Neutral Citation Number: [41] EWHC (QB)

Case No: HQ05X02211

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2006

Before :

THE HON. MR JUSTICE EADY

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Between :

Jenifer Howlett	**Claimant**
- and -	
Terry Holding	**Defendant**

- -
- -

Adrienne Page QC and Joanne Cash (instructed by **Carter-Ruck**) for the Claimant
William McCormick (instructed by **JS & A**) for the Defendant

Hearing date: 14th December 2005

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EADY

The Hon. Mr Justice Eady:

1. On 14th December 2005 I granted an injunction against the Defendant to restrain harassment of the Claimant generally and in two particular respects. I now set out my reasons. This is the first occasion on which counsel were able to reassemble.

2. The evidence before me discloses a clear and persistent campaign of harassment of the Claimant, Mrs Jenifer Howlett, which has been going on now intermittently for about four to five years. The Defendant has been flying banners from his aircraft over the Castle Point area of Essex which are addressed to Mrs Howlett, or refer to her, in abusive and derogatory terms. He has also dropped leaflets from time to time over the surrounding areas. This has undoubtedly caused her anxiety and distress and, what is more, because she never knows when she is likely to see another aircraft going past, she is forced to live in a state of uncertainty and apprehension.

3. Not surprisingly, it is contended by Mr McCormick on the Defendant's behalf that an injunction to restrain his client from flying banners with messages would constitute an infringement of his right of free communication, as protected by Article 10 of the European Convention on Human Rights. There is no doubt that his rights are engaged. So too are the Claimant's rights to privacy and to the protection of her physical and psychological integrity under Article 8.

4. The legal mechanism to which Mrs Howlett has on this occasion resorted is the Protection from Harassment Act 1997. It has already been held in *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233 that, in some circumstances, the exercise of one's right of free speech can fall within the concept of harassment, provided the other necessary ingredients are present. For example, it would have to be classified as unreasonable and oppressive conduct.

5. It was explained by the Master of the Rolls in that case that press publications, before being held capable of constituting harassment, would have to be attended by some exceptional circumstances which would justify sanctions and the restriction on the freedom of expression they involve. It was common ground in that case that such circumstances would be rare. It was also recognised that the Convention right of freedom of expression does not extend to protecting remarks directly inconsistent with the Convention's underlying values, and reference was made to *Jersild v Denmark* (1994) 19 EHRR at [35] and *Lehideux & Isorni v France* (1998) 30 EHRR at [53]. In *Thomas* itself, which was concerned only with whether a case of harassment was arguable, the respondent's case was permitted to go forward on the basis that the appellants were alleged to have harassed her by publishing racist criticism of her which was foreseeably likely to stimulate a racist reaction on the part of *The Sun's* readers. By contrast, in the present case, what is objectionable in the exercise of Mr Holding's right of free expression is the impact it has had, and is likely to continue to have, on Mrs Howlett's privacy and psychological well-being.

6. Predictably, it has been argued by Mr Holding that the Claimant's true complaint is that she has been libelled. No doubt she has. The general message of his most recent publications is that she is in some unspecified way obtaining benefits to which she is not entitled. But it is important to identify the true nature both of her complaint and of the conduct complained of. One of a number of unusual features in this case is that the Claimant has already twice sued Mr Holding to judgment in defamation proceedings,

and twice obtained the verdict and vindication of a jury in respect of other allegations of dishonesty. Those cases were heard, respectively, in October 2003 and May 2005. It cannot be said of Mrs Howlett, for one moment, that she is afraid to sue for libel, that she lacks resolve, or that she is unwilling to face public cross-examination over whatever serious allegations Mr Holding chooses to make against her. The outcome of the litigation has, however, not deterred Mr Holding from continuing with what is said to be a campaign against her.

7. The second unusual feature of this litigation is that Mr Holding has been only too willing to reveal, and has done so in the witness-box in the second libel action last year, what it is that he hopes to achieve by his campaign of public vilification. He seeks to cause Mrs Howlett "living hell" by way of retribution for her daring to speak out publicly in May 2000, in her then capacity as a councillor in Castle Point, on the subject of a planning application pending at that time by Mr Holding's company. He expressed the hope that he had caused her "hell" because it was, in his rather sinister phrase, "payback time".

8. The truth is that Mr Holding is a rich man who is prepared to use his wealth to victimise a woman of modest means, who can only defend herself by resorting to the law (taking advantage of the relatively recent provisions governing conditional fee agreements). She has been fortunate to find lawyers to represent her and to attempt, as far as possible, to protect her interests. Even so, Mr Holding is prepared to use his wealth to manipulate the system and to set her remedies at nought. He made it clear, shortly after the first libel action, by the publication of abusive banners about the judicial system, that he thought nothing of the jury's verdict in that case.

9. Mr Holding wants to use his Article 10 rights to go on inflicting damage on Mrs Howlett in a cruel and cynical way, while laughing up his sleeve at the processes available to her through the administration of justice. He prefers to use his wealth to render such remedies ineffective. He is not prepared to accept a jury's verdict, and will seek by whatever means are available to him to extricate himself from the restrictions imposed by court orders.

10. It was held in the past, for example in *Crest Homes v Ascott* [1980] FSR 396, that in a libel context it would not be right to restrain by interim order publication of defamatory words – however offensively expressed and by whatever means – provided the relevant defendant indicated that it was genuinely his intention to justify his allegations. That was an application of the rule in *Bonnard v Perryman* [1891] 2 Ch 269 in rather striking circumstances. The Defendant had been driving his rather grand motor car around an estate recently developed by the claimant company, with his front door strapped to the top of the vehicle and rude remarks painted on it about the quality of its workmanship. The issues here are not that simple. This is not an application for an interim order in a libel action. The proceedings are brought under CPR Part 8, as prescribed for harassment cases.

11. It is now clear, at least since the House of Lords' decision in *Re S (FC) (A Child)* [2005] 1 AC 593, that it is not appropriate to accord automatic precedence to one Convention right over another. Once such rights are engaged, in any particular case, as they are here, then it is necessary to carry out what has been called "the ultimate balancing exercise" by bringing to bear "an intense focus" upon the circumstances of the individual case.

12. As always, one must pay the closest regard to proportionality. Mrs Howlett is not seeking to restrain Mr Holding from exercising his right of free speech, even to make derogatory allegations about her, for all purposes. If he has genuine concerns, even now, that Mrs Howlett may yet be breaking the law, he can go to the appropriate authorities and report those concerns. Indeed, he has already done so: he has been in communication with the Department of Work and Pensions. (He has declined, however, to reveal whatever response he has had.) Thus, as Miss Page QC for Mrs Howlett succinctly put it, "he has had his say".

13. On the other hand, the anguish that Mrs Howlett has had to suffer at Mr Holding's hands over the last four years is out of all proportion to the value to be attached to the exercise of his right of free speech *by the methods he has chosen.* It is no doubt desirable in a free society that, all things being equal, any individual citizen should be free to express whatever views and make whatever allegations he or she likes – subject to the usual constraints imposed, for example, by the law of nuisance, libel, breach of confidence or contempt of court. All things are not, however, equal. Mrs Howlett's right to lead a peaceful life and to enjoy her privacy are also to be protected.

14. When one applies the necessary "intense focus" to these circumstances, and one addresses the important issue of proportionality, there is in my judgment only one answer. Mrs Howlett is entitled to call upon the protection of the law and to have Mr Holding's acts of aerial harassment restrained by injunction.

15. I should add that I expressed the view at a previous hearing, in the light of the evidence before me, that even if Mrs Howlett had claimed an interlocutory injunction on the basis of libel there was insufficient material to warrant a plea of justification. As I concluded, no responsible counsel could allege that Mrs Howlett was a benefit fraudster. It is not an allegation that can be advanced simply on the say-so of an obsessive client. Accordingly, on the facts of this case, *Bonnard v Perryman* would not avail Mr Holding.

16. Apart from questions of free speech, there is also the question of surveillance to be considered. Mr Holding has revealed that he has had Mrs Howlett watched at various times and wishes to retain his right to do so, whatever anxiety and distress that may cause her. It is another means by which he can twist the knife.

17. Various arguments have been raised by Mr Holding's legal team. It is, of course, by no means uncommon in the course of personal injury or clinical negligence litigation for defendants and their insurers to arrange for photographs or video recordings to be made of claimants purporting to have suffered certain consequences in terms of (say) pain and suffering, or loss of earnings, in order to test their veracity.

18. Reference was made to *Jones v University of Warwick* [2003] 1 WLR 954. There the court balanced various competing considerations, one of which was that in litigation it is generally desirable that the truth should be revealed. To take such steps in that context in order to protect oneself, if reasonably proportionate, is no doubt legitimate. Here there was no on-going litigation in which Mr Holding was seeking to protect himself. He wanted to expose Mrs Howlett, if at all possible, as a benefits cheat. His excuse was that he was anticipating that she *might* sue him for libel, and that the evidence *might* come in useful in that event. To put it more bluntly, he was goading

her into having to launch a third set of libel proceedings. Effectively, therefore, unlike in the *Jones* case, he was using the surveillance as a weapon of attack rather than by way of defending his own interests.

19. He knows, however, because he has seen the medical evidence adduced in the libel litigation that Mrs Howlett suffers from a degenerative disorder of the spine. He has no medical evidence himself to contradict that. He is nevertheless determined to deprive her, if he can, of the benefits which she has been receiving in respect of her disability. He suggests that the video material he has obtained casts doubt on whether she is as adversely affected as she claims. What is done cannot be undone. He may show his video footage to the relevant authorities if he wishes to do so. But the surveillance must now cease. He is an ordinary citizen, albeit a wealthy one; it is not his function to enforce the law as a vigilante. Still less is it his function to harass other citizens by having them watched or, reverting to the rather old fashioned word that was used in these situations in the past, to "beset" people in their homes. That is unacceptable and the true reason is that he simply wishes to cause Mrs Howlett a "living hell". He should not be permitted to do so.

20. Mr McCormick has raised other points in relation to surveillance. There is no doubt that Mrs Howlett has been distressed by discovering that she had been watched, and she is still anxious that she may at any moment be placed under surveillance as she goes about her daily life. It is said that there has been no surveillance since last September, but Mr Holding wishes to reserve the right to have her watched whenever he wishes in the future. The fact that she is aware that it might take place does not, however, necessarily mean that, if and when it does occur, she will find it distressing. If it is carried out efficiently, and in accordance with Mr Holding's intentions, she should not become aware of it. Moreover, applying the test in the statute, it is said for the same reason that there is no reason why Mr Holding should know, or ought to know, that secret surveillance would amount to harassment: see s.1(1)(b).

21. This gives rise to a potentially very sinister scenario. One citizen is aware that another wishes to keep her and her home under surveillance, whenever he feels like it. It seems counter-intuitive that the court should be able to do nothing to allay her concerns.

22. It is to be noted that the statute does not set out to define harassment exhaustively but merely contains the proposition that it "includes" certain matters. The relevant wording in s.7(2) is as follows:

> "References to harassing a person include alarming the person or causing the person distress."

This provision has encouraged Mr Holding to argue that he is, in effect, entitled to have Mrs Howlett and her house watched as often as the whim takes him, and to have her followed in the street, and into shops and restaurants, provided any individual act of surveillance does not involve alarming Mrs Howlett or causing her distress. Meanwhile, he can derive satisfaction from her suffering the anxiety and uncertainty of not knowing when "big brother" will strike. There can be little doubt that such behaviour would constitute a "course of conduct" for the purposes of s.1(1) of the statute. I put to Mr McCormick in the course of argument the hypothesis that a victim of surveillance had been watched on six occasions but only realised what was

happening on the seventh when he was caused alarm. On his case, there would be no "course of conduct" because there had been no alarm or distress on the previous occasions. Moreover, if the surveillance continued six more times, without the victim spotting it, those occasions would also have to be left out of account. I regard this as an artificial approach.

23. I am not persuaded that the source of Mrs Howlett's anxiety is, in this respect, beyond the protection of the law. To keep someone on tenterhooks, knowing that she is likely to be watched as she goes about her daily life, seems to me remarkably cruel. Just because she does not know, in any given instance, that surveillance is taking place, it does not make it any the less distressing for her. What causes the distress is the awareness that secret surveillance is taking place, or is likely to take place at any moment. I see no reason why that form of besetting should fall outside either the spirit or the letter of the Act.

24. Also, I need to bear in mind that what Mr Holding has done, and what he proposes to do, by way of surveillance comes close to the concept of "stalking" which, as it happens, is the very mischief to which the 1997 statute was primarily directed: see e.g. *Thomas v News Group Newspapers Ltd* at [16] and [30]. Also, as Miss Page has pointed out, it would be artificial to address the aerial harassment and the surveillance as though they belonged in separate compartments. In reality, they are each part of the continuing campaign (or "course of conduct") of giving her "hell".

25. It is necessary now for the court to have regard to the principles applied by the European Court of Human Rights in the recent case of *Von Hannover v Germany* (2005) 40 EHRR 1. The case illustrates how wide is the notion of "private life" which the court at Strasbourg is now prepared to recognise. Princess Caroline of Monaco was described in the domestic courts in Germany as a figure of contemporary society *par excellence* but, even so, it was held in Strasbourg that such a classification was not sufficient to justify constant intrusion into her private life by paparazzi. Thus her privacy was entitled to at least a degree of protection even in public places.

26. The notion of privacy was considered by the court, and especially at [50], where it was said that it included a person's physical and psychological integrity. The guarantee afforded by Article 8 of the Convention was primarily intended to ensure the development, without outside interference, of the personality of each individual in his or her relations with other human beings. A zone of interaction was recognised of one person with others, even in a public context, which would fall within the scope of "private life". In the light of this case, and indeed others such as *P G & J H v United Kingdom* (Application 44787/98) and *Peck v United Kingdom* (2003) 26 EHRR 41, it may safely now be said that it is not possible for those who wish to intrude upon the lives of individuals through surveillance, and associated photography, to rely upon a rigid distinction being drawn in their favour between what takes place in private and activities capable of being witnessed in a public place by other people.

27. Miss Page submits that against the background of Article 8 the court is obliged to ensure that there are adequate safeguards, when construing a statute such as the Protection from Harassment Act, to protect rights of privacy and, in particular, to ensure that any encroachments expressly permitted should themselves be compliant with the Convention; that is to say, they must be necessary and proportionate to the legitimate objective pursued. Those can be identified from Article 8(2). She suggests

that I should construe any "defences" under the 1997 Act so as to be compatible with the exceptions recognised by Article 8(2).

28. I should start by considering the terms of Article 8 itself:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

29. I need, therefore, next to consider to what extent the exceptions or "defences" laid down in the 1997 Act marry up with the public policy considerations identified in Article 8(2). The relevant provisions are to be found in s.1(3):

> "Subsection (1) does not apply to a course of conduct if the person who pursued it shows –
>
> (a) that it was pursued for the purpose of preventing or detecting crime,
>
> (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
>
> (c) that in the particular circumstances the pursuit of the course of conduct was reasonable".

Mr McCormick placed reliance both upon (a) and (c).

30. There was a significant divergence between counsel as to the true extent of s.1(3)(a). Miss Page suggests that the section is directed only at preventing the ordinary law enforcement agencies from being sued for harassment in the carrying out of their regular duties. Mr McCormick, on the other hand, says no such restriction is to be found in the statute and, since in this respect the statutory words are not ambiguous, there is no warrant for resorting to Parliamentary debates or ministerial statements as an aid to interpretation in accordance with the principles in *Pepper v Hart* [1993] AC 593. The parties thus differed as to whether the words were ambiguous.

31. Miss Page invited me to look at *Hansard* by way of supporting her general submission but, in the alternative, argued that as a matter of construction it simply cannot be right that the relevant provision is intended to enable any Tom, Dick or Harry to set himself up as a vigilante and harass his neighbours under the guise of "preventing or detecting crime". That may be a rather contentious way of putting it, but I think the point is a fair one.

32. Going back to the words of Article 8(2), one sees that the emphasis is upon any interference with the right under Article 8(1) "by a public authority" being permitted

only if it is "necessary … for the prevention of disorder or crime". In so far as there is a lack of clarity as to the scope of s.1(3)(a), I would have no difficulty in concluding that it is not necessary to permit *anyone* to harass his fellow citizens by surveillance. It may well be necessary to leave room for security or law enforcement agencies to have such a power in appropriate circumstances, but that is a different matter.

33. Furthermore I consider that, in view of the very differing interpretations put forward by counsel, it is legitimate and helpful to look at *Hansard*. The purpose of the proposed s.1(3)(a) was explained clearly by the then Home Secretary as being to prevent law enforcement agencies from being sued for harassment in circumstances where they were merely carrying out their duties of detection or crime prevention. What he said on 17th December 1996 was this:

> " … It will be a defence to show that the conduct was pursued for the prevention and detection of crime, or under an enactment or rule of law. Because of the nature of the activities pursued by stalkers, unless special provision is made, some police activities could be caught by the Bill. That, of course, is not our intention. I am also aware that the activities of journalists, salesmen, religious activists, debt collectors, private investigators and even political canvassers might fall within the scope of the Bill. We have therefore provided a defence of acting reasonably in the particular circumstances of the case in order to safeguard these legitimate activities."

It would thus appear that (a) was indeed framed with law enforcement agencies in mind and that (c) was directed towards others carrying out the miscellaneous functions described. Even if that is too rigid a construction, a private citizen before being able to avail himself of (a) would at least have to show that there was, objectively judged, some rational basis for the surveillance. Here there was none. It was merely carried out in the *hope* that something unlawful might be exposed. I respectfully agree with Tugendhat J's conclusion in *KD v Chief Constable of Hampshire* [2005] EWHC 2550 (QB) at [144] that an objective test must be applied.

34. Miss Page raised a further argument based on the requirement that any encroachment on a citizen's privacy rights contemplated in Article 8(2) would have to be "in accordance with the law". Thus it is necessary to consider whether there were any legal constraints restricting surveillance outside the specific context of the 1997 Act. She drew my attention to Part II of the Regulation of Investigatory Powers Act 2000, and submitted that any surveillance, even by the law enforcement agencies, would have to be authorised in writing. Obviously Mr Holding could not point to any such authorisation, and he could hardly be in a stronger position by virtue of his amateur status. That is an attractive argument but, although I have found it persuasive, it is not essential to my determination of how s.1(3)(a) bears upon this case.

35. As for s.1(3)(c), I have already expressed the view that there was no rational basis for the surveillance of Mrs Howlett. That is a proposition closely linked to whether or not Mr Holding's pursuit of that course of conduct was "reasonable". I am prepared to accept that the Home Secretary's list of occupations, given to the House of Commons in December 1996, was not intended to be exhaustive. Nor does it form part of the statutory wording. It is necessary, however, to remember that Parliament's objective

was to prevent stalking and other forms of harassment and, accordingly, that arguments of "reasonableness" for the purpose of s.1(3)(c) need to be scrutinised carefully with that in mind. The terminology needs to be interpreted alongside the concepts of necessity and proportionality, as contemplated by Article 8(2). When invited to construe a course of conduct, which would otherwise qualify as harassment, as being "reasonable", the court will no doubt always guard against gullibility. Here I see no reason at all why Mr Holding's behaviour should be classified as reasonable.

36. Those are my grounds for granting the injunction now in force.