file

The Law Society

26 June 1980

I enclose copies of two further letters which the Prime Minister has received about Clause 17 of the Employment Bill. I would be grateful if you could take into account these letters in the advice you are preparing on the earlier letter from the President of the Law Society, and also provide me with draft replies for the Prime Minister to send.

T. P. LANKESTER

Richard Dykes, Esq.,
Department of Employment

file

ds

25 June 1980

I am writing on behalf of the Prime Minister to acknowledge your recent letter. This is receiving attention and a reply will be sent to you as soon as possible.

TIM LANKESTER

Thomas Morison, Esq., Q.C.

file

ds

25 June 1980

I am writing on behalf of the Prime Minister to acknowledge your letter of 25 June. This is receiving attention and you will be sent a reply as soon as possible.

TIM LANKESTER

Peter Taylor, Esq., Q.C.

1

10 DOWNING STREET

PRIME MINISTER

Two more letters about Clause 17 of the Employment Bill (i.e. the Clause dealing with secondary action) - one from the Chairman of the Bar, the other from Mr. Thomas Morison QC. I am getting comments on the earlier letter from the President of the Law Society, and will do the same with these letters. Agree? (You did of course discuss the substance of these letters briefly with Lord Gowrie after Cabinet last Thursday; but when we have the Department's comments, you can take this up again if you wish.)

25 June 1980

f25

THE SENATE OF THE INNS OF COURT AND THE BAR

cc 19/

11 SOUTH SQUARE
GRAY'S INN
LONDON WC1R 5EL

From the Chairman of the Bar
PETER TAYLOR QC

Telephone: 01-242 0082
Records Office: 01-242 0934

25th June, 1980

Please quote reference

Dear Prime Minister

EMPLOYMENT BILL - CLAUSE 17

I write to express my grave concern about the present form of Clause 17 of the Employment Bill. I would not have taken the unusual step of writing to you direct, but I have received copies of letters already sent to you by the President of the Law Society and Mr. T.R. Morison, Q.C.

Without repeating them in detail I wish to associate myself with the views they have expressed. There are two points :-

[1] If the object is to remove immunity for the kind of secondary ~~picketing~~ action the country has suffered in recent months, then Clause 17 fails to achieve it, except to a very limited extent.

[2] Whatever may be the right balance to be achieved, the actual form and wording of this clause is depressingly convoluted and bristles with words of uncertain and arguable interpretation (e.g. "purpose" "likelihood" and "means"). The "Orr-Ewing Amendment" is crisp and clear.

As Chairman of the Bar it is no part of my function to write to you on point [1] which is primarily political. But I am, in that capacity, most anxious about point [2] lest the law be brought into disrepute. If Clause 17 is enacted we shall again have the unseemly spectacle of legal wrangling as to the meaning and application of the provisions. There may again be differing judicial views up to and in the House of Lords. I sincerely hope this

THE SENATE OF THE INNS OF COURT AND THE BAR

11 SOUTH SQUARE
GRAY'S INN
LONDON WC1R 5EL

From the Chairman of the Bar
PETER TAYLOR QC

Telephone: 01-242 0082
Records Office 01-242 0934

Please quote reference

will be avoided and that there is still time to reconsider this Clause.

Yours sincerely

Peter Taylor

The Right Honourable Margaret Thatcher, M.P.,
No. 10 Downing Street
Whitehall
London S.W.1.

Fountain Court, Temple, London EC4 9DH.
01-353-7356

cc 19 ✓

R 25/6

Dear Prime Minister,

I am a practising barrister and, as such, have been involved in most of the recent trade dispute cases (including MacShane). I have submitted two fairly lengthy, semi-technical papers to the Department of Employment about the Government's "secondary action" proposals and, latterley, clause 16 (now 17) of the Employment Bill. Having looked at the official report of the recent debate in the House of Lords (June 12, 13) on clause 17 and the "Orr-Ewing Amendment", I believe that a number of important points need to be made but, because of the nature of my practice, I cannot easily take part in a public debate about secondary action without appearing to be political. Hence this letter to you. I hope I shall be forgiven for writing directly in this way; I have assumed that at this stage decisions about the Orr Ewing amendment are for the Government and not just the Department.

May I make the following points about clause 17.

(1) The clause is extremely complicated and oddly drafted.

For example, secondary action is defined in such a way that picketing at the factory gates of the employer in dispute by his own employees may constitute secondary action, within the definition, although no-one in his right mind would so categorise it. Clause 17(5) has been put in to cover this point. This is not just a drafting point. The real problem with clause 17 is that it seeks to define secondary action by reference to the legal 'cause of action' rather than to the event itself, and, as I can quickly show, this leads to anomalies and absurdities.

(2) Clause 17 introduces concepts of "purpose" "means" and "likelihood".

The problem for the practitioner is that unless speedy injunction relief is likely to be granted by the Court the client should be advised not to pursue his legal remedy. An interlocutory injunction in trade dispute cases will not

be granted where the defendant has a reasonable claim to immunity. Inevitably, the more complicated the statutory provision and the 'looser' the concepts the harder it will be for an employer to succeed.

(3) Clause 17 only applies to cases where the plaintiff's cause of action relates to a commercial contract (inducing its breach or interfering with its performance; the 'economic torts'). If clause 17 does not apply then Section 13 of the Act will apply. In other words the claim for immunity is bound to succeed (in the light of MacShane's case in the House of Lords) unless clause 17 applies. It is plain from the recent debate in the House of Lords that lawyers do not agree about the nature and extent of the economic torts. I agree that the common law is unclear and, therefore, practitioners will find it very difficult to give confident advice to affected employers. On the whole, employers will only resort to law, in such circumstances, when they can be reasonably confident of success. Clause 17 is, therefore, not very helpful to employers.

(4) Because clause 17 has defined secondary action in this peculiar way, its application will not only be very limited (and therefore the immunity will remain very wide) but also produce some odd results. May I give three cases in which I think clause 17 will not apply however far 'down the line' from the employer in dispute the plaintiff might be (e.g. at least second third or fourth suppliers):

(1) if the purpose of the industrial action was to give moral support to the workers in dispute;

(2) if the purpose of the industrial action was to stop an employer from making (as opposed to performing) a commercial contract;

(3) if the union official directly induces an employer to break a commercial contract.

(5) If I was advising a union about the extent of the immunity I would advise that an official would be immune:

(a) in respect of industrial action at the first supplier, if he shouted from the rooftops that the purpose of the action was to stop goods going to the employer in dispute. Even though that purpose could be achieved by more selective industrial action than he organised there would still be immunity. I would advise that he had immunity however much damage was done to the first supplier's business or to all those who did business with the first

supplier. If the employer in dispute was unable to take any supplies during the dispute the union official would still have immunity if the ostensible purpose of the industrial action was to show solidarity. Of course the ostensible purpose might not be the real purpose,

(b) in respect of industrial action against second third or fourth suppliers (down the line) provided that he did not ostensibly organise the action for the purpose of interfering with a commercial contract. He could be sure to have immunity if he organised a sympathy strike which would have the effect of interfering with commercial contracts.

In short, the purpose of the action will determine the extent of the immunity. With sensible legal advice immunity will always be available 'right down the line'. And even if I am wrong about this I am confident that I am at least arguably correct or sufficiently correct to prevent an interlocutory injunction.

In plain terms clause 17 is of very limited effect. Accordingly, the problems caused by the MacShane judgment have not been grappled with.

As to the 'Orr-Ewing amendment', it has the considerable merit of being more simply drafted. However, because it has adopted the same definition of secondary action it requires a provision equivalent to clause 17(5), else primary picketing could cease to be immune. May I, respectfully, ask you to intervene before it is too late? If the choice at this stage is between the Department's clause or the Orr-Ewing clause could I urge you to accept the latter? I feel very strongly that Parliament should try and legislate clearly, in this field otherwise the Courts are in danger of being brought into contempt through involvement in matters such as "purpose" (motive) "likelihood" and "means". The Courts should not be asked to draw lines during industrial disputes when passions run high; Parliament should do so and do so as clearly as possible. Some of the law Lords have already made this point: as a practitioner I strongly support them.

Finally, can I add that I belong to no pressure group or organisation of any sort. These are my own views. The whole subject is immensely complex and should you or your colleagues find it helpful I would willingly make

myself available at any time to elaborate my misgivings from a practitioner's point of view.

Yours sincerely

Thomas Morison

THOMAS MORISON Q.C.

cc Chairman of the Bar

Miss Stephens.

I have arranged for the Lord Chancellor to come at 12.30 p.m. on Wednesday 2 July, i.e. just before he leaves for City Chambers.

10 DOWNING STREET

From the Principal Private Secretary

30 June 1980

PERSONAL

The Prime Minister has asked me to let the Lord Chancellor have the attached copies of letters about the Employment Bill which she has recently received from the President of the Law Society and the Chairman of the Bar.

We are seeking the advice of the Secretary of State for Employment on these letters, but in the meantime the Prime Minister would welcome a private word about them with the Lord Chancellor. I will be in touch with you to arrange a meeting in the next day or so.

C. A. WHITMORE

Ian Maxwell, Esq.,
Lord Chancellor's Office.