

Threatening and Settling with Crooks Without coming unstuck

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Brick Court Chambers

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A. Perspectives: The Claimant

The Claimant

“Depend upon it, sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.”

Boswell: Life

Threatening Prosecution: USA

California:

Rule 5-100 Threatening Criminal, Administrative, or Disciplinary Charges

- (A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute..“

New York:

Rules of Professional Conduct at 3.4:

A lawyer shall not ...

- (e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Cf Presidential Elections

- If I win, I'm going to instruct my Attorney General to get a special investigator to look at your situation ...
- "It's just awfully good that someone with the temperament of Donald Trump is not in charge of the law in our country,"
- "Because you'd be in jail.."

Threatening Prosecution: England and Wales

CPR Rule 81.9:

- 1 A judgment or order which restrains a party from doing an act or requires an act to be done must, if disobedience is to be dealt with by proceedings for contempt of court, have a penal notice endorsed on it as follows (or in words to substantially the same effect) –

“If you the within-named [] do not comply with this order you may be held to be in contempt of court and imprisoned or fined, or your assets may be seized.”

Cf Threats of Criminal Proceedings Guidance from the SRA via “Ethics Chat”

Question

Q. No - a claimant has a case against a defendant for fraud. The claimant's solicitor is negotiating a settlement. Can the claimant's solicitor say "If you don't agree this settlement I have instructions to report your conduct to the police" ?

Answer

- A. The claimant solicitor will need to consider if this would be a breach of the law and principle 1 (uphold the rule of law) and whether there is any legal restriction on making such a statement.

Breach of the Law?

- A War Story – Blackmail

- Theft Act 1968 section 21:

(1) A person is guilty of blackmail *if, with a view to gain* for himself or another or with intent to cause loss to another, *he makes any unwarranted demand with menaces*; and for this purpose a demand with menaces is *unwarranted unless* the person making it does so *in the belief*:

(a) that he has *reasonable grounds* for making the demand; and

(b) that *the use of the menaces is a proper means of reinforcing the demand*.

(2) The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces relate to action to be taken by the person making the demand.

Menaces

- *Thorne v Motor Trade Association* per Lord Wright:

“I think the word "menace" is to be liberally construed and not as limited to threats of violence but as including threats of any action detrimental to or unpleasant to the person addressed. It may also include a warning that in certain events such action is intended.”

Lord Atkin:

The ordinary blackmailer normally threatens to do what he has a perfect right to do namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened. [...] *What he has to justify is not the threat, but the demand of money.* The gravamen of the charge is the demand without reasonable or probable cause: and I cannot think that the mere fact that the threat is to do something that a person is entitled to do either causes the threat not to be a "menace" [...] or in itself provides a reasonable or probable cause for the demand.

Blackmail?

- Threat of prosecution could amount to “menace”;
- Real issue is whether the demand is [thought to be] justified;
- So don’t demand more than the client’s reasonable entitlement.

• **BUT** Still worry

Contempt by Intimidation

See: Arlidge, Eady & Smith 4th Ed. Chapter 11.

Smith v Lakeman (1856) 26 L.J. Ch. 305

Held: A contempt to threaten a party with indictment for perjury and forgery if he continued his action. Reference was made in the letter to the resulting disgrace which would descend upon his family. The mischief was identified by Stuart V.-C. as being “a threat for the purpose of intimidating him as a suitor;” it made no difference whether the threat had its intended effect.

Contempt/Abuse of Process

- ***Att Gen v Martin (Peter)*** The Times, April 12, 1986
 - Barrister brought private prosecution over helicopter flying too low over the Thames
 - D's solicitor threatened to report him to professional bodies and to sue for malicious prosecution
 - Held: CA – threat to report was contempt; (2:1) threat of claim for malicious prosecution was not contempt, but borderline.

Contempt/Abuse of Process

■ *Abbey v Gilligan* [2012] EWHC 3217

- Claimant claimed damages for breach of confidence, alleged email hacking and threatened to report hacking to police to extract settlement.
- Held, Tugendhat J: claim failed. It was troubling that P had repeatedly alleged that G and N had committed serious criminal offences, without evidence. The fact that he never reported the matter to the police supported the inference that he made the threats for the purpose of obtaining a settlement on terms which he did not expect to achieve on the merits of his claim. That was an attempt at extortion and an abuse of the process of the court (paras 143-159).

Contempt (2) - Breach of Implied Undertaking

- The Implied Undertaking
- *Taylor and others v Serious Fraud Office* [1998] 4 All ER 801 per Lord Hoffman at page 807:

"The implied undertaking in civil proceedings is designed to limit the invasion of privacy and confidentiality caused by compulsory disclosure of documents in litigation. It is generated by the circumstances in which the documents have been disclosed, irrespective of their contents. It excludes all collateral use, whether in other litigation or by way of publication to others."
- But note CPR 31.22(1) – Documents referred to in open court, permission, restrictions etc.

Example

Watkins v AJ Wright (Electrical) Ltd and others [1996] 3 All ER 31

- Petition under section 459 Companies Act 1986 (unfair prejudice)
- Discovery revealed invoices which the petitioner believed to be fraudulent.
- Petitioner disclosed their existence to the Inland Revenue.
- Held: guilty of contempt.

Cf: Breach of the Civil Law – The Tort of Intimidation

- Clerk & Lindsell at section 24-59:

“A commits a tort if he delivers *a threat* to B that he will commit an act, or use means, *unlawful as against B*, as a result of which B does or refrains from doing some act which he is entitled to do, thereby causing damage either to himself or to C.”
- ***But:*** could contempt/abuse of process/etc make the threat unlawful against B even if the threatened act were prima facie lawful?
- And conspiracy?

Oooer ...

- Think carefully about threats
- Threat of prosecution could amount to a menace and support a charge of blackmail
 - Make sure the demand is not excessive
- It may amount to contempt by intimidation or abuse of process
 - The threat must be proper, fair, reasonable and moderate
- It may entail civil liability
- And, it may entail disciplinary consequences

SRA Guidance (2): Principles

You must:

1. uphold the rule of law and the proper administration of justice;
2. act with integrity;
3. not allow your independence to be compromised;
4. act in the best interests of each *client*;
5. provide a proper standard of service to your *clients*;
6. behave in a way that maintains the trust the public places in you and in the provision of legal services

SRA Update Issue 20 – September 2011

- **Six thousand letters demanding compensation sent on behalf of clients to alleged unlawful file sharers led to a hefty fine ...**

[Unclear whether threats of prosecution, but robust !!!]

- The SDT found all six allegations proven and fined both men £20,000, awarding interim costs to the SRA of £150,000, with full costs still subject to a detailed assessment.
- The letters the solicitors sent out demanded compensation and costs, and warned that recipients faced further action and increased costs if the matter was not settled as a matter of urgency.
- "Solicitors have a duty to act with integrity, independence and in the best interests of their clients. Solicitors who breach those duties can expect to face action by the SRA."

The Settlement

- Tainted money? Third Party claims?
- Ex hypothesi, taking money from a crook? His money?
- Money-laundering: Proceeds of Crime Act 2002, section 328
 - “A person commits an offence if he enters into, or becomes concerned in an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person.”
- ***Bowman v Fels*** [2005] EWCA Civ 226 - section 328 does not cover or affect the ordinary conduct of litigation by legal professionals, including any step taken in litigation from the issue of proceedings and the securing of injunctive relief or a freezing order up to its final disposal by judgment.

But: Law Society View

- “Our view, supported by Counsel’s opinion, is that *dividing assets in accordance with [a] judgment*, including the handling of the assets which are criminal property, is not an arrangement. Further, *settlements, negotiations, out of court settlements, alternative dispute resolution and tribunal representation are not arrangements*. However, the property will generally still remain criminal property and you may need to *consider referring your client* for specialist advice regarding possible *offences* they may commit *once they come into possession of the property* after completion of the settlement.”
- Section 329: acquisition, use or possession of criminal property.
- *Cf* Sham litigation.

Shredding/Returning Evidence

- Criminal Law Act 1967, section 4: Penalties for Assisting Offenders
 - Offence carrying 5 years imprisonment;
 - “..any other person who, knowing or believing [an offender] to be guilty of the offence or of some other relevant offence, ***does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution*** shall be guilty of an offence..”

Criminal Law Act 1967 section 5

- Penalties for concealing offences or giving false information.

(1) Where a person has committed [a relevant offence] 1 , any other person who, knowing or believing that the offence, or some [other relevant offence] 2 has been committed, and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, *accepts or agrees to accept for not disclosing that information any consideration other than the making good of loss or injury caused by the offence, or the making of reasonable compensation for that loss or injury*, shall be liable on conviction on indictment to imprisonment for not more than two years.

Claimant's Tactics

- Think carefully about threats – as above
- Be careful in the settlement – as above (don't agree to destroy evidence, if confidentiality, subject to any legal requirement of disclosure etc).
- Consider actually reporting !
- There can be problems with involvement of criminal authorities, but sometimes it helps.

Problems of Actual Reporting

- Police seize evidence
- Loss of leverage
- Loss of control over the pace of proceedings
- Criminal proceedings may delay civil proceedings
- There may be a conflict between the interests of the State and the interests of victims/claimants

Conflict

- State may and is sometimes obliged to pursue Confiscation Order
- It may pursue “civil recovery” under Part 5 of POCA against particular property
- State may not pursue Compensation Order which are anyway not for “complex cases”
- D’s assets may be insufficient

Resolution

- If victim/claimant has a proprietary claim, property may be released from Restraint Order
- But, Court often considers that it can achieve fairer distribution than free for all:
 - *Serious Fraud Office v Lexi Holdings* [2009] QB 376
 - *Re Stanford International Bank* [2010] EWCA Civ 137
- Note: *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45 (proprietary claims for bribes).

Benefits of Actual Reporting

- War Story:
 - Extradition
 - Prosecution
 - Civil proceedings;
 - Serious Crime Prevention Order - SCPO
 - Private prosecution for breach
 - Self-reducing sentence with compliance

- And – police investigate (useful where it is difficult to get evidence from ISPs etc).

B. Perspectives: The Defendant

(2) The Defendant's Perspective

- Admissions
 - Dangerous !
 - Esp. admitting proprietary claims
 - Keep it simple (... all claims known or unknown, suspected or not suspected ...)
 - Refer to situation or dispute, not a wrong (... arising out of or connected with the joint venture agreement between ...)
- Advisers:
 - Professional constraints;
 - Money-laundering: re client and advice and implementation.

Settling with the Prosecutor

Deferred Prosecution Agreements

- Introduced on 24 February 2014 under Schedule 17 of the Crime and Courts Act 2013
- Agreement reached between a prosecutor and an organisation [not individual] which could be prosecuted, under the supervision of a judge.
- The agreement allows a prosecution to be suspended for a defined period provided the organisation meets certain specified conditions.
- DPAs can be used for fraud, bribery and other economic crime.
- ***“Allow reparation without reputational damage”.***

Example

8 July 2016:

- SFO made its second application for a Deferred Prosecution Agreement, approved by Leveson LJ
- “The counterparty to the DPA is a UK SME that cannot currently be named due to ongoing related legal proceedings”.
- Indictment alleged conspiracy to corrupt, conspiracy to bribe, failure to prevent bribery re sales to customers in foreign jurisdictions.
- As a result of the DPA, the company will pay financial orders of £6,553,085, comprised of a **£6,201,085 disgorgement of gross profits** and a £352,000 financial penalty. £1,953,085 of the disgorgement will be paid by the SME’s US registered parent company as repayment of a significant proportion of the dividends that it received from the SME over the indictment period.

Conclusion

- Like the Law Society:

Consult a barrister !