JH 851

SECRET

Prime Minister (2)

To note

AT 18/10

PRIME MINISTER

17/10/83

POEU ACTION

In Cecil Parkinson's note of 6 October, he reported that the POEU, as part of its campaign against privatisation, had indicated a work to rule in BT's International Division. There are two strands of industrial action - one against privatisation and the other against Interconnection with Mercury.

2 You may care to have our latest assessment. The initial action against privatisation led to a deterioration in international services, particularly to countries outside of Europe and North America. However, management action taken over the weekend resulted in a significant improvement and, although some users may be experiencing delays in achieving calls, BT management advise that in general services are at present fairly normal. The POEU effort to escalate action to the Goonhilly and Madley satellite earth stations, through which about half BT's international traffic is carried has not been successful so far. On the other hand, the telex lines to Aberdeen have been disrupted.

3 The action against Mercury takes two forms - the refusal to interconnect the Mercury network and specific action against the Mercury partners, Cable and Wireless, BP, and Barclays. This

secondary action is having repercussions for other inland customers particularly in Central London. BT on 12 October bussed in engineers from outer London to carry out extensive work with somewhat mixed success. They extended bussing on an extensive scale on 13 October to cover the Home Counties.

4 Perhaps the most significant change to report is the short-term decision of the POEU to carry out outstanding repair and maintenance work at Mercury and Cable and Wireless. This move is presumably related to Mercury's request for an injunction against the POEU and Mr Stanley. The hearing for this has been postponed until today in order to give the POEU more time to prepare its evidence. The POEU are on weak legal ground in extending their action against interconnect with Mercury to action against Mercury, Cable and Wireless, BP and Barclays as ordinary subscribers to BT. By drawing back from the red line here, the POEU are obviously seeking to have as clean a sheet as possible before the Court reconvenes today.

5 BT management's strategy remains broadly as set out in the note of 28 September. Engineers who refuse to carry out management instructions are suspended. The number suspended fluctuates but currently stands at about 2000. It is understood that the POEU is paying these members the equivalent of their average net earnings, which is about £120 a week. Thus the cost to the Union must now be running at nearly £¼m a week. The levy raised earlier brought in about £1m and at the moment there are no signs of any attempt to supplement this, so that without a

change of tactics the Union could soon be forced to dip into its reserves. We understand that the POEU's total assets, including fixed assets, do not exceed £5m.

6 It is encouraging that the Society of Telecom Executives (STE), which embraces line supervisors to middle management and is not committed to action against privatisation, is generally co-operating well in keeping the international services going. A call earlier this week to the 1000 members in the International Division to attend a meeting during working hours was obeyed by only 100.

7 The POEU strategy was to concentrate on a limited number of strategic targets in London. They have been surprised by the scale and vigour of the management response and are concerned at the impact of BT's lock out strategy on their funds. The NEC met throughout 13 October and there was great concern about having to renew the levy. There are also some indications of a fear of rising resignation from the POEU.

8 The situation is very fluid but remains within the parameters expected by mangement. The heat is on the NEC. The BT management retain the initiative. The next critical point will be the Court case on Mercury interconnect, a decision on which is not expected before the end of this week. Should the POEU win,

the NEC will win back some credibility. Should they lose, the silent majority may become less silent.

9 I am copying this to the Chancellor of the Exchequer, the Secretary of State for Employment, the Home Secretary and Sir Robert Armstrong.

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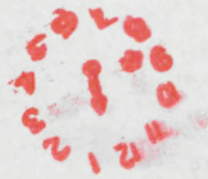
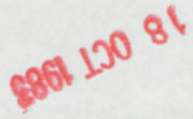
17 October 1983

Department of Trade and Industry

Post Office Future pt 7





Mercury/BT file

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Law Report October 22 1983 Chancery Division

Trade dispute over job losses prevents issue of injunction

Mercury Communications Ltd v Stanley and Another

Before Mr Justice Mervyn Davies

[Judgment delivered October 21]

His Lordship dismissed a motion in the Chancery Division by Mercury Communications Ltd seeking an injunction against the Post Office Engineering Union and its members restraining them from inducing, procuring, or threatening to induce or procure breaches of contractual relations between Mercury and British Telecommunications by procuring or threatening to induce or procure breach of contracts of employment or other unlawful means so as to cause loss or harm or damage to Mercury.

Mr Alexander Irvine, QC, Mr Richard Field and Mr Patrick Elias for Mercury; Mr Christopher Carr, QC and Miss Cherie Booth for the union.

MR JUSTICE MERVYN DAVIES said that by their motion Mercury Communications Ltd. had sought interlocutory relief against Mr Bryan Stanley and the Post Office Engineering Union (POEU). But since it emerged at the hearing that Mr Stanley, though the general secretary of the union, was not in fact a member of the national executive council of the union, it had been agreed that a member of the council should be made a defendant in his place.

The writ, dated October 5, 1983, in general terms claimed, *inter alia*, an injunction restraining the defendants from inducing and/or procuring and/or threatening to induce or procure a breach of contractual relations between Mercury and British Telecommunications by inducing or procuring breaches of contracts of employment so as to cause loss, harm or damage to Mercury; and an order requiring the defendants to rescind the executive council resolution in March 1982 to instruct union members not to cooperate with Mercury and any resolution of a like nature and to withdraw any restrictions issued in or about May 1982 implementing the March resolution. Damages claimed by the writ were not sought on the motion.

Mercury was a private company incorporated in 1981 with a capital of £1m, the shares of which were held, as to 40 per cent by a subsidiary of Cable and Wireless plc, as to 40 per cent by a subsidiary of British Petroleum plc and as to the remaining 20 per cent by a subsidiary of Barclays Merchant Bank Ltd.

On February 22, 1982, the secretary of state in exercise of powers conferred on him by section 15(1) of the British Telecommunications Act 1981 granted to Cable and Wireless a licence to run a telecommunications system in the United Kingdom on terms that Mercury would act as Cable and Wireless's agent in running the system.

On September 10, 1982, the Mercury shareholders entered into a joint venture agreement for the design, construction and operation and commercialization of such a system, and duly appointed Mercury as their agent to operate it.

Those activities took place against a background of change. Until 1981 the Post Office had a monopoly of telecommunications systems within the UK. By the 1981 Act the public corporation British Telecommunications was established. British Telecommunications took over from the Post Office its telecommunications function.

By section 10 there were transferred to it the property rights and liabilities comprised in that part of the Post Office's undertaking concerned with the provision of telecommunications and data processing services. By section 12 it was given the exclusive privilege of running telecommunications throughout the UK.

By section 15 of the Act, there was provision for the grant of licences for the running of telecommunications systems. A licence was granted by the secretary of state or by British Telecommunications, acting with the consent of the secretary of state.

There was also a Bill before Parliament called the Telecommunications Bill 1983, due to come before a standing committee of the House of Commons on October 25 for the abolition of British Telecommunications' exclusive privilege and for transfer of all its rights and liabilities to a successor company with financial provisions for the sale of the shares of such successor company.

In other words there was contemplated "privatization" as it was now called of British Telecommunications. The Bill also required that, as a condition of any licence granted to British Telecommunications and Mercury, both would be obliged to permit interconnexion of each other's telecommunications systems.

On November 5, 1982 Mercury and British Telecommunications made an agreement providing for interconnexion in various ways.

The defendants' position was that they objected to Mercury being allowed to use the British Telecommunications network and to the proposals to privatize British Telecommunications. There were about 130,000 members of POEU and the work of interconnexion depended on their helping, or at any rate not obstructing that work. The union was anxious to prevent further interconnexion and to oppose privatization and been active in pursuing those objectives.

Instructions had been given in April or May 1982 to union members not to make any connexions for the time being between the public telephone cable system and the alternative network. A day of action on October 20, 1982 was said to be only "the start of the campaign against privatization". Some demonstrations followed and on April 6, 1983 some selective strikes were launched in the London area. Those were called off on May 12, 1983 in consequence of the announcement of the general election.

On July 27, 1983 at a special meeting of the executive council of the union it was decided to escalate industrial action against Mercury shareholders.

Mr Irvine contended that a report of a special conference of POEU in September 1983 showed that it could not be said that the union was campaigning merely against the Telecommunications Bill and he relied on it as showing that the union activity was not in furtherance of any dispute with British Telecommunications but was rather one campaign embracing opposition both to Mercury and to privatization.

He produced evidence of damage being done to Mercury which included that potential customers were being deterred because they supposed that Mercury would be unable to function.

Mr Carr said that the union had not expressly informed British Telecommunications that it was in dispute with it.

His Lordship had to bear in mind that it was not his task to decide the final rights of the parties, but merely to decide whether or not to make some appropriate interlocutory order or to dismiss the motion.

His Lordship had to be guided by the principles laid down in *American Cynanamid Co Ltd v Ethicon Ltd* ([1975]) AC 396, 407) to be applied in the light of section 17(2) of the Trade Union and Labour Relations Act 1974, as amended by the Employers Protection Act 1975.

His Lordship also had in mind section 13(1)(a) of the 1974 Act, as amended by the Trade Union and Labour Relations (Amendment) Act 1976, and section 29(1) and (6) of the 1974 Act as amended by the Employment Act 1982.

Mercury's case was that the defendants' activities in preventing interconnexion between the two networks was tortious at common law, involving (1) indirectly inducing a breach of the interconnexion agreement by unlawful means, and (2) interference with Mercury's business by unlawful means.

What the plaintiffs complained of was that the defendants were inducing their members to break their contracts of employment. That would be "unlawful means" at common law for the purposes of the two torts.

But section 13(1) of the 1974 Act, as amended, conferred immunity in inducing a breach of contract of employment when done in contemplation or furtherance of a trade dispute.

It was common ground between Mr Irvine and Mr Carr that the effect of the decision in *Hadmor Productions Ltd v Hamilton* ([1983] 1AC 191) was that if the inducement was of the character now complained of it was not capable of constituting unlawful means as a necessary ingredient of either of the two torts complained of. The basic question which emerged was whether or not the defendants had acted in contemplation of a trade dispute.

But having so far agreed, Mr Carr then parted company Mr Irvine.

The defendants' case in outline was: (a) there was in existence a trade dispute between British Telecommunications and its employees who were members of the defendant union;

(b) the subject matter of the dispute was fear of job lossess;

(c) the action taken by the employees in refusing to connect and the defendants' action in advising that course was action taken in furtherance of that dispute;

(d) accordingly the defendants were within the statutory immunity conferred by section 13(1) and

(e) in any event the court's discretion having regard to section 17(2) ought to be exercised in the defendant's favour.

In light of Mr Carr's concession, his Lordship was justified in regarding the union's instructions to its members, not to connect up the two networks, as being actionable in tort at common law. But there was that possibility of the statutory defence.

Section 13(1) said that an act done by a person in contemplation or furtherance of a trade dispute should not be actionable in tort on the ground only that it induced another person to break a contract or interfered or induced any other person to interfere with its performance.

On this interlocutory application his Lordship had to consider the likelihood of the union succeeding at the trial in establishing a section 13 defence. That resulted from section 17(2).

So it came to this: what was the likelihood of the union at the trial establishing that, in ordering its members not to connect up, it was acting in furtherance of a trade dispute as defined in section 29(1).

That question involved considering (a) whether or not there was in the situation before the court a "trade dispute" within section 29(1), and (b) if so, whether or not the acts as shown in the evidence amounted to acts done in contemplation or furtherance of that dispute.

The union's case was while they would continue to campaign against privatization and liberalization their members were, as well, in dispute with British Telecommunications in consequence of its orders in June 1983 to connect up with the Mercury network.

British Telecommunications said "connect" and the men had said "we will not". The reason for the refusal, so it was said, was that to connect to Mercury would lead to Mercury – and later other companies – doing work now done by British Telecommunications, so that connexion was the first step towards possible job losses.

So there was a dispute over British Telecommunications's cooperation with Mercury, and on that analysis a "trade dispute" within section 29(1), between the engineers and their employer, relating wholly or mainly to termination of employment. No doubt it related, as well, to a dislike to privatization, but the concern expressed by members had in great measure been about job looses.

His Lordship had supposed that fear of future job losses could not be prayed in aid at this early stage, and that some real threat of dismissal would have to be shown, but the authorities showed that that supposition might be wrong: see *Hadmore Productions Ltd v Hamilton* at p226 B-G and *Heath Computing Ltd v Meek* ([1981] ICR 24).

So if there was a dispute it might be one relating to "termination" of employment within section 29(1)(b). The phrase had been "is connected with" rather than, as now, "which relates", but his Lordship thought it mattered not which phrase was taken.

It had to be remembered that British Telecommunications was obliged to enter into the interconnexion agreement with Mercury and that it had no justification for failing to afford them facilities. It had to perform its statutory duty, and could not negotiate with the union in any true fashion over the interconnexion issue.

His Lordship referred to the words of Lord Diplock in *NWL Ltd v Woods* ([1979] 1WLR 1294, 1304F), which might well relate to a dispute over job losses: see also *Duport Steels Ltd v Sirs* ([1980] 1WLR 142).

Mr Irvine submitted that there was no trade dispute within section 29(1). He said that the unions' and members' activities in refusing to connect up Mercury was not related to any dispute between British Telecommunications and its employees.

The refusal was part of a single campaign by the union against the Government and Mercury. Any suggestion that there was one campaign against privatization and another against liberalization, was, he said, pedantic and unrealistic.

There were certainly documents that supported that veiw, and the engineers' conduct in refusing to connect was "all of a piece" with action that was part of a single anti-Government campaign calculated to cause the Government to change its privatization proposals, which union members doubtless opposed fervently.

But all that was largely a matter of words until British Telecommunications in June 1983 ordered connexion to be made. Opposition then took the form of deeds, in disobeying British Telecommunication orders. It seemed to his Lordship that a particular dispute then crystallized.

It was a dispute with British Telecommunications as to whether or not its installations should be made available to Mercury, relating wholly or mainly to termination of employment: that is, job losses, and accordingly, in his Lordship's view, there was a "trade dispute" in existence within section 29(1).

BBC v Hearn ([1977] 1 WLR 1004), which showed that a union acting coercively might be without the protection of selection 13(1), did not assist.

The next question, there being a trade dispute, was whether the union members in disobeying their employer's instructions were acting in "contemplation or furtherance" of the dispute. In this connexion, his Lordship had been referred to *Express Newspapers Ltd v McShane* ([1980] AC 672).

On the facts put before him, his Lordship answered that question in the affirmative. On the evidence, his Lordship thought that the defendants were likely at the trial to establish a section 13(1) defence.

In a case of the present kind it was impractical if not impossible to assess the financial consequences of making or not making an order. On the other hand, proceeding further with the principles of the *American Cyanamid* case, there was something to be said for Mr Carr's submission that the status quo should remain.

Mr Irvine had drawn attention to the words of Lord Fraser of Tullybelton in the *Duport* case at p166 including the statement:

"If the court considers, on the available evidence, that the threatened act would probably have an immediate and devastating effect upon the applicant's person or property – for example by ruining plant which could not be replaced without large expenditure and long delay – the court ought to take that into account."

Taking all the relevant considerations into account, including his Lordship's view that the defendants were likely to succeed at trial by virtue of section 13(1), his Lordship would decline to make any order on the motion. His Lordship gave directions as to the future conduct of the action.

Solicitors: Bird & Bird; Lawford & Co.

'Reasonably' vitiates standard of proof

R v Sweeney (J. J.)

The direction of a trial judge to the jury on the standard of proof in a criminal case using the words "you must be satisfied so that you are reasonably sure" of the guilt of the defendant, was defective and was not cured by subsequent correct references omitting the word "reasonably".

The Court of Appeal (Lord Justice Kerr, Mr Justice Stocker and Mr Justice Eastham) so held on October 20 in allowing the appeal and quashing the conviction of John Joseph Sweeney at Southwark Crown Court before Mr Assistant Recorder Martin Graham, QC on February 8, 1983 of assault occasioning actual bodily harm.

LORD JUSTICE KERR, delivering the judgment of the court, said that it was well established that a proper direction to the jury on the standard of proof should indicate that they should be satisfied so that they were sure of the defendant's guilt before convicting him, and that the inclusion of the word "reasonably" at the outset of his direction on the law was enough to vitiate the direction.

TIMES PAST
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CARRY ON BLACKING

The decision in the High Court yesterday over the blacking of the Mercury telecommunications company was formally only a preliminary bout to a full contest to be held at a later stage. It was only to consider Mercury's claim for an interim injunction to have the action lifted pending a full hearing. But the fact that the judge found Mercury's case not strong enough to justify an injunction is a blow both to the company and the Government's privatization programme, in other areas as well as telecommunications.

The rules that judges must follow in considering such claims in labour cases differ from those that apply generally. Usually a judge only has to consider whether the plaintiff has a case with any claims at all to substance. Then he must consider whether it is fairer on balance, to grant the injunction rather than leave the plaintiff to secure eventual redress through damages if successful. The judge should not attempt to weigh the balance of the main issue. In labour law he generally has to, because otherwise the courts would effectively be imposing a lengthy suspension of disputes in almost every case. This would draw the courts dangerously far into the political arena.

The final round might in theory still go the other way. Parliament's twelve years of busy law-making in this area have left labour law a thing of shreds and patches, difficult to interpret, with many obscurities which have never been tested in the courts. But it is not difficult to understand why the judge arrived at his conclusion. Mercury did not claim that the action against it was a secondary action of the kind made illegal in 1980, because the action was in actual form clearly a refusal of the employers' instructions to connect Mercury to the British Telecom network – instructions which created not unreasonable fears in the workers that their pay and jobs might eventually suffer.

Mercury's contention was that whatever the action's overt form, it was in substance directed against them and the Government and that therefore it fell outside the 1982 definition of a trade dispute. The union has been energetically pursuing a frankly political campaign against the privatization policy. Far from standing to lose if the action succeeded, British Telecom would actually benefit from the elimination of a competitor.

The finding that the action was nevertheless a trade dispute seems a reasonable one. However strong the political overtones, the workers are refusing to obey employers' instructions out of concern over their pay and conditions. By preventing British Telecom from fulfilling its side of the Mercury contract, they are causing it a loss of earnings. But Mercury's failure to secure an interim injunction clearly illuminates (as its success would have done) the ultimate paradox of public service labour relations. The union is now by implication free to apply sanctions freely against Mercury so long as it does so through its power over British Telecom apparatus. Thus its chances are improved, if it can sustain the action, of frustrating government policies specifically set out in the manifesto endorsed by the electorate only four months ago.

But every public sector pay claim is in some sense a challenge to government policy on cash limits. It would be wrong to introduce a new statutory definition of political action which effectively deprived disputes about pay and conditions of the immunities they have enjoyed for generations, just because the employees' grievance has its origin in a political decision. It is still however incumbent on the courts to distinguish the genuine trade dispute from the camouflaged political strike.

Yesterday's judgment sharply illustrates the limitations of the law in restraining attempts by organized labour to frustrate policies democratically arrived at. But it offers no pointers to an equitable means of creating such a restraint.