A "death knell" for litigation surveillance?

The High Court has dismissed an application to strike out a claim for harassment relating to surveillance activities, and to strike out various aspects of the claim that the defendants could not rely on litigation privilege.[1] The court held the claim was not suitable for summary determination, and there was at least a real prospect that arguments advanced by the defendants were wrong.

The court also rejected a key argument put forward by the defendants that, because the surveillance was conducted covertly, it could not have been calculated to cause distress to the claimants and so did not amount to harassment. The judge noted that the word "calculated" does not appear in the relevant legislation and held that its mention in some of the authorities does not mean that there is a further mental element contained within the concept of "harassment". So it was not appropriate for the harassment claim to be struck out, even if all the surveillance had been conducted covertly, and there was, in any event, evidence from the claimants that it had been discovered contemporaneously.

Background

In his capacity as a partner at DLA Piper UK LLP, and then at Dechert LLP, Mr Gerrard acted as a solicitor for the first defendant, the Eurasian Natural Resources Corporation, between December 2010 and March 2013. He was instructed to investigate a number of ENRC's subsidiaries.

In September 2017, ENRC issued proceedings claiming damages for breach of fiduciary duty and negligence, alleging that Mr Gerrard had sought to encourage (and thereafter increase) the intervention of the SFO in the investigation, and by leaking ENRC's confidential and privileged material to both the media and the SFO. In March 2019, ENRC brought further proceedings against the Director of the SFO, alleging (inter alia) that the Director had induced Dechert LLP and/or Mr Gerrard to breach their fiduciary duties to ENRC.

In September 2019, Mr and Mrs Gerrard issued proceedings against the second defendant, Diligence International LLC, a firm of private investigators. ENRC was subsequently added as a defendant. They brought claims for breaches of data protection law, misuse of private information, harassment, and trespass arising from surveillance activities carried out on behalf of ENRC by various persons, including, since February 2017, Diligence. All those actions were said to be unlawful, and, among other things, the surveillance was said to have extended to protracted surveillance of Mr and Mrs Gerrard's home in East Sussex.

Claim

In October 2019, Mr and Mrs Gerrard sought an injunction to restrain ENRC from making any use of the information obtained through the surveillance and from carrying out any further monitoring. ENRC and Diligence provided undertakings in lieu of the injunction sought.

ENRC and Diligence defended the claim on the basis that: (a) the surveillance formed part of an investigation into Mr Gerrard's wrongdoing for the purposes of the ongoing litigation; (b) the instructions provided to Diligence and the documents produced in relation to the investigation were litigation-privileged; (c) the surveillance was reasonable and necessary in pursuit of the legitimate aim of investigating and preventing the wrongdoing; and (d) the surveillance was not calculated to be, and was not, harassing of Mr or Mrs Gerrard and was reasonable in light of the legitimate aim.

Strike-out application

[1] *David Neil Gerrard (2) Elizabeth Ann Gerrard v (1) Eurasian Natural Resources Corporation Limited (2) Diligence International LLC* [2020] EWHC 3241 (QB)

ENRC and Diligence applied to strike out parts of Mr and Mrs Gerrard's pleaded case, i.e. the entirety of Mr and Mrs Gerrard's claim for harassment pursuant to section 3 of the Protection from Harassment Act 1997 and various aspects of their case that ENRC and Diligence were not entitled to rely on litigation privilege in relation to the surveillance and other activities concerned.

Mr and Mrs Gerrard applied to amend their pleaded case, including to set out further particulars as to why they contended that ENRC and Diligence knew (or ought to have known) that their conduct amounted to harassment.

Issues

1 Is surveillance that is conducted covertly capable of amounting to harassment?

2 Were letters sent from ENRC's solicitors to Mr and Mrs Gerrard (in which they gave notice that ENRC would withdraw its previous undertaking, pending trial, not to carry out certain forms of surveillance) capable in principle of amounting to conduct falling within the Act?

3 Could Mr and Mrs Gerrard rely on attempts to surveil them in the Caribbean as part of the alleged "course of conduct" under the Act?

4 Was it appropriate to determine contentions advanced by ENRC and Diligence in relation to litigation privilege in advance of the disclosure stage of the proceedings?

5 Could it be said that Mr and Mrs Gerrard's arguments that litigation privilege did not apply to documents relating to the surveillance because of iniquity and/or absence of confidentiality stood no real prospect of success?

Decision

Sitting as a judge of the Queen's Bench Division, Richard Spearman QC granted the claimants permission to amend their case and dismissed the defendants' applications for strike-out.

<u>Issue 1: whether covert surveillance can amount to harassment</u>

The court's primary conclusions were that the points that ENRC and Diligence had sought to have struck out were not suitable for determination at the present stage, and there was at least a real prospect that the arguments advanced by ENRC and Diligence were wrong. Further, it accorded with the overriding objective for the points to be decided, if necessary, on the concrete findings of fact, which would be known at trial.

Mr Spearman QC considered that the action element of the crime (or tort) or harassment consists of carrying out conduct that is: "genuinely offensive and unacceptable behaviour of an order of gravity which would sustain criminal liability", including "alarming or causing distress to another person". The mental element of the crime (or tort) is satisfied if the perpetrator knew that their course of conduct amounted to harassment, or if a reasonable person in possession of the same information as the perpetrator would think that it amounted to harassment. He noted there is no requirement for harm, alarm or distress to be foreseeable, although in most cases it will be. Mention of the word "calculated" in some of the authorities does not mean that there is a further mental element contained in the concept of "harassment". The judge considered that "calculated" should be understood not in the subjective sense of "intended to bring about a certain result", but in the objective sense of "likely to produce a result". He was not persuaded that the correct meaning is "more likely than not", as opposed to a lesser or more flexible meaning, such as "sufficiently likely in all the circumstances".

So the judge held that the harassment claim should not be struck out, even if all the activities were "covert". In any event, he recorded that the activities were, in fact, discovered by Mr and/or Mrs Gerrard, in some instances at or very close to the time when they had taken place.

Issue 2: whether sending letters could be conduct falling within the Act

The judge considered that, if the allegations made in the claimants' re-amended Particulars of Claim in relation to the letters from the defendants' solicitors had comprised the entirety of their pleaded claim for harassment, thorough scrutiny of the letters might well be warranted. He noted, however, that they were only a small part of the pleaded case. Moreover, at least some of the pleaded points appeared to be correct, or at least seriously arguable, and aspects of the letters, such as the change of position regarding the right to resume surveillance of Mrs Gerrard, called for explanation. So they could form part of the "course of conduct".

The judge declined to accept a proposition advanced by counsel for ENRC that letters sent on instruction during litigation could not be the subject of a claim for harassment. He agreed that the court should be slow to find that correspondence passing between reputable solicitors in the course of hostile litigation was capable of amounting to the tort (and crime) of harassment, but he considered that, if a lay client took the opportunity to harass and cause harm to the opposing party through the medium of correspondence that the client caused to be sent, there was no reason in principle why the victim should be denied relief merely because of the interpolation of solicitors in the chain of events.

Issue 3: whether attempted Caribbean surveillance formed part of a "course of conduct" under the Act

The court held the claimants' pleas in relation to the events that took place in the Caribbean should be permitted to go forward because: (a) some of the pleas related to acts in this jurisdiction (e.g. the advance acquisition of information about the holiday and the boarding by Diligence operatives of the same flight from England as Mr and Mrs Gerrard), which were therefore relevant and admissible in any event; (b) the events in the Caribbean were relevant to the claimants' case that, if necessary for their claim, they were able to establish that subsequent acts of surveillance were likely to be discovered by them; and (c) the events were relevant to the claimants' case that the defendants could not rely on litigation privilege in the light of the iniquity exception.

Issue 4: whether contentions of litigation privilege should be determined before disclosure

This issue arose from ENRC's allegation that the engagement of investigators, including Diligence, was for the dominant purpose of litigation, such that all documents created during that investigation were subject to litigation privilege. Mr and Mrs Gerrard, on the other hand, denied that litigation privilege applied, on the basis that: (a) the documents had been generated as a result of iniquitous conduct; (b) the documents could not be confidential so far as the claimants were concerned; and (c) the documents had not been generated for the dominant purpose of the litigation. The defendants applied to strike out the first two allegations, but for the third accepted that whether and to what extent activities were carried out, and documents were generated, for the dominant purpose of litigation depended on factual issues, which could not be determined summarily.

Mr Spearman QC considered it too early to attempt to determine the contentions advanced by the defendants. Instead, if and to the extent that they did not raise issues that could only be determined at trial, it was appropriate for the contentions to be determined after disclosure had been provided, having regard to the claims of privilege advanced by the defendants in due course by reference to specific documents and any dispute as to those claims that the claimants elected to pursue having seen what those claims involved.

Issue 5: whether arguments denying litigation privilege stood no real prospect of success

The court held that the claim as to iniquity and absence of confidentiality should not be struck out as it was at least arguable. The allegation that, in undertaking the surveillance activities, the defendants had committed offence(s) of harassment was "plainly an allegation of more than civil wrongdoing". On the absence of confidentiality, the judge was not persuaded there was no real prospect of establishing the correctness of the views expressed in Matthews and Malek, Disclosure, 5th Edition, which include a statement that: "It is crucial for the existence of the privilege that the contents of the communication should be confidential." Further, it was immaterial that the alleged criminal conduct was carried out by Diligence while ENRC was the party asserting privilege: whether and to what extent ENRC was complicit in any crime(s) that may have been committed were matters of fact.

Comment

The judge robustly rejected an argument made by the defendants to the effect that acceding to the claim would "sound the death knell for surveillance activities which are legitimate and even necessary", holding that this argument was "exaggerated and without foundation". He noted that the courts plainly recognise the need to carry out a balancing exercise between competing rights and interests, and that precisely how the balance falls to be struck in any particular case "typically depends on an intense focus on the facts".

Despite the judge's forceful rejection of that argument, the decision will cause concern both to those who conduct surveillance and those who engage them. The risk of liability for harassment under the Act attaching to covert surveillance activities could have a chilling effect on such activities, and so it will be worth noting how these issues will be dealt with by the trial judge.

Eleanor Steyn, Partner, Simkins LLP