

IN THE MATTER OF

BETWEEN:

PROFESSOR CHRISTOPHER RUST

- and -

CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE

ADVICE

1. I am instructed by Professor Christopher Rust, on a pro bono basis. I am instructed to provide advice in the matter of their long-running campaign to prevent the felling of trees in the City of Sheffield (see below for a summary of facts in relation to this).

2. I am asked to advise in relation to the following questions:
 - i. Whether a person standing peaceably in their own front garden (which is inside a ‘work zone’ in which work is being carried out to a tree) is guilty of an offence under section 241 TULCRA 1992, if in doing so, they prevent another person from carrying out work under a valid contract outside of their property?

 - ii. Whether a person peaceably carrying out work on private property (which is inside a ‘work zone’ in which work is being carried out to a tree) under a valid contract is guilty of an offence under section 241 TULCRA 1992, if in doing so, they

prevent another person outside of the said property from themselves carrying out work under a valid contract?

- iii. Whether a person standing peacefully on the public highway (which is inside a taped and coned-off 'work zone' in which work is being carried out to a tree) is guilty of an offence under section 241 TULCRA 1992, if in doing so, they prevent another person from carrying out work under a valid contract on the public highway?
- iv. If no offence has been committed in any of these situations, what people can do to resist a threatened or actual unlawful arrest under section 241 TULCRA 1992?
- v. What claims, if any could be brought by those who have been unlawfully arrested under section 241 TULCRA 1992?

FACTUAL BACKGROUND

3. I have been provided with the factual background that follows in the subsequent paragraphs.

“Under a 25 year highway renewal and maintenance contract between Sheffield City Council and the Contractor, Amey, a large number of healthy street trees have been felled and more fellings are planned. This is vigorously opposed by many residents and community groups, especially given the secretive nature of the contract and confusion about the actual reason for the fellings.

Individuals and groups have been protesting on the streets since 2015 and the response of Amey, Sheffield City Council and the Police has been progressively more vigorous in threatening and, recently, arresting protestors. Some of the

arrests, at Rustlings Road, took place during a controversial pre-dawn mass felling exercise and charges were withdrawn for lack of evidence.

The City council has instituted a consultation process and an Independent Tree Panel but the consultation process is widely criticised as undemocratic and ineffectual and the Tree Panel judgements are routinely overruled by the contractor. At present, fellings are proceeding at a rapid pace with protestors being arrested and threatened with arrest under charges that have not yet come to court in this context.

Some of the following represent recent developments:

Two protesters undertaking non-violent direct action to prevent a tree from being felled on Marden Road, Sheffield on 2nd November 2016 were arrested under section 241(1)(c) of the Trade Unions Act (1992). The action consisted of their standing within the exclusion area of a tree to be felled. Their court hearing is set for 9th March 2017.

On Chippinghouse Road, Sheffield, on the week beginning 6th February 2017, the following events occurred:

On Monday 6th February, protesters undertook non-violent direct action to prevent a tree from being felled on Chippinghouse Road. Seven people were arrested under section 241 TULCRA 1992, for the same action: sitting around a tree that was to be felled.

On Tuesday 7th February, protesters stood in a garden near to a tree that was to be felled, with the knowledge and permission of the home owner. They were threatened with arrest for section 241 TULCRA 1992.

On Wednesday 8th February, protesters once again stood in a private front garden, with the permission of the owner, and were threatened with arrest, and were duly arrested for section 241 TULCRA 1992.

On Thursday 9th February, a homeowner had a person working in her front garden repainting a gate. Protesters asked why the work of Amey should take precedence over the work of the person repainting the gate. The police replied that because the homeowner had received a letter stating that Amey would be working on the street that week, she could not have someone working in the garden at the same time. It was later disclosed that the garden gate work had been arranged earlier than the felling notices so the police asked the contractors felling the trees to withdraw.

On Friday 10th February 2016, protesters, including the householder in question, stood in a garden in the danger area and were threatened with arrest under section 241 TULCRA 1992.

In addition, a resident of St Ronan's Road, Sheffield (where tree felling is due to begin in the week beginning 13th February 2016), was told that she would be arrested under section 241 TULCRA 1992 if she stood in her own front garden."

LAW & ADVICE

4. The relevant statutory provision is section 241 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA 1992"). This states:
 - (1) A person commits an offence who, with a view to compelling another person to abstain from doing or to do any act which that person has a legal right to do or abstain from doing, wrongfully and without legal authority:
 - (a) uses violence to or intimidates that person or his [F1spouse or civil partner] or children, or injures his property,
 - (b) persistently follows that person about from place to place,

- (c) hides any tools, clothes or other property owned or used by that person, or deprives him of or hinders him in the use thereof,
- (d) watches or besets the house or other place where that person resides, works, carries on business or happens to be, or the approach to any such house or place, or
- (e) follows that person with two or more other persons in a disorderly manner in or through any street or road.

(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or both.

- 5. It is section 241(1)(c) that is the particularly relevant provision here.
- 6. TULCRA 1992 was a consolidating Act. The original provision was contained in section 7 of the Conspiracy, and Protection of Property Act 1875 (“1875 Act”). Given that some of the case law relating to section 241 of TULCRA 1992 was decided under this preceding provision, I think it is worth setting it out here:

“Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority:

- (1) Uses violence to or intimidates such other person or his wife or children, or injures his property; or,
- (2) Persistently follows such other person about from place to place; or,
- (3) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,

(4) Watches or besets the house or other place where such, other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or,

(5) Follows such other person with two or more other persons in a disorderly manner in or through any street or road,

shall, on conviction thereof by a court of summary jurisdiction, or on indictment as herein-after mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour. Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.”

7. The 1875 Act was in turn based on the Criminal Law Amendment Act 1871 (34 & 35 Vict. c.32). This Act made it a criminal offence to:

“... attempt to coerce another for trade purposes by the use of personal violence; by such threats as would justify a magistrate in binding a man to keep the peace; or by persistently following a person about from place to place, hiding his tools, clothes, or other property, watching and besetting his house, or following him along any street or road with two or more other persons in a disorderly manner. These last clauses were directed against the practice of picketing...”

8. It may be thought from its stemming from a statute regulating trade union law, and its historical genesis in the legal regulation of trade disputes, that section 241 TULCRA 1992 would be confined to that context and could not be used outside of it. However, section 241 of TULCRA 1992 was held to apply in the case of *DPP v Todd [1996] Crim. L.R. 344*, which concerned a similar context of the hindrance of

workmen in the context of an anti-road protest. The head note of the Criminal Law Review case note of this case states that the court held that:

“The 1992 Act was a consolidating Act and must be presumed not to have changed the law. The court considered the legislative history of section 241. Its genesis was section 1 of the Criminal Law Amendment (Violence, etc.) Act 1871 which was replaced by section 7 of the Conspiracy and Protection of Property Act 1875. The provision was not to be artificially confined to cases involving industrial action.”

9. Therefore, it seems that section 241 TULCRA *can* apply in the present context. The question now turns to whether section 241 *does in fact* apply in any of the circumstances that I have set out at paragraph 2 (above).

10. The offence under section 241(1)(c) of TULCRA 1992 is made up of a number of components, viz:

- **Actus reus:** “Wrongfully”

-

“Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof.”

- **Mens rea:** “With a view to compel any other person.”

“Wrongfully”

11. The case of *Thomas and Others v National Union of Mineworkers (South Wales Area) and Others [1986] Ch. 20* establishes that “wrongful” conduct for the purposes of what was then section 7 of the 1875 Act, must at least amount to tortious conduct in its own right. At page 61 of *Thomas* it was stated:

“These authorities establish that conduct must, in order to be an offence under section 7, be tortious. The proposition that it can be shown to be tortious because it can be shown to be an offence under section 7 puts the cart before the horse, and in my judgment involves a misuse of section 7.”

12. I am instructed that it has not thus far been explained to any of the people arrested, or threatened with arrest, by South Yorkshire Police, what if any tortious act they are committing. To give an idea of the kinds of tortious acts that might be thought to fall under this section, it is worth looking at a number of examples of potentially tortious acts mooted in the case of *Thomas and Others v National Union of Mineworkers*. The following acts alleged by the Claimants in *Thomas* to constitute tortious acts- and the courts assessment of whether they indeed constituted tortious acts for the purposes 7 of the 1875 Act- are set out at page 62 et seq of the *Thomas* case (the numbering is my own, to allow me to deal with each point in turn at paragraph 13 below):

“I have already said that I am unable to accept Mr. Blom-Cooper's basic approach, which was to start by asking whether the picketing represented an offence under section 7 of the Act of 1875. As a supplement to that approach he submitted that the picketing complained of was tortious under a number of heads:

- i. It represented, he said, the tort of assault in that the miners going to work were put in fear of violence. I cannot accept this. Assault is defined in Clerk & Lindsell on Torts, 15th ed. (1982), para. 14-10 as "an overt act indicating an immediate intention to commit a battery, coupled with the capacity to carry that intention into effect." The tort of assault is not, in my view, committed, unless the capacity in question is present at the time the overt act is committed. Since the working miners are in vehicles and the pickets are held back from the vehicles, I do not understand how even the most violent of threats or gestures could be said to constitute an assault.

- ii. Alternatively, Mr. Blom-Cooper submitted that the picketing involved obstruction of the highway for which the working miners could sue in tort... Mr. Blom-Cooper argued that in the present case the large numbers of pickets present at the colliery gates were almost bound to be obstructing some part of the highway, even if only the pavements. That may be so, but it does not follow that the obstruction would represent a tort actionable at the suit of the working miners. The present state of affairs, which I have no reason to suppose will not continue as long as the strike lasts, is that the working miners' entry into and egress from the colliery is not being physically prevented by the pickets. If the pickets are obstructing the highway, the obstruction is not causing any special damage to the working miners. On principle, therefore, the plaintiffs cannot, in my view, have a cause of action in tort for obstruction of the highway.
- iii. Mr. Blom-Cooper further submitted that the picketing was tortious at the suit of the plaintiffs in that it represented *unlawful interference* with the performance of the contracts of employment between them and the N.C.B. The tort of interference with contract in the course of an industrial dispute has recently been considered by the House of Lords in *Merkur Island Shipping Corporation v. Laughton* [1983] 2 A.C. 570. Lord Diplock, with whose speech the other members of the House agreed, described the interference necessary in order to constitute the tort as being the prevention of the performance of a primary obligation under the contract: see pp. 608 and 609. The picketing in the present case is not, as I understand it, having the effect of preventing the performance by the N.C.B. of any primary obligation under the plaintiffs' employment contracts. The plaintiffs cannot, in my view, wield this tort as a weapon to attack the colliery gate picketing.
- iv. Mr. Blom-Cooper referred also to the tort of intimidation. By this he meant not the well-known tort of intimidation established by

Rookes v. Barnard [1964] A.C. 1129, a tort which has nothing at all to do with the present case, but the tort which he submitted was committed by a person who intimidated another. The working miners were, he submitted, being intimidated by the pickets at the colliery gates. This was another formulation of Mr. Blom-Cooper's argument based on section 7 of the Act of 1875. He argued that the pickets were committing breaches of the section since, with a view to compelling the working miners to abstain from working, they were intimidating the working miners. But, on authority, the approach is wrong. First, the tortious conduct must be identified. Only then is it relevant to see whether or not there is a breach of section 7. Nonetheless, although I cannot, for the reasons I have already given, accept Mr. Blom-Cooper's approach, I am in full agreement with his general submissions regarding the state of affairs at the colliery gates, which, he said, represented intimidation.

The working miners are entitled to use the highway for the purpose of entering and leaving their respective places of work. In the exercise of that right they are at present having to suffer the presence and behaviour of the pickets and demonstrators. The law has long recognised that unreasonable interference with the rights of others is actionable in tort. The law of nuisance is a classic example and was classically described by Lindley M.R. in *J. Lyons & Sons v. Wilkins* [1899] 1 Ch. 255, 267. I have already cited the passage. It is, however, not every act of interference with the enjoyment by an individual of his property rights that will be actionable in nuisance. The law must strike a balance between conflicting rights and interests. The point is made in *Clerk & Lindsell on Torts*, 15th ed., para. 23-01:

"a variety of different things may amount to a nuisance in fact but whether they are actionable as the tort of nuisance will depend upon a variety of considerations and a balancing of conflicting interests."

Nuisance is strictly concerned with, and may be regarded as confined to, activity which unduly interferes with the use or enjoyment of land or of easements. But there is no reason why the law should not protect on a similar basis the enjoyment of other rights. All citizens have the right to use the public highway. Suppose an individual were persistently to follow another on a public highway, making rude gestures or remarks in order to annoy or vex. If continuance of such conduct were threatened no one can doubt but that a civil court would, at the suit of the victim, restrain by an injunction the continuance of the conduct. The tort might be described as a species of private nuisance, namely unreasonable interference with the victim's rights to use the highway. But the label for the tort does not, in my view, matter.

In the present case, the working miners have the right to use the highway for the purpose of going to work. They are, in my judgment entitled under the general law to exercise that right without unreasonable harassment by others. Unreasonable harassment of them in their exercise of that right would, in my judgment, be tortious.

A decision whether in this, or in any other similar case, the presence or conduct of pickets represents a tortious interference with the right of those who wish to go to work to do so without harassment must depend on the particular circumstances of the particular case. The balance to which I have earlier referred must be struck between the rights of those going to work and the rights of the pickets.

...

From the comments I have already made earlier in this judgment it will be apparent that I think it plain from the evidence before me that the picketing at the colliery gates is of a nature and is carried out in a manner that represents an unreasonable harassment of the

working miners. A daily congregation on average of 50 to 70 men hurling abuse and in circumstances that require a police presence and require the working miners to be conveyed in vehicles do not in my view leave any real room for argument. The working miners have the right to go to work. Neither they nor any other working man should be required, in order to exercise that right, to tolerate the situation I have described. Accordingly, in my judgment, the colliery gates picketing is tortious at the suit of the plaintiff or plaintiffs who work at the collieries in question.

13. I will assess each of these potential tortious acts in turn and apply them to the facts of the present case:

- i. Given the strict criteria applied for the tort of assault in *Thomas*, it seems that the peaceful behaviour of protestors in the present instance will not constitute such a tort.
- ii. Obstruction of the highway is something that may well be relevant in the present case, particularly in cases where protestors are on the public highway (as in the factual scenario at paragraph 2(iii) above). However, merely standing on the pavement does not equate to obstructing it. Moreover, given that the miners in *Thomas* had no right to bring an action in tort for obstruction of the highway in relation to them specially, there appears to be no reason that Amey could bring such an action in tort.
- iii. It might be thought that preventing trees being felled does constitute an interference with the performance of the contract between Amey and Sheffield City Council. However, there are a number of reasons why I believe this would not constitute an actionable tort on the present facts:
 - We do not know what the contract between Amey and Sheffield City Council actually says, as those parties are refusing to disclose this contract.

Without seeing the contract, we cannot know whether certain actions interfere with it.

- Interfering with a contract is not by itself tortious. There could be many ways of interfering with a contract that are perfectly legitimate (for example, if a developer needed access across your land to complete a development that they are contractually obliged to build, you would be “interfering” with their contract, but would be within your rights to do so). The case law states that any interference must be unlawful and it does not appear to be unlawful to stand, or carry out work in, your own front garden, or to merely stand on the public highway.

- iv. It was the tort of intimidation and unreasonable harassment preventing another’s use of the public highway that was found to be established in the case of *Thomas*. The first thing that must be noted is that this tort does not seem to be applicable in the factual scenarios in paragraphs 2(i) and (iii), given that the people who are alleged to be committing the offence are not on the public highway. However, even in the scenario in paragraph 2(ii), where people are on the public highway, a tort of this kind is not automatically committed. This is because there must be some kind of unreasonable harassment preventing another’s use of the public highway. Merely standing peaceably on the public highway (even if this prevented another cutting down a tree) would not seem to be tortious and thus would not fulfil the “wrongful” requirement of section 241 TULCRA 1992.

14. Looking at the case of *DPP v Todd [1996] Crim. L.R. 344*, no wrongful act is given in the case. This is likely to be because the Defendant in that case was trespassing on a crane on someone else’s land and thus the fact that he had committed a “wrongful” act for the purposes of section 241 TULCRA 1992 was taken as a given!

“Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof.”

15. I think it is far from certain whether merely standing in the vicinity of another such that they cannot use any tool or property they own safely really satisfies this part of the offence.
16. The use of the words “deprives” and “hinders” in this context very much suggest some kind of active conduct on the part of a Defendant. Furthermore, there is a general presumption in criminal law against criminalising omissions as opposed to actions. Both of these things are at odds with criminalising people for merely standing on the street or in their front garden and thereby stopping someone else working (and using their tools) nearby because it is unsafe for that other person to do the work with someone else in the vicinity. There does not seem to be any caselaw showing that a person can deprive another of their tools, or hinder them in their use, merely by passively standing nearby.

“With a view to compel any other person.”

17. As to the mens rea of the offence, if the actus reus is established (which, as I state below, is unlikely), then it is likely that the mens rea will be established in the circumstances set out in paragraphs 2(i) and (iii). This is because, given the protestors are protesting against felling off the trees, it is likely to be found that their actions have been taken with a view to compelling Amey’s workmen to not cut down the trees (i.e. to abstain from doing an act which they have a legal right to do).
18. The mens rea component of the offence is less likely to be established in the factual scenario set out at paragraph 2(ii). This is because the actions in question are not being done with a view to compelling Amey’s workmen not to abstain from an act they have a legal right to do (i.e. cutting down the trees), but rather because the householder in question has a need to have their own work carried out. Merely

failing to give priority to Amey's need to carry out their work, over the householder's need to get work done, will not be sufficient to establish the mens rea for the offence.

Conclusion

19. Overall, although section 241 TULCRA 1992 can apply to protestors, there are a number of elements of the offence that need to be made out. In circumstances where people are either standing in their own front garden, or are working in a private front garden, it is very hard to see how the "wrongful" element of the offence could be established. Therefore, in such cases, the offence is very unlikely to be made out and any arrest is likely to be unlawful.
20. It is more possible that the "wrongful" element might be established in circumstances where a person is standing on the street. However, for the reasons given at paragraph 13(iv) (above), any conduct such conduct is likely to have to entail more than merely standing peaceably on the public highway.
21. In every circumstance, the police should be asked what they allege the "wrongful" conduct to be, so this can be analysed against caselaw to see whether it is indeed wrongful and tortious.

REMEDY & ADVICE GOING FORWARD

22. As stated above, in the scenarios in which people are standing in their own front gardens, it is very unlikely that the actus reus elements of the offence will be established. Further, even when someone is standing peaceably on the public highway, it is unlikely that the offence will be established, unless the police can specifically point to a wrongful/tortious act that is being committed. It is to be hoped that, on reading this advice, the police officers on the ground will either accept that the various elements of the offence in section 241 TULCRA 1992 are

not made out, or will state what the people they are threatening with arrest have actually done that is tortious and therefore wrongful.

23. If the police carry on arresting people on the basis of section 241 TULCRA 1992- despite having no reasonable legal basis for doing so- the question turns to a practical one.

24. A person who is being arrested under section 241 TULCRA 1992, when there is no reasonable legal basis for believing they have committed that offence, would be entitled to resist that arrest. In the case of *DPP v Todd [1996] Crim. L.R. 344*, the Defendant was also charged with obstruction of a police officer, contrary to the Police Act 1964 s.51(3). This was on the basis that the charge under section 241 TULCRA 1992 was valid and thus in obstructing a police officer who was seeking to arrest them in respect of that offence was itself an offence. In relation to that aspect of the offence, the court in *Todd* stated something interesting:

“However, if the police officer had been mistaken in the application of the 1992 Act s.241 that would have been a mistake about the law. The police officer would, therefore, not have had the reasonable suspicion needed under the 1964 Act to give him the power of arrest and the appeal would have been allowed.”

25. However, it must be emphasised that even though such an approach may be legally correct, it is possible that it may cause violent and unpleasant scenes on the ground. If the police on the ground refuse to heed the legal opinion in this advice, a less violent, but more difficult and expensive approach would be to apply for an emergency injunction to restrain them from doing so. Such an injunction could also prevent them from entering people’s private front gardens without their permission, the legal basis for which appears to be at best uncertain and at worst highly dubious.

26. Moving forward, given the nature of my opinion in this advice, those who have been arrested already for the offence under section 241 TULCRA 1992 are likely to have a strong defence if it goes to court. Furthermore, anyone arrested may also have a claim against South Yorkshire Police for unlawful arrest and false imprisonment.

PAUL POWLESLAND

12th February 2017

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13 Ely Place
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IN THE MATTER OF

Between

**PROFESSOR CHRISTOPHER RUST
(ON BEHALF OF 'SAVE NETHER EDGE
TREES')**

-and-

**CHIEF CONSTABLE OF SOUTH
YORKSHIRE POLICE**

ADVICE