

IN THE MATTER OF THE BADGEWORTHY LAND COMPANY LTD

AND IN THE MATTER OF THE HUNTING ACT 2004

OPINION dated 14 October 2024

Introduction and Background

1. I am instructed by Direct Access to advise Action Against Staghunting ('AAS') on whether the enactment of the Hunting Act 2004 ('the Hunting Act') may extinguish or curtail the private law hunting rights that the Badgeworthy Land Company Ltd has over lands in Devon and Somerset. I am also asked to advise on various related questions that are set out in my very helpful instructions.
2. I should make four introductory comments:
 - i. firstly, I am a specialist property lawyer and this Opinion necessarily draws on my property law background and AAS would be well advised to take advice from specialist advisers with a criminal and/or administrative law background on how the criminal law may be deployed to better give effect to the Hunting Act;
 - ii. secondly, the case law on "sporting rights" contains language and is predicated on values that I appreciate will be highly offensive to my instructors. However, these cases, many of them being of their time and reflecting the values of landowners of scale (and of the judiciary of the day) form part of the law and cannot be ignored in this Opinion;
 - iii. thirdly, I have no personal knowledge of the activities of Devon and Somerset Staghounds; the Quantock Staghounds; or the Tiverton Staghounds and rely solely on my instructions in this connection; and

- iv. fourthly, I have attempted to restrict this Opinion to the law on point regardless of any personal views that I may hold.
3. AAS is an unincorporated society based in Somerset. It is a campaigning organisation opposed to the pursuit of deer on horseback with hounds as currently practiced in the UK, and especially in the South West of England by the following well-established hunts: the Devon and Somerset Staghounds; the Quantock Staghounds; and the Tiverton Staghounds (“the Hunts”).
4. I am instructed that the Hunts, which have operated for many years, take the view that the passing of the Hunting Act should not restrict, or alter, their activities, which I am instructed they continue wholly unmodified by the Hunting Act.
5. AAS takes the view that the Hunts’ current activities are clearly unlawful and in breach of the Hunting Act, but that these activities continue unabated because of a lack of effective prosecution of what AAS maintains are clear breaches of the law.
6. From my instructions, I note the central importance of the following charge over much, if not most all, of the land over which the Hunts wish to range (“the Charge”).
7. The Charge is in favour of Badgeworthy Land Company Ltd (“BLC” and “the Charge”). A specimen of the Charge is, I am instructed, in the following terms¹

“ the land is subject to the following rights...

The Grantors....hereby grant and convey unto [the Badgeworthy Land Company Ltd]....the right of hunting with hounds and with or without horses in pursuit of deer foxes and hares over and upon....the Exmoor Estate....and of entering upon the said lands for the purpose aforesaid subject as to such of the said lands woods and premises....to the rights conferred upon [any tenants] by their existing leases or agreements of tenancy or by law....and without prejudice to the right of theowners or occupiers for the time being....to farm cultivate and develop [the land]....subject to making good or paying compensation for all damage....[the Badgeworthy Land Company Ltd] may from time to time

¹ I assume that this wording is extracted from a HMLR freehold title

authorise....any recognized packs of Staghounds....to exercise....the right of hunting....’ ;

8. I note the history supplied by my instructions of BCL having been incorporated in 1926 for the sole purpose of protecting the ability to hunt over lands in the South West and it having survived, with considerable influence locally, to the present day.
9. The Charge is the mechanism by which land is burdened with the obligation (whether the current owners like it or not) to afford the Hunts² *the right of hunting with hounds and with or without horses in pursuit of deer foxes and hares over and upon* their land. Hence, should a parcel of land fall into the ownership of a person opposed to hunting on their land, the Hunts are still able to do so as a matter of private law rights

Discussion

The Hunting Act

10. The central question is whether the Charge remains legally enforceable by BCL against reluctant landowners³ now that the Hunting Act has come into force.
11. Subject to limited exceptions, the Hunting Act bans the hunting of mammals with dogs (Hunting Act, s. 1). As stated in the legal guidance on the Hunting Act for prosecutors (“the Guidance”):

“The Act therefore makes clear that hunting with dogs includes engaging alone or participating with others in the pursuit of a wild mammal where a dog is used in that pursuit. Hunting is an intentional activity and there can be no such thing as unintentional hunting.

However, “hunts” do not include the mere searching for an as yet unidentified wild mammal (see **DPP-v-Wright** [2009] EWHC 105 (Administrative Court)). To cite from the Guidance:

² Claiming through BLC

³ I am instructed that, with (some) breaking up of the large estates and the resultant change in the demographics of landowners, a number of landowners do not want hunting on their land

“Hence once an illegal hunt begins, only a person who engages or participates in the pursuit of an ‘identified’ wild mammal is guilty of an offence.

12. There is also the offence of assisting an illegal hunt (Hunting Act, s. 3), To cite again from the guidance

*“An owner or occupier of land who gets an unwelcome visit from the hunt will not be caught by section 3(1). **Proof will be required that the defendant knew that illegal hunting was taking place at the time that the illegal hunt was on his land. [emphasis added]***

“It may be argued that permission was given for legal forms of hunt and that the persons have gone beyond the scope of the permission granted. In these situations it will be important that the necessary evidence of knowledge is obtained from circumstance or other evidence before a prosecution is pursued.”

“There are two differing factual situations caught by section 3(1), namely ‘entered in the course of the commission of an offence’ or ‘used in the course of the commission of an offence’.

“For the offence of permitting land to be entered in the course of a section 1 offence, the offence must have already begun before the hunt is allowed to enter the land concerned. In relation to the offence of permitting land to be used in the course of a section 1 offence, use requires that the hunting offence takes place on the land, regardless of where the hunting offence began.

13. Reference should also be made to the Hunting Act, s. 4, which provides a reasonable belief defence:

It is a defence for a person charged with an offence under section 1 in respect of hunting to show that he reasonably believed that the hunting was exempt.

Obviously, the reasonable belief defence is only engaged if the hunt was, in fact, illegal: if it was exempt and hence legal, there is no offence and hence no need to make out a reasonable belief defence.

14. Reference should also be made to various provisions of Schedule 1 to the Hunting Act (Exempt Hunting), which include, as a necessary ingredient of a specific exemption, the condition that:

(the hunter) has been given permission to use [the land upon which the hunting is occurring] for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs⁴.

The Law of Easements and Profits a Prendre

15. For present purposes, this complex, contradictory and antiquated area of the law can be dealt with shortly, though at the risk of oversimplification.
16. Firstly, the Charge, conferring as it does “sporting rights” is probably a profit a prendre and not an easement (though for present purposes this is probably a distinction without a difference).
17. It is well established that sporting rights, such as a right of hunting (venery) may exist as profits à prendre⁵: see ***Ewart v Graham*** (1859) 7 HLC 331 at 345 and see also the extensive rights claimed in ***Thorne RDC v Bunting*** [1972] Ch. 470. Generally, hunting rights are non-exclusive (though the wording of the Charge may, possibly, establish exclusive rights): see ***Duke of Sutherland v Heathcote*** [1892] 1 Ch. 475 .
18. It may also be noted that a right to hunt imposes no correlative obligation (on BCL/the Hunts) to keep down the numbers of animals on the burdened land: see ***Seligman v Docker*** [1949] Ch. 53.. However, which may be of interest, there is no infringement of a right to take game if the owner of the burdened land (an owner of land burdened by the Charge) merely cuts timber in the ordinary way, even if he thereby drives away game; but it will be a breach if fundamental changes in the land are made e.g., where the whole or a substantial part of the land is built upon or converted into use incompatible with hunting: see for example ***Peech v Best*** [1931] 1 K.B. 1 in which racing stables were constructed on the land in question.

⁴ E.g. the stalking and flushing out exemption (Sch. 1, para 1)

⁵ See generally ***Megarry & Wade- the Law of Real Property (Ed 10,)*** , para 29-035

19. Secondly, easements (and by parity of reasoning, probably, profits à prendre) generally cannot be acquired by conduct in breach of statute: see the discussion in *Gale on Easements* (ed 21) para 4-172. This is so because all rights are acquired by prescription (long unchallenged user).are founded on the legal fiction of a presumption of a grant and a grant cannot be presumed where such a grant would have been in contravention of a statute. See the discussion in the cases as to relying on prescription to found vehicular rights of way across commons, that grappled with the problem that the Law of Property Act 1925 , s 193 and the Road Traffic Act 1988, s. 34, made it illegal in the absence of the grant of lawful authority to drive motor vehicles on common land: see *Bakewell Management Ltd v Brandwood HL* [2004] UKHL 14 [2004] 2 A.C. 519, which turned on the following nuanced observation of Lord Walker:⁶

“In my opinion, it is the landowner’s unfettered power of dispensing from criminal liability, exercisable at his own discretion and if he thinks fit for his own private profit, which is the key to the disposal of this appeal. Since a dispensing power of that sort is very unusual, it is unlikely to apply to many other cases of criminal illegality⁷.”

20. However, though the Hunting Act, rendering as it does the hunting of mammals with dogs illegal, would operate to prevent such hunting rights from now accruing by prescription (long unchallenged user), that does not answer the question arising of whether the Hunting Act will extinguish the Charge (which of course pre-dates the Hunting Act).
21. The point being that the hunting rights conferred on BCL by the Charge were validly established when the Charge was granted and this grant is not automatically extinguished by reason of the fact that the permitted rights were subsequently prescribed by statute: see, by way of background, the discussion in *Hanning v Top Deck Travel Group Ltd* (Court of Appeal) (1993) 68 P & CR 14.

Whether the Charge is Extinguished by the Hunting Act

⁶ Broadly, drawing a distinction between “ real crime” and Road Traffic Act offences.

⁷ And the Hunting Act contains no general private dispensing power.

22. This focuses attention on the central issue (which my instructions are directed at) of whether the Charge continues to be enforceable to the extent that the conduct permitted by the Charge is prohibited (and rendered unlawful) by the Hunting Act.
23. The Hunting Act is silent as to whether it renders agreements such as the Charge void or unenforceable.
24. The position where the statute is silent as to whether it renders a private agreement void or unenforceable was considered relatively recently by the Supreme Court in ***Patel v Mirza*** [2016] UKSC 42; [2017] A.C. 467, though this case was addressing illegality in the narrower sense viz contracts that somehow involve a legal wrong and not, directly, the question of statutory illegality. The following observations from ***Patel*** are instructive (Lord Toulson, speaking for the majority) held that the court “*must abide by the terms of any statute*” but that the court in construing the statute could:

“... have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in the denial of the relief claimed.”

25. The authoritative commentary in ***Chitty on Contract (Ed 35)*** says this at para 19-

Thus when the court has to consider whether a contract or claim is impliedly rendered unenforceable by the statute, it seems that it is proper to consider the “trio of considerations” as a guide to what was intended.

26. When one looks at the scheme of the Hunting Act, including the exposure of landowners under section 3(1) to the risk of prosecution for the offence of assisting an illegal hunt, a Court is very likely to decline to enforce the Charge against a landowner who bars illegal hunts from his/her land.
27. However, what is the practical effect of that? It seems to me that it begs the question. All it is really saying is that a landowner whose land is subject to the Charge is not constrained by the Charge to allow an illegal hunt to be conducted on his/her land.

28. It does not follow that a landowner can simply take the view that, whatever the Hunts are doing, is, or is very likely to be, illegal, and hence, the Hunts will not be allowed onto his/her land. As to which, as my instructors will be aware, the Hunts will have all sorts of explanations and rationalisations to the effect that their activities are within the law and that any hunting by them is either:
- i. not “hunting” at all within the meaning of the Hunting Act⁸; or
 - ii. if “hunting” non-illegal (exempt) hunting,
- and either way legal and accordingly the Charge remains enforceable by BCL/the Hunts against landowners subject to the Charge.
29. A prime example of such explanations and rationalisations would be ‘trail hunting’ (i.e. the laying of a scent to be followed by hounds and riders), which is not the hunting of wild mammals per se and hence not rendered illegal by the Hunting Act.
30. I doubt that the specific exemptions in the Schedule to the Hunting Act, which require the permission of the occupier, will assist (though the contra is not unarguable). The principal difficulty is that the occupier of the land (if not the freehold owner) e.g. a tenant, will necessarily derive title under the freehold owner of the land in question and will therefore be bound by the Charge; and it is the Charge itself by which the owner/occupier’s consent to the stalking ,flushing out etc is given. The provisions requiring written evidence of this consent will be made out by the hunters carrying a copy of the Charge with them⁹.
31. The point being that the Charge operates by way of a continuing permission in the sense that the land is burdened by it, rather like a private or public footpath across private land, which the owner cannot object to (especially) if the owner does not want people walking across his/her land.

How to Challenge the Continuing Efficacy of the Charge

⁸ e.g. it is drag hunting and without the Hunting Act’s definition of hunting

⁹ Which I suspect they will do if this point is deployed against them

32. The means of challenging the Charge would be by a landowner burdened by the Charge to bring a claim for a declaration against BCL, possibly with AAS joining as an interested party¹⁰.
33. The claim would be brought in the Business and Property Courts, most probably in the High Court, Chancery Division. Any such claim could be expected to be hard fought and expensive, with the claimant landowner at risk of paying BCL's costs if the claim failed¹¹.
34. Any landowner proposing to bring such a claim would need to seek his/.her own legal advice and should not rely on this opinion, which is addressed solely to AAS.
35. The evidence to support such a claim would need to focus on the frequency of breaches of the Hunting Act by the Hunts and the improbability, and impracticability, of the Hunts' activities falling within the lawful exemptionse.e.g, explaining why drag hunts are not "what they seem", if that is the contention.
36. I am sorry not to have been able to advise in less pessimistic terms
37. I am also very sorry for my delay in completing this Opinion, caused by a serious cycling mishap from which I am only just recovering.

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¹⁰ It would also be open to the Hunts to apply to be joined as interested parties

¹¹ Any landowner bringing such a claim would need to assume that, if the claim (including any appeal/s) were lost they would be liable for BCL's costs of the proceedings.