Neutral Citation Number: [2015] EWCA Civ 192

Case No: B2/2013/3238

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BOW COUNTY COURT
MR RECORDER STEYNOR QC
1EX00608

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 March 2015

Before :

LORD JUSTICE LAWS
LORD JUSTICE LEWISON
and
LORD JUSTICE BEAN

- -

Between:

JOHN CALLAND	**Appellant**
- and -	
FINANCIAL CONDUCT AUTHORITY	**Respondent**

- -
- -

Mr Hugh Tomlinson QC (instructed by **Kitsons LLP**) for the **Appellant**
Mr Javan Herberg QC & Mr Tom Cleaver (instructed by the **Financial Conduct Authority**) for the **Respondent**

Hearing date : 4 March 2015

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Approved Judgment

Lord Justice Lewison:

1. Until January 1998 Mr Calland was an independent financial adviser. He was principal and then partner in the firm of Calland Insurance and Mortgage Services ("CIMS"). He has since been living in retirement in Spain. His son took over the business, but went bankrupt. In the spring of 2005 employees of the Financial Services Authority contacted him, once by letter, once by telephone and once by e-mail in connection with a review into pension mis-selling. Mr Calland alleges that these events amounted to harassment within the meaning of the Protection from Harassment Act 1997. The FSA applied for summary judgment against him. They failed before DDJ Rea, but succeeded on appeal to Recorder Steynor. With the permission of Gloster LJ Mr Calland brings this second appeal. For the reasons that follow, I would dismiss the appeal. The only defect in the Recorder's judgment is the unacceptable and unexplained nine month delay in delivering it.

2. Section 1 of the Protection from Harassment Act 1997 provides, so far as material:

> "(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—
>
> (a) …,
>
> (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."

3. Section 7 provides, so far as material:

> "(2) References to harassing a person include alarming the person or causing the person distress.
>
> (3) A "course of conduct" must involve—

> (a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person…"

4. Harassment is both a tort (section 3) and a crime (section 2).

5. The boundary between conduct which is lawful and conduct which is tortious or criminal is crossed when the impugned conduct ceases to be merely unattractive or unreasonable and becomes oppressive and unacceptable: *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224 at [30]. In life one has to put up with a certain amount of annoyance: things have got to be fairly severe before the law, civil or criminal, will interfere: *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46, [2010] 1 WLR 785 at [17]. Harassment involves persistent conduct of a seriously oppressive nature targeted at an individual and objectively calculated to cause fear or distress: *R v Smith* [2012] EWCA Crim 2566, [2013] 1 WLR 1399 at [24]; *Dowson v Chief Constable of Northumbria Police* [2010] EWHC 2612 (QB) at [142]. In deciding whether the boundary has been crossed the context is important; but the touchstone is whether the impugned conduct is of such gravity as to justify the sanctions of the criminal law: *Sunderland City Council v Conn* [2007] EWCA Civ 1492, [2008] IRLR 324 at [12]. Whether the boundary has been crossed is to be judged objectively: *Dowson v Chief Constable of Northumbria Police* at [142]. Courts should be astute to separate the wheat from the chaff at an early stage in the proceedings: *Majrowski v Guy's and St Thomas's NHS Trust* at [30].

6. I begin with the context in which the communications with Mr Calland took place. As the Deputy District Judge recorded, the background was a large scale investigation by the regulators into possible mis-selling of pension schemes in the 1990s. The review was launched in October 1994. The regulator has changed over the years. At the time when Mr Calland was in business it was the Personal Investment Authority. Subsequently it became the Financial Services Authority and latterly the Financial Conduct Authority. Nothing turns on the different identities; and I will simply refer to the regulator.

7. There were two phases to the investigation. Phase 1 for urgent cases ran from October 1994. Phase 2, for cases falling outside Phase 1 ran from August 1998, that is to say some seven months after Mr Calland retired. Phase 2 was to be a direct approach by financial advisers to their potentially affected clients. There were to be four elements:

   i) Firms were to write directly to investors and invite them to put their case forward for review (a direct invitation);

   ii) The investors were to provide information to the firms about themselves for the review;

   iii) Firms were to send one reminder letter to the investors;

   iv) The regulator would monitor and keep informed the investors and oversee a high profile publicity campaign to raise awareness of the review.

8. This was to be done by the end of June 2002. In the event of an investor asking for a review, the review would follow a number of key stages:

- Information gathering from the firm's own records, from occupational pension schemes and from investors;

- A loss test to establish whether an investor was likely to lose or gain from the decision to take out a personal pension rather than remain in or join an occupational scheme;

- A compliance test to establish whether the investor was given advice or information which fell materially short of the regulatory standards in force at the time it was given;

- A causation test to establish whether, if there was a loss, that loss was – on the balance of probabilities – caused by a failure in compliance by the firm;

- Redress for the investors financially harmed by non-compliance.

9. In parallel with the review the regulator made the Financial Services (Compensation of Investors) Rules 1994. These rules set up the Investors Compensation Scheme ("ICS"). The essential function of ICS was to pay compensation to investors, where the investment firm was financially unable to do so. If a firm was unable to meet claims then it was said to be "in default". Whether a firm was in default was to be established at an early stage, because if it was then ICS would deal with any claim itself for the purposes not merely of paying compensation but also the anterior stage of deciding whether any compensation was in fact due as a result of regulatory non-compliance. All this was explained to Mr Calland in ICS' letter to him of 5 April 2001 in connection with a claim that had been made by a client of CIMS. As the letter said in terms:

> "At this stage we have not investigated the circumstances surrounding the advice given."

10. However, although ICS had not investigated the circumstances in which the advice had been given, what it had done was to identify a potential loss of £6,742. This follows the staged approach in which the loss test is applied before the non-compliance and causation tests. In order to be in a position to decide whether a firm was "in default" ICS needed to be provided with financial information about the firm. The letter concluded:

> "We hope to deal with this matter as soon as possible. Accordingly please either:
>
> - Confirm to us that you or your firm will be in a position to deal with these claims in the event that liability is proven; in which case we will direct the investor(s) to you …; or
>
> - Confirm that you or the firm are unable to deal with the claims by completing the attached questionnaire and statement of assets and liabilities.

> If we do not hear from you within 14 days of the date of this letter we will proceed to make a decision as to whether Calland Insurance should be declared "in default" on the basis of such information as we already hold."

11. It is not alleged that Mr Calland replied to this letter; and indeed on 5 July 2001 ICS wrote to the investor who had made the claim stating that Mr Calland had not provided any information about his financial status. ICS has since been replaced by the Financial Services Compensation Scheme ("FSCS").

12. The three important points to note about the background are:

    i) The involvement of the firm in Phase 2 was designed to identify investors who might request a review. Once they had been identified, handling of the review passed to the firm or, if appropriate, the compensation scheme;

    ii) The loss test was a key stage to be performed before going on to the questions of compliance and causation; and

    iii) Provision of the financial information would determine who was to investigate the merits of any individual claim.

13. It is also to be noted that Mr Calland's son had been adjudicated bankrupt, and the regulator had no information about Mr Calland's financial affairs. Mr Tomlinson QC, who appeared for Mr Calland, argued that the "safety net" of the ICS did not apply to Mr Calland, because he had the resources to meet any claims made. But since he had not given any financial information to ICS that was no more than an assertion.

14. It is against this background that the communications between the regulator and Mr Calland need to be examined. The first is a letter from the regulator to Mr Calland of 16 March 2005. The material parts read:

> "As you are aware the FSA took over the responsibility from your firm for calculating redress due to consumers under the Pensions Review. This was undertaken on the basis that as soon as the losses had been established, we would write to you to ascertain your financial ability to meet the redress due. Accordingly we would advise you that of the cases reviewed to date, there is redress due to investors amounting to £168,819, with a further 6 cases awaiting review.
>
> Accordingly we would appreciate your co-operation and assistance to enable us to establish whether you have the financial resources to meet the compensation due. In this regard we require you to complete and return the enclosed Personal Statement of Assets and Liabilities. In the event that it is established that you do not have sufficient resources to meet consumer loss, we would propose to refer the matter to the [FSCS] in order that consumers can pursue their claims further."

15. One who knew the process of the pensions review would have understood that the loss had to be established before the question of non-compliance and causation were investigated; and would also know that who was to conduct the investigation would depend on the financial ability of the firm to meet the claims. That is why the letter said that the regulator would write to Mr Calland "as soon as *losses* had been established". It was unfortunate that the letter referred to "redress due", when *liability* had not been established; but on the other hand the letter also said that investors would have to "pursue their claims further". Mr Tomlinson drew attention to the fact that the letter said that "we require you to complete" the financial statement. However, that was said in the context of a request for "co-operation and assistance" which would be "appreciated". No coercive power was being suggested. This letter is quite incapable of approaching the threshold between unreasonable and oppressive conduct.

16. The next event is a telephone call between Mr Calland and Mr Sidonio, an employee of the regulator. Fortunately we have a complete transcript of the call. The overall impression I gained from reading the transcript is that Mr Calland was well able to look after himself; to challenge what he thought were errors on Mr Sidonio's part and robustly to advance his point of view. In part it reads like a cross-examination of Mr Sidonio by Mr Calland. It is argued on Mr Calland's behalf that he was extremely upset by this phone call, in which Mr Sidonio wrongly stated that he (Mr Calland) had been running the business when it went bankrupt and that the matter was about investors who had been mis-sold pensions by CIMS.

17. The first point to make is that the call took place at Mr Calland's invitation following a voice mail that he left on Mr Sidonio's phone. This is not a promising start for a claim of harassment. Let me look at some parts of the call. Mr Sidonio began by saying that he wanted a discussion, because if Mr Calland did not have the financial resources to meet claims that had been made then "what we are looking to do is to take a step forward, with your co-operation. If you don't and you can clearly indicate that you don't … then we would look to present that to the [FSCS]." Mr Sidonio continued by saying that the regulator believed that Mr Calland was responsible for the pensions review. He was immediately challenged by Mr Calland:

> "JC: Are you au fait with who was owning and running the business when it went bankrupt?
>
> DS: Carry on
>
> JC: Do you believe it was me:
>
> DS: Er, what's your view on it?
>
> JC: I – are you able to just reply to that question, do you?
>
> DS: Well let me put it this way, we'll ask you the questions first of all and then if you have any further questions you can come back to me. You're …
>
> JC: Can I just stop you there?

> DS: You are suggesting that you are not responsible for the pensions review?
>
> JC: Can I stop you there?"

18. After another couple of interchanges the conversation continued:

> "JC: … can I ask you again – are you aware as to who was running the business when it went bankrupt?
>
> DS: Yes, we are aware
>
> JC: Can you tell me who you think it was?
>
> DS: We think it was you
>
> JC: I see. You must have …
>
> DS: Are we, are we…
>
> JC: You must have an appalling filing system."

19. Mr Calland continued by explaining that he had passed liability to his son and said that the regulator was apparently not aware of that. Mr Sidonio continued:

> "DS: Well, I don't think that's our understanding of it Mr Calland, that's er your view of it but I don't think that's necessarily our view of it.
>
> JC: Well what I suggest you do if you think differently, you write to me and deal with those issues that I just broached with you."

20. That is the entire conversation in so far as it concerns CIMS' insolvency. Mr Sidonio began by asking what Mr Calland's view was, but Mr Calland insisted that Mr Sidonio should answer his question. Mr Sidonio expressed his opinion in relatively tentative terms, and then agreed to disagree. This part of the call is no more than a disagreement (and very politely expressed, at least by Mr Sidonio). Moreover, this part of the call ends with Mr Calland's inviting further communication, which belies the conclusion that he was being harassed. By no stretch of the imagination could it be called torment or oppressive conduct.

21. The second complaint about this conversation is that Mr Calland was accused of mis-selling pensions. One must not lose sight of the fact that the reason for the call in the first place was that investors had claimed compensation for mis-sold pensions; and that the claims, as calculated by the regulator, might run to over £168,000.

22. In the next relevant part of the call, Mr Calland protested that the request for him to provide financial information was negating his personal integrity. The conversation continued from there:

"DS: It's not to do with your personal integrity, this is all about investors'

JC: Yeah

DS: Those who have been mis-sold pensions by you

JC: Ah!

DS: We are giving you the opportunity, we are giving you the opportunity…

JC: Right, can you

DS: to make representations, to make representations

JC: Can you just repeat that statement "this is all about investors who have been mis-sold pensions by you" is that what you said?

DS: By the firm yeah

JC: That's what you say?

DS: This is what it's about, the mis-selling

JC: I see it's about mis-selling the

DS: Yeah

JC: That you've concluded took place

DS: No we haven't concluded, I said to you following that

JC: You didn't say allegedly mis-selling, you said mis-selling

DS: I'm sorry I didn't hear any of that

JC: You didn't say allegedly mis-selling, you said mis-selling

DS: Yes

JC: You said mis-selling

DS: Yes

JC: I see

DS: I said subject to you er making representations to the opposite which we were quite happy to entertain

JC: Yeah

> DS: If you have a different view
>
> JC: What I have previously offered to the FSCS, I have previously offered if you have any cases claiming to have been mis-sold pension products or whatever, you let me have sight of them and I will lend you all the help I can to …"

23. Mr Sidonio then offered Mr Calland facilities to inspect the files and offered to make a room available for that purpose. Mr Calland's concern was that the FSA should pay any claims made by investors and leave him alone. However, as Mr Sidonio pointed out to him the FSA did not themselves pay claims, and the FSCS could only handle and pay claims if Mr Calland showed that he was unable to do so. That was the whole reason for making inquiries about his financial position. Mr Sidonio also made it clear that disclosing his financial resources would not bind Mr Calland to pay claims; and that the non-compliance and causation tests would still need to be satisfied. As Mr Sidonio also made clear the FSA had not conducted either the non-compliance or the causation test. All they had done so far was to conduct a loss calculation.

24. The nub of the complaint appears to be that Mr Sidonio said that Mr Calland or the firm *had* mis-sold pensions, rather than saying that it was *alleged* that he or the firm had done so. However, Mr Sidonio made it clear that the regulator had not concluded that there had been mis-selling; offered to listen to any representations that Mr Calland might wish to make; and offered him facilities to inspect the files. Later in the conversation Mr Sidonio repeated that the FSA had not conducted the non-compliance test or the causation test. Moreover the impugned statement was only repeated because Mr Calland once again insisted that it should be. This comes nowhere near to being unacceptable and oppressive conduct. Mr Calland's offer to help the FSCS was also misconceived, because the FSCS would only handle a complaint if Mr Calland had been found to be "in default"; and no such finding could be made unless Mr Calland gave the requested financial information, which he refused to do.

25. The third direct communication is an e-mail of 20 May 2005 from Mr Sidonio to Mr Calland. What it says is:

> "I would reiterate that the FSA has noted your intention not to co-operate with its request for you to complete your firm's Pensions Review and to meet the claims of consumers, where redress is due. Accordingly the FSA will be referring such claims to the Financial Ombudsman Service, in order that consumers who are owed redress may pursue any award in their favour through the courts if they wish."

26. This simply informs Mr Calland of what the regulator proposes to do next. It does not suggest that any consumer is in fact owed redress. It merely tells Mr Calland the avenues that disgruntled consumers may pursue. That is the last of the direct communications relied on. Mr Calland also relies on the fact that the regulator in fact referred cases of estimated losses to the Ombudsman and asked the Ombudsman to check whether the claims fell within the Ombudsman's jurisdiction; and also wrote to consumers saying that Mr Calland had refused to pay their estimated redress and inviting them to make a complaint to the Ombudsman. The latter communication did

not suggest that any complaint would actually succeed. These communications may have become known to Mr Calland, but they were not targeted at him, and cannot sustain a claim of harassment.

27. Why did the deputy district judge conclude that this was a case fit for trial? She seems to have concluded that a fundamental issue was whether Mr Calland was obliged to provide the regulator with information about his finances. She also noted that there was an e-mail in 2002 from a Mr Armstrong of the regulator to an unnamed recipient at the FSCS saying that Mr Calland had done nothing wrong. At [21] she said:

> "Thus, there will need to be resolved here whether there was any complaint or compensation claim from a CIMS client(s), the method of them/it arising (and there were submissions relating to the FOS involvement), whether the conduct by the [regulator] was legally sound, based upon the processes set up by the statutes and statutory instruments identified and whether the conduct triggered the pursuance by the [regulator] of [Mr Calland] in the way described by him so as to amount to harassment."

28. What is conspicuous by its absence from the deputy district judge's judgment is any critical examination of the raw material which is said to amount to harassment. Nor did Mr Tomlinson undertake that examination either in his written or oral submissions. The fact that some factual or legal questions may be disputed does not absolve the judge from her duty to make an assessment of the claimant's prospects of success. As Lord Hobhouse put in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at [158]:

> "The important words are "no real prospect of succeeding". It *requires* the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a "discretionary" power, i.e. one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he *must* carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly. …Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the "bottom line" is what ultimately matters." (Emphasis added)

29. In evaluating the prospects of success of a claim or defence the judge is not required to abandon her critical faculties. As Potter LJ put it in *E D & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [2003] CP Rep 51 at [10]:

> "It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in *Swain v Hillman* [2001] 1

> All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p.467 and *Three Rivers DC v Bank of England (No.3)* [2001] UKHL/16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95]."

30. Let it be assumed that all the factual issues that the deputy district judge identified are resolved in Mr Calland's favour. How does that turn these three communications, whether viewed individually or cumulatively, into oppressive conduct? The deputy district judge did not explain. Suppose that, as he said, Mr Calland (or his son) had complied with their obligations under Phase 2. That would only mean that Mr Calland had not identified any potential complaints. As Mr Tomlinson recognised, he might have been wrong about that, and claims might subsequently emerge. If subsequent complaints did emerge (as indeed they did) they would still need to be processed. That would have to take place in accordance with the scheme. Who would handle any complaint would depend on whether Mr Calland was able to meet potential claims or not; and that in turn would depend on his financial resources. Suppose that Mr Calland had no obligation to disclose his financial affairs. In that event the compensation fund would not be able to deal with any complaint, and he would be left to deal with any complaint on his own. Disclosure of his financial affairs was in fact put to him both in the letter of 16 March 2005 and in the subsequent telephone call as a question of co-operation rather than obligation. Suppose that the regulator's conduct was not legally sound. The fact is nevertheless that the regulator had assessed potential investor losses at £168,819; and was simply asking Mr Calland for information. He was asked only twice: one by letter and once in the telephone call. Let it be assumed that, as he said, Mr Calland had done nothing wrong. In that event the claims made by consumers would fail the non-compliance test, as Mr Sidonio said. But it would be Mr Calland who would have to deal with those claims, because his refusal to disclose his finances meant that the FSCS could not do so. How does that turn the communications into harassment? Since the deputy district judge conducted no evaluation of the gravity of the impugned conduct, the Recorder was entitled to carry out his own.

31. In agreement with the Recorder, in my judgment this conduct comes nowhere near crossing the threshold. It is not even at the front garden gate. Whether the regulator could have established one or other (or both) of the statutory defences is not a question that arises. I echo the words of Ward LJ in *Sunderland City Council v Conn* at [19]: what on earth is the world coming to if conduct of the kind that occurred in this case can be thought to be harassment, potentially liable to giving rise to criminal proceedings punishable with imprisonment for a term not exceeding six months, and to a claim for damages for anxiety and financial loss? I would dismiss the appeal.

Lord Justice Bean:

32. I agree.

Lord Justice Laws:

33. I also agree.