



SO, R (On the Application Of) v
Thanet District Council [2023] EWCA
Civ 398

The Solicitors Tale
Michael Imperato
Watkins & Gunn, Solicitors

Route to the Case

- Instructions came via a local campaigning Traveller
- Also - local County Councilor
- It is useful to have an intermediary to help out

The Facts

- The claimant is a young Pavee Traveller
- She and her family had initially come to the attention of the council when it moved on to a plot of land in Palm Bay, Kent, which the council deemed inappropriate.
- It sought their removal using section 77/78 of the 1994 Act, but a Magistrates' Court refused to make a removal order because of the acute medical needs of some family members in the group, including one woman who was pregnant and whose pregnancy was thought to be very high risk.

The Facts

- As a result of the Magistrates' ruling, the council gave the group consent to move onto the land near the ferry terminal on a temporary basis.
- No end date for the occupation was specified or agreed.

The Facts

- The pregnant woman gave birth in September 2021, but the child did not survive.
- Three months later on (1 December), the council served a section 77(1) notice on the claimant and her family in an attempt to have them leave "as soon as practicable".
- At issue was whether a section 77(1) direction could not lawfully be given to the group, including the claimant, because they were not residing on the land without the consent of the occupier.

Funding

- Legal Aid
- Can be a challenge obtaining legal aid even in the most straightforward case
- A complication is often the obtaining of means documents such as; proof of benefits, bank statements etc
- Need to convince Legal Aid Agency (LAA) there is a case
- Risk for lawyers in Judicial Review (JR) cases
- Emergency Legal Aid

Get Down there



Ramsgate



Get A Good Barrister



Get a Good Barrister



Don't Give up – permission refused 1
Professor Elizabeth Cooke



Don't Give Up 2 – DHCJ Anthony Elleray KC



XMAS SUPRISE– Lord Justice Bean



Conclusion

- Lots of hurdles - Legal Aid Agency, Judiciary
- Has to be very much a team effort
- Need to do some work Pro Bono
- Need to be prepared to put costs at risk
- Need to get 'out and about'

Conclusion

- BUT –
- The work is interesting
- The work is Challenging
- The work is worthwhile
- Sometimes, might even win

THANK YOU

- Michael Imperato
- Watkins & Gunn
- Cardiff



The need for lawful notice prior to eviction of Travellers:

SO v Thanet an important case study

Tim Baldwin

25 July 2023



GARDEN COURT CHAMBERS



 @gardencourtlaw

The roadmap: this part of the seminar

- The legal framework: The choice of power
- Who were the “relevant McGinleys”?
- Who were the landowners and was the site suitable?
- The initial grounds of challenge
- The decision(s) of the High Court
- Permission granted by the Court of Appeal – JR in the Court of Appeal
- The costs dispute
- Implications:
 - Tolerated sites – Covid 19;
 - Amendments to the Criminal Justice and Public Order Act 1994, s60C – consent and liability
 - Applications as homeless



S 77 of the CJPOA 1994

77.— Power of local authority to direct *unauthorised* campers to leave land.

(1) If it *appears* to a local authority that persons are for the time being residing in a vehicle or vehicles within that authority's area—

- (a) on any land forming part of a highway;
- (b) on any other unoccupied land; or
- (c) on any occupied land without *the consent of the occupier*,

the authority *may* give a direction that those persons and any others with them are to leave the land and remove the vehicle or vehicles and any other property they have with them on the land.

(2) Notice of a direction under subsection (1) must be served on the persons to whom the direction applies, but it shall be sufficient for this purpose for the direction to specify the land and (except where the direction applies to only one person) to be addressed to all occupants of the vehicles on the land, without naming them.



S 77 of the CJPOA 1994

- (3) If a person knowing that a direction under subsection (1) above has been given which applies to him—
- (a) fails, as soon as practicable, to leave the land or remove from the land any vehicle or other property which is the subject of the direction, or
 - (b) having removed any such vehicle or property again enters the land with a vehicle within the period of three months beginning with the day on which the direction was given, he commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale.
- (4) A direction under subsection (1) operates to require persons who re-enter the land within the said period with vehicles or other property to leave and remove the vehicles or other property as it operates in relation to the persons and vehicles or other property on the land when the direction was given.
- (5) In proceedings for an offence under this section it is a defence for the accused to show that his failure to leave or to remove the vehicle or other property as soon as practicable or his re-entry with a vehicle was due to illness, mechanical breakdown or other immediate emergency.



S 77 of the CJPOA 1994

(6) In this section—“*land*” means land in the open air;

“*local authority*” means—(a) in Greater London, a London borough or the Common Council of the City of London;

(b) in England outside Greater London, a county council, a district council or the Council of the Isles of Scilly;

(c) in Wales, a county council or a county borough council;

“*occupier*” means the person entitled to possession of the land by virtue of an estate or interest held by him;

“*vehicle*” includes—(a) any vehicle, whether or not it is in a fit state for use on roads, and includes any body, with or without wheels, appearing to have formed part of such a vehicle, and any load carried by, and anything attached to, such a vehicle; and

(b) a caravan as defined in section 29(1) of the Caravan Sites and Control of Development Act 1960; and a person may be regarded for the purposes of this section as residing on any land notwithstanding that he has a home elsewhere.

(7) Until 1st April 1996, in this section “*local authority*” means, in Wales, a county council or a district council.



Section 78 CJPOA 1994

78.— Orders for removal of persons and their vehicles unlawfully on land.

- (1) A magistrates' court may, on a complaint made by a local authority, if satisfied that persons and vehicles in which they are residing are present on land within that authority's area in contravention of a direction given under [section 77](#), make an order requiring the removal of any vehicle or other property which is so present on the land and any person residing in it.
- (2) An order under this section may authorise the local authority to take such steps as are reasonably necessary to ensure that the order is complied with and, in particular, may authorise the authority, by its officers and servants—
- (a) to enter upon the land specified in the order; and
 - (b) to take, in relation to any vehicle or property to be removed in pursuance of the order, such steps for securing entry and rendering it suitable for removal as may be so specified.
- (3) The local authority shall not enter upon any occupied land unless they have given to the owner and occupier at least 24 hours' notice of their intention to do so, or unless after reasonable inquiries they are unable to ascertain their names and addresses.



Section 78 CJPOA 1994

(4) A person who wilfully obstructs any person in the exercise of any power conferred on him by an order under this section commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(5) Where a complaint is made under this section, a summons issued by the court requiring the person or persons to whom it is directed to appear before the court to answer to the complaint may be directed—

- (a) to the occupant of a particular vehicle on the land in question; or
- (b) to all occupants of vehicles on the land in question, without naming him or them.

(6) Section 55(2) of the Magistrates' Courts Act 1980 (warrant for arrest of defendant failing to appear) does not apply to proceedings on a complaint made under this section.

(7) Section 77(6) of this Act applies also for the interpretation of this section.



Section 79 CJPOA 1994

79.— Provisions as to directions under s. 77 and orders under s. 78.

- (1) The following provisions apply in relation to the service of notice of a direction under section 77 and of a summons under section 78, referred to in those provisions as a “relevant document”.
- (2) Where it is impracticable to serve a relevant document on a person named in it, the document shall be treated as duly served on him if a copy of it is fixed in a prominent place to the vehicle concerned; and where a relevant document is directed to the unnamed occupants of vehicles, it shall be treated as duly served on those occupants if a copy of it is fixed in a prominent place to every vehicle on the land in question at the time when service is thus effected.
- (3) A local authority shall take such steps as may be reasonably practicable to secure that a copy of any relevant document is displayed on the land in question (otherwise than by being fixed to a vehicle) in a manner designed to ensure that it is likely to be seen by any person camping on the land.
- (4) Notice of any relevant document shall be given by the local authority to the owner of the land in question and to any occupier of that land unless, after reasonable inquiries, the authority is unable to ascertain the name and address of the owner or occupier; and the owner of any such land and any occupier of such land shall be entitled to appear and to be heard in the proceedings.
- (5) Section 77(6) applies also for the interpretation of this section.



The guidance

Guidance on the use of s 77 has evolved over the years as to the choice of method of eviction and guidance on how the powers are to be exercised when considering human rights, equality and welfare issues.

In summary, the guidance can be described as:

- Unauthorised camping DOE circular 18/94) which is relevant to decisions made under s 77 – 80 CJPOA 94
- “Guidance on managing unauthorised camping (ODPM/HOME OFFICE 2004) “2004 Guidance”
- “Guide to Effective Use of Enforcement Powers” Guidance Part 1 (ODPM 2006) “2006 Guidance” provides for the use of the power in section 77 of the CJPOA 94 against authorised encampments, save in circumstances where there is anti-social behaviour, even if an encampment may be considered temporary.

But there is nothing within the guidance as to the use of the power when consent to occupy the land has been granted, and if consent is withdrawn, how this power may be exercised.



The dispute – who are the right McGinleys?

- The wider “McGinley” family was invited onto the site but was undefined for welfare reasons
- The identification of the members of the family was uncertain
- An Equality Impact assessment had been carried out for the occupation of the Land.
- Two waves of occupation: one in May/June 2021 inc SO and her family, and another in around August 2021. Thanet alleged 2nd group was unauthorised
- Allegations of ASB appear to be aimed at second group
- s 77 notice issued on 28 September 2021
- “ALL OCCUPANTS LAND RAMSGATE MARINA, Ramsgate Marina, Military Road, Ramsgate, Kent CT11 (“the Land”). Unclear as to compliance with s 79 and who served on.
- October 2021 complaint laid under s 78 and served on everyone and SO family members attend magistrates’ court.
- 30 November 2021: s 77 notice served and worded “ALL OCCUPANTS LAND RAMSGATE MARINA, Ramsgate Marina, Military Road, Ramsgate, Kent CT11 (“the Land”) including SO’s family. Local Authority officer said a decision was made to evict – no actual decision maker identified and said to be joined to adjourned magistrates court proceedings of the 8 December 2021.



The claim on the papers and progress to oral renewal

- The Defendant files an acknowledgment of service but with little evidence and the Claimant applied to serve a reply.
- DHJ Cooke refused permission for judicial review and on the issue of consent to occupy that this had been withdrawn.
- On the application for oral renewal, Mrs Justice Lang DBE directed extensive disclosure from the Defendant, given the limited content of the grounds of resistance and there was little evidence in support of the assertions in the grounds of resistance.
- As the disclosure ordered was quite extensive, the parties and Mrs Justice Lang directed the application be heard at a one-day “rolled up hearing”.



Oral renewal hearing: DHJ Elleray KC

- In a reserved judgment [2022] EWHC 1731 (Admin) the claim for judicial review was refused permission.
- As a result of the evidence disclosed, the distinction between the target of the September and November notice became clarified.
- On the issue of the lawfulness of the November direction notice, the judge concluded that the direction was given at the end of the temporary licence period of up to five months and this determined the consent issue, and that the decision to serve it was not unlawful or irrational.
- He also dismissed the following claims as unarguable:
 - The claim concerning defects in service under s 79 and joinder with the summons proceedings;
 - That adequate welfare inquiries had been carried out and there was no need for a further EIA required given the temporary nature of the accommodation and one had been carried out;
 - Also, that it was not arguable that the Defendant was required to produce a policy for sites and would have required persuasion as to its relevance on the issue of eviction;



Permission to appeal to the Court of Appeal: LJ Bean

- As permission was refused on oral renewal, there was only a window of 7 days for grounds and skeleton argument. The grounds of appeal were aimed at the November 2021 notice alone.
- The Defendant agreed not to enforce, even against those subject to the October 2021 notice.
- On 29 December 2022, Lord Justice Bean on the papers granted permission to appeal on two of five grounds:
 - Ground 1: The learned judge was wrong to hold that the service of the direction notice pursuant to s 77 Criminal Justice and Public Order Act 1994 on the 1 December 2021 was lawful without the Defendant first giving any notice to those on the Land, or those representing them of the withdrawal of consent to occupy the Land at Ramsgate Port, ahead of the service of the said notice.
 - Ground 2: The learned judge was wrong to hold that there was no evidence from Karen Constantine challenging the failure of the Defendant to give notice of the withdrawal of consent prior to the service of the s 77 directions notice on the 1 December 2021, or that the occupancy of the Land was. The C also seeks a stay on enforcement proceedings pursuant to s 78 of the Criminal Justice and Public Order Act 1994 before the Justices at Maidstone Magistrates' Court in respect of the directions order served on the 1 December 2021, which is next due to be heard on the 20 July 2022, pending the determination of the application for permission to appeal.



The order granting permission to appeal stated

- Ground 1 raises a point of law – whether a temporary consent to occupation must be withdrawn before service of a s 77 notice – on which the appeal has a real prospect of success. Since the decision under appeal was given at a rolled-up hearing, I do not think that any useful purpose would be served by a further hearing in the Administrative Court.
- Ground 2 may add little to Ground 1, but I will not prevent the Appellant from raising it in this court.
- Ground 3 does not appear to have featured in an argument before the High Court. In any event, I do not see how it could have been an abuse of process to serve the November 2021 notice in respect of all occupiers, including the Claimant, simply because a previous notice had been served in September in respect of those occupiers, not including the Appellant, who had entered without consent.
- Ground 4 is highly technical and devoid of merit. The notice was served on a family member of the Claimant, was wedged under a wheel of the relevant caravan and the Appellant was aware of what it said.
- Ground 5 fails on the facts. The Defendant council was well aware of the situation of the Appellant and her family; deferred enforcement action because of certain occupiers' medical issues, in particular, two pregnant mothers; and made an EIA in June 2021 and renewed it in 2021.
- The Court also granted permission for judicial review for grounds 1 and 2 to be retained by the CoA but gave no directions. There was some argument between the parties as to the procedure but it was eventually determined with the ACO.



The decision of LJs Underhill, Edis and Arnold

- The judgment is reported at [2023] EWCA Civ 398, also in the WLR and the Times Law reports.
- In summary the court determined in granting the claim for judicial review:
 - A local authority could not lawfully give a direction under the Criminal Justice and Public Order Act 1994 Pt V s.77(1) requiring persons residing on land without the consent of the occupier to leave, unless any temporary consent to their occupation had expired or been withdrawn and they knew that they were no longer on the land with consent.

On the legality of the s 77 direction:

- Section 77(1) enabled a local authority to serve a direction notice if it "appears" that persons "are for the time being" residing on unoccupied land without the consent of the occupier. The use of the present tense meant that, at the point at which the local authority decided to give the direction, those residing on the land had to be doing so without the occupier's consent. The local authority was not empowered to give a direction if the recipients were on the land with consent that would expire once the direction had been given.



The decision of LJs Underhill, Edis and Arnold

Further that:

- The lack of consent had to exist at the start of the process; it was not sufficient for it to be the result of that process. Thus, before the local authority could lawfully give a s.77(1) direction, any consent to the recipients' presence on the land had to have expired or have been withdrawn, and the recipients had to know that they no longer had consent to be on the land. That conclusion was reinforced by the fact that s.77(3) made it an offence for a person on whom a s.77(1) direction had been served to fail to leave the land as soon as practicable. The wording of s.77(5) strongly suggested that "as soon as practicable" meant "forthwith".
- If a s.77(1) direction could lawfully be given without any withdrawal of consent having been communicated, persons who genuinely and reasonably believed that they had consent to be on the land would be liable to criminal conviction if they did not leave forthwith. Given the principle that criminal offences should not be created except by clear law, there was nothing to commend such an outcome.



The decision of LJs Underhill, Edis and Arnold

Further that:

Moreover, where the occupier of land was a local authority which had given consent "until further notice", the s.77(1) process should not be available until a decision had been made about what constituted reasonable notice of the ending of that consent, and until such notice had been given. That had not happened in the instant case, even though the circumstances clearly required the local authority to give reasonable notice of its withdrawal of consent.

The local authority had to exercise its s.77(1) power in accordance with its public duties. A local authority acting reasonably, fairly and in accordance with those duties would consult before making the decision to withdraw consent; would inform those affected of its decision; and would give them a reasonable time to vacate the land before becoming liable to criminal sanctions for failing to do so. However, the local authority had made no attempt to do any of those things.

- The notice was quashed and all Travellers appear to be present on the land.



A taster of the argument: LJ Edis

“I do not accept that the terms of section 77 provide all necessary safeguards to protect the reasonable interests of a person who has been residing on land perfectly lawfully and with the consent of the occupier. I do not take such a broad view of the statutory phrase ‘as soon as practicable’ as was suggested by Mr. Lane. The terms of section 77(5) suggest strongly that, in its context, it actually means ‘forthwith’, as the notice used by Thanet District Council said it did. This is because the statutory defence there provided only becomes available once the prosecutor has proved that a person has failed to vacate the land as soon as practicable. This may be proved even where that failure was ‘due to illness, mechanical breakdown or other immediate emergency’. The effect of the statutory defence is to allow those three factors to be relied upon by the recipient of a section 77(1) direction to avoid criminal liability. The narrow list of such factors militates strongly against other, less potent, considerations being considered at the prior stage of determining whether it is proved that the recipient failed to leave the land ‘as soon as practicable’ after receiving the section 77(1) direction. If it were otherwise, section 77(5) would not be necessary.

Further, the first two sub-paragraphs in section 77(1) are aimed at cases where the person residing on land in a vehicle obviously has no right to be doing so. The third of those provisions, residing on occupied land without the consent of the occupier, should be construed so that the statutory purpose of all three categories in the list is consistently achieved.”



The punch up on costs

- The Defendant accepted that it was liable for the Claimant's costs of the appeal but not for any costs of the Claimant in the High Court, and indeed, that the Claimant do pay their costs and these be set off against those of the appeal.
- This led to further written submissions where the Claimant made arguments that the Defendant should pay 60% of her costs in the High Court and there be no set-off.
- The outcome is set out in a separate judgment (*Costs*) [2023] EWCA Civ 526.
- The issue concerned the costs of the High Court and the court, although critical of the clarity of some claimant documents determined at paragraph 16 and 17 of the judgment:

"...This makes her the successful party and she is entitled to a costs order in her favour. This should be an order that she is entitled to 60% of her costs in the High Court in addition to her costs of the proceedings in the Court of Appeal. The deduction reflects the issues on which she failed.

17. That being so, no issue as to set-off arises. I would have made this order whether she was privately or publicly funded and it is not necessary to consider any of the authorities cited."

- There was a further direction in respect of the determination of an interim payment pursuant to CPR 44.2(8).



Implications

- This issue in this case does raise what would a lawful notice terminating the consent to remain on land in order to use the s 77 procedure, before consideration of other issues such as welfare considerations.
- There was some discussion within the hearing as to what form of notice would be required and what would constitute reasonable notice. This was not resolved by the court.
- This may impact on use of s 77 directions when:
 - A site on Local Authority land has been tolerated under Covid-19.
- What happens with Local Authority enforcement on tolerated sites on private land?
- Homelessness applications - In this case during the proceedings applications for homelessness assistance were presented but remained unprocessed.
Can there ever be a finding of intentional homelessness given the consent given and duration on the Land, and what about alternative sites?



Implications : New powers under the PCSC 2022

- The issue of consent and the use of the new powers under s 60C CJPOA 1994

Offence relating to residing on land without consent in or with a vehicle:

(1) Subsection (2) applies where—

(a) a person aged 18 or over (“P”) is residing, or intending to reside, on land *without the consent* of the occupier of the land,

(b) P has, or intends to have, at least one vehicle with them on the land,

(c) one or more of the conditions mentioned in subsection (4) is satisfied, and

(d) the occupier, a representative of the occupier or a constable requests P to do either or both of the following—

(i) leave the land;

(ii) remove from the land property that is in P’s possession or under P’s control.

(2) P commits an offence if—

(a) P fails to comply with the request as soon as reasonably practicable, or

(b) P—

(i) enters (or having left, re-enters) the land within the prohibited period with the intention of residing there without the consent of the occupier of the land, and

(ii) has, or intends to have, at least one vehicle with them on the land.

(3) The prohibited period is the period of 12 months beginning with the day on which the request was made



Thank you

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