Neutral Citation Number: [2018] EWHC 809 (Ch) Case No: CH-2017-000284

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)
CHANCERY APPEALS

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL
Date: 22 January 2018

Before:

MR. JUSTICE MARCUS SMITH

Between:

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HOUNSLOW Claimant

- and -

(1) DAVID FRANK DEVERE
(4) BEN PIPER
(5) VERNON ROBERTS
(13) ROGER McGONAGLE
(15) PAUL MENDOZA
(19) STEVEN JAVOR
(24) PETER MCCRUDDEN Defendants

MR. IAIN COLVILLE appeared for the **Claimant**.
MR. CHRISTOPHER JACOBS appeared for the **4th, 5th, 13th, 15th, 19th and 24th Defendants**.
MR. STEPHEN COTTLE appeared for the **First Defendant**.

Hearing date: 22 January 2018

Approved Judgment

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

Digital Transcription by Marten Walsh Cherer Ltd.,
1st Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

Mr. Justice Marcus Smith

1. This matter was last before me on 13th December 2017 on the application by various of the above-named Defendants for a stay of execution of the order of His Honour Judge Wulwik, sealed on 20 November 2017.

2. I have, represented before me, acting for the 4th, 5th, 13th, 15th, 19th and 24th Defendants, Mr. Christopher Jacobs of counsel; acting for the First Defendant, Mr. Stephen Cottle; and acting for the Claimant, Mr. Iain Colville.

3. I am grateful to all three counsel for their most helpful submissions.

4. The matter is back before me today (22 January 2018) to deal with a question of whether permission to appeal the order of His Honour Judge Wulwik should be granted.

5. Related to that will be the question of whether the stay that I ordered on 13 December 2017 should be continued. For the present, this ruling is confined simply to the question of whether I should give permission to appeal.

6. The test that I should apply here is whether there is a real prospect of success. Although there is the alternative ground that there is public interest in the hearing of an appeal, this is a case where the more appropriate test, and the one that I am going to focus on, is whether there is a real prospect of success. No-one on behalf of the Defendants has contended otherwise.

7. I will consider the various grounds as they have been articulated by Mr. Jacobs on behalf of the 4th, 5th, 13th, 15th, 19th and 24th Defendants. The way I structured my notes is that I have done so by reference to the grounds as articulated by him which are, essentially, seven in number plus a new ground eight ("Grounds (1) to (8)").

8. There are, as between the various Defendants seeking permission to appeal the order of His Honour Judge Wulwik, certain differences, specifically in relation to the way in which the boats or vessels which they occupy or own are moored.

9. I should begin by providing a short factual background into the dispute that was determined His Honour Judge Wulwik.

10. Essentially, the Claimant brought these proceedings in trespass against various Defendants, including the Defendants before me today, seeking an injunction requiring the Defendants to remove their vessels, which are moored on the Claimant's freehold land at Waterman's Park and/or on River Works which are licensed to the Claimant pursuant to a River Works licence.

11. In addition to an injunction for the removal of these vessels, a further injunction is sought restraining the Defendants from reverting to those sites.

12. It will immediately become clear that there are two forms of property that are in play here. First, there is the Claimant's freehold land, Waterman's Park. Secondly, there are the River Works, in relation to which the Claimant only has a licence, granted by the Port of London Authority.

13. It is fair to say that there could be drawn a distinction between, for example, the First Defendant, whose trespass exists in relation to the freehold land, and some of the other Defendants, whose trespass relates to the licensed property.

14. However, I am reluctant, for purposes of the question of permission to appeal, to parse out different scenarios and different outcomes for different defendants. It seems to me more appropriate to deal with these issues globally, and to consider whether, viewed as a whole, the Defendants should be permitted to appeal or not.

15. I, therefore, propose to deal with the grounds of appeal generally in respect of each of the Defendants globally, rather than dealing with the matter Defendant by Defendant.

16. I begin, then, with Ground (1). The order of His Honour Judge Wulwik in the first three paragraphs makes provision for the removal of the vessels, their associated cabling and their gang planks, etc.

17. The fourth paragraph says:

> "In addition to the usual methods of enforcement available to the Claimant there be a declaration that if any or all of the said Defendants fail to comply with the said order, then the Claimant may remove the vessels owned or occupied by the Defendants and/or any cables, pipes or other services, walkways, gang planks, ladders or other means of access, rubbish, refuse, litter or other items left by the defendants on the claimant's land and/or the River Works and dispose of them as it thinks fit without incurring liability, be it civil or criminal, to the defendants."

18. It was said on behalf of the Defendants that this was an order without precedent and that the Judge had gone too far in that he was permitting not merely self-help, which would not require permission from the Court, but conduct going beyond self-help and providing a form of protection or declaration of non-liability in the event of the Claimant exceeding what it is entitled to do at law.

19. For his part, Mr. Colville, on behalf of the Claimant, said that there was no intention on the part of the Claimant to do anything unlawful and I, of course, entirely accept that. He did suggest that this was no more than a declaration of the right to self-help. That submission I do not accept. For the purpose of an appeal, it seems to me that there is a real prospect of successfully arguing that this is an order that went too far in that it sought – whether it was effective in doing so I do not know – to sanction conduct on the part of the Claimant that might be unlawful.

20. It seems to me that it constitutes what might well be said to be an improper circumvention of the contempt jurisdiction that normally underlies and underpins the enforcement of court orders.

21. Obviously, courts expect their orders to be obeyed. But it is the role of the contempt jurisdiction, with all its surrounding safeguards and protections, to ensure that court orders are obeyed.

22. Thus, I give permission to appeal in relation to Ground (1).

23. I should say, before going any further, that as regards all of those grounds in relation to which I give permission to appeal, I am seeking to say the least possible (consistent

with justifying my decision) in terms of the merits because it does seem to me that where the case is going further, the less said by me the better. Where I refuse permission, I will (so far as appropriate) be a little fuller in my reasons.

24. I turn then to Ground (2). Ground (2) turns on the question of whether the holder of a licence of the sort that the Claimant holds can bring an action in trespass.

25. It is, of course, accepted and not gainsaid by any of the Defendants that there are circumstances in which a claim in trespass can be brought by a mere licensee. In this regard, in his judgment Judge Wulwik relied upon the decision of the Court of Appeal in *Manchester Airport plc v. Dutton*.

26. The question before me is whether the licence that was concluded between the Claimant and the Port of London Authority was sufficiently extensive in terms of the rights that it conferred to satisfy the *Manchester Airport v. Dutton* test. It was contended by the Defendants that the rights conferred on the Claimant were insufficiently extensive for this purpose, rendering the Judge's decision that the Claimant was a proper claimant, with standing to bring an action in trespass relying upon the licence, incorrect.

27. It follows that I must have regard to the terms of the River Works licence concluded between the Claimant and the Port of London Authority on 20 August 1996. That contains an provision by way of grant that:

> "The Port of London Authority permits the person named in schedule 1 of this licence" – and that is the Claimant – "to maintain and retain the works described in schedule 2 of this licence from the date hereof"
>
> Then there follows floating in its own brackets after a full stop:
>
> "(Subject as set out hereafter)."

28. There are then various provisions regarding the obligations on the part of the licensee – the Claimant – and we come in schedule 2 to a description of the "works". I need not read that out, because it simply sets out a description of the works at Waterman's Park in Brentford, in particular the staging or elevated roadway which is the central feature of the property at Waterman's Park, but also various piers and dolphins which surround it.

29. There is an obligation in relation to the works, and that includes all of these things, to execute and maintain them to the Port of London Authority's reasonable satisfaction and to accept responsibility for any saltation or erosion caused by the works. Indeed, there are a number of provisions in schedule 3 of the licence which contain wide-ranging obligations in relation to the works read as a whole and there is no suggestion that those obligations should be shared between the Claimant and other persons. The obligation appears to be a sole one.

30. On the other hand, clause 13 in schedule 3 under the heading "Use" says this:

> "Not without the written consent of the PLA, which so far as is lawful shall not be unreasonably withheld, to use the works other than the staging as a public walkway."

31. This contains an unambiguous restriction on the use that the Claimant may put the works to, essentially to mainly use the staging or the elevated roadway as a public walkway.

32. The question is whether this limited user is to be read as a limitation on the grant by the Port of London Authority in relation to the works generally.

33. For the claimant, Mr. Colville contended that this was not the case. There was an exclusive right in relation to the works: it was simply that there was a limited user and that if the claimant wished to extend that limited user it could do so, permission from the Port of London Authority not to be unreasonably withheld.

34. The converse, however, did not pertain, according to Mr. Colville. He contended that, were the Port of London Authority:

    i) To confer rights on a person other than the Claimant in relation to the works;

    ii) That did not interfere with the user granted by the licence to the Claimant; but

    iii) Which related to the works,

    that would be impermissible.

35. The point can be illustrated by reference to various supplemental River Works licences, which I was taken to, and which were granted as between the Claimant and the Port of London Authority in relation to the mooring of various barges. I have before me, for instance, a supplemental licence dated 8 May 2006, whereby permission was given to the Claimant to add an 80-metre long gangway to serve a 26-metre barge surface too.

36. This, according to the Claimant, was a supplemental licence that could only be granted to the Claimant and not to anyone else by virtue of the extent of the grant contained in the licence, which, according to Mr. Colville, contained a measure of exclusivity.

37. I accept that there is some force in the argument based upon exclusivity when one considers the various obligations assumed by the Claimant under the licence and that is what the judge found.

38. It is not for me, however, to consider what is the right or the wrong answer. It seems to me that there is a real prospect of success in the contention that the grant is, in fact, a non-exclusive grant.

39. I reach that conclusion based upon the combination of the limited user provision and the fact that the grant not only does not contain the word “exclusive” in it but is also expressly subject to what follows hereafter which must include, although not just that, clause 13. Thus, it seems to me that there is a real prospect of success in relation to Ground (2).

40. Ground (3) I can deal with relatively quickly. It is suggested that there was an erroneous admission and reliance on a letter which is referred to in paragraph 43 of the Judgment of His Honour Judge Wulwick.

41. The letter referred to at paragraph 43 does no more than set out the Port of London Authority's understanding as to the nature of the licence that I have just been referring to. In that letter, the Port of London Authority asserts that there was a right of exclusive occupation in the Claimant.

42. A letter such as this can say nothing about the true construction of the licence and it seems to me that the Judge did fall into error, or at least arguably fell into error, in referring to this letter. At the end of the day, however, the true question is one of the proper construction of the licence rather than the use the Judge made of this letter. If the Judge is right on the question of construction, then the letter is an irrelevance; and exactly the same is true if he is wrong on construction. The letter can make no difference to either outcome.

43. So, I give permission to appeal in relation to Ground 3: but it seems to me that Ground (3) is very much a side issue, and one that is joined at the hip to Ground (2).

44. Ground (4) is also related to Ground (2). The Judge, in the course of his Judgment, made an order that there should be a payment by the Defendants of mesne profits. There are a number of questions in relation to the computation of mesne profits that arise. Most fundamentally, there is, of course, the question of whether there is an entitlement to claim mesne profits at all.

45. That, as it seems to me, must turn on the proper construction of the licence, since it does seem to me, given the construction that I have articulated as arguable, as a consequence at least arguable that the person entitled to receive payment of any mesne profits is <u>not</u> the Claimant, but the Port of London Authority itself.

46. If that is right, then an award of mesne profits of any ground would be, in principle, wrong. It seems to me that on this ground alone there are reasonable prospects of success.

47. Moreover, there are points that are made in relation to mesne profits which are not parasitic upon the terms of the licence but which turn, for instance, on the extent to which there was a non-prosecution of earlier orders and the computation of a true market rent given the terms of the licence that was executed.

48. Given my conclusion in relation to the terms of the licence and the arguability of the exclusivity of that licence, it seems to me that I need consider Ground 4 no further, but simply will grant permission in relation to that ground.

49. Ground (5) turns on two questions. It is said that there is a public right of passage and re-passage across the freehold land and, although this point was made with different emphases by the representatives of different Defendants, also the works the subject of the license.

50. There is also a question of the extent to which the bye-laws govern both the park and the works. What was clear was that the bye-laws permit use of the park and the works for recreational purposes only.

51. Two points arise in this regard:

i) First of all, there is a question of what "recreational purpose" means. Does it prevent access from the park or the works to the boats that are moored off those properties?

ii) Secondly, is there an underlying public right of way, independent of the recreational purpose permission, which informs or articulates the right of the public to access the park and the works?

52. I was referred to the decision of *DPP v. Jones*, which concerned a case where there was a public highway. That point is in dispute here. There it was said that:

> "The law is that the public highway is a public place which the public may enjoy for any reasonable purpose provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and re-pass. Within these qualifications, there is a public right of peaceful assembly on the highway."

53. I derive two points – and they are only arguable points – from this passage in this case. The first is that the right of passage, or using a public highway for reasonable purpose or, indeed, using it for recreational purposes, is a somewhat eclectic term. It does seem to me that there is an argument to be had as to the extent to which using the park to access the boats that are moored off the properties is or is not in exercise of a public right of way, whether it exists or not, and compliant with the bye-laws, whatever the true meaning of those bye-laws.

54. Again, I do not wish to trespass on the obligations of an appellate judge but it seems to me that there are, in relation to Ground (5), also real prospects of success.

55. Ground (6) concerns an argument under the Human Rights Act that the Judgment in relation to the speed with which the defendants should vacate their moorings was disproportionate, gave insufficient time, and, for those reasons, disregarded the Article 8 rights of the Defendants. This Article 8 argument is a circular one. It derives such force as it may have from the rights of the parties as I have articulated them and, for the reasons I have given, I have given permission in respect of various of the grounds of appeal. Had I not done so, I would have found this argument utterly unarguable. It seems to me that the rights of the Claimant are what they are in the licence and in the freehold and in the law generally.

56. If the earlier grounds of appeal are successful, then it seems to me that no point on the Human Rights Act arises. If they fail, then the same pertains. I am not going to give permission to appeal in relation to Ground 6.

57. Ground (7) relates to the costs order that was made by the judge against the various Defendants. That order is contained in paragraphs 6 and 7 of the order.

> "6. The 1st, 4th, 5th, 9th, 13th, 15th, 18th, 19th and 24th Defendants and each of them do pay to the Claimant the Claimant's costs of this action on a standard basis to be subject to a detailed assessment if not agreed, save that paragraph 2 being of the order dated 22nd August 2017 shall apply in respect of the preliminary issue as referred to in that order.
>
> 7. The 1st, 4th, 5th, 9th, 13th, 15th, 18th, 19th and 24th Defendants by 4.00 p.m. on 8th December 2017 do pay to the claimant an interim payment on account of costs in the

> amount of £150,000 and are liable to make such a payment in a joint and several liability on the part of the said Defendants."

58. It was said on the behalf of the Defendants that because a number of Defendants have settled, the original 21 or 22 Defendants have now reduced to around nine. That fact rendered the order made in principle objectionable and wrong, because it entailed a liability on the part of the remaining Defendants in respect of costs incurred in relation to Defendants no longer party to the proceedings. In short, the order failed – so it was contended – to recognise that the existing Defendants should be obliged to bear the costs of Defendants who had now settled, and against whom the Claimant could not longer recover costs.

59. I consider this submission to be based upon a misreading of paragraph 6 of the order. That order establishes a liability that the Claimant's costs as incurred in relation to the named Defendants be paid. There is no obligation on the part of the Defendants to discharge the Claimant's costs insofar as they relate to parties other than the named Defendants.

60. Clearly, there will be a significant portion of common costs in respect of the costs of the action and those are recoverable as against the named Defendants in paragraph 6. But the costs discretion being a wide one, this was a conclusion and an order that the Judge was entitled, in his discretion, to make.

61. As regards the interim payment that was ordered, I have no reason for considering it to be, in any way, an unreasonable assessment of what should be paid on an interim payment given the order in paragraph 6 and it seems to me that the appellate court in this case should not be troubled by a specific argument in relation to costs.

62. Of course, I recognise that if the appeal were to be successful, there would be grounds for revisiting the order of His Honour Judge Wulwik on costs in any event.

63. That leaves, finally, the new Ground (8), which relates to the cabling running to the vessels over what is said to be the Claimant's property. This is a ground inserted between the time when I heard this matter on 13 December 2017 and today.

64. The suggestion is that some of the cabling that is used to supply, amongst other things, power to the boats, actually does not run along the land possessed by the Claimant but on land possessed by somebody else and that, to that extent, the order made by the Judge is too extensive.

65. This is a difficult ground to justify. Essentially, it is accepted that there is no right on the part of the Defendants to run the cabling at all. It is just that they are infringing, at different points along the route of these cables, the interests of different persons. But without clear evidence – which appears not to have been adduced before the Judge – that none of the cabling (for any part of their length) infringes the Claimant's rights, I can see no real prospect of success in respect of this new ground. I refuse permission to appeal on Ground (8).