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CABINET

MINISTERIAL COMMITTEE ON ECONOMIC STRATEGY

TRADE UNION IMMUNITIES

Memorandum by the Secretary of State for Employment

I set out below my conclusions from my review of these immunities and my proposals for the form and timing of legislation on all my industrial relations proposals.

2 Our law does not confer rights to strike or take other industrial action but affords those who do so in defined circumstances immunity from civil action in tort. Organising industrial action usually involves persuading employees to break their contracts of employment and, if there were no immunities, employers could sue the organiser, whether individual or trade union, for damages. It has therefore long been recognised that some immunity is essential if employees are to be able to take effective action in trade disputes and the present immunities largely date from 1906.

3 They are now contained in the Trade Union and Labour Relations Act (TULRA) 1974, as amended in 1976. Section 13, which attracts most attention, provides the main immunity for individuals from being sued for acts done in contemplation or furtherance of a trade dispute which induce or threaten a breach of contract; and was extended in 1976 to cover not only employment but also commercial contracts. The effect of this was to extend this immunity to a wide variety of acts against persons or firms who are not party to the dispute in support of which the action is taken (certainly to action against first suppliers and first customers but possibly on a considerably wider scale) and who would otherwise have been able, if they chose, to take proceedings for an injunction or damages or both. Section 14 gives trade unions immunity (with a few exceptions) from injunctions and actions in tort for all acts whether or not in contemplation or furtherance of a trade dispute. And Section 17 (the provisions of which date partly from 1971 and partly from 1975) requires the courts before granting an injunction, to give the parties time to be heard and to consider the likelihood of a defence succeeding at full trial.

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4 The attached report by my officials reviews these immunities against our Manifesto commitments to look at them to ensure that the protection of the law is available to those not concerned in a dispute but who can suffer severely from secondary action; and also to guarantee a citizen's right to work and go about his lawful business free from intimidation or obstruction. It indicates

(a) on Section 13, that picketing is currently the most effective form of secondary action and the most abused; that subject to the decision of the House of Lords in Express Newspapers v MacShane which is shortly to be decided there, the effect of a number of cases since 1976 is that the interpretation of what is "in furtherance of a trade dispute" and therefore the immunity given by Section 13 is not as wide as had been supposed by many and may not extend beyond first suppliers and first customers at all, but that it certainly extends to them at least; that removing the immunity from action against first customers and suppliers would cut back the immunity more severely than possibly at any time since 1906; and that to seek to return to the position of the law between 1906 and 1971 by removing the immunity given in 1976 for direct inducement of breaches of commercial contracts would still leave it open to unions to put pressure on customers and suppliers by indirect action and would leave employers uncertain of the circumstances in which they would have a remedy (the "legal maze" to which the Donovan Commission referred in 1968). (paras 23-54).

The Solicitor General wishes it to be noted that he does not agree with a number of the propositions of law advanced in the report by officials and here summarized, in particular those advanced in respect of "direct" and "indirect" action in paragraphs 8,43,44 and 54

(b) on Section 14, that although the extent of this immunity for trade unions is unique in our law, reducing it would have only limited effect on the scope of industrial action, could weaken union authority and increase unofficial disputes, and would be regarded by the unions as an attack on their very existence by putting their funds at risk (paras 55-68);

(c) on Section 17, that it has had little effect on the courts' willingness to grant injunctions to employers (paras 69-73)

5 In my view the choice for practical action now lies solely in relation to Section 13 and between two approaches. The first approach, which I favour, is to attack those specific abuses which have clearly been shown to need remedy and accordingly

(i) as recommended in E (79) 43 to provide that the S.13 immunity for inducing breaches of contract by picketing should be limited to picketing at each person's own place of work. This will be a very tough limitation indeed and will enable an employer or employee whose business or livelihood is threatened by secondary picketing to seek an injunction to restrain that picketing and damages for any loss he suffers.

(ii) to deal with intimidation on the picket line by the threat (which can be very influential) of loss of union membership we should seek to include in the new right (also recommended in E (79)43) against arbitrary or unreasonable expulsion from membership of a union a provision which would deem it unreasonable to expel a member solely for crossing a picket line. I am having the feasibility of this urgently examined but there are difficulties, as in most industrial relations matters, and I have not consulted on this specific provision as yet.

(iii) I shall shortly receive the report by Mr Andrew Leggatt QC on the activities of SLADE in "blacking" non-unionised firms in order to coerce their employees into becoming members of that union. The report is, I understand, highly critical of SLADE and we must try to prevent a resumption of this sort of action in the future. I am therefore considering amendments to the immunity to achieve this and shall seek agreement to a specific proposal in time to put it forward for consultation when the Leggatt report is published towards the end of October.

These proposals will, I believe, meet in a specific and direct way our Manifesto commitment to curb the most widespread and effective forms of secondary action and those which aroused the most serious concern in the disputes of last winter. The only circumstances in which I would favour more general amendment to S.13 would be if the House of Lords were, in their judgements next December or January on Express Newspapers v MacShane, to overturn the Court of Appeal. That Court has in a series of cases over the last three years been called upon to consider the tests to be applied in determining whether a particular piece of industrial action is "in furtherance of a trade dispute". The effect of their judgments is as indicated above - para. 4(a) - and for most if not all practical purposes may be summarised as deciding that the immunity does not go beyond the first customer, supplier or provider of services. Should this view by overturned by the House of Lords I would propose to legislate to give it statutory effect, though this is not without its difficulties.

The alternative approach is to go beyond this by returning Section 13 to the form in which it was in TULRA 1974, save that in addition to the necessary amendments Subsection (3) should now be repealed as we then proposed but were not able to carry; that is to say, to restrict the immunity to inducing breaches of contracts of employment as it was up to 1971. First suppliers, customers and providers of services would then no longer be automatically precluded from taking action if they so choose in their own defence as they now are and will be whatever the result in the case of MacShane unless we take this step.

This course has the attraction that it would be consistent with the line we took in Opposition; it would tackle directly the 1976 Amendment Act, which is thought by many to have encouraged recent union excess; it could be presented as a return to the position which existed for all practical purposes between 1906 and 1971; and it would have a more general impact on secondary action than my own proposal. Nonetheless, after extensive discussions with industrialists and others, I am convinced that the first approach is the right one at this stage. Our aim must be to succeed in tipping the balance of power away from the unions by such legal changes as are likely to be used by employers against secondary action, be supported by the public (including trade unionists) as reasonable restriction of union and worker activity and which will not reunite the unions in such active opposition as to render the changes ineffectual. We cannot afford to introduce another round of industrial relations legislation which is made unworkable by trade union opposition. It would be too damaging to our political system and to the reputation of this country abroad. As at present advised, I believe that if we take the action that I recommend we can honestly present this as a considered judgement of what is needed to deal with secondary action in the area most in the public eye and which is most disruptive. I think we can then succeed in holding and improving our advantage over the TUC in the battle for public support and stand a better chance of pulling off some legal restriction which will survive and on which we can later build.

As it is, the employers' view, as very strongly expressed to me by the CBI and others, is that general changes in the law on immunities are too sensitive and complex to be made immediately. The CBI say that their members are strongly of the view that at this stage changes should be confined to secondary picketing and that detailed study is required before decisions are taken as to whether immunities should be tackled more widely and, if so, how this should be done. They take this view having specifically considered the contracts of employment option. In the face of this I do not see how we could justify going further at this time. However, there are matters calling for further consultation on this question with both the TUC and CBI in which I would like the Solicitor General to take part. A final conclusion should not be reached until those consultations have been completed. I see no reason why they should affect the timing of the Bill.

Form of Legislation and Timetable

I propose to cover all my proposed legislative changes - in E (79) 43, in this paper and the amendments to the Employment Protection Acts proposed in the three working papers to be published on 25 September - in a single Bill. The consultations on changes in the Employment Protection Acts should be completed by the end of November. I do not expect any difficulty in holding speedy consultations in November on specific provisions to deal with SLADE-type recruitment tactics and intimidation in picketing. This would allow the Bill to be introduced in December with, I hope, the Second Reading before the Christmas Recess. The only serious difficulty with this timetable would be if we were to decide to alter trade union immunities in some way other than either of the courses proposed in this paper. In that case, on a matter of this importance, it would be imperative that there should be sufficient time

for consultations with employer and union interests and it would then prove extremely difficult, if not impossible, to meet the timetable.

If the House of Lords judgement in Express Newspapers v MacShane is available before the Bill is published and is unfavourable I would wish to include an appropriate provision in the Bill from the outset even if this involves some delay. If this situation arises after the Bill is published, we shall have to envisage introducing a Government amendment at Committee stage.

RECOMMENDATIONS

I therefore propose that, subject to the further consultations envisaged in paragraph 9,

(i) the immunity under S.13 of TULRA for inducing breaches of contract by picketing should be restricted to picketing within the ambit of the amended S.15 (ie at an employee's own place of work).

(ii) we should seek to include in the proposed new right against arbitrary or unreasonable expulsion from membership of a union a provision which would deem it unreasonable for a union to expel a member solely for not complying with the representations made to him by those engaged in picketing.

(iii) we should seek to devise a specific provision to deal with SLADE-type recruitment tactics with a view to consultation when the Leggatt report is published towards the end of October.

(iv) we should review the position on S.13 immunities if the House of Lords judgement in Express Newspapers v MacShane is unfavourable with a view to legislating to confirm the position reached by the Court of Appeal.

(v) all the current proposals for industrial relations legislation should be incorporated in a single Bill to be introduced in December.

Department of Employment
London SW1

JP

24 September 1979

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REVIEW OF IMMUNITIES

Introduction

1 The Government is committed to a review of trade union immunities. In its manifesto it stated (page 10):

> "Violence, intimidation and obstruction cannot be tolerated. We shall ensure that the protection of the law is available to those not concerned in a dispute but who at present can suffer severely from secondary action (picketing, blacking and blockading). This means an immediate review of the existing law on immunities in the light of recent devisions, followed by such amendment as may be appropriate of the 1976 legislation in this field. We shall also make any further changes that are necessary so that a citizen's right to work and go about his or her lawful business free from intimidation or obstruction is guaranteed".

2 This paper reviews the present civil law immunities for individuals and trade unions in the Trade Union and Labour Relation Act (TULRA) 1974 (as amended). It does so in the context of the effect of these immunities on the extent of secondary action against employers. It is not concerned with primary disputes between an employer and his employees, which are also covered by the immunities.

3 The paper is in five parts

A the present law
B what constitutes 'secondary action'
C the options for changing section 13 of TULRA 1974
D the options for changing section 14
E the options for changing section 17

A The Present Law

4 The immunities discussed in this paper are civil (and not criminal) law immunities (although, in relation to picketing, the immunities do have a marginal bearing on the criminal law because of section 7 of the Conspiracy and Protection

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of Property Act 1875). The immunities are necessary because inducing a person to break a contract, including a contract of employment, is a well-established tort in common law and an injured party can sue for an injunction or damages. Organising a strike or other industrial action usually involves persuading employees to break their contracts of employment, and if there were no immunities, the employer could sue the strike organiser, who might be an individual or a trade union. Thus some immunities from actions in tort are necessary if employees are to be able to take effective action in trade disputes. This has been reccognised in statute law since 1906.

5 The nature of the present law on trade union action is not to confer rights to strike or to take other industrial action but to afford those who do so in defined circumstances immunity from civil action in tort. The present law on immunities is set out in the Trade Union and Labour Relations Act 1974 (TULRA) as amended by the Trade Union and Labour Relations (Amendment) Act 1976. Section 13 of the 1974 Act (as amended) restores and extends the protection which existed before the Industrial Relations Act 1971 for individuals, including trade union officials, organising industrial action in trade disputes. Section 14 provides a protection for trade unions against actions in tort which goes much wider than that for individuals and which is only slightly less than was accorded by the Trade Disputes Act 1906. Recent judicial decisions have tended to restrict the scope of the immunities in section 13, notably by limiting the definition of "trade dispute" and what action is properly to be regarded as being "in comtemplation or furtherance of it". Annex A explains the present law in more detail including the effect of these judicial decisions. The following are the main points to emerge.

6 First, Section 13 of the 1974 Act (as amended in 1976) is the one which attracts most attention. It provides the main immunity for individuals from being sued for damages for acts done in contemplation or furtherance of a trade dispute which merely induce or threaten breach of contract. It is important because almost any industrial action involves a person, usually a trade union official, inducing others to breach their contracts of employment and without the immunity that person could be sued for damages every time he called or threatened a strike without due notice.

7 Second, the section 13 immunity was significantly extended in 1976. Before that (with the exclusion of the period of operation of the Industrial Relations Act from 1971-1974) section 3 of the Trade Disputes Act 1906 provided immunity only for inducement of breaches of contract of employment. In 1976 the immunity was extended to inducement of breach of any contract - ie particularly commercial contracts. Thus for the first time it was possible for a union official directly to approach a

supplier or customer of an employer in dispute and induce him to breach his commercial contract with that employer, without fear of being sued for injunctions or damages.

8 Third, it was possible indirectly to induce breaches of commercial contracts before 1976. For example, a person could induce the employees of a supplier to an employer in dispute to breach their contracts of employment, and thereby interfere with the supplier's commercial contract, provided he was careful not to use unlawful means. What constituted 'unlawful means' was the subject of a good deal of case law (part of Donovan's 'legal maze'). It was only in 1974 as a result of section 13(3) that it was clearly established in statute that a breach (or inducing a breach) of contract of employment did not constitute unlawful means for the purpose of establishing liability in tort.

9 Fourth, since 1976 the courts have tended to narrow the immunity in section 13 by adopting a restrictive interpretation of what is 'in furtherance of a trade dispute'. There seem to be two strands to this thinking: (a) that some action is too remote from the main action to be arguably in furtherance of it; and (b) that some action, wherever it takes place, is not capable per se of furthering the main action. They are also tending to take a consdierably stricter view on the question whether in the first place there is a trade dispute to be furthered.

10 Fifth, section 14 of the 1974 Act provides immunity for trade unions from actions in tort for any action except one not in contemplation or furtherance of a trade dispute which causes personal injury or is connected with the ownership or use of property. The section gives much wider immunity to trade unions than to individuals. Without it, it would be possible to sue a union for injunctions or damages for acts done by its officials - and thus threaten the very existence of a union. The immunity was first introduced in the Trade Disputes Act 1906, following a number of cases, most notably the Taff Vale Railway case of 1901, in which the courts had decided that trade unions could be sued in tort.

11 Finally section 17 of the 1974 Act (as amended by the Employment Protection Act 1975) places certain restrictions on the granting of injunctions by courts. It is in two parts: the first requires courts to delay granting an injunction to give the parties time to be heard; the second requires courts to consider before granting an injunction the likelihood of a defence succeeding at full trial on the basis that the defendant acted in comtemplation or furtherance of a trade dispute.

The first dates from the 1971 Industrial Relations Act; the second was introduced in 1975.

B Secondary action

12 The present law provides a wide immunity from civil proceedings for action taken by employees in dispute against an employer additional to their own, except where the courts decide that the action cannot reasonably be said to be 'in contemplation or furtherance of a trade dispute'. But what constitutes 'secondary action' and is it by definition undesirable? The term has gained some currency recently but it is a loose term which covers a wide variety of action.

13 It is important to distinguish secondary action from primary action. Primary action occurs when employees are in dispute with their own employer and take action against him. Secondary action is aimed at a third party. Often it involves employees in dispute taking action against a third party in order to further their dispute with their own employer. This paper is not concerned with primary action.

14 It is also not concerned with sympathetic action, which may often look like secondary action, but in fact quickly becomes a primary dispute between other employees and their own employer. Sympathetic action may take a number of forms:

- employees refusing to do or handle work which would normally be done by other employees who are on strike against their employer;

- employees refusing to cross a picket line at their own workplace even though they are not in dispute with their employer;

- employees striking in sympathy with employees in the same factory or elsewhere.

Nowhere in this paper is is proposed that the immunity should be removed from those taking sympathetic action. To do so would put at risk the 'right' of workers to strike against their own employer.

15 Annex B describes some of the main types of action which are generally regarded as 'secondary'. It illustrates how imprecisely the term is used. First, it is used to describe a number of different types of action: picketing, blacking, blockading or simply the threat of these in order to press certain demands. In fact picketing is by far the most common form of secondary action because

it is the form that can most easily be extended to companies not involved in a dispute without the support of the employees of that company. Workers on strike can easily send a picket to another company, whereas it may be difficult to persuade workers in that company to support them by action of their own. Blacking is most commonly used where a union is trying to extend its membership and orders its members in a particular firm not to handle goods going to or coming from a non unionised company. Blockading is, in effect, a combination of picketing and blacking, usually intended to heighten the effect of a strike by preventing the movement of goods.

16 Second, the degree of 'secondariness' of the action varies enormously: in some cases it comes close to being the main action itself; in others it may be taken against first suppliers and customers; in a few others it describes action against suppliers of suppliers to the employer in dispute.

17 Finally, the purpose of the action may range from straightforward sympathetic action in support of the workers on strike to action aimed at putting economic pressure on the employer in dispute or even at widening its effects to the whole community.

18 It is not useful therefore, in the absence of some more precise definition, to say simply that the aim is to make 'secondary action' unlawful. The aim is rather to deal with unacceptable action, wherever it takes place, whether close to the main dispute or very distant from it.

19 This inevitably begs the question, what is unacceptable? This is a question for Ministers and this section does no more than reach some preliminary conclusions on the basis of the Manifesto which can be used in assessing the various options in the next part of the paper.

20 The Manifesto makes three important points. First it singles out picketing for special attention because of its potentially damaging effects and because it is high in the public consciousness. It proposes that picketing should be limited to those in dispute picketing at their own place of work. The question of immunities for pickets is therefore being considered separately and it will not be considered again in this paper except in so far as it is covened by general proposals on immunities. It is possible, depending on the outcome of consultations, that the final solution will be more restrictive of picketing than other forms of secondary action.

21 Second the manifesto promises an enquiry into the activities of SLADE and by implication criticizes the sort of actions which SLADE have become well known for and 'which have done so much to bring trade unionism into disrepute'. The unacceptability of such action is that it uses blacking to force union membership on employees in a company when none of them desire it and they are not in dispute with their own employer. This puts it in a somewhat different category to other action in support of a dispute. It is therefore being considered separately.

22 Third the manifesto promises that the protection of the law will be made available to those 'not concerned in a dispute who at present can suffer severely from secondary action'. There is as yet no agreed view of how 'those not concerned in a dispute' should be defined, though of course that definition will crucially affect final decisions on the review. The next part of the paper looks at the options for changing the law on trade union immunities and under each option considers how third parties 'not concerned in a dispute' would be affected.

C Section 13 - Options for change

23 There seem to be four main ways in which the section 13 immunity for individuals acting in contemplation or furtherance of a trade dispute could be narrowed:

(i) by limiting the definition of what is in furtherance of a trade dispute;

(ii) by limiting the definition of what constitutes a trade dispute;

(iii) by limiting the type of contract, the inducement to breach which is covered by the immunity;

(iv) by definition of the parties to a dispute, action against whom is covered by the immunity.

(i) "In futherance of a trade dispute"

24 As has been seen, the section 13 immunity has been framed to protect acts done "in contemplation or furtherance of a trade dispute". One way of limiting the immunity would therefore be to restrict the definition of 'in furtherance of a trade dispute'.

25 This is what the courts have done already to a considerable extent in several recent important judgements. There have been a number of strands to the Court of Appeal's thinking. The most important for present purposes are: (a) that some action is too remote from the main action to be in furtherance of it (cf. particularly Beaverbrook Newspapers v Keys 1978) and (b) that there is an objective test of what is capable of furthering a trade dispute (cf. particularly Express Newspapers v MacShane 1979).

26 One option would be to rely on the courts to limit the section 13 immunity and take no action to change statute law. The advantage of this is that it avoids legislation in a complex and controversial area and leaves the law flexible enough to deal with individual cases on a common sense basis. The disadvantage is that it leaves the law in a state of uncertainty about how far the section 13 immunity extends.

27 The courts have made clear that each case has to be judged on the merits of whether an action is too remote from the main dispute, or is not capable of furthering it. The clear trend of the judgements however is that the section 13 immunity extends to action against those with a commercial contract with the employer in dispute but not to action beyond this at more than one remove. They seem therefore to protect those acting against first customers and first suppliers, but not those acting further afield.

28 The Court of Appeal's judgements should be tested later in the year, when Express Newspapers v MacShane reaches the House of Lords on appeal. This will certainly enable the Lords to take a view on the concepts of capability and remoteness, as the Court of Appeal has developed them, since both arise in the MacShane case. It is uncertain, however, whether they will take the opportunity to review and clarify the law in this area, or whether they will limit themselves strictly to the facts of the case they are considering. The House of Lords judgement in the case of NWL v Nelson and NWL v Wood may also be relevant. This case involved the blacking of a bulk carrier on the orders of the International Transport Workers' Federation in support of the Federation's campaign to wipe out flags of convenience and to improve the terms and conditions of crews. The Lords dismissed the employer's appeal against the refusal to grant an injunction restraining the blacking. The judgement giving the reasons for the Lords' decision is expected in September and may pronounce on the interpretation of 'trade dispute' and 'in futherance'.

29 If the House of Lords judgement in either case is unclear, or does not provide a confirmation of the previous judgements in the Court of Appeal an alternative option would be to use the various strands of the Court of Appeal's interpretation as a basis for a statutory definition of action in furtherance of a trade dispute. Thus an amendment might be on the lines that action in contemplation or furtherance of a trade dispute:

(i) must not be principally for some extraneous motive; and

(ii) must be directly in furtherance of a trade dispute; and

(iii) must be reasonably capable of furthering the original trade dispute and not merely intended to do so.

30 Such an amendment would take the law no further than the Court of Appeal has done already. It would still leave a lot of questions for the Courts to decide and might easily open up new areas for the Courts to interpret in addition to those on which the Court of Appeal has already taken a view. There seems little point in making such an amendment if the Court of Appeal's judgement in Express v MacShane is confirmed.

(ii) Definition of a trade dispute

31 It has been suggested that a different approach would be an amendment to the definition of a trade dispute in section 29 of the 1974 Act. It is argued that a restriction of what constitutes a trade dispute would automatically circumscribe the immunity for acts in furtherance of a trade dispute.

32 A number of possibilities have been suggested. They include:

(a) Returning to the definition of "trade dispute" in section 5(3) of the Trade Dispute Act 1906;

(b) A reduction in those matters listed in section 29(1) on which a trade dispute can take place;

(c) Amendments to section 29(1) and 29(6) to provide that a trade dispute can only take place between an employer and his workers (or their union) and

not between two unions or two groups or workers or between an employer and another union or groups of workers not connected with him.

33 It is difficult to be sure what would be the effect of returning to the 1906 definition of trade dispute. In the 1906 Act "trade dispute" is defined as:

"Any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment or with the conditions of labour, of any person, and the expression "workmen" means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises".

34 This seems to raise difficulties of interpretation in two main areas. First, the definition of "workmen" appears to be more restrictive than the definition of "worker" in section 30 of TULRA 1974. It may not include Crown employees and those employed by local authorities and charities, nor many members of professions. It therefore appears that a return to this definition might seriously undermine the right to strike of many "workers". It does, however, specifically allow trade disputesbetween "workmen and workmen", and to that extent is very similar in effect to the provision in section 29(1) of TULRA 1974.

35 Second, it is not clear how far the 1906 definition differs from the list of matters with which a trade dispute must be connected in section 29(1) of TULRA 1974. The 1906 Act leaves much more scope for uncertainty, but it seems likely that the "duties of employment of one or more workers" and "facilities for officials of trade unions" are the only matters specified in section 29(1) which are not covered by section 5(3) of the 1906 Act. In this respect therefore there seems to be relatively little difference between section 29 of the 1974 Act and section 5 of the 1906 Act.

36 The only certain effect of returning to 1906 would be the removal of section 29(3) of TULRA. This would exclude trade disputes relating to matters outside Great Britain. It would therefore theoretically achieve some small limitation on the trade dispute definition, though there do not appear to have been many instances of industrial action in furtherance of foreign trade disputes.

37 The uncertainties of returning to the 1906 definition suggest that, if it is thought desirable to amend the definition of trade dispute, a better way would be to amend section 29 of TULRA rather than to replace it altogether. The advantage of this is that it would be possible to achieve specific limitations on the scope of trade disputes while leaving the overall definition relatively clear, and much less subject to disputes than might be the case if the 1906 definition were reinstated.

38 Two main options for amending section 29 have been canvassed. The first would limit the list of matters with which trade disputes must be connected as set out in section 29(1). It would be necessary to decide the matters on which it was thought undesirable that disputes should take place. This would certainly not be easy given that most of the subjects listed in section 29 have come to be regarded by trade unions as well within the scope of collective bargaining. The second option would be tc amend sections 29(1) and 29(6) so that trade disputes were limited to disputes between employers and their workers (or their trade union). The effect would be to exclude disputes between workers and workers, and those between workers and another employer not their own.

39 The main problem with all these options, including the return to the 1906 definition, is that they do not achieve the main aim of restricting unacceptable secondary action. Their main effect is in limiting the scope of primary action, and secondary action is restricted only as a consequence of this primary restriction. This means that even if one or all of the above options were adopted, it would still be necessary to consider other ways of restricting secondary action. Furthermore while it may be considered desirable in itself that the scope of primary action should be restricted, this is a different issue from how secondary action should be limited. It also goes a good way beyond the Government's manifesto commitment to review the law on immunities in the context of their effect on secondary action.

(iii) Limitation by type of contract

40 A different approach would be to limit the immunity to inducing breaches of contracts of employment (at present it covers all contracts, including commercial contracts). This would mean a return to the original section 13 of the 1974 Act and almost to the statutory position as it was between 1906 and 1971.

41 This option is put forward in the working paper on picketing. It is discussed in detail in Annex C to this paper. Its effect would be to remove the immunity

from actions in tort for inducing breaches of contract other than contracts of employment. It would mean that action against those with a commercial contract with the employer in dispute (ie particularly first suppliers and first customers) would no longer be automatically protected by section 13.

42 The advantage of this option, is that it would require a relatively simple amendment to the law and would allow picketing to be dealt with in the same way as other action. It would also tackle head-on the extension of the immunity to breaches of commercial contract in the 1976 Amendment Act, which many believe was the direct cause of the recent extension of secondary action. Its prime disadvantage, however, is that it leaves the law in a state of considerable complexity.

43 The root of this complexity is that the amendment would not remove the immunity from all actions to induce a breach of commercial contract. Indirect action, provided the means used were lawful, would continue to be immune. Subsection (3) of section 13 declares that an inducement to breach a contract of employment (eg a strike) is not unlawful means. Therefore, the immunity would continue to apply in a situation where a trade union official, in order to induce a breach of a commercial contract between an employer in dispute and his supplier, persuaded the supplier's employees to go on strike or to black goods to be supplied to the employer in dispute.

44 It has been suggested that this problem could be solved by repealing section 13(3). This, however, was only a declaratory section, and its removal would not automatically make indirect inducement by inducing a breach of a contract of employment unlawful. It would simply throw the whole question back to the courts for them to decide in each individual case. It would therefore create even greater uncertainty for an employer contemplating civil action, unless an authoritiative decision were given by the House of Lords.

(iv) Definition of parties to the dispute

45 A further possibility would be to limit the section 13 immunity by reference to the parties in dispute. There seem to be two ways of achieving this.

46 First the immunity might be restricted to inducement to breach of contract of employment and to breach any other contract to which the employer in dispute is a party. Leaving aside contracts of employment, the effect of this change would be to restrict the section 13 immunity to inducement to breaches of commercial contract

with the employer in dispute. It would therefore clearly allow direct action against first suppliers and customers, but not further afield.

47 The advantage of this option is that it would state more clearly than a return to 1974 where the immunity ended. This disadvantage is that it would not remove the confusion altogether. It would still, for example leave open the possibility of indirect inducement to breach of commercial contract further afield than the first supplier and customer. It would therefore be a very limited change and not even achieve as much as the Court of Appeal has already achieved in narrowing the interpretation of in furtherance of a trade dispute. If it is worth considering at all, therefore, it is only in the eventuality of the House of Lords' decision overturning the Court of Appeal's judgement in Express Newspapers v MacShane.

48 The second possibility is to remove the section 13 immunity from acts done against 'extraneous parties' and to define who is an extraneous party as precisely as possible in the Act.

49 This was almost what was done in the 1971 Industrial Relations Act. Section 98 of that Act made it an unfair industrial practice to induce a person to breach a contract (except a contract of employment) where that person was an extraneous party to an industrial dispute. Extraneous party was defined as one who was not party to the dispute nor had taken any action in material support of one who was a party to the dispute. Further a person could not be regarded as a party to the dispute simply because he was:

- an associated employer;
- a member of the same employers' organisation as the party to the dispute;
- a contributor to a relief fund;
- or a supplier of goods or provider of services to the main party.

50 It is not a realistic option to return to the 1971 position because of its reliance on the novel concept of unfair industrial practice. The importance of the example, however, is that it provides a definition of extraneous party which could be used in limiting the section 13 immunity (ie by saying that the immunity

did not apply to acts against extraneous parties). Such a change would be very restrictive indeed of action beyond the main dispute. Though the Section 98 of the 1971 Act was never tested, it almost certainly made unlawful any industrial action other than against a person giving material support to a party in dispute. It was intended to have the effect that a first supplier (though not a first customer) was not to be regarded as a party to the dispute, unless he had given material support. Of course for present purposes it would not be necessary simply to adopt the 1971 definition; for example it would be possible to use a definition which was not so restrictive of action against first suppliers and customers.

51 The 1971 Act did continue to allow action against those giving material support to the employer in dispute. In doing so it accepted that a legitimate purpose of secondary action was to prevent employers undermining or circumventing a strike at their own company eg by getting other firms to do the work which was normally done by those in dispute. It would be difficult to justify going further than this by drawing the immunity so tightly that action could not be taken even against those giving material support.

52 The apparent advantage of such an option is that it could provide a clear statement of the extent of the immunity for employers faced with secondary action. However, the application of a statutory provision in law might often give rise to difficulties in practice because of the complexities of the customer/supplier relationship. The Courts would have to decide what constituted material support and there would be difficulties of evidence in establishing whether a customer or supplier had modified his normal practice as a result of the dispute, and whether that constituted 'material support' for the employer in dispute.

CONCLUSION

53 The first step in deciding on a preferred option is to determine what type and scope of secondary action are unacceptable. Picketing has been the most used - and abused - recently and it is by far the most effective form of secondary action. The Government's working paper on picketing has suggested limiting the immunity in section 13 specifically to picketing by those party to a dispute at their own place of work; or alternatively restricting all forms of secondary action by returning to S13 of the 1974 Act (see paras 40-44 above). As to other forms of secondary action such as blacking and blockading these are very much less used and are more difficult for unions to mount, and blockading would be limited by any restriction of lawful picketing. The most common - and most objectionable - instances of blacking arise

in disputes about union membership, most notably the activities of SLADE, which are currently the subject of a separate and independent inquiry.

54 As to the means of restricting secondary action, section 13, as interpreted by the courts at present seems to carry the immunity to first customers and first suppliers but probably not beyond. The Lords' judgements in Express Newspapers v MacShane (and NWL v Wood and NWL v Nelson), may make this clear. If the aim is to go further than this and remove the immunity for action against first supplier and first customer, then returning to contracts of employment (as in S13 of the 1974 Act) would achieve that in relation to direct action to induce breach of commercial contract, but would leave it open for unions to put pressure on suppliers and customers by indirect action. In order to make clear that the immunity did not extend to first customer/supplier, it would be necessary to include some definition of 'extraneous party' in statute. This would cut back the immunity more severely than at any time since 1906 (with the possible exception of 1971 to 1974, though the 'extraneous party' definition in the 1971 Act was never tested). It would still leave a considerable area of uncertainty which would have to be clarified by the courts.

D Section 14 immunity

55 The Section 14 immunity is very wide. It confers on trade unions immunity (with a few exceptions) from injunctions and actions in tort - but not in contract - for all acts, whether or not in contemplation of furtherance of a trade dispute. It thereby protects trade unions from being sued for damages either for their own acts or, more important, for acts done on their behalf by officials or members. The immunity dates from 1906. It was partially removed in 1971 and restored in 1974.

56 There was no suggestion in the manifesto that the section 14 immunity was to be changed in any way. There are those, however, who argue for change on the grounds that the trade unions occupy a unique position in the extent of their immunity from civil action and should be brought within the law like any other organisation. Even the Donovan Commission commented: "It had been pointed out that no other body of persons enjoys such immunity; and that since the Crown Proceedings Act 1947, even the Crown does not possess it".

57 Proponents of change also argue that it is particularly relevant to consider changes to section 14 in the context of a restriction of the immunity for individuals in section 13. They do so on two grounds:

- first if trade unions could be called to account and sued for the actions of their members, they would be more responsible in the use of unacceptable secondary action and exercise more control over their officials and members when they acted unlawfully;

- second a change would enable employers to gain proper redress from trade unions for damage done to them by action in support of a dispute to which they are not a party; if the law is not changed they will only be able to sue individuals who will not be in a position to pay substantial damages.

58 The three most common suggestions for amending section 14 are as follows:-

(a) Total abolition

This is not as far reaching as it appears at first sight since trade unions, being effectively bodies corporate, would still enjoy the immunity granted to individuals by section 13. The precise effect of the limitation of trade union immunities would depend on what changes, if any, are made to section 13. If that section is not amended, unions will have immunity only for inducing breaches of contract in contemplation or furtherance of a trade dispute. It would probably not be necessary to specify in statute that, if this option is adopted, 'person' in section 13 includes a trade union. Nevertheless such a provision could be included either to avoid ambiguity or for presentational advantage.

(b) Limiting the immunity to inducing breaches of contract

The second possibility is to limit the section 14 immunity to inducing breaches of contract in contemplation or furtherance of a trade dispute. This would leave trade unions in the same position as individuals under the present law and therefore has the same effect as the repeal of section 14. If the section 13 immunity is restricted to contracts of employment, it would be possible to give trade unions the slightly wider immunity for inducing breaches of all contracts, or alternatively to bring section 14

into line with the amended section 13. Either course might be preferable on presentational grounds to simple repeal of section 14 although the effect would be similar or identical.

(c) Limiting the immunity to acts 'in furtherance of a trade dispute'

Finally trade union immunity could be limited to acts done in contemplation or furtherance of a trade dispute, as it is already to some extent in section 14(2). This was recommended by Donovan chiefly on the grounds that it met some of the criticisms that trade unions were beyond the law, without removing the essential immunity for acts done in connection with a trade dispute. Donovan felt the effect on trade unions would be minimal since trade unions rarely committed torts outside a trade dispute. This option is, however, complicated today by the Courts' judgements restricting the interpretation of in contemplation or furtherance of a trade dispute. Potentially this considerably widens the effect which such a change to the section 14 immunity could have on trade unions' liability for actions in tort.

Union responsibility

59 One of the most difficult issues raised by removal or restriction of the section 14 immunity is how far the unions are to be held responsible for the unofficial and unauthorised acts of their members. Those who favour restriction argue that there should be some positive responsibility on unions to use their best endeavours to restrain unofficial action, that this could lead to more union control over their shop stewards and eventually to fewer disputes. Opponents argue that this is a complete misunderstanding of the way in which trade unions are organised and disputes arise. It would, they say, lead to internal dissension and ultimately the weakening of trade unions, and could lead to more unofficial disputes rather than less.

60 This is deep water indeed, as was shown after 1971. The Industrial Relations Act failed to deal properly with this position because it did not expect it to arise. Unions were expected to register and, in registering, adopt rules which made the lines of responsibility within the union structure clear. Most unions

did not change their rule books and did not register. They and their officials thus became liable for unfair industrial practice if, for example, in contemplation or furtherance of a trade dispute they induced or threatened breach of contract.

61 It was left to the Courts to decide when a union was responsible for acts done by its officials, using mainly the common law concept of vicarious liability. The Courts took a somewhat confused view of when a union was responsible for unofficial action by shop stewards. The first case to reach the House of Lords was Heatons Transport v TGWU, involving blacking at the Liverpool and Hull docks. In the case the House of Lords went to considerable lengths (a) to establish that the T & G shop stewards had authority from the union membership to take industrial action to promote their members interests and that therefore they did not need specific approval from the union executive; and (b) to show that their actions were in support of a general policy of the union on containerisation.

62 The second case to reach the House of Lords was General Aviation Services (UK) Ltd v the TGWU, in which the plaintiffs were claiming compensation of about £2m from the union. In their decision the majority of the House of Lords appear to have modified their previous conclusion. They found that the circumstances of the Heaton's case - particularly the local situation at the Liverpool and Hull docks and the evidence of a union policy on containerisation - were not repeated in this case, and that the shop stewards at Heathrow airport were not acting with the authority of the defendant union.

63 The Courts also took a rigorous view of how unions should try to restrain their officials or members from taking illegal action, once their responsibility had been established. In Heatons the House of Lords ruled that it was not enough for a union to draw attention to a court order restraining the blacking or to advise their members to desist. They should take some positive steps to stop the action, if necessary withdrawing a shop steward's credentials to act on the union's behalf. This view was followed by NIRC in a number of other cases.

64 An important conclusion from all this is that it hardly seems possible to remove or restrict the section 14 immunity without dealing in some way with the question of union responsibility. Otherwise the law will be thrown into the same confusion on this question, as existed between 1971 and 1974. The alternative of trying to define 'a representative act' or 'best endeavours' in statute is an equally unattractive proposition. Apart from the technical difficulties of finding a satisfactory definition, this would bring the law back to the question of

internal trade union organisation, which was one of the reasons the trade union movement took such exception to the Industrial Relations Act.

Effect on unacceptable action

65 It is also difficult to argue that a change to the section 14 immunity is essential in the context of restricting action against employers not concerned in a dispute. Changes to section 13 can by themselves be an effective brake on secondary action and provide an employer with all the remedy he needs in order to restrain unlawful action which is damaging his business. As the cases show, it allows him to seek an injunction against the union official or General Secretary who is organising the action complained of.

66 A change to section 14 would make little difference to this. Its main effect would be to enable an employer to go beyond the interim injunction restraining the individual's action by suing the union itself for damages. Experience suggests that most employers are not interested in damages, providing they can prevent the action being taken against them. For example, under the 1971 Industrial Relations Act only one of the 33 applications by employers for relief from industrial action reached a full hearing of a complaint for damages before the Act was repealed.

Conclusion

67 The section 14 immunity goes back to the Trade Disputes Act of 1906 and has a symbolic significance in trade union history. It is the means by which unions are safeguarded from potentially destructive claims for damages arising from the pursuit of industrial action.

68 Reducing the immunity would create practical difficulties, particularly in deciding when unions were liable for the acts of their officials and members. It would also have a limited effect on the scope of industrial action, since Section 13, if satisfactorily drawn, enables an employer to seek an injunction against a union official who organises unlawful industrial action. Furthermore if he also sues the official, the union will usually pay any damages which are awarded. It is therefore difficult to argue that reducing the section 14 immunity is a limited reform which is necessary to deal with a specific abuse which has grown up recently. For this reason it seems to go a good deal further than was foreshadowed in the manifesto and to be in a different category from the other reforms under consideration.

E Section 17 - Restriction on injunctions

69 Section 17 establishes some ground rules for the courts to follow in hearing applications for injunctions. There are two main strands to it. Sub-section 1 compels courts to delay granting an injunction to give the parties time to appear and be heard; sub-section 2 compels courts to consider the likelihood of a defence based on grounds that the defendant acted in contemplation or furtherance of a trade dispute succeeding at full trial.

70 The first strand was first included in statute in the Industrial Relations Act 1971 and was reenacted in 1974. It has not been a source of contention. An example of how it works was provided by the recent case of United Biscuits v. Fall. Fall did not appear at the first hearing and the court delayed its decision for a few days to give him the chance to appear and put his case. When he did not do so the court granted the injunction.

71 The second strand was introduced by the 1975 Employment Protection Act, following the House of Lords judgement in American Cyanamid v. Ethicon Ltd (1975). The importance of this judgement in the present context is that it made it easier for an employer to obtain an interlocutory injunction restraining union action. Instead of providing evidence that there was a prima facie case to be answered he had now only to show there was a serious issue to be tried. If he could establish this, the courts were always likely to grant an injunction in the employer's favour because the balance of convenience lay with stopping the union action pending the full hearing. The aim of the 1975 amendment was to restore the balance a little in favour of the union by requiring the courts to consider the likelihood of a defence based on section 13 succeeding at a full hearing, before granting an injunction.

72 In practice this seems to have had little effect on the courts' willingness to grant interim injunctions to employers, once they have decided that there is a issue to be tried. The exception is the case of Star Sea Transport Corporation v. Slater (and others) where the High Court judge refused to grant an interlocutory injunction on the grounds that the defendants were likely to succeed at the trial of the action in showing that they were protected by section 13. The High Court was, however, overuled by the Court of Appeal, which decided that the High Court had erred in its judgement of the likelihood of a section 13 defence succeeding and that there was a point to be argued. It therefore granted the injunction on the grounds that the balance of convenience was in favour of stopping the union blacking pending the trial of the action.

Conclusion

73 The first part of section 17 has not been a source of contention. It simply ensures that the courts give the parties a chance to appear before granting an injunction. The second part has attracted more attention because it attempts to restore the balance in favour of trade unions in the hearing of applications for interim injunctions. It does not seem, however, to have had any significant effect on the willingness of the courts to grant interlocutory injunctions to employers.

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ANNEX A

REVIEW OF IMMUNITIES - THE PRESENT LAW

Individual immunities (Section 13)

1 The Trade Union and Labour Relations Act 1974 (TULRA) as amended by the Trade Union and Labour Relations (Amendment) Act 1976, restores and extends the protection which existed before the Industrial Relations Act 1971 for people involved in trade disputes. 'Trade dispute' is defined in section 29 of TULRA which considerably extends the definition in the 1906 Trade Disputes Act. Section 13 (as amended) provides that a person acting in contemplation or furtherance of a trade dispute cannot be sued on the grounds only that he threatens that a contract will be broken or interfered with or that he induces or threatens to induce another person to break or interfere with the contract.

2 The immunity in section 13 applies to any person organising industrial action in a trade dispute, whether official or unofficial. Because the immunity extends only to action 'in contemplation or futherance of a trade dispute', the definition of 'trade dispute' and the interpretation of the formula 'contemplation or furtherance' are of considerable importance. A number of recent judicial decisions and dicta have had the effect of restricting those definitions. The principal cases are discussed in paras 9 to 16 below.

3 The effect of section 13 is to allow a person to organise industrial action involving the breaching of contracts (whether of employment or otherwise). Industrial action almost inevitably leads directly and /or indirectly to a breach of contract and thus some immunity is necessary if strike action is not to be unlawful. However, section 13 allows various forms of action in addition to what might be termed primary action. Examples of such secondary action are

(i) organising action by employees of other employers, if this is in furtherance of the dispute;

(ii) bringing pressure to bear on those who are not involved in the dispute but who have contracts with the employer in dispute, eg by inducing a supplier to withhold the goods which he has contracted to supply, if this is in furtherance of the dispute.

(It should be noted that technically immunity from action in tort does not confer a right to take such action but merely removes a remedy.)

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4 The protection given for actions in contemplation or furtherance of a trade dispute under TULRA was restricted to breaches of contracts of employment. The extension of the immunity to cover all contracts was effected by the 1976 amendment. This change had been recommended by the Donovan Commission in 1968 because the restriction of immunity to breaches of contracts of employment, which applied under the Trade Disputes Act 1906 as amended in 1965 until 1971 resulted in legal complexities. For example, where a union was in dispute with an employer, it was not lawful for the union to approach a supplier and induce him to break a commercial contract. It has, however, always been lawful to induce the suppliers' employees to give due notice under their contracts of employment and then to strike on the expiry of notice, thus indirectly causing the supplier to breach his commercial contract. In both instances the same end is achieved but only in the latter case were the means lawful; the former was tortious.

Trade Union immunities (section 14)

5 Under section 14 of TULRA trade unions have immunity from actions in tort for any act except one not in contemplation or furtherance of a trade dispute which causes personal injury or is connected with the ownership or use of property. This section gives much wider immunities to trade unions than to individuals. It is based on section 4 of the Trade Disputes Act 1906 although in effect it slightly restricts the previous immunity.

6 The Donovan Commission took the view that such an all-embracing immunity was unjustified. No other body, including the Crown, enjoyed such immunity. The Commission therefore recommended unanimously : "In all circumstances we think it would be right and proper to confine the immunity of trade unions so that it applies as regards torts committed in contemplation or furtherance of a trade dispute but not as regards any other tort" (para 909).

7 However, the section 14 immunities, which extend to unions only, do not preclude actions against individual union officials in their personal capacity except where the 'trade dispute immunity' under section 13 applies. This is the basis on which employers have been able to obtain injunctions against union officials to restrain, for example, secondary picketing as in United Biscuits v Fall 1979. Such rulings have tended towards a narrow interpretation of 'trade dispute' (Section 29). Thus while section 14 places trade unions in a unique position in law, it does not widen the scope, provided by the section 13 immunities, for industrial action.

The Conspiracy and Protection of Property Act 1875

8 Section 7 of the above act (as amended) makes it a criminal offence wrongfully and without legal authority to watch or beset a place with a view to compelling a person to do or abstain from doing something which that person is legally entitled to do or not to do. The fact that picketing and other acts in contemplation or furtherance of a trade dispute are not actionable in tort by virtue of section 13 (as amended) and 15 of TULRA means that those acts are not done 'wrongfully and without legal authority' and thus do not constitute criminal offences under the 1875 Act. Therefore the trade dispute immunities do have a marginal bearing on the criminal law, although prosecutions under this section of the 1875 Act are very rare indeed.

The effect of recent judicial decisions

9 Legislation on immunities has been felt to require regular revision as case law develops. For example, the Trade Disputes Act 1965 was a consequence of the House of Lords decision in Rookes v Barnard (1964). Recent judicial decisions have tended to restrict the scope for industrial action, particularly where it affects third parties. There is now doubt as to whether certain activities which many people formerly believed to be permissible are indeed lawful. Thus it can be argued that the law is in need of amendment if only to clarify the position. It must be emphasised that the case law is not conclusive. The recent important decisions have been on applications for interlocutory injunctions. The dicta in those cases indicate the current judicial interpretation of the law.

10 Recent cases have provided restricted definitions of 'in contemplation or furtherance of' a trade dispute. Two cases are particularly important in illustrating the trend of the Court's thinking.

11 Beaverbrook Newspapers v Keys 1978

The principal point to emerge was that 'in contemplation or furtherance of' (a trade dispute) does not mean 'in consequence of'. The case concerned Keys, the General Secretary of SOGAT and the 'Daily Express'. A dispute, involving journalists prevented the 'Daily Mirror' from appearing. The Express management wished to print extra copies to meet the increased demand which resulted from the Mirror stoppage. Keys instructed SOGAT members at the Express to 'black' the extra copies. The Court of Appeal ruled that, for an act to be done in furtherance of a trade dispute, it must be directly in furtherance of it. Lord Denning held that the Express was acting not in furtherance but in consequence of a trade dispute by printing extra copies. Therefore SOGAT's instruction to its members was not in furtherance of a trade dispute either. Said Lord Denning: "It was a consequence of a consequence. It is far too remote to be protected by the Statute".

12 This concept of 'remoteness' has subsequently been cited in the judgements in Express Newspapers v Macshane, United Biscuits Ltd v Fall and Associated Newspapers v Wade and Jackson.

Express Newspapers v Macshane

13 Lord Denning's dictum in this case has implications for the definition of 'trade dispute' (TULRA section 29) although the Court of Appeal's ruling was again based on section 13. The case stemmed from the strike of NUJ journalists on local papers. With the aid of copy supplied by the Press Association, the local papers were nevertheless able to continue. The NUJ therefore called a strike of its members at the PA. Approximately half of the PA journalists took action, but the service continued. The NUJ then ordered journalists on national papers, including the Express, to 'black' PA copy. The Express sought an interlocutory injunction against the President and General Secretary to restrain them from inducing their members to breach their contracts of employment. This was granted in the High Court on the grounds that the blacking at the Express was not in furtherance of the dispute between the union and the local papers. The Court of Appeal upheld that decision.

14 However, it is significant that the test applied was whether the Express blacking furthered the action at the local papers, and not that at the PA. In particular Lord Denning said "there was a 'trade dispute' between the local newspapers and the journalists employed by them. But there was no other dispute at all. There was no dispute between the Press Association and the union. There was no dispute between the Daily Express and the union. The only dispute was with the local provincial newspapers". Thus he rejected the main strand of the NUJ's defence, which was that the Express action was in furtherance of that at the PA, and by implication defined the PA strike as a form of secondary action which, while it was in furtherance of a trade dispute, was not itself a trade dispute. It remains to be seen whether the House of Lords upholds the Court of Appeal's judgement.

Conclusion

15 The recent cases have been decided largely on their particular facts. Nevertheless they reveal the trend of judicial decisions. There seem to be three main elements in the courts' judgement of when action is in contemplation or furtherance of a trade dispute: namely that such action must

(i) not be for some extraneous motive;
(ii) be directly in furtherance of a trade dispute;
(iii) be reasonably capable of furthering the original dispute.

15 The House of Lords will have an opportunity to take its own view of these decisions in Express Newspapers v MacShane, judgement in which may not be available until the New Year (and also possibly in the case of NWL v Wood and Nelson, judgement in which should be available in September).

ANNEX B

REVIEW OF IMMUNITIES

Secondary Action

It may be helpful to look at various examples of what is called secondary action.

Action within a group of associated companies

In a group of companies, where one company or establishment is in dispute with its workers, action may be taken against other companies or establishments connected with the first. The purpose is usually to prevent the parent company transferring work from the company in dispute to others in the group or to prevent supplies or goods being sent to the company in dispute from another part of the group. In conglomerates there is always the possibility that action will be spread to companies with no connection with the employer in dispute except that they share the same holding company. In this case the purpose is to put economic pressure on the parent company by getting at a particularly sensitive part of the group.

Action on suppliers and customers

It is not uncommon for unions to take action at suppliers or customers of the employer involved in the main dispute to prevent essential supplies and goods reaching him and to put economic pressure on his business. This happens particularly where the main dispute is not having much effect on the employer's business, perhaps because most of his employees are working normally. It is also more likely to be effective where the union in dispute has members at the supplier or customer. An example is provided by the provincial journalists strike against the provincial newspapers. The union concerned, the NUJ, took action at the Press Association, because the provision of news by PA was enabling the provincial newspapers to continue publication.

In the miners' strike of 1972 and 1974 the NUM picketed the power stations in order to prevent the movement of emergency stocks, which would have enabled the power stations to operate normally for a considerable time.

Some, but not all, the lorry drivers' strike fell in this category. There was a lot of picketing of firms' own fleets of lorries, the drivers of which were not in dispute with their own employers. The aim was simply to widen the effects of the dispute to put pressure on the road hauliers and ultimately on the Government to concede their demands.

6 The road haulage dispute cannot however be categorised very easily. Much of the action was intended simply to create as much damage as possible but some of it could be regarded as more directly in support of the main dispute. For example, it could be argued that some companies used their own fleets to move goods, which would usually be moved by contractors in the 'hire and reward' sector, and that the picketing was aimed at that. In the celebrated case of United Biscuits v. Fall, United Biscuits admitted that they normally used both contractors and their own fleet to get edible oil from their suppliers; and the pickets claimed at one stage that they were really only trying to prevent the movement of oil normally carried by contractors.

7 Furthermore it is often difficult to establish the lorry drivers' place of work and in consequence picketing at the place of work is a problem. Some of the picketing at places like the docks, for example, could be represented as picketing at the place of work in order to ensure that drivers in the 'hire and reward' sector were not breaching the official strike. At a stretch that might be considered primary picketing.

Action at more than one remove from the main dispute

8 Action is sometimes taken beyond the first suppliers and customers of the employer in dispute. A good example was in the Express Newspapers v. McShane case. Here the dispute was, as described above, between the provincial newspapers and their journalists. It spread to the Press Association which was supplying the provincial newspapers with copy. Then the NUJ tried to extend it to journalists working for national newspapers, asking them to black all PA copy.

ANNEX C

THE CONSEQUENCES OF REVERTING TO S.13(1) of TULRA 1974

1. This note considers the consequences, both legal and practical, of amending S.13(1) of TULRA (as amended in 1976) so that it reverts to the original wording of the 1974 Act.

2. s.13(1) of TULRA 1974 provided that an act done in contemplation or furtherance of a trade dispute should not be actionable on the grounds only that it induced another person to break his contract of employment. S.3 of the 1976 Act extended the protection conferred by S.13(1) of the 1974 Act to breaches (and interference with the performance) of all contracts including commercial contracts.

The legal consequences of a return to the 1974 Act

3. A reversion to S.13(1) of the 1974 Act would in effect mean a return to the statute law before the 1971 Act subject to case law developments. The first limb of S.3 of the Trade Disputes Act 1906 provided that "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the grounds only that it induces some other person to breach a contract of employment ....." This provision (which was the result of a private members amendment) meant that trade union officials and others who induced a breach of any other kind of contract, whether in contemplation or furtherance of a trade dispute or not, still committed an actionable tort. It was, however, not until the 1960s, that there was a significant number of cases in which the courts issued injunctions against persons inducing breaches of commercial contracts because in so acting they were outside the protection of S.3 of the 1906 Act.

4. The locus classicus appears to be Emerald Construction Co v. Lowthian (1966). Here the main building contractors sub-contracted with the plaintiff for the supply only of labour for work on a building site. The defendants were officials of a trade union of brick-layers. They knew of the existence of the sub-contract but did not know what its precise terms were. The union officials demanded of the main contractors that the sub-contract should be terminated and brought pressure to bear by industrial action. The Court of Appeal held that an interlocutory injunction should be granted (inter alia) because the sub-contract was not "a contract of employment" within section 3 as it was not a contract between employer and workman and accordingly there was not immunity for action to procure its breach. Following this case, in the late 1960s employers frequently obtained injunctions against (usually) union officials who were inducing breaches (or interfering with the performance) of commercial contracts including those concerned with deliveries of supplies or manufactured products. These proceedings were often "ex parte" in the absence of the defendant.

5. However, the legal position was complex. The issue of liability in tort for inducing breaches of commercial contracts in contemplation or furtherance of a trade dispute turned principally on whether the inducement was direct or indirect and whether or not it was achieved by lawful means. It is essentially to this position that the law would return if S.13(1) of TULRA reverted to its 1974 wording. In general terms, an amendment of this kind would remove the immunity from direct inducement to breach a commercial contract but it would leave open the possibility of a person taking indirect action to induce a breach of a commercial contract provided that the means used were lawful, eg by first inducing a breach of contract of employment. In detail the effects would be as follows:

(a) Direct interference with the performance of a commercial contract
There would be a liability in tort for direct interference with a commercial contract even in contemplation or furtherance of a trade dispute. This would mean that if, for example, the officials of a union in dispute with an employer approached one of that employer's suppliers and demanded that he ceased supplying the employer, threatening that otherwise the supplier's employees would be called out on strike, they could be restrained from doing so by injuction and would be liable for damages provided that

(i) the demand to withold supplies amounted to persuasion, procurement, or inducement of the breach of the commercial contract (not mere advice that if the contract was not broken there would be unpleasant consequences); and

(ii) the demand was made

(a) in the knowledge of the existence of the particular commercial contract or in circumstances such that the court could impute that knowledge; and

(b) with the intention of procuring its breach or in a state of mind of not caring whether compliance with the demand, etc would cause its breach or not; and

(iii) as a necessary consequence of complying with the demand, etc, the commercial contract was or would be broken.

(b) Indirect interference with the performance of a commercial contract
There would be no liability in tort for indirect interference with a commercial contract in contemplation or furtherance of a trade dispute provided that the means used to achieve the breach were in themselves lawful. Subsection (3) of section 13 declares that an inducement to break a contract of employment (eg a strike) is not unlawful means (see para 6(i) below). Three examples of what this might mean can be quoted:

(i) in the same circumstances as in (a) above, if the union officials persuaded the supplier's employees to "black" goods to be supplied to the employer in dispute and thus induced them to break their contracts of employment with the supplier, there would be no tort even though the conditions described in (a)(i) - (a)(iii) above had been satisfied.

(ii) similarly if the union officials or the employees of the employer in dispute peacefully picketed the suppliers' establishment and persuaded lorry drivers to turn back in the knowledge that they were inducing them to breach their contracts of employment and that as a result commercial contracts for the delivery of goods would be broken, no tort would be committed. The breach of the commercial contract would have been indirectly induced by lawful means (inducement of breach of the drivers' contract of employment).

(iii) again, if the union officials called out their members who were employees of the employer in dispute they would not be liable for any consequent breach by that employer of any of his commercial contracts with his suppliers, even though the union officials knew of the existence of such contracts and intended to bring about their breach. In this case again the inducement would be indirect and the means (inducement to breach the contracts of employment) lawful.

(c) Interference with commercial contracts by unlawful means

If any of the means used were unlawful the immunity conferred by S.13 would not apply, even if the inducement were indirect. This would mean that if (in the example quoted in (a)) the union officials induced a second supplier to breach his commercial contract with the first supplier with the intention of depriving the employer in dispute of supplies from the first supplier there would be a tort because some of the means used (ie inducing a breach of the first suppliers contract with the second supplier) were not lawful.

6. The complexity of the pre 1971 situation was characterised by the Donovan Commission as a "legal maze". The Commission concluded that "the law upon the subject ought not to be left in such a state that all persons, whether they be employees, employers or trade union officials should be so uncertain of their position" (Report para 892). However, since the Commission reported the law has been clarified in a number of important respects:

(i) before 1971 it was an unresolved question whether inducing a breach of a contract of employment constituted "unlawful means" for the purposes of indirectly procuring a breach of a commercial contract.

Lord Denning in Torquay v. Cousins (1969) said that because, under S.3 of the 1906 Act, inducing a breach of a contract of employment was "not actionable" it was not unlawful means for the purpose of the indirect form of the tort of inducement to breach a contract.

Judicial opinion in most of the important cases of the 1960s seemed to agree with this view, but there were some contrary pronouncements. S.13(3) of the 1974 Act put the matter beyond doubt.

(ii) the distinction between direct and indirect inducement seems to be firmly established. In Torquay Hotel Co v. Cousins (1969) Lord Denning said that "indirect interference is only unlawful if unlawful means are used. I went too far when I said in Daily Mirror Newspapers v. Gardner that there was no difference between direct and indirect interference ..... This distinction must be maintained, else we should take away the right to strike altogether ..... A trade union official is only in the wrong when he procures a contracting party directly to break his contract or when he does it indirectly by unlawful means".

(iii) Some of the doubts expressed in the Donovan Report on the need for knowledge of the terms of the contract have been diminished because the Courts have become more ready to impute knowledge on the part of the defendants. Similarly, the Courts seem to be more ready to assume that the defendant intended the consequences of his action in cases involving trade union officials and industrial action.

(iv) It is established that provided due notice is given of a strike there is no question of unlawful means although the position with regard to industrial action short of a strike is less certain).

(v) Finally, the inclusion of the words "or interferes or induces any other person to interfere with its performance" in the 1976 amendment to S.13(1)(a) (and of similar words in 13(1)(b)) has prevented action being brought for interference with contractual relations short of inducing an actual breach of contract. Various remarks in Emerald Construction Co v. Lowthian (1966) and in the Daily Mirror and Torquay Hotel cases suggested that this became another head of action. In Torquay Hotel, Lord Denning said "the time has come when the principle" (ie of inducing a breach of contract - a tort originated in the case of Lumley v. Gye in 1853) "should be extended further to cover deliberate and direct interference with the execution of a contract without that causing any breach". There was no actual breach of contract in the Torquay Hotel case because of a clause in the contract between Esso and the Hotel excluding liability for non-performance in the circumstances of a trade dispute. It is, however, clear that normally the interference caused must be by unlawful means and this seems to put it on a par with indirect inducement.

Conclusion

7 The inclusion of the words "contract of employment" in S.13(1) of TULRA (as in the 1974 Act) would not by itself bring about a return to the "legal maze" of pre-1971 as described by Donovan. This is principally because S.13(3) declares that a breach or inducing a breach of a contract of employment is not unlawful means and because Torquay v Cousins (1969) (Lord Denning) established that there is a difference between direct and indirect inducement. However, the law would still be left in a state of considerable complexity and as a result an employer could never know whether he would obtain an injunction restraining secondary action which was damaging his business.