

Resources: Legal & Governance

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Date: 23 May 2017

Dear Professor Rust & Ms Hammond,

On 6th May 2017 you wrote to the Chief Executive, Leader of the Council and Chief Legal Officer asking, in terms, that the Council sets out the legal basis upon which it contends that protests aimed at stopping tree felling in Sheffield are illegal. I have been asked to reply to that question. On behalf of the Council I would like to say that we are happy to set out the position so that there is no ambiguity. Please note that nothing contained in this letter should in any way be construed as constraining the scope of arguments which may be raised by the Council or actions the Council may decide to take against unlawful protests.

The Duty to Maintain the Highway

For centuries, the civil and criminal law has recognised the central importance of the maintenance of highways to the public interest for obvious reasons. The duty is now set out in s.41 Highways Act 1980 ("the 1980 Act"). The duty is primarily concerned with ensuring the public at large have the ability to use the highway for the purposes for which it is provided.

To secure compliance with the s.41 duty, and to remedy a significant backlog of maintenance work, in 2012, the Council entered into a contract under the private finance initiative ("PFI") with Amey Hallam Highways Limited ("Amey") for the long term maintenance of the highways including for highway trees to be appropriately managed in order to properly meet the Council's s.41 duty.

The Council and Amey's approach to tree replacement under the Contract in pursuance of the s.41 duty was unsuccessfully challenged in R (Dillner) v.

Sheffield City Council [2016] EWHC 945 (a renewal application in the Court of Appeal also failed). Gilbart J relied heavily on the duty to maintain in s.41 and the ambit of that duty in his judgement. The fundamental point is that it necessarily follows that the Council's approach to tree felling is a central part of the lawful means by which it fulfils its highly important public function of maintenance of the highway in the public interest. It goes without saying that public highways play an essential role in the economic, social and day to day life of the city. The public duty to maintain the highway for public use is central to that role.

The Protests

The felling of some trees in some (but by no means all) neighbourhoods is felt to be controversial by a small number of people. Through a non-statutory consultation process (the Independent Tree Panel or "ITP"), the views of the public are taken into account in decision making on the merits on individual trees. As the High Court explained in detail, the ultimate decision, though, is for the Council and is informed by highway considerations – whether the felling is justified to secure the necessary maintenance of the highway.

During the judicial review, objectors had full opportunity to raise any matters they wished about the legality of the process. It is apparent from the Judgement that a wide range of issues were raised and conclusively determined in favour of the Council. The Council's approach to tree felling as part of the Streets Ahead scheme has been held to be lawful. All legal and democratic processes having been complied with, the Council is entitled to carry out the tree felling. Doing so is a necessary part of compliance with its s.41 duty.

Some objectors have turned to direct action. When the contractors attend to remove a tree, protesters arrive in relatively small numbers. The contractors erect barriers to provide a safe working zone from which the public are excluded for their own safety and to allow the works to progress ("the Safety Zone").

With the express and obvious purpose of preventing the Amey and the Council from taking the steps they have lawfully judged appropriate to secure fulfilment of the Council's statutory duty, individuals enter the Safety Zone thus preventing the works to the trees.

The intended and actual effect is that the Council is prevented from removing the trees and thus doing what it has lawfully judged appropriate to comply with its statutory duty in the public interest (and expenditure is wasted).

Civil Wrongs.

The actions constitute the torts of trespass and unlawful interference with business. They probably also constitute the tort of nuisance and obstruction of the highway.

Trespass.

They are a clear trespass against the Council for two separate (but complementary) reasons:

- a. the highway is vested in the Council: s.263 of the 1980 Act. The public have a limited licence to use the highway for all lawful purposes: see DPP v. Jones [1999] 2 AC 240. Provided that the activities are reasonable, do not involve the commission of a public or private nuisance and do not amount to an obstruction of the highway (p254H and p257D), there is no trespass. Thus peaceful protest against the tree felling outside the Safety Zones would be lawful. However, there is a stark distinction between such peaceful protest and direct action to prevent the lawful exercise of statutory powers and duties. The latter is unreasonable (as well as a nuisance and an obstruction) and thus beyond the scope of the licence to use the highway and thus a trespass. It is unreasonable because: (1) it is a criminal offence under s.241 TULRA 1992 and s.303 of the 1980 Act (see below); (2) it prevents, without lawful excuse, others from doing what they are lawfully entitled to do on the highway and what they have decided in the lawful exercise of their powers in a democracy is in the public interest; and (3) it is at least one other tort - unlawful interference with business; and
- b. the Council has made lawful orders under s.14 of the Road Traffic Regulation Act 1984 prohibiting the use of some Safety Zones by anyone other than authorised personnel. The public licence to use these areas of highway at all have been lawfully removed. Any incursion into these Safety Zones is thus unlawful and a trespass.

Professor Rust has obtained an Advice from Mr Powlesland of Counsel ("the Advice"). That Advice does not address trespass at all.

Wrongful interference with business

The actions constitute the tort of wrongful interference with business: Department of Transport v Williams (Court of Appeal) The Times 7th December 1993 and are thus “wrongful” for the purposes of s.241. Mr Powlesland does not address the implications of the Williams case. To clarify, it is the entering of a Safety Zone for the purpose of preventing the Council exercising its statutory duties which is unlawful.

Nuisance and Obstruction

The actions are clearly an unreasonable interference with the Council’s use of its highways and thus a nuisance.

The actions also appear to be an unlawful obstruction of the highway. A lawful protest may not be an obstruction but a protest which prevents others from going about their lawful activities on the highway may well be. The protests to date go beyond the ambit of a lawful protest.

The Council thus has multiple causes of action against people carrying out direct action. This is irrespective as to whether the police decide to prosecute.

Criminal offences

The actions above constitute (at least) the following criminal offences. It is obviously the case that the investigation and prosecution of criminal offences is a matter for the police together with the Crown Prosecution Service.

First, the actions comprise an offence under s.241(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRA”).

Mr Powlesland questions whether an offence is made out under s.241 of the TULCRA 1992. We will assume that that Advice has been read. We agree that, as in DPP v. Todd [1996] Crim LR 344, the offence can apply in the context of hindrance of workers in the context of an anti-road protest and thus in direct action such as that here (paras 8 and 9).

Mr Powlesland’s Advice, however, proceeds on the basis that because, and only because, there is no tortious conduct, the actions are not wrongful and no offence is committed. (A tort is a civil, as opposed to a criminal, wrong). This fundamental piece of his logic is plainly wrong (see above). The actions of the

protesters constitute a number of torts and are thus, independent of s.241, "wrongful". It is not necessary to set out all the matters which make the direct action "wrongful". Mr Powlesland does not address any of the torts referred to above.

The second obvious offence is under s.303 of the Highways Act 1980.

Whilst not a trespass or highway obstruction, the wrongful interference with business and the s.303 offence also applies to people standing on private land to prevent the works to trees. The s.241 offence is made out in that situation too. In the case of private land, the protestor is still wilfully obstructing work in the execution of the 1980 Act and is not (as the protestors would have it) simply standing in their front garden.

You rely on the fact that the police have not progressed prosecutions. This is irrelevant to the legality of the actions. For the purposes of any court action by it, the Council simply has to demonstrate that a tort is committed. It also has the right in its own behalf to take court action in support of the criminal law (whether or not the police take action): see s.222 of the Local Government Act 1972.

The Right to Protest

Mr Powlesland proceeds on the basis that, because this is a peaceful protest, the right to protest makes the action lawful and not wrongful. This is misconceived and based on a fundamental misunderstanding of the law. There is a right to peaceful non-obstructive protest on the highway. There is not a right to take direct action to prevent the lawful exercise of works being carried out pursuant to a statutory duty.

The importance of the right of peaceful protest protected by both the common law and Articles 10 and 11 of the European Convention of Human Rights was most recently stressed by the Court of Appeal in *City of London v. Samede* [2012] ECA Civ 160 [2012] 2 All ER 1039 (the St Paul's Occupy Protest). Subject to limitations, the public highway may be lawfully used for such protests (*DPP v. Jones* [1999] 2 WLR 625). Consistent with basic principles, and subject to the passage along the highway not being impeded, there could be no objection to protestors congregating on the highway outside the Safety Zone for the purpose of protesting against - but not preventing - the felling.

This would vindicate the right to protest whilst enabling the Council to lawfully carry out maintenance works pursuant to its statutory duty on the highway.

Such a protest would not be an obstruction of the highway, a crime or a tort. Indeed, the Council has no wish or intention to prevent or impede such lawful protest and will work with you to facilitate it.

However, the protest here is not about the protesters making their views known and assembling together for the purpose of expressing those views but is in the form of direct action to prevent the Council's contractors carrying out lawful works in the public interest pursuant to the important duty to maintain the highway. There is no warrant in the case law for the right to protest justifying direct action to prevent lawful actions by third parties. This distinction is clear in the case law referred to in *Samede*.

There is no legal basis which could justify (under article 10 and 11 ECHR) STAG and/or their followers, direct action. This is not just a protest against the felling but comprises direct action to prevent it. That felling is lawful and is carried out pursuant to a statutory duty imposed in the public interest to protect the public's ability to use the highway. Its general legality has been conclusively established through the High Court action. There is no right under Article 10 or Article 11 ECHR to take (unlawful tortious and criminal) direct action to prevent lawful activity by a public authority in pursuance of its statutory powers and duties. Such action is an attempt by the protestors to take the law (and the decision as to which trees to fell) into their own hands. It is plainly not the law that the right to protest encompasses a right to prevent exercise of statutory duties in the public interest.

This is not a marginal case. It has none of the features which may require the state to tolerate the protest; and many aggravating features as identified in the case law.

Summary

- a. a protest near to the Safety Zone on the highway (which did not prevent use of the highway and which did not prevent the felling works) would be lawful; but
- b. direct action consisting of entering the Safety Zone designed to prevent and in fact preventing the Council and its contractors from carrying out felling in pursuance of the Council's statutory duties is not within the ambit of the "right to protest" protected under Article 10 or Article 11 ECHR.

The Public Interest

The intended and actual effect of the criminal behaviour is to prevent the Council, indefinitely, from taking lawful steps in pursuance of its statutory duty in the public interest. Those taking direct action as explained above are thus seeking to achieve through tortious and criminal behaviour something they could not achieve through legal or democratic processes. They are seeking unlawfully to impose their will on the Council and to take control of an issue which is properly vested in the Council. Such direct action plainly is contrary to the rule of law in a democracy and I am not aware of any situation in which it has been tolerated by the courts.

I hope this answers the main question you have asked with regard to legality.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Steve Eccleston', written over a horizontal line.

Steve Eccleston
Assistant Director, Legal Services
Sheffield City Council

