

## THE HIGH COURT

[2012 No. 8738P]

BETWEEN

DERIDRE SULLIVAN

PLAINTIFF

AND

GERARD BOYLAN, GERARD BOYLAN

BUILDING CONTRACTORS LTD. AND PATRICK MCCARTAN

DEFENDANTS

**JUDGMENT of Mr. Justice Hogan delivered on 4th October 2012**

1. In the aftermath of the Supreme Court's decision in *Damache v. Director of Public Prosecutions* [2012] IESC 11, the Court of Criminal Appeal has taken the opportunity in a series of cases to emphasise what Hardiman J. described in *The People (Director of Public Prosecutions) v. Cunningham* [2012] IECCA 64 as the "intrinsic importance" of Article 40.5 of the Constitution- with its guarantee of the "inviolability" of the dwelling- to a free and democratic society.

2. In another post-*Damache* decision, *The People (Director of Public Prosecutions) v. O'Brien* [2012] IECCA 68, Hardiman J. also observed that:

"Article 40.5 by guaranteeing the 'inviolability' of the dwelling reflects long standing constitutional traditions in both common law and civil law jurisdictions, features of which were stressed in both *Damache* and *Cunningham* respectively. This constitutional guarantee presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world. In so doing, Article 40.5 complements and re-inforces other constitutional guarantees and values, such as assuring the dignity of the individual (as per the Preamble to the Constitution), the protection of the person (Article 40.3.2), the protection of family life (Article 41) and the education and protection of children (Article 42). Article 40.5 thereby assures the citizen that his or her privacy, person and security will be protected against all comers, save in the exceptional circumstances presupposed by the saver to this guarantee."

3. While these comments were made in the sphere of criminal law, they may be thought to have a particular resonance for the present case, where so far from the plaintiffs own house being a "place of repose from the cares of the world", the actions of the third named defendant have contrived to make it a misery. How has this situation come about and what should the judicial response to such conduct be? These are essentially the issues which are presented by this application for an interlocutory injunction.

4. The plaintiff, Ms. Sullivan, lives in Clontarf, Dublin 3. She engaged the first and second defendants (whom I shall collectively describe as "Boylan contractors") in December 2011 to build an extension to her property and to carry out certain refurbishments works. The works commenced in February, 2012 and ceased in May, 2012. By April, Ms. Sullivan had paid €84,000 of the initial contract sum of €91,250. There was subsequently a dispute as to whether certain contracted works had been carried out or whether instead certain additional work had to be performed over and above that which had originally been contracted for. In sum, therefore, the issue is whether Ms. Sullivan owes the Boylan contractors €7,000.00 (approximately) or €20,000.00 (approximately) or perhaps nothing at all.

5. It is clear nevertheless that there is a legitimate argument regarding the existence of any such debt or, if there is a debt, the amount of same. The Boylan contractors decided, however, to be put the matter into the hands of a debt collector, Patrick McCartan. It is the latter's conduct which has given rise to this application for an interlocutory injunction.

**The Conduct of Mr. McCartan**

6. The first contact which Ms. Sullivan had with Mr. McCartan was on 1st August, 2012. She received a telephone call from him during which Mr. McCartan identified himself as someone who worked with financial institutions. He said that he had heard from Mr. Boylan and wanted to hear her side of the story. She had understood Mr. McCartan to be some kind of intermediary, and while Mr. McCartan sought a meeting, Ms. Sullivan indicated that she would get back to him.

7. Ms. Sullivan did not have to wait long for Mr. McCartan. He turned up unannounced on the 3rd August, and appears to have allowed himself through the front door. Ms. Sullivan, whilst surprised, was not taken aback by this because Mr. McCartan did not then behave aggressively. He identified himself as the person who had rung earlier, and she invited him further into the house to show the difficulties which had arisen on the construction works. Mr. McCartan did not say that he was a debt collector but rather indicated that - or, at least appeared to indicate that- there might be some room for a constructive engagement between Ms. Sullivan and Mr. Boylan.

8. Matters changed for the worst on the 8th August, when Ms. Sullivan received an email from Mr. McCartan claiming she owed the sum of €23,783.00. The email was in the following terms:-

"I can have Mr. Boylan accept if paid by Friday the sum of €20,000.00 of which payment must be made [directly to a particular bank account]. Failure for this to appear in the account by Friday 12 noon, my instructions are to act immediately and secure judgment and park our vehicle DEBT COLLECTOR fully signage outside your house and place of work. I really would prefer an amicable agreement to settle, however I have a responsibility to my client to collect as per instructions with less interruption from yourself. You do not need any more grief from neighbours and the site of a large van with signage directed and with your details is something that should be avoided. I expect your reply and settlement as per instructions above."

It was purportedly signed in the name of Greenbank Solutions Credit License 564337 licensed to operate in the UK, Ireland, USA, and Europe.

9. On receipt of this email Ms. Sullivan contacted her solicitor who, in turn, agreed to send on a letter to Mr. Boylan. On the 10th August, Mr. McCartan contacted Ms. Sullivan by telephone. She explained that she had instructed her solicitor to handle matters with Mr. Boylan. Shortly after that she received a text message from Mr. McCartan in the following terms:-

"Deirdre you have refused to co-operate, I gave you a week and no reply. I am assuming no payment has been made. I have it made quite clear a full €23k is now required plus 10% our fee or we will expose you on this debt and will get it."

She received approximately seven further phone calls from Mr. McCartan from the same telephone number later that afternoon, but she did not answer them.

10. Not surprisingly, Ms. Sullivan was extremely distressed by this persistent calling and she sent him a text message asking him to desist from this. She then received a further text message from Mr. McCartan in the following terms:-

"My calls and presence will continue. You created the problem and agreed with me. I .... will embarrass you to your neighbours if you continue also a charge will be placed on your property and a judgment. Your choice as my client is correct."

Ms. Sullivan's solicitor, Mr. MacGuill, then wrote a further letter to Mr. McCartan asking him to desist from this conduct and drawing his attention to the provisions of s.10 and s. 11 of the Non-Fatal Offences Against the Person Act 1997 ("the Act of 1997"), and indicating that any further direct approaches to her for the sums in dispute would be referred to the Gardai.

11. Unfortunately, however, Mr. McCartan did not desist. He sent her an email on the 15th August in the following terms:-

"Dear Madam,

Unfortunately for you and your lies this matter is now being in possession and legal charge being obtained immediately please do not insult me with a letter of a so called solicitor with no letter heading or qualifications why has he to hide all you have a minimum of three days to pay or your broader investments and business will be of interest to the Revenue, do not underestimate my knowledge of your hidden undeclared properties and business."

Ms. Sullivan comments in her affidavit that:-

"I have no undeclared properties and business. I had had issued in relation to foreign property [which] were sorted out with the Revenue Commissioners a number of years ago with the assistance of a tax adviser. I do not know how Mr. Boylan or Mr. McCartan obtained access to that information."

The harassment nonetheless continued unabated, as another email followed:

"Dear Madam,

Your non-cooperation adds to our increased demand for payment due to Mr. Boylan. If you decline to acknowledge as from tomorrow as previously indicated we will cause you severe embarrassment, your neighbours have also indicated they will not tolerate increased traffic or nuisance operations causing inconvenience to their access. We are within our rights and failure by you to settle your debt will only add to your discomfort in the area. You owe the money so pay up and save yourself all this embarrassment. We look forward to your early settlement.

Greenbank Collections Licensed Debt Collectors."

Worse was to follow. On Friday 24th August Ms. Sullivan received an email from Mr. McCartan as follows:-

"We will be in attendance after 4.00pm for full debt otherwise our van will maintain a spot outside your house to highlight your refusal to settle."

There then followed a text message:-

"We are sitting outside till you come out with payment €25,000 or we start knocking on doors and telling the neighbours."

12. Ms. Sullivan was extremely alarmed by this, but felt that she had no option but to return home immediately from work. She found a large Northern Ireland registered white van parked directly in front of her house with the signage - "Licensed Debt Collectors" - prominently displayed. Ms. Sullivan recognised Mr. McCartan and spoke to him. She drew attention to the fact that her architect was finalising her report on the disputed works. Ms. Sullivan was very distressed and in her agitated state she called Mr. McCartan a criminal. While it is clear from her affidavit that she was contrite about having made that statement, one must adjudge it to be pardonable in the circumstances given the extreme distress to which she had been subjected. Mr. McCartan indicated that he took exception to her remark and telephoned Mr. Boylan. However, there was an altercation between Mr. McCartan and Ms. Sullivan and a very unsatisfactory subsequent conversation between Mr. Boylan and Ms. Sullivan.

13. As indicated, Ms. Sullivan was extremely distressed as a result of this and drove to Clontarf Garda Station. Ms. Sullivan found the Gardai very sympathetic and they had not previously been aware of Mr. McCartan's presence outside her house. They accompanied her back to her house where after discussions with Mr. McCartan the Gardai indicated that he would leave shortly. The Gardai acknowledged, however, that they were powerless to stop him coming back. The Gardai were also plainly of the view that they could take no steps as such to stop Mr. McCartan parking his vehicle with the debt collection signage directly outside Ms. Sullivan's house.

14. Shortly he had parked his van outside her house, Mr. McCartan sent Ms. Sullivan another text in the following terms:-

"Madam, solicitors are money grabbing hoods without the mask. Do not threaten me with an uneducated [solicitor] as most were fraud in the good times. You have till Monday to have €20k in my account or else the Garda said I can park outside if I want. Your neighbours are not impressed and we will be back if you refuse to pay with your name in large print Monday. As for your remark a full apology and I will have you for every euro you may have as I have you taped. Monday?"

(I have redacted some of the coarser language used).

Ms. Sullivan was naturally extremely frightened and shocked to receive this text message. She spoke with Garda Hanrahan of Clontarf Garda Station who had been present earlier that day. While Garda Hanrahan advised her to retain all emails and text messages, Ms. Sullivan formed the view that the Gardai considered the Mr. McCartan was within his rights in parking the vehicle outside her front door.

15. Matters came to a head on Monday 21st August 2012, when Mr. McGill sought undertakings on behalf of Ms. Sullivan from both Mr. Boylan and Mr. McCartan prior to making an application to this Court. The prospect of litigation did not, however, daunt Mr. McCartan in the least. The telephone calls kept coming.

16. It was against this background that the application for an interlocutory injunction was first made to me on the following day, Tuesday, 28th August. While I granted certain relief *ex parte*, the matter was adjourned on a number of occasions to enable the defendants to put their side of the case. Although the Boylan contractors have subsequently given appropriate undertakings to the Court and have terminated Mr. McCartan's retainer, Mr. McCartan did not appear and was not represented at any of these hearings.

17. I accordingly granted the plaintiff an interlocutory injunction restraining Mr. McCartan from effectively watching and besetting her home. The reasons for this conclusion are now set out in this judgment.

18. In the first place it has to be said that it is, frankly, difficult to speak with moderation in respect of the conduct of Mr. McCartan. His behaviour has, however, been contemptible, irresponsible and outrageous. He has sought to harass, bully, defame, vilify and intimidate Ms. Sullivan and to all but imprison her in her own home. It is behaviour which in a civilised society cannot be tolerated for an instant and it represents conduct which this Court cannot and will not allow.

### **Sections 10 and 11 of the Non-Fatal Offences against the Person Act 1997**

19. Judged by reference to the provisions of s. 10 and s. 11 of the Non-Fatal Offences against the Person Act 1997 ("the Act of 1997") it seems clear that Mr. McCartan's behaviour is *prima facie* unlawful. These sections provide:-

"10.-(1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.

(2) For the purposes of this section a person harasses another where

(a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and

(b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

(3) Where a person is guilty of an offence under subsection (1), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may, specify, communicate by any means with the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.

(4) A person who fails to comply with the terms of an order under subsection (3) shall be guilty of an offence.

(5) If on the evidence the court is not satisfied that the person should be convicted of an offence under subsection (1), the court may nevertheless make an order under subsection (3) upon an application to it in that behalf if, having regard to the evidence, the court is satisfied that it is in the interests of justice so to do.

(6) A person guilty of an offence under this section shall be liable-

(a) on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both,

or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 7 years or to both.

Demands for payment of debt causing alarm, etc.

11.-(1) A person who makes any demand for payment of a debt shall be guilty of an offence if-

(a) the demands by reason of their frequency are calculated to subject the debtor or a member of the family of the debtor to alarm, distress or humiliation, or

(b) the person falsely represents that criminal proceedings lie for non-payment of the debt, or

(c) the person falsely represents that he or she is authorised in some official capacity to enforce payment, or

(d) the person utters a document falsely represented to have an official character."

20. There can be little doubt but that Mr. McCartan has harassed Ms. Sullivan by "persistently following, watching, pestering, besetting or communicating with her" within the meaning of s. 10(1) of the Act of 1997, not least when she made it perfectly clear to him that such conduct was to stop. While Mr. McCartan was perfectly entitled to assert a demand for payment on behalf of the Boylan contractors, he was not entitled to make demands which by reason of their frequency were calculated - in the words of s. 11(1) of the Act of 1997 - "to subject the debtor or a member of the family of the debtor to alarm, distress or humiliation". The demands made here were clearly intended to alarm and humiliate Ms. Sullivan. This, indeed, was the entire object of the exercise. Here it may be observed that the act of parking a van with the display sign "licensed debt collector" directly outside her house

coupled with the threat to start ringing on the doors of her neighbours speaks for itself.

21. While the courts are generally reluctant to grant injunctions to enforce the criminal law (*cf* the judgment of the Supreme Court in *Attorney General v. Lee* [2000] IESC 80, [2000] 4 I.R. 65), different considerations obtain where that illegal conduct violates the constitutional rights of a private individual: see, *e.g.*, the judgment of the Supreme Court in *Lovett v. Gogan* [1995] 3 I.R. 132 and, by analogy, the judgment of Macken J. in *Pierce v. Dublin Cemeteries Committee* (No. 1) [2009] IESC 47, [2010] 2 I.L.R.M. 73. The fact, moreover, that Mr. McCartan unblushingly continued with his practice of harassing the plaintiff even after the Gardai had spoken to him points to the objective necessity for judicial intervention if the plaintiff's right to secure the protection of her person (Article 40.3.2) and her dwelling (Article 40.5) is to be effective and not merely illusory.

### **The protection of the person (Article 40.3.2) and the inviolability of the dwelling**

#### **(Article 40.5)**

22. In this context, the enactment of s. 10 and s. 11 of the Act of 1997 must be seen as complementing by law the constitutional obligations in relation to the protection of the person in Article 40.3.2 and the dwelling in Article 40.5 and these statutory provisions must be construed accordingly. As I pointed out in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235:-

"By solemnly committing the State to protecting the person, Article 40.3.2 protects not simply the integrity of the human body, but also the integrity of the human mind and personality."

23. In the present case it requires little imagination to visualise the acute mental distress which Ms. Sullivan suffered as a result of this outrageous conduct. The citizen's right to the security of his or her person necessarily implies that the subjection by unlawful means of any person to what would objectively be regarded as acute mental distress must be regarded as amounting in itself to a breach of Article 40.3.2.

24. Nor could she find that repose from the cares of world presupposed by Article 40.5- again to adopt the words of Hardiman J. in *O'Brien*- in the comfort of her own dwelling. The Irish language text of Article 40.5 ("Is slán do gach saoránach a ionad cónaithe....") captures and expresses the essence of the English language word ("inviolability") by stressing the concepts of safety and security of the dwelling. Here again all of this was compromised by the actions of Mr. McCartan. One might ask: who in such circumstances would feel safe in their house if, prior to entering or exiting their own private dwelling, they were effectively forced to run the gauntlet of passing what amounts to a picket bearing unpleasant messages by a menacing stranger, especially where these messages were designed to intimidate and humiliate?

25. The Supreme Court has already indicated that effective access and egress in the immediate vicinity of one's dwelling is a vital ancillary component of Article 40.5. As O'Flaherty J. observed in *Heeney v. Dublin Corporation*, Supreme Court, 17 August 1998, the corollary of the guarantee in Article 40.5 "must be that a person should be entitled to the freedom to come and go from his dwelling provided he keeps to the law".

26. Even in those jurisdictions (such as the United States) whose Constitutions do not protect the inviolability of the dwelling in quite the same terms as Article 40.5, the sanctity of the home and the protection of its occupants from external harassment are regarded as important values which the State may justly protect. Thus, for example, in *Frisby v. Schultz* 487 U.S. 474 (1988) the US Supreme Court upheld the constitutionality of a local ordinance which prohibited the picketing of private houses, with O'Connor J. noting that in such circumstances:-

"The resident is figuratively, and perhaps literally, trapped within the home and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech."

27. In my view, absent compelling countervailing circumstances, the picketing of a private dwelling in such circumstances must generally be regarded as amounting to a breach of the guarantee of "inviolability" of the dwelling in Article 40.5, since the practical effect of such conduct is to compromise a core aspect of the inviolability of the dwelling identified by the Supreme Court in *Heeney*, namely, the right to enter and depart from one's own home without let or hindrance.

28. Here the only possible countervailing consideration is that of Mr. McCartan's right of free speech and free expression as protected by Article 40.6.1. At the same time it must be recalled that his free speech interests in communicating this *particular information* in this *particular place* and in this *particular manner* can be adjudged in the circumstances to be weak. The speech in question related to a private dispute between private citizens in respect of which there was no discernible public interest. Insofar as Mr. McCartan had an interest in the matter, it was for purely personal commercial gain and, moreover, the object of the speech was to ensure that Ms. Sullivan was cowed into submission so that his client would be paid.

29. In this respect, Mr. McCartan's Article 40.6.1 rights at issue here stand in direct contrast to the position of the defendants in *Cornec v. Morrice* [2012] IEHC 376. In that case I held that the interests of an investigative journalist on the one hand and the host of an internet site dealing with the activities of religious cults on the other to communicate information to the wider public regarding what they insisted was the fraudulent conduct of a particular religious cult leader was extremely high. The speech at issue in *Cornec* was accordingly squarely within the core protections afforded by Article 40.6.1 - dedicated as that speech was to the education of public opinion - and represented a type of speech to which - as is clear from the language of Article 40.6 itself- the Constitution ascribes a high value in protecting. For all the reasons I have just given, the same cannot be said of the speech at issue in the present case.

### **Conclusions**

30. It goes without saying, therefore, that Ms. Sullivan plainly has satisfied the standard *Campus Oil* (*Campus Oil Ltd. v. Minister for Industry and Energy* (No.2) [1983] I.R. 88) criteria. Her entitlement to a permanent injunction at a final hearing restraining such harassment seems all but unanswerable. Damages would obviously be an inadequate remedy and the balance of convenience demands that she receive adequate protection in the interval.

31. It was for those reasons that I granted an interlocutory injunction restraining Mr. McCartan from parking his van (along with accompanying signage) within two hundred metres of Ms. Sullivan's house and from contacting her directly (whether by email or telephone or text message) in relation to any alleged debt.