

Case law update: *The Rugby Football Union v Consolidated Information Services Limited (formerly Viagogo Limited)* [2012] UKSC 55

In November 2012, the Supreme Court of England and Wales delivered its judgment on the extent of a court's power to grant third party disclosure orders under the principle originally laid down by the House of Lords in *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133. In handing down its judgment the Court ordered Consolidated Information Systems Limited (formerly Viagogo Limited) ("Viagogo") to hand over the identity of individuals who, through Viagogo's online ticket exchange, had sold international rugby union tickets for more than face value and in breach of the terms and conditions attaching to those tickets.

The decision is likely to have a lasting impact on the lawful secondary ticketing market and ticket touting practices in the UK market. From the point of view of disclosure by third parties, the ruling emphasises the importance of proportionality in assessing the need for an order and seemingly relaxes the rules governing the availability of such redress.

Legal background

Before analysing the Supreme Court's ruling, it is worth setting out the legal foundations that support its reasoning. Lord Kerr, who gave the judgment in the case, made specific reference to the *Norwich Pharmacal Co* case and The Charter of Fundamental Rights of the European Union.

1. *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133

In *Norwich Pharmacal*, the House of Lords held that a court can grant an order (henceforth a "Norwich Pharmacal Order") for the disclosure of information to an applicant so as to enable that applicant to effectively seek redress for an arguable wrong committed by another party. A court's jurisdiction in this regard applies:

"... if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing [and] he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers."

Applications for such relief are commonly granted in cases where information is sought from internet intermediaries in order to bring proceedings against anonymous internet users. It is important to note, however, that a Norwich Pharmacal Order is a discretionary remedy and courts will only grant such redress where it is necessary and proportionate to do so (*Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033).

2. The Charter of Fundamental Rights of the European Union (2000/C 364/01) (the "Charter")

Article 8 of the Charter provides that everyone has a right to protection of their personal data. "Personal data" is, in its simplest form, information that can be used to identify a living individual, such as a name or address.

However, Article 52(1) of the Charter provides that interference with an individual's right under Article 8 is permitted where:

"subject to the principle of proportionality [such interference is] necessary and genuinely [meets] objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

Factual background

The Rugby Football Union ("RFU") is the governing body for rugby union in England and is responsible for issuing tickets for matches played at Twickenham stadium. The RFU deploys a specific ticketing allocation system for each international match at Twickenham whereby a number of tickets are allocated to participants in the sport through affiliate clubs, referee societies, schools and other bodies.

The RFU's main objective in selling tickets is to promote and develop rugby union and enhance its popularity. The RFU does not, therefore, allow tickets to be resold above their face value, its terms and conditions stating that any resale or advertising of tickets at above face value constitutes a breach of contract rendering the ticket null and void.

Viagogo operates a lawful secondary ticketing website which allows members of the public to advertise tickets they wish to sell. Purchasers can then buy the tickets from those who wish to sell them, with Viagogo receiving a percentage of the price paid. The website provides a means by which persons can sell tickets anonymously at the going market rate.

On discovering that tickets to matches at Twickenham were being traded on Viagogo's website for inflated prices, the RFU sought a Norwich Pharmacal Order requiring Viagogo to identify those individuals selling and purchasing the tickets. The RFU's ultimate aim was to take action against the ticket traders for breach of contract.

Application to Court

At first instance, Mr Justice Tugendhat granted the Norwich Pharmacal Order sought by the RFU. In reaching his decision, he found that:

- (1) the RFU had a good arguable case that the buyers and sellers of tickets above market price were guilty of a breach of contract;
- (2) the RFU was seeking redress for those arguable wrongs;
- (3) the information sought was necessary to achieve that redress; and
- (4) granting the relief sought was an appropriate exercise of the court's discretion.

Viagogo appealed against Mr Justice Tugendhat's decision on the basis that a Norwich Pharmacal Order constituted an unnecessary and disproportionate interference with the fundamental rights of the buyers and sellers of the tickets under Article 8 of the Charter.

The Court of Appeal dismissed the appeal, however, stating that such interference was proportionate in light of the RFU's objective in obtaining redress for the arguable wrongs committed.

Viagogo appealed to the Supreme Court, claiming once again that in these circumstances the grant of a Norwich Pharmacal Order would involve a breach of Article 8 of the Charter.

Decision of the Supreme Court

The Supreme Court's judgment, delivered by Lord Kerr, can be divided into three distinct sections:

- (1) relevant factors in the assessment of proportionality;

- (2) wider policy considerations; and
- (3) conflicting rights.

To address each in turn:

1. Relevant factors in the assessment of proportionality

For the purposes of assessing whether a Norwich Pharmacal Order is necessary and for the purposes of Article 8 of the Charter, Lord Kerr noted that the:

“essential purpose of the remedy is to do justice” and that this would involve *“the exercise of discretion by a careful and fair weighing of all relevant factors”*.

These factors were to include:

- (a) the strength of the possible cause of action contemplated by the applicant;
- (b) the strong public interest in allowing an applicant to vindicate his legal rights;
- (c) whether the making of the order will deter similar wrongdoing in the future;
- (d) whether the information could be obtained from another source;
- (e) whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing;
- (f) whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result;
- (g) the degree of confidentiality of the information sought;
- (h) the privacy rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of the individuals whose identity is to be disclosed;
- (i) the rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed; and
- (j) the public interest in maintaining the confidentiality of journalistic sources.

2. Wider policy considerations

Viagogo argued that the court, in balancing the above factors, should:

- (a) evaluate the impact that the disclosure of information would have on the person to which it relates against the value of the information to the applicant for the order; and
- (b) conduct that evaluation solely with reference to the benefit that the disclosure might bring to the applicant. In this case, the benefit to the RFU would be the ability to bring proceedings against alleged wrongdoers; other incidental benefits, such as the potential deterrent effect that a Norwich Pharmacal Order might have, were not to be considered.

Lord Kerr accepted the first leg of Viagogo’s argument but rejected the second, describing it as “somewhat artificial, not to say contrived”. Lord Kerr stated that there was no logical or sensible reason to disregard the wider context in which the RFU wanted to have access to the alleged wrongdoers’ personal information and that its:

“desire to prevent the future sale of tickets for international matches at inflated prices [was] intimately connected to the application of the Norwich Pharmacal Order. The ability to demonstrate that those who contemplate such sale or purchase can be detected [was] a perfectly legitimate aspiration justifying the disclosure of information sought”.

3. Conflicting rights

Viagogo also argued that, when faced with a conflict of two individual rights as in this case, the court should follow the approach

taken by Mr Justice Arnold’s in *Goldeneye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch). That is:

“(i) neither [right] as such has precedence over the other; (ii) where the values under the two [rights] are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary; (iii) the justifications for interfering with or restricting each right must be taken into account; (iv) finally, the proportionality test – or ‘ultimate balancing test’ – must be applied to each.”

Lord Kerr accepted Viagogo’s argument in this regard, but did not find that an “intense focus on the comparative importance” of the right to disclosure and right to personal data protection would produce a different conclusion to that arrived at by the Court of Appeal.

Lord Kerr therefore went on to dismiss Viagogo’s appeal, holding that the RFU’s interests in obtaining the information applied for (including those relating to wider policy issues) outweighed the rights of those individuals identified by that information.

Analysis

The Supreme Court’s decision emphasises the importance of proportionality when assessing an application for a Norwich Pharmacal Order and, in particular, the need for courts to be flexible when balancing the potential benefits and possible drawbacks of granting such redress.

The key question is whether the disclosure of information is necessary and proportionate in all the circumstances; the European data protection and fundamental rights regime cannot be used by alleged wrongdoers as an impenetrable shield to avoid claims.

Perhaps of more interest to readers is the effect on the secondary ticketing market. The relationship between those issuing tickets and secondary ticketing website owners and operators is not uniform.

Operators commonly seek to enter into sponsorship and service agreements with governing bodies or clubs in order to provide a secure environment for the re-sale of tickets issued for particular events or teams. In that context, the operators are seen to be part of the solution to the problems of ticket touting and offer additional revenues to the ticket issuers.

On other occasions those issuing tickets consider the secondary ticketing sites to be part of the problem, offering a recipient of a ticket an opportunity to register and, apparently in breach of the terms under which the ticket was issued, offer a ticket for resale.

Indeed, the release of tickets for any event is commonly followed by the appearance of tickets online at price points aimed at exploiting the difference between supply and demand, thereby securing a windfall for the original recipient of the ticket rather than the ticket issuer.

The Supreme Court’s decision in this case is therefore useful for ticket issuers that actively seek to increase access to sport across all levels of society without issuing all tickets for sale at the full commercial value.

On the other hand, it is a potential blow to secondary ticket operators that look to offer services to those ticket holders who, without any compulsion by those operators, take the decision that they would like to sell their tickets, presumably for profit.

After all, the threat of being called to account in front of your peers is likely to be a powerful deterrent against seeking to profit from your luck in securing a ticket in the first place.

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