Michaelmas Term
[2009] UKSC 11
On appeal from: [2008] EWCA Civ 903

SECRETARY OF STATE FOR ENVIRONMENT, FOOD, AND RURAL AFFAIRS

Respondent

v

MEIER AND ANOTHER (FC)

Appellant

and

others and another (FC)

Appellant

and

another

before

Lord Rodger
Lord Walker
Lady Hale
Lord Neuberger
Lord Collins

JUDGMENT GIVEN ON
1 December 2009
Heard on 10 and 11 June 2009

Appellant	*Respondent*
Richard Drabble QC Marc Willers (Instructed by Community Law Partnership)	John Hobson QC John Clargo (Instructed by Whitehead Vizard)

LORD RODGER

1. If a group of people come on to my land without my permission, I shall want the law to provide a speedy way of dealing with the situation. If they leave but come back repeatedly, depending on the evidence, I shall be able to obtain an interlocutory and final injunction against them returning. But they may come on to my land and set up camp there. Again, depending on the evidence, I shall be able to obtain an injunction (interlocutory and final) against them remaining and also against them coming back again once they leave as required by the injunction. Similarly, if the evidence shows that, once they leave, they are likely to move and set up camp on other land which I own, the court can grant an injunction (interlocutory and final) against them doing that. If authority is needed for all this, it can be found in the judgment of Lord Diplock in the Court of Appeal in *Manchester Corporation v Connolly* [1970] Ch 420.

2. Of course, it is quite likely that I won't know the identities of at least some of the trespassers. If so, Wilson J regarded an injunction as "useless" since "it would be wholly impracticable for the claimant to seek the committal to prison of a probably changing group of not easily identifiable

travellers, including establishing service of the injunction and of the application": *Secretary of State for the Environment v Drury* [2004] 1 WLR 1906, 1912, para 19. That may well have been an unduly pessimistic assessment. Certainly, claimants have used injunctions against unnamed defendants. And Sir Andrew Morritt V-C was satisfied that the procedural problems could be overcome. Admittedly, the circumstances in the first of his cases, *Bloomsbury Publishing Group Ltd and J K Rowling v News Group Newspapers Ltd and a Person or Persons Unknown* [2003] EWHC 1205 (Ch), were very different from a situation involving trespassers. But trespassing protesters were the target of the interlocutory injunction which he granted in *Hampshire Waste Services Ltd v Persons Intending to Trespass and/or Trespassing upon Incinerator Sites* [2003] EWHC 1738 (Ch). Similarly, in *South Cambridgeshire DC v Persons Unknown* [2004] EWCA Civ 1280 the Court of Appeal (Brooke and Clarke LJJ) granted an injunction against persons unknown "causing or permitting hardcore to be deposited, caravans, mobile homes or other forms of residential accommodation to be stationed, or existing caravans or other mobile homes to be occupied on land" adjacent to a gypsy encampment in rural Cambridgeshire. Brooke LJ commented, at para 8: "There was some difficulty in times gone by against obtaining relief against persons unknown, but over the years that problem has been remedied either by statute or by rule." See the discussion of such injunctions in Jillaine Seymour, "Injunctions Enjoining Non-Parties: Distinction without Difference" (2007) 66 CLJ 605-624.

3. The present case concerns travellers who set up camp on the Forestry Commission's land at Hethfelton. Lord Neuberger has explained the circumstances. The identities of some, but not all, of those involved were known to the Commission. So the defendants included "persons unknown". Despite this, the Commission sought an injunction against all the defendants, including those described as "All persons currently living on or occupying the claimant's land at Hethfelton." The recorder declined to grant an injunction on the view that it would be disproportionate. But the Court of Appeal, by a majority, reversed the recorder on this point and granted an order that

   "The respondents, and each of them, be restrained from entering upon, trespassing upon, living on, or occupying the parcels of land set out in the Schedule hereto, and, for the avoidance of doubt, the 4th respondent shall mean 'those people trespassing on, living on, or occupying the land known as Hethfelton Wood on any date between 13th February 2007 and 3rd August 2007 save for those specifically identified as 1st, 2nd, 3rd, 5th and 6th respondents.'"

   In my view, for the reasons given by Lord Neuberger, the majority were right to grant the injunction. In any event, Mr Drabble QC, who appeared for the travellers, did not suggest that this injunction had been incompetent or defective for lack of service or in some other respect. Even Wilson LJ, who dissented on the injunction point in the Court of Appeal, did not go so far as to suggest that it was inherently useless: he simply took the view that it added nothing of value to the order for possession and, therefore, the recorder would have been entitled to exercise his discretion to refuse it on that basis: [2008] EWCA Civ 903, para 76.

4. This brings me to the order for possession which lies at the heart of the appeal. If people not only come on to my land but oust me from it, I can bring an action for recovery of the land. That is what the Commission did in the present case: they raised an action in Poole county court for recovery of "land at Hethfelton nr Wool and all that land described on the attached schedule all in the County of Dorset." In effect, the Commission were asking for two things: to be put back into possession of the land on which the defendants were camped at Hethfelton, and to be put into possession of the other specified areas of land which they owned, but on which, they anticipated, the defendants might well set up camp once they left Hethfelton.

5. The Court of Appeal granted an order for possession in respect both of the land at Hethfelton and of the other parcels of land situated some distance away. As regards the competency of granting an extended order of this kind, the court was bound by the decision in *Secretary of State for the Environment v Drury* [2004] 1 WLR 1906. The central issue in the present appeal is whether that case was rightly decided. In my view it was not.

6. Most basically, an action for recovery of land presupposes that the claimant is not in possession of the relevant land: the defendant is in possession without the claimant's permission. This remains the position even if, as the Court of Appeal held in *Manchester Airport v Dutton* [2000] QB 133, the claimant no longer needs to have an estate in the land. See Megarry & Wade, *The Law of Real Property* (7th edition, 2008), para 4-026. To use the old terminology, the defendant has ejected the claimant from the land; the claimant says that he has a better right to possess it, and he wants to recover possession. That is reflected in the form of the order which the court grants: "that the claimant do forthwith recover" the land – or, more fully, "that the said AB do recover against the said CD possession" of the land. See Cole, *The Law and Practice in Ejectment* (1857), p 786, Form 262. The fuller version has the advantage of showing that the court's order is not in rem; it is in personam, directed against, and binding only, the defendant. Of course, if the defendant refuses to leave and the court grants a writ of possession requiring the bailiff to put the claimant into possession, in principle, the bailiff will remove all those who are on the relevant land, irrespective of whether or not they were parties to the action: *R v Wandsworth County Court ex parte Wandsworth LBC* [1975] 1 WLR 1314. So, in that way, non-parties are affected. But, if anyone on the land has a better right than the claimant to possession, he can apply to the court for leave to defend. If he proves his case, then he will be put into possession in preference to the claimant. But the original order for possession will continue to bind the original defendant. See Stamp J's lucid account of the law in *In re Wykeham Terrace* [1971] Ch 204, 209D-210B.

7. *In re Wykeham Terrace* and *Manchester Corporation v Connolly* [1970] Ch 420 showed the need for some reform of the procedures used in actions for recovery of land. The twin problems of unidentifiable defendants and the lack of any facility for granting an interim order for possession were tackled by a new Order 113¸ the provisions of which, with some alteration of the details, have been incorporated into the current Rule 55 of the CPR. In the present case no issue arises about the wording of Rule 55. But I would certainly not interpret "occupied" in Rule 55.1(b) as preventing the use of the special procedure in a case like *University of Essex v Djemal* [1980] 1 WLR 1301 where some protesters were excluding the university from one part of its campus, but many students and members of staff were legitimately occupying other parts.

8. The intention behind the relevant provisions of Rule 55 remains the same as with Order 113: to provide a special fast procedure in cases which only involve trespassers and to allow the use of that procedure even when some or all of the trespassers cannot be identified. These important, but limited, changes in the rules cannot have been intended, however, to go further and alter the essential nature of the action itself: it remains an action for recovery of possession of land from people who are in wrongful possession of it. I should add that in the present case the defendants do not dispute that they are – or, at least, were at the relevant time – in possession, rather than mere occupation, of the Commission's land at Hethfelton. Wonnacott, *Possession of Land* (2006), p 27, points out that defendants rarely dispute this. But here, in any event, the defendants' possession is borne out by their offer to co-operate to allow the Commission's ordinary activities on the land not to be disrupted. This is inconsistent with the Commission being in possession. So the preconditions for an action for recovery of land are satisfied.

9. By contrast, the Forestry Commission were at all relevant times in undisturbed possession of the parcels of land listed in the schedule to the Court of Appeal's order. That being so, an action for the recovery of possession of those parcels of land is quite inappropriate. The only authority cited by the Court of Appeal in *Secretary of State for the Environment v Drury* [2004] 1 WLR 1906 for granting such an order was the decision of Saville J in *Ministry of Agriculture, Fisheries and Food v Heyman* (1990) 59 P & CR 48. But in that case the defendant trespassers were not represented and so the point was not fully argued.

10. Saville J referred to the decision of the Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301, which I have just mentioned. That decision is clearly distinguishable, however. The defendant students, who had previously taken over, and been removed from, certain administrative offices of the University of Essex, had been occupying another part of the

university buildings known as "Level 6". The Court of Appeal made an order for possession extending to the whole property of the university – in effect, the whole campus. This was justified because the university's right to possession of its campus was indivisible: "If it is violated by adverse occupation of any part of the premises, that violation affects the right of possession of the whole of the premises": [1980] 1 WLR 1301, 1305C-D, per Shaw LJ. In the *Heyman* case, by contrast, the Ministry's right to possession of its land at Grovely Woods was not violated in any way by the trespassers' adverse possession of its other land two or three miles away at Hare Wood. In my view, *Heyman* was wrongly decided and did not form a legitimate basis for the Court of Appeal's decision in *Drury*.

11. Mummery LJ described Wilson J's approach in *Drury* as "pragmatic": [2004] 1 WLR 1906, 1916, para 35. And, of course, the common law does evolve by making pragmatic incremental developments. But, if they are to work, they must be consistent with basic principle and they must make sense.

12. I would not put undue emphasis on the supposed practical difficulties in providing for adequate service by attaching notices to stakes etc on these remoter areas of land. Doubtless, adequate arrangements could be worked out, if extended orders were otherwise desirable. The real objection is that the Court of Appeal's extended order that "the [Commission] do recover the parcels of land set out in the Schedule hereto" is inconsistent with the fundamental nature of an action for recovering land because there is nothing to recover: the Commission were in undisturbed possession of those parcels of land. And the law is harmed rather than improved if a court grants orders which lay defendants, knowing the facts, would rightly find incomprehensible. How, the defendants could well ask, can the Commission "recover" parcels of land which they already possess? How, too, are the defendants supposed to comply with the order? Only a lawyer could understand and explain that the order "really" means that they are not to enter and take over possession of the other parcels of Commission land. This is, of course, what the injunction already says in somewhat old-fashioned, but tolerably clear, language.

13. Doubtless, the wording could in theory be altered, but this would really be to change the nature of the action and turn the order into an injunction, so creating parallel injunctions, one leading to the possible intervention of the bailiff and the other not.

14. The claimed justification for granting an extended order for possession of this kind is indeed that it is the only effective remedy against travellers, such as the present defendants, since it can ultimately lead to them being removed by a bailiff under a warrant for possession. Moreover, unless the Commission can obtain an extended order, they will be forced to come back to court for a new order each time the defendants move to another of their properties. An injunction is said to be a much weaker remedy in a case like the present since, if the defendants fail to comply with it, all that can be done is to seek an order for their sequestration or committal to prison. Sequestration is an empty threat, the argument continues, against people who have few assets, while committal to prison might well be inappropriate in the case of defendants who are women with young children.

15. Plainly, the idea of the Commission having to return to court time and again to obtain a fresh order for possession in respect of a series of new sites is unattractive. But the scenario presupposes that the defendants would, with impunity, disobey the injunction restraining them from entering the other parcels of land. So this point is linked to the contention that the injunction would not work.

16. I note in passing that there is actually no evidence that these defendants would fail to comply with the injunction in respect of the other parcels of land. So there is no particular reason to suppose that the Court of Appeal's injunction will prove an ineffective remedy in this case. On the more general point about the alleged ineffectiveness of injunctions in cases of this kind, *South Buckinghamshire DC v Porter* [2003] 2 AC 558 is of some interest. There the council wanted to obtain an injunction against gypsies living in caravans in breach of planning controls because an

injunction was thought to be a potentially more effective weapon than the various enforcement procedures under the planning legislation. This is in line with the thinking behind the application for an injunction in *South Cambridgeshire DC v Persons Unknown* [2004] EWCA Civ 1280 which I mentioned in para 2.

17. Admittedly, if the present defendants did fail to comply with the injunction, sequestration would not be a real option since they are unlikely to have any substantial assets. And, of course, there are potential difficulties in a court trying to ensure compliance with an injunction by committing to prison defendants who are women with young children. Nevertheless, as Lord Bingham of Cornhill observed in *South Buckinghamshire DC v Porter* [2003] 2 AC 558, 580, para 32, in connexion with a possible injunction against gypsies living in caravans in breach of planning controls:

> "When granting an injunction the court does not contemplate that it will be disobeyed….Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there is not one law for the law-abiding and another for the lawless and truculent."

Taking that approach, we should, in my view, be slow to assume that an injunction is a worthless remedy in a case like the present and that only the intervention of a bailiff is likely to be effective. If that is indeed the considered consensus of those with experience in the field, then consideration may have to be given to changing the procedures for enforcing injunctions of this kind.

18. But any such reform would raise far-reaching issues which are not for this court. In particular, travellers are by no means the only people without means whose unlawful activities the courts seek to restrain by injunction and where the assistance of a bailiff might be attractive to claimants. Especially when Parliament has intervened from time to time to regulate the way that the courts should treat travellers, the need for caution in creating new remedies is obvious. At the very least, the matter is one for the Master of the Rolls and the Rules Council who have the leisure and facilities to consider the issues.

19. For these reasons I would allow the defendants' appeal to the extent proposed by Lord Neuberger.

LORD WALKER

20. I agree with all the other members of the Court that this appeal should be allowed to the extent of setting aside the wider possession order. In *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906 the Court of Appeal went too far in trying to achieve a practical solution. The decision cannot be seen as simply an extension of *University of Essex v Djemal* [1980] 1 WLR 1301, in which the facts were very different. I respectfully agree with the observations on injunctive relief made by Lord Rodger at the end of his judgment.

LADY HALE

21. Two questions are before us. First, can the court grant a possession order in respect of land, no part of which is yet occupied by the defendant, because of the fear that she will do so if ejected from land which she currently does occupy? Second, should the court grant an injunction against that feared trespass? The Court of Appeal unanimously answered the first question in the affirmative, following the reasoning of that Court in *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] EWCA Civ 200, [2004] 1 WLR 1906, CA, and the decision of Saville J in *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48. The majority also answered the second question in the affirmative; Wilson LJ dissented but only because he thought the wider possession order a sufficient remedy in the circumstances.

22. The approach in *Drury* and *Heyman* was rightly described by Mummery LJ in *Drury* as "pragmatic" (para 35), depending as it did upon the comparative efficacy of possession orders and injunctions. A possession order gives the claimant the right to call upon the bailiffs or the sheriff physically to remove the trespassers from his land, which is what he wants. An injunction can only be enforced by imposing penalties upon those who disobey. Mummery LJ considered it a "legitimate, incremental development" of the ruling of the Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301, that a possession order can cover a greater area of the claimant's land than that actually occupied by the trespassers.

23. The situation in *Djemal* was very like the situation in this and no doubt many other cases. The University of Essex consists (mainly) of some less than beautiful buildings erected in the 1960s upon a beautiful campus at Wivenhoe Park near Colchester. The students had occupied a small part of the University buildings. The University wanted an order covering the whole of the University premises. The judge had given them an order covering only the part actually occupied by the students. The Court of Appeal made the wider order sought by the University, holding that there was jurisdiction to cover "the whole of the owner's property in respect of which *his right of occupation has been interfered with*" (per Buckley LJ at p 1304E, emphasis supplied). Shaw LJ reasoned that the right of the University to possession of the site and buildings was "indivisible. If it is violated by adverse occupation of any part of the premises, that violation affects the *right of possession* of the whole of the premises" (p 1305D, emphasis supplied). These were extempore judgments in a case where the students had already decided to call off their direct action, but it will be noted that Buckley LJ spoke of interference with a right of occupation, while Shaw LJ spoke of violation of a right of possession.

24. The defendants in this case are occupying only part of Hethfelton Wood. We can, I think, assume that the Forestry Commission are occupying the rest. They are carrying on their forestry work as best they can – indeed, one of their problems is that they are impeded from doing it because of the risk of harm to the vehicles and their occupants. Yet Mr Drabble, for the defendant appellants, has never resisted an order covering the whole of Hethfelton Wood, nor does he invite us to disagree with *Djemal*. Being a sensible man, he recognises that we would be disinclined to hold that if trespassers set up camp in a large garden the householder can obtain an order enabling them to be physically removed only from that part of the garden which they have occupied, even if it is clear that they will then simply move their tents to another part of the garden.

25. The questions raised by this case and *Djemal* should be seen as questions of principle rather than pragmatism or procedure. Still less should they be answered by reference to the forms of action which were supposedly abolished in 1876. The underlying principle is *ubi ius, ibi remedium*: where there is a right, there should be a remedy to fit the right. The fact that "this has never been done before" is no deterrent to the principled development of the remedy to fit the right, provided that there is proper procedural protection for those against whom the remedy may be granted. So the questions are: what is the right to be protected? And what is the appropriate remedy to fit it?

26. If we were approaching this case afresh, without the benefit and burden of history, we might think that the right to be protected is the right to the physical occupation of tangible land. A remedy should be available against anyone who does not have that right and is interfering with it by occupying the land. That remedy should provide for the physical removal of the interlopers if need be. The scope of the remedy actually granted in any individual case should depend upon the scope of the right, the extent of the actual and threatened interference with it, and the adequacy of the procedural safeguards available to those at risk of physical removal.

27. In considering the nature and scope of any judicial remedy, the parallel existence of a right of self help against trespassers must not be forgotten, because the rights protected by self help should mirror the rights that can be protected by judicial order, even if the scope of self help has been curtailed by statute. No civil wrong is done by turning out a trespasser using no more force than is reasonably necessary: see *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720. In *Cole on*

Ejectment (London, Sweet, 1857), a comprehensive textbook written after the Common Law Procedure Act 1852, there is considerable discussion (in ch VII) of the comparative merits of self help and ejectment. Any person with a right to enter and take possession of the land might choose simply to do that rather than to sue in ejectment. But this was not advised where the right of entry was not clear and beyond doubt, or where resistance was to be expected. The effect of the criminal statutes against forcible entry was "by no means clear": whether no force at all, or only reasonable force, might be used against the trespasser. Cole was not as sanguine as was Lord Denning MR in *McPhail v Persons, Names Unknown* [1973] Ch 447, 456. Lord Denning took the view that the statutes against forcible entry did not apply to the use of reasonable force against trespassers. Those statutes have now been replaced by section 6 of the Criminal Law Act 1977. This prohibits the use or threat of violence against person or property for the purpose of securing entry to any premises without lawful excuse. But it also provides that a right to possession or occupation of the premises is no excuse, although there is now an exception for a "displaced residential occupier" or "protected intending occupier". This does not include the Forestry Commission, although it is not impossible that they would be able to evict the travellers without offending against the criminal law. But in any event, the use of self help, even if it can be lawfully achieved, is not encouraged because of the risk of disorder that it may entail.

28. Lord Denning considered that the statutes of forcible entry did not apply because the trespassing squatters in *McPhail* were not in possession of the land at all. He quoted Pollock on Torts (15th ed 1951, p 292):

"A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner."

A trespasser who merely interferes with the right to possession or occupation of the property may also be ejected with the use of reasonable force: one does not need to go to court, or even call the police, to eject a burglar or a poacher from one's property.

29. Although Cole contemplated that self help might be used against a tenant who had wrongfully continued in occupation after the end of his tenancy, tenants are clearly now in a different position from squatters. Lord Denning thought that the statutes of forcible entry did apply to protect them (although Cole says that the authorities on which he relied had later been overruled). Most, but not all, residential tenants are now protected by statute against eviction otherwise than by court order. This is a complicated area which need not concern us now as we are dealing with people who have never been granted any right to be where they are.

30. However, Lord Denning's basic point is important here. "In a civilised society, the courts should themselves provide a remedy which is speedy and effective: and thus make self-help unnecessary" (*McPhail*, p 457C). It seems clear that the right of self help has never been limited to those who have actually been dispossessed of their land: in fact on one view it is limited to those who have not been so dispossessed. There is no reason in principle why the remedy of physical removal from the land should only be available to those who have been completely dispossessed. It should not depend upon the niceties of whether the person wrongfully present on the land was or was not in "possession" in whatever legal sense the word is being used. Were the students in *Djemal* in possession of the University's premises at all? Lord Denning, supported by Sir Frederick Pollock, would not think so: see *McPhail* at 456F. Were these new travellers in possession of Hethfelton Wood at all? Again, Lord Denning would not think so. They had parked their vehicles there, but the work of the Forestry Commission was going on around them as best it could.

31. If we accept that the remedy should be available to a person whose possession or occupation has been interfered with by the trespassers, as well as to a person who has been totally dispossessed, a case like *Djemal* becomes completely understandable, as does the order for possession of the whole of Hethfelton Wood in this case. Nor need we be troubled by the form of the order, that the

claimant "recover" the land. His occupation of the whole has been interfered with and he may recover his full control of the whole from those who are interfering with it.

32. As is obvious from the above, a great deal of confusion is caused by the different meanings of the word "possession" and its overlap with occupation. As Mark Wonnacott points out in his interesting monograph, *Possession of Land* (Cambridge University Press, 2006), the term "possession" is used in three quite distinct senses in English land law: "first, in its proper, technical sense, as a description of the relationship between a person and an estate in land; secondly, in its vulgar sense of physical occupation of tangible land" (the third sense need not concern us here). Possession, in its first sense, he divides into a relationship of right, the right to the legal estate in question, and a relationship of fact, the actual enjoyment of the legal estate in question; a person might have the one without the other. Possession of a legal estate in fact may often overlap with actual occupation of tangible land, but they are conceptually distinct: a person may be in possession of the head-lease if he collects rents from the sub-tenants, but he will not be in physical occupation of tangible land.

33. The modern action for the possession of land is the successor to the common law action of ejectment (and some statutory remedies developed for use in the county and magistrates' courts in the 19th century). The ejectment in question was not the ejectment sought by the action but the wrongful ejectment of the right holder. Its origins lay in the writ of trespass, an action for compensatory damages rather than recovery of the estate. But the common law action to recover the estate was only available to freeholders and not to term-holders (tenants). So the judges decided that this form of trespass could be used by tenants to recover their terms. Trespass was a more efficient form of action than the medieval real actions, such as novel disseisin, so this put tenants in a better position than freeholders. As is well known, the device of involving real people as notional lessees and ejectors was used to enable freeholders to sue the real ejectors. These were then replaced by the fictional characters John Doe and Richard Roe. Eventually the medieval remedies were (mostly) abolished by the Real Property Limitation Act of 1833; the fictional characters of John Doe and Richard Roe by the Common Law Procedure Act 1852; and the forms of action themselves by the Judicature Acts 1873-75 (see AWB Simpson, *A History of the Land Law*, Oxford, Clarendon Press, 2nd edition 1986, ch VII).

34. The question for us is whether the remedy of a possession action should be limited to deciding disputes about "possession" in the technical sense described by Wonnacott. The discussion in *Cole on Ejectment* concentrates on disputes between two persons, both claiming the right to possession of the land, one in occupation and the other not. Often these are between landlords and tenants who have remained in possession when the landlord thinks that their time is up. But it is clear that in reality what was being protected by the action was the right to physical occupation of the land, not the right to possession of a legal estate in land. The head lessee who was merely collecting the rents would not be able to bring an action which would result in his gaining physical occupation of the land unless he was entitled to it.

35. It seems clear that the modern possession action is there to protect the right to physical occupation of the land against those who are wrongfully interfering with it. The right protected, to the physical occupation of the land, and the remedy available, the removal of those who are wrongfully there, should match one another. The action for possession of land has evolved out of ejectment which itself evolved out of the action for trespass. There is nothing in CPR Part 55 which is inconsistent with this view, far from it. The distinction is drawn between a "possession claim" which is a claim for the recovery of *possession of land* (r 55.1.(a)) and a "possession claim against trespassers" which is a claim for the *recovery of land* which the claimant alleges is "occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land . . ." The object is to distinguish between the procedures to be used where a tenant remains in occupation after the end of his tenancy and the procedures to be used where there are squatters or others who have never been given permission to enter or remain on the land. That, to my mind, is the reason for inserting "only": not to exclude the possibility that the person taking action to enforce his right to occupy is also in occupation of

it. There is then provision for taking action against "persons unknown". But the remedy in each case is the same: an order for physical removal from the land.

36. It was held in *R v Wandsworth County Court, ex parte Wandsworth London Borough Council* [1975] 1 WLR 1314, that a bailiff executing a possession warrant is entitled to evict anyone found on the premises whether they were party to the judgment or not. However, there is nothing to prevent the order distinguishing between those who are and those who are not lawfully there, provided that some means is specified of identifying them. No-one would suggest that an order for possession of Hethfelton Wood would allow the removal of Forestry Commission workers or picnickers who happened to be there when the bailiffs went in. In principle, court orders should be tailored to fit the facts and the rights they are enforcing rather than the other way around.

37. This does not, however, solve the principal question before us. What is the extent of the premises to which the order may relate? As Mummery LJ suggested in *Drury*, at para 31, the origin was in an action to recover a term of years. The land covered by the term would be defined in the grant. It would not extend to all the land anywhere in the lawful possession of the claimant. Equally, however, as discussed earlier, the remedy can be granted in respect of land to which the claimant is entitled even though the trespasser is not technically in possession of it. This suggests that the scope may be wider than the actual physical space occupied by the trespasser, who may well move about from time to time. In any event, the usual rule is that possession of part is possession of the whole, thus begging the question of how far the "whole" may extend. It was suggested during argument that it might extend to all the land in the same title at the Land Registry. This could be seen as the modern equivalent of the "estate" from which the claimant had been unlawfully ousted. But this is artificial when a single parcel of land may well be a combination of several different registered titles.

38. The main objection to extending the order to land some distance away from the parcel which has actually been intruded upon is one of natural justice. Before any coercive order is made, the person against whom it is made must have an opportunity of contesting it, unless there is an emergency. In the case of named defendants, such as the appellants here, this need not be an obstacle. They have the opportunity of coming to court to contest the order both in principle and in scope. The difficulty lies with "persons unknown". They are brought into the action by the process of serving notice not on individuals but on the land. If it were to be possible to enforce the physical removal of "persons unknown" from land on which they had not yet trespassed when the order was made, notice would also have to be given on that land too. That might be thought an evolution too far. Whatever else a possession order may be or have been, it has always been a remedy for a present wrongful interference with the right to occupy. There is an intrusion and the person intruded upon has the right to throw the intruder out.

39. Thus, while I would translate the modern remedy into modern terms designed to match the remedy to the rights protected, and would certainly not put too much weight on the word "recover", I would hesitate to apply it to quite separate land which has not yet been intruded upon. The more natural remedy would be an injunction against that intrusion, and I would not be unduly hesitant in granting that. We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not. We should not be too ready to speculate about the enforcement measures which might or might not be appropriate if it is broken. But the main purpose of an injunction would be to support a very speedy possession order, with severely abridged time limits, if it is broken.

40. However, I would not see these procedural obstacles as necessarily precluding the "incremental development" which was sanctioned in *Drury*. Provided that an order can be specifically tailored against known individuals who have already intruded upon the claimant's land, are threatening to do so again, and have been given a proper opportunity to contest the order, I see no reason in principle why it should not be so developed. It would be helpful if the Rules provided for it, so that the procedures could be properly thought through and the forms of order properly tailored to

the facts of the case. The main problem at the moment is the "scatter-gun" form of the usual order (though it is not one prescribed by the Rules).

41. It is for that reason, and that reason alone, that I would allow this appeal to the extent of setting aside the wider possession order made in the Court of Appeal.

LORD NEUBERGER

42. There is an acute shortage of sites in this country to satisfy the needs of travellers, people who prefer a nomadic way of life. Thus, in the county in which the travellers in this case pitched their camp, Dorset, it has been estimated that over 400 additional pitches are required. The inevitable consequence is that travellers establish their camps on land which they are not entitled to occupy, normally as trespassers, and almost always in breach of planning control. Proceedings seeking to prevent their occupation have led to human rights issues being raised before domestic courts (for instance, in the House of Lords, *Doherty v Birmingham City Council* [2008] UKHL 57), and before the European Court of Human Rights (for instance, *Connors v United Kingdom* (2005) 40 EHRR 9). The present appeal, however, raises issues of purely domestic law, namely the permissible physical ambit of any possession order made against trespassing travellers, and the appropriateness of granting an injunction against them.

The facts and procedural history

43. Travellers often set up their camps in wooded areas. Many woods and forests in this country are managed by the Forestry Commission ("the Commission") and owned by the Secretary of State for the Environment, Food and Rural Affairs. The functions of the Commission are "promoting the interests of forestry, the development of afforestation and the production and supply of timber and other forest products …" – section 1 of the Forestry Act 1967. The Commission runs its woods and forests commercially, although it affords members of the public relatively free and unrestricted access to such areas.

44. All undeveloped land in the United Kingdom is susceptible to unauthorised occupation by travellers, and much of such land is vested in public bodies. But land managed by the Commission is particularly vulnerable to incursion by travellers. As the Recorder who heard this case at first instance said, "[g]iven the public access that it affords to its land and its needs for access for forestry vehicles, it is not protected and barricaded in the same way as much of the other land in private and local authority ownership in Dorset is now protected".

45. In 2004, the Office of the Deputy Prime Minister issued "Guidance on Managing Unauthorised Camping" ("the 2004 Guidance"). This suggests that local authorities and other public bodies distinguish between unauthorised encampment locations which are "unacceptable" (for instance, because they involve traffic hazard or public health risks) and those which are "acceptable". It further recommends that the "management of unauthorised camping must be integrated", and states that "each encampment location must be considered on its merits". The 2004 Guidance also indicates that specified welfare enquiries should be undertaken in relation to the travellers and their families in any unauthorised encampment before any decision is made as to whether to bring proceedings to evict them. The Secretary of State has accepted throughout these proceedings that the Commission should comply with the terms of the 2004 Guidelines before possession proceedings are brought against any travellers on land it manages, and that failure to do so may invalidate such proceedings.

46. One of the woods managed by the Commission is Hethfelton Wood ("Hethfelton"), near Wool, where, at the end of January 2007, a number of new travellers established an unauthorised camp. After the Commission had carried out the enquiries recommended by the 2004 Guidance, the Secretary of State issued the current proceedings, a possession claim against trespassers within CPR 55.1(b), and an application for an injunction, in the Poole County Court, on 13 February 2007. The original defendants were Natalie Meier, Robert and Georgie Laidlaw, Sharon Horie

and “Persons Names Unknown”. Ms Meier travels and lives in a vehicle with her two children, having done so since 2002. Mr Laidlaw sadly died before the hearing, and, unsurprisingly in the circumstances, Mrs Laidlaw appears to have played no part in the proceedings. Ms Horie has pursued a nomadic way of life since about 1982, and lives in vehicles together with her three children. Lesley Rand (who has been a traveller since about 1996, and lives together with her severely disabled nine year old daughter in a specially adapted vehicle) and Kirsty Salter (who was pregnant at the time, and has been a traveller for ten years) were subsequently added as defendants.

47. Two of the defendants had previously been encamped on another area of woodland, some five miles from Hethfelton, called Moreton Plantation (“Moreton”), which was also managed by the Commission. Following the issue of possession proceedings in relation to Moreton, a compromise was agreed on 9 January 2007, which provided that the Secretary of State should recover possession on 29 January 2007. It was on that day that a number of the defendants moved from Moreton to Hethfelton. Some of the other defendants had previously occupied another wood managed by the Commission, Morden Heath (“Morden”), which had also been subject to proceedings brought by the Secretary of State, which had resulted in a possession order which was due to be executed on 5 February 2007. In anticipation of the execution of that order, those other defendants moved from Morden to Hethfelton.

48. In the claim form in the instant proceedings, the Secretary of State sought possession not only of Hethfelton, but also of “all that land described on the attached schedule all in the county of Dorset”. That schedule set out more than fifty separate woods, which were owned by the Secretary of State and managed by the Commission, and which were marked on an attached plan. The number of woods of which possession was sought in addition to Hethfelton was subsequently reduced to thirteen, and the plan showed that those thirteen woods (“the other woods”) were spread over an area of Dorset around twenty-five miles east to west and ten miles north to south. In the injunction application, the Secretary of State sought an order against the same defendants (including “Persons Names Unknown”) restraining them “from re-entering [Hethfelton] or from entering [the other woods]”. Copies of the claim form seeking possession were served on the named defendants and at Hethfelton in accordance with the provisions of CPR 55.6, together with copies of the injunction application.

49. The evidence established that all the occupiers of the camp at Hethfelton were new travellers, living and travelling in motor vehicles, mostly with children and often with animals. The evidence also indicated that the camp was relatively tidy, and did not involve any antisocial conduct on the part of any of the occupants. However, the presence of children and animals caused the Commission to avoid the use of heavy plant or the carrying out of substantial work, which might otherwise have occurred, in the surrounding area. The Commission’s evidence showed that other areas in Dorset managed by the Commission, in addition to Hethfelton, including Moreton, and Morden, had been occupied by travellers as unauthorised camps, sometimes by one or more of the named defendants.

50. The claim came before Mr Recorder Norman, who gave a full and careful judgment on 3 August 2007. He had to resolve three issues. The first was whether to grant an order for possession against the defendants in respect of Hethfelton. The second issue was whether to grant an order for possession in respect of any or all of the other woods. The third issue was whether to grant an injunction restraining the defendants from entering on to all or any of the other woods.

51. The Recorder decided to grant an order for possession against the defendants in respect of Hethfelton. However, he refused to make any wider order for possession, or to grant the injunction sought by the Secretary of State. Although he accepted that he had jurisdiction to make such orders, he considered it inappropriate to do so primarily because the Commission had failed to consider the matters suggested by the 2004 Guidance before the current proceedings were begun, and because the Commission was not prepared to assure the Recorder that consideration would be given to that guidance before any wider order for possession or any injunction was

enforced. Paragraph 1 of the order drawn up to reflect this decision provided that "[t]he claimant do forthwith recover the land known as Hethfelton Wood".

52. The defendants did not appeal against this order for possession. However, the Secretary of State appealed against the Recorder's refusal to grant an order for possession in relation to the other woods (which I will refer to as a "wider order for possession") and the injunction, and the Court of Appeal allowed the appeal – [2008] EWCA Civ 903, [2009] 1 WLR 828. The order made by the Court of Appeal ordered that the Secretary of State "do recover" the other woods, and that each of the defendants "be restrained from entering upon, trespassing upon, living on, or occupying" any of the other woods.

53. In her judgment, Arden LJ followed and applied the reasoning of the Court of Appeal in the earlier decision of *Secretary of State v Drury* [2004] EWCA Civ 200, [2004] 1 WLR 1906, under which it had been held that an order for possession, at least when made pursuant to a possession claim against trespassers, could, in appropriate cases, extend to land not forming part of, or contiguous with, or even near, the land actually occupied by the trespassers. She concluded that the evidence demonstrated that at least some of the defendants had set up unauthorised encampments on woods managed by the Commission in Dorset, and that there was a substantial risk that at least some of the defendants would move onto other such woods once an order for possession was made in relation to Hethfelton.

54. Arden LJ also said, in disagreement with the Recorder, that any failure on the part of the Commission to consider the matters recommended by the 2004 Guidance before issuing the proceedings for possession of the other woods did not justify refusing to make such a wider order. This was essentially on the basis that, if there was any such failure, it could be considered at the time the wider order for possession was sought to be enforced. Pill and Wilson LJJ agreed. Arden LJ also considered that, for the same reasons, the Recorder had been wrong to refuse the injunction sought by the Secretary of State, and again Pill LJ agreed. However, Wilson LJ dissented on this point, on the ground that the Recorder had been entitled to refuse an injunction on the additional ground which he had mentioned, namely that, if he had made a wider order for possession, it would have been disproportionate to grant an injunction as well.

55. The instant appeal is brought by Ms Horie and Ms Rand, and it raises two principal issues. The first is the extent to which an order for possession can be made in favour of a claimant in respect of land not actually occupied by a defendant. The second issue concerns the circumstances in which an injunction restraining future trespass can and should be granted; this raises two points: (a) whether an injunction against travellers is generally appropriate, and (b) the point on which the Court of Appeal differed from the Recorder, namely the effect of the 2004 Guidance. I shall consider these two issues in turn and then briefly review the implications of my conclusions.

An order for possession of land not occupied by the defendants

56. In *Drury* [2004] 1 WLR 1906, the facts were similar to those here, except the Court of Appeal held that there was no evidence establishing that the travellers in that case had occupied, or threatened to occupy, other property managed by the Commission. Accordingly, the order for possession was in the normal form, limited, like the order made by the Recorder in this case, to the wood occupied by the travellers. However, the Court of Appeal decided that an order for possession could be granted, not merely in respect of land which the defendant occupied, but also in respect of other land which was owned by the claimant, and which the defendant threatened to occupy.

57. The essence of the Court of Appeal's reasoning was that (a) the law recognises that an anticipated trespass can give rise to a right of action, (b) an injunction would be of limited, if any, real use, (c) in those circumstances, the law should provide another remedy, (d) a wider order for possession would be of much more practical value than an injunction, (e) such an order for possession was justified by previous authority and in the light of the court's jurisdiction to grant

quia timet injunctions; and (f) accordingly, such an order could be made; but (g) it should only be made in relatively exceptional circumstances – see at [2004] 1 WLR 1906, paras 20-24, 34-36, and 42-46, per Wilson J, Mummery LJ and Ward LJ respectively.

58. Particularly with the advent of the Civil Procedure Rules, it is clear that judges should strive to ensure that court procedures are efficacious, and that, where there is a threatened or actual wrong, there should be an effective remedy to prevent it or to remedy it. Further, as Lady Hale points out, so long as landowners are entitled to evict trespassers physically, judges should ensure that the more attractive and civilised option of court proceedings is as quick and efficacious as legally possible. Accordingly, the Court of Appeal was plainly right to seek to identify an effective remedy for the problem faced by the Commission as a result of unauthorised encampments, namely that, when a possession order is made in respect of one wood, the travellers simply move on to another wood, requiring the Commission to incur the cost, effort and delay of bringing a series or potentially endless series of possession proceedings against the same people.

59. Nonetheless, however desirable it is to fashion or develop a remedy to meet a particular problem, courts have to act within the law, and their ability to control procedure and achieve justice is not unlimited. Judges are not legislators, and there comes a point where, in order to deal with a particular problem, court rules and practice cannot be developed by the courts, but have to be changed by primary or secondary legislation – or, in so far as they can be invoked for that purpose, by Practice Directions. In my view, it is simply not possible to make the sort of enlarged or wider order for possession which the Court of Appeal made in this case, following (as it was, I think, bound to do) the reasoning in *Drury* [2004] 1 WLR 1906.

60. The power of the County Court for present purposes derives from section 21(1) of the County Courts Act 1984, which gives it "jurisdiction to hear and determine any action for the recovery of land". The concept of "recovery" of land was the essence of a possession order both before and after the procedure was recast by sections 168ff of the Common Law Procedure Act 1852, although, until the Supreme Court of Judicature Act 1875, the action lay in ejectment rather than in recovery of land – see per Lord Denning MR in *McPhail v Persons, Names Unknown* [1973] Ch 447, 457-8. Nonetheless, the change of name did not involve a change of substance, and the essence of an order for possession, whether framed in ejectment or recovery, is that the claimant is getting back the property from the defendant, whether by recovering the property from the defendant or because the claimant had been wrongly ejected by the defendant. As stated by Wonnacott, in *Possession of Land* (2006), page 22, "an action for recovery of land (ejectment) is an action to be put into possession of an estate of land. The complaint is that the claimant is not currently 'in' possession of it, and … wants … to be put 'in' possession of it." See also Simpson, *A History of the Land Law* (2nd edition), pages 144-5 and *Gledhill v Hunter* (1880) 14 Ch D 492, 496 per Sir George Jessel MR.

61. As Sir George Jessel explained, an action for ejectment and its successor, recovery of land, was normally issued "to recover possession from a tenant" or former tenant. An action against a trespasser, who did not actually dispossess the person entitled to possession, was based on *trespass quare clausum fregit*, physical intrusion onto the land. Nonetheless, where a trespasser exclusively occupies land, so as to oust the person entitled to possession, the cause of action must be for recovery of possession. (Hence, if such an action is not brought within twelve years the ousting trespasser will often have acquired title by "adverse possession".) Accordingly, in cases where a trespasser is actually in possession of land, an action for recovery of land, i.e. for possession, is appropriate, as Lord Denning implicitly accepted in *McPhail* [1973] Ch 447, 457-8.

62. This analysis is substantially reflected in the provisions of the CPR and in the currently prescribed form of order for possession. CPR 55 is concerned with possession claims, and CPR 55.1 provides:

"(a) 'a possession claim' means a claim for the recovery of possession of land (including buildings or parts of buildings);

(b) 'a possession claim against trespassers' means a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not; …"

The special features of a possession claim against trespassers are that the defendants to the claim may include "persons unknown", such proceedings should be served on the land as well as on the named defendants, and the minimum period between service and hearing is 2 days (or 5 days for residential property) rather than the 28 days for other possession claims – see CPR 55.3(4), 55.6, and 55.5(2) and (3).

63. The drafting of CPR 55(1) is rather peculiar in that, unlike that in CPR 55(1)(a), the definition in CPR 55(1)(b) does not include the word "possession". Given that, since 1875, the cause of action has been for recovery of land, the oddity, as Lord Rodger has pointed out, is the inclusion of the word "possession" in the former paragraph, rather than its exclusion in the latter. However, in so far as the point has any significance, the definition of "a possession claim", like the definition of "land", in CPR 55(1)(a) may well be carried into CPR 55(1)(b). In any event, the important point, to my mind, is that a possession claim against trespassers involves the person "entitled to possession" seeking "recovery" of the land. Form N26 is the prescribed form of order in both a simple possession claim and a possession claim against trespassers (see CPR Part 4 PD Table 1). That form orders the defendant to "give the claimant possession" of the land in question. Although the orders at first instance (as drafted by counsel), and in the Court of Appeal, direct that the claimant do "recover" the land in question from the defendants, that is the mirror image of ordering that the defendants "give" the claimant possession.

64. The notion that an order for possession may be sought by a claimant and made against defendants in respect of land which is wholly detached and separated, possibly by many miles, from that occupied by the defendants, accordingly seems to me to be difficult, indeed impossible, to justify. The defendants do not occupy or possess such land in any conceivable way, and the claimant enjoys uninterrupted possession of it. Equally, the defendants have not ejected the claimant from such land. For the same reasons, it does not make sense to talk about the claimant recovering possession of such land, or to order the defendant to deliver up possession of such land.

65. This does not mean that, where trespassers are encamped in part of a wood, an order for possession cannot be made against them in respect of the whole of the wood (at least if there are no other occupants of the wood), just as much as an order for possession may extend to a whole house where the defendant is only trespassing in one room (at least if the rest of the house is empty).

66. However, the fact that an order for possession may be made in respect of the whole of a piece of property, when the defendant is only in occupation of part and the remainder is empty, does not appear to me to assist the argument in favour of a wider possession order as made by the Court of Appeal in this case. Self-help is a remedy still available, in principle, to a landowner against trespassers (other than former residential tenants). Where only part of his property is occupied by trespassers, a landowner, exercising that remedy through privately instructed bailiffs, would, no doubt, be entitled to evict the trespassers from the whole of his property. Similarly, it seems to me, bailiffs (or sheriffs), who are required by a warrant (or writ) of possession to evict defendants from part of a property owned by the claimant, would be entitled to remove the defendants from the whole of that property. But that does not mean that the bailiffs, whether privately instructed or acting pursuant to a warrant, could restrain the trespassers from moving onto another property, perhaps miles away, owned by the claimant.

67. Further, the concept of occupying part of property (the remainder of which is vacant) effectively in the name of the whole is well established – see for example, albeit in a landlord and tenant context, *Henderson v Squire* (1868-69) LR 4 QB 170, 172. However, that concept cannot be extended to apply to land wholly distinct, even miles away, from the occupied land. So, too, the fact that one can treat land as a single entity if it is divided by a road or river (in different ownership from the land) seems to me to be an irrelevance: as a matter of law and fact, the two divisions can sensibly be regarded as a single piece of land. Accordingly, I have no difficulty with the fact that the possession order made at first instance in this case extended to the whole of Hethfelton, even though the defendants occupied only a part of it.

68. The position is more problematical where a defendant trespasses on part of land, the rest of which is physically occupied by a third party, or even by the landowner. Particular difficulties in this connection are, to my mind, raised in relation to a wide order for possession in a claim within CPR 55.1(b). Such "a claim" may be brought "for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without … consent …". Given that such a claim is limited to "land … occupied only by" trespassers, it is not immediately easy to see how it could be brought, even in part, in relation to land occupied by persons who are not trespassers. And it is fundamental that the court cannot accord a claimant more relief than he seeks (although it is, of course, possible, in appropriate circumstances, for a claimant to amend to increase the extent of his claim, but that is not relevant here).

69. The Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301 nonetheless decided that a University could be granted a possession order under RSC Order 113 rule 1, which was (in relation to the issue in this case) in similar terms to CPR 55(1)(b), in respect of its whole campus, against trespassers who were squatting in a relatively small part, even though the remainder of the campus was lawfully occupied by academics, other employees, and indeed students. This was a thoroughly practical decision arrived at to deal with a fairly widespread problem at the time, namely student sit-ins. There was an obvious fear that, if an order for possession was limited to the rooms occupied by the student trepassers, they would simply move to another part of the campus.

70. As already mentioned, given that there is the alternative remedy of self-help, the court should ensure that its procedures are as effective as lawfully possible. Nonetheless, there is obviously great force in the argument that the fact that areas of the campus in that case was lawfully and exclusively occupied by academic staff, employees and students should have precluded a claim and an order for possession in respect of those areas, both in principle and in the light of the wording of RSC Order 113 rule 1.

71. However, this is not the occasion formally to consider the correctness of the decision in *Djemal* [1980] 1 WLR 1301, which was not put in issue by either of the parties, as the Secretary of State (like the Court of Appeal in *Drury* [2004] 1 WLR 1906) relied on it, and the appellants were content to distinguish it. Accordingly, the implications of overruling or explaining the decision, which may be far-reaching in terms of principle and practice, have not been debated or canvassed.

72. The Court of Appeal's conclusion in *Drury* [2004] 1 WLR 1906, that the court could make a wider order for possession such as that in the instant case, rested very much on the reasoning in *Djemal* [1980] 1 WLR 1306, and in the subsequent first instance decision of *Ministry of Agriculture, Fisheries and Food v Heyman* 59 P&CR 48, which represented an "incremental development of the ruling in [*Djemal* [1980] 1 WLR 1306]", as Mummery LJ put it at [2004] 1 WLR 1906, para 35. However, it seems to me that the decision in *Drury* [2004] 1 WLR 1906 was an illegitimate extension of the reasoning and decision in *Djemal* [1980] 1 WLR 1306. The fact that an order for possession can be made in respect of a single piece of land, only part of which is occupied by trespassers, does not justify the conclusion that an order for possession can be made in respect of two entirely separate pieces of land, only one of which is occupied by trespassers, just because both pieces of land happen to be in common ownership. As already mentioned,

bailiffs, whether acting on instructions from a landowner exercising the right of self-help to evict a trespasser or acting pursuant to a warrant of possession, can remove the trespasser on part of a piece of property from the whole of that property, but they cannot prevent him from entering a different property, possibly many miles away. Similarly, while it is acceptable, at least in some circumstances, to treat occupation of part of property as amounting to occupation of the whole of that property, one cannot treat occupation of one property as amounting to occupation of another, entirely separate, property, possibly miles away, simply because the two properties are in the same ownership.

73. Having said all that, I accept that the notion of a wider, effectively precautionary, order for possession as made in *Drury* [2004] 1 WLR 1906 has obvious attraction in practice. As the Court of Appeal explained in that case, the alternative to a wider possession order, namely an injunction restraining the defendant from camping in other woods in the area, would be of limited efficacy. An order for possession is normally enforced in the County Court by applying for a warrant of possession under CCR Order 26, which involves the occupiers being removed from the land by the bailiffs. (The equivalent in the High Court is a writ of possession executed by the Sheriff under RSC Order 45 rule 3). This is a procedurally direct and simple method of enforcement. An injunction, however, "may be enforced", and that was treated by the court in *Drury* [2004] 1 WLR 1906 as meaning "may only be enforced", by sequestration or committal – see RSC Order 45 rule 5(1), and, in relation to the County Court, CCR 29 and section 38 of the County Courts Act 1984. Given that the claimant's aim is to evict the travellers, those are unsatisfactory remedies compared with applying for a warrant of possession. They are not only indirect, but they are normally procedurally unwieldy and time-consuming, and, in any event, they are of questionable value in cases against travellers, as explained in the next section of this opinion.

74. There is also some apparent force as a matter of principle in the notion that the Courts should be able to grant a precautionary wider order for possession. If judges have developed the concept of an injunction which restrains a defendant from doing something he has not yet done, but is threatening to do, why, it might be asked, should they now not develop an order for possession which requires a defendant to deliver up possession of land that he has not yet occupied, but is threatening to occupy? The short answer is that a wider or precautionary order for possession, whether in the form granted in this case or in the prescribed Form N26, requires a defendant to do something he cannot do, namely to deliver up possession of land he does not occupy, and purports to return to the claimant something he has not lost, namely possession of land of which already he has possession.

75. What the claimant is really seeking in the present case is an order that, if the defendant goes onto the other woods, the claimant should be entitled to possession. That is really in the nature of declaratory or injunctive relief: it is not an order for possession. A declaration identifies the parties' rights and obligations. A *quia timet* injunction involves the court forbidding the defendant from doing something which he may do and which he would not entitled to do. Both those types of relief are different from what the Court of Appeal intended to grant here, namely a contingent order requiring the defendant to do something (to deliver up possession) if he does something else (trespassing) which he may do and which he would not be entitled to do. I describe the Court of Appeal as intending to grant such an order, because, as just explained, the actual order is in the form of an immediate order for possession of the other woods, which, as I have mentioned, is also hard to justify, given that the defendants were not in occupation of any part of them.

76. Further, while it would be beneficial to be able to make a wider possession order because of the relative ease with which it could be enforced in the event of the defendants trespassing on other woods, such an order would not be without its disadvantages and limitations. An order for possession only binds those persons who are parties to the proceedings (and their privies), although the bailiffs (and sheriffs) are obliged to execute a warrant (or writ) of possession against all those in occupation – see *In re Wykeham Terrace, Brighton, Sussex* [1971] Ch 204, 209-10, *R v Wandsworth County Court ex p Wandsworth London Borough Council* [1975] 1 WLR 1314,

1317-9, *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425, 1431-2, and the full discussion in *Wonnacott* op cit at pages 146-52. It would therefore be wrong in principle for the court to make a wider order for possession against trespassers (whether named or not) in one wood with a view to its being executed against other trespassers in other woods. Nonetheless, because the warrant must be executed against anyone on the land, there is either a risk of one or more of the occupiers of another wood being evicted without having the benefit of due process, or room for delay while such an occupier applies to the court and is heard before a warrant is executed against him.

77. Quite apart from this, a warrant of possession to execute an order for possession made in the County Court in a claim for possession against trespassers can only be issued without leave within three months of the order – CCR Order 24 rule 6(2). So, after the expiry of three months, a wider possession order does not obviate the need for the claimant applying to the court before he can obtain possession of any land the subject of the order. Further, as pointed out by Wilson J in *Drury* [2004] 1 WLR 1906, para 22, it seems rather arbitrary that only a person who owns land which is being unlawfully occupied can obtain a wider order for possession protecting all his land in a particular area.

78. In conclusion on this issue, while there is considerable practical attraction in the notion that the court should be able to make the wide type of possession order which the Court of Appeal made in this case, following *Drury* [2004] 1 WLR 1906, I do not consider that the court has such power. It is inconsistent with the nature of a possession order, and with the relevant provisions governing the powers of the court. The reasoning in the case on which it is primarily based, *Djemal* [1980] 1 WLR 1301, cannot sensibly be extended to justify the making of a wider possession order, and there are aspects of such an order which would be unsatisfactory. I should add that I have read what Lord Rodger has to say on this, the main, issue, and I agree with him.

Should an injunction be refused as it will probably not be enforced?

79. That brings me to the question whether an injunction restraining travellers from trespassing on other land should be granted in circumstances such as the present. Obviously, the decision whether or not to grant an order restraining a person from trespassing will turn very much on the precise facts of the case. Nonetheless, where a trespass to the claimant's property is threatened, and particularly where a trespass is being committed, and has been committed in the past, by the defendant, an injunction to restrain the threatened trespass would, in the absence of good reasons to the contrary, appear to be appropriate.

80. However, as Lord Walker said during argument, the court should not normally make orders which it does not intend, or will be unable, to enforce. In a case such as the present, if the defendants had disobeyed an injunction not to trespass on any of the other woods, it seems highly unlikely that the two methods of enforcement prescribed by CCR 29 and section 38 of the County Courts Act 1984 (RSC Order 45 rule 5(1) in the High Court) would be invoked. The defendants presumably have no significant assets apart from their means of transport, which are also their homes, so sequestration would be pointless or oppressive. And many of the defendants are vulnerable, and most of them have young children, so imprisonment may very well be disproportionate. In *South Bucks District Council v Porter* [2003] UKHL 26, [2003] 2 AC 558, local planning authorities were seeking injunctions to restrain gypsies from remaining on land in breach of planning law, and at para 32, Lord Bingham of Cornhill said that "[t]he court should ordinarily be slow to make an order which it would not … be willing, if need be, to enforce by imprisonment".

81. On the other hand, in the same paragraph of his opinion, Lord Bingham also said that "[a]pprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate". A court may consider it unlikely that it would make an order for sequestration or imprisonment, if an injunction it was being invited to grant were to be breached, but it may nonetheless properly decide to grant the injunction. Thus, the court may take the view

that the defendants are more likely not to trespass on the claimant's land if an injunction is granted, because of their respect for a court order, or because of their fear of the repercussions of breaching such an order. Or the court may think that an order of imprisonment for breach, while unlikely, would nonetheless be a real possibility, or it may think that a suspended order of imprisonment, in the event of breach, may well be a deterrent (although a suspended order should not be made if the court does not anticipate activating the order if the terms of suspension are breached).

82. It was suggested in argument that, if a defendant established an unauthorised camp in a wood which, in earlier proceedings, he had been enjoined from occupying, the court would be likely to be sympathetic to an application by the Commission to abridge even the short time limits in CPR 55.5.2. However, as Lord Rodger observed, if the court were satisfied that a defendant was moving from unauthorised site to unauthorised site on woods managed by the Commission, an abridgement of time limits might be thought to be appropriate anyway. Quite apart from this, if the only reason for granting an injunction restraining a defendant from trespassing in other woods was to assist the Commission in obtaining possession of any of those other woods should the defendant camp in them, it seems to me that this could be catered for by declaratory relief. For instance, the court could grant a declaration that the Commission is in possession of those other woods and the defendant has no right to dispossess it.

83. In some cases, it may be inappropriate to grant an injunction to restrain a trespassing on land unless the court considers not only that there is a real risk of the defendants so trespassing, but also that there is at least a real prospect of enforcing the injunction if it is breached. However, even where there appears to be little prospect of enforcing the injunction by imprisonment or sequestration, it may be appropriate to grant it because the judge considers that the grant of an injunction could have a real deterrent effect on the particular defendants. If the judge considers that some relief would be appropriate only because it could well assist the claimant in obtaining possession of such land if the defendants commit the threatened trespass, then a declaration would appear to me to be more appropriate than an injunction.

84. In the present case, neither the Recorder nor the Court of Appeal appears to have concluded that an injunction should be refused on the ground that it would not be enforced by imprisonment or because it would have no real value. Although it may well be that a case could have been (and may well have been) developed along those lines, it was not adopted by the Recorder, and clearly did not impress the Court of Appeal. In those circumstances, it seems to me that it is not appropriate for this Court to set aside the injunction unless satisfied that it was plainly wrong to grant it, or that there was an error of principle in the reasoning which led to its grant. It does not appear to me that either of those points has been established in this case.

The effect of the 2004 Guidance on the grant of an injunction

85. The Recorder considered that it was inappropriate to grant an injunction in favour of the Secretary of State because the Commission had not complied with the 2004 Guidance in relation to the other woods before issuing the proceedings, and would not give an assurance that it would comply with the 2004 Guidance before it enforced the injunction. The Court of Appeal considered that the injunction could nonetheless be granted, as the issue of the Commission's compliance with the 2004 Guidance could be considered before the injunction was enforced.

86. As I have already mentioned, it has been conceded by the Secretary of State throughout these proceedings that the Commission is obliged to comply with the 2004 Guidance, and that failure to do so may vitiate its right to possession against travellers trespassing on land it manages. On that basis, there is some initial attraction in the appellants' argument that, if the 2004 Guidance ought to be complied with before the injunction is enforced, it would be inappropriate to grant the injunction before the Guidance was complied with. After all, now the injunction has been granted, the defendants would be in contempt of court and prone to imprisonment (once the appropriate procedures had been complied with) if they encamped on any of the other woods.

87. However, I am of the opinion that the Court of Appeal was right to conclude that, even in the light of the Secretary of State's concession, the 2004 Guidance did not present an obstacle to the granting of an injunction in this case. The Guidance is concerned with steps to be taken in relation to existing unauthorised encampments: it is not concerned with preventing such encampments from being established in the first place. The recommended procedures in the 2004 Guidance were relevant to the question of whether an order for possession should be made against the defendants in respect of their existing encampment on Hethfelton. However, quite apart from the fact that they are merely aspects of a non-statutory code of guidance, those recommendations are not directly relevant to the issue of whether the defendants should be barred from setting up a camp on other land managed by the Commission. Accordingly, I do not see how it could have justified an attack on the lawfulness of the Secretary of State seeking an injunction to restrain the defendants from setting up such unauthorised camps. At least on the basis of the concession to which I have referred, I incline to the view that the existence and provisions of the 2004 Guidance could be taken into account by the Court when considering whether to grant an injunction and when fashioning the terms of any injunction. However, I prefer to leave the point open, as it was, understandably, not much discussed in argument before us.

88. Even if the 2004 Guidance was of relevance to the issue of whether the injunction should be granted, it seems to me that it could not be decisive. Otherwise, it would mean that such an injunction could never be granted, because it would not be possible to carry out up-to-date welfare enquiries in relation to defendants who might not move onto a wood which they were enjoined from occupying for several months, or, conceivably, even several years, after the order was made. As Arden LJ held, particularly bearing in mind that it purports to be no more than guidance, the effect and purpose of the 2004 Guidance is simply not strong enough to displace the Secretary of State's right to seek the assistance of the court to prevent a legal right being infringed. Further, the fact that welfare enquiries were made in relation to the defendants' occupation of Hethfelton by social services means that the more significant investigations required by the 2004 Guidance had been carried out anyway.

89. Following questions from Lady Hale, it transpired for the first time in these proceedings that, at the time of the issue of the claim, the Commission had (and has) a detailed procedural code which is intended to apply when there are travellers unlawfully on its land, and that this code substantially followed the 2004 Guidance. It therefore appears that the Commission has considered the 2004 Guidance and promulgated a code which takes its contents into account. On that basis, unless it could be shown in a particular case that the code had been ignored, it appears to me that the Commission's decision to evict travellers could not be unlawful on the ground relied on by the appellants in this case. However, it appears to me that failure to comply with non-statutory guidance would be unlikely to render a decision unlawful, although failure to have regard to the guidance could do so.

90. If the defendants were to trespass onto land covered by the injunction, the Commission would presumably comply with its code before seeking to enforce the injunction. If it did not do so, then, if justified on the facts of a particular case, there may (at least if the Commission's concession is correct) be room for argument that, in seeking to enforce the injunction against travellers who have set up a camp in breach of an injunction, the Secretary of State was acting unlawfully. It is true that this means that, in a case such as this, a defendant who trespasses in breach of an injunction may be at risk of imprisonment before the Commission has complied with the 2004 Guidance. However, where imprisonment is sought and where it would otherwise be a realistic prospect, the defendant could argue at the committal hearing that the injunction should not be enforced, even that it should be discharged, on the ground that the recommendations in the 2004 Guidance have not been followed.

91. Accordingly, on this point, I conclude that, even assuming (in accordance with the Secretary of State's concession) that the Commission's failure to comply with the 2004 Guidance may deter the court from making an order for possession against travellers, it should not preclude the

granting of an injunction to restrain travellers from trespassing on other land. However, at least in a case where it could be shown that the claimant should have considered the 2004 Guidance, but did not do so, the Guidance could conceivably be relevant to the question whether an injunction should be granted (and if so on what terms), and, if the injunction is breached, to the question of whether or not it should be enforced (and, if so, how). In the event, therefore, the grant of an injunction was appropriate as Arden and Pill LJ concluded (and the only reason Wilson LJ thought otherwise, namely the existence of the wider possession order, no longer applies).

The implications of this analysis

92. As I have explained, the thinking of the Court of Appeal in *Drury* [2004] 1 WLR 1906 proceeded on the basis that an injunction restraining trespass to land could only be enforced by sequestration or imprisonment. In the light of the terms of RSC Order 45 rule 5(1), this may very well be right. Certainly, in the light of the contrast between the terms of that rule and the terms of RSC Order 45 rule 3(1) and CCR 26 rule 16(1) (which respectively provide for writs and warrants of possession only to enforce orders for possession), it is hard to see how a warrant of possession in the County Court or a writ of possession in the High Court could be sought by a claimant, where such an injunction was breached.

93. However, where, after the grant of such an injunction (or, indeed, a declaration), a defendant entered onto the land in question, it is, I think, conceivable that, at least in the High Court, the claimant could apply for a writ of restitution, ordering the sheriff or bailiffs to recover possession of the land for the benefit of the claimant. Such a writ is often described as one of the "writs in aid of" other writs, such as a writ of possession or a writ of delivery –see for instance RSC Order 46 rule 1. Restitution is normally the means of obtaining possession against a defendant (or his privy) who has gone back into possession after having been evicted pursuant to a court order. It appears that it can also be invoked against a claimant who has obtained possession pursuant to a court order which is subsequently set aside (normally on appeal) – see sc46.3.3 in Civil Procedure, Vol 1, 2009. Historically at any rate, a writ of restitution could also be sought against a person who had gone into possession by force: see *Cole on Ejectment* (1857) pp 692-4. So there may be an argument that such a writ may be sought by a claimant against a defendant who has entered onto the land after an injunction has been granted restraining him from doing so, or even after a declaration has been made that the claimant is, and the defendant is not, entitled to possession. It may also be the case that it is open to the County Court to issue a warrant of restitution in such circumstances.

94. Whether a writ or warrant of restitution would be available to support such an injunction or declaration, and whether the present procedural rules governing the enforcement of injunctions against trespass on facts such as those in the present case are satisfactory, seem to me to be questions which are ripe for consideration by the Civil Procedure Rules Committee. The precise ambit of the circumstances in which a writ or warrant of restitution may be sought is somewhat obscure, and could usefully be clarified. Further, if, as I have concluded, it is not open to the court to grant a wider order for possession, as was granted by the Court of Appeal in *Drury* [2004] 1 WLR 1906 and in this case, then it appears likely that there may very well be defects in the procedural powers of the courts of England and Wales. Where a person threatens to trespass on land, an injunction may well be of rather little, if any, real practical value if the person is someone against whom an order for sequestration or imprisonment is unlikely to be made, and an order for possession is not one which is open to the court. In addition, it seems to me that it may be worth considering whether the current court rules satisfactorily deal with circumstances such as those which were considered in *Djemal* [1980] 1WLR 1306.

Disposal of this appeal

95. Accordingly, it follows that, for my part, I would allow the defendants' appeal to the extent of setting aside the wider possession order made by the Court of Appeal, but dismiss their appeal to the extent of upholding the injunction granted by the Court of Appeal.

LORD COLLINS

96. At the end of the argument my inclination was to the conclusion that in *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] EWCA Civ 200, [2004] 1 WLR 1906 the Court of Appeal had legitimately extended *University of Essex v Djemal* [1980] 1 WLR 1301 to fashion an exceptional remedy to deal with cases of the present kind. I was particularly impressed by the point that an injunction might be a remedy which was not capable of being employed effectively in cases such as this. But I am now convinced that there is no legitimate basis for making an order for possession in an action for the recovery of wholly distinct land of which the defendant is not in possession.

97. But in my opinion *University of Essex v Djemal* [1980] 1 WLR 1301 represented a sensible and practical solution to the problem faced by the University, and was correctly decided. I agree, in particular, that it can be justified on the basis that the University's right to possession of its campus was indivisible, as Lord Rodger says, or that the remedy is available to a person whose possession or occupation has been interfered with, as Lady Hale puts it. Where the defendant is occupying part of the claimant's premises, the order for possession may extend to the whole of the premises. First, it has been pointed out, rightly, that the courts have used the concept of possession in differing contexts as a functional and relative concept in order to do justice and to effectuate the social purpose of the legal rules in which possession (or, I would add, deprivation of possession) is a necessary element: Harris, *The Concept of Possession in English Law*, *in Oxford Essays in Jurisprudence* (ed Guest, 1961) 69 at 72. Secondly, the procedural powers of the court are subject to incremental change in order to adapt to the new circumstances: see, e.g. in relation to the power to grant injunctions, *Fourie v Le Roux* [2007] UKHK 1 [2007] 1 WLR 320, at [30]; *Masri v Consolidated Contractors International (UK) Ltd (No.2)* [2008] EWCA Civ 303, [2009] 2 WLR 621, at [182].

98. I would therefore allow the appeal to the extent of setting aside the wider possession order.