



Neutral Citation Number: [2015] EWHC 934 (QB)

Case No: HQ14X04050

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/04/2015

Before :

SENIOR MASTER FONTAINE

Between :

KERR

Claimant

- and -

ATTORNEY GENERAL
(On behalf of the Security Service)

Defendant

MR TIMOTHY LAWSON-CRUTTENDEN (solicitor advocate)
of **RICHARD SLADE AND COMPANY**) for the **Claimant**
MISS VICTORIA AILES (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 2 February 2015

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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SENIOR MASTER FONTAINE

SENIOR MASTER FONTAINE :

1. This was the hearing of the Defendant's application dated 17 October 2014 that the claim be struck out and the Defendant's costs be paid by the Claimant. The application is supported by the statement of truth in section 10 of the application notice. The Claimant relies on his witness statement (undated) served in support of the claim on 3 October 2015, and his solicitor's skeleton argument dated 4 November 2014.
2. This is a Part 8 claim under the Protection from Harassment Act 1997 ("PHA") seeking an order for injunctive relief under section 37 Senior Courts Act 1981 to protect the lawful and legitimate interests of the Claimant.
3. References in this judgment to documents in the bundle prepared for the hearing are in the following format [tab number page number]

Factual background

4. I summarise the matters relied on in the Claimant's witness statement. The Claimant alleges that from about 1996 until about 2003 he acted as a "go-between" between members of the Liverpool criminal fraternity, in particular a Colin Smith, and the police, in particular David Rush, a police officer in Liverpool who died in about September 2010. The Claimant says that he realised in about 2002 that Mr. Rush was acting for MI5 and then ceased the relationship.
5. The Claimant alleges that he has been subject to harassment by the Security Service by a course of conduct from 1 March 2002 to 8 September 2014, comprising 149 incidents in total, which are set out in a schedule to the Claimant's witness statement at Exhibit PMK1 ("the schedule"). He says that this course of conduct, which includes stalking and surveillance, has been carried out overtly, rather than covertly, by the Security Service (MI5) in order to persuade or force him by intimidation to work with the Security Service. He seeks only an injunction to prevent the Security Service from carrying out continued harassment in the manner in which he alleges it has been done, and not damages.

Defendant's case in support of the strike out application

6. The Defendant's application proceeds on two bases: under CPR 3.4(2) (a) and 3.4(2) (c).

CPR 3.4(2)(a) - The statement of case discloses no reasonable grounds for bringing the claim.

7. The Defendant prefaces its case on this ground with the explanation stated in a letter to the Claimant's solicitors dated 3 September 2014 [A67] in response to pre-action correspondence dated 15 August 2014. Mr Tim Denham on behalf of the Director General of MI5 sets out the longstanding policy of successive governments to neither confirm nor deny ("NCND") allegations in relation to matters of intelligence and national security. It is stated that this policy is necessary, as confirming the truth would obviously compromise security sources and techniques. However, the policy of NCND also prevents the denial of allegations, including those which are spurious

and absurd, as the denial of perhaps an obviously false allegation in one case could lead to a damaging inference being drawn in another case, if no denial was forthcoming in that case. It is stated that this policy applies to those whom the Security Service is investigating (or has investigated) as well as to those whom it seeks to recruit (or has recruited) (“agents”). MI5 declined to provide an undertaking as sought by the Claimant in his solicitors’ letter of claim, or at all, “not least because any undertaking so framed would constitute an acceptance that there had been a course of conduct amounting to harassment in the past, which is denied”. That letter and a letter dated 23 October 2014 [E4] set out in some detail the NCND policy and the reason for the Defendant’s reliance upon it in this case.

8. The Defendants rely on section 1(2) and 1(3) and section (2) of the Security Service Act 1989 as the statutory basis for the NCND policy. I am referred also to the decision of the Lord Chief Justice of Northern Ireland, Lord Chief Justice Carswell in *Re: Scappaticci* 18 August 2003 at [15] where the Lord Chief Justice stated, in relation to agents engaged by the Security Service, that:

“There is in my judgment substantial force in these propositions and they form powerful reasons for maintaining the strict NCND policy”.

9. That policy was adopted by the Defendant in the pre-action correspondence between the parties and accordingly the factual allegations in relation to the alleged harassment are not the subject of comment by the Defendant in respect of the truth of them or otherwise.
10. Accordingly, the Defendants do not challenge the truth or otherwise of the factual allegations, but say that the matters relied on in the schedule to the claim form are not capable of establishing a cause of action under the PHA. They say in relation to such allegations:
- i) Certain allegations do not attribute the alleged contact to anyone at all e.g. items 1 to 4, 24, 37, 46, 48, 54, 56, 59, 60, 62, 67, 68, 71, 72, 73, 74, 75, 76, 77, 78.
 - ii) Entries where the actions complained of are alleged to have been carried out by MI5 or on their instructions but there is no basis for the attribution to MI5 being responsible for such conduct e.g. item numbers 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 34, 36, 38, 39, 40, 41, 42, 43, 44, 45, 47, 49, 50, 51, 52, 53, 54, 55, 57, 58, 61, 63, 64, 65, 66, 69, 70.
 - iii) Unparticularised allegations of stalking or surveillance e.g. item numbers 4, 8, 13, 14, 15, 16, 20, 21, 22, 3, 24, 26, 28, 31, 34, 37, 38, 39, 40, 43, 44, 45, 47, 48, 52, 53, 54, 55, 56, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 77.
 - iv) Emails item 79 to 151 from various people/organisations between 4 May 2014 and 8 September 2014, all said to be stalking emails from MI5, whereas they appear to be the normal type of spam/marketing emails received by most

people on the email system with no proper indication as to why an allegation could be made that these were sent by MI5 under a false email address.

- v) Allegations of threats, messages, poisoning or detention for which no evidence is provided for the assertion that these were instigated by MI5, when they could just as easily have come from the members of criminal community which the Claimant asserts in his witness statement he has contacts with. See for example paragraph 19 of the Claimant's witness statement.
11. The Defendant submits that neither individually nor collectively could the allegations made in the schedule found any basis for the claims the Claimant makes. They are either not attributed to the Defendant at all, or if they are there is no basis for such attribution to the Defendant, or the allegations are so unparticularised that it is impossible to tell what is the basis for them or where they are emails why they differ from emails which any ordinary user of email might expect to receive.

CPR 3.4(2)(b) – Abuse of process

12. The Defendant says that in circumstances where the Claimant's case comprises a complaint into the alleged treatment by the Security Service in relation to him and his property, according to the terms of section 65 of Regulation of Investigatory Powers Act 2000 ("RIPA") the appropriate forum for such a complaint is the Investigatory Powers Tribunal ("IPT"). That information was provided to the Claimant in the Defendant's letter of 3 September 2014 [A67].
13. Accordingly it is submitted that the respondent's statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings insofar as it purports to circumvent the jurisdiction of the IPT, and should be struck out.
14. The Defendant's case in oral submissions backtracked slightly from the position in the application notice, in that it is accepted that the IPT does not have exclusive jurisdiction, unlike claims under section 7(1)(a) of the Human Rights Act 1998, where section 65(2) of RIPA provides that the IPT have exclusive jurisdiction,. Section 6(4) provides that for any other complaint falling under section 65(5), the IPT is "the appropriate forum". It is clear that the Claimant's allegations fall fully within section 65(5) and this is not disputed.
15. The Defendant says that in proceedings before the IPT the Defendant could give a full factual account in relation to the legality of any surveillance on the Claimant and the monitoring of any telephones or other electronic devices, but there is a bar to the Court hearing such claims. There would have to be an application in this Court under section 6 of the Justice and Security Act 2013 for a declaration that a closed material application may be made in the proceedings and there would therefore have to be a transfer to a High Court Judge for that purpose which would consume many resources of this Court. There would further have to be an application under section 12 of the PHA if the Defendant intends to rely upon a defence under section 1(3) of the PHA. Although it was accepted that the IPT cannot grant injunctive relief in comparison with this Court, the usual remedy in those circumstances would be a declaration or adjudication by the IPT in respect of any violation of the law. If the IPT found that the Claimant's complaint was substantiated it would give the complainant a full

explanation and in those circumstances the Crown would be likely to act in accordance with the adjudication made. That, therefore, would be the most appropriate method of pursuing the Claimant's complaint.

Summary of Claimant's submissions

CPR 3.4(2)(a) – No reasonable grounds

16. The Claimant in his pleaded case and in his witness statement relied upon the inferences that he drew from the Defendant's letter of 3 September 2014, [A67] as set out at paragraph 8 of the Claimant's solicitor's letter of 23 September 2014 [A74] namely:

“(i) Your authority [*i.e.* MI5] are conducting a course of conduct against our client.

(ii) That course of conduct is consistent with that described in the evidence prepared by your client and already disclosed to you.

(iii) The purpose of the course of conduct is to “force” our client to work for your authority.

(iv) Accordingly, the course of conduct is lawful under S1(3) of the 1997 Act.

(v) If proceedings are commenced and your authority intends to procure the filing of a S12 certificate seeking to prevent the High Court from enquiring into any of these matters.”

17. No response was received from the Defendant in relation to that letter until 23 October 2014 [E4], when proceedings had already been issued. The response to that paragraph states:

“Your inferences, assumptions and purported conclusions and understandings in paragraphs 2, 4, 5 and 6 are unsupportable.”

18. Accordingly the Claimant was proceeding on the basis that the Claimant's factual allegations were not in dispute and that the “reverse” burden of proof applied under section 1(3) of the PHA and that the Defendant would be relying on a defence under that section and a section 12 certificate. (See paragraph 3 to 7 of the Claimant's witness statement).

19. It is submitted that paragraphs 9 to 21 of the Claimant's witness statement set out the reasons why the Claimant attributes the factual allegations in the schedule to the Defendant and that paragraph 22 provides a general indication of the more particularised allegations set out in the schedule. It is submitted that as the PHA requires a course of conduct only consisting of two matters of conduct, the claim more than meets the low threshold for the requirements of CPR 3.4(2)(a).

20. It is submitted that it is noteworthy that there is no summary judgment application where the Defendant would have to provide witness evidence to support a case of no

real prospect of success, which one could assume because no-one was prepared to state that the allegations made by the Claimant were untrue. Thus it is submitted the Court can draw inference that the claim must have a real prospect of success. There is no dispute to the Claimant's evidence in his witness statement and the Court must therefore proceed on the basis that it is undisputed. He has only to show sufficient factual evidence for the assertions of harassment and apprehended harassment, which he has done. In respect of his application for an injunction he does not even have to show that the Defendant's behaviour was unlawful or tortious (see *Burris v Azadani* [1995] 4 All ER 802, judgment of Sir Thomas Bingham MR (as he the was) at page 807, so there is a low threshold for the Claimant to meet, which is met by the witness statements and even simply paragraphs 19 and 22 of the witness statement.

21. The Defendant should have stated in its correspondence that it regarded the schedule provided by the Claimant as implausible and should have answered the inferences that the Claimant says he has been able to draw and responded to the effect that he was not entitled to draw such inferences, before proceedings were issued. If the Court considers that the schedule could be more particularised then the Defendant's application could be stayed to enable the Claimant to re-particularise its case.
22. Further, the Defendant's NCND policy is a breach of the CPR, as the protocol on pre-action conduct requires defendants to engage with a claimant's case and the Defendant failed to do so. Its policy of non-engagement was a breach of CPR and it was not entitled to disregard the Court's rules in this way. Accordingly its application was an abuse of process.

CPR 3.4(2)(c) - Abuse of Process

23. It is clear that the Court has jurisdiction to hear the claim under the PHA and that the IPT does not have exclusive jurisdiction. The Claimant relies on the fact that the Secretary of State has made no order under section 65(2)(d) RIPA that proceedings under the PHA should be allocated to the IPT and accordingly the Claimant is free to bring proceedings for an injunction under the PHA in the Court.

Conclusion

CPR 3.4(2)(a) – No reasonable grounds

24. Because no issue has been taken with the evidence in the Claimant's witness statement I must assume for the purposes of this application that the Claimant will be able to prove the factual matters set out in the witness statement and the schedule. I have therefore to consider whether that evidence meets the standard under CPR3.4(2)(a), namely whether there are reasonable grounds for bringing the claim.
25. I accept that the matters referred to in the schedule itself (leaving aside the emails) will not on their own meet that threshold for the reasons advanced by the Defendant. However, the matters in the schedule must be read in the context of the matters referred to in the witness statement, in a Part 8 claim, and in that context it is clear that the attribution of the matters referred to persons employed by or acting on behalf of MI5 are clear. The reason for such attribution is set out, namely the intention to persuade the Claimant to work as a go-between between members of the criminal fraternity and MI5. CPR 3.4(2)(a) is a relatively low threshold for a Claimant to meet

and the Claimant meets that threshold. The incidents referred to satisfy the requirement of sections 1 (1A) and 1(2) of PHA, in my judgment.

26. I do not accept the Claimant's invitation to conclude that his case has a real prospect of success. That is not a matter before me, and the test is different than under CPR 3.4(2). I do conclude, however, that the possibility of the claim having a real prospect of success may well be improved by the allegations being set out with more particularity, as in a Part 7 statement of case.

CPR 3.4(2)(c) – Abuse of Process

27. I agree with the submissions on behalf of the Claimant that Section 65(2) of the RIPA makes it clear that the only exclusive jurisdiction of the IPT relates to proceedings under section 7(1)(A) of the Human Rights Act 1988 which also fall under section 65(3) of RIPA. It is common ground that the Claimant's complaints fall under section 65(2)(B) of RIPA, and whilst the IPT would clearly have jurisdiction under section 65(3) of RIPA the only sensible reading of section 65(2)(b), in contrast to section 65(2)(a), is that for all other claims not falling under 65(2)(a) the IPT does not have exclusive jurisdiction. The decisions in *A v B (Investigatory Powers Tribunal: jurisdiction)* [2010] 1 All Er 1149 and *ZZ v The Secretary of State for the Home Department SC/63/2007* unrep.14 November 2014 support this interpretation. However, I also agree with the Defendant's submissions that the IPT would be the most appropriate forum for the Claimant's complaints (see section 65 (4) and 5 of RIPA) for all the reasons relied upon by the Defendant.
28. The question I have therefore to consider is whether it is nonetheless an abuse of process for the Claimant to bring his claim by way of court proceedings when there is a more appropriate forum.
29. In my judgment I should take into account in this application the overriding objective - see *Samara v MBI & Partners UK Ltd* [2014] EWHC 563 (QB) at [34-37] (not cited by either party). The requirements of rule 1.1(2)(a) is met because both parties are represented by experienced solicitors and/or Counsel, although I accept that an individual may frequently be on less of an equal footing with a party who is a government department or agent of the Crown. Sub section 1.1(2)(f) is not relevant, at present. However, the other requirements of the rule, sub sections 1.1(2) (b) to (e), are very relevant, in my view, to this issue.
30. The claim will involve the parties, and in particular the Defendant, in a considerable amount of costs. There will have to be the applications made for a s.12 declaration and an application for closed material to be admitted. There may have to be an application under CPR 31.19 to withhold inspection or disclosure of documents. These will cause some delay. If such applications are successful the claim may have to proceed as a Part 7 claim because there may be factual evidence in dispute. In terms of the number of instances of conduct relied on by the Claimant that may amount to a considerable volume of evidence. The claim is one for an injunction only and not for damages. The incidents relied upon as a course of conduct, apart from the e-mails, are no more recent than 1 May 2014. Some of the incidents, which go back to 2002, are likely to be time barred. However, there remain many incidents in respect of which evidence of a number of individuals from MI5 will no doubt be required. The considerations of the issues in relation to the Security Service will

inevitably be more complex than most claims under the PHA. As a result of these factors the court's resources will be utilised disproportionately in this case.

31. The Claimant has given no reasons why the IPT would not be the most appropriate forum to determine his claim, save to state that the Claimant's solicitors have written to the IPT but have received no reply. The Defendant's solicitors, having made inquiries of the IPT, say that the IPT have no record of such correspondence.
32. In my view it is a disproportionate course to bring proceedings in the courts which are likely to incur disproportionate costs and use of resources when the most appropriate forum, as stated by statute, is a specially constituted Tribunal that can hear the Claimant's complaints, and where the Defendant can submit its evidence, without the considerable expense and use of court resources that will be required in these proceedings. It is not in accordance with the overriding objective. It is, in my view, an abuse of process to bring such proceedings when another more appropriate forum is readily available at much less cost. The position may be different where an emergency interlocutory injunction is sought under the PHA, but this is not the case here. The incidents relied upon, apart from the emails, are between 1 March 2002 and 1 May 2014. The Claimant has not provided any grounds on which he says that the IPT would not be a suitable forum to deal with his complaints.
33. The only basis on which the Claimant could properly object to the IPT as a forum would be on the ground that it has no jurisdiction to grant injunctive relief. I accept the Defendant's submission that the Crown is unlikely to refuse to act in accordance with a finding or determination of the IPT. However, it seems to me that this objection could be met by staying the claim, rather than striking it out, pending a determination of the IPT, so that in the event that MI5 did not comply with any such determination, the claim could be pursued, and the limitation position preserved.

Whether the Defendant is in breach of the Protocol on Pre-action Conduct

34. I do not accept submissions on behalf of the Claimant that the Claimant's policy of NCND is an abuse of process or a breach of CPR. Neither the CPR, nor the requirement for compliance with the protocol for pre-action conduct, requires a Defendant to breach its statutory duties in its response to a letter of claim. MI5 has statutory duties under the Security Service Act 1989. Although not binding upon this court, the judgment of the Lord Chief Justice of Northern Ireland in *Scappaticci* is persuasive authority which, in my judgment, the Court of England and Wales would be most likely to follow in respect of its recognition of the "powerful reasons" for maintaining the strict NCND policy on the part of the Security Service. Moreover, the Defendant did not refuse to engage with the Claimant's claim, and set out its position clearly, including the reasons for following the NCND policy in response to the Claimant's factual allegations. It took a constructive approach to the complaints made by suggesting that the Claimant bring his complaint before the IPT rather than through the courts, and explained that in such a jurisdiction MI5 would be in a position to respond fully to the detailed factual allegations (in its letter of 6 July 2012 and 3 September 2014).
35. I shall accordingly make an order as set out in Paragraph 33 above at the handing down of judgment, when I shall also deal with the costs of the Defendant's application.

