

IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION

The Rolls Building

4th April 2012

Before :

MR. JUSTICE ARNOLD

OLYMPIC DELIVERY AUTHORITY	Claimant
- and -	
PERSONS UNKNOWN	Defendants

Transcribed by BEVERLEY F. NUNNERY & CO
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

MR. T. FANCOURT QC (instructed by Berwin Leighton Paisner LLP) appeared on behalf of the Claimant.

MS. K. ANDREWS and MR M. DOYLE appeared in person as Interested Parties.

Crown Copyright ©

MR. JUSTICE ARNOLD:

1. This is an application by the Olympic Delivery Authority ("ODA") to restrain unknown defendants described as "persons unknown entering or remaining without consent on land known as Porters Field and surrounding land forming part of Leyton Marsh in connection with protest activities." I will refer to the defendants, without intending any discourtesy, as "the protesters".
2. The background to the application is as follows. The ODA is an executive non-departmental public body and statutory corporation established by section 3 of the London Olympic Games and Paralympic Games Act 2006 to be responsible for the planning and delivery of the Olympic Games 2012, including the development and building of Games venues. Upon completion, the venues are handed over to the

London Organising Committee of the Olympic and Paralympic Games ("LOCOG"), which is responsible for preparing and staging the Games. The Games, as everybody knows, are scheduled to commence in approximately 16 weeks' time. ODA and LOCOG work in tandem to ensure that the venues for the Games will be ready on time and to the standard required by statute, contract and the expectations of the various stakeholders, including the International Olympic Committee.

3. The present application is concerned with some land known as Porters Field, which forms part of a larger area of land known as Leyton Marsh owned by the Lee Valley Regional Park Authority ("the Park Authority"), which was established by the Lee Valley Regional Park Authority Act 1966. The piece of land with which we are particularly concerned, referred to as "the ODA Site", is a rectangular parcel of land which is shown (for those who have access to the documentation) hatched in red on the plan which is annexed to the particulars of claim in this matter, and also to the draft order accompanying the application notice.
4. The ODA Site is intended to be used as a temporary basketball practice facility consisting of two basketball courts together with ancillary changing, catering and other facilities for use as practice courts by national basketball teams competing in the Games. The ODA's interest in the Site comes about by virtue of a Licence Agreement dated 7 July 2011 between the Park Authority and the ODA under which the Park Authority granted the ODA an exclusive licence to occupy the ODA Site to carry out works and use the ODA Site during the period 1 February 2012 to 15 September 2012. Subsequently that was varied by a Deed of Variation dated 10 November 2011 so that the licence period started on 1 March 2012 and ended on 15 October 2012. The Licence Agreement provides for access from the public highway known as Lea Bridge Road to the ODA Site for vehicles and pedestrians via the car park of the Lee Valley Ice Centre, which is an ice rink owned and operated by the Park Authority, and along an unadopted gravel roadway known as Sandy Lane, as also shown on the plan.
5. By an agreement between the ODA and LOCOG dated 22 November 2011, the ODA granted LOCOG a sub-licence in respect of the ODA Site. Under the terms of that agreement, the ODA is obliged to carry out works essentially consisting of the erection of the basketball facility and to complete the same by 7 June 2012. LOCOG is to be granted access to the ODA Site from the following day, 8 June 2012.
6. The ODA, under the terms of the licence granted by the Park Authority, entered into occupation of the ODA site by its contractors, a company called Nussli (Schweiz) AG, on 1 March 2012 and started the works to build the basketball facility on that date. I should observe at this point that, as may be expected, an application for planning permission was required for this purpose. Planning permission was granted on 8 February 2012. That permission expires on 15 October 2012 and it requires the removal of the basketball facility and reinstatement of the land by that date. Condition 19 of the planning permission limits construction work to the hours of 8 am to 6 pm Monday to Friday other than bank or public holidays, and 8 am to 1 pm on Saturdays.
7. The project programme for the erection of the basketball facility provides for the works to commence on site on 1 March 2012 (as indeed they did) and for those works to be completed by 30 May 2012. It can therefore be seen that there is only one week's leeway between the scheduled completion of the works and the date of

handover of the site to LOCOG. Once the site is handed over to LOCOG, LOCOG will need to fit out the basketball facility so that it is suitable for use by national teams for practice with effect from 16 July 2012, i.e. 11 days before the Games are scheduled to commence.

8. The use of the ODA Site as a basketball facility, and the grant of planning permission for that purpose, is something that has been opposed by a number of local residents. They have formed a protest group under the name "Save Leyton Marsh". That group has a website at www.saveleytonmarsh.wordpress.com and a presence on Facebook. Since planning permission was granted, those protesters have held a series of meetings and rallies on the Park Authority's land surrounding the ODA Site in the vicinity of Sandy Lane to protest against the ODA's use of the Site.
9. Beginning on about 20 March 2012 there were some short term obstructions of the access route by protesters standing on Sandy Lane in the path of delivery lorries for periods of up to 30 minutes at a time. As will be appreciated, in order to accomplish the works, the contractors have a considerable number of lorries arriving and departing each day during the permitted hours, making deliveries and carrying spoil away and so forth. On 23 March 2012 a group of protesters obstructed the access route for several hours by playing a game of boules on Sandy Lane. During this period the delivery vehicles were unable to access the ODA Site at all, and that eventually brought work on the Site to a standstill.
10. At around the same time, it appears that a link was made between the local protesters and the Occupy London protest movement which, since the events at St. Paul's Churchyard, has been occupying a site in Finsbury Square. On 24 March 2012 a march took place from Finsbury Square to Leyton Marsh. Since then, a number of protesters have established a camp on part of Porters Field. I hasten to emphasise that the camp is not on the ODA Site itself, but it is adjacent to it.
11. On the morning of 26 March 2012 the lock on the gate between the Ice Centre car park and Sandy Lane was found to have been glued shut, and it is apparent that this had been done with the intention of blocking access to delivery lorries. Despite the lock being forcibly opened, attempts by the delivery lorries to access the Site were prevented by protesters lying under and in front of the delivery lorries. Since then, the position has been that deliveries to the Site have been suspended until such time as access can be assured. Presently, therefore, there is no work being undertaken on site.
12. In addition to the simple obstruction of access to the Site in the manner that I have described, there is evidence before me that employees of the ODA's contractors and subcontractors have been threatened, harassed and intimidated by protesters. Protesters have subjected them to foul and abusive language; have followed them to their cars in the Ice Centre car park and threatened to cause damage; and have spat at them, pushed them and, according to the evidence, on one occasion hit an employee with a piece of fencing.
13. The ODA's concern in the present situation is that, as a result of the inability of its contractors to access the site, costs are being incurred at a substantial rate. The evidence before me is that the costs are approximately £8,000 per day, and that as at the date of the witness statements that were made on behalf of the ODA, it had

incurred costs of approximately £170,000 in connection with storage of materials which could not be delivered, wastage of materials, transport charges and additional security costs. Obviously, the longer the situation continues, the more the costs will run up.

14. Furthermore, at present the works are at least seven days behind schedule. That is something that can be made up by 7 June 2012 if a greater number of workmen are employed, but obviously the longer the present situation continues, and the longer the delay to the construction works, the greater the risk to the ability of the ODA to deliver the basketball facility to LOCOG on time. That is particularly so given the restrictions on the hours of work under the planning permission condition to which I referred earlier. The ODA is extremely concerned that failure to deliver the basketball facility on time would mean that it had failed to achieve one of its statutory objects and that this would have severe financial and reputational consequences for both the ODA and LOCOG if that were to take place. It is in those circumstances that the present application has been made.
15. It is important to note that the application has been made on short notice in the following manner. On Monday, 2 April 2012, the ODA made a without notice application to Master Marsh, who granted an order for substituted service of the claim form, particulars of claim, and the present application for an injunction by fixing copies of the documents conspicuously on the fence surrounding the land in question. As I understand it, that was done between about 7 and 8 o'clock in the evening on Monday. Accordingly, there is no dispute that the present application has been made on short notice.
16. I have heard in opposition to the application from two local residents, who do not consider themselves to be within the description of the defendants to the application, but are nevertheless concerned by the ODA's activities on the Site, and concerned by the present application. The foremost point that they have made is that the application has been made on short notice. I have been told that they wish to have a chance to obtain proper legal advice as to their position and the interests of local residents more generally in relation to the present application. That is, of course, something I accept that they should have the opportunity to do. The question before me, however, is how to proceed today in the circumstances disclosed in the evidence before me.
17. I turn, therefore, to consider the legal claims that are made by the ODA. The ODA's primary case before me today is based on the torts of private nuisance and public nuisance. Dealing first with private nuisance, the ODA's contention is that the conduct of the protesters in preventing the ODA from having access to the ODA site is an actionable nuisance. Counsel for the ODA submits that an exclusive right to possess or occupy land is a sufficient interest in the land to found an action in nuisance. That submission is supported by the speech of Lord Hoffmann in *Hunter v Canary Wharf Ltd* [1997] AC 655 at 704B-F and by the decision of the Court of Appeal in *Pemberton v Southwark London Borough Council* [2001] 1 WLR 1672. In the latter case the status of a tolerated trespasser was held to be sufficient to found a claim in nuisance. Counsel for the ODA accordingly submits that the ODA's interest as an exclusive licensee of the Park Authority under the Licence Agreement is a sufficient interest to found a claim in private nuisance.

18. A cause of action in nuisance exists against the actual wrongdoer. Counsel for the ODA submits that even a trespasser on the land in question may be the subject of a claim in nuisance. That proposition is supported by *Clerk & Lindsell on Torts* (20th ed) at paragraphs 20.30 and 20.70, and by the statement of Devlin J in *Esso Petroleum Co v Southport Corporation* [1956] AC 218 at 224-225. Accordingly, counsel for the ODA submits that the protesters' conduct in deliberately preventing the ODA from gaining access to the Site is an actionable nuisance. The effect of that conduct is not merely to diminish the value of the ODA's exclusive licence for the period of the licence, but it is also to imperil the ODA's project of erecting the basketball facility for use by the teams participating in the Games.
19. So far as public nuisance is concerned, counsel for the ODA points out that it is a civil wrong and actionable as such where a private individual has suffered particular damage over and above the general inconvenience suffered by the public when there is a public nuisance such as obstruction of a public highway. That is a proposition which is supported by *Clerk & Lindsell* at paragraphs 20.03 and 20.181. Accordingly, insofar as the protesters are obstructing Sandy Lane, and insofar as there is a public right of way over Sandy Lane, as to which the evidence before me is unclear, then counsel submits that that will constitute a public nuisance which is actionable at the suit of the ODA as someone who suffers particular damage as a result. If the Lea Bridge Road were to be blocked, then the same consequence would follow.
20. I should also mention for completeness that the ODA contends that the protesters' conduct in abusing, threatening and assaulting the ODA's contractor and its employees constitutes harassment, which is an offence under the Protection From Harassment Act 1997 and also constitutes the tort of intimidation. For the purposes of today's application, however, counsel for the ODA has made it clear that he primarily relies upon the ODA's claims in private and public nuisance, and in particular the claim in private nuisance.
21. Counsel for the ODA submits that, if one leaves on one side for the moment the human rights aspects of the present matter, then, as a matter purely of ordinary domestic tort law, the ODA's case is really unanswerable. I accept that submission. I have not seen any material which would suggest that the protesters have any defence to the claim in private nuisance, other than their claims under the Human Rights Act 1998. It is to that matter that I therefore turn next.
22. Counsel for the ODA submitted that the relief which the ODA was seeking by the present application was an injunction to restrain unlawful activities and not lawful protest. Accordingly, he submitted that the nature of the application was not such as to engage the protesters' rights under Articles 10 and 11 of the European Convention on Human Rights. Article 10 is, of course, the right to freedom of expression and Article 11 is the right to freedom of assembly. In the present circumstances, however, I am not persuaded that the protesters' rights under Articles 10 and 11 are not engaged.
23. It seems to me that there is abundant evidence that the protesters are seeking to exercise their rights of freedom of expression and of freedom of assembly. It may well be the case, as one of the residents who addressed me pointed out, that the protesters are not a single organisation, but have a diversity of viewpoints and a diversity of objectives. Even so, as it seems to me they are all seeking in their diverse

ways, and for their diverse reasons, to express views about what is being done on Porters Field. It appears that some are concerned about the situation from a planning perspective, while others may have wider and more diffuse political concerns. Be that as it may, they are seeking by their protest to articulate their views and to draw attention to them. Insofar as they are doing so by obstructing access to the ODA Site, it seems to me that they are choosing a manner of drawing attention to their activities which is designed to facilitate their exercise of those rights. Accordingly, I proceed on the basis that their Convention Rights are engaged.

24. In those circumstances, it seems to me that the approach laid down by Lord Steyn where both Article 8 and Article 10 ECHR rights are involved in *Re S* [2004] UKHL 47, [2005] 1AC 593 at [17] is applicable in the present case. Here we are concerned with a conflict between the ODA's rights under Article 1 of the First Protocol, and the protesters' rights under Articles 10 and 11. The correct approach, therefore, is as follows. First, neither the ODA's rights under Article 1 of the First Protocol, nor the protesters' rights under Articles 10 and 11 have precedence over each other. Secondly, where the values under the respective Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test, or ultimate balancing test, must be applied to each.
25. In considering the proportionality of the injunction sought by the ODA it is necessary to have regard to the precise terms of that injunction. As a result of discussion between counsel for the ODA and myself in the course of his opening submissions, counsel has prepared a revised draft which meets certain objections which I raised to the original draft order. As revised, what is sought is an order that the defendants must not:

"1 Obstruct or try or threaten to obstruct in any way whatsoever the free passage of the employees, agents, contractors, and invitees of the claimant or of the London Organising Committee of the Olympic and Paralympic Games ("LOCOG") whether on foot or in vehicles to and from the public highway known as the Lea Bridge Road through the Lee Valley Ice Centre car park along Sandy Lane and into and out of land edged and hatched in red on the plan annexed to this order, the ODA land.

2 Encourage or incite others to obstruct or to try or threaten to obstruct in any way whatsoever the passage of the employees, agents, contractors and invitees of the claimant and LOCOG whether on foot or in vehicles too and from the public highway known as the Lea Bridge Road through the Lee Valley Ice Centre car park along Sandy Lane into and out of the ODA land.

3 Obstruct or try or threaten to obstruct in any way whatsoever on any part of the Lee Valley Regional Park or on the highways adjoining or leading to the Lee Valley Regional Park the carrying out by the employees, agents and contractors of the claimant, or LOCOG of their

duties in connection with the construction works or the dismantling and remediation works on the ODA land.

4 Encourage or incite others to obstruct or try or threaten to obstruct in any way whatsoever on any part of the Lee Valley Regional Park or on the Highways adjoining or leading to the Lee Valley Regional Park, the carrying out by the employees, agents and contractors of the claimant, or LOCOG of their duties in connection with the construction works or the dismantling and remediation works on the ODA land.

5 Enter or threaten to enter the ODA land or damage or attempt to break through the fence surrounding the ODA land or the gates giving access to the ODA land or attaching themselves by any means to the fence or gates or cover up any health and safety notices on the fence or gates.

6 Encourage or incite others to enter or try or threaten to enter the ODA land or damage or attempt to break through the fence surrounding the ODA land or the gates giving access to the ODA land, or attach themselves by any means to the fence or gates or cover up any health and safety notices on the fence or gates."

Then lastly a supplemental provision:

"7 Remove or encourage or incite others to remove this order from posts on the land to which it is attached save for the purpose of reading the order and then replacing the order in the plastic envelope attached to the post."

26. In considering the proportionality of that order, I take into account the guidance recently given by the Master of the Rolls delivering the judgment of the Court of Appeal in the case concerning the St. Paul's Churchyard protest, *The Mayor Commonalty and Citizens of London v Samede* [2012] EWCA Civ 160 at [39]:

"As the judge recognised, the answer to the question which he identified at the start of his judgment is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public."

That statement was made in the context of a claim for possession of the land in question, but it seems to me that similar considerations are applicable in the present circumstances.

27. Counsel for the ODA emphasises that the object of the order that is sought is not to curtail the protest itself. Thus it is no part of the ODA's application to seek possession of any land. Nor is it part of the ODA's application to seek to evict the protesters who are encamped on Porters Field. I was told that there is an application by the Park Authority for possession, but that application is not before me and that seems to me to raise separate considerations. I am concerned only with the ODA's application. Accordingly, counsel for the ODA submits that the order is an order which is necessary and proportionate to restrain unlawful activity as opposed to lawful protest. He submits that the balancing exercise comes down firmly in favour of the grant of the order since it will not prevent the protesters from exercising their Article 10 and Article 11 rights to freedom of expression and freedom of assembly by making their views known at the encampment and in other lawful ways. All it will do is to prevent unlawful obstruction of the ODA in its use of the ODA Site.
28. Furthermore, he submits that, if one turns to consider the fact that this is an application for an interim injunction, this is a case in which damages are not an adequate remedy for the ODA in the first place. It is not at all clear that there are any defendants who would be in a position to pay any damages. Furthermore, the damage the ODA is concerned it would suffer if the protest continues is one that is not readily quantifiable and would not be referable by an award of damages. He acknowledges, I think, that insofar as the protesters' rights under Articles 10 and 11 are engaged and are circumscribed as a result of the grant of the order, then any damage to them is likewise not readily quantifiable. He submits, however, that the balance of the risk of injustice is firmly in favour of the grant of an injunction, particularly having regard to the urgency of the present situation.
29. In my judgment counsel for the ODA's submissions are well founded. I accept that the order that is sought by the ODA is one that should not have the effect of unduly curtailing the protesters' rights of freedom of expression and rights of freedom of assembly. All the order does is to prevent obstruction of the ODA's contractors and employees in accessing the site and ancillary activities. I recognise that part of the protesters' objective in their protest has been precisely to obstruct the delivery lorries in accessing the site, and thereby to delay the works. It seems to me to be clear, however, that that is an objective which is, on the state of the evidence before me, an unlawful one. It amounts to a private nuisance and it may well amount to a public nuisance. The rights to freedom of expression and freedom of assembly in Articles 10 and 11 of the European Convention are not unqualified rights. On the contrary, they are qualified rights, and must give way in appropriate circumstances, that is to say where it is necessary and proportionate to do so, to the rights of others. In the present situation the ODA has the right of exclusive possession of the ODA site, and that right is being unlawfully interfered with by the obstruction which has been carried out by the protesters. Furthermore, the protesters are also interfering with the rights of local residents and visitors to the Lee Valley Park who use Sandy Lane. The grant of the order will not prevent the protesters from continuing with their protest and making their views known in ways that do not involve obstructing access to the Site. Thus it will not prevent them from continuing with their camp, from displaying banners and the like, and generally drawing attention to the views to which they wish to draw attention. For my part, I fully recognise their entitlement to do that, subject to the requirements to act lawfully and peaceably.

30. In all of those circumstances, it seems to me the balance of the risk of injustice comes down firmly in favour of the grant of an injunction, subject to one point and that is the point that I made at an early stage in this judgment about the timing of the present application. As I have acknowledged, the present application was made on short notice. As a result of the short notice, those who are concerned about the grant of the injunction have not had a full opportunity to seek legal advice or to obtain representation before me today. Still less have they had the chance to submit evidence before this court. In those circumstances, it seems to me that it is right that they should have an opportunity to do so. Counsel for the ODA has submitted that an injunction should be granted until trial or further order. In the circumstances which I have just described, I do not consider that that is the right course. I consider that the right course is to grant a short term injunction so as to reinstate the status quo which existed before the protests started, that is to say the situation where the ODA had proper access to the Site, and for the matter to return to the court in 14 days time. At that point the ODA will have to justify the continuance of the injunction. By then both the protesters and anyone else who is concerned about the injunction will have had time to seek advice, if possible to obtain representation and certainly to put evidence before the court in opposition to the continuance of the injunction if so advised.
31. For all of those reasons, I will grant an order in the revised terms submitted by counsel for the ODA, but only until 18 April 2012. On that occasion, as I say, it will be for the ODA to renew its application for a continuation of the injunction.