High Court bans "urban explorers" from O2 Arena roof and orders take-down of videos

The High Court has granted an anticipatory final injunction against three known defendants and persons unknown. The order restrains them from trespassing on the O2 Arena and Entertainment Complex and also requires the known defendants to remove videos of their past O2 trespasses from their social media channels.[1] In confirming protection against venue intrusion and unauthorised exploitation of footage, the ruling will be welcome to venue owners, promoters and artists.

Background

The claimants in this case were the owners of the O2. The known defendants were self-styled "urban explorers", who had, on more than one occasion, trespassed on the claimants' property by overnighting in the O2 and climbing on the roof's external tent-like fabric.

The injunction sought by the claimants in this instance was a *quia timet* (anticipatory) injunction on a final basis. For the High Court to grant this injunction, it was necessary for the claimants to prove, and for the court to be satisfied, that:

(a) there was a "strong probability" that, unless restrained by injunction, the defendants would act in breach of the claimants' rights; and

(b) if the defendants did contravene these rights, there would be harm that was "so grave and irreparable" that it could not be avoided by an immediate interim injunction.[2]

Judgment

<u>First issue – strong probability</u>

Mr Hugh Mercer QC, sitting as a High Court judge, considered several factors when deciding whether or not to grant the injunction sought in this case. First, he considered the anticipatory nature of the injunction. On the evidence presented, the judge was satisfied that "short of putting up a high fence", which would change the character of the O2 as a multi-purpose venue, the claimants had done what was reasonably possible to prevent trespassing. After each incident, the claimants considered what more could they could do to avoid trespass, and it was expected that they would continue to do so in the future. The judge noted that the roof of the O2 is very attractive to urban explorers, and that the edge of the external tent is fairly unchallenging to access because it is close to ground level.

Urban explorers climb and explore man-made landscapes. As urban explorers, the known defendants scale landmarks and buildings, and proceed to post video footage of their feats on the internet via social media channels such as YouTube. Two of the three known defendants are currently subject to criminal behaviour orders prohibiting them from being on a structure "in areas that are not open to the public" without permission. Accordingly, if those orders were observed, then there would be no further trespass by the relevant defendants. But the claimants submitted that an application to vary the criminal behaviour orders could be made by the first and second defendants without the claimants' knowledge. Nor was there any indication that the defendants would stop this type of exploration. Instead, there

[1] *Ansco Arena Limited v Law* [2019] EWHC 835.

[2] *Vastint v Persons Unknown* [2018] EWHC 2546.

were possible indications of future unlawful behaviour from one of the defendants, who had promised viewers new video content on his social media channels.

So the judge found that the "strong probability" threshold was met in this case.

Second issue – irreparable harm

To establish irreparable harm, the claimants submitted evidence of the risks involved to people engaging in urban exploring and, accordingly, to visitors to the O2, security services and emergency services personnel who might be called to recover trespassers. The potential distraction to security personnel from their existing duties and responsibilities, such as security and anti-terrorism, was also submitted as a factor, and the judge made reference to the recent terrorist attack at a similar Manchester venue. In his view, an interim injunction would be powerless in this particular situation due to the immediate nature of the risks involved. Although careful not to exaggerate the gravity of the harm caused to the claimants by urban exploring at the O2, the judge found that the activities were sufficiently grave and irreparable in so far as they could not be circumvented by an immediate interim injunction.

Mandatory relief to remove online videos

The judge then turned to the persons unknown – urban explorers that might want to trespass on the O2 and to climb the external roof.

The main reason that the known defendants trespassed on the claimants' property was for financial gain. Their intention was to film their trespassing activities and to post videos on the internet with the goal of earning a share of advertising revenues. The claimants submitted that the trespass and subsequent posting of online videos encouraged other persons unknown to trespass on their property. The judge referred to a group of Dutch nationals who visited London with the intention of scaling the O2 and who, on being stopped, said they had "been inspired by YouTube videos showing urban climbers climbing iconic buildings in London". These events were considered together with the fact that the known defendants make up a large proportion of the online video views for urban exploring at the O2.

The judge found a sufficient causal connection between the defendants' trespass, the posting of the online video footage and the trespass of others. So the original trespass required a restriction on the posting of the videos, as the videos were found to form a fundamental part of the trespass.

The claimants also submitted that the posting of online videos of the defendants' actions at the O2 was capable of being a nuisance, and they presented multiple cases to the court in support of this. The judge observed that nuisance is an action that is "not otherwise authorised", and that "causes an interference with the claimant's reasonable enjoyment of his land".[3] The judge found that, in this case, the posting of videos brought about the nuisance, i.e. the trespass on the claimants' land by other persons encouraged by the defendants' videos. The defendants were in control of their video posts and, in accordance with Dyson LJ's comments in *LE Jones (Insurance Brokers) Ltd v Portsmouth City Council*,[4] the key to responsibility is the degree of control exercised by the defendant over the activity. The judge stressed that the findings of trespass and nuisance in this case were made on the basis of the evidence before the court, but that it is a fact-sensitive analysis.

[3] *Coventry v Lawrence* [2014] AC 822.

[4] [2003] 1 WLR 427.

Balance of rights

Finally, the judge considered the balance between s 12 of the Human Rights Act 1998 and Article 10 of the European Convention on Human Rights, in respect of the defendants' right to freedom of expression and Protocol 1, Article 1 in respect of the claimants' right to property. The judge referred to Lord Hoffmann's comments in *Belfast City Council v Miss Behavin' Limited*[5] that not all restrictions on the right to freedom of expression are at the same level. For example, restricting a trespass that was carried out at the O2 in order to create online content is a lesser priority than the publishing of a newspaper article. The proposed restriction of freedom of speech in this case was specifically to grant an order that would protect the claimants' property, and the propensity of the videos to encourage unidentified third parties to infringe those rights on a continual future basis was considered to be the key issue, rather than act of publication itself.

The judge stated that the claimants' enforcement of their property rights in this case has the ancillary and proportionate effect of restricting the defendants' freedom of expression. Notably, then, the order granted was only for a fixed period of two years. The judge commented that the balance of rights might alter in future cases and noted that, if the evidence presented had been videos made for entertainment purposes only, and which "did not carry with them the implicit encouragement of third parties to engage in similar conduct", then the outcome might have been different.

Comment

The balance of human rights (Article 10 and Article 1 Protocol 1) was central to this case. While not disregarding the importance of the defendants' right to freedom of expression, venue owners need to be able to enforce their right to property and their right to protection against unlawful trespass. It was impossible for the claimants to enforce their rights without affecting the defendants' rights, but it seems that tipping the balance in favour of the claimants was justified on these particular facts, and the deletion of online content that encourages others to break the law is quite distinct from other restraints of freedom of expression.

The judge made clear that the outcome of this case might well have been different if the facts of the case had been different. The particular function and structure of the O2 as a venue was an important factor. Besides, without the concern for the safety of patrons, staff and performers that frequent the venue, the requirement for grave and irreparable harm might not have been established.

As considered in the judgment, it is hard to predict how the practice of urban exploring will develop. It is clear that it remains a popular and sensational activity that receives a substantial amount of public attention. If more cases of this nature come before the courts, the rulings may vary depending on the circumstances, including the type of venue and whether the purpose of trespass is financial. For now, though, the ruling sets a broadly helpful precedent for venue owners in protecting their own property and their promoters, artists and patrons from unauthorised intrusion and exploitation.

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[5] [2007] 1 WLR 1420.