Neutral citation number: **[2022] EWHC 1960 (QB)**

Case No: QB-2021-001414

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2022

Before:

MR JUSTICE JAY

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Between:

(1) THOMAS HODSON
(2) HODSON DEVELOPMENTS LIMITED **Claimants**

- and –

(1) PERSON UNKNOWN A
(2) PERSON UNKNOWN B
(3) DAVID DARBY
(4) LAURENCE DARBY **Defendants**

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Jonathan Barnes QC (instructed by **Keystone Law**) for the **Claimants**
Simon Davenport QC (instructed by **Leverets**) for the **Defendants**

Hearing dates: 12th and 13th July 2022

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Judgment Approved

MR JUSTICE JAY:

Introduction

1. Throughout this judgment I will be referring to the First Claimant, Mr Thomas Hodson, as "TH", the Second Claimant, Hodson Developments Limited, as "HDL", the Third Defendant, Mr David Darby, as "DD", the Fourth Defendant, Mr Laurence Darby, as "LD", and their company Darby Groundworks Limited as "DGL". DD is the managing director of DGL and his elder brother, LD, is the senior contracts manager.

2. The Parties Unknown have not been identified and the claims against them cannot therefore be pursued.

3. HDL is a building and property development company. Its directors are TH and his father, Mr Alan Hodson. As TH explains in his first witness statement, HDL is developing and constructing the Chimlington Green site which is a 1,000 acre Garden Suburb town extension in Ashford, Kent. Building started in 2017 and 5,750 houses and associated amenities will be constructed over 25 years. Phase 1 consists of 1,500 units and is part complete. I have not been told how many units form Phase 2 and the detail does not matter for the purpose of this claim.

4. Between 2018 and 2019 HDL entered into three sub-contracts with DGL for the following:

   (1) Contract 1 for the groundworks for 67 houses and associated estate roads as well as foul and storm water drainage (Phase 1A). The contract price was £2,478,543.

   (2) Contract 2 for the groundworks for 50 houses etc. (Phase 2A). The contract price was £2,898,256.

   (3) Contract 3 for the construction of a 7m deep wet well for a Foul Water Pump (the Pump Station).

5. Disputes have arisen under these contracts. The resolution of these disputes cannot be my function, but they constitute important, relevant background to the present claim.

6. By this CPR Part 8 Claim TH and HDL seek final injunctions and damages pursuant to s. 3 of the Protection from Harassment Act 1997 in respect of alleged acts of harassment perpetrated at the instance of DD and LD. The basis of the claim is a number of threatening phone calls and voicemail messages made or left by persons unknown in March 2021, culminating in the grant of an interim order by this court on 23rd April. The alleged harassment ceased when the interim injunction was personally served on 27th April.

7. The nature of the harassment will be set out in greater detail below, but for these present introductory purposes I set out what the caller said on 16th March:

> "… I have been trying to call you. Pay the Irishman the 1.5 million pounds or else. … You know who the Irishman is. You better contact him or else."

8. DD and LD deny that they arranged or orchestrated this call or any of the calls that followed. They accept that they are of Irish origin but deny that this links them to the calls. Whether they were owed £1.5M is less clear and I will have to address that. It is DD's and LD's case that TH has concocted these calls in the sense that he is behind them. In a nutshell, the issue for me to resolve is whether TH and HDL can satisfy me on the balance of probabilities that these calls were made and that DD and LD were, inferentially, behind them.

9. Claims under the Protection from Harassment Act 1997 must be brought under CPR Part 8 but they need not remain there. The Order for an Injunction made on 23rd April 2021 by Mr Recorder Smith sitting as a Deputy Judge of the High Court required DD and LD to state reasons under CPR Part 8.8(1)(b) why the claim should be transferred to CPR Part 7 by no later than 4pm on Friday 7th May 2021. That did not happen. Given that it must have been clear to those advising DD and LD that there were substantial issues of fact, the CPR Part 8 procedure was no longer appropriate. At the very least, an application should have been made for a direction under CPR Part 8.6(2) and (3) as to oral evidence and cross examination. Fortunately, Leading Counsel for the parties very sensibly agreed that justice could not possibly be done in this case without the written evidence being thoroughly tested. It has proved unnecessary to make a formal order for transfer.

The Witnesses

10. I heard oral evidence from TH, DD and LD. It is clear to me that there is no love lost between the parties.

11. It is right that I set out my impressions of the witnesses.

12. TH is a well-spoken, polite, mild-mannered individual. He often gave wordy, circumlocutory answers to questions, seeking to provide the court with what he thought was relevant context. In the process, there was a tendency not to answer the question that was being put. On occasion, too, I found him quite evasive and defensive. TH is not an overtly aggressive person; indeed, I would say that he likes to "de-escalate" potentially confrontational situations by seeking to out-talk his interlocutors. I cannot accept that TH is a bully in the sense in which most people would use that term, although I can fully accept and understand that he is someone who might appear to people like DD and LD as more than willing to wear his opponents down.

13. Overall, TH is a man who believes that he is right and can be, or at least appear to be, intransigent. He digs his heels in and does not want to budge. That impression I have of him is also borne out by the fact that he is quite litigious (his evidence in one case was not accepted by HHJ Saggerson) and is prepared to wait until statutory demands and even winding-up petitions are brought before settling HDL's debts.

14. What I have said thus far does not assist the case of DD and LD one jot. Indeed, on one view it assists the case of TH and HDL: the more intransigent TH may come across, the greater the possibility that someone might resort to unorthodox techniques.

15. Was TH a credible witness? In certain respects his evidence was unsatisfactory, and I will address these in due course. However, on the critical issue in this case – the events of March and April 2021 – TH's evidence was much better. I was studying him closely

when he recounted the receipt of the various phone calls and voicemail messages, and in my judgment his evidence was firmer, more direct and not evasive in any way. He strongly repudiated the suggestion that he had concocted the calls or set up false flags, and he became quite emotional when addressing the impact on his family and the hiring of a private security firm. I am satisfied that TH's evidence was genuine in these respects.

16. Both DD and LD are less sophisticated people than TH. Frankly, I found them far more likeable. But that is not the point. With reluctance, I have concluded that their evidence was often exaggerated, and untruthful in a number of material respects; and I will be setting out my reasons. Moreover, I believe that there did come a time when they became heartily fed up with TH and decided to threaten him in a misguided attempt to make him see sense. DD denied at police interview that he had personally fallen out with TH although he claimed that TH had said to him that he would make him suffer.

The Underlying Commercial Dispute

17. According to para 56 of DD's first witness statement:

> "Darby has been trading successfully for 23 years now and we have never encountered a contractor like Hodson before. It appears to be TH's normal practice to avoid paying sub-contractors and to immediately launch legal attacks as soon as those parties take action against him to recover their unpaid sums. In the 35 years that I have worked in this business I have never dealt with this level of bullying and fabrication of defects in order to avoid payment of due payment applications. It appears that TH will go to extreme lengths to avoid payments."

18. What I have described as the underlying commercial dispute is undoubtedly complex and the available documentation gives me an incomplete picture. The focus of the trial was on drainage defects, but that is far from the whole story. DGL has advanced claims for prolongation, deferred works and an extension of time. I have seen some of the figures but have not been asked to drill down to the very bottom.

19. In my judgment, there are two matters which do require judicial resolution. The first is whether I may be satisfied that TH has deliberately manufactured or concocted defects in order to avoid payment. The second is the amount due and owing to DGL under these three contracts as at March 2021.

20. The first matter is relevant only in this indirect way. If TH is someone who is prepared to concoct defects (i.e. act dishonestly), the more probable it is that he might also be someone prepared to concoct these calls and messages. The second matter is relevant because the individuals issuing the threats were under the impression that £1.5M was due and owing.

Drainage Defects

21. A site meeting took place on 9th October 2019. DD's evidence was that TH refused to be specific about the alleged drainage defects, and was deploying them purely as an excuse not to pay.

22. DD's evidence was that at this site meeting he asked TH why he was continuing to sell houses and let the new owners in if there were drainage defects (see para 39 of his first witness statement). DD was not cross-examined about this evidence. TH accepted in cross-examination that there may have been a conversation along these lines. I felt that TH was being cagey about that, and he failed to give an immediate, clear answer to counsel's question as to when the first people moved in – November 2019. TH then said in cross-examination, and repeated this when I later asked him a question on the same topic, that the defects were remediated by HDL before the first people moved in. TH added that the costs of remediation were included in the running account between the parties.

23. In my judgment, TH's evidence hereabouts was unsatisfactory. Para 39 of DD's witness statement had been entirely clear and he had made a very reasonable point. Para 89 of TH's fourth witness statement said:

> "As regards para 39, I do not recall this conversation in October 2019 and do not agree with what he says took place. At that time HDL did not know the full nature and extent of the drainage issues. Our first house sale in Phase 1 was in November 2019, so I could not have had this conversation with DD at the time he alleges."

TH's attention was not drawn to para 89 during the course of his oral evidence. The final sentence of para 89 makes only a superficially good point because DD could well have been aware in October that people were about to move in the following month.

24. TH's evidence in cross-examination was materially different. TH was no longer saying that DD's evidence was untrue because he was wrong about the dates; TH was now saying that there were defects and they were remediated. I have not been shown any documents which support TH's new case.

25. One way or another, the fact remains that this issue was not fully explored in evidence. It has caused me to be sceptical about TH's evidence on the issue of drainage defects, but – taken in isolation – it does not fatally undermine him.

26. DD gave further evidence about the 9th October meeting. TH allegedly said that if DD alerted the new buyers to the issue with the drains, it would be a short-term problem for him and a long term problem for DGL which he would personally see to. There was no cross-examination about this evidence. DD also stated in evidence that TH retorted that he had solicitors on a £1M retainer per year. There was cross-examination on that topic. TH accepted that he may have mentioned solicitors (this was still in the context of a conversation that, according to para 89 of his witness statement, he could not recall), but did not believe that he said anything about a £1M retainer. TH said that he did not have solicitors on a £1M retainer. Later in cross-examination he said that he was certain that he did not say anything about a £1M retainer.

27. I am completely satisfied that TH did not have solicitors on a £1M yearly retainer. Unless he was both extremely wealthy and litigious, there would have been no need for that. Whether he uttered a threat along these lines raises a slightly different issue, and on balance I conclude that, although TH mentioned solicitors, he did not state a figure. Further, I am not satisfied that TH told DD that if he mentioned the drains to the new

buyers that would be a long term problem for DD. If there had been such a conversation, both men would have been proceeding on the premise that the drains were defective. However, it is DD's case that there were no defects and that TH has manufactured them.

28. DD states that there was a phone call from TH on 16th December 2019 during the course of which TH told him to drop all the claims in order to make the account run more smoothly. TH denied that he said this, although he accepted that there may have been a call. I cannot accept that TH made such a request, being one which he knew could not possibly have been accepted by DD.

29. In April 2020 an Adjudicator was appointed to deal with a dispute that had arisen in connection with Contract 3 – the Pump Station works. HDL's case was that there were defects in DGL's work, some of which related to the drains, to the tune of £377,600. In the result, the Adjudicator concluded that the true cost of remedying the defects was £22,280. This is an indication that HDL is prepared to advance an inflated claim but I do not read the Adjudicator's decision as supporting the proposition that either TH or HDL is prepared to put in a concocted claim. The point has been made that an Adjudicator's decision is interim only, although it is my understanding that it remains binding between the parties unless and until set aside or overtaken by court proceedings or arbitration.

30. It is debatable who "won" this Adjudication. DGL's fees were held to be subject to a contractual cap which meant that, even with a vastly reduced defects claim, no entitlement to further monies under Contract 3 could be established. On the other hand, it is obvious that reducing the defects claim by over 90% represented a considerable victory of sorts for DGL.

31. On 11th June 2020 Fenwick Elliott, DGL's solicitors, wrote to Gowling WLG (UK) LLP, HDL's solicitors, stating *inter alia*:

> "As to our 25 March 2020 letter, we note that we have not yet received a substantive response to Darby's comments in relation to Phase 2 in that letter …
>
> In our letter of 22 April 2020, we requested a copy of the as-built levels of survey of the surface water drainage system … in the Phase 2A section of the project you have referred to in your letter of 16 April 2020 in order that Darby could properly understand Hodson's allegations and address them appropriately. However, Hodson has not yet provided a copy of the survey referred to in your letter of 16 April 2020."

32. According to Gowling's letter dated 30th June 2020:

> "We enclose an updated list of the Phase 1 defects which sets out the defects in Darby's works including the internal foul drainage, external foul drainage, external surface drainage and a number of other areas of work.
>
> Hodson notified Darby of defective works on numerous occasions during site meetings and also by email on 29

> November 2019, 9 December 2019, 10 January 2020, 13 January 2020 and 5 February 2020 …"

Gowlings did not provide a copy of the as-built levels of survey.

33. The emails enumerated are not available, although the bundle does include a letter from Gowling dated 11th February 2020 which refers to a list of defects. Although I have not seen any such list (either in the context of that letter or the June 2020 letter), I cannot conclude that no such list exists, and that was not suggested by or on behalf of DD.

34. On 11th August 2020 DD sent an email to TH drawing attention to the "threatening manner and behaviour that Hodson's staff and site operatives applied to Darby's staff and its visitors". DD stated that DGL left site due to HDL not being able to release areas for the former to progress.

35. On 14th January 2021 there was a without prejudice meeting on site to resolve the issue of defects. Present at the meeting were TH, DD, LD and four other HDL operatives identified by TH in re-examination. DD's account, supported by his email of the following day, is that:

> "… Hodson did not allow Darby the freedom to inspect the site or alleged defects but instead continually intimidated Darby by having 5 Hodson staff members surrounding Darby.
>
> … Hodson were continually being disruptive and when they found it difficult and unable to answer straight yes/no questions, Hodson told Darby to immediately leave site."

36. TH's inability to answer "straight yes/no questions" rather rings true, but I cannot accept DD's evidence that he was physically intimidated. TH's evidence to me was that he said no more than "let's call it a day". That may understate the position, and it may also be the case that from TH's perspective the main purpose of the meeting was to seek to persuade DGL that he was right and they were wrong. But I am not satisfied that HDL and TH in particular were acting in bad faith.

37. There was further correspondence about drainage defects in January – March 2021 the terms of which I have considered. For present purposes I need only set out part of TH's email to DD dated 26th February 2021:

> "We also attach:
>
> - An updated List of Defects for Phase 2 [this is not in the bundle]
>
> - Drainage Defects As-Built plan by Vectos, the Civil Engineers for the works:
>
> - AB2 – this drawing shows the significant and minimum areas of drainage that requires remedial works …

> - AB3 – this drawing shows the drainage network that has not been installed in line with the design drawing – basically, all the drainage.
>
> You first received the drawing in June 2020. The only recent update to the drawing is that Vectos added a table on the drawing showing the:
>
> - Design levels
> - As built levels (independently surveyed)
> - Difference
>
> Note that this is not new information …
>
> We await your comments by return on the defects.
>
> We still continue to find further defective works upon carrying out further surveys and reviews of your works. It is also our position that senior individuals within Darby have been aware of these defective works but have chosen not to bring it to the attention of Hodson …"

38. The trial bundle does not contain a timely response to this email. A reply did not come until 20th April 2021 when Fenwick Elliott suggested that there be a joint inspection of the site to ascertain the correct as-built levels of the drains. Their understanding of the dispute between the parties was as follows:

> "It seems to us that the parties' position in relation to this allegation are entrenched. For the avoidance of doubt, Darby denies Hodson's allegation that the drainage installed by Darby is defective. Darby relies on its as built levels drawings, which it has provided to Hodson and which clearly show the drainage as running to appropriate falls, as evidence of the position. However, Hodson relies on its own as built levels of drawings as evidence of its position that the falls are inappropriate."

39. This letter came after the first wave of the alleged threatening calls but whether Fenwick Elliott knew about those is unclear. What is clear is that Fenwick Elliott were not alleging that HGL were acting in bad faith.

40. Gowlings replied to Fenwick Elliott's letter on 22nd April. After pointing out that the timing of this correspondence was not a coincidence, Gowlings stated that the independent reviews of Vectos and MLM, testifying to drainage defects, had "we understand" been provided to DGL. Gowlings doubted DGL's ability to carry out the necessary remedial works, and observed that the issue identified by Fenwick Elliott was important albeit "there are numerous other examples of Darby's defective work aside from drainage installation". In those circumstances they could not agree to a joint inspection.

41. My conclusion on the issue of drainage defects is as follows. The bundle is incomplete and probably rightly so, the parties apprehensive of burdening me with too much information on a subordinate issue. The observation by Fenwick Elliott that both parties had adopted entrenched positions is not wide of the mark. I am fully prepared to accept that TH has been high-handed and may have taken advantage of his superior bargaining power in this commercial relationship, not least because HDL are, at least on paper, the paying party. But what the available evidence does not permit me to conclude is that TH has acted in bad faith by deliberately concocting a defects claim which he knows to be false. That may be the perception of DD and LD, but for me it is at least one step too far.

The Amount Due and Owing as at March 2021

42. TH's evidence on this topic lacks clarity.

43. According to his police statement, which I will be returning to, HDL were withholding just over £1M. According to his oral evidence, his understanding or perception as at the time of the first threatening call (sc. mid-March 2021) was that the amount being withheld was in the bracket of £1.1 - 1.2M. Given the threats made, it would have been easier for him to say – if he were being untruthful that is - that he thought that the amount withheld was £1.5M, but that may be over-analytical. According to para 39 of his first witness statement, the amount withheld on Contract 1/Phase 1 was £668,113.55, on Contract 2/Phase 2 was £507,754 and HDL were also claiming an overpayment on Contract 3 in the sum of £379,542 "being the expert cost witness report submitted in the Adjudication". Adding all these figures together yields a sum of about £1.55M, at least "on one view".

44. Mr Simon Davenport QC cross-examined TH on these figures. TH came across as someone who gets his mind around figures very quickly. The figures of £668,113.55 and £507,754 correspond with documents in the bundle on which I need not dwell. TH's dogged adherence to the £379,542 is not attractive, not least because, and contrary to the first witness statement, the Adjudicator did not find that these were the costs of repair. The figure was less than 10% of that. In my judgment, this is further evidence of TH's intransigence and inflexibility.

45. Although the £379,542 figure, rightly or wrongly, appeared in the PayLess Notice dated 26th February 2021, the right question is not the amount in dispute (which on TH's analysis does appear to be around £1.55M) but the amount HDL was withholding. HDL was not withholding the £379,542 because they had already paid it. If DGL had been on the same page as HDL, their thought-process would have been that they were owed nearly £1.2M. (£668,113.55 plus £507,754 is £1,175,687.55).

46. DD's evidence about the state of the account was no better. He told the police at interview that the sum being withheld was close to £2M. In his witness statement filed on 7th December 2021, LD stated that the amount withheld was £1,457,607.54 less retentions. I have not been able to reconcile that figure with the PayLess Notices contained in the bundle, but I cannot say that it must be wrong. DGL's payment applications for January and February 2021 were for £1,175,687.55, and it is possible, contrary to DD's oral evidence that the retentions came to approximately £200,000, that they were closer to £280,000. DD accepted in evidence that the retentions were not due and owing at this stage, but whether that was his state of mind in March 2021 may be

open to question. The £1.457M figure is not far off the £1.5M that formed the basis of the threat.

47. Aside from accruing interest, the indebtedness, from DGL's perspective, could not have changed much between March and December 2021. Although it was later to be asserted on DGL's behalf that the indebtedness increased between January and March, I do not believe that this could have been so.

48. In my judgment, the evidence relating to the state of the account between the parties is somewhat inconclusive. The focus should be on the amounts being withheld by HDL rather than on whether there was any right to withhold. Further, the focus should also be on the parties' respective perceptions – as at March 2021 – of what was being withheld rather than on what the accounts may actually have shown. Overall, the better view on the evidence is that the true figure was closer to £1.1 – 1.2M than £1.5M, but that does not rule out the possibility that DGL wanted the latter.

49. This analysis of the figures far from proves that DGL believed that £1.5M was due and owing, in the sense of being withheld, in March 2021, but it does not preclude it.

50. In any event, what is more important in this context is whether anyone else was owed £1.5M, or anything like it, by HDL. It is to that issue that I will now turn.

Gallaghers

51. DD told the police at interview that Gallaghers, another Irish company, were owed in the region of £1.5M.

52. TH denied in evidence that this was the case. He said that relations with Gallaghers remained cordial and that there had been no substantial financial disputes. TH referred to a certificate of practical completion which to my mind does not show that there were no significant financial disputes, but I have seen no document that proves that there were.

53. According to para 54 of DD's first witness statement:

> "I was told by an associate at Gallagher .. that Hodson disputed and refused to pay their applications for payment totalling around £1.25 – 1.5M, arguing alleged defects in their work. This still has not been amicably resolved."

54. In his oral evidence, DD said that this was "100% true". The reason Gallaghers were not giving oral evidence was that they had been awarded a contract to build a school at the Chimlington Green development (not by HDL) and did not want to create difficulties for themselves. It was completely unclear when this happened. Later in his cross-examination, DD said that he had spoken to Gallaghers just three days previously, and that although HDL had invited them to submit a further tender they would never work for them again.

55. In my judgment, DD gave vague and unconvincing evidence about the alleged debt due from HDL to Gallaghers as well as the reasons for the latter not giving evidence at this trial. Moreover, there was an inherent oddity about DD's case which should be pointed

out. The whole point of telling the police about Gallaghers was to make them a prime candidate for the alleged harassment. They were Irish and were owed the right amount. If that were true, Gallaghers were never going to be giving evidence about an alleged debt of £1.5M. DD must have understood this. Simultaneously, however, DD in his oral evidence was seeking to build up the credibility of Gallaghers and the cordiality of his relations with them.

56. Furthermore, if TH knew that HDL owed or had owed Gallaghers £1.5M, his evidence to me would have been a brazen and categorical lie. I do not accept that it was. He would not have "clicked" (see below) that the "Irishman" was DD.

57. I conclude that the reason DD mentioned Gallaghers in the first place was to seek to deflect the blame. He has singularly failed to do that, and in my judgment that significantly impacts on his overall credibility.

58. In addition, there is no evidence that anyone else was owed £1.5M or anything close to it by HDL.

Two Further Matters Relevant to the Credibility of DD and LD

59. According to para 53 of DD's first witness statement:

> "The window and door sub-contractors actually started to physically remove the installed windows on one occasion I recall, and this was due to Hodson disputing and then not meeting their applications for payment."

60. On 24th May 2021 Mr Spicer of Munster Joinery confirmed by email that "we have not removed any windows or doors from this or any other Hodson development". Confronted by this evidence, DD then said that a sub-contractor started to remove the windows and doors. That entity was not named. I cannot accept DD's evidence about that.

61. Secondly, at the very end of his evidence LD told me that he did not know the amount of money that was being withheld by HDL although it may have run to the hundreds of thousands of pounds. I regret that I cannot accept that his younger brother did not tell him.

Peripheral Matters

62. TH was cross-examined at length on a number of matters which may best be described as peripheral. Had TH's credibility been substantially undermined by this cross-examination that would have advanced DD's and LD's case a certain distance, but in my view the endeavour was not successful.

63. A number of disgruntled customers have placed online reviews about HDL. There is some evidence of threats of legal action and/or advising customers to take down these reviews before their complaints would be addressed. Tactics of this nature are as commonplace as they are unethical. It was put to TH that he is responsible for the culture of his organisation, but I am not satisfied from the answers he gave that he encouraged employees to act in this way.

64. There is some evidence that HDL's holding company is trading at a loss. This is to be balanced against the evidence, which DD accepted, that the withholding of over £1M has caused DGL financial difficulties. I am not sure that any of this evidence is of any real assistance. It cannot be denied that over £1M is a substantial sum of money for both parties. Even if DGL's financial difficulties were greater than those of HLD or its holding company, that would not really assist me in resolving the main issue.

65. Mr Davenport also cross-examined TH on the s. 106 agreement with Kent County Council. In my opinion, this led nowhere.

The Alleged Harassment

66. On Monday 15th March 2021 TH received a number of missed calls from mobile number 07417425380. TH tried calling that number but did not get through.

67. On 16th March there were more calls from that number. At 11:39 TH answered the call and heard the following:

> "… I have been trying to call you. Pay the Irishman the £1.5M or else. You have 24 hours or else.
>
> … You know who the Irishman is. You better contact him or else.
>
> … We have written to you."

68. According to TH, the caller spoke in an East London accent. He "clicked" that this must be a reference to the Darbys.

69. There was another call at 11:48 and the gist of the message was repeated.

70. TH reported the matter to the police, informed his solicitors and was advised to contact Blackstone Consulting for security. The latter were retained the following day.

71. On 17th March two police officers attended HDL's offices in Park Lane. According to TH, they needed help in preparing a brief statement on an iPad or similar device. The statement provided:

> "The value of the contracts is around five million and we are withholding the value of just over one million. There [sic] company took the matter to tribunal. To which the company I worked for won and did not have to pay anything to [DGL].
>
> … The voice had a strong Essex accent.
>
> … I believe this comes from the contractors we hired as this is the only dispute the company I work for has had that has gone to tribunal with and the was a large sum of money that we did not have to pay. [sic]"

72. Although it is correct to say that the upshot of the Adjudication was that HDL did not have to pay any money to DGL in relation to Contract 3, TH appears to have been

giving the misleading impression that the "tribunal" had absolved him across the board of the obligation to pay just over £1M or any amount. Or, and perhaps more accurately, that was the impression he was giving had he given the matter a moment's thought.

73. I have thought long and hard about this since the hearing. At one stage I was of the view that TH was deliberately misleading the police in relation to the threat: he was claiming not merely that the threat was made but it was entirely unwarranted because a tribunal had held that nothing was due and owing. Ultimately, however, I have concluded that this is not the correct interpretation of what happened. TH is not so Machiavellian that he would have thought along these lines, and the better explanation is that the police officers formed this misunderstanding which was then left uncorrected before he signed the police statement.

74. On 23rd March Tuckers drafted a letter on behalf of TH and HDL which was not sent by email until 29th March. The delay has not been explained. The letter too refers to "a clear unwarranted demand for £1.5M" but it was written from the viewpoint of criminal solicitors steeped in s. 21 of the Theft Act 1968 rather than the law of harassment.

75. On 28th and 29th March there were a number of calls from a different number, 07751742853 which, on police advice, TH did not answer.

76. On 30th March 2021 a voicemail on TH's mobile phone was left from the 853 number:

> "This is a message for Thomas Hodson. Get in touch with the Irishman and pay him the money. If not, we are coming for your family."

77. TH reported this to the police and increased his private security arrangements.

78. On 1st April, which was Maundy Thursday, TH attempted to contact DD by phone to discuss "de-escalation". DD was in a meeting which did not end until 18:45, and he did not return the call.

79. TH was closely cross-examined by Mr Davenport on this call. It was put to him that if DD had instigated these calls he would have been expecting TH to get in touch with him ("get in touch with the Irishman") and would either have taken the call immediately or phoned him back. The fact that he did not proves that DD was not the instigator of these calls.

80. TH did not immediately understand the subtle point that Counsel was making, and I had to repeat it. TH's answer was that he believed that DD's failure to revert to him was part of the harassment.

81. This seam of evidence is not easy to interpret. TH's attempt to speak to DD was unwise. Taking the message at its face value, one could well argue that DD's blackmail attempt required, in order to be efficacious, a positive response from TH and DD hearing it, and TH had made such a response. Even so, in my experience people do not always act rationally. If DD were behind these threats, *ex hypothesi* he was acting irrationally and stupidly (a point which cuts both ways, of course) and would not necessarily have been thinking through all the ramifications. One possibility, as Mr Jonathan Barnes QC put to me in closing argument, is that TH could simply have refrained from submitting a

PayLess notice at the end of the month and DD's objectives would have been secured. Another possibility is that DD had only received the letter from Tuckers a couple of days beforehand and was still pondering what to do next.

82. On 12th April Keystone Law wrote a pre-action protocol letter to DD and LD and sought written undertakings by 5pm on Tuesday 13th April. DD and LD did not respond immediately to this letter.

83. On 16th April the CPR Part 8 Claim Form was issued, together with an Application Notice for an interim injunction.

84. On 18th April TH received two calls on his mobile phone from "No Caller ID". These were referenced in his second witness statement dated 19th April.

85. On 19th April Corker Binning acting on behalf of DD and LD replied to Keystone Law's letter. The allegations against DD and LD were vehemently denied. The delay between 12th and 19th April was not explained, nor indeed was the earlier delay following Tuckers' letter. DD's and LD's evidence to me was that they were taking legal advice. In my view, they were dragging their heels.

86. The final paragraph of Corker Binning's letter provided:

> "Our client is concerned that you and Tucker's letters are part of a smear campaign by your client. A large debt has been accumulating over a number of month [sic] as a result of non-payment most of which has been incurred since January 2021. The difference between our client's position and your client's position has increased significantly since January 2021."

87. It was not correct to say that the debt had substantially increased in this way but DD may have perceived that it had. He is caught on the horns of a forensic dilemma. Either he gave his solicitors false instructions, or he lays himself wide open to the observation that the stronger may have been that perception, the more likely it could be that he would resort to unorthodox measures.

88. On Friday 23rd April the remote *inter partes* hearing took place. The injunction being sought was not formally opposed. I read nothing into that because, as the Deputy High Court Judge stated, the granting of the relief did not depend on the court being satisfied that TH's and HDL's case was substantially correct. The Order contained the following "carve out" which was made at the initiative of those representing TH and HDL:

> "… provided that this does not prevent the sending of lawful communications or demands to talk to or pay to the Claimants' advisers through legal representatives or the Third or Fourth Defendants sending PayLess Notices or other contractual or statutory notices or correspondence under contracts with the Second Claimant …"

89. DD and LD were aware of the terms of the Order on the date it was made, but the Order was not personally served until approximately 14:35 on 27th April.

90. On Monday 26th April at 08:00 TH received a voicemail message on his mobile phone from 07950223568:

> "This is a message for, er, Thomas Hodson.
>
> Call the Irishman. He will give you bank details to pay the money you owe. If you don't your family will find out who we are."

According to TH's evidence, the voice had a foreign accent.

91. This message was at least triply crass. TH already knew the bank details of the "Irishman". The latter had not taken his call on one occasion and had not called back. The instigator of the call, if it be DD and/or LD, was by now well aware that TH was not going to pay. Mr Davenport prays in aid this crassness in support of a submission that DD and/or LD could not have been behind the calls.

92. At approximately 12:30 on the same day Keystone Law sent a text message to the three mobile phone numbers in these terms:

> "We are lawyers acting for TH and HDL. This text is to give you notice that our clients have obtained a court order against DD and LD that they must not whether by themselves or through others threaten or harass TH. Please email us at …"

93. On 27th April TH received four missed calls from "No Caller ID". At 12:31 he received a voicemail message from the 568 number in these terms:

> "Stop hiding behind solicitors letters. Pay the money you owe, owe. We are coming for your family you c***."

The voice was the same as that behind the previous day's message.

94. At 12:48 on 27th April Keystone Law received a text from the 568 number in these terms:

> "Solicitors letters won't stop us doing what we have to do send as many as you like you now all sleep well I'm going to enjoy the next bit."

95. DD and LD accepted in evidence that only they knew about the solicitor's text message and earlier letters.

96. After personal service had been effected, Keystone Law wrote the following letter to Leverets:

> "… If your clients are behind the calls being made then they are acting in breach of the court order made on last Friday …"

97. Mr Davenport suggested that this was less than a ringing endorsement of the correctness of Keystone Law's clients' claims. With respect, that was not Mr Davenport's best point. Mr Roxborough was being appropriately cautious, not least because he was giving his opponent an opportunity to climb down.

98. I should add that some of the phone calls I have itemised appear as screenshots in the bundle.

99. Later on, both DD and LD were arrested and interviewed. The bundle contains only the police interview of DD and I have referred to a number of key matters. The police decided to take no further action, no doubt aware of the difficulties of proving blackmail in the circumstances of this case to the criminal standard.

Relevant Legal Framework

100. Section 1 of the Protection from Harassment Act 1997 provides:

> "**1 Prohibition of harassment**
>
> (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.
>
> (2) For the purposes of this section or section 2A(2)(c), 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 harassment of the other.
>
> (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."

101. Section 3 provides, in material part:

> "**3 Civil remedy**
>
> (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."

102. There is nothing between the parties as to the governing legal principles.

103. In *Hayes v Willoughby* [2013] UKSC 17; [2013] 1 WLR 935, Lord Sumption characterised harassment as:

> "… a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress."

104. The dividing-line between irritating and annoying conduct on the one hand, and unreasonable and oppressive conduct on the other, is a matter of fact and degree: see Lord Nicholls in *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34; [2007] 1 AC 244.

105. It is not in dispute that if TH's evidence is true the phone calls and voicemail messages in question amounted to harassment within the meaning of s. 1.

106. The civil standard of proof applies: see *Hipgrave v Jones* [2004] EWHC 2901 (QB). Although proof to a high standard is not required to reflect the seriousness of the conduct alleged, the familiar principle expounded by Lord Nicholls in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 is applicable:

> "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probabilities."

Harassment is a criminal offence and engages this principle.

107. Mr Davenport submitted that the case of TH and HDL has proceeded by way of inference alone. In *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, Lord Wright drew a distinction between inference on the one hand, requiring as it did the proof of sufficient positive facts from which a secondary fact might be deduced, and speculation and conjecture on the other. These principles are well understood. In *Potter v Price and another* [2004] EWHC 781 (QB), the court did infer that a series of

anonymous phone calls had been made by the defendants. Mr Davenport submitted that in that case (cf. the present case) there was positive evidence from which the relevant inferences could appropriately be drawn.

108. HDL has been joined in the claim as an interested person. Only TH claims general damages for alarm, fear and distress, as well as special damages for the cost of hiring security services.

Mr Davenport's Submissions

109. Mr Davenport submitted in writing that the quality of the evidence adduced by TH is so poor and is a hallmark of fabrication. There was a five month delay in providing to DD's and LD's solicitors the electronic files containing the voicemail messages. He submitted that TH and HDL had acted in a high-handed and obstructive manner in relation to the underlying commercial dispute, and that it was highly likely that the company was in financial difficulty. By contrast, he submitted, DGL were not under such difficulties.

110. Mr Davenport submitted that TH was obviously pursuing a strategy of concoction for avoiding DGL's debt claims and keeping them at a distance. It was inherently improbable, he submitted, that decent men such as DD and LD would have acted in so blunt and crass a fashion. It was even more improbable that they would have continued to act in this way after the interim injunction hearing on 23rd April. Even if the calls were made, there was no evidence at all to support the inferential case that DD and LD were behind them.

111. Mr Davenport further submitted that after the dispute first arose in November 2019 DGL pursued it in an entirely orthodox and appropriate fashion, using highly competent solicitors and attending at least one without prejudice meeting in an attempt to resolve the dispute.

112. In closing argument Mr Davenport submitted that his clients were clearly telling me the truth and that TH was not. He advanced a series of interesting submissions directed to the application of the concept of the civil burden and standard of proof in this case. He submitted that the overall history of the relationship between the parties betokened a pattern of intimidatory and bullying behaviour on the part of TH, as well as of ethically dubious conduct in relation to the online reviews and the s. 106 agreement.

113. I asked Mr Davenport to crystallise his case for me on the issue of concoction and TH's possible motives. He submitted that the advantage to TH in concocting these calls etc. was to allow HDL to terminate the contracts, to retard the payment obligation, and to put in place, through the court, a controlled environment in which communications could take place.

114. Mr Davenport advanced other submissions which I have not found it necessary to record.

115. A brief summary of the written and oral arguments of Mr Barnes is not required. I accept many of them.

Discussion: Liability

116. During the course of the hearing I was receptive to the possibility that TH had concocted this story in order to achieve some sort of strategic or tactical advantage in relation to the underlying commercial dispute, which had become increasingly bitter. As I have already said, there were aspects of TH's evidence which gave rise to concern, as well as the manner in which he gave it.

117. By the end of LD's evidence, however, I was completely satisfied that TH and HDL had proved their case to the relevant standard.

118. Many of my reasons have been prefigured.

119. TH and HDL have clearly proved that there were phone calls and voicemail messages left. That, in itself, does not constitute proof that DD and/or LD (the brothers are indistinguishable for these purposes) were behind the calls, and I agree with Mr Davenport that this could only be established as a matter of inference.

120. However, at the conclusion of the evidence in this case I indicated to counsel that it seemed to me that there were only two sensible possibilities here: either TH concocted the calls, or DD and/or LD were behind them. The possibility of "miscreancy", as Mr Davenport put it, did not sensibly arise. I have set out the sequence of events in some detail, but one of the key points is that only TH, DD and LD knew of the solicitors' letters.

121. Mr Davenport's initial reaction was not to take issue with what might be described as a binary analysis. However, in oral argument he presented me with four possibilities, viz.:

(1) Concoction;

(2) TH's evidence was of no probative value;

(3) TH and HDL had failed to discharge the burden of proof;

(4) Miscreancy.

122. Mr Davenport did not place before me a fifth possibility, which is that TH's evidence was substantially true. If it were, I adhere to the view that (4) above cannot sensibly arise, and that the inferential case that DD and/or LD must have been behind the calls is made out.

123. The proposition that there are only two sensible viewpoints does not carry with it any implication that DD and LD must prove concoction. At no stage does any burden of proof shift in their direction. I bear in mind these two binary hypotheses in forming my final judgment as to where the truth lies, but in formal terms the position must be this:

EITHER: TH and HDL have proved their case on the balance of probabilities that the calls etc. were made and that TH was genuinely distressed as a result (he would not have been genuinely distressed had he concocted them)

OR: TH and HDL have not proved their case on the balance of probabilities.

124. The second option does not require a finding that TH therefore concocted the calls, but if I were satisfied that he did it seems to me that I should so hold.

125. Mr Davenport strongly submitted that it was just as likely that TH concocted these calls as DD and/or LD were behind them. He argued that the second possibility was inherently implausible (he was not prepared to accept any implausibility as to the first possibility). I cannot accept this analysis. In terms of the inherent probabilities (i.e. the likelihood of X as opposed to Y having taken place as a matter of first impression and before any proper examination of the evidence), the concoction hypothesis is less plausible than the genuine harassment hypothesis. It would require a level of deviousness and dishonesty far greater than the crass and blunt behaviour of the callers and those behind them, assuming that they were genuine calls. I should emphasise, lest I be misunderstood, that what I am calling inherent probability is only the starting point.

126. Despite my reservations about some of TH's evidence elsewhere, I am satisfied that what he told me about the calls and his reaction to them was truthful. He was not evasive and keen to contextualise; he answered Mr Davenport's questions in a direct and honest fashion, aware that I was watching him very closely. His immediate reaction was to call the police, instruct solicitors and hire security. His evidence on these matters has been consistent throughout, and it contains no real weaknesses. I am persuaded by what he told me, and the manner in which he said it, that he has not created a synthetic edifice for his own perverse reasons, with all the risks that would involve.

127. I have already indicated the respects in which I have found DD and LD to be unsatisfactory witnesses. Further, the delay in responding to TH's and HDL's allegations via solicitors is inexplicable if they had a genuine defence, and I also think that it is a striking feature of the evidence that the harassment stopped after personal service of the injunction. At that point, whatever their state of mind before, they fully appreciated and understood the consequences of breach.

128. I have also referred to the features of the evidence which can only be described as odd. If DD and/or LD were behind the calls, they knew that TH was fully aware of DGL's bank details. The messages sent on 26th and 27th April were almost ridiculously crass, given amongst other things the risks they were taking. However, it is a false endeavour in cases of this sort to seek to analyse the evidence too closely for complete coherence, and to attempt to attribute a logical and sensible thought-process to behaviour which is inherently irrational.

129. Overall, I am satisfied by a wide margin that the case of TH and HDL has been proved.

Discussion: Remedies

130. I have decided that TH and HDL are entitled to a permanent injunction because there is a risk that without it this conduct might be repeated. DD and LD have obeyed the interim injunction, but I am far from convinced that without legal protections there would not be a repeat.

131. TH is entitled to general damages for distress. He is not entitled to recover damages as a proxy for his family's distress. Para 43-019 of *McGregor on Damages* provides some useful guidance. *S&D Property Investments Ltd v Nisbet* [2009] EWHC (Ch) provides the closest analogue to the present case. There, £7,000 was awarded as compensation for harassment carried out in connection with the non-payment of a debt. The conduct in the instant case is more serious, and in all the circumstances I award the sum of £11,500 as damages for distress and injury to feelings.

132. As for special damages, I think that I can take judicial notice of the fact that the sums charged by this security company were, and are, on the high side. However, a claimant in these circumstances is not required to shop around, and in my judgment the nature of the threats justified 24-hour security.

133. Once the injunction was in place, TH had a substantial measure of protection. The law requires him to act reasonably, and in my judgment there soon came a time at which further security was no longer reasonably required. In my judgment, after about one month, it should have become clear to TH that the injunction was effective. In all the circumstances of this case I allow the claim for security services at the rates and over the hours sought but only until 23:59 on 27th May 2021.

134. I invite Counsel to draw up an order reflecting my findings.