in *London Borough of Harrow v Donohue* [1995] 1 EGLR 257. In that case, the defendants had erected a garage which, in a blatant act of trespass, encroached by a factor of approximately 50% onto an undeveloped strip owned by the claimant council. Offers by the defendants to purchase part of the strip had previously been refused. As a result, the council had been entirely dispossessed of those parts of the strip on which the garage had been built.

So far as the jurisdiction to grant an injunction requiring the removal of the encroaching garage was concerned, Waite LJ mused as follows:

> "*Was there really any discretion [to refuse an injunction]at all? If a defendant acts in total breach of the plaintiff's proprietary rights, by dispossessing him altogether through the erection of building works which have the effect of excluding him totally from the land to which he has title, does the court have any real choice in the matter? Is it not rather the plaintiff who has the option; either of accepting the building works as an accretion to his title (keeping them or demolishing them or dealing with them out of court in whatever way he chooses) or, alternatively, of coming to court and insisting as of right upon either an order for possession of the encroached land or an order for*

demolition of the encroaching building works? If the plaintiff makes the latter choice, does the court have any discretionary power beyond the right perhaps to make a choice as between those last two remedies?"

The Court proceeded to provide an answer. Although there might be a "*limited discretion*" to choose between an order for possession and a mandatory injunction requiring removal of the encroachment to the claimant's land, the claimant was, on any view, entitled as of right to one of those two remedies. Where an order for possession, which would effectively split the to the garage in two, would all but inevitably give rise to further litigation, a mandatory injunction was the proper remedy and would not be refused.

The *Donohue* case concerned a final injunction, but a similar idea has also been adopted in the context of interim relief. In *Patel v WH Smith (Eziot) Ltd* [1987] 1 WLR 853, the defendant had a right of way over the claimants' land as well as a right to park vehicles for loading and unloading. The claimants subsequently took issue with the defendant parking numerous vehicles for broader purposes and asserted trespass. The defendant intimated a counterclaim based on the existence of prescriptive rights.

At first instance, the judge refused an injunction on the basis that there was a serious issue to be tried and that the balance of convenience favoured the preservation of the *status quo* prior to trial. This decision was overturned by the Court of Appeal, which explained that, in a case where trespass is asserted and there is no question as to the claimant's title to the land, an injunction should follow in all but exceptional circumstances unless the defendant puts forward an arguable case that he has a right to do that which the claimant asserted was a trespass. On the evidence available, the defendant had failed to establish an arguable case (even at the interlocutory stage) that its use of the claimants' land had not been with their permission. Accordingly, an injunction should have been granted. In the absence of an arguable defence to the trespass, the balance of convenience, the preservation of the *status quo* and the adequacy of damages were not relevant considerations.

At least so far as the approach to final injunctions in concerned, the decision in *Donohue* has subsequently been subjected to doubt in *Department for the Environment, Food and Rural Affairs v Feakins* [2005] EWCA Civ 1513: see [203]-[204]. In that case, counsel had sought to

persuade the Court that, on the basis of *Donohue,* where a landowner had been dispossessed of his land, an injunction ought to follow effectively as of right.

Moses LJ did not agree, noting that the judgment in *Donohue* was remarkably sparse in its reference to prior authority and, indeed, was "*out of line"* with the later (and seminal) case of *Jaggard v Sawyer* [1995] 1 WLR 269 which had conducted a thorough review of the decided cases and underlined the discretionary nature of injunctive relief. Whilst the result in *Donohue* may have been correct on the facts in a clear case of an encroachment which entirely dispossessed the claimant of its land (by means of the erection of a building), it did not give rise to any general principle that, in any case of trespass, there was no discretion to withhold an injunction. On the facts of *Feakins*, which concerned an ashpit below the surface of the land, there was no dispossession of the surface. In any event, it was clear on the facts that damages would be an adequate remedy. It had therefore been appropriate for the Court to refuse an injunction.

What conclusions do we draw from the above? Whilst the *Donohue* case suggests that, where the claimant has been entirely dispossessed of his land, the Court may have a limited choice as to whether to grant an order for possession or an injunction (but does not have a discretion to refuse a remedy at all), it seems, in light of *Feakins,* that the Court would be unlikely to accede to an overarching submission that there is no discretion at all to refuse relief, save perhaps in a case in which the facts so closely mirrored those of *Donohue* that the Court considered itself bound. In any event, a case about an encroaching building would appear to be quite different from a scenario concerning an unlawful occupier of land. *MB* was very much the latter kind of case and the judge clearly approached the case by applying discretionary principles.

The existence of a discretion (however residual) would also appear to be supported by the decision in *Patel* where, despite the Court of Appeal's reasoning pointing to the strongest of presumptions in favour of an interim injunction in clear cases of trespass, it was expressly acknowledged that, although such instances would be "*very rare"*, the Court retained a discretion to refuse relief in exceptional circumstances.

***MB* in the light of the earlier authorities**

To return to *MB*, then, it was clear that the judge was exercising a discretion, rather than assuming that a right to an injunction would follow as of given that a trespass had clearly been

established. Although the judge was satisfied that there was *clearly* no defence to the Trust's trespass claim (which inevitably skewed the merits in its favour), it is notable how the judge considered that discretionary factors were in fact decisive. The following were of particular relevance:

1. There was no risk of MB being left without care, given the 24-hour care package that had been arranged for her;

2. If her mental health were to deteriorate sharply, the possibility remained of MB being admitted to a psychiatric ward; and

3. In the context of the pandemic, MB's refusal to vacate the ward would prevent another patient from accessing appropriate care and would also increase MB's chances of contracting COVID-19 herself.

Two observations may be made in respect of the above. First, it was clear, on the evidence available to the judge, that MB had somewhere else to go: there was no risk of her being rendered homeless. As a result, although not expressly explained in this way, the grant of an injunction would not inevitably have led to a contravention of the current restrictions on movement imposed by the Health Protection (Coronavirus, Regulations) (England) Regulations 2020. There was therefore little risk of the Court's order resulting in illegal conduct.

Secondly, the *MB* case may properly be termed "exceptional" on the basis that its underlying facts – the occupation of hospital accommodation – were intrinsically linked with the pandemic itself and the extra pressures which it was inevitably placing on the NHS. That shines an important light on the criticisms, outlined above, about possession being obtained through the "back door". Although, in practice, an injunction might have been used to obtain what is effectively an order for possession, there were very strong public policy arguments, on the specific facts of the case, in favour of the exercise of the discretion to grant an injunction. The grant of an injunction was not, therefore, *merely* a means of obtaining a possession order by a different name; it had its own distinct motivation. Whereas possession orders and injunctive relief may overlap in cases of trespass, they are not entirely interchangeable.

Practical effects: what next for claimants?

Where, then, does this leave claimants in more ordinary cases where possession would normally be sought using the Part 55 procedure in the County Court? In our view, despite the fact that the cases considered above support a strong presumption in favour of an injunction in clear cases of trespass, these are not normal times, and the normal presumptions do not necessarily apply. As we see it, the Courts are, save in exceptional circumstances (such as the *MB* case), unlikely to exercise their discretion so as to permit injunction claims to be used as a means of obtaining possession, particularly where the result of so doing would be to drive a cart and horses through the underlying policy of the new practice direction.

In any event, in any standard case against unknown squatters, the recent amendments at paragraph 2A of the practice direction will allay any concern: a possession order can be sought from the Court in the ordinary way. Even in these cases, however, a prohibitory injunction (in addition to a more limited possession order) may be the only useful remedy when there is a risk that the squatters will simply move on to other land owned by the claimant, but of which they are not currently in possession: see the *Meier* case referenced above.

What, however, of squatter cases involving named defendants? In our view, in line with *Manchester Corporation v Connolly*, a claimant would still have a decent chance of obtaining injunctive relief on an urgent basis against the named defendants even if the Court were to find that a possession order was not available. Practical absurdities would arise if an order for possession could be obtained against persons unknown, but an injunction were refused against the defendants whose names were in fact known. That is likely to be a central consideration in the exercise of the discretion whether to grant the latter type of relief.

If we consider other cases, however, where – as in *MB* – a licence to occupy premises has been terminated and an injunction to restrain trespass might in principle be sought as an alternative to a possession order, the chances of obtaining an injunction seem to us to be considerably less certain. Examples would be where a family member had been occupying a relative's flat under a bare licence and at no rent, where an executor requires possession of residential property in order to administer an estate (see, e.g. *Williams v Holland* [1965] 1 WLR 739), or termination of the occupancy of an almshouse, where the occupier resides there as an object of charity rather than a tenant. In all of these cases, notice to quit (compliant, as necessary, with the provisions of the Protection from Eviction Act 1977) will have been given. If an injunction

requiring vacation of the property were granted in these cases, not only would its grant amount to a clearer contravention of the policy behind paragraph 2 of PD51Z; it would also give rise to a direct risk of homelessness at a time when it is offence to leave one's home without reasonable excuse. That would be quite different from the *MB* case.

Further, contrary to a case where a possession order has been obtained (and, practically speaking, there will be an inevitable delay in obtaining a bailiff's appointment), any deliberate breach of an injunctive order would amount to an immediate contempt of court. In the current circumstances, it seems to us that the Court would be hesitant to put a residential occupier of property between a rock and a hard place, by facing him with a choice of either committing an offence by roaming the streets or risking imprisonment by failing to vacate.

What of commercial cases, such as those where a tenancy contracted out of the protection of the Landlord and Tenant Act 1954 has expired? Whilst the risk of homelessness does not apply, the arguments in favour of an injunction again seem equivocal, in the absence of special circumstances. In order for the tenant to remove its chattels from the relevant property and to abate its trespass, movement to and from the property would be required by the tenant or his agents. In any event, there is currently no market for re-letting, so commercial landlords are unlikely to be unduly prejudiced (at least, no more than any other landlord) by being required to wait until the stay on possession claims is lifted. Of course, in the interim, an entitlement to mesne profits would accrue.

Finally, in cases such as *Donohue* itself, where there is a "pure" encroachment, e.g. by the erection of a building on neighbouring land, in the current circumstances, the possession/injunction distinction might practically be academic. If unlawful building works were commenced, an interim injunction might well be obtained, on an urgent basis, to prevent any further work. A mandatory injunction for the removal of the encroachment, however, is considerably more difficult to achieve on an interim basis. By the time of trial, particularly where there is such strain on the court system at present, the stay on possession claims may well have been lifted in any event. Aside from that, the restrictions on the movement of people are not relevant to cases involving, for example, the erection of a garage. The same considerations (discretionary or otherwise) would therefore not apply.

Conclusions

So, what is the overarching lesson? Although the Court has a discretion to grant injunctive relief in a case of trespass, the *MB* case probably ought not to be taken as a general invitation to seek an injunction as a means of obtaining possession. Nor are cases such as *Donohue* and *Patel* likely to prevent the Court, in these extraordinary times, from considering itself entitled to refuse to grant an injunction if the practical consequences are likely to be a breach of the current regulations or the facts otherwise fall short of special circumstances.

In *Patel,* Neill LJ commented as follows:

> "*I, for my part, am prepared to assume that there may be exceptional cases, of which Behrens v. Richards is one, where notwithstanding that a continuing trespass is proved or admitted, the court can properly decline to grant an injunction. But such cases are likely to be very rare."*

Without knowing it, the learned judge may have been referring to the unprecedented times through which we are all currently living.

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23 April 2020