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EDO Technology Limited ("EDO"), David Anthony Jones v Campaign to Smash EDO and Others

Case No: HQ 05 X00791

High Court of Justice Queen's Bench Division

4 November 2005

[2005] EWHC 2490 (QB)

2005 WL 4277970

Before : Mr. Justice Walker

04th November 2005, Hearing dates: 1, 2, 3 November 2005

Representation

- Mr Timothy Lawson-Cruttenden (of Lawson-Cruttendon & Co) for claimants.
- Mr Keir Starmer QC and Ms Stephanie Harrison instructed by Moss & Co for D3 (Mathew Axworthy), D4 (Simon Levin), D8 (Elizabeth Welch), D11 (Tom Daly), D12 (Jaya Nyanajoti), D14 (James Fenn) and D15 (Paul Fenn).
- D5 (Mr Christopher Osmond), D10 (Ms Lorna Marcham), D17 (Mr Ceri Gibbons) in person.
- D1 and D2 struck out; D6 (Anthony Parker), D7 (Cynthia Schwartz), D9 (Penny Steel) D13 (Thomas Gittoes) and D16 (Richard Hollis) did not attend and were not represented.
- Mr David Perry instructed by the Treasury Solicitor for the Attorney-General.

Approved Judgment

Mr. Justice Walker :

The Claim

1 The first claimant, "EDO", is a company incorporated in this country. It has a factory in Brighton where it designs and makes weapons and related equipment. The equipment made in Brighton is sold to the governments of the United Kingdom and the United States of America. The defendants allege that it is also sold to the government of Israel. The second claimant is the managing director of EDO and brings these proceedings for and on behalf of the employees of EDO pursuant to CPR 19.6. I shall refer to him and others employees of EDO as the "second claimants".

2 The second claimants maintain that the defendants have, through a protest campaign conducted by themselves and other activists, pursued a course of conduct against the second claimants amounting to harassment under the Protection From Harassment Act 1997 ("the PHA 1997"). In proceedings issued on 22nd March 2005 they sought an injunction prohibiting certain future conduct. The cause of action for seeking an injunction appears from paragraphs 11 and 25 of the particulars of claim as follows:

> "11. The claimants' case is that the activities of the defendants/activists together constitute a course of conduct which amounts to unlawful harassment contrary to the Protection From Harassment Act 1997 … The claimants support this claim with … particulars which they say establish that they have been the subject of unlawful harassment and consequently that they are likely to be the subject of unlawful harassment in the future."
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> ….
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> "25. Accordingly, the claimants claim that unless the defendants and the unknown and

unnamed protesters working in association with them are restrained the claimants are likely to be unlawfully harassed by the defendants/protesters contrary to the Protection From Harassment Act 1997."

3 The PHA 1997 does not confer rights of action on a company and the first claimant accordingly participates in these proceedings on the basis that it is not seeking any relief in its own right.

4 As to the cause of action under the PHA 1997, the starting point is section 1 subsections (1), (1A) and (2), which are as follows:

> "(1) A person must not pursue a course of conduct — (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other.
>
> (1A) A person must not pursue a course of conduct — (a) which involves harassment of two or more persons, and (b) which he knows or ought to know involves harassment of those persons, and (c) by which he intends to persuade any person (whether or not one of those mentioned above) — (i) not to do something that he is entitled or required to do, or (ii) to do something that he is not under any obligation to do.
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> (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other."

5 I shall return to subsection (3). Section 1 is to be read with section 7 subsections (2) to (5) which state:

> "(2) References to harassing a person include alarming the person or causing the person distress.
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> (3) A 'course of conduct' must involve — (a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person, or (b) in the case of conduct in relation to two or more persons (see section 1 (1A)), conduct on at least one occasion in relation to each of those persons.
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> (3A) A person's conduct on any occasion should be taken, if aided, abetted, counselled or procured by another — (a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and (b) to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.
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> (4) 'Conduct' includes speech.
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> (5) References to a person, in the context of the harassment of a person, are references to a person who is an individual."

6 The criminal offence of harassment is created by section 2 in these terms:

> "(1) A person who pursues a course of conduct in breach of section 1(1) or (1A) is guilty of an offence.
>
> (2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both."

7 A civil remedy is conferred by section 3. I need set out only subsections (1) to (3) as follows:

> "(1) An actual or apprehended breach of section 1(1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in

question.

(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

(3) Where — (a) in such proceedings the High Court or a county court grants an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment, and (b) the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction, the plaintiff may apply for the issue of a warrant for the arrest of the defendant."

8 Returning to section 1(3), this disapplies section 1(1) and section 1 (1A) in certain circumstances. It reads:

"(3) Subsection (1) or (1A) does not apply to a course of conduct if the person who pursued it shows — (a) that it was pursued for the purpose of preventing or detecting crime, (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or (c) that in the particular circumstances the pursuit of the course of conduct was reasonable."

9 The trial of the second claimants' claim is set down to be heard over a period of 10 working days starting on 21 November 2005, that is just over a fortnight from today. For that reason this judgment dealing with preliminary issues for that hearing has been prepared as soon as possible after the close of argument. I shall say more about those preliminary issues shortly.

The defence

10 The general shape of the defence case as it emerged during the course of argument has three heads. First, leaving aside section 1(3), the defendants deny that their actions, whether individually or taken together, amount to harassment. They say that their individual acts and the extent to which any one defendant can be held responsible for the acts of others on the facts of this particular case will have to be determined at trial.

11 So far as this head of defence is concerned, it seems to me that it can succeed in one or other of two ways. One way is that if a defendant's acts, including deemed acts under section 7(3A), are not shown by the claimants to constitute a course of conduct amounting to harassment then the claim against that defendant will fail. The other way is that the claimants may be unable to show that a defendant knew or ought to have known that such course of conduct, as is proven by the claimants, amounted to harassment. In that case also the claim against such a defendant will fail. On this first head of defence it is the claimants who bear the burden of proof.

12 The second head of defence will only be needed if the claimants overcome the first head of defence. It relies upon section 1(3)(c) of the PHA 1997 as disapplying the operative parts of that statute. Here the defendants say that any course of conduct that the claimants may prove at trial was, in the particular circumstances, reasonable. As I shall explain later in this judgment, this head of defence raises at its core what I consider to be a key issue at trial. This is the balance that is to be struck between, on the one hand, legitimate protest involving a proper invocation of principles of freedom of expression and, on the other hand, interference with the rights of others.

13 It is common ground that the burden of proof under section 1(3)(c) lies on a defendant. If a defendant meets that burden of proof, establishing that the course of action in question was reasonable, then the claimants' claim fails so far as that defendant is concerned.

14 The third head of defence will only be needed if both the first and second heads of defence have failed. It says that section 1(3)(a) of the PHA 1997 disapplies operative parts of the statute on the basis that any course of conduct that the claimants may prove at trial was pursued for the purposes of preventing crime.

15 At a directions hearing on 12th July 2005 an order was made by Simon J which, among other things, required that the defendants should serve a composite document particularising the exact nature of the crime which the defendants say they are preventing, who is committing the crime, and how the defendants' conduct prevents the commission of the alleged crime. Particulars in

this regard were set out in a composite defence dated 4th August 2005. The essential thrust is that any course of conduct that the claimants may prove was pursued for the purpose of preventing (i) the crime of aggression, and/or (ii) offences under the Geneva Conventions Act 1957, and/or (iii) offences against the International Criminal Court Act 2001.

16 The defendants accept that only a crime under domestic law suffices for section 1(3)(a). I shall return to the alleged crime of aggression later in this judgment. There is no dispute that relevant crimes under the Geneva Conventions Act and the International Criminal Court Act are domestic.

17 On the third head of defence the defendants say they were concerned about two parts of the world where they believe that the first claimant's products are used. The first is Iraq, where it is acknowledged by the first claimant that its products are used by the United Kingdom and United States governments in military operations. The defendants say that at the time their protests began there had been specific incidents which justified a belief that crimes had been committed under each of their three heads and that this warranted a belief, borne out by events since the protest began, that future such crimes would be committed.

18 The second is Israel, where the defendants assert, but the claimants deny, that the first claimant's products are used by the Israeli government. Here the defendants' focus is on Israel's policy of assassinating particular persons specifically targeted for this purpose; a policy condemned by the United Kingdom government, among others, as unlawful.

Prior hearings and the preliminary issues

19 On 29th April 2005 Gross J granted the claimants an interim injunction. Whether that injunction is to become permanent, either in its current form or in some other form, will be resolved at the trial.

20 At a case management conference on 9th September this year, it was ordered that the following issues should be tried as preliminary points of law:

- (a) Are matters of United Kingdom (UK) foreign policy and the deployment of the UK's armed forces in the exercise of the Royal Prerogative matters which are justiciable in these proceedings?
- (b) Does the Defendants' composite Defence (the Defence) disclose the commission of any offences contrary to section 51 International Criminal Court Act 2001?
- (c) Irrespective of the answer to question (b) above, does the Defence disclose any conduct ancillary to an offence under section 51 above, which is capable of constituting an offence contrary to section 52 of the Act?
- (d) Irrespective of (a), (b), and (c) above, is there sufficient nexus or connection between the admitted conduct of the Defendants and the Defendants' assertions that they were acting to prevent the commission of crime(s) by the Claimants?
- (e) On the facts set out in the Defence, is the Defendants' conduct capable of falling within the terms of section 1(3)(a) and/or (c) of the Protection from Harassment Act 1997, and does the commission of any alleged crime have to be immediate or imminent?

21 It is these preliminary issues that were argued before me. The orders made at the Case Management Conference invited the Attorney General to attend and make representations. The parties agreed that I should hear first Mr. Keir Starmer QC, who appeared with Ms. Stephanie Harrison on behalf the 3rd, the 4th, the 8th, the 11th, the 12th, the 14th and the 15th defendants. These defendants instructed Messrs. Moss & Co. to act as solicitors for them; I shall refer to them as the Moss defendants. I then heard the 17th defendant, Mr. Gibbons, the 5th defendant, Mr. Osmond, and the 10th defendant, Miss Marcham, each of whom adopted what Mr. Starmer had said and added individual points. Other defendants did not appear and were not represented. There then followed submissions from Mr. Lawson-Cruttenden for the claimants and from Mr. Perry on behalf of the Attorney General. Mr. Starmer replied, and those defendants who were representing themselves adopted what he said.

22 During the course of argument it became clear that certain aspects of the construction of the

PHA 1997 were important. I shall deal with them before addressing each preliminary issue in turn.

First construction point: objective nature of s 1(3)(c)

23 It was accepted by the defendants that section 1(3)(c) involves a fully objective test: whether the conduct was, in the judgment of the tribunal, reasonable. This appears from R v Colohan [2001] EWCA (Crim) 1251, a case which was decided by the Criminal Division of the Court of Appeal on 17th May 2001 and which examined both section 1(2) and section 1(3)(c) of PHA 1997. The reasoning can be seen from paragraphs 10 to 11 and 16 to 21 of the judgment delivered by Kennedy LJ on behalf of the court as follows:

> 10. Mr. Butterfield's principal short submission on behalf of the appellant is that in order to apply this test the hypothetical reasonable person referred to in section 1(2) must be endowed with the relevant characteristics of the accused and in particular with any recognisable mental disorder to which he is subject. In the present case the consequence of the submission, if correct, is that the appellant is to be judged by the standards of the hypothetical reasonable schizophrenic.
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> 11. Mr. Butterfield's associated secondary submission is that the jury ought to have been directed that it was open to them when considering the defence provided by subsection (1)(3)(c) to say that the appellant's conduct was, in the particular circumstances of his illness, a reasonable one. Any construction other than that, say Mr. Butterfield, is simply unfair to an accused with a recognizable mental illness.
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> …
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> 17. The question raised by these submissions is one of the proper construction of the Protection from Harassment Act 1997. As the first word of that title suggests, this is an Act whose purpose is significantly protective and preventative. The long title is 'An Act to make provision for protecting persons from harassment and similar conduct.'
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> 18. As well as making a course of conduct amounting to harassment an offence, the Act by section 3 provides civil remedies by way of damages for a breach of section 1 and by way of injunction to restrain an apprehended breach of it. Further, section 5 enables a criminal court, before whom a defendant has been convicted under section 2, to make a restraining order prohibiting him from doing anything specified. Such a restraining order is to be made for the purpose of protecting from harassment not only the victim of the offence but also any other person specified. As is well-known the Act was passed with the phenomenon of 'stalking' particularly, although not exclusively, in mind. The conduct at which the Act is aimed, and from which it seeks to provide protection, is particularly likely to be conduct pursued by those of obsessive or otherwise unusual psychological make-up and very frequently by those suffering from an identifiable mental illness. Schizophrenia is only one such condition which is obviously very likely to give rise to conduct of this sort.
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> 19. We are satisfied that to give the Act the construction for which Mr. Butterfield contends would be to remove from its protection a very large number of victims and indeed to run the risk of significantly thwarting the purpose of the Act. If such a construction is correct it would prevent the conduct in question from being a breach of section 1 and thus exclude not only suitable punishment for the perpetrator, but also damages, and, more especially, an injunction or restraining order for the protection of the victim. We do not believe that Parliament can have meant the provisions in question to have the meaning fro which Mr. Butterfield contends. Moreover, as it seems to us, if Mr. Butterfield's submissions were correct then subsection 1(2) would have been inserted unnecessarily into the Act.
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> 20. We agree accordingly with the learned judge that except in so far as it requires the jury to consider the information actually in the possession of this defendant section 1(2) requires the jury to answer the question whether he ought to have known that what he was doing amounts to harassment by the objective test of what a reasonable person would think. Its words, we are satisfied, are abundantly clear.
>
> 21. As to section 1(3)(c) that, we are satisfied, poses even more clearly an objective

> test, namely whether the conduct is in the judgment of the jury reasonable. There is no warrant for attaching the word 'reasonable' or via the words 'particular circumstances' the standards or characteristics of the defendant himself.

24 It seems to me that there is a direct and helpful analogy here with section 5(1)(c) of the Public Order Act 1986. In relation to the offence under that section of, among other things, using threatening, abusive or insulting words or behaviour it is a defence for the accused to prove that his conduct was reasonable. How is that to be reconciled with the principle of freedom of expression found in Article 10 of the European Convention on Human Rights? This issue arose in the Divisional Court in Percy v Director of Public Prosecutions, [2001] EWHC Admin 1125, and the answer was made plain in the judgment of Hallett J with whom Kennedy LJ agreed. The case concerned an appellant whose conviction arose from her behaviour at an American air base at RAF Feltwell. She was coordinator of an organisation called the "Campaign For Accountability of American Bases" and had experience over many years of protesting against the use of weapons of mass destruction and against American military policy, including the Star Wars National Missile Defence System. She believed that the base at Feltwell would have a part to play in such a system. She defaced the American flag by putting a stripe across the stars and by writing the words "Stop Star Wars" across the stripes. She stepped in front of a vehicle and she placed flag down in front of it and stood on it. Those affected by her behaviour were mostly American service personnel or their families, five of whom gave evidence of their distress to varying degrees. They regarded her acts as a desecration of their national flag to which they attach considerable importance. The district judge concluded that the appellant's actions were calculated to offend and found that her behaviour with the flag was insulting to American citizens at whom it was directed. She did, however, satisfy the court that her behaviour was motivated by strongly held beliefs that the Star Wars project was misguided, posed a danger to international stability and was not in the best interests of the United Kingdom. She failed to persuade the district judge that her conduct on the balance of probabilities was reasonable.

25 On the appeal Hallett J said this in a passage which begins in paragraph 25:

> 25. … the provisions of section 5 and section 6 of the Public Order Act, as enacted and applied by the courts of this country, contain the necessary balance between the right of freedom of expression and the right of others not to be insulted and distressed. The right of freedom of expression was well established in the United Kingdom before the incorporation of the Convention. Peaceful protest was not outlawed by section 5 of the Public Order Act. Behaviour which is an affront to other people, or is disrespectful or contemptuous of them, is not prohibited: see Brutus v Cozens [1973] AC 854. A peaceful protest will only come within the terms of section 5 and constitute an offence where the conduct goes beyond legitimate protest and moves into the realms of threatening, abusive or insulting behaviour, which is calculated to insult either intentionally or recklessly, and which is unreasonable.
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> 26. It is significant in my view that section 5(3)(c) and section 6(4) of the Public Order Act specifically provide for there to be proof of mens rea and for the defence of reasonableness. Even where a court finds that conduct has been calculated to insult and has, in fact, caused alarm or distress, the accused may still establish on the balance of probabilities that his or her conduct was reasonable. The question of reasonableness must be a question of fact for the tribunal concerned taking into account all the circumstances.
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> 27. Where the right to freedom of expression under Article 10 is engaged, as in my view is undoubtedly the case here, it is clear from the European authorities put before us that the justification for any interference with that right must be convincingly established. Article 10(1) protects in substance and in form a right to freedom of expression which others may find insulting. Restrictions under Article 10(2) must be narrowly construed. In this case, therefore, the court had to presume that the appellant's conduct in relation to the American flag was protected by Article 10 unless and until it was established that a restriction on her freedom of expression was strictly necessary.
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> 28. I have no difficulty in principle with the concept that there will be circumstances in which citizens of this country and visiting foreign nationals should be protected from intentionally and gratuitously insulting behaviour, causing them alarm or distress. There

may well be a pressing social need to protect people from such behaviour. It is, therefore, in my view, a legitimate aim, provided of course that any restrictions on the rights of peaceful protesters are proportionate to the mischief at which they are aimed. Some people will be more robust than others. What one person finds insulting and distressing may be water of a duck's back to another. A civilised society must strike an appropriate balance between the competing rights of those who may be insulted by a particular course of conduct and those who wish to register their protest on an important matter of public interest. The problem comes in striking that balance, due weight to the presumption in the accused's favour of the right to freedom of expression.

29. I turn to the way in which the District Judge approached the task that confronted him in this case. I remind myself that Ms. Percy attended RAF Feltwell intending to protest against the 'Star Wars' project, a matter of legitimate public debate. The message she wished to convey, namely 'Stop Star Wars' was a perfectly lawful, political message. It only became insulting because of the manner in which she chose to convey the message. That manner was only insulting because she chose to use a national flag of symbolic importance to some of her target audience.

30. In carrying out the balancing exercise, the District Judge first found that there is a pressing social need in a multi-cultural society to prevent the denigration of objects of veneration and symbolic importance for one cultural group. For my part, I am prepared to accept that he was entitled to find that such a protection was a legitimate aim. The next stage of his task was to assess whether or not interference with the accused's rights to free expression by criminal prosecution for using her own property to convey a lawful message in an insulting way was a proportionate response to that aim. The only aspect of the case referred to by the District Judge in this respect was the fact that the appellant's 'conduct was not the unavoidable consequence of a peaceful protest against the 'Star Wars'; project, which was her stated intention, but arose from the particular manner in which she choose to make her protest'.

31. The fact that the appellant could have demonstrated her message in a way which did not involve the use of a national flag of symbolic significance to her target audience was undoubtedly a factor to be taken into account when determining the overall reasonableness and proportionality of her behaviour and the state's response to it. But, in my view, it was only one factor.

32. Relevant factors in a case such as this, depending on the court's findings, might include the fact that the accused's behaviour went beyond legitimate protest; that the behaviour had not formed part of an open expression of opinion on a matter of public interest, but had become disproportionate and unreasonable; that an accused knew full well the likely effect of their conduct upon witnesses; that the accused deliberately choose to desecrate the national flag of those witnesses, a symbol of very considerable importance to many, particularly those who are in the armed forces; the fact that an accused targeted such people, for whom it became a very personal matter; the fact that an accused was well aware of the likely effect of their conduct; the fact that an accused's use of a flag had nothing, in effect, to do with conveying a message or the expression of opinion; that it amounted to a gratuitous and calculated insult, which a number of people at whom it was directed found deeply distressing."

26 These observations are, in my judgment, equally applicable to s 1(3)(c) of the PHA 1997. It follows that if at trial the first head of defence fails, the court will have the important role of striking a balance between competing fundamental rights, and ensuring that legitimate protest is not stigmatised as unlawful. The court performs that role when it comes to consider s 1(3)(c) under the second head of defence. Thus, it will be impossible for the claimants to succeed if their claim would amount to a disproportionate interference with freedom of expression including the expression of protest.

Second construction point: objective elements in s 1(3)(a)

27 The defendants contended in argument that section 1(3)(a) is primarily subjective. I say primarily because they acknowledged that the subjective events which a defendant is concerned to prevent must be events which amount in law to a crime. Subject to that, the defendants say

that by referring to the purpose of a defendant the Act is plainly directing attention to the subjective intention of that defendant.

28 It was contended for the claimants and by the Attorney General, however, that section 1(3)(a) was objective. In broad terms it was said that a defendant could rely on section 1(3)(a) if that defendant acted reasonably in thinking that a crime would take place and in thinking that the conduct in question would prevent it.

29 To introduce a test of reasonableness into section 1(3)(a) appears at first sight to run counter to the wording and structure of section 1(3). Three points appear to be immediate obstacles. First, subsection (3)(a) makes no mention of the word "reasonable": one would have to read in words in order to introduce any objective element. Second, in a number of cases where the statute intends an objective test, it makes this clear by using the word "reasonable" or other appropriate words. This suggests that the omission of any reference to reasonableness in subsection (3)(a) is deliberate. Third, if a defendant could rely upon subsection (3)(a) only in cases where that defendant had behaved reasonably, then there would be to no need for subsection (3)(a) at all, for reasonableness would be a defence under subsection (3)(c). The obvious inference from setting out paragraphs (a) and (c) separately and as alternatives in subsection (3) is that (a) is intended to provide a defence in circumstances where (c) will not be available.

30 In support of the contention that subsection (3)(a) requires objectively reasonable behaviour on the part of a defendant, Mr. Lawson-Cruttenden referred me to the case of Monsanto plc v Tilly [1999] TLR 829. That, however, was a case about a defence of necessity to the tort of trespass, and has no bearing on the present question. Mr. Lawson-Cruttenden added that the question of reasonableness would arise at the stage when the court considered whether to grant an injunction as a matter of discretion under section 37 of the Supreme Court Act 1981. I do not in any way minimise the importance of the court's role in considering whether an injunction should be granted as a matter of discretion. For present purposes, however, it suffices to observe that section 37 only arises at the stage of considering whether a remedy should be granted. It has no bearing on the logically prior question of whether a cause of action is made out.

31 Mr. Perry for the Attorney General made detailed submissions on this question. He said that the Act was structured in a way which showed that section 1(3) was intended to operate so that each of paragraphs (a), (b) and (c) were governed by objective tests. He drew attention to the long title: the Act was a protective measure to protect individuals from certain types of conduct. Turning to section 1(1)(b), the statute inserted the words "or ought to know" in order to avoid argument as to whether somebody actually knew, as explained in subsection (2). Mr. Perry noted that the prohibition only crystallises where there is in fact a course of conduct amounting to harassment. As to harassment, while there was no exhaustive definition, the non-exhaustive definition in section 7(2) included causing alarm. Mr. Perry drew attention to section 8, which is concerned with the position in Scotland, noting that reference is made there to a "reasonable person".

32 Turning to civil liability under section 3, Mr. Perry suggested that there was a flaw in the defendants' argument in that they were bringing into section 1(3)(a) principles applicable to criminal liability. On the contrary, said Mr. Perry, section 1(3)(a) had to be interpreted objectively in order to achieve the aims of the statute. If that were not so the most serious cases would not be within the Act. Mr. Perry gave the example of a schizophrenic who believes that a person is about to commit a serious crime and harasses that person for that reason.

33 So far as analogies with other statutes are concerned, Mr. Perry made reference to authorities on section 3 of the Criminal Law Act 1967. That provides by subsection (1) that: "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large." It had been established that so far as civil proceedings were concerned, the test under section 3(1) was an objective test.

34 Referring to the decision of the Court of Appeal in Southwark London Borough Council v Williams [1971] Ch 374, Mr. Perry noted that provisions where reasonableness was required were, according to Edmund Davies LJ, not to be interpreted in so exorbitant a way as to offer a cloak or mask for anarchy. Moreover, the general principle was that a person could not rely upon unknown justifying circumstances.

35 It seemed to me that the Southwark case, along with the analogy with the Criminal Law Act 1967 and the suggested flaw of introducing principles applicable to criminal liability, would be relevant only if the statute had indeed contemplated an objective test for s 1(3)(a). I asked Mr Perry why subsection (3) should have separate provision in paragraph (a) on his construction given that, to my mind, on his construction every case falling within sub-paragraph (a) would of necessity fall within sub-paragraph (c). Mr. Perry did not identify any case which, on his construction, would fall within sub-paragraph (a) but would not fall within sub-paragraph (c). He recognised that there is a presumption that one alternative provision is intended to add something to the others, for the draftsman does not write in vain and avoids surplusage. However, said Mr. Perry, if applying that presumption would defeat Parliament's intention then it should not be applied. Here, the intention to adopt an objective approach was seen throughout the statute, not least in the definition of “course of conduct”.

36 I have concluded that, despite the care and thoroughness with which these arguments have been advanced, they do not overcome the obstacles I identified earlier. In enacting the PHA 1997 Parliament was significantly extending the reach of the criminal and civil law in controversial circumstances. In doing so, great care was taken to identify expressly occasions when conduct was to be judged objectively. Failure to use any words indicating a test of reasonableness plainly suggests that no such test was intended.

37 Further, the structure of section 1(3), by identifying paragraphs (a) and (b) as alternatives to paragraph (c), involves a plain statement that Parliament thought it undesirable for those who fall within paragraphs (a) or (b) to have to justify their conduct as reasonable. This is readily understandable. Where people fall within paragraph (b), they will be acting pursuant to: “… any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment”. Whether a person relying on sub-paragraph (b) will need to act reasonably will be governed by the statutory provision or rule of law in question. Turning to sub-paragraph (a), in order to prevent or detect crime a person may have to take emergency action without pause for thought. That emergency action may follow something done earlier and thus be said to form part of a course of conduct. Prior to the enactment of the PHA 1997, if the emergency action would otherwise amount to unlawful conduct, then the general rule under the Criminal Law Act 1967 would be that the emergency action would be excused only if reasonable. The subjective wording of paragraph (a), in my view, indicates a desire, when extending the reach of the criminal and civil law in a controversial way, not to impose a test of reasonableness where there is good reason not to do so, an example being emergency action of the kind I have described.

38 I recognise that this interpretation of paragraph (a) involves a subjective test which may mean that s 1(1) of the PHA 1997 would be disapplied in the case of a schizophrenic who is under the delusion that someone is about to commit, for example, murder. If that is to be reconciled with the desire that I have identified, then it will have to be done by Parliament. However, for reasons which I give when considering the next point of construction, such an interpretation of paragraph (a) does not give carte blanche to defendants.

Third construction point: meaning of “preventing crime” in section 1(3)(a)

39 It is convenient to deal with this by reference to separate sub-headings.

Need an offence actually be committed?

40 The defendants submitted that it was unnecessary under section 1(3)(a) of the Prevention from Harassment Act 1997 for the defendants to prove that an offence was actually committed. All that needs to be established is that any course of conduct that the claimants may prove against them was pursued for the purpose of preventing crime. A course of conduct might be pursued for the purpose of preventing crime, even if, as it turned out, no crime was actually committed (or even contemplated), so long as the course of conduct was genuinely pursued for the purpose of preventing crime. This submission was not disputed by any party and in my view is plainly right.

Need it be the claimants who would commit the offence?

41 The defendants also submitted that it was unnecessary under section 1(3)(a) of the PHA 1997

for the defendant to prove that the offence to be prevented was one which was to be committed by the claimants. On the plain and ordinary reading of section 1(3)(a), a course of conduct might be pursued against X to prevent Y committing a crime so long as there is a sufficiently well established link between the conduct pursued against X and the offence committed by Y.

42 Mr. Lawson-Cruttenden said this was illogical in the context of the drafting of this section. The statute concerned a course of conduct, so it must be a crime by the person against whom the course of conduct was directed. It was contrary to principle for the claimants to bear responsibility for the crimes of others.

43 For the Attorney-General, Mr. Perry took a less extreme position. He said that as to a defendant harassing one person to prevent a crime by another, nothing in the Act necessarily prevented that construction. It appeared as though that would be the correct construction because it may sometimes be reasonable and necessary to do an act of that kind. However, it was difficult to envisage circumstances which subjected a third party to harassment to prevent another person from committing a crime.

44 I agree with the defendants and the Attorney-General that, as a matter of construction, sub-paragraph (a) extends to a defendant harassing one person to prevent a crime by another. I understand the concern of the claimants that they could thus be exposed to harassment to prevent the crimes of others. This, to my mind, is one of a number of reasons why the words in paragraph (a) are not to be given an expansive construction. Where, however, the defendant does indeed intend truly to act to prevent a crime by another, giving the words “prevent crime” their proper construction, then the public good may require that there be an inroad on the claimants' ability to seek relief for harassment.

Need there be a specific and imminent or immediate crime?

45 Mr. Starmer submitted that the purpose of the Moss Defendants' campaign of protest was to draw the attention of the public (locally and more generally), along with the first claimant and its employees, to the activities of the claimants and the effects of those activities and thereby to dissuade the claimants from engaging in those activities. This was cogently affirmed in the oral submissions of the 5th, 10th and 17th defendants.

46 Both Mr. Starmer and the individual defendants added that such conduct has a well established history and tradition in this country and abroad; and there are numerous examples of the success of similar protest campaigns in persuading individuals and corporate bodies to change their activities. The decision of Barclays Bank to disengage from apartheid in South Africa in the 1980s was put forward as an obvious example. Mr. Starmer pointed out that under Article 5 of the Rome Statute (that is, the statute whose provisions are in part embodied in the International Criminal Court Act) apartheid is a crime. Thus it is said by the defendants that the essential purpose of their conduct is preventative. What is plain, however, is that in using the word “preventative” to describe their conduct the defendants have very much in mind the long term. It could not be contended, and they did not contend, that what they did was intended to bring about an immediate stop to what they considered to be war crimes. Can it be right that section 1(3)(a) has long term prevention of this kind in mind?

47 Both the claimants and the Attorney-General submitted that it does not. Mr. Lawson-Cruttenden drew attention to cases where, in relation to defences of duress of circumstances and necessity, and where a defendant relied on the Criminal Law Act 1967, requirements as to nexus were identified. For the Attorney-General, Mr. Perry said in addition that if the Act is to serve to meet the mischief for which it was designed, it cannot be the case that a person can say there was some speculative possibility of “a future offence to be committed by an unspecified person at an unspecified location that gave me cause to pursue conduct which would otherwise amount to harassment.” Given that the defendants accept that what they call “prevention” may take years, the construction for which they contend would mean that any released offender might be the subject of conduct aimed, no doubt, at rehabilitation which would otherwise be harassment.

48 In answer to what he called “the defendants' exorbitant construction”, Mr. Perry asked a series of rhetorical questions. Is it permissible to harass a nightclub owner on the basis that the purpose is to prevent drug dealing in the nightclub? Is it permissible to harass Marks & Spencer to prevent burglars buying nylons for use in burglaries? Is it permissible to harass women to stop them

going out at night for the purpose of preventing them doing something which may lead to their being attacked? Thus, he said, the only construction which made sense was one which kept the exception under section 1(3)(a) within proportionate and proper limits.

49 In reply, Mr. Starmer said that the composite defence pointed to specific acts. He drew my attention to paragraphs which identified specific attacks in Iraq during the currency of the defendants' protest. Other specific matters identified concerned the Israeli assassination policy which was condemned throughout the world. These types of matters were expected to be and were in fact carried out. If it transpired that the incidents the defendants pointed to provided a basis to believe war crimes were committed, then to require them to point to the location of the next incident in order not to be liable, whether in the criminal court or in the civil court, was unrealistic. It was submitted by Mr. Starmer that the crime the defendants feared was committed. It would be far too restrictive under section 1(3)(a) to say to a protester against a company that provides arms for assassination that, “You cannot come within section 1(3)(a) unless you can point to the next assassination”. That, said Mr. Starmer, was also relevant to the question of imminence or immediacy. In all the other statutory privileges there was use of force. The defendants accepted that harassment can involve the use of force but it need not do so. Thus, as a matter of construction, one could not read in an immediacy requirement.

50 In reply to a question from me, Mr. Starmer said that immediacy was not inherent in the word “prevent”. One could prevent crime by educating people. To put pressure by campaigning in the hope that this will prevent crime is, he said, just as legitimate, if not more legitimate, than taking direct action by the use of force to prevent crime. In that regard, there was a principled distinction between section 1(3)(a) on the one hand and, on the other hand, the Criminal Law Act and other statutory provisions and the general defence of necessity. In relation to cases on those defences and the specific statutory provisions, Mr. Starmer drew attention to the fact that the PHA 1997 section 1(3)(a) was targeted at a course of conduct for the purpose of preventing crime. By contrast, for example, section 3(1) of the Criminal Law Act focussed on the single act of preventing crime.

51 These submissions would have considerable force if there were not in section 1(3)(c) separate provision which disapplies the operative parts of the statute where what is done is reasonable. The practical position is that a defendant who behaves reasonably — and is given for this purpose the proper benefit of Article 10 of the European Convention on Human Rights — will not need to rely on section 1(3)(a). When one takes account of this fact, I consider it plain that “preventing crime” in section 1(3)(a) does not refer to long term prevention. It is concerned with preventing in the sense of thwarting or forestalling. That links with the consideration I mentioned earlier as justifying separate provision in (a) — there may be may not be time to pause for thought.

52 I do not find it necessary to rely on authorities concerned with other statutes or with the general defences in criminal law. The point which arises here concerns the construction of this particular statute. Once one recognises that a defendant need only rely on section 1(3)(a) in cases where his conduct was unreasonable, the considerations identified by Mr. Perry are overwhelming. A zealot may well believe that imposing a particular code of morality on others will reduce crime. I stress that I do not suggest that the defendants are zealots. Looking at the position generally, however, it can hardly have been Parliament's intention to enable such a person to harass others unreasonably. There is the further factor, which I mentioned earlier, that, because this provision may put a victim in a position where they have to submit to what would otherwise be harassment in order to prevent a crime not by the victim but by some other person, it would be wrong to give an expansive construction to section 1(3)(a).

53 I conclude that to rely on section 1(3)(a) a defendant must have intended to prevent a crime that was both specific, in the sense that a particular victim or victims and a particular danger could be identified, and immediate or imminent.

Relevance of alternative methods of prevention

54 Both Mr. Lawson-Cruttenden and Mr. Perry referred to authorities indicating that where reliance is placed on statutory provisions or on general defences, it is necessary to show that there was no alternative method of preventing the outcome in question. I doubt whether on my construction of section 1(3)(a) this particular aspect can arise. Given that there are requirements, as I read subsection (3)(a), for an identifiable danger to an identifiable victim or victims, and for

the danger to be immediate or imminent, I do not consider that it is necessary to read in a further requirement that one could not bring about the result by alternative means. Certainly there are good grounds to think that where such a consideration arises under section 1(3)(c) it is just one factor: see the passage cited from Percy v. DPP above. I do not consider that availability of alternative methods is determinative on subsection 1(3)(a).

Preliminary Issue (a)

55 In the light of those conclusions as to construction, I can deal with the preliminary issues shortly.

56 Preliminary issue (a) reads as follows: Are matters of United Kingdom foreign policy in the deployment of the United Kingdom's armed forces in the exercise of the royal prerogative matters which are justiciable in these proceedings?

57 The defendants on this preliminary issue drew my attention to developments in relation to the suggested crime of aggression. In the case of R v. Jones [2004] 3 WLR 1362, the Court of Appeal held that there was no firmly settled rule of international law which established a crime of aggression which could be translated into domestic law as a crime in domestic law for the purposes of section 3 of the 1967 Act. It was accepted by the defendants in this case that there was no material distinction between the 1967 Act and the PHA 1997. An appeal to the House of Lords in Jones is due to be argued shortly. For the time being, so far as the crime of aggression was concerned, it was accepted by Mr. Starmer that I must rule that there is no crime of aggression in domestic law for the purposes of section 1(3)(a). I will rule accordingly and that will give the defendants the opportunity to seek to appeal that ruling should they consider that appropriate.

58 That being the case, said Mr. Starmer, no question as to the royal prerogative arose and thus Issue (a) did not arise for decision. Mr. Perry agreed. Mr. Lawson-Cruttenden, however, relied upon the royal prerogative on aspects of other preliminary issues. I shall return to that in due course.

Preliminary Issue (b)

59 This issue is as follows: Does the defendants' composite defence disclose the commission of any offences contrary to section 51 of the International Criminal Court Act 2001?

60 Mr. Starmer submitted that this issue had been phrased incorrectly. The true question, he submitted, was, as regards section 1(3)(a): “Even if the defendants succeed in establishing all the facts and matters set out in the composite defence would those facts and matters be incapable of establishing that the defendants honestly believed that those facts and matters constituted crimes under the Geneva Convention Act 1957or the International Criminal Court Act 2001?” As regards section 1(3)(c), he submitted it should read: “Even if the defendants succeed in establishing all the facts and matters set out in the composite defence, would the defendants be incapable of establishing that circumstances that can be envisaged in which a course of conduct proven by the claimants against them could be said to be reasonable?”

61 Given that questions of fact in this case, which would include questions of subjective belief, are to be resolved at trial and not at the stage of preliminary issues, I agree that preliminary issue (b) would need to be reformulated in some way. However, the conclusions which I have reached on Preliminary Issues (d) and (e) mean that preliminary issue (b), even as reformulated by Mr. Starmer, does not arise.

Preliminary issue (c)

62 Preliminary Issue (c) is as follows: Irrespective of the answer to Question (b) above, does the defence disclose any conduct ancillary to an offence under section 51 above which is capable of constituting an offence contrary to section 52 of the Act?

63 This is ancillary to preliminary issue (b), and the considerations identified in relation to that preliminary issue apply with equal force.

Preliminary issues (d) and (e)

64 These were in the following terms. First, preliminary issue (d) asks:: “Irrespective of (a), (b) and (c) above, is there sufficient nexus or connection between the admitted conduct of the defendants and the defendants' assertions that they were acting to prevent the commission of crimes by the claimants?”

65 Preliminary issue (e) is as follows: “On the facts set out in the defence, is the defendants' conduct capable of falling within the terms of section 1(3)(a) and/or 1(3)(c) of the PHA 1997, and does the commission of any alleged crime have to be immediate or imminent?”

66 It is convenient to take these two preliminary issues together and to examine them in relation to section 1(3)(a). For the reasons I have given earlier, I have concluded that this provision can be invoked only where those relying upon it subjectively intended to prevent a crime which was both specific, in the sense that a particular victim or victims and a particular danger could be identified, and immediate or imminent.

67 As I noted earlier in this judgment, it could not be suggested, nor do the defendants suggest, that their protests were intended to prevent the particular events which followed shortly after their protests or indeed during their protests in Iraq and Israel. The defendants' aim was long term. In those circumstances, it is simply not possible to assert that the matters in the composite defence fall within section 1(3)(a).

68 I turn to section 1(3)(c). As I indicated earlier, section 1(3)(c) enables the defendants to answer a claim that they have been guilty of harassment by replying that they have acted reasonably in the particular circumstances of the case. I have not been asked, as part of this preliminary issues hearing, to look at the matters that the defendants say are the particular circumstances of the case. Nor would I think it right to do so.

69 The particular circumstances of the case must, to my mind, depend very strongly on precisely what acts are proven to have been committed by any particular defendant and the extent to which any particular defendant can be said to be deemed to have committed acts which are done by others under section 7(3)(a). The exercise under section 1(3)(c) involves fundamental questions of individuals' rights and freedoms.

70 The approach taken in R v. Colohan shows an overall objective test. I question whether, for the purposes of determining entitlement to rely upon section 1(3)(c), it is necessary or indeed desirable to make any findings as to whether the matters set out in the composite defence either constitute or are capable of constituting specific crimes. The criteria which, to my mind, arise are likely to be very similar to those identified by Hallett J in the Percy case. I stress, however, that I have not heard submissions on the point, and accordingly my remarks are preliminary only. Pending such submissions, I consider that it will be for the judge at trial, in the light of careful consideration by the parties of the true issues that arise, to determine to what extent, if at all, it is necessary for the purposes of s 1(3)(c) to go into any of the matters raised in preliminary issues (b) and (c), and I do not think it is appropriate to attempt such an exercise at the stage of preliminary issues.

Additional points raised by the claimants

71 Mr Lawson-Cruttendon submitted that the first claimant's supply of weapons fell within a non-justiciable area of law, for the points raised by the defendants would require the court to examine the disposition, armament and control of the armed forces, the waging of war and the conduct of foreign policy. This submission cannot be right as regards points taken by the defendants about the commission of crimes under domestic law, for in relation to such crimes a domestic criminal court will be entitled to investigate whether the elements of the crime have been proved. The same must hold true for this court if — and I stress “if” — there is a need to investigate whether such a crime has been or would be committed.

72 Mr Lawson-Cruttendon made submissions on a further point: the possibility that one or more of the claimants might be said in a domestic court to be liable under the provisions found in the International Criminal Court Act 2001 for criminal liability of accessories. He said that there could be no such liability as the claimants would not be in a position to control how the products in question were used by the alleged criminal principal. It seems to me that if — and I stress “if” — a court were ever to find itself examining such liability, questions might arise as to the extent to which any particular claimant knew of the intended use of a particular product and was in a

position to prevent the supply of that product by the first claimant or others to the alleged criminal principal. In those circumstances I say no more about this point.

Conclusion

73 I have concluded that the defendants' composite document does not enable them to rely upon their third head of defence, as the facts and matters they set out do not fall within section 1(3)(a) of the PHA 1997. This leaves for trial the first and second heads of defence. Nothing in this judgment involves any predetermination by me of the issues of fact that will arise at trial. In particular, nothing in this judgment involves any conclusion by me as to the reasonableness or unreasonableness of what any particular defendant did.

74 I will ask the parties to consider the consequential orders which flow from this judgment.

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