The end of the road for human rights in private landowners' disputes?

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This article examines whether, and if so, to what extent, human rights are progressively transforming the juridical basis of the law in relation to private landowners. Human rights' synergies create new dimensions of land entitlements, which alter the parameters of proprietary rights by augmenting the protection of occupiers of land. There accordingly need to be clear mechanisms to adjudicate the impact and role of human rights in private land law disputes, especially because the majority of tenancies are in the private sector.[1] A comprehensive framework for doing so was not provided by the Supreme Court in *McDonald v McDonald*[2] as was demonstrated by the subsequent decision of the Court of Appeal in *Watts v Stewart*.[3] Two areas of this complex situation are examined: firstly, the vagaries which undermine a coherent framework for horizontality that might erode stability and predictability in private land law disputes; and secondly, whether vulnerability as a heuristic device can result in increased human rights protection for occupiers of privately owned land. Constant tension and paradox between predictability and certainty on the one hand, and prioritising fundamental values on the other hand, encourages litigation, poses dilemmas as to the extent of the marginalisation of human rights and exposes social and economic injustices within land law which need to be addressed.

Coherent framework for horizontality in private land law disputes?

There has been some debate concerning horizontal effect of the European Convention on Human Rights (as implemented by the Human Rights Act 1998) in land law disputes,[4] because that effect determines whether the Convention imposes obligations on individuals. Prior to *McDonald v McDonald*,[5] the Supreme Court had specifically not decided the issue of whether a defendant could raise a proportionality defence in a possession claim brought by a private landowner.[6] The Supreme Court in *McDonald*[7] held that a court did not have to consider proportionality under Article 8(2) when considering whether to make a possession order against a residential tenant of a private landlord and that there was no obligation to assess proportionality under section 21(4) of the Housing Act 1988, which gives landlords a mandatory right to recover possession of the property. Academic critiques of the decision in

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[1] See Department for Communities and Local Government Report, *Dwelling Stock Estimates: 2016, England*, identified 4.8 million private rented dwellings and 4 million social and affordable rented dwellings by private registered providers and local authorities.

[2] *McDonald v McDonald* [2016] UKSC 28; [2016] 3 W.L.R. 45.

[3] *Watts v Stewart* [2016] EWCA Civ 1247; [2017] H.L.R. 8.

[4] See S. Nield, "Shutting the Door on Horizontal Effect: McDonald v McDonald" [2017] Conv. 60; E. Lees, "Article 8, Proportionality and Horizontal Effect" (2017) 133 L.Q.R. 31.

[5] *McDonald v McDonald* [2016] UKSC 28.

[6] *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 W.L.R. 1441 at [50].

[7] *McDonald v McDonald* [2016] UKSC 28.

McDonald have focused on lack of engagement with theories of statutory, direct, indirect, intermediate and remedial horizontality.[8]

It is notable that the word "horizontal" was not used even once in the judgment in *McDonald.* The judiciary avoids engaging with theories of horizontality, preferring in specie judgments, rather than enunciating principles of general application. The reason for such apparent lack of engagement may be that theories of, or approaches to, horizontality have not been argued in full before the courts. Whilst judges appear to have ruled out no or full horizontal effect (without using the term "horizontal effect"), they have not collectively felt willing to endorse any particular model.[9] Wright disagrees with such an assessment, however, and argues[10] that close examination of Strasbourg case law reveals that Strasbourg treads warily in the field of the positive obligation to control private parties in their relationships *inter se*; that is why English courts have not found it necessary to express concluded views on the scope of section 6 of the Human Rights Act.

In this section, it is argued firstly, that *McDonald* is applying a species of negative obligation model of horizontality with the consequence that horizontality will only apply in non-regulatory and non-consensual circumstances. Secondly, it is suggested that there is cognitive dissonance between the analysis in *McDonald* and normative adjudicative reasoning on the following grounds:

- the contrast with the way in which the Equality Act qualifies an absolute right to possession;
- the articulation of a confused balance between Article 8 and Article 1 Protocol 1;
- a misconstrued rationalisation of the rule of law trumping human rights;
- a problematic differentiation with horizontal effect in tortious or quasi-tortious relationships;
- a questionable, potential change in the approach to human rights due to subsequent Government policy.

Finally, in this section, it is argued that judges may be evolving a form of contextual horizontality to deal with the complexities involved in difficult circumstances.

(a) <u>Negative obligation model: non-regulatory and non-consensual horizontality only?</u>

Lord Neuberger, delivering the judgment in *McDonald* jointly with Baroness Hale, appears to be applying a species of negative obligation model[11] in circumstances where there are contractual rights protected by legislation which have the effect of negating the applicability of Article 8. Some provisions of land law legislation, as demonstrated in *McDonald* in relation to section 21 of the Housing Act 1998, may appear on such an analysis to be incompatible with Convention rights. Section 21 is a prime example of legislation, which is

[8] See, for example, S. Nield, "Shutting the Door on Horizontal Effect: McDonald v McDonald" [2017] Conv. 60; E. Lees, "Article 8, Proportionality and Horizontal Effect" (2017) 133 L.Q.R. 31.
[9] G. Phillipson and A. Williams, "Horizontal Effect and the Constitutional Constraint" (2011) 74 M.L.R. 878, 910.
[10] J. Wright, "A Damp Squib? The Impact of section 6 HRA on the Common Law: Horizontal Effect and Beyond" [2014] P.L. 289, 298-301.
[11] This is adapted from one of the models proposed by A.L. Young, "Horizontality and the Human Rights Act 1998" in K.S. Ziegler, *Human Rights and Private Law: Privacy as Autonomy* (Oxford, Hart Publishing, 2007) Ch.4 at 39-40.

uncompromising in disregarding the interests of the tenant, whatever the circumstances, and offers no protection for tenants even in exceptional circumstances. Under this provision, a landlord is entitled to possession at the expiration of an assured shorthold tenancy and has served the requisite two months' notice in writing on the tenant.[12] Much of the general academic commentary on horizontal effect focuses on how far the common law should be developed to protect Convention rights[13] rather than the type of situation which arose in *McDonald*, which derived from a legislative provision. The triggers or mechanisms for horizontality where statutory provisions are in issue differ distinctly from those relevant for development of the common law. Lord Neuberger applied the principle that where there are statutory provisions governing a contractual relationship, they preclude any assessment as to whether an order for possession would be proportionate. He recognised that Article 8 was engaged, but that the proportionality test could not be applied,[14] which is doctrinally problematic.

In setting out exclusionary rules for Article 8 with the justification being the provisions of the Protection from Eviction Act 1977, section 89 of the Housing Act 1980 and Chapters I and IV of the Housing Act 1988, Lord Neuberger acknowledged that those Acts all pre-date the Human Rights Act 1998.[15] His justification, however, that they have been considered and approved in government reports since 2000 and confirmed by Parliament when approving and amending those statutes since 2000, is questionable, because Parliament has not addressed the issue specifically of whether those legislative provisions achieve that balance.

There was no analysis by the Supreme Court of how section 21 of the Housing Act would apply if the landlord had been a housing association granting an assured shorthold tenancy as a starter tenancy. The approach in *Manchester City Council v Pinnock*[16] and *Hounslow London Borough Council v Powell*,[17] applying the proportionality assessment in Article 8(2) where it crosses the high threshold of being seriously arguable, would be relevant to housing associations exercising public functions. It seems somewhat incongruous to use the ground of contract and statute as justification for the *McDonald* decision in relation to private sector parties when housing associations would be relying on the same contract and statute. More cogent reasoning is required, which would provide justification why the same contract and statute do not prevent Article 8 being raised as a defence where a public authority landlord is concerned. The extent of the problem is further complicated by the fact that the border between private and public bodies has become blurred, and the test to determine a quasi-public authority is complex as demonstrated by *R (on the application of Weaver) v. London and Quadrant Housing Trust*.[18]

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[12] It is, however, subject to Housing Act 1980 s.89(1), which allows suspension of the order for possession for a maximum of six weeks in cases of exceptional hardship.
[13] See, for example, G. Phillipson and A. Williams, "Horizontal Effect and the Constitutional Constraint' (2011) 74 M.L.R. 878; G. Phillipson, "The Human Rights Act, 'Horizontal Effect', and the Common Law: a Bang or a Whimper" (1999) 62 M.L.R. 824.
[14] *McDonald v McDonald* [2016] UKSC 28 at [40].
[15] *McDonald v McDonald* [2016] UKSC 28 at [40].
[16] *Manchester City Council v Pinnock* [2010] UKSC 45 at [54].
[17] *Hounslow London Borough Council v Powell* [2011] UKSC 8; [2011] 2 W.L.R. 287 at [33].
[18] *R (on the application of Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587; [2010] 1 W.L.R. 363. See also *R (on the application of Macleod) v Peabody Trust Governors* [2016] EWHC 737; [2016] H.L.R. 27.

Support from the European Court of Human Rights for the approach taken by the Supreme Court in *McDonald* can be found in the subsequent case of *Vrzic v Croatia*,[19] albeit that the case did not involve a possession claim by a landlord, but concerned mortgage possession proceedings brought by a private lender. Some aspects of the negative obligation model were nevertheless implicitly demonstrated in the judgment in *Vrzic* despite the differences between the cases. The European Court of Human Rights noted the decision in *McDonald* at the beginning of the judgment.[20] The court distinguished earlier cases such as *McCann v United Kingdom*[21] and also *Orlic v Croatia*[22] in which it was held that any person at risk of eviction from his home should be able to have the proportionality of that measure determined by an independent tribunal, because these cases concerned State-owned or socially-owned flats, so there was no other private interest at stake. Central to the case was that the applicants had voluntarily used the property as collateral and had agreed that the lender could sell the property in the event of default. They had failed to take the opportunity to challenge the sale price, or object to the valuation report, or participate in the valuation process. The subsequent sale, therefore, was a consequence of the applicants' failure to meet their contractual obligations, and there had been no breach of Article 8 or Article 1 Protocol 1 when the sale was below market value. With its emphasis on the importance of contractual rights between private parties and the limited role of the court in enforcing those rights, the decision echoes that of the Supreme Court in *McDonald*.[23]

There were nevertheless relevant differences. Central to the decision in *Vrzic* was that the applicant had been at fault and that adequate procedural safeguards had existed if the applicants had taken advantage of them. The legal scenario in that case can be distinguished from section 21 of the Housing Act 1988, which does not contain any inherent safeguards to a tenant in the position of Ms McDonald. The European Court of Human Rights did, however, comment that "even in cases involving private litigation, the State is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law",[24] a view which demonstrates that the decision in *Vrzic* is of extremely limited support for *McDonald*. That is because judicial procedures offering the necessary procedural guarantees were lacking in *McDonald*, and the decision in *Vrzic* can accordingly be distinguished on that ground.

There are other pointers in the case law, however. *Ivanova v Bulgaria*[25] was published after *McDonald* and concerned interference with Article 8 by the state in the context of a demolition order. It demonstrated in a broadly worded judgment that a proportionality defence could be available equally to cases involving private parties: "An analogy may also be drawn with cases concerning evictions from properties previously owned by the applicants

[19] *Vrzic v Croatia* [2016] H.L.R. 37.
[20] *Vrzic v Croatia* [2016] H.L.R. 37 at [H5].
[21] *McCann v United Kingdom* [2008] H.L.R. 40.
[22] *Orlic v Croatia* [2011] H.L.R. 44.
[23] See A. Dymond, "McDonald- Private Landlords and Article 8" [2016] J.H.L. 93.
[24] *Vrzic v Croatia* [2016] H.L.R. 37 at [101].
[25] *Ivanova v Bulgaria* [2016] H.L.R. 21.

but lost by them as a result of civil proceedings brought by a private person, civil proceedings brought by a public body, or tax enforcement proceedings".[26]

The distinction in *McDonald* between the contractual/statutory paradigm where proportionality will not be considered, and contractual/non-statutory and statutory/non-contractual paradigms where proportionality will be relevant renders the proportionality test in consensual, regulatory frameworks virtually redundant. It marginalises the test almost to the point of extinction due to the ubiquity of assured shorthold tenancies in the private rental sector, which gives tenants limited contractual freedom of choice when entering tenancy agreements.[27]

(b) Cognitive dissonance between analysis in McDonald and normative adjudicative reasoning

There is, however, disparity between the analysis in *McDonald* and normative adjudicative reasoning which renders the negative obligation model doctrinally problematic in numerous ways.

(i) Equality Act 2010 qualifying an absolute right to possession
Section 21 must be exercised in a way which is compatible with the Equality Act 2010, which was acknowledged by Lord Neuberger.[28] This must also signify that section 21 must be exercised in a manner compatible with the Human Rights Act 1998, but Lord Neuberger did not analyse equivalence between the two statutory regimes and merely dismissed the constraints on a private landlord's rights by the Equality Act 2010 as being laid down by statute without further analysis. There is no doubt that a court could interfere if a landlord's sole motivation for serving the section 21 notice is discriminatory according to the Equality Act 2010. Human rights are, therefore, incorporated into disputes between private landowners through the Equality Act 2010, and the decision in *McDonald* creates a binary divide between human rights and disability in private landlord and tenant cases.

It is notable that Ms McDonald suffered from mental health problems and lacked capacity to conduct legal proceedings, but the Equality Act 2010 was not pleaded, presumably because the reason for service of the section 21 notice was that Ms McDonald's parents could no longer afford the necessary payments. However, if a broader view is taken of the circumstances which resulted in the McDonalds buying the property for their daughter due to her disability, then further to the Supreme Court decision in *Aster Communities Ltd v Akerman-Livingstone*,[29] an automatic right to possession under section 21 of the Housing Act 1988 might have been treated differently, and there may have been scrutiny of the effect of proportionality on the right to possession. Since "a court" is specifically included within the expression "public authority" by section 6(3)(a) of Human Rights Act 1998 Act, it is difficult

[26] *Ivanova v Bulgaria* [2016] H.L.R. 21 at [52] referring specifically to "Zehentner v. Austria, no. 20082/02, 16 July 2009 (proceedings brought by a creditor); Brežec v. Croatia, no. 7177/10, 18 July 2013 (proceedings brought by the true owner of the premises); Gladysheva v. Russia, no. 7097/10, 6 December 2011 (proceedings brought by a municipal body); and Rousk v. Sweden, no. 27183/04, 25 July 2013 (tax enforcement proceedings)".
[27] See further S. Nield, 'Shutting the Door on Horizontal Effect: McDonald v McDonald' [2017] Conv. 60, 66.
[28] *McDonald v McDonald* [2016] UKSC 28 at [67].
[29] *Aster Communities Ltd v Akerman-Livingstone* [2015] UKSC 15; [2015] 2 WLR 721.

to rationalise why human rights are treated differently, and why human rights appear to be less important than equality rights.[30]

(ii) Confused balance between Article 8 and Article 1 Protocol 1?
The reason Lord Neuberger gave that *Pinnock* and *Powell* would not apply is that "a private sector landlord can claim that any delay in giving him possession of the property to which he is entitled would be an interference with his rights under article 1 of the First Protocol to the Convention".[31] It is notable that the first reason given by Lord Neuberger is not that the Convention rights are not applicable between private parties, but that the balancing act between Article 8 and Article 1 Protocol 1 would cancel the likelihood of success of a tenant's defence.[32] However, although it is generally assumed that Article 1 Protocol 1 applies to the landlord so as not to interfere with "the peaceful enjoyment of his possessions", a tenant can arguably claim to be in need of protection of both Article 8 and Article 1 Protocol 1. This is not acknowledged at all by Lord Neuberger whose balancing act between Article 8 and Article 1 Protocol 1 is arguably too simplistic and whose analysis of the issue is far too brief.

In fact, in a notable case, *Sims v Dacorum Borough Council*,[33] where the claimant joint tenant unsuccessfully claimed breach of Article 8 and Article 1 Protocol 1, it was Lord Neuberger who delivered the judgment, so it is a pity that Lord Neuberger did not delve into this balance in greater depth in *McDonald*. Goymour has argued that the ending of a lease in accordance with its terms fails to engage the tenant's Article 1 Protocol 1 rights, because the lessee's rights are circumscribed by the leasehold terms from the outset.[34] Only if there is a shift in proprietary entitlement, Article 1 Protocol 1 will be engaged, but not if there is merely the enforcement of pre-existing rights. Lees, however, has argued that since the landlord's rights were always subject to the human rights of the tenant, and all Article 1 Protocol 1 protects is pre-existing legal rights, there is no breach of the landlord's Article 1 Protocol 1 rights by giving effect to a tenant's Article 8 rights.[35] This view is doctrinally consistent with the Human Rights Act, and in the context of the *McDonald* scenario, it is problematic to ignore the tenant's potential Article 1 Protocol 1 rights.

Developing this further, it is arguable that a tenant should pursue a breach of Article 1 Protocol 1 against a private landlord by analogy with *Pye v UK*.[36] It is significant that in the context of adverse possession, *Pye* was an admissible claim involving two private parties based on breach of Article 1 Protocol 1. Since *Pye* demonstrates that ending a freehold estate through adverse possession can be challenged under Article 1 Protocol 1, ending a leasehold

[30] See further S. Pascoe, "Disability Discrimination: Recasting the Parameters of Proprietary Rights?" in R. Hickey and H. Conway (eds), *Modern Studies in Property Law* Vol.9, Ch.8 (Oxford, Hart Publishing, 2017).
[31] *McDonald v McDonald* [2016] UKSC 28 at [39]. See also D.S.K. Maxwell, "Disputed Property Rights: Article 1 Protocol No. 1 of the European Convention on Human Rights and the Land Reform (Scotland) Act 2016" [2016] E.L.R. 900.
[32] It is notable that in the Supreme Court case of *Salvesen v Riddell* [2013] UKSC 22 at [38], Lord Hope stated that, "as a minority group landlords, however unpopular, are as much entitled to the protection of convention rights as anyone".
[33] *Sims v Dacorum Borough Council* [2014] UKSC 63; [2015] A.C. 1336.
[34] *Sims v Dacorum Borough Council* [2014] UKSC 63 at 279 citing Laws LJ in *Sheffield City Council v Smart* [2002] EWCA Civ 4; [2002] H.L.R. 34 at [46].
[35] E. Lees, "Article 8, Proportionality and Horizontal Effect" (2017) 133 L.Q.R. 31, 35.
[36] *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 E.H.R.R. 1083.

estate, which is the other estate in section 1 of the Law of Property Act 1925, could also be challenged under Article 1 Protocol 1. There would then be scope for considering the human rights compliance of the system in an analogous way to *Pye*. In order to do so, that would require treating leases as property and not as contract,[37] namely as proprietary rather than merely contractual rights in land.

(iii) Should the rule of law trump human rights?

Lord Neuberger was concerned that to allow Article 8 as a defence would undermine the rule of law.[38] He did not want to force the state to accept a super-added requirement of addressing the issue of proportionality in each case where possession was sought. He set out "ensuring consistency of application and certainty of outcome" as "two essential ingredients of the rule of law".[39] However, the fact that Article 8 is engaged means that a proportionality assessment must be carried out and assessing proportionality would not necessarily undermine the rule of law. The rule of law does not mandate consistency and certainty to trump human rights. The Human Rights Act, which made courts the adjudicators of human rights compatibility, was passed in accordance with the rule of law, but Lord Neuberger is proposing to ignore a central element of the rule of law by bypassing the proportionality assessment required by the Human Rights Act.

Lord Neuberger in *McDonald* is erroneously applying the rationale from *Qazi v Harrow LBC*,[40] which he overruled himself in *Pinnock* and *Powell* and is demonstrating in *McDonald* the same resilience shown by the majority of judges in *Qazi*, which he subsequently overruled. There is a possibility that if the facts in *McDonald* had been different, and if the parents had been the *de facto* claimants seeking to evict their own daughter from the premises, then the courts may have adopted a more flexible or more nuanced approach. The decision in *McDonald* is resonant of cases where the courts do not want creditors to be kept waiting for their money.[41] Receivers brought possession proceedings in the parents' names in *McDonald*, because the lenders were entitled to their money and required that the property be sold with vacant possession, but the court avoids treating this as a mortgage repossession case.

Although section 89(1) Housing Act 1980 allows suspension of an order for possession for a maximum of six weeks in cases of exceptional hardship, Lord Neuberger in *McDonald* did not explore further the point made in *Powell* by Lord Hope that to postpone the execution of a possession order for a longer period than the statutory maximum "would go well beyond what section 3(1) of the 1998 Act permits".[42] As Lord Neuberger stated, "The cases in which it would be justifiable to refuse, as opposed to postpone, a possession order must be very few and far between … They could only be cases in which the landlord's interest in regaining

[37] See *Bruton v London and Quadrant Housing Trust* [1999] 3 W.L.R. 150; *Kay v Lambeth LBC* [2006] UKHL 10; [2006] W.L.R. 570; *Mitchell v Watkinson* [2014] EWCA Civ 1472; [2015] L.&T.R. 22.
[38] *McDonald v McDonald* [2016] UKSC 28 at [43].
[39] *McDonald v McDonald* [2016] UKSC 28 at [43]. For detailed analysis of the rule of law, see P. Gowder, *The Rule of Law in the Real World* (Cambridge, CUP, 2016); T. Bingham, *The Rule of Law* (London, Penguin, 2011).
[40] *Qazi v Harrow LBC* [2003] UKHL 43; [2004] 1 A.C. 983.
[41] See, for example, *Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 All ER (Comm) 920; *First National Bank v Achampong* [2003] EWCA Civ 487; [2004] 1 F.C.R. 18.
[42] *Hounslow London Borough Council v Powell* [2011] UKSC 8 at [62].

possession was heavily outweighed by the gravity of interference in the occupier's respect for her home".[43] One scenario would surely be where parents such as the McDonalds are claiming possession against a vulnerable daughter with serious medical problems. In considering the issue in *McDonald* that if a proportionality assessment had been required where the occupier crossed the high threshold of showing an arguable case, and section 21(4) could be read so as to accommodate it, Corrie J at first instance would have taken the view that the tenant's personal circumstances were sufficiently exceptional to justify dismissing the claim for possession on the basis that it was disproportionate. The Supreme Court, however, disagreed and was critical of that view.[44]

On these aspects, *McDonald* has not overruled other areas of land law involving private parties where the courts have evolved greater levels of contextual adjudication and considered breaches of Article 8 and Article 1 Protocol 1 without analysing problems of horizontal application. Potential breaches have been rejected, not on the basis that they do not apply to private parties, but on more specific grounds, including there being no breach,[45] in the areas of mortgage possession proceedings,[46] possession actions by a trustee in bankruptcy,[47] application for sale under section 14 of the Trusts of Land and Appointment of Trustees Act 1996,[48] in adverse possession[49] and overreaching.[50]

Phillipson and Williams argue that the rule of law is another reason why judges are not engaging in theories of horizontality, because none of the models so far advanced draw on background constitutional fundamentals, including those of particular concern to the judiciary, such as the rule of law.[51] Instead academic commentary has concentrated on the Act in isolation from its constitutional backdrop. They note that direct and full horizontalists argue for the effective collapsing of the distinction between public and private bodies, and that it is a deliberate omission by the Human Rights Act to provide specific guidance on horizontal effect. They argue that stronger models of horizontal effect, which purport to impose absolute obligations on the court to act compatibly with Convention rights in the private sphere, lack precision and concrete content. Their view is that, in practice, the relevant horizontally applicable Convention rights are likely to operate under the Human Rights Act as principles or values i.e. as reasons for making a decision rather than hard-edged rights. However, Wright notes that the term "horizontal effect" fails to capture the fact that

[43] *McDonald v McDonald* [2016] UKSC 28 at [73].
[44] *McDonald v McDonald* [2016] UKSC 28 at [71]-[75].
[45] See S. Pascoe, "Europe, Human Rights and Land Law in the Twenty-First Century: An English Example" (2011) 1 Prop. L. Rev. 179 at 191-193.
[46] *Barclays Bank Plc v Alcorn* [2002] EWHC 498; [2002] 2 P.&C.R. DG10; *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327; [2009] 1 W.L.R. 1255.
[47] *Barca v Mears* [2004] EWHC 2170; [2005] 2 F.L.R. 1; *Nicolls v Lan* [2006] EWHC 1255; [2007] 1 F.L.R. 744; *Ford v Alexander* [2012] EWHC 266; [2012] B.P.I.R. 528.
[48] *National Westminster Bank Plc v Rushmer* [2010] EWHC 554; [2010] F.L.R. 362; *Fred Perry (Holdings) Ltd v Genis* [2015] 1 P.&C.R. DG5.
[49] *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 E.H.R.R. 1083; *Ofulue v Bossert* [2008] EWCA Civ 7; [2009] Ch. 1.
[50] *City of London Building Society v Flegg* [1988] A.C. 54; *National Westminster Bank Plc v Malhan* [2004] EWCA Civ 847; [2004] 2 P.&C.R. DG 9.
[51] G. Phillipson and A. Williams, "Horizontal Effect and the Constitutional Constraint" (2011) 74 M.L.R. 878 at 910.

the obligations of state and non-state actors are of a different order.[52] Her view is that horizontal effect of human/constitutional rights will at most be a partial translation of the obligation into the private sphere: an obligation to "respect", but not to protect or fulfil the relevant standards.

(iv) Tortious or quasi-tortious relationships in private law- horizontal effect?
The distinction drawn by Lord Neuberger in *McDonald* between contractual and tortious relationships, in deciding whether a court is obliged to carry out a proportionality assessment to balance Convention rights, demonstrates that human rights retain a distinctive role in disputes between private landowners. Lord Neuberger recognised that Convention rights will be relevant between private parties in tortious or quasi-tortious relationships.[53] The position then arguably becomes the same whether the landlord or landowner is a public sector or private landlord, which is precisely the situation which Lord Neuberger was seeking to avoid in the specific circumstances of *McDonald*. The Supreme Court was not saying, however, that a trespasser would be afforded more protection than an assured shorthold tenant, so there is no exact equivalence between the two, and a direct parallel cannot be drawn. Since torts are common law claims, indirect horizontal effect whereby the Convention influences the development of the common law between private parties, is relevant to analysis relating to the incremental development of the common law as a result of the Convention.[54]

In some cases for possession against trespassers in the lower courts, the issue of horizontal effect has been assumed, and in others, it has not been discussed.[55] In two notable cases, it was suggested horizontal effect was possible. In *Malik v Fassenfelt*,[56] the view of Sir Alan Ward was that the court must consider a possession action by a private landowner in a similar way to one brought by a public landowner. In *Manchester Ship Canal Developments Ltd v Persons Unknown*,[57] Pelling J held that Article 8 was capable of being engaged in relation to possession claims brought by private landowners against trespassers following the reasoning of Sir Alan Ward in *Malik*, although it would only be in exceptional circumstances that trespassers' Convention rights would trump a landowner's Article 1 Protocol 1 rights.

Viewing the issue from this perspective, it might be thought that *McDonald* contains conflicting comments on the applicability of Article 8 to trespass claims. Lord Neuberger noted that there were a number of residential occupiers, including trespassers, bare licensees, sharers with the landlord, some temporary occupiers as well as mortgagors[58] who, whilst not being protected by the Protection from Eviction Act 1977, could be peaceably physically

[52] J. Wright, "A Damp Squib? The Impact of section 6 HRA on the Common Law: Horizontal Effect and Beyond" [2014] P.L. 289 at 291.
[53] *McDonald v McDonald* [2016] UKSC 28 at [46].
[54] See G. Phillipson and A. Williams, "Horizontal Effect and the Constitutional Constraint" (2011) 74 M.L.R. 878; G. Phillipson, "The Human Rights Act, "Horizontal Effect", and the Common Law: a Bang or a Whimper" (1999) 62 M.L.R. 824; J.F. Krahe, "The Impact of Public Law Norms on Private Law Relationships" [2015] E.J.C.L. 124, 150.
[55] See E. Lees, "Actions for Possession in the Context of Political Protest: the Role of Article 1, Protocol 1 and Horizontal Effect" [2013] Conv. 211.
[56] *Malik v Fassenfelt* [2013] EWCA Civ 798; [2013] 3 EGLR 99 at [28] and compare Lord Toulson at [45].
[57] *Manchester Ship Canal Developments Ltd v Persons Unknown* [2014] EWHC 645.
[58] As demonstrated in *Ropaigealach v Barclays Bank plc* [2000] Q.B. 263: see Lord Neuberger in *McDonald v McDonald* [2016] UKSC 28 at [42].

evicted without recourse to the court and would not have the opportunity to raise human rights considerations during possession proceedings.[59] Yet he had set out earlier in his judgment the view that chapter IV of the Housing Act 1988 imposes damages on a landlord who unlawfully ejects a residential occupier and extends the ambit of harassment. The justification for the differentiation of treatment of tortious and contractual relationships is unconvincing.[60] The consequence is that the judgment in *McDonald* is confined to ruling out applicability of the proportionality test in Article 8 in relation to possession claims by private landlords, but not in relation to trespass or other torts.

(v) Relevance of changing Government policy?

Lord Neuberger's analysis in *McDonald*[61] of White Papers[62] placed great importance on Government policy since 1977 to determine policy as interpretive tools. This raises the poignant question whether the reshaping or reformulation of policies enunciated in the White Paper: *Fixing our broken housing market*[63] published on 7 February 2017 could have an impact on the decision in *McDonald* and its application to future cases. The White Paper urges doing more to prevent homelessness and states that, "Our focus now is on ensuring that more people get the help they need before they become homeless, to prevent a crisis from happening in the first place".[64] If that approach had been adopted in *McDonald*, the analysis might have been different, and the court might have shown more flexibility in accommodating the needs of all parties rather than accepting the inevitability that Ms McDonald could become homeless. The White Paper recognised that losing a private sector tenancy is now the main cause of homelessness.[65] Yet the stated aim of the White Paper, "to prevent people reaching crisis point",[66] was conspicuously not the approach adopted in *McDonald*.

An additional problem regarding Article 8 protection of tenants is that homeless people are being increasingly discharged to the private sector. The Localism Act 2011 gave more scope to local authorities to place homeless people in private rented accommodation.[67] Tenants will accordingly not have the Article 8 protection which they would have if the landlord were a public or quasi-public authority. Some assistance will be provided by the Homelessness Reduction Act 2017, which states[68] that a person is threatened with homelessness if a valid notice has been given to that person under section 21 of the Housing Act 1988, which was the specific statutory provision in issue in *McDonald.* The Act will require councils to provide advisory services to those threatened with homelessness, as well as those who are homeless, and the Act significantly broadens the remit of those who must be helped. The government is

[59] *McDonald v McDonald* [2016] UKSC 28 at [42].
[60] *McDonald v McDonald* [2016] UKSC 28 at [27]. See also J. Dilcock and A. Oldfield, "Evicting Article 8: Human Rights and Possessions" (2016) 1635 E.G. 66.
[61] *McDonald v McDonald* [2016] UKSC 28 at [11]-[19].
[62] White Paper, *Housing: the Government's Proposals* (Cm.214) (1987) and White Paper, *Our Future Homes: Opportunity, Choice and Responsibility* (Cm.2901) (1995).
[63] White Paper, *Fixing our Broken Housing Market* (Cm.9353) (2017).
[64] White Paper, *Fixing our Broken Housing Market* para.4.50.
[65] White Paper, *Fixing our Broken Housing Market* para.4.49.
[66] White Paper, *Fixing our Broken Housing Market* para.4.53.
[67] Housing Act 1996 s.193 was amended by the Localism Act 2011 to include a power for local housing authorities to discharge the main homelessness duty by way of a private rented sector offer- see Housing Act 1996 s.193(7AA).
[68] Homelessness Reduction Act 2017 s.1(3), which is to become Housing Act 1996 s.175(5).

providing £61 million to councils to meet the costs incurred, which may be inadequate due to the extent of the problem. Councils will be required to start assessing someone at risk of being made homeless 56 days before losing their home rather the current period of 28 days.[69] These changes might potentially give grounds for the *McDonald* decision to be distinguished in future cases.

(c) Contextual horizontality

It is argued here that a more nuanced form of horizontality is required in order to recognise the intricacies and subtleties germane to making decisions on complex facts. More suited to such circumstances is what is termed here "contextual horizontality". Indeed, the corollary of the negative obligation model may be a form of contextual horizontality with the context decided by the Supreme Court without justification from the Human Rights Act itself. It is understandable in light of such a plethora of models[70] why courts choose not to engage in more abstract discussions of models of horizontality. Although the Supreme Court decision has been analysed in terms of remedial horizontality,[71] it is arguable that remedial horizontality is nullified by Lord Neuberger's judgment, because "To hold otherwise would involve the Convention effectively being directly enforceable as between private citizens so as to alter their contractual rights and obligations, whereas the purpose of the Convention is, as we have mentioned, to protect citizens from having their rights infringed by the state".[72]

Lord Neuberger in *McDonald* is not undertaking what Mullender terms "qualified deontology". Whilst Article 8 purports to uphold a set of rights established regardless of consequences, paragraph 2 of Article 8 allows for Article 8's restriction by reference to consequentialist considerations ("legitimate aims"), provided there is a pressing social need to do so and the restriction is proportionate. The court's capacity to make policy decisions in Convention cases will be more constrained than when engaging in ordinary common law adjudication, but *McDonald* exemplifies the consensual, regulatory framework in which no qualified deontology is possible.

It is noteworthy that the Court of Appeal in *Jones v Canal and River Trust*[73] placed the emphasis on context, although the case did concern a public waterways authority. McCombe LJ, with whom the other two judges agreed, distinguished *Pinnock* and the other public authority cases, as not demonstrating a true exception to the requirement of a structured approach to the proportionality assessment,[74] and on the facts of their own case, focused on context by stating, "I do not consider the overall context of the proceedings allowed the judge to summarily dismiss the Article 8 defences as he did."[75] The view of the Court of Appeal was that the relative weight of the competing interests of a boat operator and his personal circumstances might give rise to a seriously arguable Article 8 defence.

[69] See Housing Act 1996 s.175(4).
[70] Leigh distinguished six types of horizontal effect: 'direct statutory horizontality', 'public liability horizontality', 'intermediate horizontality', 'remedial horizontality', 'indirect horizontality', and 'full or direct horizontality': see I. Leigh, "Horizontal rights, the Human Rights Act and privacy: lessons from the Commonwealth?" (1999) 48 I.C.L.Q. 57.
[71] S. Nield, "Shutting the Door on Horizontal Effect: McDonald v McDonald" [2017] Conv. 60, 66.
[72] *McDonald v McDonald* [2016] UKSC 28 at [41].
[73] *Jones v Canal and River Trust* [2017] EWCA 135.
[74] *Jones v Canal and River Trust* [2017] EWCA 135 at [52].
[75] *Jones v Canal and River Trust* [2017] EWCA 135 at [54] (McCombe LJ).

In relation to private parties, contextual horizontality is evident in *Watts v Stewart*[76] where Sir Terence Etherton, delivering the sole judgment of the Court of Appeal, struggled to derive clear guidance from Lord Neuberger's judgment in *McDonald* and applied horizontal effect to the dispute between the private parties. He recognised the fact that where Article 8 is engaged, this necessitated that a proportionality assessment was relevant and should be applied. This acknowledgement remedies a conceptual weakness in the *McDonald* judgment, because an interference with Article 8 can only be assessed by undertaking a proportionality assessment.

In this important respect, *Watts v Stewart*[77] is a significant case on the application of human rights law to private bodies and charities. The appellant's arguments were hindered by a concession made in the county court that the trustees of the charity were not a public authority. The appellant sought to withdraw that concession in the Court of Appeal, but the court held that this was a mixed question of fact and law and that it was not appropriate to reopen the issue. Rather, the court held that the appellant, Ms Watts, the occupier of an almshouse, was a beneficiary under the charitable trust; she did not have exclusive possession of the property and was a licensee not a tenant. Exclusion of security of tenure for occupiers of almshouses was a proportionate means of achieving a legitimate aim.

After a fairly comprehensive review of *McDonald*, Sir Terence Etherton stated concisely that, "The question as to when art.8 is engaged therefore remains unclear on the authorities. However, for the purposes of the present case we are prepared to proceed on the assumption that its facts do fall within the ambit of art.8 for the purposes of engaging art.14".[78] The effect of this, however, is to blunt much of the harshness of the perceived ratio of *McDonald*, and it is significant that the Court of Appeal could not ascertain clear guidance from *McDonald*. If *McDonald* is confined to its specific facts and the specific statutory provision of section 21 of the Housing Act 1988, the consequence of *Watts* is that Article 8 can be applicable in other factual and legal scenarios.

Sir Terence Etherton was viewing the issue of possession through the prism of having to be Convention compliant and took a broad-brush approach. He did not distinguish *Southward Housing Co-operative Ltd v Walker*[79] on the basis that it involved a public authority. He had no hesitation exploring the issue of whether there was justification for differential treatment of almspersons and whether such treatment was a proportionate means of achieving a legitimate aim.[80] The ratio of *McDonald* did not prevent an exploration of the issue of proportionality under Article 14 between private landowners. Quoting from *Blecic v Croatia*,[81] Sir Terence Etherton assumed that *Blecic* applied in the same way as far as horizontal effect was concerned. "… the state enjoys an equally wide margin of appreciation as regards respect for the home in circumstances such as those prevailing in the present case,

[76] *Watts v Stewart* [2016] EWCA Civ 1247.
[77] *Watts v Stewart* [2016] EWCA Civ 1247.
[78] *Watts v Stewart* [2016] EWCA Civ 1247 at [75].
[79] *Southward Housing Co-operative Ltd v Walker* [2015] EWHC 1615; [2016] Ch. 443.
[80] *Watts v Stewart* [2016] EWCA Civ 1247 at [84]-[87].
[81] *Blecic v Croatia* (2005) 41 E.H.R.R. 13.

in the context of article 8".[82] Applying this approach, a court will only intervene if the situation is manifestly disproportionate to the legitimate aim being pursued, but Sir Terence Etherton did equate proportionality analysis for private and public authority landowners.

Sir Terence Etherton appears in his reasoning to be exercising what Somers terms "system responsibility": the responsibility of the state to protect human rights in horizontal relationships.[83] Somers' view is that it was only a matter of time before human rights as legally enforceable instruments would be applied by a court in horizontal relationships, because the notion of human rights stems from social-contract theory, and human rights in this theory essentially have a horizontal dimension.[84] He did acknowledge that Article 8 cannot be applied directly in horizontal relations, because this must be precluded due to the effect on legal certainty: one cannot expect citizens to know the evolutions in the jurisprudence of the Strasbourg Court, especially not in relation to topics where there is no jurisprudence of the Court at hand.[85]

In addition, Sir Terence Etherton is adopting public law norms as an overarching system of values along the lines advocated by Krahe.[86] Krahe's view in relation to indirect horizontal effect is that it can be explained either as a result of the objective nature of public law norms as an overarching system of values (what he terms "indirect Model A"), which would appear to be the model adopted in *Watts v Stewart*,[87] or by focusing instead on the subjective nature of public law norms as rights to respect, protection and fulfilment (referred to as "indirect Model B").[88] With increased recognition that human rights norms, which flow from the relationship between citizen and state and are thus public in nature, affect the private sphere, the borders between public and private law are becoming progressively blurred. An advantage of adopting a public norms framework is that such a framework avoids straitjacketing the courts to one of the theories of horizontality whilst enabling them to retain flexibility.

According to Krahe, English courts are able to adhere to indirect Model A, because the European Court of Human Rights' jurisprudence does not have binding force in English law, and the English judiciary's general willingness to follow Strasbourg is increasingly being called into question.[89] The focus that indirect Model B places on human rights as subjective public law rights, although uncontroversial in the German and European legal contexts, is alien to English law's traditional emphasis on liberties rather than rights. In Krahe's view, indirect Model B, which emphasises the courts' obligations to respect and protect human rights, would accomplish several objectives: it would provide sound doctrinal footing, bring English law into line with the European Court of Human Rights, render the balancing process between competing rights more predictable, and serve to structure the interpretation and development of both common law and statute. Sparing use of public law norms as standards

[82] *Watts v Stewart* [2016] EWCA Civ 1247 at [85].
[83] S. Somers, "Protecting Human Rights in Horizontal Relationships by Tort Law or Elaborating Tort Law from a Human Rights Perspective" [2015] E.H.R.L.R. 149.
[84] S. Somers, "Protecting Human Rights in Horizontal Relationships" [2015] E.H.R.L.R. 149 at 153.
[85] S. Somers, "Protecting Human Rights in Horizontal Relationships" [2015] E.H.R.L.R. 149 at 160.
[86] J.F. Krahe, "The Impact of Public Law Norms on Private Law Relationships" [2015] E.J.C.L. 124.
[87] *Watts v Stewart* [2016] EWCA Civ 1247.
[88] J.F. Krahe, "The Impact of Public Law Norms on Private Law Relationships" [2015] E.J.C.L. 124 at 125.
[89] J.F. Krahe, "The Impact of Public Law Norms on Private Law Relationships" [2015] E.J.C.L. 124 at 153.

for the development of subjective private law rights does, however, preserve the distinction between public and private law,[90] which is important for English cases to preserve.

Effect of vulnerability as a heuristic device?

The next section examines whether vulnerability of an occupier is a factor in encouraging courts to give greater weight to human rights considerations. When Lord Neuberger stated in *Pinnock* that the suggestion put forward on behalf of the Equality and Human Rights Commission, that proportionality is more likely to be a relevant issue "in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty",[91] he opened the door to the proportionality test in Article 8 cases being accorded greater weight and significance in some cases involving public authority landlords. His statement is notably broader than the definition of disability in the Equality Act. In such cases, in Lord Neuberger's view, it will be harder for the landlord to satisfy the court of the proportionality issue. Lord Neuberger repeated this view in *Aster Communities Ltd v Akerman-Livingstone*,[92] citing from his earlier judgment in *Pinnock*, but Lord Neuberger has not applied this to cases involving private landowners. If someone in Ms McDonald's position due to her mental health issues and vulnerability to commit suicide could not establish that the decision was disproportionate, it is difficult to envisage circumstances where disproportionality could be established. However, a common underlying theme in cases where the Convention has been considered applicable between private landowners involves some element of vulnerability broadly defined and tacit recognition of helping those in need.

In contrast to *McDonald*, *Watts v Stewart*[93] does demonstrate the flexibility needed to help the vulnerable where necessary. The principal object of the charity (of which the claimants were trustees) was to provide accommodation in almshouses to "poor single women of not less than 50 years of age" who lived in the parish of Ashtead. The case raised issues relevant to the status of 35,000 almshouse residents of 1,700 almshouses, so was of considerable potential significance. The purposes of the charity included "relieving either generally or individually persons … who are in conditions of need, hardship or distress by making grants of money or providing or paying for items, services or facilities calculated to reduce the need, hardship or distress of such persons". The charity was clearly helping vulnerable people, although Mrs Watts' specific circumstances did not evoke sympathy, because she had acted in an anti-social and aggressive manner and in breach of the terms of the Appointment Letter.

The emerging concept involved in this discussion of vulnerable groups has been examined by Peroni and Timmer,[94] who trace it back to the Roma minority in *Chapman v United*

[90] J.F. Krahe, "The Impact of Public Law Norms on Private Law Relationships" [2015] E.J.C.L. 124 at 154. See also A.L. Young, "Horizontality and the Constitutionalisation of Private Law" in K.S. Ziegler and P.M. Huber, *Current Problems in the Protection of Human Rights: Perspectives from Germany and the UK* (Oxford, Hart Publishing, 2013) Ch 5 at 70 who analyses the extent to which horizontality can lead to the constitutionalisation of the content of private law.
[91] *Manchester City Council v Pinnock* [2010] UKSC 45 at [64].
[92] *Aster Communities Ltd v Akerman-Livingstone* [2015] UKSC 15 at [56].
[93] *Watts v Stewart* [2016] EWCA Civ 1247.
[94] L. Peroni and A. Timmer, "Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law" [2013] I.J.C.L. 1056.

Kingdom,[95] who were in need of special protection. The concept has extended to include people with mental disabilities[96] as a particularly vulnerable group in society who have suffered considerable discrimination in the past, as well as to people with HIV and asylum seekers. Peroni and Timmer analyse vulnerability as a heuristic device[97] and acknowledge that the relationship between vulnerability and human rights is a contested terrain. Since there is recognition that human rights may fail to adequately protect those who are marginalised, various Conventions endeavour to protect these interests specifically.[98] They argue that in response to the exclusions under human rights law, the Strasbourg Court has been forced to attend to the constructed disadvantage of certain groups, and in so doing, has deployed the concept of group vulnerability.[99] Prejudice, stigmatisation, social disadvantage and material deprivation are all indicators of vulnerability.

Using Fredman's multi-dimensional characterisation of substantive equality,[100] Peroni and Timmer argue that the Court's insertion of the notion of vulnerable groups has addressed substantive equality's four chief aims: participation, transformation, redistribution, and recognition.[101] The case law examined by Peroni and Timmer demonstrates that the Court has embraced several aspects of substantive equality by establishing positive obligations towards vulnerable groups in both the context of Article 14 and of freestanding Convention rights in Articles 8 and 3, which may not associate themselves with equality-based reasoning as easily as Article 14. Moreover, the Court's recognition of positive obligations towards members of particularly vulnerable groups has often involved "special consideration to" or "special protection of" their "specificities" and "needs".[102] This kind of reasoning reflects an asymmetry that characterises substantive equality: when it comes to the most vulnerable, states are obliged to provide a level of protection that is more responsive or tailored to their particular needs and concerns.[103]

Vulnerability was evident in *Zehentner v Austria*,[104] which concerned private parties, where the complainant suffered from severe mental illness and lacked legal capacity. Judicial sale of her home and eviction to satisfy payment orders for debts were held to violate Article 8 and

[95] *Chapman v United Kingdom* (2001) E.H.R.R. 18. Peroni and Timmer at 1065 trace its evolution through *DH v Czech Republic* (2008) 47 E.H.R.R. 3; *Sampanis v Greece* (2008) (32526/05); *Orsus v Croatia* (2011) 52 E.H.R.R. 7; *VC v Slovakia* (2014) 59 E.H.R.R. 29; *Kiyutin v Russia* (2011) 53 E.H.R.R. 29; *MSS v Belgium* (2011) 53 E.H.R.R. 2.

[96] *Kiss v Hungary* (2013) 56 E.H.R.R. 38 at [42] which concerned the disenfranchisement of people with mental disabilities in Hungary where the court embraced a "social model" of disability recognising society's negative attitude as the main factor disabling and excluding people.

[97] L. Peroni and A. Timmer, "Vulnerable Groups" [2013] I.J.C.L. 1056 at 1059-1060 deriving the term from M.A. Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" 20 Yale J.L.& Feminism 1, 9 (2008-2009).

[98] The Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Elimination of Racial Discrimination and the Convention on the Rights of the Child.

[99] L. Peroni and A. Timmer "Vulnerable Groups" [2013] I.J.C.L. 1056 at 1062.

[100] S. Fredman, *Discrimination Law*, 2nd edn (Oxford, OUP, 2011) at 25-33.

[101] L. Peroni and A. Timmer, "Vulnerable Groups" [2013] I.J.C.L. 1056 at 1074.

[102] L. Peroni and A. Timmer, "Vulnerable Groups" [2013] I.J.C.L. 1056 at 1076 citing *Chapman v United Kingdom* (2001) E.H.R.R. 18; *MSS v Belgium* (2011) 53 E.H.R.R. 2 and *Yordanova v Bulgaria* (2012) (25446/06).

[103] L. Peroni and A. Timmer, "Vulnerable Groups" [2013] I.J.C.L. 1056 at 1076.

[104] *Zehentner v Austria* (2011) 52 E.H.R.R. 22.

Article 1 Protocol 1 due to a lack of procedural safeguards and her mental incapacity. In *McDonald*, Lord Neuberger distinguished *Zehentner* on the grounds that Austria did not challenge the contention that Article 8 was engaged and that the case did not concern a landlord's right to possession.[105] However, if the *Zehentner* approach had applied in *McDonald*, lack of procedural safeguards might have meant that more exhaustive steps would have been necessary to safeguard Ms McDonald's position as a result of arrears in her parents' mortgage payments allowing further postponement of the order for possession to ensure a smooth transition towards Ms McDonald renting another property, since her rent was in any event covered by housing benefit. Because the case concerned proceedings prior to recovery of mortgage arrears, there could have been consideration of the procedural side-stepping of the forbearance mechanisms in section 36 of the Administration of Justice Act 1970.[106] This may not, however, have assisted, because the pre-condition for exercising the powers of adjournment of proceedings, staying or suspending execution of the judgment or order or postponing the date for delivery of possession are dependent on the mortgagor being likely to be able within a reasonable period to pay sums due under the mortgage. In addition, Ms McDonald should have been given an additional two months as an unauthorised tenant under section 1 of the Mortgage Repossession (Protection of Tenants etc) Act 2010 to vacate her home, but there was no consideration of this in *McDonald*.[107]

McDonald demonstrates that where the Equality Act 2010 is not specifically pleaded in English cases, the notion of vulnerability does not yet have a freestanding place in English law in relation to private parties. As a result, the redistributive aspect of substantive equality to which Peroni and Timmer refer, resulting in the socio-economic nature of the positive duty imposed on states,[108] has no Supreme Court backing in relation to private landowners. By way of contrast, underlying the judgment in *Watts* is a sensitivity of approach which appears implicit in the analysis, even if it is not articulated in the decision itself, such that an asymmetrical approach could emerge in deserving cases, even though *Watts* itself was not such a case.

Conclusions

The Human Rights Act envisages some role for Convention rights in litigation between private parties, even though the Act leaves the extent of this role unclear.[109] The factual matrix of a human rights challenge to a statutory provision, which gives the landlord an absolute right to possession, needs be differentiated from other cases of private land law disputes where a flexible and contextual approach to horizontality is adopted. Such an

[105] *McDonald v McDonald* at [51]. Lord Neuberger also distinguished at [52] *Zrilic v Croatia* (2013) (46726/11) on similar grounds. *Brezec v Croatia* [2014] H.L.R. 3 at [53] was distinguished on the grounds it had been a state-owned company. *Belchikova v Russia* (2010) (2408/06) at [54] was distinguished on the ground that there was no challenge to Article 8 being invoked. *Mustafa v Sweden* [2008] 52 E.H.R.R. 24 at [56]-[58] was distinguished, because it only established that Article 8 was engaged and that the Swedish government had failed to enact legislation to satisfy Article 10.
[106] S. Nield, "Thumbs Down to the Horizontal Effect of Article 8" [2015] Conv. 77, 84.
[107] S. Nield, "Thumbs Down to the Horizontal Effect of Article 8" [2015] Conv. 77, 84.
[108] L. Peroni and A. Timmer, "Vulnerable Groups" [2013] I.J.C.L. 1056 at 1077 analyse *Yordanova v Bulgaria* (2012) (25446/06) at [130] where the court stated, "[A]n obligation to secure shelter to particularly vulnerable individuals may flow from article 8 in exceptional cases".
[109] G. Phillipson and A. Williams, "Horizontal Effect and the Constitutional Constraint" (2011) 74 M.L.R. 878 at 880.

approach enables judges to avoid being placed in a "straitjacket" whereby their judgments are inevitably confined within pre-determined guidelines or principles. At present, following the decision in *McDonald*, there is little scope for a challenge to a landlord's absolute right to possession at the end of an assured shorthold tenancy under section 21 of the Housing Act 1988. This is because there is no requirement for a private landlord to give grounds for possession. In the absence of such a requirement to specify grounds, it is difficult for a court to establish proportionality in circumstances where the Equality Act 2010 is not pleaded, especially as there is no judicial backing for the proposition that section 3 of the Human Rights Act mandates an implied term that possession cannot be ordered unless it is proportionate to do so. The Supreme Court would have preferred a declaration of incompatibility rather than imply such a term.

The decision in *McDonald* may reflect the biases of the judges, many of whom may be private landlords themselves, who might take the view that public authorities can bear the expense and burden of dealing with Article 8 defences in exceptional cases for deserving tenants, but that private landlords should not be burdened by such social responsibility. The way forward for a future decision challenging an absolute right to possession could be to distinguish *McDonald* by championing changes in Government policy and challenging any side-stepping of mortgage possession proceedings in a similar factual scenario to *McDonald*, such a scenario being unusual in cases where landlords are seeking possession. There could also be a challenge to the maximum postponement period of six weeks, for example, if a tenant needs to apply for housing benefit in order not to be made homeless, or if further time is needed so that state mechanisms for helping those most in need would be triggered by new formalised procedures under the Homelessness Reduction Act 2017.

The courts' apparent lack of engagement with theories of horizontality is deliberate, which may be to allow judicial flexibility and contextualised adjudication or alternatively, it may be to close down any discussion, because judges do not welcome this power. There are, however, moral and humanitarian grounds for incorporating human rights into disputes between private landowners, even though such incorporation is necessarily at the expense of certainty. The tenant who is about to become a property outsider is desperately trying to crack the glass ceiling to remain a property insider.[110] Seeking to rely on Article 8 is often a last resort and a cry for help where society is not caring adequately for the most vulnerable. Bilateral initiatives are needed whereby the state safeguards the position of the private landlord, for example, paying financial compensation (the equivalent of housing benefit) to a landlord for whom there is a delay in obtaining possession, and also protects vulnerable tenants who need longer to resolve their housing problems in order to avoid becoming homeless.

Flexibility to shift where necessary from a property absolutist stance to that of a property relativist basing ownership on qualified entitlements would enable the economic and social realities faced by tenants to be evaluated and would offer a welcome move away from the blunt instrument of a possession order. Some process of fine-tuning and moulding is needed to prevent the scales being weighted too heavily in favour of a landlord without the possibility in exceptional cases of a nuanced or balanced approach. As Rose has argued, the problem of substituting "mud" rules for "crystal" ones is that we substitute fuzzy, ambiguous rules for what seem perfectly clear demarcations of entitlement.[111] However, friction in

[110] See L. Fox O'Mahony, "Property Outsiders and the Hidden Politics of Doctrinalism" (2014) C.L.P. 409.
[111] C.M. Rose, "Crystals and Mud in Property Law" 40 Stan.L.Rev. 577, 578 (1987-1988).

English land law in relation to private landowners' disputes between human rights, autonomy and equality on the one hand, and certainty, efficiency and crystalline rules to discourage litigation on the other, reveals deep tensions between justice-based and certainty-based land law.