OUTER HOUSE, COURT OF SESSION

[2016] CSOH 113

P1351/15

OPINION OF LORD TURNBULL

In the Petition of

SCOTTISH PARLIAMENTARY CORPORATE BODY

Petitioner;

for

an Order under section 46 of the Court of Session Act 1988

Petitioner: Moynihan QC; Brodies LLP
Respondents: Gardner, Advocate; Flanagan & Co Solicitors (for respondents Gibson, Wallace and Halliday)
Party Respondents: McFarlane, Mitchell, Gemmell

27 July 2016

Introduction

[1] I issued my decision on the underlying merits of the present action on 5 May 2016. In that written judgment I gave my reasons for accepting that the petitioner was a legal entity, was entitled to own land and property, and was entitled to enforce its property rights in a court of law. I also gave my reasons for rejecting the various propositions advanced by the respondents in support of their claims to be entitled to occupy the grounds of the Scottish Parliament.

[2] At paragraph [64] of my opinion I acknowledged that the respondents' rights in terms of articles 10 and 11 of the European Convention on Human Rights, namely the rights to freedom of expression and freedom of assembly were engaged and I referred to the importance of the rights recognised in these articles of the Convention. I also pointed out that articles 10 and 11 themselves each expressly acknowledge that restrictions on the exercise of the freedoms concerned may be imposed in certain circumstances. I therefore noted that the question for the court would be whether the interference with the respondents' rights entailed in granting an order such as is sought would be lawful, necessary and proportionate. I therefore explained I had come to the view that the respondents were entitled to have the proportionality of the making of the order sought by the petitioner assessed by the court on the basis of whatever evidence might cast light on this issue.

[3] In paragraphs [69] and [70] I explained that I proposed to permit a further hearing to enable the petitioner and the respondents to lead evidence on the issues which they each considered relevant to an assessment of the proportionality of the making of the order sought. I emphasised that the only remaining issue was proportionality.

[4] After various other procedures, a hearing on that issue took place before me on 29 and 30 June. At an earlier hearing I decided in terms of Rule of Court 14.8 that I would fix a hearing rather than a proof and that I would only consider evidence in the form of affidavits or statements along with other relevant productions. It is plain though from some of the submissions presented at the hearing that the respondents, or some at least of them, refuse to accept the legal findings which I made in my earlier decision. I will return to discuss the submissions presented in due course.

The evidence presented

[5] On behalf of the petitioner affidavits were lodged from Sir Paul Grice, the Chief Executive of the Scottish Parliamentary Service, Roy Devon, the Head of Events and Exhibitions at the Scottish Parliament, Rebecca Thompson, Head of Security at the Scottish Parliament and Victoria Barby, Environmental Performance Manager at the Scottish Parliament. Various documentary productions including photographs of the grounds were also relied upon.

[6] The affidavit from Sir Paul Grice explained that prior to the Parliament being established a report entitled "Shaping Scotland's Parliament" was prepared by the consultative steering group. In that report the principles of openness and accessibility, applying equally to all people, were identified as being central to the operation of the Parliament. These principles, as taken from the report, were then adopted by the Scottish Parliament on its establishment. The policies which the Scottish Parliamentary Corporate Body implement for the use of the grounds of the Parliament flow from these principles with the consequence that there is a policy of open and equal physical access to the external Parliamentary estate. He explained that proactively encouraging people to come onto the grounds of the Parliament is part of the way in which the Parliament seeks to engage with the people of the country. This policy carried with it a responsibility to ensure equality of opportunity and fairness of treatment which is achieved through the Code of Conduct used to facilitate and support gatherings and protests. That Code provides as follows:

"The Scottish Parliament is an open, accessible and participative Parliament and recognises the importance of peaceful protest in a democratic society. This Code of Conduct has been prepared in order to facilitate effective protest opportunities at the Scottish Parliament and for the safety and convenience of all members of the public planning to participate in a protest at the Scottish Parliament.

The Scottish Parliamentary Corporate Body (SPCB) will ordinarily grant permission to protest on SPCB property, subject to the following conditions. Please remember that this is a working Parliament, and the aim of these conditions is to assist in facilitating an organised and effective protest whilst protecting the rights and interests of the staff, visitors, Members, users and neighbours of the Scottish Parliament."

The conditions are then set out. Permission is never given for overnight or permanent occupation of the property for residential purposes, as this is seen as fundamentally incompatible with the policies concerning the use of the grounds.

[7] Sir Paul went on to explain the importance to the Parliament of its policy concerning political neutrality. The petitioner considered that it was crucial for the Parliamentary Corporate Body, as the corporate identity of the Parliament, to maintain a distinct political neutrality in order to retain the confidence of the public in the Parliament as an institution serving the public as a whole. In order to achieve this aim the Corporate Body implemented a strict policy of refusing to give permission for the use of its property for party political campaigning.

[8] Having identified the underlying principles governing the use of the grounds of the Parliament, Sir Paul went on to identify the problems and concerns which had arisen as a consequence of the existence of the camp. He observed that the exclusive occupation of part of the Parliament's land denies anyone else the right to be on that land or to walk across it and disrespects the many other members of the public who use the land appropriately. He mentioned the obvious deterrence to others which the existence of residential space creates and commented on his observations that other users of the grounds tend to avoid not just the area of the camp itself but also the wider area around it.

[9] He commented that the permanent nature of the camp offends against the policy of neutrality and observed that the prominence and proximity of the camp to the Parliament suggests tolerance and tacit acceptance of the views of the campers. The presence of the camp in pre-election and pre-referendum periods was completely at odds with the policy of neutrality and of denying permission for party political campaigning. The permanent nature of the camp also offended against the policy of allowing fair and equal opportunity for all to protest and he drew attention to various requests which have been received from others to permit camping on the estate for both political and recreational purposes, all of which have been denied.

[10] Sir Paul also drew attention to the disruption to the plans for the use of the Parliamentary grounds on the day of the opening session of the new Parliament when it was planned to hold a public entertainment event using the full extent of the campus. The presence of the camp meant that these plans had to be scaled back and take account of security concerns and a health and safety assessment. He also drew attention to the damage which has been caused to the grounds as a consequence of being occupied by caravans, trailers and motor vehicles. On various occasions, as vouched by some of the photographs in the bundle of productions, those attending the camp had driven a significant number of vehicles straight onto the grassed grounds and had simply used them as a free car park, despite the presence of a public car park on the opposite side of the road. He also drew attention to an event, apparently of a social nature, which the organisers of the camp had arranged for Sunday 19 June to which people were invited to attend for a barbecue.

[11] The changing membership of the camp and the variety of views which appeared to be being expressed was also addressed in his affidavit. Sir Paul observed that this made it more difficult to ascertain what the focus of the protest was and made the prospect of a resolution seem more distant. For these reasons he expressed the concern that the camp was operating as a magnet attracting those with different causes.

[12] In his affidavit Sir Paul also mentioned the attempts which members of his staff had made to engage with those occupying the camp. He explained that various efforts had been made to discuss the possibility of alternative forms of protesting, such as protesting on a daily basis, so long as they did not remain overnight or attach any structures to the land on a permanent basis. The campers refused to discuss matters with members of his staff and indicated that they would only talk to the police. He observed that it therefore became clear to him that they were only interested in exclusive and indefinite occupation.

[13] The affidavit of Roy Devon provided information concerning the impact which the presence of the camp was expected to have on the events which were scheduled to take place at the Parliament and on its grounds on 2 July 2016. It was anticipated that over 1000 people would require to be accommodated on the landscaped area outside the Parliament as part of the historical procession called the "Riding of the Parliament". He explained that the area where the camp is located would inhibit the access onto the grounds for those participating in the Riding.

[14] Mr Devon also explained that the space occupied by the camp comprises a significant proportion of the usable flat grassed land and the presence of the camp would interfere with the ability to accommodate the visitors. Other family events were also scheduled to take place on the grounds in the course of the afternoon which would be impacted on and restricted by the presence of the camp.

[15] The affidavit of Rebecca Thompson noted that she had responsibility for managing the security of any form of protest, demonstration or similar event which was taking place on the Parliamentary estate. She explained that the policy which the petitioner operated was to give permission for a protest on its land unless there was a particular reason to refuse it. Permission would be refused to a protest which was party political in nature. She explained that permission is never granted for a protest involving overnight camping and she referred to requests from a number of other groups who had unsuccessfully sought permission to set up protest camps on the Parliamentary estate including: an anti-nuclear group wishing to protest against the dropping of the atomic bomb, a Kurdish group who wished to protest in relation to the treatment of the Kurdish people by the Turkish Government and a post-dramatic stress disorder campaigner who wished to protest about the lack of support for former soldiers with mental health conditions. She noted that this protester had explained that he thought camping was permitted because of the tents and caravans at the camp.

[16] Ms Thomson also explained that there are dogs and occasionally children at the camp and noted that posts from the Facebook page associated with the camp suggested that children have stayed overnight. She expressed the opinion that the location at which the camp has been established is unsuitable, observing that it is not well lit at night, there are no sanitation facilities, no proper toilet facilities or running water and no electricity or drainage. She noted that in addition to the vehicles apparently associated with the camp other people assumed that it was acceptable to park their vehicles in that vicinity of the Parliamentary grounds since vehicles were already there. She gave an account of some of the damage which has been caused to the grassed area in the form of tyre tracks, ruts, damage under the caravans, tents and trailers and to the grass under the pallet walkway which the campers have placed down. She also noted that fires were lit in the

camp and that ash had been dumped on the Parliament's land. She noted that, contrary to the petitioner's policy, there is a bucket inviting donations from the public in support of the protest outside one of the caravans.

[17] The affidavit of Victoria Barby provided further evidence of damage. In paragraphs 15 – 17 she identified damage caused by vehicles. In paragraphs 11 – 14 she identified interference with the ability to control the biodiversity of the land in support of action on carbon emissions. In other paragraphs she identified concerns arising out of the use of campfires, the use of boardwalks and the introduction of non-native species of plants. Towards the end of her affidavit she identified the ongoing work which the Parliament has engaged in with agriculture students. Because of the presence of the camp it has not been possible to continue that this year and educational tours which were planned for the summer time have been cancelled, to the detriment of members of the public.

Mr McFarlane

[18] Mr McFarlane addressed the court on his own behalf and on behalf of Ms Maureen MacLeod. He lodged and sought to rely on four statements. None of these contained any information explaining why these individuals wanted to protest in the manner in which they did, nor did they even explain what the nature or essence of their protest was. They referred to the camp as "the peace camp", asserted various rights to occupy the ground and appeared to engage in religious and spiritual discussion. One of these, from Mr Crielly, engaged in a lengthy discussion of spiritual matters, explained his search for the Stone of Destiny which he planned, he said, to return to its rightful home in Ireland, and then set out a series of complaints about the activities of the Driver and Vehicle Licensing Authority and the conduct of the police and the courts. He also made a rather troubling reference to what he called the "arrestment" of the Queen on her attendance at Holyrood Palace on 2 July 2016. I will say a little more about another of these documents in due course.

Mr Mitchell

[19] Mr Mitchell addressed the court on his own behalf and on behalf of Mr John Freeman and Mr David Paterson. Mr Mitchell had sworn and lodged an affidavit in which he made it plain that his own participation at the camp was as part of a vigil in support of Scottish independence. He stressed the peaceful nature of the vigil, the small area of ground occupied and the lack of any incidents involving public disorder. He made various other arguments in support of a right to freedom of speech and expression. Mr Mitchell also lodged a letter addressed to the court from a Mr Martin Keating, whose address is not given and who is not otherwise identified. In that letter Mr Keating engaged in a mixture of political and legal discourse in support of the right to freedom of speech.

[20] During the course of the hearing Mr Mitchell also produced various additional photographs which bore to show the condition of the ground around the camp at the present time.

Mr Gemmell

[21] On his own behalf Mr Gemmell swore and lodged an affidavit in which he set out a history of litigation which he had been involved in concerning businesses in Glasgow. He lodged extracts from various processes which appeared to concern this litigation and had nothing whatsoever to do with the present case. He appeared to explain that his purpose in associating himself with the camp and with the present action was to protest against corruption in various institutions including the courts, Customs and Excise, the police, Glasgow City Council and other organisations. He identified himself as participating in a protest rather than a vigil.

Submissions for Petitioner

[22] On the behalf of the petitioner, Mr Moynihan QC submitted that the presence of the respondents interfered with the proper functioning of the Parliament, that they interfered with the rights of others to use the grounds, that they caused damage to the grounds and that their presence served as a magnet for others who wished to use the grounds of the Parliament inappropriately. He sought to underpin these submissions by reference to the affidavits lodged on the petitioner's behalf and submitted that the arguments advanced

by the respondents failed to take account of the fact that they have no legal entitlement to a continued presence on the grounds of the Parliament.

[23] Mr Moynihan accepted that the grant of the order sought would constitute a restriction on the article 10 and 11 rights of the respondents. However, he submitted that this was a reasonable and proportionate restriction since it would go not to the essence of the right of any of the respondents to express a point of view, nor even to do so at the site of the Scottish Parliament. The restriction would simply go to the manner in which the respondents were able to exercise that right. He submitted that in these circumstances, and given the level of interference with the rights of others which the respondents' conduct created, the balance of the competing considerations meant that the restriction sought was proportionate.

[24] As general legal guidance, Mr Moynihan drew my attention to the Supreme Court case of *R (Lord Carlisle of Berriew and others)* v *Secretary of State for the Home Department* [2015] AC 945 and to Lord Sumption's comments at paragraph 34 in which he noted that in considering the proportionality of an interference with the Convention right, context was important as was the significance of the right, the degree to which it is interfered with and the range of factors capable of justifying that interference.

[25] He also referred me to the particular circumstances of two cases which he suggested provided guidance on the facts of the present case. The first was the case of *Mayor of London* v *Haw* [2011] EWHC 585 (QB) in which the court made an order bringing to an end the protest vigil which Mr Haw had conducted by camping in Parliament Square Green, despite his reliance on the exercise of his Convention rights. The second was the case of *R (Gallastegui)* v *Westminster City Council* (CA) [2013] 1WLR which concerned the circumstances in which Ms Gallastegui, whom the court described as a peace campaigner, conducted a vigil in Parliament Square. As Mr Moynihan pointed out, the court drew a distinction between a restriction on the right to express views publicly and the right to assemble on the one hand, and on the other hand a restriction on the manner in which these rights are exercised.

Submissions for the respondents

Mr McFarlane

[26] Mr McFarlane, who has appeared to take something of a lead role in more recent appearances, advanced a fairly stark proposition. In short, his contention was that, contrary to the findings in my original decision, he and the others who occupy the camp have the complete right to do so. This time that assertion was based upon the contention that Jesus Christ in his second coming is within the camp and has granted his permission to occupy the grounds. On this basis Mr McFarlane's proposition appeared to be that the law which I purported to apply has no standing and that his rights and the rights of others were being exercised under what he claimed to be God's law, and that this should therefore prevail.

[27] Having taken this stance Mr McFarlane made no relevant submissions on the question of the proportionality of granting an order as sought.

Mr Mitchell

[28] Mr Mitchell made a spirited and sincere address on the importance of the rights of freedom of speech and freedom of assembly in a democratic society. He also made various observations about the inappropriate imbalance of power which he saw as contributing to the action being brought and the circumstances which the respondents find themselves in. Much of what Mr Mitchell had to say on the matter of freedom of speech and freedom of assembly would find broad support but in the end it seemed to me that he was rather unwilling to acknowledge the fact that the rights protected by articles 10 and 11 of the Convention are not unfettered rights.

[29] Mr Mitchell's contentions may perhaps be best put this way. The rights which the respondents are exercising are of such importance that they ought to outweigh any competing rights held by the petitioner and the rights being exercised by the respondents do not conflict with, or interfere with, the ability of others to exercise relevant rights on the grounds of the Scottish Parliament.

[30] Putting the matter slightly differently, Mr Michell's submissions may come to this. Because the rights as are guaranteed by articles 10 and 11 are of such importance in a peaceful democracy the respondents claim the right to exercise those rights in the manner of their choosing. It is disproportionate, they say, to

grant the order sought against them because they occupy a small space on the grounds of the Parliament, they do so peacefully and do not interfere with the rights of others.

Mr Gemmell

[31] Mr Gemmell began his submissions by seeking to draw a distinction between a protest and a vigil. His premise was that a vigil was something which was characterised by constant patient and inactive conduct, whereas a protest involved some positive activity. On this distinction he identified himself as a protester rather than someone who was participating in a vigil. He was protesting against corruption in various different forms. He acknowledged that he was not participating in a vigil in terms of his own definition as he only visited the camp intermittently. He did not seek to suggest that his own article 10 and 11 rights would be interfered with by the granting of the order sought and wanted to present an argument that his right to a fair hearing in terms of article 6 of the Convention had been infringed. When this was developed it became plain that he simply wished to reiterate his arguments attacking the right of the Scottish Parliamentary Corporate Body to own property. He had no submissions to present in relation to the single outstanding issue.

Mr Gardner

[32] Mr Gardner did not lodge any statements or other documents on behalf of the respondents for whom he appeared. He began his submissions by seeking to emphasise that the level of harm caused by those occupying the camp was low by comparison with the level of harm, or interference with the rights of others, which had been present in certain of the other reported cases to which my attention had been drawn. Allied to his submission on the low level of harm caused, he sought to make a distinction between restrictions on the free exercise of article 10 or 11 rights which went to the essence of the protest being made, and those which restricted the manner or form of the protest.

[33] With these two considerations in mind Mr Gardner then made submissions as to the impact of the relevant legal authorities. By way of introduction he identified four distinct propositions which he said would be supported:

- First, in circumstances in which a great deal of harm was caused by a particular protest, and the restrictions imposed on those wishing to exercise their rights went to the manner and form of the protest, then such restrictions could be proportionate;
- Second, in circumstances in which a great deal of harm was caused by a particular protest, and the restrictions imposed on those wishing to exercise their rights went to the essence of the protest, then such restrictions could still be proportionate;
- Third, in circumstances in which a relatively low level of harm was caused by a particular protest, and the restrictions imposed on those wishing to exercise their right went to the manner and form of the protest, then such restrictions may be appropriate;
- Fourth, in circumstances in which a relatively low level of harm was caused by a particular protest, and the restrictions imposed on those wishing to exercise their right went to the essence of the protest, then such restrictions would be disproportionate.

[34] Mr Gardner submitted that the authorities relied on by the petitioner all related to restrictions concerning the manner or form of the protest or issues concerning the convenience of the protesters. By way of contrast, he relied on the case of *Tabernacle* v *Secretary of State for Defence* [2009] EWCA Civ 23, which he submitted was important as the restrictions on the Convention rights of the protesters which were being considered in that case went to the essence of the protest and were held to be disproportionate. He submitted that there were significant similarities between the circumstances of the case of *Tabernacle* and the circumstances of the respondents' protest and that it provided helpful guidance as to how to resolve the issue in the present case.

[35] Mr Gardner's submission was that the order sought by the petitioner in the present case would go to the essence of the protest being carried out by the respondents. Since the level of harm being caused by the exercise of their article 10 and 11 rights was low, the grant of that order would be disproportionate. It could be seen that the restriction sought would go to the essence of the protest for two reasons. First, it would interfere with the place where the protest was taking place. It was self-evidently important for a protest in

support of Scottish independence to take place close to the Scottish Parliament. Secondly, the continuous nature of the protest was of its essence, it was identified as the "Indycamp". As had been held to be the case by the court in *Tabernacle*, the present respondents' protest had also acquired a symbolic force which allowed it to sit above the comings and goings of particular individuals.

[36] Turning to his submissions on the actual level of harm caused by the respondents' protest, Mr Gardner submitted that there was no great divide between Mr Moynihan's submissions on this issue and his own. He acknowledged that the site was of a permanent nature but submitted that this was not determinative. The weight which this consideration would attract would depend upon other circumstances. Of more weight would be the specific harm which had arisen from the permanent nature of the occupation.

[37] On issues concerning the nature of the Parliament, he submitted that the camp was in a relatively secluded corner of the estate and any concern about the impact on the Parliament's neutrality was overstated and in any event was answered by the very fact that the present action had been taken against the campers. He submitted that any concerns about the camp acting as a magnet were hypothetical. It was important to appreciate that there was no question of any harm flowing from the existence of the camp reaching the extent of an interference with the Convention rights of others. He submitted that it was still possible for the Scottish Parliamentary Corporate Body to make opportunities available for students and visitors despite the presence of the camp. These opportunities could be arranged in different ways.

[38] Mr Gardner recognised that it was valid to describe the area as unsuitable for a campsite but in determining the weight to be given to this consideration he invited me to take account of the fact that it had been there since November of last year and suggested that this general consideration should be seen alongside the limited evidence of specific damage.

[39] Lastly, he acknowledged that the use of the area occupied by the campers would interfere with the events scheduled for the opening of the Parliament but asked me to take account of the fact that these events were still proceeding and that the area being occupied by the camp was small. He also pointed out that if there were legitimate concerns about interference with this particular event then any such concerns could be addressed through a more limited interdict preventing the respondents from leaving or using certain areas. Such an order would have the necessary effect by restricting the manner or convenience of the exercise of the respondents' rights without restricting the essence of their protest.

[40] It is appropriate that I should record the court's gratitude to Mr Gardner and to his solicitor Mr Flanagan. Both were instructed only very shortly before the hearing and were prepared to remain and present submissions despite my refusing their initial motion to sist the case in order to permit an application for legal aid to be made. The submissions were well thought out and eloquently presented. I understand that a number of other legal representatives were approached but were unable to assist the respondents. Mr Gardner and Mr Flanagan both deserve my thanks for the considerable assistance which they provided to the court. Their willing participation in difficult circumstances reflects both professional strength of character and an admirable sense of public duty consistent with the office which each holds.

Discussion

[41] I am aware that this case has been of interest to those who have observed the ongoing protest and to others who are interested in the manner in which the rights to freedom of speech and freedom of assembly are protected in this country. It may therefore be important to say a little more about the basis upon which some of the competing contentions were advanced before me.

[42] One of the statements which was lodged by Mr McFarlane in support of the submissions he advanced was a document which was addressed:

> "To ALL the people who are acting as judges in Scotland"

[43] This document stated that there was an affidavit attached which was presented: "in this case and all other cases brought before every court in Scotland". This so-called affidavit bore to be from Christ on his second coming, it ran to eight typed pages and bore to be signed: "Christ – King of Scotland". The author was present in court for at least some of the hearing and claimed in the body of the document to be the owner of the whole world and everything pertaining to it. It was also explained in the document that he had given the Indycampers his permission to occupy his land and buildings. This was the basis upon which Mr McFarlane invited me to refuse to grant the order sought.

[44] As this so-called affidavit continued the author asserted that the judges were frauds, having no authority to judge anyone or to decide any matter, that their oaths were null and void, that they were fraudulently impersonating judges and that they and their fraudulent Queen were guilty of capital crimes and should all be executed. For these reasons the author asserted that these judges were criminals and had no authority or jurisdiction to order that the Indycamp be removed whilst the campers had his permission to use his land.

[45] I did point out to Mr McFarlane the logical conflict between asserting to me that neither I nor the court had any jurisdiction, whilst at the same time asking me to apply legal rights in his favour. I also pointed out that in ordinary circumstances the expression of such comments to the court might easily constitute contempt. I propose to take a more benign view and not to engage any further procedure. I will also leave it to others to comment on the tactical wisdom of responding to my original offer to hear submissions on the proportionality of making an order against the respondent's by referring to me and my colleagues in the manner described.

[46] Rather than addressing the content of this document, or the submission based upon it, I choose to restrict myself to stating the perfectly obvious, namely, that as a judge charged with presiding over legal proceedings in a civilised and mature legal system I must apply the law as promulgated by Parliament and as explained in binding case law. I have no ability to ignore or to depart from the law of the land based upon one individual's contention that I should apply what he calls "God's law". I should also make it clear that on the instructions of the respondents whom he represented Mr Gardner disassociated himself from the content of this document.

[47] In dealing with the other submissions made, I should begin by stating that for the purposes of examining the proportionality of granting the present order sought, it makes no difference whether one refers to the camp as a protest or a vigil. However, beyond the submission made by Mr Gardner, no submission has been advanced in support of a contention that protesting 24 hours a day whilst camping out on the site of the Scottish Parliament is essential to the protest or vigil which the respondents wish to make. No evidence has been presented to explain why a 24 hour permanent presence is essential. In the case of *Gallestegui* the court acknowledged that that for some who wish to protest a permanent presence might be essential to the nature of the protest they wish to make and the court acknowledged that the manner and form of a protest may constitute the actual nature and quality of that protest. It observed though that whether these observations did apply to any particular case would have to be judged on its own facts.

[48] Mr Gardner's submission to the effect that the continuous nature of the present protest was of its essence is undermined in a number of different ways. Whilst it may be true to say that it is identified by some as the "Indycamp", it is now perfectly plain that it has attracted individuals whose interests are different from, and go well beyond, the concept of Scottish independence. It cannot be said that there is a unified focus to the presence of those at the camp. As pointed out earlier, the statements lodged by Mr McFarlane now refer to the encampment as a peace camp. Some of those involved no doubt are protesting in support of Scottish independence. Others appear to be attracted by spiritual considerations and Mr Gemmell's interests are in opposing corruption. Nor is it plain from any of the material submitted in evidence how regularly any of the present respondents attend at the camp. This is of some importance as it was explained to me on earlier occasions that the residents of the camp come and go. Certain of the respondents, Mr Gemmell and Mr McFarlane in particular, have told me that they are only present intermittently. They both have addresses in Bellshill. I therefore do not accept the contention that the continuous nature of the camp is of the essence of the protest being made.

[49] Nor do I accept Mr Gardner's submission that the protest or the presence of the camp has acquired a symbolic force allowing it to sit above the comings and goings of particular individuals. In *R (Barda)* v *Mayor of London* [2016] 4 WLR 20 at paragraph 91 the court noted the following:

> "In *Tabernacle* the longevity of the AWPC and the symbolic force it had garnered meant that the camp would become the protest itself. A protest does not require that status simply by declaring it to be so."

[50] It seems to me that one of the principal reasons why the court held as it did in the case of *Tabernacle* is that the Aldermaston Woman's Peace Camp had been in place for 23 years before the Secretary of State took

any steps to put a stop to it. Throughout that period there had been a consistent focus to the protest. The circumstances of the present case are quite different. There has not been a consistency of focus in the protest, far less a consistency over so many years. In the present case the Scottish Parliamentary Corporate Board took active steps to remove the camp from its very commencement. They first took informal and light touch steps which they only escalated into formal proceedings when the respondents refused to engage with them to any extent.

[51] It is of course correct that the order sought in the present proceedings would operate as a restriction on the article 10 and 11 rights of those at the camp. I do not though accept the contention that this restriction would go to the essence of their right to freedom of expression or to protest. I have already set out my reasons for rejecting the un-vouched contention that the continuous nature of the protest is essential. It is plain from the affidavit of Sir Paul Grice and the documentation concerning the Scottish Parliamentary Corporate Body Code of Conduct, that protest is possible both in the vicinity of the Scottish Parliament and on the grounds owned by the petitioner. As his affidavit made clear, the petitioner was willing to discuss the possibility of daily protest by the respondents on the grounds of the Parliament but the respondents were not willing to even engage in discussion. In my judgement it is plain from the evidence presented that the complaint which the respondents advance goes no further than saying that an order made against them would prevent them from exercising their article 10 and 11 rights in the manner of their choosing. As I understand it the petitioner remains willing to discuss facilitating the respondents' rights to freedom of expression or protest in line with its Code of Conduct. Their right to engage in whatever protest it is that they each wish to state remains available. The restriction which the petitioner seeks in my opinion goes to the manner and form of the protest (or protests) which are ongoing rather than to the essence of any of them.

[52] In *Tabernacle* itself (at paragraph 19) the court cited with approval of the statement of Professor Barendt in Freedom of Speech 2nd ed., p. 281 to the following effect:

> "Reasonable time, manner, and place restrictions have been upheld, provided at any rate that they leave ample alternative channels for communication of the ideas and information."

[53] In the end the importance of the decision in that case is that the court decided that the Secretary of State's justifications for the proposed interference with the appellant's article 10 rights were not made out. They were in objective terms nothing more than nuisance points. That is not the position in the present case.

[54] In my view the case of *Haw* is of assistance. As can be seen from the circumstances of that case, Mr Haw was only occupying a small area and there were no issues of public disorder associated with his conduct. Nevertheless, Parliament Square Green was an open space available for public use. Camping was viewed as incompatible with the function, lawful use and character of what was seen as an important space and Mr Haw thereby caused substantial harm to the public interest. The public were effectively excluded from the small area for their lawful activities indefinitely. Camping on the lawn caused harm to the grounds. There was no suitable infrastructure in terms of sanitation or running water and there was a concern that his camp would become a precedent for further impermissible use. In my view Mr Moynihan was correct to identify the parallels between the circumstances of Mr Haw's case and the present one.

[55] In my judgement Mr Moynihan was also correct in submitting that the case law referred to by him supports the proposition that individuals do not have the absolute freedom to choose the manner of the expression of their rights under articles 10 and 11 to the detriment of others. He was also correct in submitting that the case law shows that individuals may stretch their articles 10 and 11 rights too far if they seek to occupy permanently or indefinitely land belonging to third parties even if occupying small areas, posing no threat to public order and even if not causing damage to property.

[56] In the present case the respondents have been in exclusive possession of an area of the grounds of the Scottish Parliament for many months. In doing so they are interfering with the rights of others. The information in the affidavits relied upon by the petitioner establishes good reasons for the petitioner seeking the order which it does. That information demonstrates that the respondents have continued to interfere with the rights of others to use the grounds openly. They have caused damage to the grounds themselves in a variety of different ways, their presence is incompatible with the nature of the Parliament's grounds which are unsuitable for use as a campsite and they have acted as a magnet, or a precedent, for other impermissible use of the grounds. It would obviously be inappropriate and reflect entirely unsuitable use of the grounds of

the Parliament if there were a numbers of different groups occupying the grounds. Furthermore, the presence of the camp constituted a significant and obvious obstacle to the proper running of the events scheduled for 2 July this year and will do so for other events of a similar nature which may take place in the future.

[57] I also consider that Mr Moynihan was correct in drawing attention to the suggestion made to the effect that other arrangements could be made to accommodate the work which the Parliamentary Corporate Body engages in with students and the like by adapting its strategy. As he correctly observed, this suggestion ignored the fact that it is for the Parliament to decide for itself the best way to advance its policy of promoting democracy and engaging with the whole of the public. There was force in Mr Moynihan's submission that Parliament's strategy should not be dictated, either directly or indirectly, by one group of individuals regardless of however genuine or meritorious its cause was. The interference with the Parliament's entitlement to use its land to promote engagement as it saw fit was not merely a nuisance point as had been held by the court to be the case in *Tabernacle.*

[58] In essence the respondents' position seems to be that their rights under articles 10 and 11 should trump both the petitioner's right to possession and the rights of others to enjoy undisturbed use of the grounds. This rather selfish or even arrogant approach was well illustrated in two ways. First, by the way in which the respondents felt able to hold a barbecue and social gathering in and around the area of the camp which they openly advertised on social media. Second, the affidavits provided, as taken along with the photographs, make it plain that damage has been caused to the grounds of the Parliament by vehicles being parked on the grassed areas and by other means. In production 6/29 there are a number of photographs showing a significant number of motor cars and other vehicles openly parked side-by-side on the grassed areas of the Parliament and near to where the campers tents and caravans are located. The photographs show vehicles parked on different days in January of this year and in March of this year. These vehicles are all parked on the other side of the roadway from a public car park.

[59] No explanation has been offered to explain this, to my mind, quite remarkable conduct. It would be perfectly obvious to anyone parking their vehicle on the grassed area of the grounds of the Scottish Parliament that to do so would cause damage. That conduct displays open disregard for the rights of others to enjoy the grounds in their undisturbed form. There is nothing in the nature of any of the respondents' protests or vigils which required them or anyone else to park any, far less so many, motor vehicles on the grassed areas of the Parliamentary grounds. The adjacent carpark, although requiring payment, provides entirely adequate and suitable parking facilities. It is very little to the point that the damage caused at that time may no longer be visible. Even the photographs lodged by Mr Mitchell during the course of the hearing demonstrate an ongoing, albeit minor, level of damage to the grounds.

[60] In the whole circumstances it is clear to me that the petitioner has now established that the respondents' activities on its property are interfering with its own rights and duties and with the rights of the public and that the order sought meets a pressing social need.

[61] The officials of the Scottish Parliamentary Corporate Body have made it plain to the respondents that there are other opportunities for them to legitimately exercise rights of freedom of speech and assembly. The officials remain open to negotiations with the respondents to permit the exercise of these rights through events such as meetings, vigils and protests, so long as these comply with the petitioner's policy on such conduct.

[62] The order sought by the petitioner does not substantially impair the ability to protest at the grounds of the Scottish Parliament. It may interfere with the respondents' wish to conduct their vigil in the manner and form of their choosing but they are mistaken in considering that they have an unfettered right to make this choice.

[63] The interference with the respondents article 10 and 11 rights which would be caused by granting the order sought is targeted, limited and will not deprive them of the essence of their rights. The balance which has to be struck in light of all of the circumstances I have identified comes down firmly in favour of holding that the interference caused by granting the orders sought is proportionate.

[64] I will uphold the petitioner's second plea in law and grant the prayer of the petition. As requested, I will reserve meantime the question of expenses.