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*Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **17/12/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

THOMAS ANTHONY CARLIN AND MAXINE KAREN HUGHES CARLIN

v

SANTANDER (UK) PLC AND R.G.SINCLAIR

DEENY J

Application

[1] The court has before it an originating summons from Thomas Anthony Carlin and Maxine Karen Hughes Carlin, his wife, against Santander UK Plc. Originally the proceedings were also brought against their solicitors, R G Sinclair & Co, but they were discontinued today before me, 17 December 2013. The complaint of the Carlins, if I may so refer to them, is about a letter and series of phone calls made to them at their dwelling house which in the submission of Mr Carlin constituted harassment at law. Mr Carlin appeared in his own right as litigant in person and the court gave him leave to appear for his wife in the circumstances also.

[2] The initial claim was that this was a breach of the Harassment Order and constituted harassment. Today Mr Carlin on foot of an affidavit served yesterday also added the Malicious Communications (Northern Ireland) Order 1988 to which I will refer in a moment. He seeks an injunction against the Bank restraining them from trespass upon the property he currently occupies with his family at [home address] and further restraining them from any conduct constituting harassment or breaching his Article 8 rights to a private and family life and those of his wife.

[3] The plaintiffs initially came before the court on 16 October 2013 seeking an ex parte interlocutory injunction. I was not satisfied at that stage that it was a suitable matter for an ex parte injunction and I directed them to serve a Notice of Motion with affidavit upon the solicitors for the Bank. The matter was then returned for

22 October. The court then was offered undertakings by Mr Mark Orr QC for the Bank. In the events that happened that turned into an injunction. That really happened because it was appropriate that a cross undertaking be given in damages but Mr Carlin felt unable to give such a cross undertaking in damages, and, in fairness to him, I think he had some difficulty in understanding what was involved in that, so what issued therefore was an injunction but on condition that he would be responsible for any loss caused to Santander by the granting of the interim injunction.

[4] The matter came before the court again on 20 November and a date was fixed for a full interlocutory hearing today, the injunction remaining in place. The position with regard to interlocutory injunctions is well established by the decision of the House of Lords in American Cyanamid [1975] A.C. 396 and the decision of Lord Diplock has well borne the test of time and any comments which I have made on it or those of my brethren in no way invalidate it. I have made the observation in a recent judgment that, of course, this court has a statutory power under the Judicature Act to grant an injunction when it is just and convenient to do so. But that may be said to be another way of acknowledging that the court has a discretion.

[5] The key issues in the case before me are threefold. Firstly, do the plaintiffs have an arguable case that Santander has been guilty of harassment contrary to law or a breach of the Malicious Communications (Northern Ireland) Order 1988? There has been no formal amendment but if necessary I would grant leave to amend. Secondly, even if there was a triable issue would damages be an adequate remedy because, save in exceptional circumstances which Mr Orr submits do not apply here, if damages are an adequate remedy an injunction is not applicable on an interlocutory basis? And thirdly, was there a lack of candour on the part of Mr Carlin which should disentitle him to a remedy which he might otherwise receive from the court?

[6] I look first logically to the issue as to whether there is a triable issue, whether he has an arguable case that may succeed at the trial of the action. Lord Diplock disposed of the argument that there had to be a probability of success at this stage but there must be an arguable case. Here Mr Orr is on strong ground because he is able to refer the court to a recent decision of the Court of Appeal in England in Roberts v Bank of Scotland Plc [2013] EWCA Civ 882 on appeal from His Honour Judge Spencer QC in Dewsbury County Court. Miss Roberts, as I apprehend her to be, had three accounts with Halifax, the pre-cursor of Bank of Scotland Plc, at least in part. She had a current account, a credit card account and a loan account and she modestly, in the words of Lord Justice Jackson who delivered the principal judgment of the court, exceeded the overdraft limit on her current account, she modestly exceeded the credit limit on her credit card account, but there does not seem to be any complaint about the loan account. As a result of this the Bank decided to contact the claimant by telephone and I quote from Lord Justice Jackson at paragraph 12 of his judgment:

> "There is nothing objectionable in taking that course. The problem in this case lies in the sheer number of phone calls that were made and the content of those calls. According to the Bank's log, bank staff made no less than 547 calls or attempted calls to the claimant over the period December 2007 to January 2009. The great majority of those calls were made during the first half of 2008."

[7] Their Lordships Jackson and McCombe LJJ and Her Ladyship Lady Justice Arden upheld the decision of the County Court Judge that that did amount to a course of conduct constituting harassment in breach of the equivalent English legislation: Protection from Harassment Act 1997. That decision is of highly persuasive authority in this court. In any event I respectfully agree with it and the view that was there taken. But one has to just pause there and reflect on that, that is 547 calls or attempted calls over 14 months regarding modest amounts owing from only two accounts and one compares that with the admission on the part of the Bank here that since June of this year 95 calls or attempted calls have been made to Mr and Mrs Carlin and it can be seen that that is a significantly lower level of calls or attempted calls although still considerable in number. But there is a further distinction on the facts from Roberts, namely, that that lady was, as the judge found, only modestly in excess of limits on two accounts and one can tell by the overdraft limits of £1250 and a credit limit of £2,700 that the sums are modest. Mr and Mrs Carlin are in default of paying a mortgage of £213,000 and they are now in arrears of £16,000. Mr Carlin disputes that Santander is the right plaintiff to pursue that claim. But somebody is owed £213,000 and the plaintiffs have downed tools in their payments despite having shown the court earlier at the direction of the court that they had a joint income of £2,993 per month - they were making no payments on their mortgage, because, they said, of the handling of this matter by Santander. The court did quash the Order of the Master for possession granted earlier this year and the matter is yet to be re-adjudicated.

[8] The context can be seen to be very different from that of Miss Roberts. But not only that, the Carlin's have a number of other accounts and it is stated before me without dispute that there are five others - which has only emerged from the very recent affidavits in this case - all of which are now in arrears. Now Mr Carlin says from the Bar that they are all in dispute but the nature of the dispute appears to be his row with Santander about the mortgage. He has not gone on affidavit nor has he said in answer to direct questions from the court that he never got these monies and indeed Mr Orr submits, I think rightly, that it is clear that the mortgage monthly payments were received for some time on the biggest debt owing to Santander, and that no payments have been made for a considerable period of time.

[9] So it seems to me that on the facts, the plaintiffs here fall well below the threshold in the decision of the court in Roberts. Mr Carlin in his ample recent affidavit relied on another decision of the Court of Appeal in Ferguson British Gas

Trading Ltd [2009] EWCA Civ 46 and cited that court as saying the fact that a [bank] computer sends out a spate of bills is no defence to a defendant. I respectfully agree with that and if organisations choose to get bigger and bigger, if they choose to expand from their home territory, of in this case Spain to the United Kingdom, that does not mean that they can thereby deprive other people of their rights. That in a way is trite law and as was said when Guinness owned ships they had to operate them as reasonably careful ship owners not as reasonably careful brewers. If Santander chooses to be a huge international company it does not excuse it from obeying the law. But it does not seem to me, and Ferguson was expressly addressed in the Court of Appeal decision in Roberts, that that assists the plaintiffs here. I note two quotations of relevance, one from Lord Justice Jacob who said that for it to be harassment the course of conduct must be grave:

> "things have got to be fairly severe before the law, civil or criminal, will intervene."

[10] Applying that to the plaintiffs' case is it grave, is it severe here? In terms of the phone calls I am not persuaded that either of those words are appropriate. Attempted calls have been made roughly every second day for some months and every second day is a phrase in common usage for persistence but I do not think the court should condemn as unlawful a lender which is owed large sums of money on one account and smaller sums of money in relation to other accounts for putting their computers to trying to get the people to repay them money as long as that remains within reason. And indeed I think Mr Carlin recognised that to some degree because he emphasised repeatedly to me that it was the letter from R G Sinclair that he received after winning the case in this court that particularly alarmed him or indeed in his words scared him, i.e. a letter threatening to repossess his dwelling house within 7 days and I am going to return to that letter later.

[11] Staying with Roberts for the moment Lady Justice Arden quoted with approval the following dictum from Lord Justice Gage in another Court of Appeal decision in England, Sutherland County Council v Con [2007] EWCA Civ 46, para. 78, to the following effect:

> "It seems to me that what, in the words of Lord Nicholls in Majrowski crosses the boundary between unattractive and even unreasonable conduct and conduct which is oppressive and unacceptable, may well depend on the context in which the conduct occurs. What might not be harassment on the factory floor or in the barrack room might well be harassment in the hospital ward and vice versa. In my judgment the touchstone for recognising what is not harassment for the purposes of Sections 1 and 3 will be whether the conduct is of such gravity as to justify the sanctions of the criminal law."

[12] Lady Justice Arden feels that applies even though she was dealing with a civil case. The matter was addressed in the principal judgment by Lord Justice Jackson and I think for completeness, as this is apparently a novel point, at least in this jurisdiction, I will quote three paragraphs from his judgment beginning at 35:

> "[35] Fortified by this guidance from the authorities, let me now turn to the Bank's conduct in the present case. The first point to make is that whenever the claimant exceeded her permitted level of indebtedness to the Bank, she was in breach of contract. The Bank was entitled to pursue its legal rights. The Bank could sue the claimant for sums which owed. If it wished to do so, the Bank could withdraw its services from the claimant and leave her to take her custom elsewhere.
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> [36] Before taking any of these drastic courses, it obviously made sense for the Bank to contact the claimant and to seek a mutually acceptable resolution of the problem. Possibly the Bank could help the claimant through a difficult period. Possibly the Bank could set up a new arrangement for repaying the claimant's indebtedness. This might, for example, involve reduced instalments paid over a longer period. With these matters in mind, it made perfectly good sense for the Bank to write to the claimant and also to telephone her. Indeed, any creditor should make contact with its debtor to request and discuss repayment before embarking upon formal legal proceedings.
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> [37] The existence of a debt, however, does not give the creditor the right to bombard the debtor with endless and repeated telephone calls. The debtor is fully entitled to say that he or she does not wish to talk to the creditor. In those circumstances, the creditor is thrown back upon his formal legal remedies. That is what the courts are there to provide. They are there to ensure that creditors do not resort to the remedy of self-help."

[13] Now Mr Carlin has said he did not want to speak to Santander and that that was largely ignored, although it is right to say as I have been reminded, that a number of these phone calls just simply went to answer phone and were not answered by Mr and Mrs Carlin but it seems to me that the facts here, certainly so

far as I am concerned today, on the material before me, do not amount to bombarding a debtor with endless calls, although there is certainly a measure of repetition. Therefore, I uphold the submissions of senior counsel on behalf of the defendant that there was not an arguable case to be pursued here and therefore it is not appropriate to grant an interlocutory injunction. Out of caution I will deal with his second argument and the third matter which I have mentioned.

[14] The second matter is the question of damages. Now Mr and Mrs Carlin had not sought damages. I will if requested by them after this judgment give them leave to amend to claim damages but I do not want that to be misunderstood, because obviously if they are unlikely to win the case they should not waste any more time on the matter. But why would damages not be an adequate remedy if the conduct of Santander does amount to harassment in law contrary to the view I have formed at this stage? How would Mr and Mrs Carlin not be compensated by a money payment at some future date? I ask those questions rhetorically because I do not seem to have got an answer to them. I think the thrust of Mr Carlin's observation is that it was those coupled with the inappropriately worded letter and indeed he goes on in fairness to him to make, I think, a valid point that when he came back from the 10 day holiday that he went on with his family he might have been minded to leave the matter and then he found that there had been more communications from Santander. That aspect of it is something I will take into account in a moment.

[15] But for my part it seems to me that here damages would be the more appropriate remedy. If I were to grant an injunction until the trial in this matter some months at least, in whatever court it was heard in, that would mean that Santander would be deprived of their contractual right to try and recover their monies. They are losing interest; we do not know what the outcome will be for Mr and Mrs Carlin. Happily, they are both in employment at the moment but will Santander ultimately recover those monies? So there is a definite disadvantage to them [if injuncted] while there is, I accept, an annoyance for Mr and Mrs Carlin to have Santander contacting them. But the remedy there might be to pay off these accounts one by one from their income or at least to engage with Santander and put in place some kind of repayment schedule. So it seems to me that if necessary the Bank would have been entitled to succeed on that ground of adequacy of damages.

[16] The third issue here is the respective conduct of both parties. Mr Orr understandably laid stress on the lack of candour on the part of the plaintiffs but there is conduct on the part of the defendant which I will address also. The lack of candour on the part of Mr Carlin consists, firstly, that in his original affidavit supporting his ex parte application he did not tell the court that he had other accounts in arrears with Santander. The picture the court was being given was that he was being harassed with 9 calls on a Saturday about the mortgage when he had just won a case against Santander. There is no dispute the letter was written. I feel, having had a transcript prepared at the request of one of the parties, that the ex parte hearing on 16 October was indeed a short one before me and I am not minded to criticise Mr Carlin for not volunteering it then. He was not very candid on the 22nd

but at one point as the transcript shows, he did say there was a least one account in overdraft so I am not going to hold that against him because he is a personal litigant; I know that legally represented parties can get irritated at that and I have sympathy with them but I am not going to condemn him solely for that omission not to be so frank and indeed that was at an inter parties hearing. So I have reached the conclusion that lack of frankness in providing information to the court was not enough to defeat the plaintiffs' claim on that ground.

[17] Balanced against that, in any event is the conduct of the defendants. The court having granted the injunction, although I am now persuaded to discharge it, it should have been obeyed and it clearly was not obeyed. Now, having had the benefit of the affidavits from Santander from Melissa Serin and Nicholas Sands who both provided two affidavits to the court, I am satisfied that was not contumacious in any way, that was not defiance of the Order of the Court. Various reasons have been put forward for the further letters. Some of the letters they were obliged to write to comply with the requirements under the Credit Regulations relating to lenders and that appears from one of the affidavits of Mr Nicholas Sands, to be found at page 109 of the trial bundle, sub-paragraphs 4 and 7, referring to the Consumer Credit Regulations and the Mortgage Conduct of Business Regulations Rules 13.41 and 13.51. So they were doing something that was otherwise lawful. But secondly they rely on the fact that the central computer for this Bank is in Spain. I make it clear that is not in my view a good reason. The court, as it happens, no doubt because Mr Orr asked me to, gave a slight deferment on the injunction coming into effect to allow the Bank's various arms to be informed. If banks want to operate on a very large scale they are entitled to do so but they are not entitled to prejudice the rights of citizens of the United Kingdom and they are not entitled to fail to obey the Order of the Court. So while I accept this was not contumacious, if the injunction had been upheld it would have been something that I would have proposed to address. And the fact also that the debt collection agency was used is not a sufficient excuse either; they should have been informed promptly also.

[18] I say further that if Mr and Mrs Carlin choose to pursue the case and another court takes a different view from me and finds having heard oral evidence that this did constitute harassment these communications of the weeks after 22 October could ground an increase in the award of damages. However, Mr Orr has wisely brought both deponents here. He has tendered them. They have made it clear that this was all inadvertent and I am not going to uphold the injunction against them for the reasons given. I am not going to take any further step except this. Normally costs would follow the event i.e. that the Bank having succeeded here would be entitled to its costs against Mr and Mrs Carlin but as an indication that the hugeness of the Bank is not a defence to complying with the orders of the court and for another reason which I will give in a moment I am not going to make an order for costs in this case in favour of the defendant.

[19] The two remaining matters I want to deal with are these. One, at an earlier review of this matter I commented to counsel for R G Sinclair & Company, Mr David

Dunlop, that I had some sympathy with the Carlins with regard to the letter that was written. It was warning, if you like, of repossession proceedings in 7 days which could not have happened within 7 days, they could not have seized the dwelling house from these people within 7 days and I think that language is inappropriate and I think R G Sinclair & Company should use a different letter in the future and I am willing to accept Mr Carlin's statement and indeed affidavits that that did cause alarm. I accept however that Mr Dunlop pointed out that on one view what they had said was not inaccurate but it is ignoring part of the law of the land. I think that letter which I was told was a standard letter should be amended to avoid situations like this and again if another court takes a different view from me on whether this is harassment contrary to the view I have formed this morning that court can take that into account.

[20] The court that should take it into account is in my view likely not to be this court because in the leading case of Roberts v The Bank of Scotland Plc the Court of Appeal approbated the decision of the learned County Court Judge to award £7,500 to Miss Roberts for these 547 calls or attempted calls. So a standard has been set there; the damages that would be received by the Carlins if they won, contrary to the view that I have currently formed, must be less than that and therefore likely to be in the District Court rather than in the County Court or this High Court and I make that observation by way of assistance to the plaintiffs.

[21] There is one loose end I should address, namely that I said that I would deal with the Malicious Communications (Northern Ireland) Order 1988. It was only raised belatedly by Mr Carlin but for completeness I shall address it. That provision creates an offence of sending letters etc with intent to cause distress or anxiety and such a rubric has been said not to be part of the operative part of the section but I think it is often valuable to note it. Article 3 reads as follows:

> "[1] Any person who sends to another person:
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> (a) A letter or other article which conveys –
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> (i) a message which is indecent or grossly offensive;
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> (ii) a threat; or
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> (iii) information which is false and known or believed to be false by the sender; or
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> (b) any other article which is in whole or a part of an indecent or grossly offensive nature,

> is guilty of an offence if his purpose, or one of his purposes in sending it is that it should, so far as falling within sub-paragraph (a) or (b), cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated."

Paragraph [2] of Article 2 reads:

> "A person is not guilty of an offence by virtue of paragraph 1(a) (ii) that is the threat, if he shows –
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> (a) that the threat was used to reinforce a demand which he believed to have reasonable grounds for making; and
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> (b) that he believed that the use of the threat was a proper means of reinforcing the demand."

Paragraph [4] says:

> "A person guilty of an offence under this Article shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale."

[22] So the first point is it creates a criminal offence; unlike the Harassment Order it does not create a civil wrong. However, it might be arguable that it was enforceable by an injunction before the court so I will not reject Mr Carlin's point on that ground. It seems to me two matters are relevant : does the threat have to be unlawful and certainly, as the legislation expressly contemplates that it was a threat which the party thought it was proper to make, ie a threat to repossess the house. Sinclairs are the solicitors acting for a lender whose mortgage is long in arrears and they are entitled to threaten repossession proceedings, they are perhaps not entitled to say that would happen within 7 days which could not be the case in law but it seems to me that that would be a difficult case for a prosecutor to prove against Santander or their solicitor, although I have said the letter should be amended. So it does not seem to me to add sufficiently to the plaintiffs' case here to alter the view which I have already expressed.