Neutral Citation Number: [2011] EWCA Civ 123

Case No: B2/2010/0959

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CROYDON COUNTY COURT
Mr JUSTICE TEARE
9CR20347

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2011

Before :

LORD JUSTICE RIX
LADY JUSTICE SMITH
and
LORD JUSTICE RICHARDS

- -

Between :

IQBAL	**Appellant**
- and -	
DEAN MANSON SOLICITORS	**Respondents**

- -
- -

Mr Mashood Iqbal (Litigant in person) for the **Appellant**
Mr Christopher Brown (instructed by **Thompson & Co Solicitors**) for the **Respondents**

Hearing dates : Wednesday 24th November 2010

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Judgment

Lord Justice Rix :

1. This appeal concerns a claim under the Protection from Harassment Act 1997 (the "Act") brought by a solicitor-advocate, Mr Mashood Iqbal, here the appellant, against a small firm of solicitors, Dean Manson Solicitors, the respondents, by whom he used to be employed. His complaint arises from a series of allegations which they have made against his professional and personal integrity. As such, the case may seem to lie rather far from the kernel of the mischief which no doubt led to the Act's enactment, which was the stalking of women. However, it is clear that the Act has a wider ambit than that, and it is important to bear in mind that this claim arrives in this court at a still preliminary stage, before trial: for it has been summarily struck out as not presenting an arguable case of harassment within the Act.

2. The appeal came before us as a renewed application for permission to appeal, adjourned by Aikens LJ to the full court, with appeal to follow if permission was granted. This is a second appeal, and therefore Mr Iqbal, who represented himself, had to meet the high burden laid down by CPR 52.13. Nevertheless, we granted him permission and went on to allow the appeal, thereby reinstating his claim. These are my reasons for that decision.

The three letters

3. Mr Iqbal complains in particular of three letters as constituting a course of conduct amounting to harassment within the terms of the Act. I shall set out the three letters below, but before doing so it is necessary to say a little about the background to them.

4. In February and March 2006 Mr Iqbal worked part time as an assistant solicitor for Dean Manson. On 31 March 2006 he ceased his employment with them. At the time of his employment with them, Dean Manson had as clients a Mr and Mrs Tahir, on whose file they say Mr Iqbal worked. Dean Manson alleged they had the benefit of a guarantee for fees owed to them by the Tahirs from a Mr Butt. In January 2009 Dean Manson issued proceedings in the Leeds county court against Mr Butt under the alleged guarantee and against the Tahirs. Mr Butt instructed Mr Iqbal, now running his own firm of solicitors under the name of Ahmads' Solicitors of Putney, London, to act for him in those proceedings. It was in that context that Dean Manson wrote the following series of letters to Ahmads for the attention of Mr Iqbal. The principal (and only full) partner of Dean Manson whose name at that time was on its stationery was Mr Muzaffar Mansoor, and it was his initials, MM, which were identified in the letters' reference numbers.

5. The first of the three letters was dated 28 January 2009, was captioned with the name of Dean Manson's proceedings against Mr Butt (as were all three), and read as follows:

> "As you are acting for the Defendant we would like to raise a few questions in relation to your integrity as a solicitor acting in this matter, in particular whether you are satisfied before your client that you can act independently and impartially for your client and in his best interests.
>
> We understand that you are a sole practitioner and therefore you are dealing with this matter in person.
>
> Will your client be satisfied if he comes to know that you were in the past supervised by the Partners of our firm? Thanks to their blessing you were able to become who you are now. They made several recommendations for you. You were also employed by our firm in the past. Was your departure from the firm amicable or have you any issues in relation to your employment and departure still outstanding?
>
> This is an open letter, which will be presented in court if needed."

6. The second letter, dated 17 February 2009, was as follows:

> "In essence we understand that the defendants Mr and Mrs Naseem Ahmad Tahir were personal contacts of yours and you have also worked on the file during your employment at Dean Manson Solicitors. We therefore believe that this raises serious conflict and conduct issues on your part since your departure from Dean Manson Solicitors was not pleasant and you were summarily dismissed due to your insubordination and reckless conduct in dealing clients' matters and entering into unnecessary argument in court with immigration judge.
>
> We are therefore inclined to believe that you have intentionally taken instructions in this matter to set scores because of your personal vendetta with the firm. We suggest this because we have also come to know that you have been poaching and inciting clients of the firm belonging to a particular community to initiate malicious complaints before third parties. There is indicative of clear conflict involving ethical issues as you have been working on this file and have personal knowledge of the firm and its partners.
>
> We are very surprised that you are defending the clients in this matter since you are aware of the amount of work that has gone into this matter and the complex nature of the case whilst you worked with the firm. We will therefore advise you that you ask Mr Butt to settle our costs as it will prolong matters and incur unnecessary costs of litigation due to your own vendetta. All legal work carried out in accordance with his own instructions and

> personal guarantees (verbal and in writing) also confirmed through his MP to pay our legal costs for his release and hence he has no defence…"

A copy of that letter was sent by Dean Manson to the Leeds county court, as was indicated at the foot of the letter itself.

7. The third letter was dated 26 February 2009. It too was sent to the Leeds county court ("Copy to court"). It read as follows:

> "Thank you for your letter of 18 February 2009 we suggest that you wait for the decision of your premature and irrational application for strike off. We will state our position in defence before the Court should the need arise.
>
> We will also put you on strict notice that your former partner Mr Sajjid Ali had also worked with and passed out from this firm who had personal knowledge of the partners and the firm with whom you using his name later established partnership with thereby misleading the law society and general public unbefitting of the legal profession because Mr Ali has no permission to remain and work in the UK in breach of the law of land. We believe it is important for the court to know of you and your partner's level of past association with our firm."

8. The essential issue on this appeal is not whether these letters constitute a course of conduct amounting to harassment within the Act, but whether they are capable of amounting to such. If they are, then the matter may have to go to trial. If they are not, then the claim should be summarily stopped at this preliminary stage.

Mr Iqbal's claim

9. Mr Iqbal drafted and lodged his particulars of claim in the Croydon county court on 26 February 2009, after receiving the second letter cited above, dated 17 February 2009. He had not yet received the third letter, and it is not mentioned in his particulars. However, on behalf of Dean Manson, and after taking instructions in court, their counsel, Mr Christopher Brown, informed us that no point was taken on the absence of mention of that letter in the particulars. It had been considered by both judges below as if it had been mentioned in the particulars of claim. That is possibly because the third letter had been mentioned in the witness statement that Mr Iqbal had made on 4 March 2009 in support of his application made that day for an interim injunction to restrain Dean Manson from further acts of harassment: "by writing offensive, threatening, intimidating & harassing letters

whether directly or indirectly and whether actually or potentially aim[ed] at damaging the professional and personal integrity of the Claimant".

10. Mr Iqbal's claim form was issued by the Croydon county court on 12 March 2009. It was lodged by Mr Iqbal and issued as a Part 7 claim form. CPR 65.28 (Part 65 deals specifically with anti-social behaviour and harassment, and section V of Part 65 deals specifically with claims under section 3 of the Act) in fact requires proceedings under the Act to be "subject to the Part 8 procedure". The Part 8 procedure is the simplified procedure suitable for claims where a claimant "seeks the court's decision on a question unlikely to involve a substantial dispute of fact" (CPR 8.1(2)(a)). There is plainly an intent to streamline civil claims under the Act and an expectation that the Part 8 procedure will suffice.

11. Mr Iqbal's particulars also complained about letters sent by Dean Manson in December 2006, two each to the principal partners of two firms of solicitors for whom Mr Iqbal was then working on a part time basis: but he has not pressed his complaint about the earlier letters.

12. Dean Manson served their defence on 25 March 2009. It is a lengthy document, affirmed by Mr Mansoor personally, and attaching numerous exhibits. Among the matters raised in the defence are the following, whose scandalous nature could only be justified, if that were possible, by their truth. In effect, Dean Manson and Mr Mansoor alleged that Mr Iqbal had been shown nothing but kindness and consideration by them, after he had been introduced to them "newly arrived in the UK as a student and was introduced as an abandoned family child living upon the community's charity". He had been briefly employed by Dean Manson (in February and March 2006) but had left under a cloud. He had wanted to become a partner in the firm "to regularise his immigration status", but his "attitude suddenly turned to grave insubordination and arrogance". He was ambitious to set up his own firm and had made use of Dean Manson. In March 2006 he married a British citizen, a Miss Raja, in order to change his immigration status, but –

> "upon his immigration status clearing he left his wife and without a proper divorce has announced and entered into another marriage overseas and has brought in his second wife pretending to be a student from Pakistan thereby circumventing the law of the land. The Defendant has therefore experienced that the Claimant has a tendency to exploit and use people for his benefit and on achieving his goals to misbehave later, one of the reasons [t]hat the Defendant decided to dismiss him…There were also complaints from clients regarding his conduct and entering into arguments with a judge in court and complaints from clients" (at para 10).

13. The defence repeats the allegation of a bigamous marriage at para 35(i). It also alleges forgery of a statement of truth purporting to be that of Mr Sajjad Ali (at para 35(ii)). Mr Ali is another solicitor, a friend of Mr Iqbal, who had been a partner with him before he returned to Pakistan. Mr Ali has on the face of it made a witness statement in support of Mr Iqbal's proceedings, but Dean Manson and Mr Mansoor say that this is a forgery by Mr Iqbal. It will be recalled that Mr Ali's involvement in Mr Iqbal's firm was the subject-matter of allegations of impropriety and illegality stated in Dean Manson's third letter.

14. As for the letters complained of by Mr Iqbal, the defence denies any intention to track or damage Mr Iqbal's career. On the contrary –

> "The Defendant had no contact with the Claimant after his departure from the Defendant's office on or about 30th March 2006 or shown any interest in his professional life whatsoever…the Defendant believes that after his unpleasant departure from the Defendant's firm the Claimant is more likely to hold a personal grudge against the Defendant and in particular the Senior Partner who was compelled to ask the Claimant to leave the premises on dismissal" (at para 12).

There are repeated allegations in the defence about personal and professional grudges held by Mr Iqbal against Dean Manson and Mr Mansoor, of Mr Iqbal's "vendetta", of his seeking "an opportunity for avenge", and of his "bad faith" and "malice" (for instance at paras 17, 24, 26, 30 and 36/37).

15. The defence ends with a counterclaim "to restrain the Claimant from any further harassment" and for damages.

16. The annexed documents do not on their face support the defence's allegations concerning the reasons for Mr Iqbal's departure from Dean Manson at the end of March 2006. As late as 24 March 2006 Dean Manson wrote to Mr Iqbal offering him full time work. On 30 March 2006 Mr Iqbal replied respectfully declining the offer (for reasons which he said he would be happy to disclose in person) but saying that he would like to remain as before working on a part time basis.

17. In the circumstances, during the hearing of the appeal the court asked Mr Brown for any explanation of why there was nothing among the letters annexed to the defence to support the allegations that Mr Iqbal had been dismissed by Dean Manson for the reasons mentioned both in the letter dated 17 February 2009 ("you were summarily dismissed due to your continued insubordination and reckless conduct") and in the defence: especially against the background of the offer of

full-time employment less than one week before Mr Iqbal left Dean Manson. We were told on instructions that there was correspondence in support of those allegations, but it had not been put into evidence so far. Such an answer carried no weight.

18. As for Mr Ali and the allegation of forgery, the position seems to be as follows. On 19 February 2009, shortly before he commenced his proceedings, Mr Iqbal initiated a complaint against Dean Manson to the Solicitors Regulation Authority (SRA), based on the same material particularised in his claim. In his letter to the SRA he referred to Mr Ali, explaining that he had also worked for Dean Manson from February to October 2006 and was willing to provide a statement in support. On 25 February 2009 Mr Ali emailed the SRA directly from Lahore attaching his statement also dated 25 February 2009. He said that Mr Iqbal had left Dean Manson because he felt exploited. He said that Mr Mansoor was very angry with Mr Iqbal. Mr Ali sent another copy of his statement directly to Mr Iqbal by email on 3 November 2009, for use in his proceedings before HH Judge Ellis in Croydon county court.

19. Copies of Mr Ali's statement must also have been sent to Dean Manson by the SRA, for Mr Ali's email to the SRA and its attachment are among the documents annexed to Dean Manson's defence. On 20 March 2009, a few days before the making of that defence, Ejaz Baig (who had been a salaried partner in Dean Manson at the time of the three letters complained of by Mr Iqbal but had become a full partner by April 2009) emailed Mr Ali referring to a telephone conversation between them and asserting that in that conversation Mr Ali had denied any knowledge of any statement by him to the SRA. Mr Baig wrote that Mr Ali's failure to reply that day would allow him to assume he confirmed what he had said on the phone. On 23 March 2009 Mr Baig emailed Mr Ali again and asked for his written disclaimer of the statement. However, on 27 March 2009 Mr Ali appears to have replied to Mr Baig confirming his statement rather than disclaiming it. On 14 April 2009 Mr Baig made a witness statement in the current proceedings to say inter alia that Mr Ali had "flatly denied on phone to have written any statement…and disowned the above statement in its entirety when read over to him". On 14 May 2009 Mr Ali emailed the SRA to confirm his communication of 27 March 2009 and to reaffirm that, although Mr Baig had tried to persuade him to change his evidence, he declined to do so.

20. On 27 May 2009 Mr Iqbal applied to strike out the defence as an abuse of the court pursuant to CPR 3.4(2)(b) but failed (see the order dated 1 June 2009 of District Judge Freeborough).

The judgment of HHJ Ellis in the Croydon county court

21. On 2 July 2009 Dean Manson's application to strike out the claim was heard by Judge Ellis.

22. Judge Ellis ruled that he had no jurisdiction to hear the claim, because it had wrongly been commenced as a Part 7 claim instead of a Part 8 claim. The point had only been raised against Mr Iqbal in a skeleton argument which he had received that morning. The judge refused him an adjournment, saying he, the judge, had to be robust. He was nevertheless prepared to assume that an application for relief had been made to him, and that led him to consider the "overall merits of the claim". In a brief passage at paras 16/17 of his judgment he concluded that the three letters cited above "disclose no credible cause of action" and "do not and could not be construed as harassment under the Act". Apart from saying that he had to look "at all the background facts and circumstances" and that he had considered the authorities cited to him by Mr Iqbal and the terms of the Act, he offered no reasons for his decision. Judge Ellis also said (at para 11) that a claim could not be brought against a partnership, only against an identified individual.

23. Permission to appeal was granted by Eady J.

The judgment of Teare J: the first appeal

24. Teare J said [2010] EWHC 1249 (QB) that Judge Ellis had been wrong to conclude that he had no jurisdiction to hear the claim. Teare J pointed out, correctly, that CPR 3.10 provides that an error of procedure does not invalidate any proceedings (unless the court so orders) and that the court may make an order to remedy the error. Nevertheless, Teare J recognised that Judge Ellis had ultimately founded his reasoning on his conclusion that the claim was substantially without merit. That led to two issues which he needed to consider. The first was whether the three letters complained of showed an arguable case of harassment within the Act. The second was whether a claim under the Act could be brought against a partnership.

25. As to the first of those issues, the judge guided himself by what Lord Phillips of Worth Matravers MR had said in *Thomas v. News Group Newspapers Limited* [2001] EWCA Civ 1233, [2002] EMLR 4 at [30] about harassment under the Act, namely that

> "It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable."

(Section 7(2) provides that "References to harassing a person include alarming the person or causing the person distress".) On the basis of Lord Phillips' test the judge concluded that, although they contained "unfortunate and regrettable passages", the first two letters (those of 28 January and 17 February 2009), cannot be said to be oppressive or unreasonable. However, the judge accepted that the third letter (that of 26 February 2009) was arguably capable of being described as harassing: *but* it "was only one instance and so does not form a course of conduct" (at paras 18 and 24). In that latter judgment he had in mind that, for a civil claim to arise, the Act requires a "course of conduct" and section 7 defines "course of conduct" in relation to a single victim as "conduct on at least two occasions".

26. As for the difference between the first two letters and the third letter, the judge gave no explicit reason for stating his conclusion that the former could not, but the latter arguably could, be described as harassing. However, he did state that the former "cannot be said to be oppressive and unreasonable" (and that Mr Iqbal did not press the point), and that the latter's paragraph about Mr Ali did not have anything to do with the case of Dean Manson against Mr Butt but raised "an entirely separate matter designed, no doubt, to put pressure upon Mr Iqbal". Those are the only clues as to the judge's thinking in this respect.

27. The judge also considered the nature of Dean Manson's defence, which Mr Iqbal relied on as containing other instances of harassment, in particular para 35(i) which alleges bigamy and immigration fraud against Mr Iqbal. The judge said this:

> "It is said that that also amounts to harassment of Mr Iqbal. It does not appear to have anything to do with the dispute between the parties and is an unfortunate paragraph to find in the defence. However, I do not accept that it amounts to a second heading or occasion of harassment for two reasons. Firstly, the cause of action for harassment has to be established like any cause of action as at the date of the claim form and what is said in the defence naturally occurs thereafter. Secondly, although this allegation may have no place in the defence, if it is truly irrelevant then it is open to the claimant to seek to have it struck out. It is put in the defence, perhaps misguidedly by the defendant, but I do not think it can amount to harassment."

28. As to the second issue, the judge said that he did not have to decide it in the light of his decision on the first issue, but he would nevertheless hold, if he had had to decide the point, that a partnership could not be a "person" within the Act,

because difficult questions would arise as to whose *mens rea* would be the relevant *mens rea* for establishing that there had been harassment contrary to the Act (at para 34).

The issues on this appeal

29. In the circumstances, four issues arise on this appeal: (i) What was the difference between the third letter and the first two letters? Were all or none of the letters capable of constituting harassment? (ii) Even if the first two letters by themselves were not capable of constituting harassment, could they amount, together with the third letter, to a "course of conduct" within the meaning of the Act? (iii) Could the defence be relied upon as evidencing a course of conduct within the Act, and did it matter that the defence post-dated the claim form? (iv) Could a partnership be a defendant to a civil action under section 3 of the Act?

The Prevention from Harassment Act 1997

30. The Act provides both for a criminal offence under section 2, and a civil cause of action under section 3. We are concerned with the latter. Section 7 is a definition section. The Act is framed in terms of a "course of conduct" which amounts to harassment of another. It provides as follows:

> "1 Prohibition of harassment
>
> (1) A person must not pursue a course of conduct –
> (a) which amounts to harassment of another, and
> (b) which he knows or ought to know amounts to harassment of the other…
>
> (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.
>
> (3) Subsection (1)…does not apply to a course of conduct if the person who pursued it shows…
> (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.
>
> 2 Offence of harassment

(1) A person who pursues a course of conduct in breach of section 1(1)…is guilty of an offence.

(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or both.

3 Civil remedy

(1) An actual or apprehended breach of section 1(1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.
(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment…

7 Interpretation of this group of sections

(1) This section applies for the interpretation of sections 1 to 5A.
(2) References to harassing a person include alarming the person or causing the person distress.
(3) A "course of conduct" must involve –
(a) in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person…
(3A) A person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another –
(a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and
(b) to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.
(4) "Conduct" includes speech.
(5) References to a person, in the harassment of a person, are references to a person who is an individual."

Issue (i): The three letters

31. There is no respondent's notice. Therefore it may be taken as a given that the third letter is capable of being described as harassing. However, in my judgment, each of the three letters is capable of being so described, a fortiori as the question of harassment has to be considered by reference to a course of conduct as a whole, and not by reference to each individual occasion relied on. I shall return to that matter under issue (ii). For the present, however, I would observe that it seems to me to be entirely arguable that each of the letters by themselves can stand as an occasion which is capable of being described as harassing (and thus in any event

capable each of contributing to a course of conduct which can arguably be said to amount to harassment).

32. In *Thomas v. News Group Newspapers* the defendant had published in The Sun an article reporting that two police sergeants had been demoted to constables after the claimant had alleged that they made racist jokes about a Somali asylum-seeker. The claimant was referred to in the article as a "black clerk". Within another eight days The Sun had published two further similar articles. The claimant alleged that as a result she had received racist hate mail. She said that the article amounted to a course of conduct amounting to harassment because it incited racial hatred against her. The defendant applied to strike out the claim on the ground that "harassment" could not extend to what was written in the newspapers, but lost the application. On appeal to this court, the defendant conceded that newspaper material could amount to harassment, but that it was not arguable that these publications did, especially when the guarantee of freedom of speech was taken into account.

33. As cited above, the test of harassment was held to be "conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable" (at [30]). Lord Phillips continued:

> "31. The fact that conduct that is reasonable will not constitute harassment is clear from section 1(3)(c) of the Act. While that subsection places the burden of proof on the defendant, that does not absolve the claimant from pleading facts which are capable of amounting to harassment. Unless the claimant's pleading alleges conduct by the defendant which is, at least, arguably unreasonable, it is unlikely to set out a viable plea of harassment."

34. As for the facts of that case, Lord Phillips said this, under the heading of "The Nature of Reasonable Conduct":

> "[32] Whether conduct is reasonable will depend upon the circumstances of the particular case. When considering whether the conduct of the press in publishing articles is reasonable for the purposes of the 1997 Act, the answer does not turn on whether the opinions in the article are reasonably held. The question must be answered by reference to the right of the press to freedom of expression which has been so emphatically recognised by the jurisprudence both of Strasbourg and this country.
>
> [33] Prior to the 1997 Act, the freedom with which the press could publish facts or opinions about individuals was circumscribed by the law of defamation. Protection of reputation is a legitimate reason to restrict freedom of expression. Subject to the law of defamation, the press was entitled to publish an article, or series of articles, about an individual, notwithstanding that it could be foreseen that such conduct was likely to cause distress to the subject of the article.

> [34] The 1997 Act has not rendered such conduct unlawful. In general, press criticism, even if robust, does not constitute unreasonable conduct and does not fall within the natural meaning of harassment. A pleading, which does no more than allege that the defendant has published a series of articles that have reasonably caused distress to an individual, will be susceptible to a strike-out on the ground that it discloses no arguable case of harassment.
>
> [35] It is common ground between the parties to this appeal, and properly so, that before press publications are capable of constituting harassment, they must be attended by some exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve. It is also common ground that such circumstances will be rare.
>
> [36] Mr Pannick QC, for the respondent, offered the example of an editor who uses his newspaper to conduct a campaign of vilification against a lover from whom he has broken off a relationship. Mr Browne rightly submitted that editorial comment would only amount to harassment if it incited, provoked or encouraged harassment of an individual.
>
> [37] It is not necessary for this court to rule on Mr Pannick's example, nor to attempt any categorisation of the types of abuse of freedom of the press which may amount to harassment. That is because the parties are agreed that the publication of press articles calculated to incite racial hatred of an individual provides an example of conduct which is capable of amounting to harassment."

35. In *Majrowski v. Guy's and St Thomas' NHS Trust* [2006] UKHL 34, [2007] 1 AC 224, the issue was whether an employer could be vicariously liable under the Act for harassment by its employee. The House of Lords held that it could. It was submitted that such an answer would open the floodgates to vicarious liability for all the petty nastiness of employee to employee, and even to unfounded and speculative or unmeritorious claims by disgruntled employees. Lord Nicholls of Birkenhead said this:

> "[30] This is a real and understandable concern. But these difficulties, and the prospect of abuse, are not sufficient reasons for excluding vicarious liability…Courts are well able to separate the wheat from the chaff at an early stage of the proceedings. They should be astute to do so. In most cases courts should have little difficulty in applying the "close connection" test. Where the claim meets that requirement, and the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to

> the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2."

36. Baroness Hale of Richmond said at [66]:

> "A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour."

37. In the present case, the first letter immediately said that Dean Manson wished to raise questions "in relation to your integrity as a solicitor". That was a strong way to introduce a query as to whether there was an undisclosed conflict of interest between Mr Iqbal and his client, Mr Butt. If the letter had been confined to such a query, or if Dean Manson's subsequent correspondence had been confined to such a query, then it would be understandable to conclude that there was no arguable case of harassment. As it was, the letter which had opened with questions as to Mr Iqbal's integrity, closed by asking whether there were outstanding issues "in relation to your employment and departure" and with a threat to present the letter in court. Especially in the light of what follows, the letter can arguably be understood as an attempt to get Mr Iqbal to stand down as Mr Butt's solicitor, or else to face unpleasant consequences.

38. The second letter went much further. It expressly accused Mr Iqbal of having been summarily dismissed by Dean Manson for "continued insubordination and reckless conduct" and of intentionally using Mr Butt's retainer "to set scores because of your personal vendetta against the firm"; and also of "poaching and inciting the clients of the firm…to initiate complaints". None of that appears to have anything to do with the Butt litigation itself. The letter incidentally suggests a different conflict of interest from that raised in the first letter, namely a breach of confidence between Mr Iqbal and Dean Manson, because of Mr Iqbal's knowledge of Dean Manson's files, but that is separate from the accusations levelled against Mr Iqbal. Finally the letter seeks to advise Mr Iqbal to tell his client to pay Dean Manson, in order to save costs "due to your own vendetta". Moreover that letter was sent to the county court.

39. The third letter accused Mr Iqbal of "misleading the law society and the general public" and participating in conduct "in breach of the law of the land" by assisting Mr Ali to obtain employment when he had no permission to remain or work in the UK. That letter was also sent to the county court as a matter relevant to the Butt litigation. The allegation of illegal conduct perhaps went beyond the previous allegations of unprofessional conduct meriting summary dismissal and of

subjecting the interest of clients to a personal vendetta: but that might be thought to be a matter of argument.

40. The judge himself considered the third letter to be designed "to put pressure on Mr Iqbal" and to be capable of being described as harassment or arguably so. Passages in the first two letters are described as "unfortunate and regrettable". It is not clear to me, however, what there is, arguably, to choose between them.

41. The judge was perhaps concerned, and rightly so, not to set up every complaint between lawyers as to the conduct of litigation as arguably a matter of harassment within the Act. It must be rare indeed that such complaints, even if in the heat of battle they go too far, could arguably fall foul of the Act. However, in my judgment, these three letters, particularly when viewed in the light of each other, and especially the last two, arguably amount to a deliberate attack on the professional and personal integrity of Mr Iqbal, in an attempt to pressurise him, by his exposure to his client and/or the court, into declining to act for Mr Butt or else into advising Mr Butt to meet the demands of Dean Manson. It cannot, at any rate arguably, assist Dean Manson that such letters were written in the context of litigation and in an attempt to improve their position in that litigation, or in an attempt to raise even serious and proper questions as to possible conflicts of interest. Arguably, the letters go way beyond such concerns. Indeed, Mr Brown conceded in argument that if the above was, even arguably, the view which could be taken of these letters, as distinct from the view of them which he submitted was the correct one, namely that they were simply and solely raising legitimate queries as to conflicts of interest between Mr Iqbal and his client and as to breach of confidence between Mr Iqbal and Dean Manson, then Mr Iqbal's claim could not be struck out, at any rate subject to issue (iv).

42. In sum, in my judgment, each of these letters does, when considered side by side, arguably evidence a campaign of harassment against Mr Iqbal. They are arguably capable of causing alarm or distress. They are arguably unreasonable, or oppressive and unreasonable, or oppressive and unacceptable, or genuinely offensive and unacceptable. Arguably, they go beyond annoyances or irritations, and beyond the ordinary banter and badinage of life. Arguably, the conduct alleged is of a gravity which could be characterised as criminal. A professional man's integrity is the lifeblood of his vocation. If it is deliberately and wrongly attacked, whether out of personal self-interest or malice, a potential claim lies under the Act.

43. It is suggested that Mr Iqbal conceded the inadequacy of the first two letters before Teare J. Mr Iqbal says, however, that any concession went no further than to accept the inadequacy of the first two letters if viewed entirely each by itself. He did not, he says, withdraw reliance on the first two letters. I would accept this

explanation (compare the concession concerning the 2006 letters). It is entirely consistent with the course of the litigation as a whole, including the way in which the judge set out the first two (as well as the third) letters verbatim.

Issue (ii): Course of conduct

44. The next issue is whether the first two letters, read together with the third letter, could amount to a "course of conduct" which amounts to harassment, even if, as the judge found, those first two letters in themselves, unlike the third, were not capable of constituting harassment. As it is, in the light of my answer to issue (i), this second issue is not determinative. However, it has been fully argued and I shall give my opinion on it.

45. In my judgment, the Act is concerned with courses of conduct which amount to harassment, rather than with individual instances of harassment. Of course, it is the individual instances which will make up the course of conduct, but it still remains the position that it is the course of conduct which has to have the quality of amounting to harassment, rather than individual instances of conduct. That is so both as a matter of the language of the statute, and as a matter of common sense. The Act is written in terms of a course of conduct: see sections 1(1), 1(2), 1(3), 2(1), 3(1), 7(3). That course of conduct has to amount to harassment, both objectively and in terms of the required mens rea (see section 1(1)(b)). In the case of a single person victim, there have to be "at least two occasions in relation to that person" (section 7(3)(a)), but it is not said that that those two occasions must individually, ie standing each by itself, amount to harassment. The reason why the statute is drafted in this way is not hard to understand. Take the typical case of stalking, or of malicious phone calls. When a defendant, D, walks past a claimant C's door, or calls C's telephone but puts the phone down without speaking, the single act by itself is neutral, or may be. But if that act is repeated on a number of occasions, the course of conduct may well amount to harassment. That conclusion can only be arrived at by looking at the individual acts complained of as a whole. The course of conduct cannot be reduced to or deconstructed into the individual acts, taken solely one by one. So it is with a course of communications such as letters. A first letter, by itself, may appear innocent and may even cause no alarm, or at most a slight unease. However, in the light of subsequent letters, that first letter may be seen as part of a campaign of harassment.

46. That, however, was not how the judge looked at the matter. Having found the third letter to be arguably capable of amounting to harassment, he never went back to ask himself how the three letters were to be looked at together as a possible course of conduct. Of course, it is always feasible that a number of disparate instances are not capable of being aggregated into a course of conduct, because, for instance, they are too separated in time or subject-matter. However, that does

not apply in this case (although it could have applied to the 2006 letters if Mr Iqbal had persisted in relying upon them). The three letters were close in time, all headed by reference to the Butt litigation, and at any rate arguably, connected with one another.

47. In this connection, both parties relied on *Kelly v. Director of Public Prosecutions* [2002] EWHC Admin 1428, [2002] 166 JP 621, [2003] Crim LR 45 (Burton J). The appellant there was convicted by the magistrates of an offence under section 2 of the Act. He had made three abusive telephone calls within a few minutes of one another to the victim's mobile, in the middle of the night. The victim did not receive the calls at that time and they were recorded on her voicemail facility. In the morning she listened to all three messages one after the other. It was submitted on behalf the appellant that the three calls were all so much part and parcel of one another that there was no course of conduct, and that in any event the victim had to feel alarm on more than one occasion. The appeal failed. Each call was abusive and alarming, but the peculiar facts there were that the calls were very close in time and the victim was only alarmed on one occasion.

48. On behalf of Dean Manson, Mr Brown relied on what Burton J said at 626G, viz –

> "The Act requires that an offence must be committed more than once before it can be actionable, and it was committed more than once."

In my judgment, however, that cannot be right (and I suspect was not what Burton J intended to say, as is demonstrated by what is said elsewhere in his judgment). The "offence" cannot be committed without a course of conduct, and there is no need for more than one offence, only for more than one incident, or, in the neutral words of the Act, "conduct on at least two occasions".

49. Mr Iqbal, however, relied on what Burton J said at 627F/628A:

> "Similarly, the purpose of the Act, it seems to me plain, is intended to render actionable conduct which might not be alarming if committed once, but becomes alarming by virtue of being repeated – the repetitious conduct to which Latham LJ referred [in *Pratt* (2001) 165 JP 800]…It seems to me that…what was intended was that something which might not be alarming the first time would become actionable, criminally and civilly, on the second occasion. It is, therefore, in my judgment, not necessary for there to be alarm caused in relation to each of the incidents relied upon as forming part of the course of conduct. It is sufficient if, by virtue of the course of conduct, the victim is alarmed or distressed."

50. That seems to me to be correct. Section 4 of the Act sets out an alternative offence ("Putting people in fear of violence") which does require "another to fear, *on at least two occasions*, that violence will be used against him" (emphasis added). Burton J therefore implicitly emphasises that the various incidents alleged to make up the course of conduct as a whole have to be scrutinised for their capacity to constitute a course of conduct which amounts to harassment.

51. In my judgment, therefore, the judge erred in failing to ask himself, in the light of his finding as to the third letter, whether the three letters as a whole could amount to a relevant course of conduct. For the reasons already given under issue (i) above, it is very difficult to see why they could not. The fact that the first two letters were possibly more closely concerned with the Butt litigation than the third is merely one strand in an assessment. In truth, it is difficult to see what Mr Iqbal's suggested dismissal from Dean Manson (raised in the first two letters), any more than Mr Iqbal's alleged misconduct in connection with Mr Ali (raised in the third letter), has to do with the Butt litigation. In any event, if there be doubt about such matters, it seems to me that Dean Manson's defence, which reverts to the circumstances of Mr Iqbal's departure from the firm, together with his alleged misuse of his two wives, supports evidentially a view of the three letters as part of a course of conduct, each incident in which can arguably stand as a separate incident capable together of constituting harassment within the meaning of the Act.

Issue (iii): the defence

52. This issue raises the questions whether Dean Manson's defence can be relied on as evidencing a course of conduct within the Act, and whether it matters that the defence post-dates the claim form. As for the first of those questions, I have already in effect answered it at the end of the previous paragraph. It seems to me that Mr Iqbal can refer to the defence, as he did before the judge, not necessarily for the purpose of constituting an occasion helping to make up a course of conduct and thus a cause of action, but as throwing evidential light on the proper understanding, interpretation and assessment of the three letters themselves. Do *they* arguably amount to a course of conduct amounting to harassment? If they are to be understood as arguably an attack on the personal and professional integrity of Mr Iqbal, then the answer appears to me to be, Yes. That is the answer given under issue (i). But if there is doubt about that, then it seems to me that that question can be looked at with the evidential assistance of the defence. When that is taken into account, the answer, as to what the three letters are arguably capable of amounting to, seems to me to be confirmed. For these purposes it does not matter that the defence is post claim form. It is not relied on for the purposes of creating the cause of action, but for the purposes of providing evidence in support of it. The judge therefore erred in suggesting that he could not take it into account for the purpose of deciding whether there had arguably been a course of conduct amounting to harassment.

53. Secondly, in as much as Mr Iqbal sought to rely on the defence as a second occasion making up a course of conduct and thus completing his cause of action, in my judgment the judge erred in excluding it from consideration on the ground that it occurred after the claim form. That is a rule of practice, rather than a rule of law and can be departed from when the justice of the case requires: see *Alfred C Toepfer v. Peter Cremer* [1975] 2 Lloyd's Rep 118 (CA) and *Maridive and Oil Services (SAE) v. CNA Insurance Co (Europe) Ltd* [2002] EWCA Civ 369, [2002] 2 Lloyd's Rep 9. It is recognised that it is the every day practice of the courts to give judgment for mesne profits, or loss of earnings, which arise post claim form. In the present case, the Act itself contemplates that a merely "apprehended breach" of section 1 can be the subject of civil claim by the person who may be the victim of the course of conduct in question (see section3(1)). Therefore a victim may seek an injunction *before* a course of conduct has been established, if the claimant can show a suitable case of fear of such a course of conduct. That is part of what Mr Iqbal sought to do in the present case. In such circumstances, it would seem profitless and harsh to force a claimant back to the issue of a further claim form where a defendant himself provides a further occasion making up a course of conduct amounting to harassment in the course of the proceedings themselves, such as in his defence.

54. As for whether the defence could be viewed as arguably part of a course of conduct amounting to harassment, for the reasons set out above, it seems to me that it can, although it is not necessary to decide the question and I do not. The judge thought that it could not, because the relevant parts of the defence might be viewed as truly irrelevant. If so, and scandalous, vexatious or abusive, I would have thought that was an a fortiori case for holding that such material was capable of amounting to an instance within a course of conduct amounting to harassment. Whatever the hardships involved in litigation, it is not the occasion for irrelevant and abusive dirt to be thrown as part of a malicious campaign. Just as even the freedom of the press may be abused in a rare case (*Thomas*), so even litigation, whose natural contentiousness also requires its own freedom of speech, can exceptionally be abused. I would, however, equally deplore satellite litigation.

Issue (iv): partnership as a defendant

55. The fourth issue is whether a partnership can be a defendant for the purposes of the Act. The judge considered, in an obiter section of his judgment, that it could not.

56. The Act states that a "person" may commit the criminal offence or be liable for the civil wrong of harassment (sections 1, 2 and 3). The Interpretation Act 1978

defines "person" (for the purposes of any statute passed after 1889) in the following way: "'Person' includes a body of persons corporate or unincorporate" (schedule 1, and section 5 which provides: "In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule"). Therefore prima facie the defendant in a harassment claim pursuant to the Act can be a partnership, which is a form of unincorporated body.

57. However, a victim under the Act must be an individual and cannot be anything else. That is because section 7(5) provides that "References to a person, in the harassment of a person, are references to a person who is an individual". It might be said that that provision underlines and confirms that "person" in the case of a defendant can be a corporate or unincorporated body.

58. Civil decisions under the Act have frequently been rendered against unincorporated bodies, such as animal rights activists: see *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty* [2003] EWHC 1967 (Gibbs J), *Daiichi UK Ltd v. Stop Huntingdon Animal Cruelty* [2003] EWHC 2337 (Owen J), and *The Chancellor, Masters and Scholars of the University of Oxford v. Broughton* [2004] EWHC 2543 (Grigson J). In *Majrowski* the defendant was an NHS Trust (a corporate body) and the issue was whether an employer could be vicariously liable under the Act in a civil action. The House of Lords held, as a matter of general principle, that it could be. It was there submitted that the possibility of criminal liability under the Act pointed away from vicarious liability, but the argument was rejected. On the contrary, Lord Nicholls pointed out (at [26]) that although the Act confined a criminal defendant to the actual perpetrator or to someone who aided, abetted, counselled or procured the harassing conduct (see section 7(3A)), that did not exclude vicarious liability for the tort of an employee: just as the criminal offences of conversion, assault and battery could also attract civil liability and, in that latter context, vicarious liability. The point was made generally (at [17]) that –

> "Unless the statute expressly or impliedly indicates otherwise, the principle of vicarious liability is applicable where an employee commits a breach of a statutory obligation sounding in damages while acting in the course of employment."

Lord Hope expressly contemplated that an employer could be secondarily liable as such an aider etc (at [60]); while Lord Carswell said (at [78]) that –

> "One can envisage situations in which it is desirable that there should be vicarious liability for the acts of an employee towards a member of the public, where the victim cannot identify the employee or obtain redress from him."

59. In such circumstances, their Lordships clearly contemplated that "person" as regards a defendant to the statutory tort created by the Act could include a corporate body (see [19]); and if that is so, it would be hard to understand why a defendant could not be an unincorporated body as well. An unincorporated body such as a partnership can of course be vicariously liable for the wrongs of its employees and (under section 10 of the Partnership Act 1890) its partners: see *Dubai Aluminium Co Ltd v. Salaam* [2002] UKHL 48, [2003] 2 AC 366.

60. What is to be said on the other side? Mr Brown relies in this connection on *W Stevenson & Sons (a partnership) v. R* [2008] EWCA Crim 273. That did not concern the Act, but the Sea Fishing (Enforcement of Community Control Measures) Order 2000. The partnership named in the title to the case was convicted of an offence under that Order and faced confiscation proceedings as a result. The Crown sought disclosure for those purposes not only from the partnership but also from its partners (who had not been charged or convicted). The issue was whether the partners could be drawn into the confiscation proceedings. The Order (by its para 11(2)) drew a clear distinction between a partnership (on which strict liability was imposed) and its partners (who could only be liable if complicit in the offending). In the circumstances, the CACD held (i) that where a partnership alone was indicted, any fine imposed could only be levied against the assets of the partnership and not against the assets of individual partners who were not complicit in the offence; (ii) that confiscation proceedings could not be brought against individual partners because they were not offenders; and (iii) the partnership's application for leave to appeal against its conviction failed.

61. Nevertheless, in the course of his judgment Lord Phillips, referring to the Interpretation Act, made these obiter observations, which are relied upon by Mr Brown:

> "[26] This passage suggests that the effect of the Interpretation Acts is, in effect, to create a single legal entity that can itself commit an offence. Those Acts do not, of themselves, produce that result. The effect of those Acts is that where a statute refers to a 'person' '*unless the contrary intention appears*' that word should be read as including a partnership. The Acts do not state what the effect is to be of giving the word 'person' such a meaning. There is a dearth of cases in the reports (indeed we have been referred to none) where the prosecution have relied upon one of the Interpretation Acts to bring criminal proceedings against a firm in relation to a statute that makes it an offence for 'any person' to do or to fail to do a specified act…
>
> [28] This case involved an offence of strict liability. Had it involved *mens rea* it would not have been open to the court to have convicted the partner who was not complicit. Would it have been open to the prosecution to prefer the

> information against the firm and then seek to recover the fine imposed from the two partners jointly? We do not find it easy to answer this question. It is one thing to hold a limited liability company open to prosecution for an offence that requires *mens rea*. It is another to hold a partnership open to prosecution if the consequence of a conviction will be to render liable in respect of the penalty persons who had no involvement in the offence. In the present case three of the partners in the Partnership had retired and played no part in the running of the firm. One lived abroad. It seems to us that the question of whether or not the context permits one to read 'person' in a criminal statute as including a partnership may depend critically upon whether there is some restriction upon the assets that will properly be available to meet any penalty imposed."

62. I do not find it easy to transpose these observations into the present case. There the Order itself made clear that a partnership could be indicted. In the present case, however, if the assets of individual partners not complicit in any course of conduct of harassment are not available for the payment of fines, which was Lord Phillips' preferred general solution, then I do not see why a partnership could not be made criminally liable. In any event, it may always be a difficult question when dealing with a partnership to say what the financial liability of individual partners is for some partnership liability. Be that as it may, I do not think I need to come to any conclusion about such matters in this case. It is enough, in my judgment, to be guided by the House of Lords in *Majrowski*. It is plain there, that only a complicit person can be criminally liable, but that in the civil sphere, there is certainly a statutory intention to make employers vicariously liable. In such circumstances, it is to my mind impossible to say that a partnership cannot be a "person" for such purposes within the Act, for it would be irrational to distinguish between corporate and unincorporated persons. It would also drive a coach and horses through the Act if unincorporated bodies, including partnerships, could not be at least civilly liable for harassment. It would be particularly surprising if protesters, who associate themselves into groups of unincorporated bodies, could evade liability by the device of making partners of one another.

63. For the same reason, I would, if necessary, reject the judge's solution that the doctrine of *mens rea* made it impossible to sue a partnership under section 3 of the Act. Some form of mental element is an ingredient of many cases of tortious liability – that does not mean that a corporate or unincorporated body cannot be liable, either directly or vicariously. The position may be different in criminal cases. In *R v. L* [2008] EWCA Crim 1970, [2009] 1 All ER 786, in a case of strict liability under the Water Resources Act 1991, it was held that a club (an unincorporated body) could be prosecuted, as the definition of "person" in the Interpretation Act 1978 applied and there was no contrary intention. However, Hughes LJ went on to reserve the position in statutes where *mens rea* was required (at [30]), "which would be likely to raise quite different questions because of the personal and individual nature of a guilty mind". However, whatever may be the position in such cases, there seems to me to be no reason why "person" in section

3 of the Act, even if the position had to be different for the purposes of section 2, should not be given its natural meaning. That appears to have been the logic of the reasoning of the majority in this court in *Majrowski* [2005] EWCA Civ 251, [2005] QB 848 at [72] ("The civil remedy provided in section 3 is not predicated on there having been a criminal offence" *per* Auld LJ) and [89] (*per* May LJ)).

64. Nor is it clear to me exactly what the consequences of suing a defendant on a civil claim by use of a partnership name is. Partners may be sued in their individual names or in the name of the firm, although it would seem that if more than one partner is sued, then the firm name should be used (CPR 7.2A and 5A PD 7A). Whatever complexities may be involved in a proper identification of Mr Iqbal's defendant(s), those are to my mind procedural matters which do not remove as a matter of the principled interpretation of the Act all jurisdiction under its section 3 to sue a partner or partnership.

65. I would therefore hold that, whatever the financial consequences might be for individual partners, if indeed Mr Mansoor had a partner at the relevant time, a partnership may be made a defendant to a claim under the Act to liability for the statutory tort of harassment.

Permission to appeal

66. We granted permission to appeal at the hearing. This was admittedly a second appeal. Mr Brown submitted that there was no important point of principle which should or could generate jurisdiction for a second appeal. We did not agree. This court has not had to consider before the issues raised and discussed above, which are individually and cumulatively important. It would emasculate the Act if individual acts of potential harassment had to be scrutinised each by themselves, rather than looked at as a whole for the purpose of asking whether there has been a course of conduct capable of amounting to harassment.

Conclusion

67. In sum, these are the reasons for which I joined in our decision to grant permission to appeal, and to allow the appeal of Mr Iqbal. At the close of the hearing, we also recommended that the parties consider mediation. They are members of the same community in London. Litigation does not seem an obvious means to settle their differences. We therefore directed that the Civil Appeals Office should issue to

the parties its standard letter regarding the Court of Appeal Mediation Scheme (CAMS). I hope that the parties will take the opportunity of mediation seriously.

Lady Justice Smith:

68. I agree

Lord Justice Richards:

69. I also agree.