Neutral Citation Number: 2014 EWHC 645 CH

Case No: A30MA135

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY

Civil Justice Centre
Manchester

Date: 10/03/2014

Before :

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

(1) MANCHESTER SHIP CANAL DEVELOPMENTS LIMITED
(2) PEEL INVESTMENTS LIMITED

Claimants

- and -

(1) PERSONS UNKNOWN
(2) IAN CRANE
(3) SEAN PEATFIELD
(4) DANIEL EVANS
(5) MARTIN BURKE
(6) TAMMY SAMEDE
(7) GEORGE THOMAS-BROWN

Defendants

- -

Ms Katharine Holland QC (instructed by **Wragge & Co**) for the **Claimants**
Mr Lindsay Johnson (instructed by **Leigh Day**) for the **Second and Fifth Defendants**
The remaining Defendants did not appear and were not represented
Hearing dates: 6th and 7th March 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC :

Introduction

1. By a Claim Form issued by the Claimants on 18 February 2014, the Claimants sought possession of the land referred to in Paragraph 2 of the Particulars of Claim served with the Claim Form. The land in respect of which a possession order is claimed is shown coloured yellow, green, and blue, and outlined with a red line on the plan at Appendix 1 of this judgment. That plan is oriented with north at the top and south at the bottom. Appendices 2, 3 and 4 are expanded views of the area in respect of which possession is sought. Appendix 2 shows the area within the box marked "*North*" on the plan at Appendix 1, Appendix 3 shows the area within the box marked "*Middle*" and Appendix 4 shows the area within the lowest most box shown on the plan at Appendix 1.

2. The land in respect of which a possession order is sought consists principally of a single-track road over which there is a public footpath. The tarmaced area of the road is shown coloured yellow and green on the plans at Appendices 1-4. The road is unlit and uncurbed throughout its length. It is known as and is referred to in this judgment as Barton Moss Road. The area shaded blue, and that between the red lines and the areas coloured yellow and green, consist of grass verge. To the north the road crosses over a bridge over the M62 motorway. To the south the road joins the A57. Aside from being a public footpath the road is used by vehicles, but this user is governed by licence agreements between the Claimants and the users concerned. Although it is conceivable that this type of access is the subject of specific easements, there is no evidence that such is the case.

3. The areas shown shaded yellow on the plans at Appendices 1-4 are referred to in the documentation relevant to this claim and this judgment as "the Yellow Land". The Claimants' case is that the First Claimant owns this land and the land between the red lines and the Yellow Land. The Claimants' case is also that the land shown on the plans at Appendices 1-4 shaded green and blue (referred to hereafter and in the documentation relevant to this claim as respectively the Green and the Blue Land) is owned by the Second Claimant.

4. The land to the west of the road and verge is farmland owned by the First Claimant that is let to a third party under a farming business tenancy. The land to the north east of the road and north and north east of Tunnel Farm is also farmland that has been let out. The land to the southeast of the lane running east from Barton Moss Road and southeast of Tunnels Farm ("Twelve Yards Road") is owned by the First Claimant and is known as Barton Aerodrome.

5. To the east of Barton Moss Road is a secure childrens home owned by the Youth Justice Board and operated by a local authority. Barton Moss Road provides the main access to that facility. Barton Moss Road also provides a means of access to Barton Aerodrome and it is said that on that account it must be kept clear of obstructions. Barton Moss Road also provides the main access to an engineering business called Plasmet Limited, which occupies premises to the east of Barton Moss Road. Barton Moss Road also provides the main access from the A57 to a number of residential properties including Tunnel Farm (the complex at the junction of Barton Moss Road

and Twelve Yards Road) and another farm. There are other businesses and properties to the north of the M62 that rely on Barton Moss Road as a means of access to the A57.

6. To the northeast of the Green land is an area of land owned by the Claimants, on which the Claimants have licensed a third party (Igas Energy Plc ["Igas"]) to carry out exploratory drilling that is due to terminate at the end of March 2014 ("the drilling site"). The location of the drilling site is not shown on the plans because it is too far away to be included within the scale drawing that I have used as Appendix 1 to this judgment. Igas obtain access to and egress from the drilling site via Barton Moss Road.

7. Igas's drilling activity is investigatory and is for the purpose of establishing whether there are hydrocarbon deposits underneath the land that are capable of being exploited using a technique known as "*fracking*" – a technique that involves using fluid under pressure to fracture subterranean shale rock formations for the purpose of extracting the hydrocarbons trapped therein. The technique is controversial because some people consider that the effect of using the technique will be to damage the environment in a number of different respects including but not limited to pollution of ground water, and damage to buildings and life due to ground instability induced by the process. No fracking is taking place at the drilling site. Work at the drilling site is due to end at the end of March 2014, when Igas will vacate that site.

8. The circumstances that have led to the commencement of these proceedings in summary are these. In or around the middle of November 2013, a number of individuals in effect set up a camp on the western verge of Barton Moss Lane, north of the track shown on the plan at Appendix 5 as a dotted line running east from Barton Moss Road, roughly opposite the manuscript note that refers to "*Crane's Caravan*". The camp has steadily grown in size since then and its size as at 17 February 2014 is described by Mr Tames in Paragraph 16 of his first statement in support of the claim as consisting of about 6 tents which he says are located on the Blue Land, and around 36 tents, 6 caravans and two huts on the western verge of the Yellow Land, north of the eastern track that I have referred to already. I refer to these areas collectively and for convenience only as "the camp". Those who have set up the camp are protesting against fracking in general and the exploratory activities by Igas in particular. They prefer to be known as protectors rather than protestors.

9. The 2nd and 5th Defendants appear by counsel and resist the Claimants' claim for possession. Aside from maintaining that the Claimants have not proved title to the land they claim possession of, the Defendants maintain that a possession order ought not to be made because such an order would represent a disproportionate interference with their rights under Articles 8, 10 and 11 of the European Convention of Human Rights ("ECHR").

10. These proceedings first came before HH Judge Hodge QC sitting as a Judge of this court on 21 February 2014. On that occasion he gave directions for the filing and service of a Defence, witness statements by the parties and skeleton arguments and directed that the Claimants' claim for possession would be heard on 6 March 2014. He directed that the trial should proceed on the basis of written evidence only and that no oral evidence was to be received at the trial. This approach has the advantage that

the hearing will be much shorter than would otherwise be the case but makes it impossible to resolve disputed issues of fact that are material. In those circumstances it was agreed between the Claimants and the 2nd and 5th Defendants that I should grant possession only if satisfied that the Defendants had failed to demonstrate that they had a realistically arguable defence to the claim. If satisfied that the Defendants had demonstrated a realistically arguable defence to the claim then it was agreed that I should give directions for the trial of the claim. In relation to disputed issues of fact that were material, it was agreed it should be assumed that the Defendants' positive case on those issues was correct for the purposes of the hearing before me. This is broadly reflective of the approach adopted on summary judgment applications and reflects what is set out in CPR r. 55.8. There is of course a distinction to be drawn between issues of fact and issues of law in the context of a hearing such as this. In relation to the latter the correct approach is that identified by Lewison J (as he then was) in Easy Air Limited v Opal Telecom Limited [2009] EWHC 339 (Ch), at paragraph 15(viii) in these terms:

> "On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725"

The Issues

11. A Defence was filed on behalf of the 2nd 3rd and 5th Defendants pursuant to Judge Hodge's order. Since then, the 3rd Defendant has withdrawn his instructions from the solicitors then acting for him and the 2nd and 5th Defendants and he does not appear and is not represented. None of the other named defendants appear or are represented. The Defence stands therefore as the Defence of the 2nd and 5th Defendants only. I agree with the submission made by Ms Holland in the course of her reply submissions that I am concerned therefore with three classes of defendant being (a) persons unknown (b) the 2nd and 5th Defendants and (c) the remaining named Defendants. I also accept her submission that none of the positive defences referred to in Paragraph 10(b) above are relevant to any of the defendants other than the 2nd and 5th Defendants

on whose behalf they have been pleaded. However it remains the case that the Claimants must prove their case as to their entitlement to immediate possession of the land the subject of this claim before they can succeed against any of the defendants. Subject to those qualifications, the issues that arise are as follows:

i) Have the Claimants proved title to the land in respect of which they claim possession;

ii) Are the Claimants entitled to possession ro the sub-soil of the road over which there is a public right of way as I have described above;

iii) If they have do the or any of the Defendants have a realistically arguable defence to the claims based on

a) Article 10 or 11 of the ECHR; and/or

b) Article 8 ECHR.

The Title Issue

12. I have set out above the Claimants pleaded case as to its entitlement to the land in respect of which a possession order is claimed. Although it was submitted that I could not be sure of the exact position of the various boundaries. I reject that submission. I am satisfied that the boundaries shown on the plans that have been provided by the Claimants are as accurate as modern technology permits in the light of the evidence given by Mr. Tames in Paragraphs 25- 28 of his 3rd witness statement which is not challenged even by assertion and which I accept. The plans at Appendices 2-4 of this judgment were produced in the course of the hearing and differ from those attached to the draft Order served with the proceedings only because various measurements that did not appear on those drawings have been inserted. It was explained that the computer aided mapping systems used by the Claimants have the facility to show or not show such measurements as the operator chooses.

13. The real issue between the parties concerns the status of the western verge of Barton Moss Lane. The submissions made on behalf of the 2nd and 5th Defendants in relation to this issue are that (a) the evidence adduced by the Claimants does not prove that the Claimants own the verge but (b) in any event the Claimants have not proved that the western verge was not included within the scope of the farming business tenancy under which the land to the west of the road was let by the Claimants. This last mentioned point is significant because if right it would mean that even if the Claimants established freehold title to the verge, the Claimants could not maintain their claim to the possession of anything other than the tarmaced road and thus could not obtain possession of the land currently occupied by the Protest Camp – see Clerk & Lindsell on Torts, 20th Ed., Paragraphs 19-10 and 19-24. It has not been asserted by the Claimants that the reversion has been or is being damaged by the matters of which they make complaint. Their case is simply that the land they seek possession of does not fall within the scope of the lease on which the Defendants rely.

14. The first issue that I have to consider therefore is whether the evidence establishes that the Claimants have freehold title over the western verge. Before doing so I note that the 2nd and 5th Defendants have not sought to advance a positive case that the

Claimants do not own the freehold title to this land. Indeed, neither have sought to assert that they are not in at least partial possession of the western verge.

15. At Paragraph 23 of his statement, Mr Crane says:

> "I have seen the map provided by the Claimants which shows edged in red the land they are seeking possession of. My caravan is about 6 feet wide and about 8-8 feet from the tarmac road. … There is approximately a car width between my caravan and the tarmac of the road. It is very unclear to me which land the Claimants own. My understanding is that they just own the road (i.e. the tarmac) and therefore my caravan is not on their land. However, if this is not the case and they own some of the land alongside the road, judging by the map they have provided, I am still of the view that at least some of my caravan if not all is outside the land edged red on the map. "

Two points emerge from this – first an assertion that the Claimants' title is confined to the tarmac road (that is the Yellow and Green Land) and secondly even if that is not so then at most only part of Mr Crane's caravan is within the red land to the west of the tarmac. In relation to the second of these two points there is a complete answer to it in my judgment. First, if and to the extent that Mr Crane's caravan is partly on land owned by the Claimants (that has not been let out to a tenant) then that is trespass and subject to the ECHR defences the Claimants are entitled to possession. Secondly and decisively, the Claimants only seek possession of the land that they claim to own. It follows that if Mr Crane is correct in his assertion that his caravan is not parked on any part of the Claimants' land then any possession order made in favour of the Claimants cannot require him to move his caravan. Thus the real issue that arises is whether the Claimants have proved that they have title to, and an immediate right to possession of, the western verge.

16. The 5th Defendant does not advance any positive case as to title or the location of the structures constituting the Camp either. He says at Paragraph 10 of his statement only that he has inspected the maps provided by the Claimants, that the boundaries of Barton Moss Road are not physically marked and that in his view it is not clear from the maps provided where the boundaries lie. He expresses the view that "*... the vast majority of the temporary shelters at Barton Moss camp are not on the land shown edged red on the map"*.

17. I am satisfied that the Claimants have proved that they own the freehold of the whole of the sub-soil of the land between the red lines and the Yellow Land, the Yellow Land, the Green land and the Blue Land and that the contrary is not realistically arguable. My reasons for that conclusion are as follows.

18. The First Claimant is the registered proprietor of the property known as Barton Aerodrome. The land encompassed within that title is described in the register of title for it as being the land "*... shown edged red on the plan ...*". The relevant plan is at KTP/1, page 13. The land shown on that plan includes the whole of the roadway including the relevant verges. This is apparent from the presence within the fixed lines of the two dotted black lines, which I conclude are intended to represent the tarmaced

roadway. No alternative suggestion was advanced on behalf of the Defendants. Thus what is included within that title includes the western verge all the way north to the junction of Barton Moss Road with Twelve Yards Road. That this is so is put beyond doubt by the terms of the Transfer of Barton Aerodrome by Manchester City Council to the First Claimant at KTP/3, page 29. This defines the land transferred as including "*the Highway Land"* – see Box 3, which also defines the land transferred as being the land shown on the plan attached edged red as well as the Highway Land. The Highway Land was defined as meaning Barton Moss Lane shown coloured Green on the relevant plan. The relevant plan (as attached to a Deed of Rectification) shows the whole of the roadway so coloured from the A56 up to the junction with Twelve Yards Road. That plan also clearly shows the tarmac as a double dotted black line over the part of the road relevant for present purposes. I have reproduced this plan for ease of understanding at Appendix 6 to this judgment.

19. In relation to that part of the roadway to the northwest of Twelve Yards Road, the Claimants have established that land to be owned by the Second Claimant. That this is so is apparent from comparing and contrasting the Register for tile number GM362614 and the plan attached thereto at KTP/1, page 43 with that for title number GM393831 which shows that the First Claimant is the registered proprietor of the whole of the field to the west of Barton Moss Road - see the plan at KTP/1, page 20. This last mentioned plan shows very clearly that the whole of the road including the verge to the west of the tarmaced surface with only the field being included within the GM393831 title.

20. It is next necessary to consider the effect of the tenancy. The tenancy is a Farm Business Tenancy made on 23 November 2013 between the Second Claimant and Barton Moss Farm Produce Limited ("the Lease"). The land let was the "*... land known as Moss Lane and Tunnel Farms ... shown edged red on the attached plan ...*". That plan shows outlined in red the field to the northeast of Barton Moss Road but excluding the complex of buildings in the southwest corner and the field to the west of the road – see KTP/3, page 60. It was submitted on behalf of the 2nd and 5th Defendants to be at least arguable by reference to the plan attached to the lease that what was let included not merely the field to the west of the road but also any verge on the western edge of the road. It is this point that gives rise to most difficulty in this case.

21. There is one oddity about the lease that is unexplained. It is not a point focussed on in the submissions made by either counsel. The evidence establishes as I have explained that the freehold title in the field to the west of the road is vested in the First Claimant as part of title GM393831. That being so it is entirely unclear why it is the Second Claimant that is letting the land. Whilst this is unexplained, I have come to the conclusion that it does not matter for present purposes save in one respect. The one respect is this – if the lessor under the lease had been the First Claimant then it would have been impossible for it to have let any part of Barton Moss Road north of Tunnel Farm because it did not own that land. Whilst the Second Defendant apparently does not own the field that it has purported to let, it does own the Green and Blue Land and thus could at least theoretically have let out some or all of the Blue Land and Green land when entering into the farm business tenancy. Thus had the lease been entered into by the First Claimant it would have been impossible for it to have let out any part of the Blue or Green Land, but that point cannot apply where the lease is by the

Second Claimant. The apparent error concerning the lessor is otherwise immaterial. As between the lessor and lessee, the lessee is likely to be estopped from denying the title of the lessor and so far as the Defendants are concerned it is to be assumed ion favour of the Defendants that the lease is a valid lease of whatever has been let under it.

22. The land leased under the lease cannot be on any view more extensive that the terms of the Lease permit. As to that I do not consider that it extends to any part of Barton Moss Road. I say that because I am satisfied within the confines imposed by the quality of the plan attached to the Lease that what was being let was the fields concerned and only the fields. This is most clearly illustrated by the northeast corner of what is shown on the plan of the field to the west of Barton Moss Road, where a black line is clearly visible on the road side of the field outside the red line that defines what has been let. This conclusion reflects the commercial reality. The Lease was for agricultural purposes. No useful agricultural purpose would be served by the tenant renting the grass verge. As is apparent from the photographs included in the evidence, the tenant is not able to use the land that has been let at its outermost edges in any event. Thus the tenant will already be paying rent for some unproductive land. It is highly unlikely that a farmer would wish to rent more than the absolute minimum of unproductive land.

23. I remind myself that the test that I am required to apply in considering whether to decide the claim or give case management directions is whether the claim is disputed on grounds that appear to be substantial. As against the two named Defendants, the point I am considering is not material at all since they do not occupy any part of the land I am now considering as I have explained. The only person who appears to occupy land to the northwest of the junction with Twelve Yards Lane is Mr Woolman. However his tent appears to be pitched on land that on any view is on the field side of a fence slightly north of but opposite Tunnel Farmhouse and thus on part of the tenanted land. I expressed the view in the course of the hearing that on the face of it, Mr Woolman's tent is plainly within the area covered by the Lease. The Claimants were prepared to accept that this was so at any rate for the purposes of the present application.

24. In those circumstances and for those reasons I am satisfied that the Claimants have proved title to the land in respect of which they seek a possession order and in particular have proved that they are entitled to a possession order over land that is occupied by the 2nd and 5th Defendants.

Possession over the Highway

25. It is common ground that Barton Moss Road is a public footpath. It is recorded on the Definitive Map as being a public footpath and thus is a highway to that extent. As such the public (including of course the Defendants) have a right to pass and re-pass on foot along the road. The 2nd and 5th Defendants further admit that as part of a peaceful and lawful protest they have stood in, sat on or laid down on the road – see Paragraph 5.7 of the Defence. That admission was also made on behalf of and binds the 3rd Defendant.

26. It is clear that there have been acts of more serious obstruction of the highway by others. These acts are described in detail by Mr Tames in Paragraphs 21-24 of his first statement and Paragraphs 9 – 12 of his third statement. Mr Crane says at Paragraph 13 of his statement, that as far as he knows no one at the Protect Camp has been responsible for obstructing the road in the manner described by Mr. Tames and in particular by depositing a wind turbine blade on its surface or parking a coach there. Mr Pitfield makes similar points in Paragraph 9 of his statement. Whilst I accept that evidence as far as it goes for the purposes of the present hearing, that does not meet the point – this is a claim for possession against persons unknown and the fact of obstruction by these means has not been denied.

27. In my judgment, and again subject to the point I have made already concerning the effect of ECHR Articles 8, 10 and 11, these facts entitle the Claimants to a possession order over the part of the road over which the public footpath rights runs. The user that I have described exceeds permissible highway use and as a result constitutes a trespass against the owner of the land over which the right runs. There can be no question of the possession order adversely affecting the right of all the public to pass and re-pass along the public footpath - not least because it is proposed that the order be expressly qualified so as to make that point entirely clear.

The ECHR Defences

Articles 10 and 11

28. In so far as is material ECHR Articles 8, 10 and 11 provide as follows:

> "Article 8:
>
> 1. Everyone has a right to respect for … his home …
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary … for the protection of health … or …the rights and freedoms of others
>
> Article 10:
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom … to impart information and ideas without interference by public authority;
>
> 2. The exercise of these freedoms … may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary … for the preventiuon of disorder … for the protection of health … or rights of others …
>
> Article 11

1. Everyone has the right to freedom of peaceful assembly …

2. No restrictions shall be placed on the exercise of these rights other than such as are presented by law and are necessary … for the protection of the rights and freedoms of others …"

In addition to these rights, Article 1 of the 1st Protocol to the ECHR ("A1P1") protects the rights of property owners to enjoy the vacant possession of their property.

29. The question of the interrelationship between Articles 10 and 11 on the one hand and A1P1 on the other was considered by the European Court of Human Rights ("ECtHR") in Appleby v. UK (2003) 38 EHRR 783. That case was concerned with a protest that the protestors sought to conduct within a privately owned shopping mall against a plan by a local authority to build on a public playing field. The manager of the shopping mall refused the applicants permission to protest within the shopping mall and applicants complained that this refusal breached their rights under Articles 10 and 11. The ECtHR concluded that the applicants Article 10 and 11 rights had not been breached. In reaching that conclusion the court observed:

i) The issue to be determined was whether the Government had failed to protect the exercise by the applicants of their Article 10 and 11 rights;

ii) Whilst freedom of expression was one of the pre-conditions of a functioning democracy, it was not an unlimited right;

iii) Regard had to be had to the property rights of the owner of the shopping mall under A1P1;

iv) Article 10 "*... does not bestow any freedom of forum for the exercise of ...*" an individual's Article 10 or 11 rights and the Court was not persuaded that there was any present necessity that requires "*... the automatic creation of rights of entry to private property, or even, necessarily, all publically owned property ...* "; but

v) Where a bar on access to property had "*... the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court could not exclude that a positive obligation could arise for the state to protect the enjoyment of Convention rights by regulating property rights.*"

However the circumstances in which the principle identified in (v) above would arise were extreme. The only example identified was where a private body controlled an entire municipality. In that case the exception was not engaged because the protectors were able to distribute leaflets on public access paths, they could campaign elsewhere and employ alternative means.

30. The interaction between the rights of protesters under Articles 10 and 11 on the one hand and the rights of a private land owner protected by A1P1 was considered by the Court of Appeal in City of London v. Samede and others [2012] EWCA Civ 160.

That case was concerned with a protest camp established in the City of London in very close proximity to St Pauls Cathedral. The majority of the area occupied was highway land owned by the City Corporation but also included land owned by the Church Commissioners. The City's claim was for possession of the highway land that it owned. The Court of Appeal held that the protesters' rights under Articles 10 and 11 were engaged and that the question whether interference with those rights was lawful necessary and proportionate was inevitably a fact sensitive question that would depend amongst other things on "[39] *...the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protestors, the duration of the protest, the degree to which the protesters occupy the land and the extent of the actual interference the protect cause to the rights of others including the property rights of the owners of the land and the rights of any members of the public ...*" but "*... it is very difficult to see how* [the protesters' Article 10 and 11 rights]*... could ever prevail against the will of the landowner, when they are continuously occupying public land, breaching not just the property owner's rights and certain statutory provisions , but significantly interfering with the public and convention rights of others, and causing other problems (connected with health nuisance and the like) particularly in circumstances where the occupation has already continued for months and is likely to continue indefinitely.*".

31. The notion that Articles 10 and 11 do not provide an arguable defence in relation to a claim by a private property owner of privately owned land has been adopted in a number of first instance decisions. Thus in SOAS v. Persons Unknown (2010) 25 November (Unreported) – which was concerned with the occupation by students of a particular part of SOAS known as the Brunei Suite - Henderson J considered a defence based on Articles 10 and 11. He referred to Appleby v. UK (ante) and the general principles to be derived from that case summarised above. He then said:

> "That … appears to be clear authority that Article 10 does not give any general freedom to exercise the right on private land. It is only in exceptional circumstances where the court considered that the inability to exercise the right on private land would prevent any expression of the right. In the present case it is entirely fanciful to suggest that preventing the students exercising their rights in the Brunei Suite would prevent them from exercising their rights of expression. The proposition that the law requires the property rights of SOAS to be overridden in their own building is unarguable."

32. A similar approach was adopted by Sales J in University of Sussex v. Persons Unknown and others [2013] EWHC 862 (Ch.). That case was concerned with an application by the university for possession of a part of its property known as Bramber House. Having cited Paragraph [47] from Appleby v. UK (ante), he then recorded a submission on behalf of the Defendants in that case that the campus was the equivalent of a corporate town and thus that the essence of the freedoms of free expression and association would be destroyed of a possession order was made, which he rejected on the facts. Sales J noted SOAS (ante), and quoted from Paragraph 39 of the lead judgment in Samede (ante), the material part of which is set out above. He noted that the outcome in that case was that the property owner was held entitled to

recover possession of its property and that the court had noted that there were other places where the protesters could exercise their Article 10 and 11 rights. Sales J concluded that a possession order ought to be made in that case, amongst other reasons, because "*... the continuation of the protest, denying the University its property rights would be a plain breach of domestic law ...*", because the protest had been going on for a long time and because of the availability of other means of expression and protest.

33. The final authority that I need refer to at this stage is Sun Street Property Limited v. Persons Unknown [2011] EWHC 3432 (Ch.). I understand that permission to appeal from this decision was granted but not exercised. I accept that it must be read subject to the decision of the Court of Appeal in Semede (ante). Sun Street (ante) was concerned with an application made by the Defendants to set aside a possession order made against them following their occupation of a large complex of buildings in the City of London. The Defendants relied on Articles 10 and 11. Having recited the relevant Articles, Roth J referred to Appleby (ante) at [29] , to SOAS and then to an argument on behalf of the Defendants that each case was fact sensitive and that in that case the occupiers' rights should prevail because the property was unoccupied, and the location was "*... absolutely integral ...*" to the protesters' message. Roth J rejected that submissions in these terms:

> "Those submissions confuse the question of whether taking over the bank's property is a more convenient or even more effective means of the Occupiers expressing their views with the question whether if the bank … recovered possession, the Occupiers would be prevented from exercising any effective exercise of their freedom to express their views so that, in the words of the Strasbourg Court, the essence of their freedom would be destroyed. When the correct question is asked, it admits of only one answer. The individuals … currently in the property can manifestly communicate their views about waste of resources or the practices of one or more banks without being in occupation of this building complex. … I need hardly add that the fact that the occupation gives them a valuable platform for publicity cannot in itself provide a basis for overriding the respondent's own right as regards its property."

These comments are perhaps rather starker than those contained in Samede (ante) and to the extent that they suggest that a full fact sensitive analysis is not required in the circumstances may be wrong. Nonetheless in my judgment it is reflective of the effect of Appleby (ante).

34. In my judgment Articles 10 and 11 do not even arguably provide the 2nd and 5th Defendants with a defence to the Claimants' possession claim. My reasons for reaching that conclusion are as follows. First, the land in respect of which possession is claimed is land owned otherwise than by a public authority. To permit the Defendants to occupy that property would be a plain breach of domestic law, because neither defendant has the licence or consent of the Claimants to be or remain on the land. It is also an interference with the Claimants' A1P1 rights in relation to their property. Although Mr. Johnson submitted that this factor was circular and had the

effect of defeating the Defendant's Article 10 and 11 rights, I reject that argument. I do not regard the points as being of themselves decisive. They are two factors that have to be weighed in the balance with others. Nonetheless they are powerful factors because if effect is not given to them then the result will be to deprive a property owner of its entitlement to enjoy its property without interference. As Appleby (ante) demonstrates, it will only be in exceptional circumstances in which such an outcome could be justified, particularly in relation to privately owned land.

35. Secondly, the continued presence of the Defendants and, more importantly, all those others coming within the scope of the phrase "Persons Unknown" is a source of interference with other legitimate users of the land concerned. At the outset of this judgment I explained that Barton Moss Road is an important source of access for third parties with properties and businesses located on and around it. Although the Defendants deny that there is any interference with third party users or occupiers, other than Igas, that is not the effect of the evidence. The effect of this conduct on others seeking to use the road is obvious from a consideration of the evidence of Mr. Tames at Paragraph 21-23 of his 1st witness statement. This evidence is not denied. Indeed, it is admitted by the 2nd and 5th Defendants that they have stood in sat on or laid down on Barton Moss Road – see Paragraph 5.7 of the Defence. This is obstruction of a public highway and thus unlawful apart from the factors considered in the previous paragraph. Paragraphs 10 – 12 of Mr. Tames' 3rd statement further evidences the effect on third party users, who derive their right to use Barton Moss Road through the Claimants. The effect on such third parties is also evidenced by the reaction of local residents and business operators – see Paragraph 15 of Mr. Tames' 3rd statement. Paragraph 16 of that statement refers to the effect on Plasmet Limited. The email from the managing director of that company is very clear in the effect the occupation was having on the business of Plasmet and the stress thereby caused to its workforce. As Mr. Tames explains in Paragraph 16 of his 3rd statement, the result has been that the Claimants have had to construct an alternative means of access over other land for Plasmet at a cost of about £4,000. This would have been entirely unnecessary but for the protracted obstruction of Barton Moss Road. I do not regard that the issue of third party effects is arguable simply because the Defendants have filed witness statements that contain either generalised denials of such effects and a generalised assertion that all has been done to avoid such inconvenience. The evidence relied on by the Claimants relevant to this issue is direct detailed and particularised.

36. Thirdly, the protest has been ongoing and escalating since last November. The length of the protest is a relevant consideration as Sales J demonstrated in University of Sussex v. Persons Unknown and others (ante). Whilst this factor may not be a particularly weighty one it is nonetheless of importance when considered with the others I have so far mentioned.

37. The final and key point is that there is absolutely nothing to prevent the protesters from carrying on their protest elsewhere and/or by other means that does not involve interfering with the A1P1 rights of the Claimants, their licensees and visitors. There is no evidence offered by the Defendants on this issue. Rather what is said is that the camp is the most effective means of protest available to them – see in this regard the evidence of the 2nd Defendant at Paragraphs 14, and 26 – 30; that of Mr. Pitfield at Paragraphs 21-22; and that of Mr. Burke at Paragraph 11. This may be so but is not

the point as the ECtHR held in Appleby (ante) as Roth J explained in Sun Street (ante) at the part of his judgment set out in Paragraph 33 above. This point is probably decisive because as the ECtHR said in Appleby (ante), Articles 10 and 11 will only provide a defence to a claim for possession of privately owned land if the effect of requiring the protesters concerned to give up possession would be to prevent "*... any effective exercise of freedom of expression ...*" or would be that *" ... the essence of the right has been destroyed ..."*. This hurdle is obviously and intentionally a high one that the Defendants do not even arguably clear on the facts of this case. As I have said, this factor is probably decisive but is clearly so when viewed in combination with the other factors I have mentioned above

Article 8

38. Mr. Johnson submitted that it was open to the 2nd and 5th Defendants to rely on the effect of Article 8 on all those who are present in the camp as a defence to the possession claim. In my judgment this is plainly wrong in principle. Article 8 is a right accorded to an individual who is entitled to assert it usually as an answer to proposed administrative action by a public authority. It is not an answer to a claim for possession made by a landowner against a specific individual that the effect the order sought will be a disproportionate interference with the Article 8 rights of other defendants unless the allegation is of interference with family rights, where the interests of the family as a whole may be relevant – see R (Beoku-Betts) v. SSHD [2008] UKHL 39 [2009] 1 AC 115. That is not this case.

39. The evidence that a possession order will interfere with the 2nd and 5th Defendants homes is within their witness statements filed in these proceedings. The only factual assertion contained in the Defence is that in Paragraph 7.3 where it is pleaded that the land in respect of which possession is sought "*... is the defendants' home*". This claim is not otherwise particularised either in respect of each Defendant concerned (at that stage the 2nd 3rd and 5th Defendants) or in any other way.

40. Mr. Crane's evidence relevant to this issue is in Paragraphs 18-20 of his statement, which are in these terms:

> "18. I first pitched a tent on Barton Moss Community Protection Camp in the latter part of October 2013. After 3 months of residing in my tent a caravan was kindly donated to me by a supporter. I now live in the caravan which is parked at the beginning of the site…
>
> 19. Although I have been living in the camp full time, I am currently renting a repossession property from a bank. I have however been informed by the bank that they are selling this property. I must therefore vacate this property on 11 March 2014, from this date the caravan … will be my only home.
>
> 20. If possession is granted to the Claimants and I am evicted from the camp I will be homeless."

41. Mr. Burke's evidence relevant to the issue I am now considering is in Paragraph 9 of his statement and is as follows:

> "I come here because this is the only active fracking site at the moment and it is local. It takes me 90 minutes on the bus to get here. I occasionally stay over night at the side of the footpath. On one occasion … I stayed there for three days because of the publicity. On the 14 and 15 February I stayed here after a court hearing. …"

42. The Claimants maintain that the Article 8 claim is misconceived for three reasons being:

    i) Article 8 is not engaged because the claim is one between private individuals;

    ii) Article 8 is not engaged because the possession order sought will not interfere with the right to respect for a home as that concept is to be understood in this context; and

    iii) In any event even if Article 8 applies, there are no sufficiently exceptional reasons that would justify any postponement of a possession order.

43. In relation to the first of these issues the Defendants rely on a judgment of Sir Alan Ward in <u>Malik v. Fassenfelt and others</u> [2013] EWCA Civ 798. That judgment is entirely *obiter* in relation to the issue I am now considering and was not adopted by either of the other members of the court. In essence the question is whether Article 8 has any application in a claim by a private landowner for possession of his her or its property from someone who is a trespasser. This case was an appeal from the County Court against an order for possession made by the County Court against some squatters who had taken control of some property owned by the respondent to the appeal. The appellants relied on Article 8 for the purpose of justifying their assertion that they should be given a reasonable period to vacate and thus that <u>McPhail v. Persons Unknown</u> [1973] Ch. 447 – in which the Court of Appeal held that the courts had no jurisdiction to give a squatter time to vacate – was no longer good law.

44. Having reviewed a number of authorities concerned with claims for possession by local authorities (where the applicability of Article 8 is not now in doubt) Sir Alan then turned to the applicability of those authorities to a claim by a private landowner for possession. He concluded that the Court as a public authority was obliged to act in a manner that was compatible with a convention right and thus the notion that the court had no jurisdiction to extend time to a trespasser to vacate could no longer be good law. The question in each case was first whether the trespasser concerned had established a home on the land in respect of which the possession order was sought applying the autonomous European test by which that question was to be decided and if that was established whether eviction was proportionate in the circumstances. This reasoning was in essence that adopted by the first instance judge but it was not before the Court of appeal because the Respondent chose not to act on the permission to appeal given in relation to that issue. Thus Sir Alan's analysis is *obiter* and not binding.

45. The other two members of the court (Lord Toulson and Lloyd LJ) declined to decide the issue because it was not before the Court and had not been fully argued. Whilst declining to reach a final conclusion, Lord Toulson observed that all the earlier authorities referred to by Sir Alan related to local authorities and that the courts concerned had been careful to observe that nothing in them was intended to bear upon claims by private landowners – see [42] – and that Article 8 does not ordinarily regulate conduct in the private sector – see [44] - and that:

> "It would be a considerable expansion of the law to hold that Article 8 imposes a positive obligation on the state through the courts to prevent or delay a private citizen from recovering possession of land belonging to him which has been unlawfully occupied by another."

46. Any view I express on this issue is unlikely to be anything more than the platform for an appeal so I express my conclusions on this issue shortly. Firstly, it is difficult to see on what logically defensible basis it could be said that Articles 10 and 11 are engaged in relation to claims for possession by private landowners - as to which see the discussion above - without also concluding that Article 8 is also capable of being engaged in relation to such claims. Secondly, I do not see how it is open to the Court to opt out simply because the Claimant is a private landowner given the terms of s.6 of the Human Rights Act 1998. There is nothing artificial in this – the private landowner is seeking to use a public authority (the court) in order to assist him to vindicate his ownership of his land. The court as the public authority concerned can only do so on terms that respect the convention rights of all relevant parties, which on this analysis would include the Article 8 rights of the trespasser and the A1P1 rights of the landowner. The landowner accepts this by seeking the assistance of the court. Thirdly, although extending Article 8 to claims by private landowners would be an extension I question whether it would be an unprincipled one given that anyone relying on Article 8 in this context would have to establish that the land concerned was a home applying the convention test applicable to that concept, and given that once that threshold has been passed the only obvious justification for treating a trespasser on land owned by a local authority any differently than a trespasser on privately owned land is that the Article 8 rights of the trespasser would have to be balanced against the A1P1 rights of the private landowner. If that is so, I do not see why that cannot be catered for by treating the fact that the land is owned privately as the primary factor in deciding whether ordering possession is proportionate much as is the effect of Appleby (ante) in relation to Article 10 and 11 cases concerning claims for possession by private landowners with the result that it will only be in exceptional cases that the A1P1 rights of a private landowner are treated as trumped by the Article 8 rights of a trespasser. For those short reasons I proceed on the basis that Article 8 is capable of being engaged even in relation to land owned by a private landowner. This was the approach favoured by both the first instance judge and Sir Alan in Malik v. Fassenfelt and others (ante).

47. That being so, the first real question that has to be resolved is whether either the 2nd or 5th Defendants have made out at least an arguable case that they have established a home on the land over which the Claimants seek possession. The test that must be applied is that first identified by the ECtHR in Buckley v. UK (1996) 23 EHRR 101. In summary, the test that must be applied to each Defendant in this case is the highly

fact sensitive one of whether on the whole of the facts the Defendant has established the existence of sufficient and continuous links with the land in question. No further or other gloss on that test is required.

48. I turn first to Mr. Burke. In my judgment he has manifestly failed to satisfy the test for establishing whether his home is the land in respect of which the Claimant seeks possession. I need do no more than refer to his own evidence, the relevant part of which is set out above. It establishes no more than that he has stayed on the land occasionally and that his permanent home is and always has been elsewhere. This is not either a sufficient link with the land to establish it as his home and it does not establish either that he has a continuous link with the land. In addition, it was submitted on behalf of all the Defendants that it was the intention of all who were present at the camp to vacate as soon as Igas vacated, which was understood to be the end of the month. That fact fatally undermines the existence of anything other than a purely temporary link with the land in respect of which possession is sought.

49. Even if this is wrong and a sufficient link with the land has been established, it is manifest that there is nothing in the facts that would make a possession order disproportionate. There is nothing in the facts of Mr. Burke's case that suggests that it is in any respect sufficiently exceptional to cause the Claimants' right to peaceful enjoyment of their land to yield to Mr. Burke's Article 8 rights supposing he had any.

50. I now turn to Mr. Crane. His evidence is that he has lived on the land first in a tent and then in a caravan. At all times down to the 11 March 2014, his evidence is that he was the tenant of a house elsewhere. He says (but there is no evidence other than his assertion that this is so) that the bank that is the owner of the property has repossessed the property with a view to it being sold. He says that if evicted he will be homeless, that he is unemployed but does not claim benefits. He does not explain how that is consistent with being able to pay rent on the property that has been or is to be re-possessed by the bank.

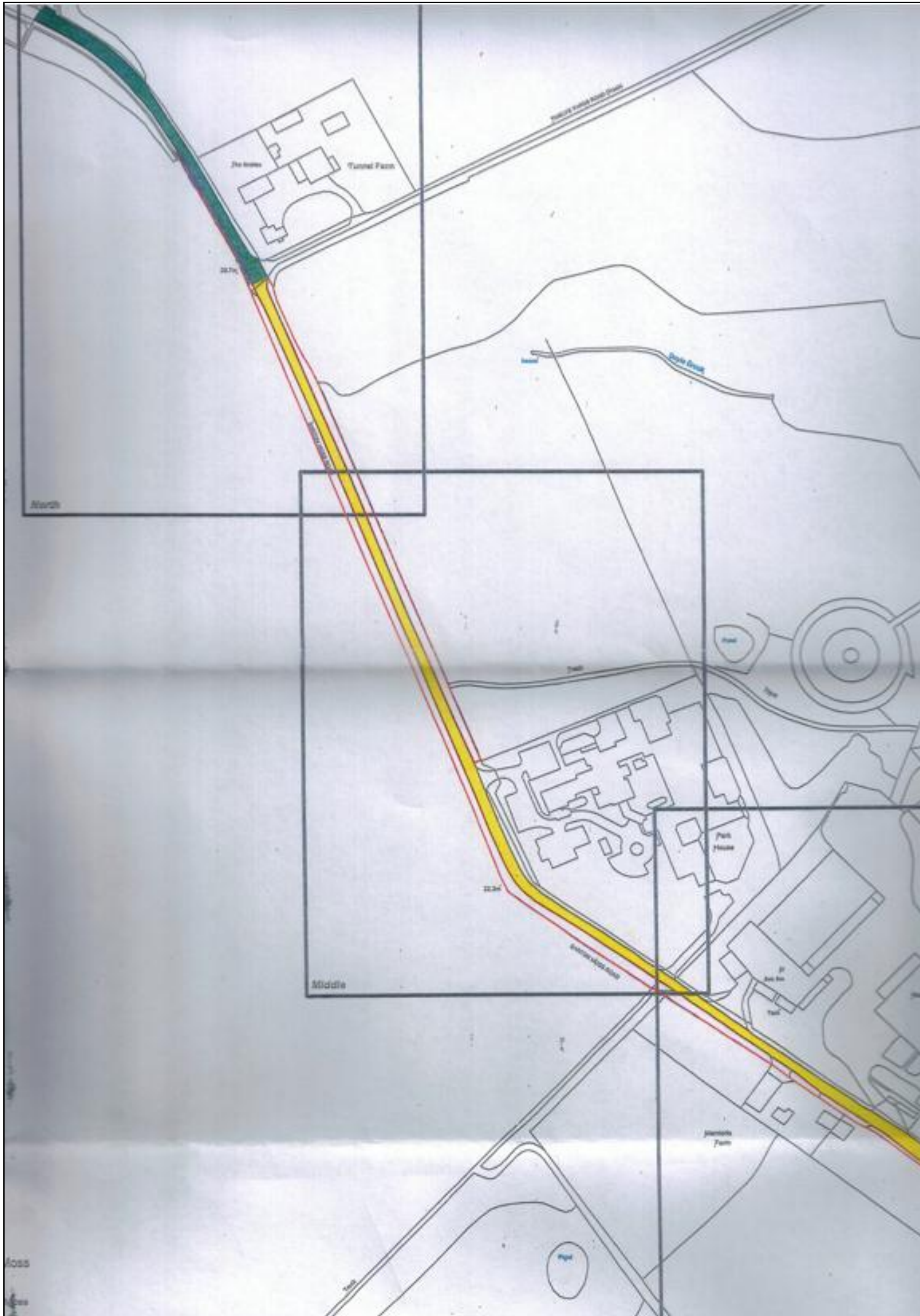
51. In my judgment there is nothing in the facts and matters relied on by Mr. Crane that established the existence of sufficient and continuous links with the land in question. There is nothing in his evidence that suggests he intended to abandon his rented accommodation as his home either at the time he started camping on the Claimants' land or at any time thereafter. The reasons for the loss of his rented property as his home have nothing to do with him camping on the land. Residing on the land for the more efficient conduct of the protest does not constitute a sufficient connection with the land for these purposes. It is not now and never has been his intention to remain on the land on an indefinite or permanent basis. On the contrary his case is that he intends to vacate as soon as the exploratory work by Igas comes to an end at the end of the month. For these reasons, Mr. Crane has not passed the threshold test.

52. Even if this is wrong and Mr. Crane has established the existence of sufficient and continuous links with the land in question, there is nothing sufficiently exceptional in the facts of this case that would justify the conclusion that the Claimants' right to peaceful enjoyment of their land should yield to Mr. Burke's Article 8 rights supposing he had any or should be postponed by the making of anything other than an immediate possession order. As I have said the loss of his rented property is nothing to do with the Claimants or Mr. Crane's occupation of the Claimants' land.

Scope of Order sought

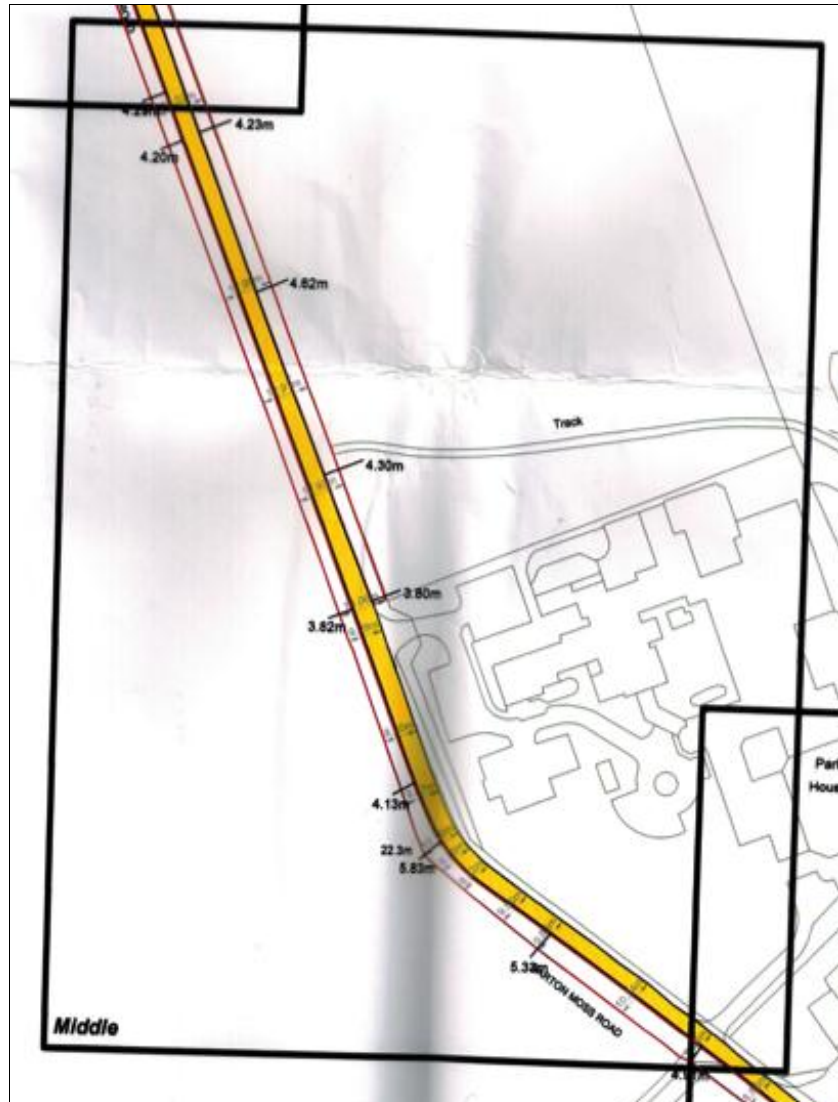
53. The scope of the order sought, and the Claimants' justification for seeking it, is set out in Paragraphs 5.24, 6, 7 and 8 of the Claimants written opening submissions. Mr. Johnson did not dispute any of this in the course of his submissions. Having read the relevant authorities referred to by Ms Holland in these paragraphs and having regard to the conclusions that I have reached on the issues in dispute between the parties referred to above, I conclude that in principle she is entitled to the Order she seeks. I will however hear further from the parties at the hand-down of this judgment as to the precise terms of the Order sought.

APPENDIX 1



APPENDIX 2

APPEMDIX 3



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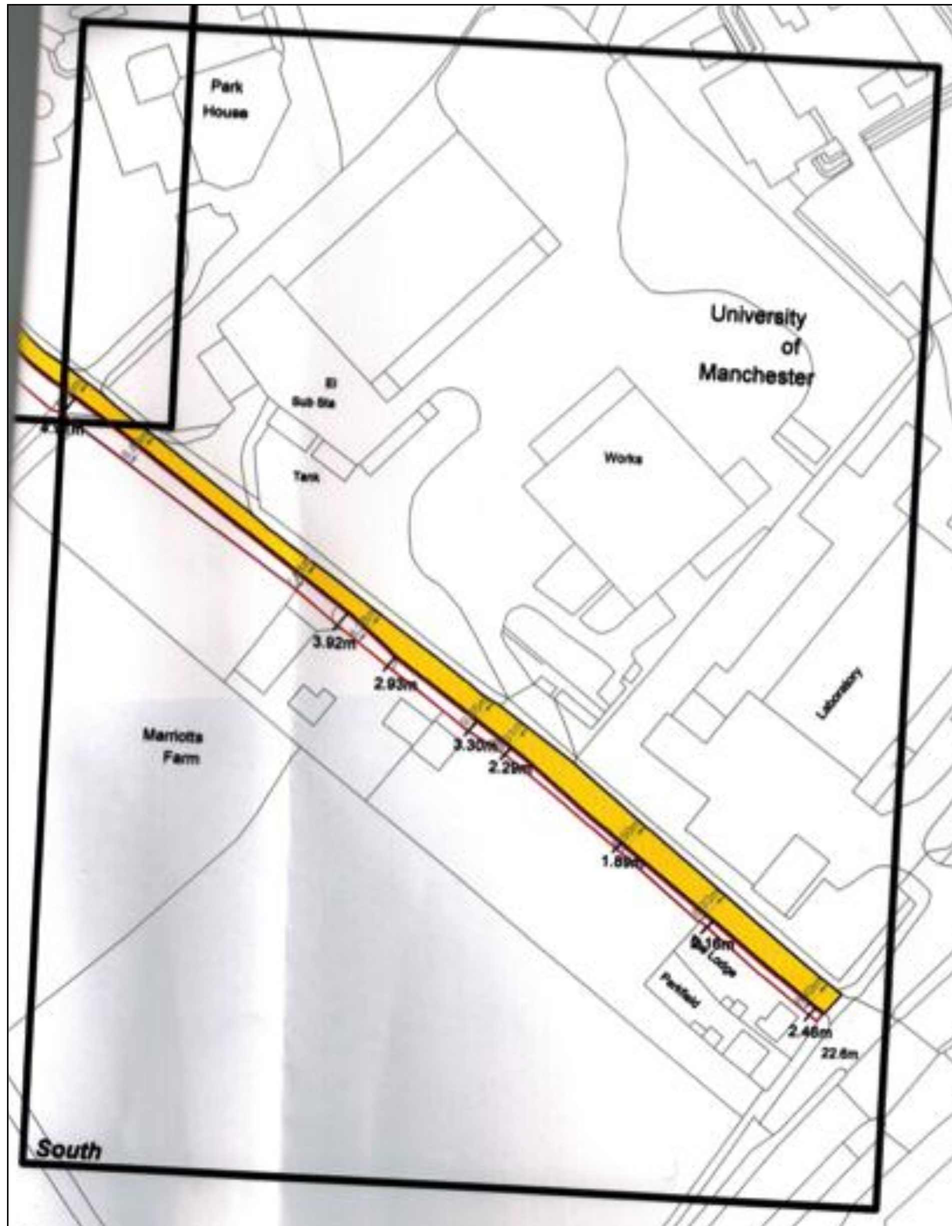
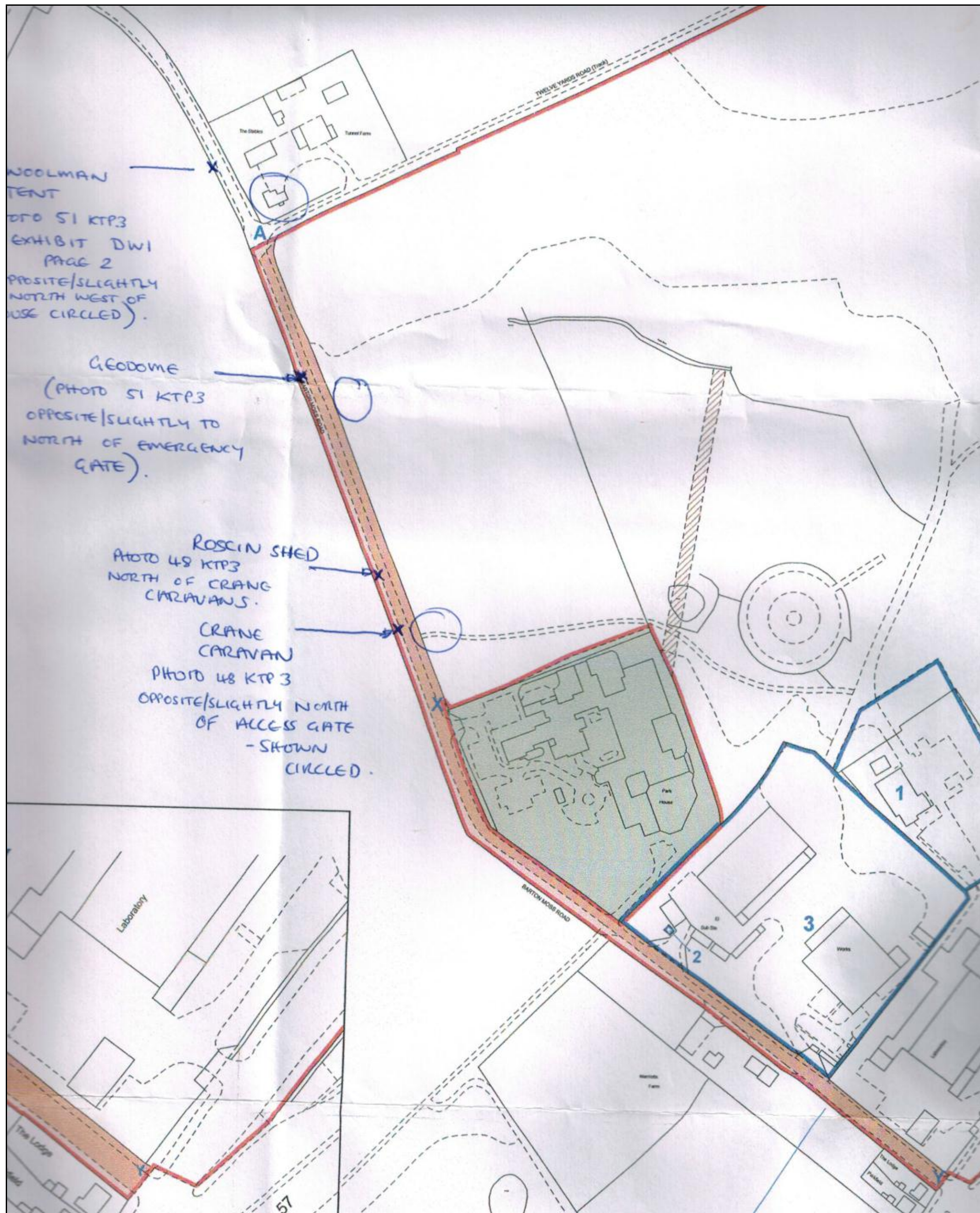


APPENDIX 5



APPENDIX 6