CONFIDENTIAL

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Ref. A01257

PRIME MINISTER

Steel

There will be two aspects of steel to discuss at your meeting this evening:

(1) The Denning judgment and its implications.

(2) The financial position of the British Steel Corporation (BSC) as set out in the Department of Industry letter of 25th January, which you saw over the weekend.

2. I understand that it will be a day or two before the House of Lords decides whether to allow an appeal to them from the Court of Appeal, and another day thereafter before the appeal itself is heard. In the meantime, the Court of Appeal judgment stands. You will wish to get a clear picture from the Attorney General about what this means. One possibility is that the ISTC will obey the judgment and rescind the strike action in the private sector. The other possibility is that they will prefer to defy the Court of Appeal judgment, pending the hearing of the House of Lords appeal. What would follow from this second course? Would it be open to the employers to try to take action to enforce the compliance with the injunction? What would that action be? Are we in danger of confrontation between the unions and the law, or even martyrdoms (for instance Mr. Sirs going to gaol for contempt of court)? We presumably want not to prejudice whatever chances there are of an early settlement of the dispute by actions of that kind. Is there anything the Government can do to avoid them?

3. As to finances of BSC, once the BSC report the position as described in the Department of Industry letter, the Government's position of "no more cash beyond £450 million in 1980-81" will be untenable. There will have to be a hard look at what this means. The following questions will arise:

(a) If the Government has to find more money for BSC next year anyway, what has it to say about the possibility of finding more money to finance higher pay? Would it be, for example, a tenable line to say: "No more cash to finance pay increases" - implying that there might be more money for other purposes, if increased productivity was available to finance pay increases.

(b) It does not look as if disposal of assets could conceivably be available on the scale required to meet the deficit. Another option is further closures. But we may have reached the point at which further closures would cost more in 1980-81 than keeping plants open.

(c) Does the new financial forecast call in question the level of redundancy pay agreed? Presumably there can be no going back on redundancy payments already agreed. It is a question for the future. If BSC were a private sector concern, it would be bankrupt, and presumably there would be no question of paying more than the statutory levels. Hitherto, by contrast, the policy has been one of providing redundancy payments at a sufficient level to bring about voluntarily the redundancies required.

4. The implications of all this are very large, and it will obviously be impossible to take decisions this evening. I suggest that you will want to ask the Department of Industry, in consultation with the Treasury and the CPRS, to review the new situation as a matter of great urgency, and to produce a report to be considered by Ministers as soon as it can become available. The first obvious occasion is Cabinet on Thursday; but I think that it would be better not to go straight to Cabinet without some prior discussion, if time will allow, and I suggest that we should arrange for the report to be considered either by E or by a smaller ad hoc group of Ministers, to be arranged at short notice as soon as the documents are available.

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ROBERT ARMSTRONG

28th January, 1980

Financial Times Monday January 28 1980

Will Denning's law survive the Lords?

WHILE STEEL WORKERS strike, judges work overtime might be the flippant comment on the Court of Appeal's ruling, after a whole Saturday's sitting, at the Royal Courts of Justice in the Strand, on the steel unions' attempt to spread industrial action to the private sector of the steel industry.

But the ruling will not only have far-reaching implications in the protracted struggle between the British Steel Corporation and the Iron and Steel Trades Confederation over pay increases for steel workers in the public sector. It will also arouse once more the growing opposition, in both political and legal circles, to Lord Denning, who at 81 is thought to have long since outstayed his judicial term of office.

For the legal profession the immediate question is whether the ruling is sound in law and will survive scrutiny at the hands of the Law Lords; and, if the case either survives that appellate review or is not taken on appeal by the unions, what effect the decision will have on the Government's declared policy to amend the Trade Union and Labour Relations Act 1974 to control secondary blacking and secondary picketing.

There were two distinct steps in the reasoning of the Court of Appeal, leading to its decision to grant the injunctions requested. First, was the action in calling out the steelworkers in the private sector "in furtherance of a trade dispute"? If there was any doubt about that, should the court, pending the trial of that issue, grant relief to the private steel companies on the basis that the balance of convenience pointed to stopping the secondary strike action rather than leaving the parties to enjoy and suffer respectively the consequences of industrial action?

The Court of Appeal was faced with the recent ruling of the House of Lords in *Express Newspapers Ltd. v. McShane** which laid down the test for answering the question. "Is it sufficient for those claiming the trade union immunity from legal action simply to have a genuine intention to further an existing trade dispute?"

The majority of the Law Lords in that case said that the test was a subjective one and means that if the trade unionist acts with the purpose of helping his cause to achieve his objectives in an honest and reasonable belief that it will do so, he is acting in furtherance of a trade dispute. Nobody denied that the ISTC had a trade dispute with BSC. Why then was the threatened strike action prompted by the officers of ISTC, among private sector workers who had no dispute with their employers still not a furtherance of the primary trade dispute, at least in the honest belief of Mr. Bill Sirs?

Because, Lord Denning observed, the action of the union was to get the Government to change its policy of non-intervention, and that was not a trade dispute. "It could not be said on the present evidence," he said, that bringing pressure to bear on the Government—"to bring them to heel"—so that they would provide more money to BSC was a trade dispute.

Lord Denning justified his interpretation of the evidence on the footing that the judgments in the McShane case "are not nearly so clear as some would believe." But in that case the extension of the trade dispute between the National Union of Journalists and the Newspaper Society, representing the proprietors of provincial newspapers, to NUJ's call to its members to take industrial action against the Press Association, which supplies news to all newspapers with whom there was no dispute, appears to preclude any distinction.

The fact that British Steel Corporation is a public corporation answerable to a Minister and sustained by public funds means that the Government is ineluctably linked to its statutory creature, whether or not it involves itself with the latter's labour relations. But arguably Lords Justices Lawton and Ackner thought there are two separate disputes, one with BSC and the other with the Government. And if the point was arguable, it could not be said that the unions were overwhelmingly likely to succeed in sustaining their immunity at trial.

In those circumstances, should the court take the view that, until trial, the private steel companies should be allowed to protect their businesses against industrial action, where they themselves had no dispute with their workforce? A further provision of the 1974 Act states that the court, in exercising its discretion whether to grant an injunction, shall "have regard to" the likelihood of the immunity of the trade union being upheld at trial. The provision does not state that it must have regard to the near certainty or high probability that the defence will succeed to the exclusion of all other factors.

While the court would be reluctant to grant an injunction pending trial if the union was very likely to succeed in getting it discharged at trial, it might be less reluctant if the claim to immunity is in doubt. Where the outcome of the issue whether the union was or was not acting in furtherance of a trade dispute (or honestly believed that its action was to further its trade dispute) is in doubt, other factors may weigh with the court in deciding that labour injunctions should issue.

The Court of Appeal said that the ISTC action was one of those cases where the effects on the country would be so disastrous that the injunction should be granted. In the McShane case, Lord Scarman had postulated a case where a trade dispute so endangered the nation, or put at risk such fundamental rights, such as Press freedom, that the courts might restrain the industrial action pending trial.

But the Court of Appeal seems to have put its decision to grant an injunction more on the principle of a balance of convenience that is the ordinary rule in other types of legal action. In *American Cyanamid Company v. Ethicon Ltd.*† the House of Lords laid down that the court, in exercising its discretion as to granting or refusing an interlocutory injunction, ought not to weigh up the relative strengths of the parties' cases on the evidence, necessarily incomplete at that stage.

Once the court decides that there is a serious question to be decided—here it would be, if anything, the question whether the dispute over governmental policy of non-intervention was in furtherance of ISTC's trade dispute with BSC—it ought not to try to resolve conflicts of evidence, or even legal argument based on that evidence, but decide the issue of the injunction on the balance of convenience to the parties pending the trial.

Ironically, Lord Denning in a series of judgments has shown a hearty dislike for the American Cyanamid ruling, and thinks that it has led too readily to interlocutory injunctions being given. Now he appears, by implication, to have followed the authoritative line of thought.

The ruling will at least give the Government some breathing space while it reflects on what legislation it would like to bring in to amend the law to achieve the kind of result produced by the Court of Appeal. It is well known that legal draftsmen are finding acute difficulty in framing language apt to outlaw secondary blacking and picketing, without in some way damaging the generally acknowledged right of trade unions to their immunity for industrial action against those with whom they are directly in industrial dispute.

If the House of Lords were to uphold Saturday's ruling—and that seems wildly improbable, if only because the McShane ruling envisaged just such a situation that would be covered by the statutory immunity — the Government would feel relieved of the unenviable task of finding the apt formula. The judges would have done the job for them.

The only problem then would be that subsequent industrial action — sympathetic strike, secondary blacking and picketing — would always be a candidate for litigation, on the basis that no two cases are alike and lawyers are always adept at finding recondite distinctions even where there is no discernible difference: which is how some knowledgeable commentators would describe Lord Denning's latest excursion into law-making.

* *[1980] 2 W.L.R. 89.*
† *[1975] AC. 396.*

THE WEEK IN THE COURTS

BY JUSTINIAN

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Saturday, 26th January, 1980.

DRAFT JUDGMENT FOR REVISION

DUPONT STEELS LTD. & ors.

v.

WILLIAM SIRS & ors

THE MASTER OF THE ROLLS: It is important to distinguish between the public sector and the private sector of the steel industry. The public sector is under the control of the British Steel Corporation. It accounts for 40 or 50 per cent of the production of crude steel and the processing of it. But there is an important private sector which covers about 20 per cent of the rest of the industry. It is run by many private companies. The turnover is something in the region of £1,500,000,000 a year in the private sector.

At the beginning of this year there was a dispute between the workers in the British Steel Corporation and their employers the British Steel Corporation itself in regard to wages. Through their union, the Iron and Steel Trades Confederation, the workers in the public sector demanded higher wages. As they did not achieve what they desired, they called a strike (I think the first for many, many years in the industry) on the 2nd January of this year. They called out all the workers in the public sector: and brought the whole of that great sector to a standstill.

The strike does not seem to have achieved the objective which the union desired. So, on Wednesday, 16th January, an important decision was made by the union or its representatives. They made the decision that they would call out the members of the union who were employed in the private sector.

Let it be said at once that those workers in the private sector had no dispute

whatever with their employers ~~in the private sector~~. All was peaceful and contented. They were ready to go on, and wanted to go on, with their work - processing the steel, making it, supplying it, and so forth. When ~~it was~~ the Union suggested - indeed ordered - that those in the private sector should come out, ballots were taken in some cases, These showing that the workers in the private sector did not want to come out. We know that the majority in a secret ballot did not. There is other evidence to show that many others of them did not want to come out. Nevertheless, if ordered to do so by their union, they would have no option: because, if they did not obey the union call, they would lose their union card and in due course their employment.

On the 16th January of this year there was a meeting of the Executive Council of the union. They came to a decision to extend the dispute into the private sector. They decided to call out all those men: and the date they chose for this action was the 27th January, 1980 at 6.00 a.m.

Meanwhile, ~~long before deciding to call the men out,~~ the men the movement of all steel throughout the United Kingdom was to cease from 6.00 a.m. on Thursday, 17th January, 1980.

So there was a most important decision. The Iron and Steel Trades Confederation decided to call out the men, who had no quarrel whatever with their own employers - or between the employers and the men. They decided to call them out in regard to a dispute with which they were not in any way concerned. So the question must be asked, and is asked: Why did the trade union extend the strike to the private sector?

It is amply shown by a letter which was written by Mr. William Sirs on the 17th January, 1980 and by instructions

which were given to all the branches. I will read a sentence or two ~~of~~ from ~~that~~ the letter: because it is quite plain to my mind that by this time the trade union had determined that the one way in which they could achieve their ends - or might hope to achieve their ends - was by bringing pressure to bear on the Government. They knew - as is indeed so by an Act of Parliament - that the British Steel Corporation is in many respects under the general direction and control of the Secretary of State. That appears in the Iron and Steel Act 1975, section 4, which provides:

"The Secretary of State may, after consultation with the Corporation, give to the Corporation directions of a general character as to the exercise and performance by the Corporation of their functions (including the exercise of rights conferred by the holding of interest in companies) in relation to matters which appear to him to affect the national interest; and the Corporation shall give effect to any directions so given".

They knew that the government had declined to print any more money for the purpose of increasing the wages of the workers. In these circumstances, the trade union seems to have directed its attack on the government.

On the 17th January, 1980 Mr. Sirs wrote to the Independent Steel Employers Association. He said: "... whilst agreeing that there is no dispute with any independent steel employer, (they) were firmly of the opinion that this dispute is becoming politically stage-managed by the Conservative Government. We feel that with not being made an offer of any new money, that we are being singled out for a direct Government and British Steel Corporation attack. It is because of the political intervention that my Executive Council feel that

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we should now take the action of involving the private sector in the public battle against the Government attitude".

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They knew that they were going against all the industrial ~~Immunities~~ agreements which had been ~~given~~ made: because the letter goes on to say: "I recognise the fact that our procedure agreements do

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exist and we do not have a dispute with you, nevertheless these points have been made to our Executive, who have ultimately taken this decision".

That letter was sent ~~out~~ by Mr. Sirs to the independent employers.

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Then on the 2~~8~~th January Mr. Sirs sent out a general direction to the union branches. "It was apparent, that the strike was developing into a confrontation between the government and the trade unions. It was also apparent that the continued operation

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of the private sector was not only having the effect of prolonging the trade dispute: but was creating a feeling of injustice within ~~the~~ the trade unions".

~~I need not go further; but~~ there ~~is~~ was further ~~ample~~ evidence, such as a statement broadcast on the B.B.C. on the 16th January. The Trade Unions ~~They~~ ~~made it quite clear~~ were no doubt about their aim was to force the

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government ~~to~~ intervene in the Passage after passage in the newspapers, and on the evidence, show that the action taken against the private sector was in order to bring pressure to bear on the government: so as to make the government alter its policy and increase the payments to the British Steel Corporation - out of the taxpayers' money, I suppose.

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That action taken was ratified, we are told, unanimously by all the 21 members of the Executive Council on the 24th January, which was last Wednesday. This action is timed to take place at six o'clock tomorrow morning.

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There is evidence of the disastrous effect which this

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action will have, not only on all the companies in the private sector, but so much of British industry itself. The private sector, as I have said, has a turnover - if it continues to work - of £1,500,000,000 a year. The turnover in the private sector is about £30,000,000 a week. If the men are called out in the private sector, all these companies would have to shut down at enormous loss. Not only will they have to shut down, but all the firms which they supply will not be able to carry on with their work. They will not be able to make their steel. British Leyland, who depend on 80 per cent of their supplies from the private sector, will have to shut down too. Not only much of his units that: we will lose trade here in this country, and our competitors abroad will clap their hands in anticipation of being able to send their products into England:because our industry is at a standstill.

In these circumstances, it is not surprising that 16 of the big private steel companies in this country have come to the courts - hoping they can get here in time - to restrain the three principal members of this union (Mr. Sirs, Mr. Bramley and Mr. Makepiece) calling this disastrous strike, which is going to injure British industry so much.

The judge below heard the application yesterday afternoon. He felt that he had to refuse it because of the recent case in the House of Lords of Express Newspapers Ltd. v. McShane (1980) 2 Weekly Law Reports 89. He inferred from that, that the majority of the House held that the test was purely subjective: and that if the trade union leaders honestly believed that what they were doing was in furtherance of a trade dispute, they would have complete immunity: and the courts can do nothing, because they would be exempt from judicial review.

We have gone through that case, and have read the judgments. They are not nearly so clear on the point as some would believe: but I will deal with them as we come to consider the case. But, first, there is a preliminary point to be considered: What was the dispute here? Was it a trade dispute? Section 29 of the Trade Union and Labour Relations Act 1974 defines a "trade dispute". It is quite plain that the dispute between the workers and the employers of the British Steel Corporation was certainly a trade dispute. It was "a dispute between employers and workers ... connected with ... terms and conditions of employment". Beyond all doubt, it was a trade dispute. In regard to any acts done in contemplation or furtherance of that dispute, they were entitled to immunity under section 13 of the 1974 Act.

But was that the only dispute in this case? On the evidence which I have read, it seems to me that there is good ground at least for thinking that, besides that initial dispute, there was a second dispute: not between the union and the private steel companies, because they were all in agreement and were happy working together: but a dispute between the union and the government of this country. I have read enough already to show that the union leaders were complaining of 'political stage management' by the Conservative government. They were engaged 'in a public battle against the government's attitude.' There was 'a confrontation between the union and the government.' All this goes to show that there is evidence that there was a second dispute here: a dispute between the union and the government, in which the union were seeking to bring pressure to bear on the government to make them change their attitude and provide more money, or take other steps in relation to the

British Steel Corporation, so as to bring them to heel.

It seems to me that that second dispute cannot be regarded as a trade dispute within section 29 at all. In so far as the acts done - or the calling out of these workers - was in furtherance of that second dispute, they are entitled to no immunity whatsoever. It is not a trade dispute. It is between the union and the government.

Then it was suggested by Mr. Melville-Williams that in any event it was in furtherance of that earlier dispute with the British Steel Corporation. That may be a question on the facts. It is hardly a matter of state of mind, or anything of that kind. I must say that it seems to me arguable that this step taken of calling out all the employees in the private sector - stopping all the movement of steel into and out of the country - was taken in furtherance of a dispute with the government. To try and bring the government to heel - and not in furtherance of the original dispute. If that be so, then they are not protected: because they are only protected for acts done in contemplation or furtherance of the original trade dispute.

That is the first part of the case. But I would say at this point that there was only one member of the House of Lords who dealt with the question of remoteness. That was Lord Wilberforce: and he certainly expressed the law as I have always understood it to be. He said at page 94:

"... it is always open to the courts - indeed their duty - with open-ended expressions such as those involving cause, or effect, or remoteness, or in the context of this very Act, connection with" - or, I would add, "in furtherance of" - "to draw a line beyond which the expression ceases to operate. This is simply the common law in action. It does not involve

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the judges in cutting down what Parliament has given: it does involve them in interpretation in order to ascertain how far Parliament intended to go".

In the cases which we have had very recently in this court, particularly in Associated Newspapers Group Ltd. v. Wade (1979) Industrial Cases Reports 664, we granted an injunction especially because the act was too remote to be considered in furtherance of it. It is significant that ~~not one of these cases (there were three of them) was~~ the case was overruled by the House of Lords ~~or~~ was, it said to be erroneous. I need only repeat what I said in the case of Associated Newspapers v. Wade at page 694: "Some acts are so remote from the trade dispute that they cannot properly be said to be 'in furtherance' of it. When conduct causes direct loss or damage to the employer himself (as by withdrawing labour from him or stopping his supplies) it is plainly 'in furtherance' of the dispute with him. But when trade unions choose not to cause damage or loss to the employer himself, but only to innocent third persons - who are not parties to the dispute - it is very different. The act done may then be so remote from the dispute itself that it cannot reasonably be regarded as being done 'in furtherance' of it" - I cite Breaverbrook Newspapers Ltd. v. Keys (1978) Industrial Cases Reports 582; ~~Express Newspapers Ltd. v. McShane (1979) Industrial Cases Reports 210~~ and United Biscuits (U.K.) Ltd. v. Fall (1979) Industrial Relations Law Reports 110 - "Thus when strikers choose to picket, not their employers' premises, but the premises of innocent third persons not parties to the dispute - it is unlawful. 'Secondary picketing' it is called. It is unlawful at common law and is so remote from the dispute that there is no immunity in regard to it".

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As I say, The House did not say that any of those cases were wrongly decided.

Departing from that for the moment, it seems to me, as I have said, that it is arguable in this case that there is no immunity for these acts done in calling out the private sector, because those acts were done in furtherance of the dispute with the government. It was not a trade dispute at all. It is arguable that they were not done in furtherance of the original trade dispute with the British Steel Corporation.

Having said it is arguable, that brings me to the other point in this case which is raised by the amended section 17 of the statute, which is in the Schedule to the Employment Protection Act 1975. That section says, in respect to an interlocutory injunction, that "the court shall, in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that party's succeeding at the trial of the action". That section was much considered by the House of Lords in two recent cases - N.W.L. Ltd. v. Woods (1979) Industrial Cases Reports 867; and the recent case of Express Newspapers Ltd. v. McShane (1980) 2 WLR 89. It is very interesting to see how the House of Lords have been dealing with section 17. They point out that it does not mean that the likelihood of success is to be the paramount or sole consideration in granting an injunction: there are other matters to be considered. In particular, damage to the employers or to the public, or even to the nation can be considered in considering whether to grant or refuse an injunction. Although he put it in the form of a double negative, I would quote what Lord Diplock said (removing the double negative and putting it into the affirmative) in N.W.L. v. Woods at page 881:

"... there may be cases where the consequences to the employer or to third parties or the public and perhaps the nation itself, may be so disastrous that the injunction ought to be granted, unless there is a high degree of probability that the defence will succeed".

Then Lord Fraser speaks to the same effect at page 883. He said that the likelihood is not to be regarded as overriding or of paramount importance. And Lord Scarman, on that point, said at page 890:

"... I do not rule out the possibility that the consequences to the plaintiff (or others) may be so serious that the court feels it necessary to grant the injunction; for the subsection does leave a residual discretion with the court".

That seems to me to be the view of the majority of the House in the case of N.W.L. v. Woods. It was taken up by Lord Scarman in particular in the McShane case. It had not been raised by counsel in the court, but he thought it so important that he brought it up himself. He referred to that passage, which I have quoted, from Lord Diplock, and went on to say (page 105):

"... in a case where action alleged to be in contemplation or furtherance of a trade dispute endangers the nation or puts at risk such fundamental rights as the right of the public to be informed and the freedom of the press, it could well be a proper exercise of the court's discretion to restrain the industrial action pending trial of the action. It would, of course, depend upon the circumstances of the case: but the law does not preclude the possibility of the court exercising its discretion in that way".

Those passages which I have read from the judgments of the House of Lords do show that there is a residual discretion in

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the courts to grant an injunction restraining such action as in this case, where it is such as to cause grave danger to the economy and the life of the country, and puts the whole nation and its welfare at risk. In those circumstances, the courts have a residual discretion to grant an injunction: unless it is

B clear - or in the highest degree probable - that there is a defence which is likely to succeed.

I have said enough in this case to show that there is a very good ground for argument that the so-called defence - the

C immunity - is not likely to succeed. To call out these private steel workers, who have no dispute at all with their employers, would have such a disastrous effect on the economy and well-being of the country that it seems to me only right that the

D court should grant an injunction to stop these people being called out tomorrow morning: to stop all this picketing: and to stop all these people who are preventing the movement of steel up and down the country.

E It seems to me that this is a case where, in our residual discretion, we should grant the injunction in the terms asked. I would allow the appeal.

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