Case No: CO/5520/2010

Neutral Citation Number: [2010] EWHC 3037 (Admin)
IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Sitting at:
Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M3 3FX

Date: Tuesday 6th July 2010

Before:

LORD JUSTICE MUNBY
and
MR JUSTICE LANGSTAFF

- -

Between:

UNSWORTH	**Appellant**
- and -	
	Respondent
DPP	

- -

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Mr Benjamin Myers appeared on behalf of the Appellant (Defendant).

Ms Vanessa Thomson appeared on behalf of the Respondent (Prosecutor)

- -

Judgment

(As Approved)

Lord Justice Munby:

1. This is an appeal by way of Case Stated from a decision of the Crown Court (HHJ Jonathan Gibson sitting with two Lay Justices) at Crown Square, Manchester, so far as is relevant for present purposes dismissing the appeal of the appellant, Ms Jacqueline Unsworth, from a decision of Oldham Magistrates Court for an offence of causing criminal damage contrary to section 1(1) of the Criminal Damage Act 1971.

2. The proceedings arose out of a dispute between Ms Unsworth and her neighbours a Mr and Mrs Parsons, the parties living in adjacent properties in Oldham. The historical facts can for present purposes be briefly and succinctly summarised, as they were in paragraph 5 of the Case:

> "The principal facts (undisputed at the hearing) were as follows:
> i. in March 2008, Ms Unsworth lived at 32B Crowley Lane, Oldham;
> ii. Paul and Nicola Parsons lived next door at 40 Crowley Lane;
> iii. conifer trees, approximately 10-12 feet in height, stood on the Parsons' side of the boundary between the gardens of the two houses;
> iv. these trees were the property of the Parsons;
> v. in December 2007, Ms Unsworth wrote to the Parsons on two occasions requesting that the trees be reduced in height … In the letter dated 14/12/07, Ms Unsworth made reference to her depression;
> vi. on the 2nd March 2008, the Parsons discovered Ms Unsworth cutting the conifer trees with

a saw. This cutting was substantially on the Parsons' side of the boundary and caused significant damage to the trees (as depicted in the photographic exhibits)

vii. Mrs Parsons called the police who attended. Ms Unsworth was arrested on suspicion of criminal damage."

3. As can readily be understood in the light of those facts, the essential issue, both before the Magistrates' Court and on appeal before the Crown Court, was whether or not Ms Unsworth was able to establish the defence under section 5(2)(b) of the Act. The Crown Court held that she was not, or to be more precise held that the Crown had successfully demonstrated that she was not entitled to that defence. Mr Myers, who appears before us today on her behalf, asserts not merely that the Crown Court was wrong in that finding but indeed, on its findings of fact, including crucially its findings as to her state of mind, that the defence was made good, so that, he says, on the Crown Court's own findings of facts she was entitled to an acquittal.

4. Section 1(1) of the Act provides as follows:

> "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.

It is therefore an essential ingredient of the offence that the damage which is caused is caused without there being lawful excuse.

5. The lawful excuse which can be relied upon by way of defence may of course be a lawful excuse conferred upon the defendant by the civil law, for example if the defendant can demonstrate that in doing what she did she was lawfully exercising a right of abatement conferred upon her by the civil law. Section 5(2), however, provides an extended ambit to the defence of lawful excuse, providing so far as is material for present purposes as follows:

> " A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes 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 or threatened to destroy or damage 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 or another, 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 the circumstances."

Subsection (3) provides:

> " For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held."

6. It can be seen from an analysis of the language in subsection (2)(b) that there are two elements to the defence. The first element, which for ease of exposition I will refer to as limb (A), is that introduced by the words "in order to protect property" and so on. The other element, which for ease of exposition I will refer to as limb (B), is the latter part of the subsection beginning with the words "at the time of the act or acts alleged". As will be appreciated limb (B) itself has two sub-limbs, those set out in subsection (2)(b) paragraphs (i) and (ii).

7. On a plain reading of the statute the test in relation to limb (B) is and is exclusively a test of the defendant's belief. What on the other hand is the nature of the test in relation to limb (A)? The answer to that question is in my judgment answered definitively by the decisions of the Court of Appeal, Criminal Division, in R v Hunt (1977) 66 Crim App Rep 105, followed by and elaborated upon in R v Hill, R v Hall (1988) 89 Crim App Rep 74.

8. In Hunt the judgment was given by Roskill LJ, who said this at page 108:

> "But in our view the question whether he was entitled to the benefit of the defence turns upon the meaning of the words 'in order to protect property belonging to another.' It was argued that those words were subjective in concept, just like the words in the latter part of section 5(2)(b) which are subjective.
> We do not think that is right. The question whether or not a particular act of destruction or damage or threat of destruction or damage was done or made in order to protect property belonging to another must be, on the true construction of the statute, an objective test."

As I read that, Roskill LJ is clearly distinguishing between what I have referred to as limb (A) and limb (B), is clearly stating that limb (B) is "subjective" but is accepting that in part at least limb (A) imports "an objective test".

9. That reasoning was accepted by Lord Lane LCJ, giving judgment in Hill and Hall, as being binding upon the court. However, at page 79 he added these important observations:

> "But we add that we think that Hunt was correctly decided, for this reason. There are two aspects to this type of question. The first aspect is to decide what it was that the applicant, in this case Valerie Hill, in her own mind thought. The learned judge assumed, and so do we, for the purposes of this decision, that everything she said about her reasoning was true. I have already perhaps given a sufficient outline of what it was she believed to demonstrate what is meant by that. Up to that point the test was subjective. In other words one is examining what is going on in the applicant's mind.
>
> Having done that, the judges in the present cases – and the judge particularly in the case of Valerie Hill – turned to the second aspect of the case, and that is this. He had to decide as a matter of law, which means objectively, whether it could be said that on those facts as believed by the applicant, snipping the strand of the wire, which she intended to do, could amount to something done to protect either the applicant's own home or the homes of her adjacent friends in Pembrokeshire.
>
> He decided, again quite rightly in our view, that that proposed act on her part was far too remote from the eventual aim at which she was targeting her actions to satisfy the test."

10. Reading that, not merely on its own but in conjunction with the earlier judgment of Roskill LJ, it is clear in my judgment that the discussion by the Lord Chief Justice there was exclusively by reference to limb (A) and not by reference to limb (B). The significance of the principle as there expounded is that limb (A) has, for the reasons explained by the Lord Chief Justice, two aspects: the one subjective, the other objective.
11. From those two judgments, as indeed from the structure and wording of section 5(2)(b) I conclude therefore that limb (A) has both a subjective and an objective aspect, whereas limb (B) has an exclusively subjective aspect. It is also important to bear in mind, not least in the light of certain submissions helpfully put before us by Ms Thomson on behalf of the respondent, the Crown Prosecution Service, that the focus in limb (A) is upon the single question of whether what was done was done "in order to protect property", whether the property of the defendant or someone else or to protect some interest in property which the defendant believed was vested in himself or somebody else. The matters referred to in paragraphs (i) and (ii) at the end of subsection (2)(b), that is, whether the property was in "immediate need of protection" and whether the means of protection were or would be "reasonable having regard to all the circumstances", are to be found within limb (B) and are therefore, for the reasons I have given, subject to an exclusively subjective test.

12. The other authority to which we were referred was the decision of the Divisional Court in Chamberlain v Lindon [1998] EWHC Admin 329, [1998] 1 WLR 1252. (The report does not include the paragraph numbers, so for ease of reference I include both the paragraph numbers from the original transcript and the corresponding page numbers from the report.) In that case Sullivan J, as he then was, gave the leading judgment but it is to be noted that Rose LJ expressly agreed not merely (paragraph 53, page 1262D) with Sullivan J's conclusions but also with his process of reasoning in reaching those conclusions.

13. Chamberlain, in contrast to Hill and Hall, was a case which on its facts bears more than superficial resemblance to the present case. Hill and Hall was a case where antiwar protestors unsuccessfully sought to set up the defence, the essential argument being that they were entitled to the defence in answer to a complaint that they were damaging the perimeter fence on a military base because that was done in order to protect their property, the process of reasoning being that, if the base occupied by the American armed forces was perceived by the Americans as being unsustainable, they might be induced to leave, which would minimise the risk of a nuclear attack on the area by the then Union of Soviet Socialist Republics. One can readily understand why in that type of situation, and there are other similar cases where analogous attempts to rely on the defence have failed, the decision of the court was that the link, the chain of causation, between the proposed act and the protection of property was simply far too intangible, far too remote, to give the defendant the defence; indeed so remote that as a matter of law the defence could properly be withdrawn from the jury.

14. Chamberlain, in contrast, was a case of a neighbour's dispute involving a right of way where the defendant was held entitled to the defence, having demolished his neighbour's wall in the belief, accepted by the court, that he had to do so in order to protect his right of way.

15. It was in that setting that Sullivan J turned to consider the earlier decision of Hill and Hall, in the context of a submission (see paragraph 25, page 1258F) that the defendant's act of destroying the wall was done not in order to protect his property but for the purpose of avoiding litigation. In considering that submission Sullivan J turned (paragraph 29, page 1259B) to consider and summarise the passage from Hill and Hall to which I have already referred. He continued (paragraphs 30-31, page 1259C) :

> "[Counsel for the prosecutor] concedes that demolishing the wall was capable of protecting property, but he says it was done for an additional purpose, (to avoid litigation), and if there is a dual purpose then the objective test is not met. I agree with [counsel for the defendant] that it is plain on the facts as found by the justices that what the defendant did, namely demolishing the wall, could on the facts, as believed by him (namely that he was entitled to exercise a right of way which was being obstructed by the wall) amount to something which

> was done to protect his right of way: … No doubt he hoped to avoid litigation. He could have sought to protect his right of was either by recourse to litigation or by way of abatement. The fact that he chose the latter does not mean that his act of destroying the wall was not done to protect his right of way on the facts as he saw them. His purpose was to protect the right of way. He chose the means of abatement because he hoped to avoid litigation. That does not convert the avoidance of litigation into his purpose."

In other words, in the circumstances of that case the defendant was able to establish both the objective and the subjective aspects of limb (A).

16. In paragraph 49 (page 1262B) of his judgment Sullivan J said, and I agree with him:

> "It is unnecessary to reach a conclusion as to whether the defendant's self-help was justified as a matter of civil law on the facts of this case, because the prosecutor chose to take proceedings in the criminal courts."

That must be correct. If the defendant to the criminal proceedings chooses to stand solely on the defence of lawful excuse as contained in section 1(1) of the Act, then it may be critical to determine whether the civil law does or does not give him a lawful excuse for what he has done. In the present case, however, as I suspect in most such cases, reliance is placed not upon the ingredients to the offence in section 1(1) but on the statutory defence in section 5(2) and that is in no way confined to the circumstances in which the civil law would give a defence. Therefore the question of whether or not, as a matter of civil law, the actions would be lawful or unlawful is not, as Sullivan J makes clear, a matter upon which it is necessary to reach a conclusion.

17. Finally, and it is a passage upon which, as we will shortly see, weight was appropriately, as it seems to me, placed on behalf of Miss Unsworth before the Crown Court, but which caused the Crown Court some concern, Sullivan J said this at paragraph 50 (page 1262C):

> "In the criminal context the question is not whether the means of protection adopted by the defendant were objectively reasonable, having regard to all the circumstances, but whether the defendant believed them to be so. By virtue of section 5(3) it is immaterial whether his belief was justified, provided it was honestly held."

18. That in my judgment is an entirely accurate if succinct summary of the statutory provisions set out in limb (B). Limb (B), to repeat, is on the authorities, as in my judgment on the plain reading of statute, entirely subjective. The question and the only question is honest belief. Whether that belief was reasonable or unreasonable is not of itself determinative of the presence or absence of honest belief. It is, as Sullivan J correctly observed, immaterial whether the belief was justified, a reading of the statute which is not merely as it seems to me implicit in the words of section 5(2)(b) but which is made explicit in section 5(3).

19. The final observation to be made on the statute is that although reasonableness as a concept does appear in section 5(2)(b)(ii), what is relevant under the statute is not whether in fact the means of protection adopted or proposed to be adopted by the defendant were or would be reasonable but whether the defendant believed that those means were or would be reasonable. In other words the honest belief which provides the defence includes an honest belief that what is being done is reasonable. If there is honest belief that what is being done is reasonable the fact that, assessed objectively, it is not reasonable is neither here nor there.

20. I return to the Case Stated. In paragraph 11 the Case records the particular reliance which had been placed in argument on behalf of Ms Unsworth upon what Sullivan J had said in Chamberlain at paragraph 50. The arguments deployed before the Crown Court in seeking to set up the defence under section 5(2)(b) were twofold: first, that the steps taken by the defendant entitled her to the statutory defence in protection of an asserted right of way and, secondly, that she had the defence in relation to an asserted right to light. The Crown Court was dismissive of the attempts to establish the defence in relation to the right of way and that part of the argument has not been pursued before us. Before us the argument has focussed upon her belief in the existence of a right of light and her belief in the reasonable necessity of taking the steps she did in order to protect the right of light as giving her the defence.

21. In those circumstances I can proceed immediately to the centrally important paragraphs of the case. They are paragraphs 13, 14 and 15, which I should set out *in extenso*:

> "13. The Court accepted the appellant's evidence that, at the time she committed the relevant acts she honestly believed she was doing those acts in order to protect a right to light in the kitchen. The Court accepted that at the relevant time she felt 'depressed' at least in part because of the lack of light to her kitchen and that she felt she needed to take immediate action in order to remedy that situation. The Court did not find it necessary to determine whether, as a matter of civil law, such a right to light in fact existed.
>
> 14. The Court concluded, however, that if the appellant's advocate was correct in his

submission that *Chamberlain* should be broadly applied, this might permit damage to be caused to property in situations beyond which the High Court had envisaged.

15.On the basis that *Chamberlain* could not be so applied, and following the decision in*R v Hill and Hall* [1989] 89 Cr App R p74, as explained by the High Court at paragraph 34 of the Judgment in *Chamberlain*, the Court found that, in the circumstances, there was no evidence on which it could be said that the appellant believed there was a need of protection from immediate danger. In coming to this conclusion, the Court took into account that the appellant had practical and legal steps she could have taken in order to resolve the dispute, for example, procedures which could have been invoked by the local authority and, if necessary, civil proceedings in the County Court. The Court also considered that protecting a right to light in these circumstances was distinguishable from protecting a right of way, the dark kitchen being a relatively minor interference with the appellants' enjoyment of her property (despite her evidence about her 'depression'), whereas the obstruction of the right of way in *Chamberlain* was a major interference to the respondent's ability to use his property in that case."

22. In the light of that analysis, the conclusion of the Crown Court was that Ms Unsworth's appeal against conviction should be dismissed. The Crown Court posed for determination by this court the question:

> "In the light of our findings of fact, were we justified in finding that the statutory defence had not been established by the appellant?"

23. Ms Thomson on behalf of the Crown invites us to answer that question in the affirmative. Mr Myers on behalf of the appellant invites us not merely to answer that question in the negative but to go on to hold that, in the light of the Crown Court's own findings of fact, the statutory defence had indeed been established.

24. It is perhaps unfortunate that in formulating those crucial paragraphs of the Case Stated the Crown Court did not more closely and meticulously follow the language of the statute. Had it done so we would not have been faced, as in my judgment we are, with the preliminary question of determining what it is that the Crown Court did or did not find as a fact.

25. In essence, in paragraph 13 the Crown Court set out its finding that it accepted that Ms Unsworth at the time "honestly believed she was doing those acts in order to protect a right to light in her kitchen", just as the court "accepted" that at the relevant time she felt depressed and "felt she needed to take immediate action in order to remedy that situation". Correctly, in my judgment, the court went on to say, as we have seen, that it did not find it necessary to determine whether as a matter of civil law such a right to light in fact existed.

26. The problem, as will be appreciated if one contrasts the formulation of the findings in paragraph 13 with the various components identified in section 5(2)(b), is that the Crown Court has not, at least explicitly, made a finding as to whether Ms Unsworth at the relevant time believed that the steps she was taking were reasonable. In my judgment, however, on a fair reading of paragraph 13, read in conjunction with the issue which the Crown Court seems to have been addressing in paragraph 15, the proper meaning of this Case is that the Crown Court found as a fact that at the relevant time Ms Unsworth honestly believed each of the matters which in accordance with limb (B) of section 5(2)(b) were required in order to establish the defence.

27. I have referred in this context to paragraph 15 of the Case because in paragraph 15 the Crown Court appears to have embarked upon a consideration of whether there was objective basis for, in particular, a belief in a need of protection from immediate danger. Those words, of course, reflect the language of section 5(2)(b)(i), and it is hard to imagine why in paragraph 15 the court should have been considering (whether correctly or, as Mr Myers would have it, erroneously) the question of whether there was an objective basis for that belief and whether her belief was reasonable, unless it had already accepted that that was in fact her belief.

28. More generally, it seems to me on a fair reading of the Case, and bearing in mind the structural relationship between paragraphs 13, 14 and 15, where in paragraph 13 the Crown Court is setting out its findings of fact before going on in paragraphs 14 and 15 to analyse the legal consequences of its findings, that this analysis would simply be otiose unless the Crown Court had already found in Ms Unsworth's favour in relation to the various subjective ingredients to the offence. Moreover, as my Lord has pointed out in the course of argument, it is for the prosecution, once the matter has been raised by the defendant and once some proper evidential basis has been led by the defendant seemingly grounding the defence, to prove the offence and inherently in that to disprove the defence. Absent a finding (which, whatever else we do or do not see in the Case, we certainly do not see) that the Crown Court was not satisfied that Ms Unsworth believed that the steps she was taking were reasonable, she is entitled as it seems to me to have the Case read, as in any event I would read it, on the footing that the facts had been found in her favour.

29. Mr Myers' attack is, against that background, understandably and appropriately directed to what is said in paragraphs 14 and 15 of the Case. Paragraph 14 is curious because it records, as we have seen, the conclusion of the Crown Court that if the effect of paragraph 15 of Chamberlain was as was being submitted on behalf of

Ms Unsworth, then this might permit damage to be caused to property "in situations beyond which the High Court had envisaged". With great respect to HHJ Gibson and his colleagues, paragraph 15 of Chamberlain was, as I have already said, nothing more than an accurate if succinct summary of the effect of the statute. It is therefore not, with all respect to the Crown Court, a question of what the High Court has envisaged. It is, with respect, a question of what Parliament has determined shall be the law.

30. One sees the same concern about, as the Crown Court put it, the implications and ambit of Chamberlain, but (as I venture to suggest) put more accurately, the implications and ambit of the statute, in the discussion which follows in paragraph 15. That paragraph, I have to say, is confusing in a number of respects. It begins, as we have seen, with reference to the judgment in Hill and Hall, as correctly summarised by Sullivan J in paragraph 34 of his judgment in Chamberlain. That of course, for reasons I have already explained, goes to limb (A). Paragraph 15, however, immediately proceeds with reference to the Crown Court having found that in the circumstances there was no evidence on which it could be said that Ms Unsworth believed there was a need of protection from immediate danger, that being of course a matter arising under limb (B) and a matter upon which, with all respect to the Crown Court, the decision in Hill and Hall threw no light whatever. Moreover there are some difficulties in understanding what the point is which the Crown Court was driving at when it concluded that there was no evidence on which it could be said that Ms Unsworth believed there was a need of protection from immediate danger, given that it had previously found explicitly in paragraph 13 that she honestly believed that she needed to take immediate action.

31. It seems to me as a matter of logic that the analysis in paragraph 15 is either simply inconsistent with the finding of fact explicitly set out in paragraph 13 or alternatively, and more probably in the circumstances, a legally irrelevant and impermissible foray into the question of whether there was an objectively reasonable basis for Ms Unsworth's belief. That the latter view is the more probably correct is, in my judgment, reinforced by the content of the remaining part of paragraph 15, which focuses upon such questions as to whether there were or were not alternative steps that Ms Unsworth could (and seemingly, it is suggested, should therefore) have taken rather than by self-help, as also by the Crown Court's attempt to distinguish between the obstruction in Chamberlain, which it characterised as "a major interference", to the defendant's ability to use his property in that case and what by implication they seem to have thought was the less serious interference caused to Ms Unsworth's asserted rights by her neighbours. Those issues, given the findings of fact previously set out in paragraph 13, were simply irrelevant to any task upon which the Crown Court was properly engaged.

32. Bearing in mind the immediate causal link between the act of lopping off the trees which would *eo instanti* ameliorate the obstruction to Ms Unsworth's light, the present case, as in Chamberlain, is as far removed as can be imagined from the tenuous causal chain between action and consequence characterised by Hill and Hall and similar such cases. In just the same way as in Chamberlain, where the objective element in limb (A) caused no difficulties to the success of the defence, the objective element in limb (A) could not in this case, as it seems to me, be any difficulty in the way of Ms Unsworth establishing the defence.

33. Mr Myers appropriately focussed upon Sullivan J's reference (see paragraph 30) to the question of whether on the facts the steps taken "could" ameliorate the damage to the property in that case and, in this case, the obstruction to the easement. Manifestly in the present case as in that case not merely were the steps which Ms Unsworth believed it proper to take steps which *could* ameliorate the problem; they were steps which of their very nature *would* ameliorate the problem and moreover do so immediately

34. Of course it is not for us to find the facts, and we are confined by the facts as set out in the Case, but there is not from beginning to end anything that I can detect in the Case which would indicate that the Crown Court took the view that the objective element in limb (A) was not in fact established, nor indeed anything in the Case which would have entitled the Crown Court to come to that conclusion. In the way in which it formulated the questions which, albeit erroneously, it sought to answer in paragraph 15, the Case demonstrates that the focus of the Crown Court's analysis appears to have been, as inevitably it seems to me it had to be on its approach, not upon the objective element in limb (A), which was taken as satisfied, but impermissibly upon the legally irrelevant question of whether, in the context of limb (B), what Ms Unsworth chose to do was objectively justifiable as being objectively reasonable. In my judgment, with great respect to the judge and his colleagues in the Crown Court, the analysis in paragraph 15 of the Case, which in truth lies at the heart of the decision to dismiss Ms Unsworth's appeal, is both confused and confusing and in any event unsound in law.

35. Ms Thomson, who has valiantly said everything that could be said on behalf of the Crown in an attempt to save the verdict, has put her submissions, if I may so, in the most attractive, moderate and responsible fashion. Her submissions, and I hope I do her no disrespect by summarising them in this way (I have, of course, had regard to everything set out in the admirable skeleton argument) really come down to two propositions. The first is that upon a proper reading of the Case the task upon which the Crown Court was properly engaged in paragraph 15 of the Case was in analysing whether limb (A) of the defence was established; and that the analysis there of the objective circumstances was a proper exploration as to whether limb (A) was satisfied in circumstances which entitled the Crown Court to conclude, as she would submit it did conclude, that the defence failed under limb (A). It is no criticism whatever of Ms Thomson, who has done her best with unpromising materials, if I say that that valiant attempt fails.

36. For the reasons I have already given, it seems to me that, both read on its own and read in the context of the overall structure of the Case, the issue which the Crown Court has focussed upon in paragraph 15 was an impermissible analysis of limb (A) in the context of objective reasonableness in relation to limb (B) and not an analysis which would have been permissible of the objective aspect of limb (A). I add only this: if in fact the Crown Court had been, and as I have said I do not accept that it was, focussing upon limb (A), and if the Crown Court had come to the conclusion that the defence under limb (A) failed because it could not be said objectively that what Ms Unsworth did was done "in order to protect" her property, such a finding would have been very difficult, indeed impossible to uphold, given the correct ambit of limb (A) as explained in the authorities, and in circumstances, common to Chamberlain, such as arise in the present case.

37. Ms Thomson's second main line of argument was that, if one looks to the objective realities of this case, it is difficult to see that what Ms Unsworth did was reasonable, that there was any immediate need for her to do what she did or that what she did was necessary. Ms Thomson makes the point that the only prior activity there had been as between Ms Unsworth and her neighbours was the sending of the two letters in December 2007 referred to in paragraph 5 of the Case. This was, as she points out, a situation very different from that in Chamberlain, where years of dispute between the parties had led to no resolution and where the defendant was therefore perhaps justified in taking the view that unless he did something the matter would go on for ever. Here, says Ms Thomson, the matter had not yet reached the stage at which Ms Unsworth was justified in concluding that she should act as she did.

38. One can see the force of those points, but they are points which, if they were to be deployed were to be deployed before the Crown Court, in submitting that on the facts and on her evidence, Ms Unsworth had not established the honest belief identified in section 5(2)(b). The fact is, however, that we have to take the facts as found by the Crown Court and as it has set them out for us in the Case. Those arguments are, as it seems to me, no longer open to the Crown to take before us given the findings of the Crown Court as set out in the Case, namely, as I have explained, findings in Ms Unsworth's favour in relation to the honesty of her belief in relation to all the relevant parts of limb (B).

39. In these circumstances, in my judgment this appeal must succeed. The order of the Crown Court in relation to the appeal so far as concerns the offence of criminal damage must be set aside and consequentially Ms Unsworth's conviction by the Oldham Magistrates Court of the offence of criminal damage must be reversed.

40. There is one final aspect which I should perhaps refer to. As will be apparent, the Crown Court was perturbed as to the possible implications in cases of this kind, if the statutory defence was available in circumstances such as arose in the present case. And, as we have seen, it was concerned about the implications of what Sullivan J had said in particular in paragraph 50 of his judgment in Chamberlain. From one perspective, one can perhaps understand such concerns, but it is to be borne in mind, as I have already said, that all that Sullivan J was doing, as all that we are doing, is loyally applying the law as laid down by Parliament.

41. The statutory defence in this particular case is perhaps unusual. The point is well made in *Smith and Hogan*, Criminal Law, ed 12, para 29.1.5.2:

> "This provision [that is, I interpolate, section 5(2)(b)] is in line with general principles of defences in so far as it relates to beliefs in facts or circumstances; however, it goes well beyond that in so far as it provides D's *belief* that the means employed *were reasonable* will excuse. This must be contrasted with the position in self-defence and the prevention of crime where D may use such force as *is found by a jury to be reasonable* in the circumstances which D believed to exist. Under the common law defence, the defendant's belief in the trigger for the defence is assessed on a subjective basis but the response to it is assessed objectively."

In other words, whereas many such defences have a double requirement, a requirement of honest belief coupled with the requirement that that belief be reasonable, this defence is founded exclusively, so far as concerns limb (B) on the honesty of the belief. And although, as we have seen, reasonableness comes into limb (B), it comes in not as an additional criterion to be met but as one of the ingredients of the defendant's honest belief.

42. *Smith and Hogan* goes on to observe that in theory the defence might be relied upon as justification for a defendant "laying waste an oil refinery because he believes its effluent is damaging his geraniums". The protection, the safeguard, against such extravagant attempts to rely upon the defence is of course, as the authors point out, that a jury is unlikely in the circumstances postulated to believe that the defendant did think or could possibly have thought that what he was doing was reasonable. In other words the safeguard here is not to be found, as in many such defences, with the super-riding requirement to demonstrate that the belief was reasonable; it is to be found in the pragmatic reality that the fact-finding tribunal, whether in the present case the Magistrates' Court or, in trials on indictment, a jury, is the more unlikely to accept that the defendant's belief was honest the longer the difficulty has been in existence and the more extreme the measures the defendant takes to remove it. A defendant who has tolerated some obstruction, whether it be an obstruction to a right of way such as in Chamberlain or an obstruction to a right of light as in this case, may find it the more difficult to establish the honest belief in the need to take "immediate steps" the longer that state of affairs has gone on. After all, if you

have tolerated something for a very long time how can it be said that you honestly believe that you have to take immediate steps? In just the same way the more extreme the steps taken to ameliorate the perceived damage the more difficult it will be to persuade the fact-finding tribunal that you honestly believed that what you were doing was reasonable.

43. It seems to me that the spectre conjured up and which troubled the mind of the Crown Court is not perhaps as great as it may have feared. The answer in all such cases lies in the good sense and common sense of the fact-finding tribunal in taking a realistic view as to whether the defendant can really honestly have believed that which he or she asserts, in particular if the steps taken are extravagant. It does not take much imagination to imagine what the outcome would be if, in the example given by *Smith and Hogan*, the gentleman who blew up the oil refinery tried to persuade a jury that he honestly believed that was a reasonable step to take to prevent damage to his flowers. In just the same way, although, perhaps unsurprisingly, she was able to establish the defence in the present case, because all that she had done was to lop the upper parts of the trees, Ms Unsworth might have had more difficulty if she had cut the trees down altogether and would, I can confidently assert, have had no prospect whatever of establishing the defence if the remedy of which she availed herself had involved not merely the cutting down of the trees but the demolition of part of the defendant's structure.

44. Be that as it may, the fact is that the defence is perhaps unusual in its width. For the reasons I have given this appeal must in my judgment be allowed.

Mr Justice Langstaff:

45. I agree with Munby LJ that the question for our determination should be answered “no” for the reasons and on the grounds which he has set out in his judgment. I would add only these two further observations. Section 5(3) must not be lost sight of. It provides that it is immaterial whether a belief is justified or not if it is honestly held. The word “belief” must in my view relate back to section 5(2)(b) in which belief refers to three things: first, the belief of the defendant that he has a right or interest in property, part of limb (a); secondly, a belief that the property right or interest was in immediate need of protection; and thirdly, that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances. Like my Lord, I would draw a clear distinction between the evidence which a court will consider in determining those questions and the approach which it must take in order to look at whether the belief referred to is or is not reasonable or, in the words of the statute, “justified”, but whether it is honestly held. It is only in respect of limb (a), which is on the wording prior to any question or reference to belief that the objective comes into play as a matter of approach.

46. Secondly, I would emphasise, as my Lord has pointed out, and in deference to the concerns which the Crown Court appear to have had in mind at paragraphs 14 and 15 of the case, that the conclusion of this court is not that the acts taken by Ms Unsworth were lawful, it is merely that they were not criminal within the meaning of the Criminal Damage Act 1971. It does not seem to me in the least surprising that the legislature should have adopted a policy of criminalising only those acts which have a requisite and particular mental element, to which plainly the defence, insofar as it is plainly subjective in subsection 5(2)(b) (limb (b)) is directed.

47. The approach which the Crown Court took here in paragraph 15 has puzzled and troubled me too, but I would add that it appears to have confused an evidential test with the approach which it ought to have adopted, The question which it appears to be addressing is whether the appellant believed there was a need of protection from immediate danger. That seems to be a reference to personal danger which may owe something to the facts of the case. The statutory test is of course not danger to her but any need to protect a right in property which she enjoyed.

48. This case seems to me to emphasise once again that in dealing with a case such as this primary regard need to be had to the words of the statute throughout.

Lord Justice Munby:

49. I think it appropriate and helpful for me to add that I agree with everything that has just fallen from my Lord.

50. Now Mr Myers, the appeal will be allowed, the conviction in relation to the criminal damage will be quashed. I think you told us that no penalty has been exacted so there is no need for any supplemental order. Is there any other form of order or relief you seek from us?

MR MYERS: My Lord, no. Thank you my Lord.

LORD JUSTICE MUNBY : Thank you both very much for your help. I am greatly indebted, as I am sure my Lord is.