

# **FREEDOM TO PROTEST CONFERENCE, 23/10/05**

## **Workshop 3: Going to court, a quick guide**

Facing legal proceedings can be daunting for anybody, so it's helpful to have an idea of where to start, where to get more information, and of some of the practices and procedures along the way. We hope this guide will help.

Within a week of people being arrested or having received 'Particulars of Claim' from a company, it is important for the people involved and supporters to hold a defendants meeting, to discuss how to deal with the case. It is useful to have a sympathetic lawyer or someone with knowledge of the law to attend to answer people's questions on legal procedure, likely outcomes, legal aid etc. But it is the defendants who should make the final decisions on how the case is run.

Meeting up in this way and knowing there is support increases the likelihood of people feeling able and willing to fight the case and reduces feelings of isolation and fear. Supporters can take on jobs such as tracking down potential witnesses, dealing with the media, organising court pickets and ensuring that there are supporters in court.

Many people assume that going to court is simply about having a good solicitor. This is far from the truth. As campaigners it is important that we make the effort to find lawyers who will defend us properly and genuinely look after our interests. Most solicitors are simply there to guide you through the court system. If you pick a solicitor out of the book or simply because you know them, they may not have the same interest as you in defending the case or may not even care enough to do it properly.

Even if you have a good solicitor, you cannot count on them to do everything. You need to be actively involved in your case as you are the person who understands the situation the best. This includes:

- ? Finding and chasing up witnesses
- ? Doing background work and identifying other sources of evidence that will help you, for example CCTV cameras which may provide exonerating footage.
- ? Ensuring that any statements provided honestly reflect what you want to say.
- ? Correcting misconceptions made by the prosecution and identifying mistakes that will help you.
- ? Acquainting yourself with the ins and outs of the particular offences you are charged with.

It is important to listen to your lawyers advice, especially if they are particularly experienced in supporting activists, but they are not always right and they may not understand the bigger picture outside of the case in hand, so do not be afraid to stand up to them. If the relationship with your lawyer breaks down you can change them. Ultimately they are there at your bequest and they are there to represent you.

Not every case is suitable for a media frenzy or challenging the basis of the laws. However, if the law is a relatively new one, there is often scope for challenging the interpretation. If an arrest is blatantly unjust and political in nature you can do work to publicise it and bring your cause to a wider audience.

Court can be daunting, but if you put in the work, and practise then you can take the state and your opponents on in the turf they feel safest on. You can opt out of giving evidence yourself (though that may not always be wise tactically), and sometimes you can put your opponents in the spotlight, as they are forced to come and give evidence themselves.

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### **Defending Yourself In Person**

There are a number of situations where you end up having to defend yourself in court. The two most common ones are when you have been denied legal aid (eg. the offence is considered too trivial such as s.5 of the Public Order Act,) or when a company brings a private civil action against you or a group you're involved with. Alternatively, you may want to present the case yourself to ensure your point of view is correctly put across (eg. in accountable actions) - campaigners have been known to do better than their advocates lawyers sometimes in this respect. However, it must be remembered that it can be very hard work. Nevertheless, the rewards and satisfaction can be great. Note, that it is easier than it was to get legal aid to defend cases were companies are taking you to court.

### **I. General Points**

Note that legal proceedings are designed to intimidate people. Don't be surprised if Judges speak to you like

you are a pile of dirt, do not take it personally, it is not a reflection on you, it is a reflection on them and their attitudes to ordinary people. Do not be intimidated. At the outset, if you don't understand what is going on, ask the Court to explain. Don't be embarrassed by not knowing, they designed the legal system to be inaccessible to ordinary people, so it's good to challenge that by asking for the procedures to be explained. Be persistent, you have a right to a fair trial under the Human Rights Act Article 6, and it cannot be fair if you cannot participate because you haven't been told when you will get the chance to speak or because lawyers & the Judge are using legal jargon and not explaining it to you.

If you are representing yourself you are entitled to have what is called a 'Mackenzie Friend' to advise and support you in court. This could be a sympathetic lawyer or another campaigner with legal experience, who can advise you of the procedure or remind you of particular points to raise or answer. Even if you can't find someone with legal experience, it can be worth just asking a friend who's read through the paperwork to sit beside you in court because it can be hard to remember to deal with everything so having someone to prompt you can take some of the pressure off.

Regardless of whether a case is in the civil or criminal courts there are a few rules of thumb which go across the board.

### *1. Preparation is key*

You can never prepare too much. A key to a successful defence is to be able to anticipate what the opposition will throw at you. It also allows you to go on the attack, which is always a good thing. This goes for both knowing the evidence and the law, especially the latter. The law is not set out in easily understandable language, instead it is based on previous Judgements going back several hundred years. These are known as 'Authorities' which get quoted by each side in support of their legal arguments. There are many strange loopholes in the law you can use and can be used against you. If you have a long case, in particular when in the civil courts, process becomes very important and can make or break a trial.

It is important to look at the case not just in legal terms but also as an opportunity to obtain more information about a company and to publicise the issues to a much wider audience, particularly if the case may attract media coverage.

It is always good to define your objectives, prioritise them and decide a point when it sensible to cut your losses and bow out. Sometimes winning or losing is not the most important thing at stake, and the airing of issues is the real aim, especially when there is an associated media campaign. However, if bringing the case yourself, be aware of the consequences of failing - you could lose a lot in terms of your assets and also future credibility. If a judgement goes against you, and you have to pay costs, assets such as campaign names and websites can be legally taken from you in extreme cases.

Finally, be ready for the workload. Fighting a big case can take over your life. You are entering a world that has different rules to what you normally expect and that can put you at a disadvantage. You don't have the backing of clerks and years of training so you will often be running just to keep on top of stuff. It can also become a financial burden.

### *2. Professionalism*

Being professional in your approach can win you points, whether with judges, juries or other parties such as the media. This includes looking smart, though in magistrates this does not count for as much as you would expect. What it shows is that you are determined and helps project confidence in your argument, and that you care enough to fight the case properly.

Professionalism is also usually very important in the court, and includes making sure that documents arrive in good time, are properly numbered & labelled, courtesy is shown to the opposition and you observe court etiquette (as galling as that may be).

### *3. Presentation and dealing with being attacked*

How you put yourself forward is important, whether not falling asleep on the bench, or coming across well when giving evidence. Be prepared for the character assassination and for the opposition to go in for outrageous twisting of the truth. If you are prepared well enough you can rise above it, and do not let them rile you - that is often victory for them.

Practise being asked awkward questions. They are not avoidable so the best thing to do is to be ready for them, and tackle them head on. If you come across as being evasive it does not help the believability of the rest of your case. This is often the part people find most difficult to handle, even in preparation, but there is little way of avoiding it, especially when you have the stronger case. This is not just the case for you as a

defendant, but holds for your witnesses as well.

#### 4. *Be realistic about the law*

Judges and juries are not completely rational beings, which is something that can go both for and against you. Sometimes they are simply too prejudiced for you to win and there is a degree of arbitrariness which can be very frustrating. Either you live with this or you tackle it head-on, and try to pin the court down as much as possible. Be aware though that judges are quite good at also fudging issues. The law is not always fair and has as a different set of priorities to what people might expect, especially where it ranks property rights above other issues.

#### 5. *Media Campaigns*

Depending on the case, it may be appropriate to bring the media in on the issue - or the opposition may do it for you. Be aware that the media is fickle and the stories they publish may be a travesty of what you told them. It is better to understand the media, or rather have an ally who does and can do the work on your behalf (when defending cases, there are a lot greater priorities for you as the defendant).

Case studies seem to indicate that reaching out to other groups around you is a good way of building up popular support without too much reliance on the media and also means that by the time the media picks up on your story you will have much more control over the content of the stories.

## **II Criminal Courts**

After being arrested and charged you will have to attend court usually within the next few days, or often the next day. Avoid pleading guilty at the first hearing, particularly if you have been held overnight, because you should give yourself time to discuss the situation with lawyers experienced in fighting protest cases, and with friends and other people arrested to work out your best course. The court will usually allow an adjournment of a couple of weeks so that you can get advice and prepare.

Depending on the nature of the charges, you may have the option of deciding between a magistrates court where one or three people decide your fate, or the crown court, where a jury gets to decide. A magistrates court can only impose a maximum sentence of six months, while a court can do to the maximum the law allows for the offences. However, you are far more likely to be found guilty by the magistrates than a jury, juries often being more willing to accept that your actions were justified or that the police got it wrong. Unfortunately, if magistrates decide the offence is serious enough they can refer sentencing to the crown court, even though you have been found guilty by the magistrates.

There is a duty for deals to be discussed, and they are not always a bad idea. It does not mean that your lawyer is selling you out. However, only you can make the final decision on whether to accept a deal or not, and you should take into account wider social and political requirements surrounding your actions, and not just focus on the immediate legal consequences which your lawyer is advising you about. You may want to consider what are the consequences for others of having them in or out of a trial. Remember, that sometimes it can be as much about tactics as right or wrong.

People often have to attend court a number of times before their trial is actually heard. If you live a long way from the court, it can be worth contacting the clerk of the court before the hearing and asking if a plea of not guilty can be entered in your absence - this will sometimes be accepted.

The more evidence you can gather in your favour, from factual accounts to character witness statements the better, but be careful of attempting to overwhelm the court with material, or being too careless in the selection of what you present. Remember to push for disclosure and do not let the court processes become obstructive. If something is not done right, stand up and declare the fact.

Some time before the trial there will usually be a **Pretrial Review**. Each side gets asked how many witnesses they intend to call, and then the court will decide when the trial should take place, and how many days should be set aside for it. You should make sure that you take a list of your witnesses and the dates they (and you) are unavailable, and make sure you tell the court of the dates that are unsuitable. If the police have not disclosed witness statements and documents by this stage, or you believe there are more relevant documents, this is an opportunity to ask for them to give you copies.

When setting the date the court should also take into consideration that you have enough time to prepare for the trial, so if there are more documents, statements or videos etc. to be disclosed to you make sure you ask for enough time to consider them and carry out any further preparation necessary.

If you have never been to a trial it is a good idea to go and watch a trial (either of some other protesters, or if not, just any full trial at your local court), to get an idea of how the process works and the tactics that lawyers use in court.

The actual **Trial** usually takes a standard course of an opening speech by the prosecution followed by them calling all their witnesses in turn. Each witness will be taken through their evidence by the prosecutor, then you get the opportunity to ask them questions (cross-examination) in order to show up the parts of their evidence that are wrong or that you disagree with. It is usually better to suggest that a witness is mistaken in what they claim to have seen or heard, than to accuse them of lying, although sometimes this is unavoidable. If you accuse them of lying magistrates/judges sometimes feel the need to find against you in order to protect them / the reputation of the police, whereas they may think anyone could make a mistake. Accusing a witness of lying can also lay you open to having your previous convictions put to you when you are in the witness box.

After you have finished cross examining a witness the prosecution then has a chance to re-examine to clarify any points arising from your questions. They should not bring up new evidence at this point, and if they do you should object.

After the prosecution case has finished, if the evidence against you is very weak it may be worth making a submission to the judge that there is no case for you to answer. However it is rare for a case to be thrown out at this point.

The case then moves on to the Defence, and you will then call your witnesses to give evidence and be cross examined. Make sure they cover all the key points before cross examination as it will be too late afterwards.

After you have called all your witnesses you can then go into the witness box to give evidence and be cross examined. You can decline, although generally it doesn't look good. You then go back to your seat and give a closing speech summing up the evidence in your favour and pointing out the weaknesses and contradictions in the prosecutions case, and referring to any law cases which support your case.

The magistrates usually then adjourn to consider their verdict, and you will be told to wait or perhaps to come back on another date. If you are found guilty you should be given the chance to speak about your view on what the sentence should be (though that's not to say they'll take much notice). If you are acquitted don't forget to ask for the other side to pay your costs.

### ***Further points regarding planned arrests and accountable actions***

The key to winning these cases is preparation. The strongest hand is having materials in your defence prepared beforehand. In these types of cases much of the argument will often revolve around how honest your intent was. If you come up with the arguments afterwards, the prosecution can claim that it is a false defence and should not be admitted, which gives you a large hill to climb. This is particularly important if trying to challenge laws or bringing in large outside issues, for example, legitimacy of a war, prevention of another crime (which is considered a reasonable defence in English & Welsh courts).

Honest intent is also a legitimate defence in law, where you argue that your intentions were to prevent a greater crime, or you committed your act with the best of intentions. It is a useful defence for activists caught in the act so to speak, but is a significantly difficult one to run with.

### **III. Civil Courts**

In the civil courts you have the *Claimants* who bring the case, and the *Defendants* who fight it, with a judge as the arbitrator. If you are defending the case yourself, you are known as a 'litigant-in-person'. The claimants file a *Particulars of Claim*, supported by witness statements, setting out their reasons for going after the defendants and form the basis for all subsequent issues raised. The defendants then file a Defence responding to this. There may be further pleadings by both sides.

If you are served with 'Particulars of Claim' it is important not to just ignore it and hope it will go away - if you do this you run the risk of a default judgement being entered against you, landing you with an injunction and/or bill for costs which you may not be able to challenge later.

Frequently the Claim is vague in what it alleges each Defendant is responsible for. It is important that you should challenge this by serving a '*Request for Further Information*' in which you ask the Claimant to be more specific about each of the incidents set out in their Claim and what they allege you personally did and are responsible for (see the Civil Procedure Rules on what you and they can ask about). This is important to

enable you to defend yourself properly against the allegations. If they fail to answer your request, this can sometimes be grounds for their Claim or parts of it to be thrown out against you.

This is the same when it comes to court hearings: the claimants will have their say, the defendants respond and if they bring up new points or evidence then the claimants will have a chance to reply. In theory they are not supposed to bring in new material in a reply. Claimants have two shots, defendants normally have only one, which is why preparation is fundamental to fighting the case.

Before the trial there will be a variety of hearings such as Case Management Conferences which decide on various procedural issues such as disclosure, any problems and to prepare for the trial. The general process is that if you are submitting an application you file a *Skeleton Argument* outlining what you are going to argue and what authorities you are planning to rely on. Copies of all authorities used need to be provided. If you are responding to an application (*contesting*) you will need to do so likewise, often at very short notice. However, if you are representing yourself you should argue for leeway in this process since you cannot be expected to have the same capabilities as a trained lawyer, and the courts should make some allowance for this to ensure the proceedings are fair. During the hearing itself there is normally a list of issues drawn up in an attempt to speed up the hearing by getting straight down to the points of contention.

Be prepared for the course of a hearing to take a different turn from what the skeleton arguments laid out. Also, if there are points of contention these can sometimes be dealt with by negotiation outside of the court - do not underestimate how your own grasp of the particular issues can put you at an advantage here.

#### *Authorities and Precedent*

The civil courts are obsessed by these. While Parliament may lay down the words of the law, the actual interpretation is done by previous cases which act as guidelines for the case in hand. If you are arguing a legal point then you need to cite the cases which back you up. This is probably the most difficult part of fighting the case, as finding and understanding these authorities requires a lot of patience and submitting to the arcane ways of the court system. And even then, little subtleties in them can have profound effects on their interpretation and application.

The key to understanding them is that no judge wants to be seen to criticising or disagreeing with the ruling of another judge and that often ties their hands. When there is clear conflict between rulings or the situation is simply inappropriate, it is at this point that the Court of Appeals is normally brought in.

#### *Civil Procedure Rules*

These are the rules of the court and proceedings in general and are contained in the "White Book", which is the court's bible. Like most legal books, it costs a fortune, so you need to find a library that has the most recent edition, and copy the pages you need to refer to. The courts should have a spare copy for you to use in the court room if you ask. It is a dense document with many tricks and loopholes that barristers are trained to interpret but can get wrong. If defending yourself in the high court then you need to be aware of the relevant sections and spend time learning how it works. Not having a decent understanding on it can open you up to being bluffed and also that you miss out on possible courses of action - to your detriment.

Note that the other side should automatically provide you with copies of any authorities that they are relying on, and you can also ask them to copy the relevant pages of the White Book that they intend to refer to. Also if you are unable to make copies of the authorities you wish to rely on, you could try asking the other side to do it for you - lawyers have a duty to be helpful to the court so they often don't like to refuse.

#### *Documentation*

All documents for a hearing must be submitted to the other party and to the judge in good time so that they can be read. It is considered very bad form to present them on the day as all parties should have time to read them. They need to be properly headed with the case number and names of parties, labelled, bundled and preferably set out double spaced on single sided paper or judges can get annoyed. However, it is accepted that for litigants-in-person then there should be leeway on matters like this.

#### *Disclosure*

Part of the legal process is the disclosure of evidence by both parties. Both sides are meant to disclose any documents or other material in their possession or control which are relevant to the issues to be decided in the case. This is any material which you wish to rely on at the trial itself. There are several key points here:

- a. Both sides are supposed to disclose any evidence that could help the opposition's case, not just their own.
- b. Keeping evidence in reserve and not disclosing it until at the last minute can actually harm your case unless you have a good reason for not presenting it sooner (such as that it has only just come into

- your possession).
- c. Disclosure is initially done by court order, but there is an on-going duty to disclose any new evidence which comes up. You can also apply for further disclosure based on previous disclosure, for example, if a disclosed document refers to another document which has yet to be presented the other party can make a request to see it.
  - d. Each party can request the court to order the other party to disclose any evidence that may help build their case. This is a double-edge sword as it can be used to fish for information. However, reasonable arguments need to be put forward as to why the evidence is needed, for example, in a recent case the claimants attempted to get the full transcripts of a protest group's bank accounts which was a veiled attempt to get a list of possible financial backers and activists. The court must in cases such as these be mindful of alternative methods of finding the same information and also that the act of disclosure is not detrimental to the other party.
  - e. If the cost of providing the disclosure requested is large then the party requesting it can be asked to pay the bill.
  - f. There is only a duty to disclose documents which are in your possession or control. So if for example you are asked as an individual to disclose the minutes book of a group you are involved with, unless it is within your control you cannot be expected to disclose it. Companies will also use this clause in order to avoid disclosing documents created by their customers or suppliers even if they might be relevant to the case. However it is possible for the parties to the case to apply for disclosure from a third party.
  - g. If documents have been destroyed you (or the claimant) will be expected to provide details of when/where and how they came to be destroyed. Some disclosure requests are simply not possible to fulfil, for example documents and records simply not existing. This should be brought to the court's attention as soon as possible and evidence provided if required.
  - h. You should think carefully about what documents the other side have which could help your case. For example relevant contracts, policies etc, and any documents hinted at in witness statements. Note that you should ensure that key documents and/or key segments which help your case and campaign are referred to and read out in open court, as then they are part of the public record and can be publicised in campaign material and the media.

### *Witness Statements*

These are accounts from people used to back up your case. They can incorporate evidence through reference and can be submitted to the court / other party at any time. In interim hearings witness statements are general simply read out, but if they are going to be used at the main trial then the witnesses should be willing to come to court unless there is compelling reasons why not, or the evidence will carry less weight. In general witnesses and their statements come top of the pecking order when it comes to applying weight to the evidence presented, though hearsay evidence such as newspaper articles can in some cases also be admitted.

When submitting, witnesses statements try to should follow the correct presentation rules for court, and ensure they are signed. If you are not completely sure about something it can be better to say something like 'to the best of my recollection' than to make out you are totally sure and then be proved wrong by CCTV for example.

### *Costs*

If you lose you may well be ordered to pay the other sides costs, which can come to a considerable amount, so bear this in mind when deciding your strategy. If you decide to 'settle out of court' with the other side you should ensure the settlement includes an agreement that you wont have to pay costs or will only have to pay a small specified amount. Don't just accept their first suggested terms, they'll usually back down because they want to avoid a trial more than you do.

If you win, you should apply for the other side to pay your costs. These include not just the obvious costs such as photocopying, phone calls, postage etc, but also you are entitled to claim for the time you have spent on the case. There is a set rate in the White Book for litigants in person (currently £9.25 per hour). For this reason it is important to keep all receipts, and whenever possible to keep a note of the dates and times that you worked on the case, and what you were doing.

### *Playing a tactical game*

The law can be as flexible as it is inflexible, and within definitions and rules there is often scope for manoeuvre. There is a degree of playing a game in all this, which is disconcerting when you are fighting for an ethical cause. However, keep your objectives in sight and know that you may not win every battle but by fighting the case you are forcing the company to defend its claim and maybe its reputation. Sometimes a judge will give partial victories to both sides so as to appear being balanced, and if you are willing to deal

with this you can come out the better. Sometimes you demand more or less than you want depending on the situation in order to appear reasonable or to simply bluff. Understanding and watching the judge is also very useful as it means you can adapt to their needs, giving you a better position.

#### **IV. Final Note**

This article is just a summary of the main points. There are a variety of groups, public interest lawyers and people with previous experience (eg McLibel, freeBEAGLES, Ploughshares) who can be called upon for advice.

There is a lot of work involved and it is not a job to be taken lightly, but with McLibel exposing the reality of McDonalds reputation, SmashEdo challenging the basis of the war and SHAC fighting to protect fundamental rights to protest there are very significant rewards to be made.

Even if the eventual outcome may be a technical loss, there are many other ways in which companies and the state attempting to drag you through the courts can be turned on its head into a practical, moral victory.

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Available from [www.freebeagles.org](http://www.freebeagles.org)

#### **Further resources:**

##### *Activists Groups*

Trident Ploughshares - [www.tridentploughshares.org](http://www.tridentploughshares.org)

Legal Defence & Monitoring Group - [www.ldmg.org.uk](http://www.ldmg.org.uk)

##### *Other Legal Advice*

Citizens Advice Bureau - [www.citizensadvice.org.uk](http://www.citizensadvice.org.uk)

Community Legal Service Direct - [www.clsdirect.co.uk](http://www.clsdirect.co.uk)

Just Claim - [www.justclaim.co.uk](http://www.justclaim.co.uk)

##### *Courts / Government*

Court Service - [www.hmcourts-service.gov.uk](http://www.hmcourts-service.gov.uk)

Department of Constitutional Affairs - [www.dca.gov.uk](http://www.dca.gov.uk)