Rights of Way, Abatement and Criminal Damage

Case Note: *Chamberlain* v *Lindon* (1981) All ER 538

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Disputes between neighbours have become part of the regular fare of popular culture, whether on television or in the newspapers. It is not difficult to understand why this should be: the extraordinary behaviour of neighbours acting in unbiblical fashion toward each other excites prurient and voyeuristic tendencies which such programmes and articles can exploit to attract an audience. In these dramas of everyday life, the law has more than a mere walk-on part. Ward LJ captures the point succinctly: 'disputes between neighbours tend always to compel ... some unreasonable and extravagant display of unneighbourly behaviour which profits no one but the lawyers'.[1] The law does not provide a single, simple mechanism for resolving such disputes. One possibility is to try to settle the matter by employing a self-help remedy. However, using such remedies carries considerable risks. The courts do not like them,[2] they are confrontational, and the dangers of acting outside their parameters are ever present. Further, as *Chamberlain* v *Lindon*[3] illustrates, use of such remedies does not necessarily mean that a dispute is resolved without recourse to lawyers and legal proceedings. But what this case also demonstrates is that opportunities for the preferable course of dispute avoidance are not always taken and that a

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1 *Alan Wibberley Building Ltd* v *Insley* [1998] 2 All ER 82 p 83. This case concerned a boundary dispute, and was itself the subject of popular interest: see, for example, the *Daily Mail*, 6 October 1998. It should, in fairness, be pointed out that Ward LJ regarded that particular dispute as an exception to the general run of neighbour disputes to which he alludes in the remarks quoted in the text.

2 See, for example, *Lagan Navigation Company* v *Lambeg Bleaching, Dyeing and Finishing Co Ltd.* [1927] AC 226 pp 244-5 *per Lord Atkinson and Southwark LBC* v *Williams* [1971] Ch 734 pp 745-6 *per* Edmund Davies LJ.

3 [1998] 2 All ER 538, Division Court, Queen's Bench Division, Rose LJ and Sullivan J.

consequence of a failure to anticipate and address problems before they arise can be a protracted and unseemly dispute.

C owned two adjacent properties, Mill Farmhouse and the Mill. He agreed to sell the Mill to L in 1988. In order to obtain access to the Mill from the highway, it was necessary to cross a piece of land ('the brown land') which C had retained as part of Mill Farmhouse, and L did this both on foot and by vehicle in order to reach his land. In 1991, following proceedings for specific performance, C granted L, by deed, a right of way over the brown land, and L continued to cross it to gain access to his property. However, L had taken to crossing the brown land diagonally, to which C objected. It would appear that the deed did not limit the use of the right of way and, of course, in the absence of any restriction L could cross the brown land in whichever way and by whatever means he chose.[4] It is, therefore, difficult to understand on what basis C wished to prevent L crossing it diagonally. If C wished to proscribe a particular way of crossing the land, he should have done so at the outset, or, at the latest, in the deed of 1991. Having failed to do so, C could not subsequently limit L's use of the right of way. In 1995, following correspondence between the parties, C laid the foundations of a wall, which he was building in order to prevent L from driving diagonally across the brown land. L drove his car over the foundations and parked it on his property. C completed building the wall, with the result that L's car was trapped. L then complained that he had been denied his right of access across the brown land, as he had the right to cross it in whatever direction he chose. He also complained that the width of his right of way had been reduced by the wall. L could, at this point, have pursued a civil action through the courts. Instead, he gave notice that he would demolish the wall unless C did so. C failed to do this, and so, in April 1996, L knocked it down.

C then had a choice: he could accept L's actions; try to reach an agreement or compromise with L; pursue a civil action; or institute

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[4] Where a right of way is the subject of an express grant, its precise scope falls to be construed with reference to the terms of the grant considered in the light of the surrounding circumstances at the date of the grant': Kevin Gray *Elements of Land Law* (2nd edn 1993) p 1081. See *Cannon* v *Villars* [1878] 8 Ch D 415 esp p 420 *per* Sir George Jessel MR; *St Edmondsbury and Ipswich Dioceasan Board of Finance* v *Clark* (n 1)[1975] 2 WLR 468 esp pp 476-7 *per* Sir John Pennycuick.

criminal proceedings. He chose the last of these, 'a manifestly inappropriate procedure to adopt in the circumstances',[5] and preferred an information against L alleging criminal damage contrary to s 1 (1) Criminal Damage Act 1971.[6] The magistrates dismissed the information on the basis of s 5 (2) (b), which, so far as is material, provides:

> '...(2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purpose of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse ... (b) if he destroyed or damaged ... the property in question ... in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself ... and at the time of the act or acts alleged to constitute the offence he believed - (i) that the property, right or interest was in immediate need of protection; and (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all of the circumstances.'

They found that L had destroyed the wall in order to protect a right or interest in property[7] which he believed to be vested in him, namely the right to cross the piece of land diagonally. They found that he honestly believed that this right or interest was in immediate need of protection and that the means adopted were reasonable in the circumstances. The criteria in s 5(2) (b) were made out, and L had a complete answer to the charge. C appealed by way of case stated, contending, *inter alia*, that L's purpose in destroying the wall was not the protection of property but the avoidance of litigation, and that the right was not in immediate need of protection as the wall had stood for

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5 [1998] 2 All ER p 540 *per* Sullivan J.

6 A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.'

7 S 5(4) extends the definition of property to include '... any right or privilege in or over land, whether created by grant, licence or otherwise ...'.

nine months. For reasons discussed below, the Divisional Court dismissed the appeal, holding that the justices were entitled to dismiss the information.

An initial issue[8] relates to the interpretation of s 5(2) (b). In order to have a defence under section 5(2) (b), the defendant must have caused the damage 'in order to protect property'. Although the words of s 5(2) (b) might appear, in the context of the subsection, to be wholly subjective, in a series of cases[9] the courts have imported objective criteria, particularly with regard to the words 'in order to protect property' and 'in immediate need of protection'. That this is at variance with the wording of the subsection has been the main thrust of academic criticism of this approach.[10] However, as Professor Smith points out,[11] s 5 is couched in very subjective terms, and a literal interpretation of it would involve a departure from the general principle that standards are set by the law and not by the defendant. Although the courts' interpretation does not accord with the words of the subsection, this may provide a reason for construing it in this way. But such an interpretation has set up a tension, discussed below, which neither earlier cases nor *Chamberlain* v *Lindon* resolves.

The higher courts have held that a two stage test is involved.[12] The first stage, which is subjective, is to ascertain the defendant's purpose. The second stage is for the court to determine whether that purpose amounted to something done in order to protect property: if it did not, then s 5 cannot apply.[13]

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8 Aside, of course, from the evidential question of whether the court believes the defendant.

9 See, for example, *R* v *Hill, R* v *Hall* (1988) 89 Cr App R 74; *Blake* v *DPP* [1993] Crim LR 587; *Johnson* v *DPP* [1994] Crim LR 673.

10 See, for example, Smith JC, *Smith and Hogan Criminal Law,* (9th edn 1999), pp 688-690 and commentary on *Johnson* v *DPP* [1994] Crim LR p 674; R Card, *Card, Cross and Jones Criminal Law* (14th edn 1998) p 365; Allen M, *Textbook on Criminal Law,* (4th edn 1997), p 438.

11 op cit (1999) pp 689-9.

12 See the cases cited *supra* n 9.

13 As a matter of precedent, the Divisional Court in *Chamberlain* v *Lindon* was bound to follow the approach laid down by the Court of Appeal in *Hill.*

The first thing to ascertain was, therefore, L's purpose in demolishing the wall. This in turn depended on whether he honestly believed that he was entitled to use the right of way as he did. It did not matter whether he was in fact correct or not. Section 5 does not require that his belief is reasonable or that it is based on an objectively accurate assessment of his position in the civil law: the reasonableness or otherwise of his belief is merely evidential, as a factor to be taken into account in deciding whether he honestly held the belief.[14] Thus, in *Chamberlain* the civil law issue did not require detailed consideration, as the focus was on the defendant's belief about the legal position of the parties rather than the actual state of affairs.[15]

C argued that L's real purpose in demolishing the wall was not the protection of property, but was instead the avoidance of litigation. The court took the view that, on the evidence, his purpose was to protect his right of way and the fact that, at first, his preferred method of doing so was abatement rather than civil proceedings did not convert his purpose into the avoidance of litigation. L was thus not prevented from relying on s 5(2) (b) on this ground. In this, the court's wider characterisation of L's purpose was critical. On this view, the avoidance of litigation, or indeed the desire to exercise the remedy of abatement, merely became a means of achieving this end rather than a purpose in itself.[16]

Another aspect of the subsection was more troublesome. Section 5(2) (b) (i) requires that the defendant must believe that the right was in immediate need of protection. As we have seen, as interpreted by the courts, this contains both a subjective and an objective element. This creates a tension relating to the question of how the court views a

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14 S 5(3) provides: 'For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held'.

15 Even if the defendant is mistaken as to his position in the civil law, he can still rely on s 5 as long as the tribunal of fact accepts that he believed he was entitled to act in the way he did: see Smith JC, op cit, *supra* n 10 (1999) p 692.

How extensively criminal courts need to explore civil law concepts in order to determine questions of criminal responsibility is an issue of more general application. This remains a contentious issue which is particularly significant in relation to offences against property. See generally Smith JC, 'Civil Law Concepts in the Criminal Law' (1972 B) CLJ 197.

16 Professor Smith, op cit, *supra* n 10 (1999) p 689, interprets the avoidance of litigation as an alternative purpose.

defence under s 5(2) (b) bearing in mind the words of the subsection and the interpretation of them by the higher courts. In particular, there is the question of who decides whether the defendant has satisfied all the requirements of the defence. Commenting on this, Professor Smith says:[17]

> 'There is, however, justification for the importation of an objective element into the question of D's alleged belief that the property was "in immediate need of protection". Under s 5(2) (b) (i) and (ii) it is irrelevant that the belief was wholly unreasonable if it was, or may have been, actually held. Unreasonableness is only evidence, relevant to the ultimate question whether the belief was held or not. But, once D's belief is ascertained, the question whether it is a belief of the kind specified in the section is an objective question - a question of law or, perhaps, mixed fact and law. Whether the need, as seen by D, is an "immediate" need is a question for the court or jury. If, for example, Johnson had said that he believed his goods would be in need of protection when he moved them into the premises in a week's time, the court may believe him but not accept that this belief is a belief in an "immediate" need for protection. It may be that all three decisions[18] can be justified without resort to the unacceptable view that "in order to" bears an objective meaning, because the need, even as asserted by the defendants, was not an immediate need.'

In *Chamberlain* v *Lindon*, the need, as asserted by the defendant and accepted by the court, was demonstrably immediate, and the purpose the protection of his right of way: it was therefore the converse of the earlier cases, and did not require the court to resolve the subjective/objective dilemma.

It was suggested that the fact that nine months had elapsed since the wall was built was fatal to L's defence, as he could not honestly believe that the action was necessary for the *immediate* protection of

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17 op cit p 690.

18 The cases cited *supra* n 9.

his right. During those nine months, there had been correspondence between the parties, and Sullivan J took the view that L should not be penalised for his attempt to resolve the dispute by such means. He continued:

> 'So long as the wall remained it was, on the facts as believed by the respondent, and obstruction to his right of way and so there was an immediate need to remove it.'[19]

The case was thus, in the court's view, distinguishable on the facts from cases such as *Hill*[20] where the threat lay in the future. In the instant case, there was evidence that D believed that the interest was presently in immediate need of protection, and there was evidence to support this belief. Although a literal reading of the subsection might suggest a connotation of urgency in the use of the 'immediate', it is suggested that the approach of the Divisional Court has much to commend it in encouraging, or at least not penalising, attempts to deal with the situation by means other than by causing immediate damage to, or destruction of, property. It is surely not desirable to produce a situation where D is, in effect, required to act at the first opportunity by committing acts which cause damage, and hence, perhaps, exacerbate the situation, if there is the possibility of resolving the matter by less dramatic means. What is not clear, however, is how far this latitude extends. Speculation of this matter was not necessary to decide this particular case, but may have to be confronted in the future on different facts. It might be tied in to some evidence of attempts by D to resolve the matter by means other than damaging property. But what of the situation where D simply does nothing for a period of time and then acts causing damage? On the view expressed by Sullivan J, the immediacy still exists as long as the interference with property is ongoing, for he does not qualify the statement quoted above by reference to any action on D's part by way of attempting to resolve the dispute by methods not involving direct action. The approach of the Divisional Court, in not

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19 [1998] 2 All ER at p 546.

20 (1988) 89 Cr App R 74.

requiring that the defendant act at the first appearance of the interference in order to have a defence under s 5, but allowing him the possibility of a defence where he acts at the first available opportunity is, for this reason, to be welcomed. It is suggested, however, that the statement should be confined to the facts of, or similar to, the present case, where there is evidence of an attempt to resolve the matter by other means, for otherwise there is a danger of the dispute drifting on in a state of uncertainty, with an ever present threat of escalation through direct action. If the defendant is at least doing something to resolve the dispute, the fact of the interference is still to the fore and may be said to satisfy Sullivan J's view of immediacy. Where there has been no attempt to resolve the situation, it might be harder to demonstrate continuing immediacy, in the sense described here: indeed, a prolonged failure to do anything might be seen as acquiescence and undermine the defendant's ability to argue that his proprietary rights are being interfered with and are in immediate need of protection.[21] Ultimately, each case will turn on its facts.

As to the final element, s 5(2) (b) (ii), Sullivan J observed[22] that the question was not whether the means of protection adopted by L were objectively reasonable but whether L believed them to be so, and by virtue of s 5(3) it was immaterial whether his belief was justified provided it was honestly held. On the facts found by the magistrates, L honestly believed that the means used were reasonable in all the circumstances.

The court did not, of course, have to determine the issue as to whether L's self-help would have been justified as a matter of civil law, for, as we have seen, this was not necessary for resolution of these criminal proceedings. In the light of this, the lengthy discussion of the abatement by the Divisional Court seems disproportionate, even if out of deference to counsel's argument which seems to have been designed to assimilate the requirements of the civil law with those of s 5, and which,

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21 As counsel pointed out, the longer the wall remained the more urgent the need, from L's point of view, to remove it to avoid any suggestion of acquiescence: [1998] 2 All ER at p 544.

22 [1998] 2 All ER p 546.

if successful, would have been to the detriment of the defendant. Section 5 does not replicate the civil law requirements for abatement, which have, in recent years, been subject to judicial refinement.[23] Most obviously, the civil law requires consideration of what the position was in fact rather than what D believed it to be. Further, the requirement of immediacy, while relevant to both, is qualified in the civil law to eliminate the possibility of self-help where a remedy by ordinary legal process, however protracted, is available, except in circumstances which are clear-cut and urgent or where the matter is so trivial that legal proceedings would be inappropriate, none of which applied here.[24] There is no such restriction in s 5, and the Divisional Court recognised that action may still be immediate even though not taken at once: in effect, the Divisional Court only requires that, for the purposes of s 5, action is taken at the earliest opportunity rather than literally at the first appearance of the interference with the proprietary right. Given the differences between the requirements of the civil and criminal law, C may have been more successful if he had proceeded by way of a civil action.

The criminal courts are not the obvious forum for the resolution of disputes over matters of civil law, whatever other ends they might serve. The conclusion of criminal proceedings in *Chamberlain* v *Lindon* cannot be said to have solved the problem that lay at the heart of this dispute, namely the use of the right of way:[25] a detailed exploration of the position of the parties in the civil law was not necessary to determine the question of criminal responsibility. The escalation of this quarrel and the various means employed by the protagonists to deal with it - including self-help and the initiation of criminal proceedings – highlight the absence of a suitable ADR mechanism for resolving neighbour disputes of this kind. But, in the end, it is hard to escape the conclusion that, with more thought at the outset about the right of way, and drafting

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23 See, for example, *Burton* v *Winters* [1993] 1 WLR 1077.

24 This can be traced back as far as Blackstone: see *Burton* v *Winters*, *supra* n 23, p 1081 *per* Lloyd LJ. See generally on abatement *Clerk and Lindsell on Torts*, (17th edn 1995), pp 1549-1553 and R A Buckley *The Law of Nuisance*, (2nd edn 1996), ch 9.

25 And indeed other issues, such as whether C was entitled to compensation for the destruction of the wall, which he had built at a cost of £1,800: [1998] 2 All ER p 541.

the deed in relation to it, this whole protracted and, in many ways, sorry episode could have been avoided.

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