Harassment

A high hurdle

Protecting privacy under PHA 1997 can be a tough task, note **Chris Bryden** & **Michael Salter**

IN BRIEF

- The PHA 1997 is a wide-ranging statute which offers flexible remedies in a range of circumstances. However, there are limits to its use, particularly when freedom of expression is involved.

The Protection from Harassment Act 1997 (PHA 1997) is a versatile and wide-ranging statute that has come the full circle since its amendment by the coming into force of the Protection of Freedoms Act 2012 (PFA 2012). PHA 1997 was originally envisaged as an Act to prevent stalking and to punish stalkers. However, as the authors have previously discussed, by omitting reference specifically to "stalking" and instead focusing on a much broader offence of harassment (undefined, but "includes causing alarm or distress") PHA 1997 is of much wider application. However, following lengthy Parliamentary consultation (which the authors were privileged to have been involved in) PFA 2012 (which received Royal Assent on 1 May 2012) introduced two new offences specifically of stalking. PHA 1997 remains one of the most flexible pieces of legislation of recent years.

Not always a remedy

However, PHA 1997, while able to be utilised in various circumstances, will not always provide a remedy. In the case of *Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB), Mr. Justice Tugendhat refused a claim under PHA 1997 in an important case which involved consideration of Art 10 of the European Convention of Human Rights (ECHR).

Carina Trimingham began an affair with Chris Huhne MP in 2008. The relationship became public and led to the break-up of both Huhne's marriage and Trimingham's civil partnership. Between 20 June 2010 and 1 July 2010 the *Daily Mail* and the *Mail on Sunday* printed a number of articles which, Trimingham claimed, infringed her rights to privacy. She claimed under the Copyright Designs and Patent Act 1988 in respect of two photographs of her; for misuse of private information under the Human Rights Act 1998 (HRA 1998) and ECHR Art 8; and also claimed under PHA 1997. The claim was later amended to include a number of other articles, a total of 65. In addition Trimingham relied on readers' comments published on the *Mail Online* under her claim of harassment. Trimingham sought damages and an injunction. As the claimed injunction would affect the right to freedom of expression, it was necessary for the court to give consideration to this competing right.

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Trimingham contended that the defendant had pursued a course of conduct that amounted to harassment, including publication of comments about her personal appearance as well as her sexuality, which she found offensive. She also contended that the manner in which the news about her had been gathered amounted to harassment. It was not in issue as to whether there was a course of conduct, nor that, the distress caused would amount to harassment, if it was caused by the course of conduct and was reasonable.

Constituting harassment

Tugendhat J summarised the law in respect of PHA 1997 and noted that it was one of many laws that give effect to the obligation of the state to prevent interference with the right of individuals to protection of their private lives under ECHR, Art 8. He noted that it was established by the Court of Appeal in *Thomas v News Group Newspaper Ltd* [2001] EWCA Civ 1233 that publication in a newspaper was capable of constituting harassment, but further noted that this was the first trial of a claim in harassment against a newspaper in England, *Thomas* having been a strike out application which failed. In *Thomas*, Lord Phillips had noted that harassment should not be interpreted

in such a way that restricted the right of freedom of expression, save so far as is necessary to achieve a legitimate aim. When considering the question of reasonableness of the conduct, the answer did not turn on whether the opinions expressed were reasonably held. Press criticism, even if robust, will not generally constitute unreasonable conduct and does not fall within the natural meaning of harassment; there must be "some exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve". An example was given of articles calculated to incite racial hatred of an individual.

Tugendhat J took from this that, for a court to comply with HRA 1998, s 3, it must hold that a course of conduct in the form of journalistic speech is reasonable under s 1(3)(c) PHA 1997 unless, "in the particular circumstances of the case, the course of conduct is so unreasonable that it is necessary (in the sense of a pressing social need) and proportionate to prohibit or sanction the speech in pursuant of...in particular for the protection of the rights of others under Art. 8". In other words, the rights of the individual will come second to the right of free speech unless it is so unreasonable that the right to private and family life is infringed in such a way as would affect society. This is an extremely high test for an individual to reach.

Tugendhat J noted that in considering the effect of such a course of conduct, the meaning conveyed by words such as "bisexual" needed to be decided. Trimingham contended that it was used in a pejorative way towards her by the defendant. Tugendhat J noted that there is no crime or tort of insult, save under PHA 1997, as insults or non-defamatory abuse were not actionable as defamation. He accepted that, in principle, repeated publication in the media of offensive or insulting words about a person's appearance could amount to harassment; the same applied with much greater force in relation to sexuality. Repeated mocking by a national newspaper of a person by reference to their sexual orientation would "almost inevitably be so oppressive as to amount to harassment", and likewise in respect of the other protected characteristics set out in the Equality Act 2010.

Tugendhat J in considering the caselaw on freedom of expression also concluded that the principle that "harassment must not be given an interpretation which restricts the right to freedom of expression" needed also to be applied when considering what a reasonable person would think would amount to harassment, as well as to reasonableness under s 1(3)(c).

The learned judge having set out the law at length applied his mind to three questions:

(i) Was the distress suffered the result of the course of conduct complained of?; if so
(ii) Ought the defendant do have known the course of conduct amounted to harassment?; and if so
(iii) Has the defendant shown that it was *Thomas* reasonable?

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Private individual?

There was also the subsidiary question of whether Trimingham was a public or private figure. Tugendhat J determined that Trimingham was not a private individual. He found that none of the witnesses ought to have known what they were writing amounted to harassment, nor that a reasonable person in the possession of the same information as the defendant about the job of Trimingham and her past career as a journalist, that it would amount to harassment. Nor did he find that the distress was caused by the course of conduct—ie the words in the articles complained of. "bisexual" and "lesbian" would not have been read in a pejorative sense by a reasonable reader of the articles. Discussions or criticisms of sexual relations which arise within a pre-existing professional relationship, or that involve infidelity are matters a reasonable person would not think would be conduct amounting to harassment, and would be reasonable unless other circumstances make it unreasonable. One such circumstance could be interfering with Art 8 rights, but Trimingham's rights were limited by not being a purely private person and that she had been open about her sexuality and relationships. Further, as "unreasonable" in respect of s 1(3)(c) had to be read compatibly with the right to freedom of expression, the test for harassment is objective, and the repetition in respect of her sexuality across the numerous articles did not make otherwise "reasonable" speech cross the line to amount to harassment, because the repetition related principally to articles about Huhne, and not her. The claim did not succeed.

Trimingham demonstrates the high hurdle that a claimant under PHA 1997 must surmount when bringing a claim arising out of publication. This has important ramifications for claimants considering actions in relation to comments made on the internet, social media sites such as Facebook or platforms such as Twitter, and demonstrates the significant weight given to Art 10 (freedom of expression). It is not clear to how great an extent the finding that Trimingham was not a purely private person bore upon the decision; would the balancing act prescribed in *Thomas* between Art 8 and Art 10 have been different if she had been a purely private figure? Would a campaign by, say, the *Mail*, seeking to "out" homosexual primary school teachers cross the line? Quite possibly. It may be that the possible existence of such a line will serve to keep the media in check; however *Trimingham* points towards a re-balancing away from privacy and towards freedom of expression, certainly in respect of claims under PHA 1997. NLJ

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