Neutral Citation Number: **[2023] EWCA Crim 338**

Case No: 202201911 B1

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT CHELMSFORD**
**HIS HONOUR JUDGE WALKER**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/03/2023

**Before** :

**LORD JUSTICE BEAN**
**MR JUSTICE SOOLE**
**MR JUSTICE CHAMBERLAIN**

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**Between :**

**SUSAN WU** **Appellant**

**- and –**

**CHELMSFORD CITY COUNCIL** **Respondent**

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**Alex Stein and Rhys Rosser** (instructed by **Rustem Guardian Solicitors**) for the **Appellant**
**Gordon Menzies and Angelica Rokad** (instructed by **Chelmsford City Council Legal Services**) for the **Respondent**

Hearing date: 8 March 2023

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 30/03/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

**MR JUSTICE SOOLE:**

1. With the leave of the single judge, the appellant appeals against her conviction on two counts of unlawful eviction contrary to s.1(2) of the Protection from Eviction Act 1977 (the 1977 Act) and two counts of unlawful harassment contrary to s.1(3A) of that Act. Those convictions were on 23 May 2022 in the Crown Court at Chelmsford following a trial. On 14 July 2022 the appellant was sentenced on each Count to a 12-month community order and ordered to pay prosecution costs of £14,000 and £1000 compensation.

2. The Appellant is represented by Mr Stein and Mr Rosser, neither of whom appeared below. Mr Menzies and Ms Rokad appear for the prosecuting local authority, Ms Rokad having appeared below.

3. Section 1 of the 1977 Act provides as material:

'*Unlawful eviction and harassment of occupier*
*1(1) In this section "residential occupier", in relation to any premises, means a person occupying the premises as a residence, whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises.*

*(2) If any person unlawfully deprives the residential occupier of any premises of his occupation of the premises or any part thereof, or attempts to do so, he shall be guilty of an offence unless he proves that he believed, and had reasonable cause to believe, that the residential occupier had ceased to reside in the premises.*

*(3) If any person with intent to cause the residential occupier of any premises –*

*(a) to give up the occupation of the premises or any part thereof; or*
*(b) to refrain from exercising any right or pursuing any remedy in respect of the premises or part thereof;*

*does acts likely to interfere with the peace or comfort of the residential occupier or members of his household, or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence, he shall be guilty of an offence.*

*(3A) Subject to subsection (3B) below, the landlord of a residential occupier or an agent of the landlord shall be guilty of an offence if –*

*(a) he does acts likely to interfere with the peace or comfort of the residential occupier or members of his household, or*
*(b) he persistently withdraws or withholds services reasonably required for the occupation of the premises in question as a residence,*

*and (in either case) he knows, or has reasonable cause to believe, that that conduct is likely to cause the residential occupier to give up the occupation of the whole or part of the premises or to refrain from exercising any right or pursuing any remedy in respect of the whole or part of the premises.*

*(3B) A person shall not be guilty of an offence under subsection (3A) above if he proves that he had reasonable grounds for doing the acts or withdrawing or withholding the services in question.*'

4. Sub-sections 1(3A) and (3B) were inserted by the Housing Act 1988.

The facts

5. The appellant was the landlord of 39 Goldlay Avenue, Chelmsford (the Premises); Mr and Mrs Krishnamoorthy were her tenants and lived there with their three teenage children. Their tenancy agreement was an assured shorthold tenancy commencing 1 February 2013 for a fixed term of 12 months. Upon expiry the tenancy continued as a periodic tenancy. In the absence of the tenants leaving of their own free will, the means of obtaining lawful possession included the appellant serving valid notice under s.21 Housing Act 1988 and thereafter issuing Court proceedings. It was accepted that the appellant at no stage instituted legal proceedings to obtain possession of the Premises.

6. On 13 June 2018 Mrs Krishnamoorthy was present at the Premises. The appellant arrived with her partner and two builders and entered using her own set of keys. She instructed the builders to change the locks on the main front door and to resolve a water leak. This resulted in the builders disconnecting the water supply and removing a section of the water pipes. Mrs Krishnamoorthy telephoned her husband and he advised her to call the police. Police officers attended and told her that the issue was a civil matter and then left. She called her husband again who eventually spoke to a Housing Officer at Chelmsford City Council. Mr Krishnamoorthy returned home from work at lunchtime. He later left the Premises while his wife remained inside, to attend at the offices of the Housing Team at the Council.

7. While at the Housing Office he emailed the appellant to advise that there was no emergency accommodation available and that if the Premises were uninhabitable she would be required to provide accommodation. He then returned to the Premises and told the appellant she was obliged to house them. The appellant and Mr Krishnamoorthy eventually both attended the Housing Office. A Housing Officer told the appellant that she was to make the necessary arrangements for accommodation as she had made the Premises uninhabitable. Mr Krishnamoorthy and the appellant returned to the Premises. The appellant left shortly thereafter without having given Mr and Mrs Krishnamoorthy a set of new keys. They remained inside the unlocked Premises. Mr Krishnamoorthy spoke further to a Housing Advice Officer at the Council. The latter advised the appellant that withholding the new keys might give rise to an accusation of illegal eviction. The appellant said she would arrange for a set of new keys to be given to the tenants. These were ultimately delivered to Mr and Mrs Krishnamoorthy at the Premises, just after midnight on 14 June.

8. The appellant was in due course indicted on four counts. Counts 1 and 2 alleged unlawful eviction contrary to s.1(2) of Mr Krishnamoorthy (Count 1) and of Mrs Krishnamoorthy (Count 2). The particulars of Count 1 were that *'SUSAN WU on dates between 13th June 2018 and 14th June 2018 did or did attempt to unlawfully deprive* [Mr] *Krishnamoorthy, the residential occupier, of his occupation of the premises…by changing the locks of the said premises during his absence and refusing*

*to provide* [him] *with a copy of the new keys'*. Count 2 was in the same terms save as to the name of the residential occupier and to omit the words *'during his absence'*.

9. Following discussion between the parties and before the evidence began, the Judge permitted amendment of each of these two counts so as to delete the words *"or did attempt to"*; thus removing the alternative inchoate offence which s.1(2) expressly includes.

10. Counts 3 and 4 alleged unlawful harassment contrary to s.1(3A) of Mrs Krishnamoorthy (Count 3) and of Mr Krishnamoorthy (Count 4). The particulars of Count 3 were that the appellant *'on dates between 13th June 2018 and 18th June 2018 did acts likely to interfere with the peace and comfort of* [Mrs] *Krishnamoorthy, the residential occupier of* [the Premises]*, namely, the disconnection of water services and refusal to reconnect them within a reasonable time, knowing, or having reasonable cause to believe, that that conduct was likely to cause the residential occupiers to give up the occupation of the whole or part of the premises.'* Count 4 was in the same terms, save as to the name of the residential occupier.

11. As to Counts 1 and 2, it was agreed on behalf of the appellant that Mr and Mrs Krishnamoorthy had in fact been deprived of occupation by the changing of the locks and the failure to provide new keys. It was further agreed that the issue for determination by the jury was whether the appellant had intended the deprivation of occupation to be permanent.

12. It was also undisputed that, if the jury were sure that the appellant did have such intent, the deprivation was 'unlawful' (s.1(2)) in circumstances where she had not commenced any court proceedings for possession.

13. Accordingly the sole question for the jury as set out in the agreed 'Route to Verdict' on each of Counts 1 and 2 was: '*Are we sure that* [by] *the acts of changing the locks and not providing keys until late into the night the defendant intended to evict* [Mr/Mrs] *Krishnamoorthy permanently from the property?*'

14. The agreed legal directions on that issue included: '*The defendant accepts that she did, briefly and accidentally, deprive the Krishnamoorthys of their occupation of the*

*premises. She accepts that she caused the locks to be changed but says that she simply forgot to provide keys to the Krishnamoorthys. She says that once she became aware that they did not have keys she arranged for a set to be delivered…It is accepted that by changing the locks the defendant did deprive the Krishnamoorthys of the premises. If it was an exclusion designed to evict* [Mr] *Krishnamoorthy (Count 1) and/or* [Mrs] *Krishnamoorthy (Count 2) permanently from the property then the defendant is guilty. However if the defendant excluded one or both persons from the premises for a short period of time, because she forgot to supply a set of keys for the new locks and that was the sole object of exercise, then the defendant is not guilty. The issue for you on counts 1 and 2 is whether you are sure that when the defendant changed the locks to 39 Goldlay Avenue and refused to provide a copy of the keys she did so with the intention of evicting the person named in that count permanently from the property."*

15. In consequence of the appellant's acceptance that Mr and Mrs Krishnamoorthy had in fact been deprived of occupation of the Premises, the Prosecution withdrew the allegation of attempted deprivation of occupation and the indictment was amended accordingly.

16. As to Counts 3 and 4, it was agreed that the appellant had arranged the disconnection of the water services and had refused to reconnect them when requested; and that those acts were likely to interfere with the peace or comfort of Mr/Mrs Krishnamoorthy: see the Route to Verdict.

17. Accordingly it was agreed that the two questions for the jury on each Count were '*Are we sure that when she arranged those acts the defendant knew or had reasonable cause to believe that that conduct was likely to cause* [Mr/Mrs] *Krishnamoorthy to give up the occupation of the premises?*' and, if so, '*Is it more likely than not that the Defendant had reasonable grounds for doing those acts?*'; the latter raising the reverse burden of proof under s.1(3B)**.**

18. The jury convicted the appellant on each Count.

Ground 1

19. The first ground of appeal relates to Counts 1 and 2. Mr Stein's essential submission is that (i) the actus reus of deprivation of occupation under s.1(2) requires the Prosecution to establish that the residential occupier was put and/or kept out of physical occupation; (ii) on the undisputed facts (and regardless of the issue of intent) neither complainant was in fact deprived of physical occupation of the Premises.

20. Accordingly he submits that the agreed legal direction, that by causing the locks to be changed the appellant had deprived Mr/Mrs Krishnamoorthy of their occupation of the Premises, was wrong in law. No such concession should have been made on behalf of the appellant.

21. As to Mrs Krishnamoorthy, it was undisputed that she was in physical occupation of the Premises throughout the period in question, i.e. from the time on 13 June when the appellant entered the property with her own keys and had the locks changed until new keys were eventually supplied just after midnight on 14 June.

22. As to Mr Krishnamoorthy, he had returned home after work and was not prevented from entering the property. When the appellant left, he and his wife were left 'inside an unlocked property': Prosecution opening note para. 56. He had subsequently left and returned to the Premises, without restraint, before the keys were supplied.

23. As a matter of law there was no actual deprivation of occupation within the meaning of s.1(2) unless the conduct of the defendant caused the residential occupier to be put or kept out of physical occupation of the premises. That was the clear implication of the decision of this Court in R. v. Yuthiwattana (1985) 80 Cr App R 55 and of the Divisional Court in Costelloe v London Borough of Camden [1986] Crim LR 249.

24. Insofar as the decision of the Court of Appeal in Commissioners of Crown Lands v. Page [1960] 2 QB 247 ('Page') held that there could be an eviction without physical expulsion, that had no application to the interpretation of the offence under s.1(2) and its concept of deprivation of occupation of the premises.

25. Mr Stein acknowledged that the consequence of the concession below was that the alternative offence of attempted deprivation of occupation was deleted from the indictment; that the mens rea of attempt was necessarily established by the jury's answer to the one question posed in the Route to Verdict for each of Counts 1 and 2; that it is unlikely that there would have been any further evidence on the actus reus of attempt; and that it would have been open to the jury to convict on that alternative.

26. However he submitted that, even if that alternative had been left on the indictment, a conviction under sub-section (2) would not have been safe, given the error of law on the actus reus of the completed offence.

Prosecution submissions

27. On behalf of the Prosecution, it is submitted, first, that there is no basis to permit the appellant to resile from the concession made on her behalf. The attempt to do so is not properly raised in the grounds of appeal nor the accompanying Advice; and in any event the application does not meet the high bar which authority supports for the withdrawal of concessions: R v. R [2015] EWCA Crim 1941 at [53]-[54]; R. v E [2018] EWCA 2426 (Crim) at [18]-[20]; FSA v. Bakers of Nailsea Ltd [2020] EWHC 3632 (Admin) at [20]-[22].

28. In any event, says Mr Menzies, the concession was rightly made. The actus reus of 'deprivation of occupation' does not require physical deprivation.

29. In Yuthiwattana this Court held that s.1(2) was '*directed to the concept of eviction, and that the unlawful deprivation of occupation referred to in it requires to have the character of an eviction*': per Kerr LJ at p.63.

30. As to the 'character of an eviction', in Page (a decision on the meaning of eviction in a the general context of the law of landlord and tenant) the Court of Appeal had cited with approval the statements in leading textbooks that physical expulsion was not a necessary ingredient of an eviction. Thus Halsbury's Laws of England (3rd ed, vol 23, p.552, para.1211): *"To constitute an eviction for this purpose it is not necessary that there should be an actual physical expulsion from any part of the premises; any act of a permanent character done by the landlord or his agent with the intention of*

*depriving the tenant of the enjoyment of the demised premises or any part thereof will operate as an eviction. Thus, there is an eviction if the landlord enters and uses the premises, the tenant remaining in possession; though a mere trespass by the landlord is not sufficient."*: to the same effect, Foa on Landlord and Tenant (8th ed) at p.159.

31. Having considered Page, the Court in Yuthiwattana stated, in the context of s.1(2) *"In our view "permanency" goes too far. For instance, if the owner of the premises unlawfully tells the occupier that he must leave the premises for some period, it may be of months or weeks, and then excludes him from the premises, or does anything else with the result that the occupier effectively has to leave the premises and find other accommodation, then it would in our view be open to a jury to convict the owner under sub-section (2) on the ground that he unlawfully deprived the occupier of his occupation. On the other hand, cases which are more properly described as "locking out" or not admitting the occupier on one or even more isolated occasions, so that in effect he continues to be allowed to occupy the premises but is then unable to enter, seem to us to fall appropriately under sub-section 3(a)or (b), which deals with acts of harassment. In our view, the prosecution case about the events of April 28 fell into this category. They might have been presented in a different way. It might have been alleged that the appellant there and then intended to exclude Mr Nelson permanently, never to allow him to come back, but there was then a change of mind on her part or that of her husband. But that was not how the case was put. Having regard to how it was put, the mere exclusion for one night cannot, in our view, properly be regarded as a deprivation of occupation under sub-section (2)."*

32. In Costelloe, an appeal against conviction on s.1(2) and (3) by way of case stated, the Divisional Court considered Yuthiwattana and focused on the intent of the landlord. Thus Glidewell LJ: *"It is clear from the last passage in the judgment of Lord Justice Kerr, in my view, that if a residential occupier is excluded from premises, apparently permanently, in circumstances in which he thinks he has been permanently excluded and it appears to be the intention of the landlord to exclude him or her permanently, but for whatever reason, whether because the landlord changes his mind or is obliged to do so, the occupier is later readmitted, such a case could nevertheless come within subsection (2) of section* [1] *of the Protection from Eviction Act 1977 even though the absence was only for a short time…Again, in my view, if Miss Smith had been told to*

*leave and had thought that that meant she had to stay out until her notice expired and she did stay* [out] *until her notice expired, a prosecution under subsection (2) of section 1 of the Protection from Eviction Act 1977 might have been entirely proper. But if on the other hand the situation was that while Miss Boddy was intended to be kept out permanently Katie Smith was really only being evicted for a short time and the true situation was that she was going to be allowed back in after a short time had elapsed, then the decision in* [Yuthiwattana] *in my view binds us to say that this was not a case in which a prosecution under subsection (2) of section 1 of the Protection from Eviction Act 1977 should have succeeded. In that case the matter properly fell within subsection (3), the harassment section, rather than the eviction section, subsection (2)."*

33. Further Woolf J (as he then was) added: *"As I understand Lord Justice Kerr's judgment…the proper test is: What was the nature of the exclusion? Was it, whether it be short or long, an exclusion designed to evict the tenant from the premises? If it was, then it falls within section 1(2). If on the other hand all that occurred was the deprivation of the occupation of the premises for a short period of time and that was the object of the exercise, then it would not fall within section 12."*

34. Thus for the purposes of section 1(2), it was not necessary to establish there had been a physical expulsion or that the residential occupier had been kept out of physical occupation. The critical question for determination was, in the words of Woolf J, whether the "object of the exercise" was to evict the occupiers permanently from the premises which they were entitled to occupy.

35. That question was correctly identified in the Judge's agreed directions and Route to Verdict; each of which correctly reflected the decisions of this Court in Yuthiwattana and the Divisional Court in Costelloe. Whilst those decisions in fact concerned residential occupiers who had been physically put out, the reasoning did not make that a requirement of the actus reus.

36. The agreed directions were further strengthened by the definition of 'residential occupier' in s.1(1) and its focus on his legal rights. Those rights were two-fold: the right to remain in occupation and a right to restrict any other person to recover

possession of the same; see also Street v Mountford [1985] AC 809 and the right of exclusive possession. Changing the locks and failing to provide keys removed the tenant's ability to exercise those rights, both against the landlord (save as the tenancy otherwise permitted) and against the world at large.

37. To the same effect was the law on interference by the landlord with the covenant of quiet enjoyment implied into this and every tenancy. Changing the locks was an obvious example of such a breach: see e.g. Arden, Quiet Enjoyment: Protection from Rogue Landlords (8th ed, 2017) at paras.1.8 and 1.10 ; also Southwark LBC v Mills [2001] AC 1 at [11].

38. The act of changing the locks 'fundamentally' affected the right to remain in occupation. If the appellant's construction were correct, it would reduce the scope of s.1(2) to the narrow instance of physical exclusion. It was unduly restrictive to divide the section between acts which caused physical exclusion (sub-section (2)) and those which did not (sub-sections (3) and (3A)).

39. On the contrary, the three sub-sections embraced a 'spectrum' of acts of interference with the residential occupier's rights to remain in occupation. Changing the locks was a fundamental breach of those rights, at one end of the spectrum; save exclusion by violence, there was nothing more serious. By contrast, less fundamental breaches, e.g. disconnection of the water supply as in this case, were further along the spectrum the spectrum and fell within sub-sections (3) and (3A). The spectrum was also reflected by the comparative mental element in each of the sub-sections.

40. It was for the jury to determine where the conduct fell on the spectrum. For that purpose it was not necessary to direct the jury to consider whether or not there was a breach of 'fundamental' rights so as to fall within the offence under sub-section (2); but words to that effect would be helpful to the jury. So far as possible the statute should be interpreted and explained in a non-technical manner.

41. Neither sub-sections (3) and (3A) would be otiose if the Prosecution's interpretation of the section were correct.

42. Accordingly the concession below and the Judge's directions as to the actus reus were correct; and by their verdicts the jury were sure that the appellant did intend permanently to evict each of the complainants. In any event, if the concession had not been made and the alternative of attempt had been left to the jury, it must inevitably have convicted on that alternative. In either event the convictions on Counts 1 and 2 were safe.

Conclusion on Ground 1

43. In our judgment, that part of the actus reus of s.1(2) which requires that the resident occupier has been deprived of occupation of the premises does require actual physical deprivation of occupation, namely that the occupier has by the defendant's conduct been put and/or kept out of physical occupation of the property.

44. First, we do not accept that the contrary statement of this Court in Page is applicable to s.1(2). In particular:

(i) this Court in Yuthiwattana did not treat Page as of direct application to s.1(2). If it had, the Court would not have held that the requirement that eviction must be of a permanent character *'goes too far'* for the purpose of s.1(2);

(ii) whilst holding that s.1(2) is directed to the concept of eviction and that the unlawful deprivation of occupation *'requires to have the character of eviction'*, the Court in Yuthiwattana was not stating that the phrase 'deprivation of occupation' is in every respect to be interpreted as equivalent to the meaning of 'eviction' in the broader context of the law of landlord and tenant. In this respect it is also relevant that s.1(2) uses the language of the deprivation of 'occupation' rather than of 'possession';

45. Secondly, the judgments in both Yuthiwattana and Costelloe use the language of 'exclusion' in terms which imply the necessity under s.1(2) for physical exclusion. Thus e.g. in Costelloe Glidewell LJ refers to a residential occupier who 'is excluded from premises, apparently permanently' but is 'later readmitted'. We do not accept that those references are merely a reflection of the facts in the particular cases.

46. Thirdly, s.1(2) has to be interpreted in the context of the section as a whole, including the offences contained in sub-sections (3) and (3A). On the Prosecution's, rights-focussed, analysis of the ambit of sub-section (2), it is difficult to envisage factual circumstances in which the offences under sub-sections (3) and (3A) would not be otiose. Likewise with the statutory alternative offence of attempt in sub-section (2) itself.

47. Fourthly, we see no merit in the Prosecution's concepts of a 'spectrum' which distinguishes for the purposes of s.1(2) between 'fundamental' and lesser breaches of the rights of the residential occupier. The statutory language provides no basis to do so; and would be likely to require legal directions of some complexity.

48. In our judgment the natural reading of s.1 is that the actus reus of the completed offence under sub-section (2) requires that the defendant's conduct has in fact put or kept the residential occupier out of physical occupation. This is in clear and sensible contrast both to the actus reus of the offence of attempt under that sub-section and to the offences under sub-sections (3) or (3A). It is a distinction which will be readily explicable to a jury in straightforward, non-technical, language.

49. In the present case, the changing of the locks would have been highly material to the offences charged under Counts 3 and 4 if it had been relied on for that purpose. However, on the particular facts of this case, that conduct did not put or keep either complainant out of physical occupation. Accordingly, in our judgment, the agreed direction that 'by changing the locks the defendant did deprive the case of occupation of the premises' was wrong in law.

50. However that is not the end of the matter. This was a direction agreed on behalf of the appellant; and its consequence was that the Prosecution withdrew the alternative offence of attempted deprivation of occupation from the particulars of the s.1(2) offences charged under Counts 1 and 2.

51. If that alternative had remained on the indictment, the Prosecution would have had to make the jury sure on each count that the appellant (i) with intent to commit the s.1(2) offence of deprivation of occupation of the premises (ii) by her admitted conduct did

acts which were more than merely preparatory for the commission of that offence: s.1 Criminal Attempts Act 1981. Given both the jury's actual finding on the issue of intent and the undisputed conduct of changing the locks, the jury would inevitably have found the appellant guilty of the statutory alternative under sub-section (2). We add that Parliament's decision to take the unusual course of including the alternative of attempt within the s.1(2) offence rather suggests that its intent was to avoid debates on property law of the type which has arisen on this appeal. This case demonstrates the wisdom of including that alternative within an indictment under s.1(2).

52. In all the circumstances it follows that the convictions on Counts 1 and 2 are safe; and that it would be quite unjust to permit the appellant to resile from the concession which was made.

53. Accordingly the appeal on ground 1 is dismissed.

Ground 2

54. This ground relates to Counts 3 and 4. The contention is that (1) 'acts' in sub-section (3A) (i) requires more than one act and (ii) does not include omissions; (2) the indictment charges one act, i.e. disconnection of the water supply, and one omission, i.e. failure to reconnect the supply within a reasonable time; (3) accordingly the agreed direction was wrong in law.

Acts

55. Mr Stein submits that the requirement of plurality is plain from the language of the provision as read in its context. That context includes sub-section (3A)(b) which applies where the landlord 'persistently' withdraws or withholds services reasonably required for the occupation of the premises as a residence.

56. This submission has to confront the decision of this Court in R. v. Polycarpou (1978) 9 HLR 131. That concerned the like offence under s.30(2) Rent Act 1965. In the case of one property the appellant had removed the gas ring, which was the sole source of heat for the tenant. In another case he had erected a partition. On appeal against

conviction in each case, he contended that the 'acts' in the section must be plural. The Court rejected that argument by reference to the Interpretation Act 1889. As now replicated in s.6 Interpretation Act 1978 this provides that in any Act '*...unless the contrary appears, - ... words in the singular include the plural and words in the plural include the singular*.'

57. Mr Stein contends that this decision has no application because it predates the insertion of s.1(3A) by the Housing Act 1988. In any event the Interpretation Act applies 'unless the contrary intention appears'. In this case the contrary intention is clear from sub-sections (a) and (b) and in particular the words 'acts' and 'persistently'.

58. In Rv Mitchell (1993) 26 HLR 394, a case under s.1(3A), the question was whether it was necessary for all members of the jury to be in agreement as to the act or acts on which the indictment was based, i.e. whether it was necessary to have a Brown direction ((1984) 79 Cr App R 115). Allowing the appeal, this Court held that such a direction was necessary, at least in the instant case. Thus *"This was a case which alleged unlawful harassment and the acts relied upon by the Crown in the particulars were very disparate, both as to time and as to their nature…Accordingly, we are persuaded that this was a case where there was a real risk that unless otherwise directed the jury might come to the conclusion that provided all 12 of them were agreed that the defendant had committed one of the acts alleged, even though they were not all agreed as to which of them, they could and should convict the appellant of the charge."*

59. Mr Stein disagreed that it was implicit in this conclusion that one act would be sufficient to found a charge under s.1(3A). That was not the issue for decision in Mitchell.

60. As to omissions, he cites R v Ahmad (1987) 84 Cr App R 64, a decision on s.1(3) where this Court stated: *"This statute uses the words "does acts". In our view the words of this Act do not impose a responsibility to rectify damage which the defendant has already caused by an act done without either of the intentions necessary to constitute an offence under section 1(3). Thus we conclude that the failure by the*

*appellant to take steps to complete the work was not the doing of an act or acts for the purposes of that subsection".* Mr Stein submits that the failure to reconnect the supply was an omission and not an act.

Ground 3

61. This ground is that the Judge should have directed the jury that one of the ingredients for the offence under sub-section (3A) was that there had been a 'course of conduct' by the defendant within the meaning of the offence of harassment under the Protection from Harassment Act 1997 (PHA).

62. Mr Stein points first to the heading of s.1 of the 1977 Act, i.e. "unlawful eviction and harassment of the occupier". This reflects sub-section (2) (unlawful eviction) and sub-sections (3) and (3A) (harassment of the occupier).

63. As to the PHA, this provides by s.1(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.*"

64. By enacting the PHA Parliament must have intended a single definition of harassment within the criminal law; and that accordingly it is necessary under sub-sections (3) and (3A) to establish a 'course of conduct' by the defendant. The single act of disconnection of the water supply was not a course of conduct.

65. Further section 6 of the PHA inserts into s.11 of the Limitation Act 1980 (special time limit for actions in respect of personal injuries) an exclusion of the PHA from its reach: *'(1A) This section does not apply to any action for damages under section 3 of the Protection from Harassment Act 1997.'* Had Parliament intended to exclude the harassment provisions in the 1977 Act from the PHA definition of harassment, it could have done so. There was nothing within the PHA to suggest any such exclusion.

66. Similarly, the editors of Smith and Hogan, Criminal Law placed harassment under the two Acts within the same chapter and did not suggest any differentiation. Further, two decisions of this Court on sub-section (3) used the language of 'course of conduct': R v Ahmad; and R v Ishaque [2006] EWCA Crim 2538.

Conclusion on Grounds 2 and 3

67. In our judgment there is no merit in either ground. Dealing first with ground 3, there is no basis for importing the language of the PHA into the 1977 Act. True it is that the headnote of s.1 1977 Act refers to 'harassment'. However, the operative words of the relevant offences are those identified in ss.1(3) and 1(3A); and neither include the word 'harassment'.

68. If the legislative intent of the PHA were to create a comprehensive definition and code for all offences of 'harassment', the statute would have so provided. On the contrary, the PHA made no such provision and left the 1977 Act unamended; and in contrast to the amendment which it made to the Limitation Act 1980. Thus the absence of any reference to the 1977 Act points against the argument which is advanced.

69. The cited decisions of this Court also provide no support. In each case the phrase 'course of conduct' is simply used as a non-technical description of the conduct in the particular case. If it were a necessary ingredient, the Court would have said so. On the contrary the 'elements of the offence' are described by reference to the statutory language alone: see e.g. Glidewell LJ in Ahmad.

70. As to ground 2, in our judgment it is clear that one act suffices. In particular:

    (i) Polycarpou remains good authority. We do not accept that the subsequent insertion of s.1(3A), and in particular the word 'persistently' in s.1(3A)(b), demonstrates a contrary intention to the effect of s.6 Interpretation Act 1978. Nor, for the reasons given above, does ground 3 provide any support;

    (ii) Mitchell is to the same effect. It post-dates the 1977 Act, and s.1(3A) in particular. Whilst its focus is the issue of a Brown direction, it makes explicit that unanimity of the jury on one of the 'acts' alleged is sufficient.

    (iii) More generally, we see no discernible policy reason why an individual act, e.g. removing a gas ring which provides the only heating for the tenant (Polycarpou)

or disconnecting the water supply as in the present case, should not attract criminal liability if the other ingredients of the offence are established.

71. In any event, we also consider that a refusal to rectify a previous action (as opposed to a failure to do so) is capable of constituting a positive act rather than a 'mere' omission. In the present case the appellant had a duty to reconnect the water supply to her tenants; and the agreed directions and route to verdict were in terms that she had refused to arrange for reconnection.

Conclusion

72. The appeals on each of grounds 1, 2 and 3 are dismissed.