



SECRET

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PRIME MINISTER

1. I attach a Note on the present law on picketing and blacking. A complete survey was not possible in the space of a day, but I have outlined the main provisions of the law which are relevant to the items we discussed yesterday.

2. I am afraid that this gives us little comfort. The position in respect of the civil law is worse than last winter when the Court of Appeal was prepared to restrict the words "in contemplation or furtherance of a trade dispute" (in s.13(1) of TULRA 1974) with the result that the courts were able to grant injunctions to restrain some forms of secondary action (including secondary picketing). But now the House of Lords in McShane has stopped all that; their judgment largely rules out the prospect of obtaining injunctions.

3. At the meeting yesterday we discussed the concept of "lawful intimidation". This was an unfortunate phrase which was used by my predecessor (Hansard, 25 January 1979, Col 712). In doing so he appears to have been referring to s.13(1) of TULRA 1974, which inter alia means that certain threats - which earlier had amounted to intimidation at common law - are made lawful.

4. Whether particular threats are protected by s.13(1) and hence are "lawful intimidation" in this sense is a question which depends on the particular facts and cannot be dealt with satisfactorily in the abstract. But in the case we discussed, that of threats of future blacking made to a private employer not involved in the main dispute, the immunity now given by s.13(1) could well be available. However, this immunity will not be available in respect of action to implement such threats once the main action is over.

5. Apart from s.13(1) (which deals solely in respect of threats with those which relate to breach of or interference with contract), the general principle is that intimidation is not unlawful unless the threat itself is unlawful; clearly this would be the case where physical violence is threatened, because physical violence is itself unlawful. But in the case of, say, a picket who threatens the loss of a union card, the threat might well be held to be unlawful if (but only if) the picket has no authority to make it and (in accordance with union rules) there is no prospect of the threat being carried out. But a warning in good faith that breach of a union rule may lead to loss of membership is not, of course, unlawful.

6. This minute and the attached Note are copied to all members of Cabinet, the Chief Whip, the Minister of Transport, the Minister of State (MAFF) and Sir Robert Armstrong.

M.H.

LAW OFFICERS' DEPARTMENT
9 January 1980

SECRET

THE PRESENT LAW ON PICKETING AND BLACKING

Note by the Attorney General for Cabinet

1. This Note outlines the present law on picketing and blacking. The relevant Acts are the Trade Union and Labour Relations Act 1974 (TULRA 1974) as amended by the Trade Union and Labour Relations (Amendment) Act 1976 (TULRA 1976). This Note does not deal with the changes in this area in the Employment Bill 1979 now before Parliament nor with any future amendments to that Bill which may affect the position.

Picketing

2. Picketing may be broadly defined as action taken by strikers to procure others to support them in their dispute, whether those others are fellow workers, substitute labour, customers or suppliers or their employees. Section 15 of TULRA 1974 provides that such action is not illegal if it:-

- (a) is in contemplation or furtherance of a trade dispute (for the meaning of this see 9-10 below);
- (b) is not at, or near, another person's home unless his home is also his place of work or business; and
- (c) is solely for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working.

This means in effect that no legal proceedings can be brought in respect of picketing unless in the course of that action some crime or independent tort is committed. Relevant crimes would include obstruction of the highway (both a statutory and a common law offence), unlawful assembly, assault, obstruction of a police officer in the execution of his duty, causing damage to property, carrying an offensive weapon and causing a breach of the peace. Relevant torts would include trespass to the highway and private nuisance. But it follows from the wording of section 15 that where the picketing is entirely peaceful no action would lie under any of these heads. In the case of criminal offences this is qualified by the overriding duty of the police to uphold the law, which would enable them eg to require pickets to disperse where it is anticipated that they would otherwise cause a breach of the peace. In practice criminal sanctions are often available under the above heads.

3. Apart from section 15, section 13 of TULRA 1974 as amended gives immunity in tort in respect of picketing which results in or is aimed at breaches of or interference with contracts. This section relates to all forms of industrial action and is dealt with in 5 and following below.

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4. This form of industrial action may be broadly defined as action intended not to promote the withdrawal of labour but to interfere with the business of the employer, eg refusal by employees of a supplier to handle goods or provide service intended for the employer in dispute. Such action is not covered by section 15 of TULRA 1974 but section 13 as amended is relevant to it as it is to picketing.

Immunity in Tort

5. Section 13(1) as amended gives immunity in tort to any person who acts "in contemplation or furtherance of a trade dispute" and that act -

- (a) induces a breach of contract by another person or interferes or induces him to interfere with its performance; or
- (b) consists in his threatening that a contract will be broken (whether he is a party to it or not) or its performance interfered with, or that he will induce another person to break a contract or interfere with its performance.

6. Section 13(1) was originally confined to contracts of employment but by section 3(2) of TULRA 1976 was widened to cover all contracts and hence gave substantial further protection in respect of direct inducement to an employer to break his commercial contracts.

7. To take advantage of the immunity the defendant must first show that there is a "trade dispute" as defined in section 29(1) of TULRA 1974 and secondly that the action taken was in "contemplation or furtherance" of it. The definition of trade dispute is extremely wide and actions rarely succeed on the basis that the definition is not satisfied.

8. Prior to the judgment of the House of Lords in Express Newspapers v McShane (December 1979) the courts, and in particular the Court of Appeal, had favoured a narrow construction of the words "in contemplation or furtherance of a trade dispute", thus attempting to limit the immunity in relation to action that could be said to be far removed from the main dispute. The Courts had held, inter alia, that the immunity was not available if the action was not reasonably capable, on an objective view, of advancing the interests of those in dispute.

9. But the House of Lords in McShane has now clearly removed this limitation. By a majority of four to one the judges favoured a subjective test, so that any defendant can claim the immunity if he can show that he honestly believed that the action taken was likely to advance those interests; there was some difference of view as to whether the court can enquire into the reasonableness of the belief, and grant an injunction in cases where it is not satisfied of this,

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but the clear feeling of the court (Lord Wilberforce dissenting) was that the courts should be reluctant to substitute their own judgment for that of experienced trade union witnesses where the latter gave evidence that in their view the action taken was likely to further the dispute.

10. In practical terms the result of the McShane judgment is that all kinds of picketing and blacking will be protected from successful proceedings in tort where the existence of a trade dispute can be proved and the defendant can show honesty of purpose in relation to the action he took. The importance of the distinction between "primary" and more remote forms of industrial action, both picketing and blacking, is much reduced and the likelihood of injunctions being granted (under section 17 of TULRA 1974 as amended) is correspondingly less. This applies equally to the grant of interlocutory relief, having regard to section 17 (2) of TULRA 1974 inserted in 1975.

Law Officers Department
9 January 1980

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