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ROYAL COURTS OF JUSTICE,
LONDON, WC2A 2LL

11 February, 1980

The Rt. Hon. James Prior, MP,
Secretary of State for Employment,
Department of Employment,
Caxton House,
Tothill Street,
London, SW1.

Dear Jim

It seemed to me at the last meeting that a substantial amount of the time of the Committee was taken up with explanations of the basic questions of law which it is necessary to understand in order to follow and choose between the various options.

Accordingly after the meeting I drafted a note setting out what seem to me to be the real basics in their simplest form in the hope that that might be useful as a background to future discussions.

I enclose a copy herewith and am copying this letter and enclosure to the Prime Minister and other members of "E" Committee, the Lord Chancellor, the Lord Advocate and Sir Robert Armstrong.

Yours ever,

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Background note on matters of law relevant to the questions of policy now for consideration concerning Secs. 13 and 14 of T.U.L.R.A. 1974 as amended in 1976.

Part I General

1. There is an irreducible minimum of background law, without which consideration of the subjects in question may at best be confused, at worst meaningless. The following paragraphs are an attempt to set out that irreducible minimum.

2. Those who are the victims of industrial action (or their legal advisers) have to ask themselves three, cumulative, questions
   (a) have we got a cause of action; and if so
   (b) are we prevented by Sec. 13 of TULRA 1974 from suing on it; and if not so prevented
   (c) who can/should we sue?

3. The answer to (a) depends on the state (and development) of the law of tort (civil wrong) and is not affected by our proposals.

4. The answer to 2(b) lies in the combined effect of a number of factors, viz.,
   (a) If the cause of action is for anything except "interference with contractual relationships" - i.e. trespass, nuisance, intimidation - Sec. 13 has no application - it can and should be ignored.
   (b) If the cause of action is for "interference with contractual relations" then so long as the acts complained of were done "in furtherance of a trade dispute" Section 13 prevents the party from pursuing the rights which, ex hypothesi, he would otherwise have been able to pursue in the Courts.
   (c) Recent cases in the Lords have made clear that our worst fears as to the extent of that immunity (expressed repeatedly in 74 - 76) were well founded.

(d) In the first instance (i.e., in 1974) Sec. 13 was limited to "inducing breach of contract of employment". That is an advantage which trade unions have enjoyed for a very long time, which they need in some form if they are to function, and which it is not intended to limit save in the case of picketing.

(e) In 1976 the Labour Government extended the protection then given in respect of interfering with contracts of employment, to all contracts. It was as the result of this that parties who are not parties to a dispute are now in so many more cases deprived of the right to apply to the Court for protection, which is theirs at Common Law.

(f) The combined effect of the matters referred to in this paragraph is that where the "victim's" only cause of action is for "interference with contractual relations" (as is so often the case) Sec. 13 will in any of the practical circumstances we have to consider, prevent the "victim" from being able to pursue his Common Law rights.

Part II Limitation of the immunity given by Sec. 13

5. It is agreed (a) that except so far as picketing is concerned the immunity given in relation to "contracts of employment" for a very long time, shall remain, but (b) that the immunity given in relation to other contracts is too wide and must be reduced.

6. There are two main routes by which that may be done.
(a) Limiting the application of the whole Section by altering or defining the words by which the whole of Sec. 13(1) are conditioned i.e., "in furtherance of."

or (b) Deciding to what extent the immunity should extend to contracts other than contracts of employment and amending Sec. 13 to give effect to that.

7. As to the first, the "in furtherance route":-
(a) We have not yet found any formula which would offer any prospect of securing the sort of limitation desired with the sort of certainty for which one would wish.
(b) If the operation of the Section is to be limited by this route the change (or limitation) would apply to contracts of employment as well as other contracts unless specifically applied only to other contracts, with the result that
(i) if the change applied to all contracts and was significant this would represent a significant inroad into what can properly be called traditional immunities as distinct from those which have only existed since 1976.
(ii) if the change applied only to "other" contracts there would be two different tests.

8. As to the second here again there are two main lines of approach
(a) to say that if the "victim" is, though not a party to the dispute, a first supplier/customer of someone who is a party to the dispute, he shall be prevented by Sec. 13 from suing but immunity shall not extend beyond that; or
(b) to say that if the "victim" is not a party to the dispute and his action is for interference with contract(s) other than contract(s) of employment he shall not be prevented by Sec. 13 from suing;
and then in each case to add such refinements/modifications as may be considered appropriate.

9. Whether one looks at it in terms of restoring Common Law rights or limiting the privileges given to those engaging in industrial action, the second of those alternatives would of course go significantly further than the first. That would be its objective. Precisely how far would depend upon what refinements were asked for.

Part III "Making the Union funds liable"

10. That brings me to the third question. Assuming that the "victim" has a cause of action, and that he is not prevented by Sec. 13 from pursuing it, who can/should he sue?

11. I think that such a plaintiff would invariably be advised to sue the person actually doing what is complained of and any Union official who could be identified as having a part in it - whether or not he could sue the Union as well.

12. At present plaintiffs have to stop there, for Sec. 14 of TULRA is conclusive against suing the Union - so for the remainder of this part I will assume that Sec. 14 is not there and there is no statutory bar to proceedings against the Union.

13. It does not by any means follow, in my view that a plaintiff would always (i) join the Union or (ii) get an order against it - for there is little point in joining the Union unless there is a reasonable chance of getting an order against it and in order to do that the plaintiff would have to show that the action complained of was one for which the Union was vicariously liable - and in the present state of the structure of trade unions this could undoubtedly raise very many problems.

14. Such difficulty would not arise in the circumstance postulated by the Chancellor of the Exchequer - i.e. where the acts complained of are acts of the governing body of the Union. But then the question arises as to how much is in fact gained.

15. In such a case, if the members of the Executive are ordered to do something and fail to obey, the Court has three ways of punishing that contempt of Court. It may commit to prison

or it may sequestrate the assets of those in contempt until the contempt is purged, or in lieu of either of those it may impose a fine (unlimited). Thus it by no means follows as a matter of law that those who wish to get into prison will be able to do so. Plaintiffs - and Courts - may well consider the other means by way of fines and/or sequestration more effective - and it may well be unlikely that the members of the Executive would be prepared to have their assets taken, and likely therefore that they would demand reimbursement out of Union funds.

16. There are other considerations - such as that it might put a premium on unofficial action.

17. In those circumstances it may be felt

(a) that to repeal Sec. 14 would add nothing in the potentially large number of cases where "vicarious liability" would be a substantial issue; and

(b) that it is questionable whether it would in fact add much even in cases where there was no doubt on that issue; and

(c) that it is not in fact essential either for the purpose of denying defendants the pleasure of going to prison or of securing that expense may fall on Union funds.

11 February, 1980