

worldsportslawreport

FEATURED ARTICLE
05/11



cecile park publishing

Head Office UK Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com
www.e-comlaw.com

Ways of obtaining information from ticket resellers

The Rugby Football Union has recently been successful in obtaining a Norwich Pharmacal Order requiring ticket resale site Viagogo to provide it with information regarding the resale of tickets to its events. Tom Burrows, a Trainee Solicitor with Paris Smith LLP, examines the case and the implications it could have for restrictions on reselling sporting event tickets, which is likely to become a big issue over the coming months as people receive their ticket allocations for the London 2012 Olympics.

With the closure of the Olympic ticket 'lottery' at 01:00 am on Wednesday 28 April and the news that more than 20 million tickets had been applied for by 1.8 million people, fears have grown that people have over committed themselves when applying for tickets. With the possibility of a person winning more tickets than they expected and budgeted for, the resale of tickets in the secondary market - so-called ticket touting - will become a hot topic.

Ticket touting is merely the unauthorised resale of event tickets, usually for a profit. Yet the term 'ticket touts' often conjures up images of shady characters gathered outside sporting arenas cheating consumers out of their money through fraudulent tickets. Whilst there will always be those individuals selling tickets, it is the faceless online fan-to-fan secondary market, through services provided by many websites, that is currently the growth area in ticket touting and the hardest to police.

Whilst the London Organising Committee for the Olympic Games (LOCOG) is braced for a surge of Olympic tickets in the secondary market, it is not the only

organisation that is busy in the fight against ticket touts, as demonstrated in the recent case of Rugby Football Union v Viagogo Ltd¹. However, not all events are afforded the same protection in combating ticket touting.

London 2012

The London Olympic Games and Paralympic Act 2006 ('the 2006 Act') received Royal Assent on 30 March 2006 and deals with a number of important issues in the organisation of the Games from the creation of the Olympic Delivery Authority to the provision of new criminal offences.

Section 31(1) of the 2006 Act provides that it is a criminal offence to 'sell an Olympic ticket in a public place or in the course of a business and otherwise than in accordance with a written authorisation issued by the London Organising Committee'².

Under s31(2)(c) a person 'will be treated as acting in the course of a business if he does anything as a result of which he makes a profit or aims to make a profit'³.

The London Olympic Games and Paralympic Games (Amendment) Bill, which is due to be considered by a Public Bill Committee, seeks to raise the maximum fine for this offence from £5,000 as it currently stands to £20,000.

It was stated during the Standing Committee debates on the 2006 Act that 'the aim of [section 31] is to ensure that tickets are sold properly and honestly and that they go to genuine sports fans'⁴. However, the 2006 Act does not distinguish between those archetypal ticket touts on street corners and genuine sports fans who can no longer attend.

So what can a genuine sports fan do if he ends up with more tickets than he can afford? LOCOG has provided that people who wish to resell tickets will be able to do so at

no more than face value through the official London 2012 resale programme. This is the only authorised manner in which a person can buy tickets that are offered for resale. However, this does not open until later in 2012.

As such, there will be many people who have over-committed themselves to thousands of pounds without an authorised opportunity to resell those tickets and recover their money until 2012. In the current economic climate, there will be circumstances where people will be unable to manage the level of debt that they have incurred until the resale programme opens. This will no doubt result in people attempting to recoup their money through fan-to-fan exchanges.

Whilst this would be in breach of s31 of the 2006 Act, it would not seem to breach the intended spirit of the 2006 Act in ensuring that genuine sports fans were able to attend the Games. It will be interesting to see how the authorities deal with such breaches in the coming months.

English Football

Under s166 of the Criminal Justice and Public Order Act 1994, it is an offence for an 'unauthorised person to sell a ticket for a designated football match or otherwise dispose of such a ticket to another person'⁵. A person guilty of such an offence is 'liable to face a fine not exceeding level 5 on the standard scale'⁶.

This law was introduced after the Taylor report into the Hillsborough disaster with the aim of cracking down on touts, but perhaps more importantly keeping opposing fans segregated. In terms of controlling the secondary ticket market, a person is 'unauthorised to sell a ticket unless he is authorised in writing to sell or otherwise dispose of tickets for the match by the organisers of the match'⁷.

Viagogo, the online ticket exchange that allows people to buy and sell tickets mentioned in the introduction, has become authorised to resell tickets through its partnership with a number of football clubs including Chelsea and Manchester United. This appears to demonstrate the acceptance by Football Association Premier League clubs of the need for fans, especially season ticket holders, to recoup their money for matches they are unable to attend.

Rugby union

Whilst both London 2012 and football tickets are subject to specific legislation which criminalises the resale of tickets in the secondary market, other sports are not afforded such protection. The Rugby Football Union (RFU) has previously submitted a memorandum to the Select Committee on Culture, Media and Sport requesting that the UK Government provide similar blanket legislative protection as afforded to London 2012. However, this has not been forthcoming. As such, with no legislative protection, the RFU is forced to rely on civil sanctions for breach of contract in order to attempt to combat what it believes to be a serious threat to the future of rugby union.

The RFU distributes tickets under terms and conditions which state that a ticket may not be sold or transferred, except if more than one ticket is issued to a purchaser, in which case such tickets may be used only by the purchaser and a person accompanying the purchaser to the stadium provided that there is no resale or transfer of a ticket above face value. In addition, tickets may not be advertised for transfer or sale.

The terms and conditions also provide that any ticket acquired in breach of the conditions is null and

I would contend that there is a strong argument that terms and conditions banning the resale of tickets could be both unfair and unenforceable

void and the RFU are entitled to refuse to admit the holder of such a ticket to the stadium and eject that person from the stadium even after admission.

The RFU spends £50,000 per year on policing the black market through advertising and mystery shopping⁸. The RFU also devotes circa 80% of the time of one in-house lawyer to following up on sellers and the sources of tickets⁹. It is this obvious commitment to driving out the secondary ticket market that has led to the recent case of Rugby Football Union v Viagogo Ltd¹⁰.

As previously discussed, Viagogo provides a secondary market for tickets for many different venues and events. However, it does not generally involve itself in actually buying and selling tickets, but merely provides a forum where prospective sellers may record details of tickets they are selling and prospective buyers may find tickets they want and buy them directly from the seller.

The RFU was not claiming in these proceedings that Viagogo had itself become a wrongdoer but that when such a sale occurred, Viagogo had facilitated - or become mixed up in - the wrongdoing committed by others. The RFU sought an Order requiring that Viagogo provide the RFU with the names and addresses of people who had advertised for sale and/or sold RFU tickets via their websites for international rugby union matches held at Twickenham during the 2010 autumn international series and the 2011 RBS Six Nations, as well as the full details of all the tickets advertised for sale including the gate, block, row, seat number and the price at which it was advertised.

Such an order is commonly known as a Norwich Pharmacal Order, the principle of which is that a person who unwittingly

facilitates the tortious acts of others is under a duty to provide the wronged person with full information, including the identity of the wrongdoers.

The court determined that the application by the RFU gave rise to four issues, namely:

- Was there arguably wrongdoing?
- Is the RFU intending to try to seek redress for the wrong?
- Is disclosure of the information to the RFU necessary?
- Should the court exercise its discretion in favour of granting relief?

It was accepted by Viagogo that if the court determined there to be arguably wrongdoing, then it had innocently become mixed up in it.

In order to obtain a Norwich Pharmacal Order, the standard of proof that an applicant must attain is that he has at least an arguable case¹¹. In *Ashworth Hospital Authority v MGN Ltd*¹², Lord Woolf CJ stated that a claimant must identify 'clearly the wrongdoing on which he relies in general terms'¹³.

Further, in *United Company Rusal v HSBC Bank Plc & Others*¹⁴, it was stated that the appropriate test in Norwich Pharmacal applications is that the court must be satisfied that factors exist which allow the court to take jurisdiction, or that the applicant has a better argument than the defendant.

Was there arguable wrongdoing?

It was argued by the RFU that on each occasion that an RFU ticket was offered for sale or sold, there was arguably wrongdoing in four categories:

- The original applicant for the ticket who is in breach of contract;
- The first recipient of the ticket from the applicant who is also in breach of contract;
- The seller who commits the tort of conversion of the paper ticket; and

● The ticket holder who trespasses when the ticket is used to gain entry to the stadium.

The RFU argued that there is an arguable conversion by both seller and buyer. In determining that the RFU did in fact have a good arguable case, the court stated that it was not deciding whether the RFU's submissions were right or wrong, but merely whether there was a good arguable case.

Is the RFU intending to try to seek redress for the wrong?

An applicant for a Norwich Pharmacal Order must demonstrate that the purpose of the application is to enable him to seek 'lawful redress of a wrong and cannot otherwise obtain redress'¹⁵.

It was Viagogo's case that the RFU were not seeking lawful redress, but in fact using the publicity generated by the application to damage the business of Viagogo. This point was dismissed by the court.

Is disclosure of the information to the RFU necessary?

The court determined that the RFU had no straightforward or available means of finding out the information that it sought via its application and therefore concluded that the making of the Norwich Pharmacal Order was indeed necessary.

Should the court exercise its discretion?

The court held that it did not accept the submissions of Viagogo regarding the strength of the RFU's case, nor that the information would be of no assistance in seeking redress. As such, it was held that Viagogo had not provided any reason why the court should not exercise its discretion in favour of the RFU. Accordingly, the court made the Norwich Pharmacal Order sought by the RFU.

Conclusion

This is the first time that such an order has been made in respect of ticket touting and provides event organisers who do not have the luxury of legislative protection criminalising the resale of tickets with an important tool in effectively enforcing their terms and conditions.

However, I would contend that there is a strong argument that terms and conditions banning the resale of tickets could be both unfair and unenforceable. In *RFU v Viagogo*¹⁶ it was made clear that the court was not deciding whether such wrongdoing occurred when a ticket was resold as argued by the RFU, as this could only be established 'in an action brought, whether in contract or in tort, against a club or ticket holder'¹⁷.

In fact, it has previously been stated by the Office of Fair Trading that it could be argued under the Unfair Terms in Consumer Contract Regulations 1999 (UTTCRs) that it is 'unfair to restrict consumers from reselling tickets for profit unless fair mechanisms are provided where consumers can dispose of a ticket they can no longer use'¹⁸. There is clearly a need for clarification as to the enforceability of such terms and conditions.

The Department for Culture, Media and Sport (DCMS) has accepted that having a two-tiered approach to the protection of events may promote the existence of anomalies, but has argued that the measures put in place to restrict the sales of tickets for London 2012 and football do not represent either a justification or precedent for further regulatory intervention in other sports. The DCMS has stated that it was a formal requirement for the Government to accept such restriction when it elected to bid for the Games and the restrictions

in relation to football exist for the legitimate aim of protecting public order, which do not necessarily apply to other sports or events.

As such, this two-tiered system for restricting the resale of tickets has been allowed to develop as a matter of government policy. Therefore, whilst the government does not deem it appropriate to legislatively restrict the resale of event tickets - with the exception of football and London 2012 - should event organisers be able to attempt to do just that through their terms and conditions?

Tom Burrows Trainee Solicitor
Paris Smith LLP, Southampton
tom.burrows@parissmith.co.uk

Tom was a professional cricketer with Hampshire for six years and is currently qualifying to become a Solicitor.

1. [2011] EWHC 764 (QB).
2. s31(1) London Olympic Games and Paralympic Act 2006.
3. *Ibid* s31(2)(c).
4. James, M and Osborn, G. 'Consuming the Olympics: the fan, the rights holder and the law'.
5. s166(1) Criminal Justice and Public Order Act 1994.
6. *Ibid*. s166(3).
7. *Ibid*. s166(2)(a).
8. Memorandum submitted by the Rugby Football Union, June 2007. www.publications.parliament.uk/pa/cm200708/cmselect/cmcumeds/202/7062602
9. *Ibid*.
10. See footnote 1.
11. See *R (Mohammed) v Secretary of State for Foreign and Commonwealth Affairs (No1)* [2009] 1 WLR 2579.
12. [2002] 1 WLR 2033.
13. *Lord Woolf CJ Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033.
14. [2011] EWHC 404 (QB).
15. *BSC v Granada* [1981] AC 1096 at 1132.
16. [2011] EWHC 764.
17. *Rugby Football Union v Viagogo Ltd* [2011] EWHC 764 at para 45.
18. Memorandum submitted by the Department for Culture, Media and Sport and the Department of Trade and Industry. www.publications.parliament.uk/pa/cm200708/cmselect/cmcumeds



cecile park publishing

Head Office UK Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com
www.e-comlaw.com

Registered number 2676976 Registered address 141 Wardour Street, London W1F 0UT VAT registration 577806103

e-commerce law & policy

Many leading companies, including Amazon, BT, eBay, FSA, Orange, Vodafone, Standard Life, and Microsoft have subscribed to ECLP to aid them in solving the business and legal issues they face online.

ECLP, was nominated in 2000 and again in 2004 for the British & Irish Association of Law Librarian's Legal Publication of the Year.

A twelve month subscription is £440 (overseas £460) for twelve issues and includes single user access to our online database.

e-commerce law reports

You can now find in one place all the key cases, with analysis and comment, that affect online, mobile and interactive business. ECLR tracks cases and regulatory adjudications from around the world.

Leading organisations, including Clifford Chance, Herbert Smith, Baker & McKenzie, Hammonds, Coudert Brothers, Orange and Royal Mail are subscribers.

A twelve month subscription is £440 (overseas £460) for six issues and includes single user access to our online database.

data protection law & policy

You can now find in one place the most practical analysis, and advice, on how to address the many problems - and some opportunities - thrown up by data protection and freedom of information legislation.

DPLP's monthly reports update an online archive, which is an invaluable research tool for all those who are involved in data protection. Data acquisition, SMS marketing, subject access, Freedom of Information, data retention, use of CCTV, data sharing and data transfer abroad are all subjects that have featured recently.

Leading organisations, including the Office of the Information Commissioner, Allen & Overy, Hammonds, Lovells, BT, Orange, West Berkshire Council, McCann Fitzgerald, Devon County Council and Experian are subscribers.

A twelve month subscription is £410 (public sector £290, overseas £430) for twelve issues and includes single user access to our online database.

world online gambling law report

You can now find in one place analysis of the key legal, financial and regulatory issues facing all those involved in online gambling and practical advice on how to address them. The monthly reports update an online archive, which is an invaluable research tool for all those involved in online gambling.

Poker, payment systems, white labelling, jurisdiction, betting exchanges, regulation, testing, interactive TV and mobile gaming are all subjects that have featured in WOGLR recently.

Leading organisations, including Ladbrokes, William Hill, Coral, Sportingbet, BskyB, DCMS, PMU, Orange and Clifford Chance are subscribers.

A twelve month subscription is £545 (overseas £565) for twelve issues and includes single user access to our online database.

world sports law report

WSLR tracks the latest developments from insolvency rules in football, to EU Competition policy on the sale of media rights, to doping and probity. The monthly reports update an online archive, which is an invaluable research tool for all involved in sport.

Database rights, sponsorship, guerilla marketing, the Court of Arbitration in Sport, sports agents, image rights, jurisdiction, domain names, ticketing and privacy are subjects that have featured in WSLR recently.

Leading organisations, including the England & Wales Cricket Board, the British Horse Board, Hammonds, Fladgate Fielder, Clarke Willmott and Skadden Arps Meagre & Flom are subscribers.

A twelve month subscription is £545 (overseas £565) for twelve issues and includes single user access to our online database.

- Please enrol me as a subscriber to **e-commerce law & policy** at £440 (overseas £460)
- Please enrol me as a subscriber to **e-commerce law reports** at £440 (overseas £460)
- Please enrol me as a subscriber to **data protection law & policy** at £410 (public sector £290, overseas £430)
- Please enrol me as a subscriber to **world online gambling law report** at £545 (overseas £565)
- Please enrol me as a subscriber to **world sports law report** at £545 (overseas £565)

All subscriptions last for one year. You will be contacted at the end of that period to renew your subscription.

Name

Job Title

Department Company

Address

Address

City State

Country Postcode

Telephone Fax

Email

1 Please **invoice me** Purchase order number

Signature Date

2 I enclose a **cheque** for the amount of

made payable to 'Cecile Park Publishing Limited'

3 Please debit my **credit card** VISA MASTERCARD

Card No. Expiry Date

Signature Date

VAT No. (if ordering from an EC country)

Periodically we may allow companies, whose products or services might be of interest, to send you information. Please tick here if you would like to hear from other companies about products or services that may add value to your subscription.

priority order form

FAX +44 (0)20 7729 6093

CALL +44 (0)20 7012 1380

EMAIL ngaio.claris@e-comlaw.com

ONLINE www.e-comlaw.com

POST Cecile Park Publishing 17 The Timber Yard, Drysdale Street, London N1 6ND