Neutral Citation Number: [2021] EWCA Civ 1035

Case No: B2/2021/0659

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT IN LUTON
Her Honour Judge Bloom
G00LU644

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 July 2021

Before :

LORD JUSTICE PETER JACKSON
and
LORD JUSTICE POPPLEWELL

- -

Between:

DECLAN MOLLOY	**Appellant/ Defendant**
and	
BPHA LIMITED	**Respondent/ Claimant**

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- -

Philip McLeish (instructed by **Blackbird Solicitors Limited**) for the **Appellant/Defendant**
Jennifer Moate (instructed by **Devonshires Solicitors**) for the **Respondent/Claimant**

Hearing date : 6 July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Friday, 9 July 2021.

Lord Justice Peter Jackson :

1. A engages in racist harassment of his neighbour B and her family. B complains to the police and to her housing association, which is landlord of both properties. She is advised to install CCTV outside the front of the property to obtain evidence. She does so, gathers evidence, and the court makes injunctions against A and his wife. A's continued racist abuse is recorded by the CCTV and viewed by B later. The housing association takes committal proceedings for breach of the order. The judge makes a finding of fact that a breach had occurred and imposes a suspended sentence of imprisonment. A appeals on the basis that the judge was wrong to make the finding, and that the terms on which the sentence was suspended, which include an order preventing him from using any abusive language or gestures outside the properties, disproportionately breach his right to respect for his private life.

2. I would unhesitatingly dismiss the appeal. After hearing submissions, we informed the parties of that outcome, and I now give my reasons.

3. In describing the factual background, I will identify B only as Ms B. She was a witness for the housing association, not a party to the proceedings, and there is in any case no reason for her identity to be publicised merely because she is unfortunate in her neighbours.

4. The appellant and Ms B occupy adjoining properties in a small terrace. They park their cars on the street outside and share a short communal pathway leading from the street to their front doors.

5. On 9 June 2020, the housing association issued proceedings against the appellant for an injunction under Anti-Social Behaviour, Crime and Policing Act 2014, whose relevant provisions are in Sections 1 and 2:

> "**1 Power to grant injunctions**
>
> (1) A court may grant an injunction under this section against a person aged 10 or over ("the respondent") if two conditions are met.
>
> (2) The first condition is that the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-social behaviour.
>
> (3) The second condition is that the court considers it just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour.
>
> (4) An injunction under this section may for the purpose of preventing the respondent from engaging in anti-social behaviour—
>
> (a) prohibit the respondent from doing anything described in the injunction;

> (b) require the respondent to do anything described in the injunction.
>
> (5-8) …
>
> **2 Meaning of "anti-social behaviour"**
>
> (1) In this Part "anti-social behaviour" means—
>
> (a) conduct that has caused, or is likely to cause, harassment, alarm or distress to any person,
>
> (b) conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises, or
>
> (c) conduct capable of causing housing-related nuisance or annoyance to any person.
>
> (2-4) …"

6. The power to grant injunctions can therefore only be used if the two conditions in Section 1 are met, but if they are the court can prohibit or require "anything" on the part of the respondent for the purpose of preventing him or her from engaging in anti-social behaviour. As it is acting as a public authority, it must clearly exercise this power in a manner that is necessary and proportionate when interfering with any Convention rights of the respondent.

7. In the present case, the evidence concerned some nine incidents, caught on camera. I will not set out (though they are important to a full understanding of the case) the details of the repeated abuse directed by the appellant at Ms B and her family in full view – as he knew – of the CCTV camera. This included racist abuse (usually referring to monkeys), racist gestures (typically, making monkey noises and gestures) and crude sexist abuse. Other incidents were said to have occurred off camera.

8. In her witness statements, Ms B described the impact of the behaviour on her and her family. She said she felt vulnerable and unsafe in her own home and could not invite friends to visit for fear of what the appellant might do. It had caused her and her family a lot of stress and they were sometimes scared to leave the property when the appellant was at home. She felt anxious about returning home in the evening and found herself watching the CCTV camera from her phone while approaching her property to check that he was not outside.

9. On the basis of this evidence, a without notice order was made on 17 June 2020. Amongst its terms, the appellant and his wife were forbidden from

> "1. Using racist, offensive, or abusive language or gestures against [Ms B], any member of her family or visitors to [her property].
>
> 2. …

> 3. Intimidating or attempting to intimidate
>
> (a-b) …
>
> (c) [Ms B] any member of her family or visitors to [her property]."

10. The matter returned to court on 30 June and on 11 August, when the appellant and his wife indicated that they wished to defend and directions for trial were given. Meanwhile, the injunctions remained in effect.

11. In fact, at the final hearing on 7 December 2020, the appellant and his wife did not contest. The injunction was made final and a power of arrest was included.

12. Unfortunately, despite the interim order, the appellant's behaviour continued. On 25 September 2020, before the final order could be made, the housing association issued committal proceedings in relation to six alleged breaches of the interim injunction in the period between 12 July and 20 September 2020. It was that application that finally came before Her Honour Judge Bloom on 18 March 2021, when she made the order now under appeal. Then as now, the appellant and his wife were represented by Mr McLeish and the housing association by Ms Moate. We are grateful to them both for their submissions.

13. The Judge heard evidence from Ms B, from a representative of the housing association, and from the appellant's wife. The appellant filed a witness statement, but chose not to be questioned on it.

14. In her extempore judgment, the Judge directed herself on the criminal standard of proof before addressing the schedule of six allegations, five of which arose from incidents that had been recorded on CCTV. She noted the housing association's argument that, although, the alleged abuse had not been delivered face-to-face, it still amounted to a breach of the order as the appellant knew that the CCTV would be viewed. She recorded the appellant's argument that these were private conversations between him and his wife, or the appellant muttering to himself, and that the court could not be satisfied that they amounted to intimidation.

15. The Judge first dealt with a number of allegations against the appellant's wife, which she did not find made out, largely on the basis that the wife had merely been present with the husband rather than being the prime mover.

16. As to the allegations against the appellant, the Judge did not find five of the six allegations proved to the criminal standard. In one case, where there was no CCTV footage, she could not be satisfied that the abuse (which was on this occasion vulgar sexist abuse) had been directed at Ms B, though she said she would have been satisfied to the civil standard. In another case, she found that the appellant was angry, abusive and shouting, but she was not satisfied that it was directed at Ms B or her family. She dealt similarly with an occasion on which the appellant got out of his car and spat as he approached the shared front gate. The judge deplored this behaviour but was not satisfied that it was a breach of the injunction. Likewise, she did not find an incident in which the appellant was for no apparent reason "swearing his head off" was abuse directed at Ms B.

17. From the descriptions given in the judgment, the appellant might consider himself fortunate that findings were not made against him in relation to at least some of these matters, but there is no appeal from the Judge's conclusions in that respect.

18. The only finding of breach made by the Judge concerned an incident on 9 September 2020, which she found amounted to intimidation or attempted intimidation. She did not however find it amounted to abuse "against" Ms B, because Ms B had not been physically present. She expressed her conclusions in this way:

> "44. Turning now to the next allegation, allegation number 2, which is 9 September. What is said is that the Molloys we're outside the property. They got out of their car and Mrs Molloy said, "shall I block it", the first defendant said, "yes". The second defendant turned to walk back towards the car before he stopped her and the first defendant pointed at Ms B's cars and shouted, "fucking monkeys".
>
> 45. As I have already said, I have seen the video footage and I have heard from Ms B on this matter. It is right to say as Ms B gave evidence, she said it was not that he was gesturing towards her car, but rather that he was looking and pointing at the camera. What I saw on the video was, as I have already said, the second defendant was saying "shall I lock it" and Mr Molloy then says yes. Mrs Molloy then turns to walk back and walks back, and as they come in through the gate, Mr Molloy very clearly and pointedly says, "fucking monkeys". He uses his thumb to sort of point backwards over his shoulder.
>
> 46. There was no context to this at all except that he is entering the communal gate in sight of the camera and making a racist expletive. I am quite satisfied he said it, I saw it on camera. The question is, what was his intention and was it a breach of the injunction.
>
> 47. In the context of this case and in the history of this case, and Mr Molloy not having given evidence himself, and having seen the history of Ms [B]'s allegations and what Ms [B] be has told me, I am quite satisfied that this was a racist exploitive directed at this family, the Bs. There is no other reason to say it, there is no good reason for standing in a communal pathway of a property you share with a black neighbour and saying, "fucking monkeys". There is simply no good reason at all to say that, particularly when you know that there is a CCTV camera pointing directly at you, where you have already been found to be saying abusive things of this nature, and there is a history of it.
>
> 48. Does it fall within paragraph one? Is it using racist, offensive or abusive language or gesture against Ms [B], a member of her family or visitors to [her property]?

> 49. I do not think it is a breach of paragraph 1, because I am with Mr McLeish in that the ordinary reading of paragraph 1 is that anyone would see that as being directed, actually face-to-face, against someone. I understand what was intended and it may well be that we need to amend and alter paragraph 1. ...
>
> 50. It is, however, in breach of paragraph 3(c) because Mr Molloy is also forbidden, whether by himself or other people, from intimidating or intending to intimidate Ms [B], any member of her family or visitors to [her property]. In my view it is a breach of paragraph 3(c). I am quite satisfied that by entering his property, he may have been speaking to his wife, but he was speaking loudly and clearly in the vicinity of the common areas directly in front of a camera, in a point where he knew full well he was in CCTV view and for no reason at all, he says "fucking monkeys".
>
> 51. In my view, there is only one reason to do that, and he knew perfectly well that in doing it, he was seeking to intimidate Ms B and her family, who he knew watched the CCTV. I am quite satisfied that is a breach of paragraph 3(c). He was either intimidating or attempting to intimidate. Perhaps attempting is a better way of looking at it, but he was attempting to intimidate them by saying these words which they would see on CCTV.
>
> 52. Of course, I heard from Ms [B], that that is the effect this action has and therefore, I am satisfied so that I am sure that in relation to paragraph 2, Mr Molloy did breach paragraph 3(c) of the injunction and I find allegation 4 established, which is the 9 September allegation."

19. The Judge sentenced the appellant to 28 days imprisonment suspended for two years on compliance with the injunction. She extended the injunction to last for that period and added a new term prohibiting the appellant from

> "using abusive language, in particular racially abusive language or gestures, (including spitting), in the public area outside [the properties] or on the communal pathway."

20. On this appeal, the appellant presents himself as victim:

> "In this case, a neighbour had installed CCTV with apparently powerful audio capacities and was using this technology to systematically eavesdrop on the conversations of her neighbour in his own garden and in the street outside their houses. She was doing this in order to garner evidence of hostile or antisocial attitudes towards her capable of being used by the claimant for the purposes of committal proceedings. Over the course of 9 months she identified 4 private conversations in which the Defendant was either speaking to his wife or muttering to

himself and turned this material over to her housing association who then brought such committal proceedings."

21. From these unpromising beginnings spring the grounds of appeal:

"Ground 1

The judge was misled by her disapprobation of the content of the words into deciding that these words were motivated by an intention to intimidate because:

a) There was no factual evidence identified by the judge which could have entitled her to be sure to the criminal standard that Mr Molloy was deliberately 'speaking to the camera' rather than - as he appeared to be doing - having a private conversation with his wife.

b) The general finding that Mr Molloy was generally aware that there was a CCTV camera applied in equal measure to all four incidents as well as to a fifth incident involving spitting. But either Mr Molloy specifically had the CCTV camera in mind or he did not: there was no specific evidence that on this occasion he was any more alert to its presence than on the four other occasions in which she had rightly found that she could not be sure that he had intended to intimidate or to perform to the camera.

c) The judge had undue regard to the fact that there was 'no good reason' to say these words, which was irrelevant to the question of whether or not they were intended to intimidate.

d) In placing weight on the fact that these words were 'directed at this family', the judge appears to have allowed the meaning of 'directed at' to bleed across from denoting the referent of the speech to denoting the interlocutor of the speech.

Ground 2

At paragraph 4 of her judgment the judge varied the existing injunction by inserting into it the words - "Using abusive language, in particular racially abusive language or abusive gestures… in the public area outside [the property] or on the communal pathway." Although this pursued the good intention of making the injunction clear, in so doing the judge wrongly infringed the Defendant's reasonable expectation of privacy when talking outdoors beyond the earshot of other people, because it required him to modify and alter his behaviour for the benefit of persons eavesdropping on his private conversations in a public place. In amending the injunction in this way, the Judge wrongly legitimated the mission creep through which the CCTV camera installed outside his home had changed its function from

> being a device passively used to record behaviour that would – with or without that technology – already amount to nuisance; into a surveillance and eavesdropping device which intrusively sought to regulate conduct that would – absent that device – not amount to nuisance at all. The new paragraph should either be deleted in its entirely or modified by adding at the end, "capable of being heard by any person physically present."

22. I take the grounds in turn.

23. Ground 1 is hopeless. To succeed, the appellant would have to show that the finding was not reasonably open to the Judge on the evidence, in other words that it was perverse. But the Judge was plainly aware of the difference between a private conversation and words that were intended to come to Ms B's notice. She found as a fact that it was the latter and, having seen the CCTV footage, I am not at all surprised. Far from being a perverse finding, it is hard to see a credible alternative.

24. If I have any misgivings, it is that the Judge did not also find this a breach of paragraph 1 of the order. That was because she understood the words "using… abusive language or gestures against" as "being directed, actually face-to-face, against someone" (paragraph 49). Her finding that the appellant knew perfectly well that he was seeking to intimidate Ms B shows that the words were being used "against" her. Insofar as the Judge may have thought that paragraph 1 could only apply to language or gestures made "face-to-face", I respectfully disagree. The order, which was made in the knowledge that CCTV was in operation, contains no requirement for both parties to be present when the words are used. There is no conceptual difference between what has taken place here and a situation in which an abusive message is posted through a front door, something that would plainly be a breach of both parts of this order. However, there is no cross-appeal on this issue and I say no more about it.

25. Nor do I accept Mr McLeish's submission that the Judge's refusal to make findings on other matters amounts to inconsistency. The fact that different findings were made about different incidents does not show inconsistency and is not a valid challenge to the single finding that was made.

26. The Judge found that the appellant either intimidated or attempted to intimidate Ms B. Although at paragraph 51 she seems to have favoured the latter, she also found the former, and at paragraph 52 she found that Ms B had been intimidated. For intimidation to be established in relation to a particular act, intent and impact would have to be proved, which they were. By contrast, an attempt can be established by proof of intent alone. The Judge's preference for attempt overlooks this, but either way it does not help the appellant.

27. Finally, it is argued that the Judge did not sufficiently distinguish between whether the appellant was talking in front of the camera *about* Ms B and her family or whether he was talking *to* them. In my view, this is a distinction without a difference, given the clear and justified finding that it was conduct intended to intimidate Ms B.

28. Ground 2 is slightly more substantial. It proposes that the Judge was wrong to add an order prohibiting the appellant from "using abusive language, in particular racially abusive language or abusive gestures (including spitting) in the public area outside the

property and on the communal pathway". If this appeal was only against the amendment of the order, permission to appeal would have been required. However, the amended order forms part of the conditions of suspension of the committal order, and accordingly an appeal can be brought as of right.

29. Mr McLeish's refers to the General Data Protection Regulation (2016/679 EU), the Protection of Freedoms Act 2012, the Surveillance Camera Code of Practice, and guidance issued by the Information Commissioner about the use CCTV in public spaces. He then cites Article 8 ECHR, and the reasonable expectation of privacy. He asserts that the court has overridden his client's reasonable expectation that conversations with his wife, carried on in the absence of other persons, are private ones and that it is a disproportionate interference with his Article 8 to require him to regulate his behaviour for the benefit of, as he puts it, "the operator of a CCTV system eavesdropping on such conversations".

30. These submissions miss the point. If the appellant lived on Rockall, he could behave as he likes. Similarly, if there had been no history of anti-social behaviour, there would be no justification for this use of CCTV. But that is not the situation here and the appellant has to take account of the effect of his behaviour on his neighbour, in the everyday and legal meanings of that word. His rights are not the only ones to be considered.

31. I would accept that the entrance to one's home is an important area for most people and that the fact that it is small area is not a complete answer. I also acknowledge that the court has no business in intervening under this legislation, indeed it has no power to do so, unless it is satisfied that the respondent has engaged or threatens to engage in anti-social behaviour. However, in this case the conditions for intervention were satisfied and the form of intervention was both necessary and proportionate. The Article 8 right of Ms B and her family to respect for their family life overwhelmingly outweighs any considerations of privacy which the appellant and his wife would normally be entitled to expect. It is not normal to be recorded by one's neighbour whenever one leaves or returns to one's home, but the circumstances here undoubtedly justified a departure from the norm.

32. Further, the complaint about the use of CCTV in this case is patently overblown. It is only to defend herself and her family from the appellant's behaviour that Ms B has had to install the equipment. The logic of the appellant's argument is that instead of putting up these defences, Ms B should retreat into her own home, leaving him free to flout court orders as and when he chooses and without the inconvenience of being recorded doing so. Fortunately, that is not the law, and at the hearing before us Mr McLeish expressly conceded that the installation and use of CCTV on police advice in this case was completely appropriate. In any event, it can also be seen as a protection for the appellant if he is wrongly accused, the issue about blocking/locking the car being a good example.

33. Against that background, I return to the submission that the Judge was wrong to extend the order. The existing orders prohibit the appellant from intimidating Ms B and her family, or directing abuse against them. The new order goes further by prohibiting the appellant from using abusive language or gestures of any kind within a certain defined area. That, says Mr McLeish, is a real infringement of his normal freedoms, and it runs the risk that the appellant will find himself in breach of the order merely because he

might utter conventional profanities that are not directed at Ms B and her family. He describes this as a strict liability regime.

34. To most people the obligation to behave in a civilised manner in a shared area in front of their home would not be very burdensome, but the imposition of an order of this kind must still be justified. Here, in my judgment, it was. There is a strong sense that the appellant had been playing cat and mouse with the existing orders, and if he now finds himself banned from engaging in abusive speech and conduct in the shared area, he has only himself to blame. He has created conditions in which conduct of that kind in that place is (to use the words of the statute) conduct that has caused, or is likely to cause, harassment, alarm or distress to Ms B, because she will understandably fear that it is directed at her and her family. The original orders require an inquiry into the appellant's state of mind, but the abusive behaviour will in the meantime have had its impact. The new order avoids that and it is a necessary and proportionate means of combating further anti-social behaviour. This ground of appeal also fails.

35. I would finally add that we were informed for completeness that on 25 June 2021 the appellant was arrested under the power of arrest for a further alleged breach of the order and that committal proceedings are to take place on 13 July. Further, on 30 June, the appellant was convicted of a racially aggravated offence in regard to the events underlying the original injunction and was ordered to do 100 hours of community service, go on a rehabilitation course, and pay compensation of £500 to Ms B.

36. Neither of these matters has any bearing on this appeal, which will be dismissed, with costs.

Popplewell LJ

37. I agree.
