

Neutral Citation Number: [2016] EWHC 928 (Admin)

Case No: CO/249/2016

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

29/04/2016

B e f o r e :

**LORD JUSTICE BEAN
MRS JUSTICE CARR DBE**

Between:

**ROYAL SOCIETY FOR THE PREVENTION
OF CRUELTY OF ANIMALS** **Appellant**

- and -

**(1) CRAIGE McCORMICK
(2) NATHAN BAKER
(3) BENJAMIN LUSCOMBE
(4) CRAIG FORD
(5) ALEX SALT** **Respondents**

**Mr Iain O'Donnell (instructed by Nash and Co) for the Appellant
Miss Sara-Lise Howe (instructed by Clive Rees & Assocs.) for the 1st Respondent
Mr Nigel Weller (Solicitor Advocate) for the 2nd Respondent
Mr Henry Spooner (instructed by Clive Rees & Assocs. for the 3rd Respondent
Mr Harry MacDonald (instructed by Boyle Leonard Solicitors) for the 4th Respondent
Miss Aleksandra Rees (Solicitor Advocate) for the 5th Respondent**

Hearing date: 21st April 2016

Mrs Justice Carr DBE:

Introduction

1. This is an appeal by way of case stated following the ruling of District Judge Kevin Gray ("the District Judge") as to the meaning of "animal fighting" within s.8 of the Animal Welfare Act 2006 ("the Act") in the context of a prosecution by the Appellant ("the RSPCA") against various individuals said to be members of a group known as the "Devon Destroyers". The RSPCA is a private charity which, amongst other things, prosecutes animal welfare offences in England and Wales.

2. The five Respondents (originally alongside an additional two defendants) appeared at South and West Devon Magistrates' Court sitting at Newton Abbot on 12th October 2015 charged with a total of 38 offences contrary to sections 4, 8 and 9 of the Act, and (as alternatives) contrary to section 3 of the Deer Act 1991 and section 1 of the Protection of Badgers Act 1992. Specifically, so far as the Act is concerned, the Respondents faced charges as follows :
 - a) Keeping and/or training a dog or dogs for use in connection with an animal fight contrary to section 8(1)(h) of the Act;
 - b) Causing an animal fight contrary to section 8(1)(a) of the Act;
 - c) Being present at an animal fight contrary to section 8(2) of the Act (Nathan Baker only).
3. The District Judge delivered his (reserved) ruling at the close of the prosecution case, it having been agreed by all parties that the question of interpretation arising went to the heart of the issues and affected questions of evidential admissibility. This was a most unusual case, in that there was no direct evidence of any of the activity alleged to have taken place, which was the subject of the offences under section 8 of the Act. Rather, the prosecution case rested on Facebook and mobile telephone messages and entries, together with photographs and items discovered upon the execution of search warrants. The course adopted by the District Judge was entirely appropriate as a matter of case management and procedure.
4. Again by agreement the District Judge gave his ruling by reference to the prosecution case taken at its highest. He ruled :

“My ruling is that to constitute “animal fighting” as defined in Section 8 of [the Act] the “protected animal” must be placed with the other “animal” in an environment where the ability of both and in particular the other “animal” to leave is restricted and controlled by some person or persons connected with that activity or by some artificial restraint. It is only when this occurs that it can be said that a protected animal is placed with an animal for the purpose of fighting as required by Section 8.”
5. As a result of this ruling, the RSPCA elected to offer no evidence in relation to charges not brought under section 8 of the Act, on the basis that these were test prosecutions on the definition of “animal fighting”. The District Judge went on to dismiss all of the charges under section 8 of the Act on 12th November 2015.
6. The RSPCA seeks clarity of interpretation on the range of factual scenarios in which an animal fighting prosecution might be brought under section 8 of the Act. It emphasises that its intention is not to attempt to enlarge the ambit of the Act to encompass offences committed in the context of traditional (now illegal) hunting, but rather to ensure that it is able to prosecute in a range of factual circumstances where the purpose of the individuals involved is to procure a fight involving animals. As will be apparent from the summary of facts below, if the activities alleged did indeed occur, then they can only be seen as abhorrent and offensive to all right-thinking members of the public. If the District Judge's ruling is upheld, then the RSPCA intends to lobby for a legislative change to enable the prosecution of animal offences in a wider range of factual circumstances than the ruling permits.
7. To this end there are now two separate but overlapping questions framed for this Court as follows :
 - a) Was the District Judge correct in deciding that in order for an offence of animal fighting to be committed contrary to section 8 of the Act as defined by section 8(7) thereof, that the other animal, with which a protected animal is placed, has to be the subject of some

control or restraint by some person or persons connected with that activity or some other artificial constraint so that its ability to escape is prevented? (“Question 1”)

- b) Was the District Judge correct in considering that the tenet of Section 8 of the Act is aimed at organised and controlled animal fights, such as dog fights, which invariably involve money? (“Question 2”)

The assumed facts

8. As indicated above, the District Judge proceeded on the basis of the prosecution case at its highest, which can be summarised as follows : on the dates alleged in the charges (ranging between 2012 and 2014), one or more of the group would go into the countryside at night with one or more dogs (mainly lurchers or lurcher cross types) owned by them or in their charge seeking wild animals (namely deer, foxes, badgers and/or rabbits) in their natural environment. Their purpose was to set the dog or dogs on any wild animals found and for the dog or dogs to attack and kill. In some cases, particularly with deer, there would be a pursuit beforehand. When caught, the animal (except for rabbits) would fight to protect itself. This was, on the RSPCA’s case “the animal fight”. On occasion, in the case of deer, one of the Respondents might assist by cutting the deer’s throat. On occasions, the dog or dogs suffered injury during the course of “the animal fight”. One or more of the Respondents had raised the issue, on social media between them, of potentially digging out from its sett any badger found by the dogs, or roping any such badger and taking it to where the dog or dogs could attack it.
9. In written submissions, Mr O’Donnell for the RSPCA also submits it was the RSPCA’s case that the Devon Destroyers created the scenarios within which their dogs and the wild animals they found were placed together to fight : first the Devon Destroyers attended locations where they knew or believed that they would locate the wild animals they sought, and secondly, documentary evidence was adduced that wild animals were moved from one location to another in order that they could then be “placed more discreetly with the dogs for the purpose of setting up the desired animal fight.” It is right to record that these allegations are hotly contested.

The relevant legislation

10. Animal fighting has been outlawed since the Cruelty to Animals Act 1835. That act was repealed by the Cruelty to Animals Act 1849, which was amended and expanded by the Cruelty to Animals Act 1876. The Protection of Animals Act 1911 repealed the previous legislation and was amended by the Protection of Animals (Amendment) Act 1988 (“the 1911 Act”). The offence of causing an animal fight was there subsumed under the general heading of “offences of cruelty”. Section 1(1)(c) made it an offence for any person to “cause, procure, or assist at the fighting or baiting of any animal; or [to] keep, use, manage, or act or assist in the management of, any premises or place for the purpose, or partly for the purpose of fighting or baiting any animal, or [to] permit any premises or place to be so kept, managed, or used, or [to]...receive, or cause or procure any person to receive, money for the admission of any person to such premises or place”. Notably for present purposes, section 5A of the 1911 Act provided :

“Attendance at animal fights

A person who, without reasonable excuse, is present when animals are placed together for the purpose of their fighting with each other shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale.”

11. The Act repealed, amongst other legislation, sections 1 to 3 and 5 to 5B of the 1911 Act. Section 8 of the Act replaces the offences under sections 1(1)(c), 5A and 5B of the 1911 Act. It provides materially as follows :

“Fighting etc

(1) A person commits an offence if he –

- a) causes an animal fight to take place, or attempts to do so;
- b) knowingly receives money for admission to an animal fight;
- c) knowingly publicises a proposed animal fight;
- d) provides information about an animal fight to another with the intention of enabling or encouraging attendance at the fight;
- e) makes or accepts a bet on the outcome of an animal fight or on the likelihood of anything occurring or not occurring in the course of an animal fight;
- f) takes part in an animal fight;
- g) has in his possession anything designed or adapted for use in connection with an animal fight with the intention of its being so used;
- h) keeps or trains an animal in connection with an animal fight;
- i) Keeps any premises for use for an animal fight.

(2) A person commits an offence if, without lawful authority or excuse, he is present at an animal fight

...

(7) In this section –

“animal fight” means an occasion on which a protected animal is placed with an animal, or with a human, for the purpose of fighting, wrestling or baiting...”.

12. A “protected animal” is defined in section 2 of the Act. An animal is a “protected animal” if :

- “a) it is of a kind which is commonly domesticated in the British Islands;
- b) it is under the control of man whether on a permanent or temporary basis, or
- c) it is not living in a wild state.”

13. There was no issue here but that the dogs in question were protected animals within the meaning of the Act.

14. Subsections 8(3) to (5) of the Act make it an offence in certain circumstances to publish, supply, show or possess (with knowledge of the content and intent to supply) a video recording of an animal fight.

15. Separately, section 1 of the Hunting Act 2004 (“the Hunting Act”) provides :

“Hunting wild mammals with dogs

A person commits an offence if he hunts a wild mammal with a dog, unless his hunting is exempt.”

16. Hunting is exempt if it is within a class specified in schedule 1. Amongst other things, Schedule 1 includes stalking and flushing out a wild mammal, and the associated use of dogs below ground, if certain conditions are met; the hunting of rats and rabbits and the retrieval of hares on land belonging to the hunter or which the hunter has permission to use for such purpose; the flushing out of a wild mammal for the purpose of enabling a bird of prey to hunt on land belonging to the hunter or which the hunter has permission to use for such purpose; the hunting of a wild mammal for recapture and rescue of a wild mammal again if certain conditions are met; hunting for research and observation if certain conditions are met.
17. By section 11(2) of the Hunting Act, a reference to a person hunting a wild mammal with a dog is defined so as to include “in particular, any case where–
 - “a) a person engages or participates in the pursuit of a wild mammal, and
 - b) one or more dogs are employed in that pursuit (whether or not by him and whether or not under his control or direction).”
18. The penalties available for animal fighting and associated offences under the Act are more severe than those available under the Hunting Act. Under the Act a defendant can be imprisoned for up to six months and disqualified from keeping animals for life. Under the Hunting Act, only financial penalties are available, with no risk of disqualification.

The ruling below

19. As the District Judge put it, the ruling addressed the generality of taking a protected animal to a location to seek and attack another animal without any specific and direct involvement with that other animal by the person in charge of the protected animal or any other person prior to any attack on that other animal.
20. The District Judge found that the crucial words in section 8(7) of the Act were “is placed with”. And the placing had to be for the purpose of fighting. An unforeseen fight between two dogs, for example, would not fall foul of section 8(7) because there would not have been any deliberate placing of the protected animal with the other animal. He went on to hold :
 - “16. It seems clear to me that the whole tenet of the section is aimed at organised and controlled animal fights such as dog fighting (but not by definition limited to dogs – indeed any animal (providing one is a protected animal) or humans can be involved) and which invariably involves money. Section 8(1)(b) – receives money for admission; (c) publicises; (d) encourages attendance; (e) bets; (i) keeps premises for use. In addition there are the prohibitions regarding videos of animal fighting in subsection 3. I also consider it relevant that “fighting” in subsection (7) is listed with “wrestling or baiting””.
21. The District Judge went on to hold that the taking of a dog into the countryside in the hope of finding another animal to attack was not a “placing” for the purpose of section 8. The other animal had to be in a confined situation from which it could not depart without being allowed to by someone connected with the activity. It was not the intention of Parliament to class the activity alleged here by the RSPCA as “animal fighting” within the meaning of section 8.
22. The District Judge also took into account the Hunting Act in the course of his deliberations. The effect of classifying the activities under consideration as “animal fighting” would mean that hunting with dogs was subject to a far heavier sentencing regime than Parliament must be taken to have intended.

Question 1 : Was the District Judge correct in deciding that in order for an offence of animal fighting to be committed contrary to section 8 of the Act as defined by section 8(7) thereof, that

the other animal, with which a protected animal is placed, has to be the subject of some control or restraint by some person or persons connected with that activity or some other artificial constraint so that its ability to escape is prevented?

23. The RSPCA submits :

- a) That the District Judge wrongly imported additional requirements into section 8(7) to make out the offence. The requirement for the ability of both animals to leave to be restricted or controlled by participating individuals or by means of some other restraint is unsustainable : section 8(7) imposes no such requirement. The interpretation of the District Judge unduly narrows the ambit of the section : for example, if two dogs bred for fighting were placed together in an open field to fight by a person, on the District Judge's construction, the activity would not be caught by section 8(7) because their ability to leave was not restricted or controlled. The District Judge confused "animal fighting" in the broad sense with the narrower understanding of traditional dog fighting;
- b) That, expanding on a), the impermissible effect of the District Judge's ruling is to restrict the definition of animal fighting under section 8(7) to occasions where a protected animal is placed with another protected animal (because of the definition of protected animal in section 2(b) of the Act). Section 8(7) simply refers to a placing of a protected animal with another animal, not another protected animal. Reference is made to Blackstone's Criminal Practice (2016 Ed.) at paragraph B20.26 which comments in the context of section 8 of the Act that a wild animal, such as a badger, which has been captured for the purpose of being baited by dogs, will itself be a protected animal whilst in captivity;
- c) That the District Judge appears to have conflated "fighting" with "baiting" and/or "wrestling" and so misinterpreted "fighting". Baiting does require a degree of restraint (for an animal to be baited by the dogs) but there is no such requirement in "straight fighting". There is no requirement for restraint for fighting or wrestling;
- d) That the District Judge was wrong to conclude that all section 8 animal fighting activities must invariably involve money, in circumstances where "commercial gain" is an aggravating factor of higher culpability for sentencing purposes (see the Magistrates' Court Sentencing Guidelines on Animal Cruelty Offences). It would be contrary to the object and purpose of the Act if a person were able to escape prosecution under section 8(1)(f) if he personally took part in a fight with a dog simply because no money was involved in the fight ;
- e) That the District Judge was wrong in principle to rely in his deliberations on his finding that anyone hunting illegally with dogs could be prosecuted under the Act and the Hunting Act in "identical circumstances". First, the factual circumstances relating to an illegal foxhunt are not identical to those alleged by the RSPCA here. The persons involved do not intend to cause an animal fight to take place; they intend to create and participate in the discovery and tracking of, and then pursuit of, a fox by dogs. Additionally, a traditional illegal fox hunt could not lead to prosecution for animal fighting under section 8 of the Act, as it does not involve the section 8(7) requirement that the dogs be placed with the fox for the purpose of fighting. Finally, an animal hunt could be followed by an "animal fight", leading to prosecution both under the Hunting Act and section 8 of the Act. It is often the case that one act of criminal conduct can lead to another.

24. In overview, the RSPCA submits that the distinction between traditional hunting and animal fighting for the purpose of section 8 of the Act is important as a matter of principle. The nuisance at the centre of the prosecution of the Devon Destroyers must have been contemplated by Parliament when it introduced into the Act the definition of animal fighting that it did.

25. All Respondents submitted that, whilst the activities alleged against them may have amounted to offences under the Hunting Act, they did not meet the criteria for “animal fighting” under the Act. Parliament chose the words in the definition of “animal fighting” with care. The phrasing indicates that the activity is not made out by the mere act of a protected animal fighting with its quarry during the process of hunting or otherwise some chance encounter. Parliament’s intention was to outlaw fights, wrestling or baiting which occur in a contrived and/or artificial setting as a consequence of the deliberate and intentional acts of a person placing them in that setting for entertainment and/or financial gain.
26. Against these submissions, I turn then to my analysis.
27. Section 8(7) sets out an exhaustive definition of an “animal fight” :

“animal fight” means an occasion on which a protected animal is placed with an animal, or with a human, for the purpose of fighting, wrestling or baiting...”.
28. It was common ground that the dogs were protected animals. It was the dogs which had to be placed with the other animals. The placement of the dogs could be with any animal or human listed. The purpose had to be fighting, wrestling or baiting.
29. For present purposes the critical words to be construed in the context of the section as a whole are “placed with” “for the purpose of fighting”, words which are to be construed as a matter of normal language.
30. Looking at the section as a whole, whilst each of the sub-paragraphs in section 8 creates an independent and self-standing offence, its clear focus is on organised and controlled animal fights. I refer for example to : section 8(1)(b) (knowingly receiving money for admission to an animal fight; section 8(1)(c) (knowingly publicising a proposed animal fight); and section 8(1)(i) (keeping premises for use for an animal fight).
31. Looking at the normal language of the phrase “placed with” in that context, placing one animal with another animal (or a human) connotes a placing together of the two (as was expressly stated in section 5A of the 1911 Act). “[P]laced with” does not mean and cannot be equated with the release of a protected animal into the actual or potential unrestricted vicinity of another animal (or a human). Putting it another way, taking a dog (or other protected) animal into land or woods where there might or would be wild animals and then letting the dogs go in the hope that they would hunt and then attack those wild animals leading to a fight cannot be said to amount to a “placing” for the purpose of fighting within section 8 of the Act. If a fight or intended fight is to fall within the meaning of section 8, it cannot be the by-product of a chance meeting but rather must be a contrived or artificial creation specifically for the purpose of a fight during which, on the assumed facts, the other animal has no natural means of escape.
32. There are in my judgement two key elements by reference to the assumed facts in order for an animal to be “placed with” another animal “for the purpose of fighting”, namely physical proximity and control :
 - a) Proximity in the sense that the other animal must be immediately present. There is no hunt or chase to find the other animal;
 - b) Control in the sense that the other animal cannot escape. I accept that the fact that the paradigm example of an animal fight under section 8 may be one in a confined area does not itself determine that there is thus a requirement for confinement in all cases. But it seems to me that unless the other animal, say a deer, cannot escape, one is not “placing” the dog “with the deer”. Rather one is simply placing the dog in a field where there was a deer.

33. Thus the release of the dogs on the assumed facts here was not a placing of the dogs with the wild animals being targeted. At best the Respondents were letting the dogs loose in a certain unrestricted area where there might be or were other animals – the dogs were not being “placed with” those other animals.
34. This is not a question of importing additional requirements into the words of section 8. Rather it is a question of the proper construction of the phrase “placed with”. Nor do I accept that this is to conflate the concept of fighting with that of baiting or wrestling. The question of fighting is being assessed quite separately.
35. As for the example advanced by the RSPCA, namely of two dogs bred for fighting being placed together in an open field to fight, quite different considerations arise. If the dogs were encircled by onlookers so as to prevent escape, there would be no reason why such activity could not fall within section 8 of the Act.
36. But more importantly, the factual scenario posited is wholly different to that identified in the assumed facts here. The example suggested is not a situation where there is one attacker and one prospective victim. Rather, it is a question of two trained fighters being placed together for the purpose of fighting. That purpose will be achieved in the example given without the need for restraint or control. The “other” dog will not attempt to escape. It will fight. By contrast, in circumstances such as the assumed facts, where the “other” animal will instinctively attempt to escape, physical restraint is necessary to achieve the purpose – for the fight to happen. Whether or not restraint is required for the purpose of a placing for the purpose of fighting within section 8(7) will depend on the facts. On the assumed facts, it is. In the example of the two dogs bred for fighting, it is not.
37. This example demonstrates the fallacy in the RSPCA’s argument that the District Judge’s ruling unduly limits the concept of animal fighting to fighting between two protected animals. It does not. Assuming in the RSPCA’s favour that restricting an animal’s ability to escape amounts to control for the purpose of section 2(b) of the Act, it simply means that the “other” animal may or may not be a protected animal within the meaning of the Act.
38. The above approach is also a result that is loyal to the distinction between offences under the two separate regimes created by the Act and the Hunting Act. Parliament did not outlaw the keeping and training of dogs for the purpose of hunting (as opposed to animal fighting). Hunting does not involve the placing of a protected animal, nor is its purpose the taking place of a fight. The prey animal is free to escape. As the District Judge pointed out, the construction advanced by the RSPCA would create a very odd anomaly: standard (now illegal) hunting activities would be susceptible to prosecution under the Act, when Parliament clearly intended them to be the subject of the quite separate Hunting Act.
39. For these reasons, I answer Question 1 in the affirmative.

Question 2 : Was the District Judge correct in considering that the tenet of Section 8 of the Act is aimed at organised and controlled animal fights, such as dog fights, which invariably involve money?

40. As indicated above, I agree that the tenet of section 8 of the Act is aimed at organised and controlled animal fights. However, the involvement of money is not a necessary ingredient of offending under sub-sections 8(1)(a)(c)(d)(f) (g)(h) or (i) of the Act. By the time of the hearing before us, this was common ground between the parties.
41. Fairly read, I do not in fact think that the District Judge held otherwise. He was simply making the point at paragraph 16 of his ruling that in his view, in practice, it would invariably be the

case that money was involved. He may well have been right as a matter of fact : these activities are generally done for money.

42. But in so far as he did so hold, he was wrong to do so. The involvement of money is indeed an aggravating factor of any offending under 8(1)(a)(c)(d)(f) (g)(h) or (i), but it is not a necessary element of the offences.
43. This clarification does not in any way undermine the District Judge's headline ruling on interpretation as relevant on the facts of this case.
44. Accordingly, I answer Question 2 in the affirmative, save that in so far as the District Judge held that money had invariably to be involved for there to be an offence under section 8 of the Act, he was incorrect.

Conclusion

45. In conclusion, I answer Questions 1 and 2 by reference to the assumed facts as follows :
 - a) The District Judge was correct in deciding (by reference to and on the basis of the assumed facts) that in order for an offence of animal fighting to be committed contrary to section 8 of the Act as defined by section 8(7) thereof, that the other animal, with which a protected animal is placed, has to be the subject of some control or restraint by some person or persons connected with that activity or some other artificial constraint so that its ability to escape is prevented;
 - b) The District Judge was correct in considering that the tenet of section 8 of the Act is aimed at organised and controlled animal fights, such as dog fights. In so far as he held that money had invariably to be involved for there to be an offence under section 8 of the Act, he was incorrect.
46. This limited clarification does not require the ruling of the District Judge to be quashed or a fresh re-trial to be ordered.

Consequential matters : costs

47. The RSPCA invites the Court to make order for payment of its costs of this appeal out of central funds pursuant to section 17(1)(b) of the Prosecution of Offences Act 1985 on the basis that the purpose of the appeal was to obtain the Court's guidance on an important point of interpretation. It has submitted a statement of costs in the sum of approximately £19,000. I have no doubt that this appeal was brought in good faith to seek clarity on the points arising. But the appeal has been dismissed. It seems to me inappropriate that all or most of the RSPCA's costs of this appeal should be borne by the general taxpayer. However, in recognition of the fact that the RSPCA has achieved some clarification and guidance on points of general public importance over and above the ruling below, I would order that the sum of £5,000 be paid out of central funds towards the RSPCA's costs of appeal. That is a just and reasonable sum in all the circumstances.
48. The Respondents, who apparently each benefit from separate legal aid certificates, seek orders for legal aid taxation. Despite the submissions of all five legal representatives for the Respondents, I cannot identify any material conflict between them, or any reason why there was at any time a reasonable need for separate representation. This appeal raised two relatively short points of law on which, as the Respondents' skeleton arguments demonstrate, the Respondents took essentially the same position. In this jurisdiction there could never have been any examination of the facts of the case, or the relative merits or de-merits of the individual cases against the individual Respondents.

49. Nevertheless, there appear to have been communications with the Administrative Court Office where it was accepted that separate representation for at least one of the Respondents was appropriate. In the circumstances, where there was a degree of confusion amongst the Respondents, I am prepared to order legal aid taxation of all Respondents' costs without more. However, I would emphasise that the position is unsatisfactory. Even though time was short, the Respondents should at least have communicated with the RSPCA to flush out the extent to which any factual issues that could give rise to any conflict of interest might arise. Such enquiry would have revealed that they would not, and that no separate representation was necessary. The time and expense of such representation would have been spared. This was always only an appeal on points of law by reference to assumed facts. I would certainly not have made a separate costs order in favour of each Respondent on an inter partes basis.

Lord Justice Bean :

50. I agree.