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Date	29 January 2008
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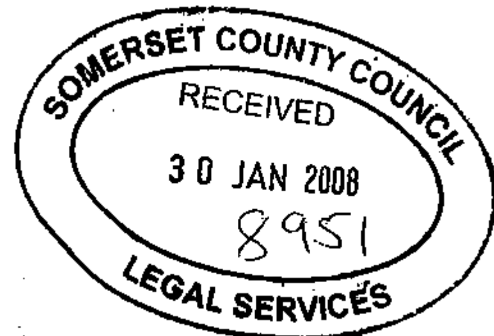

Dear Sirs

Barcroft Lane Gates: Appeal to Crown Court
Re: Mr Herrick - v – Mr Kidner

1. Our Counsel George Laurence QC has been discussing the above matter with your Counsel, Colm Lyons. We understand having seen Mr Lyons' Opinion dated 4.01.2008 that his advice is that it is SCC's clear duty to resist the Herrick appeal. We respectfully agree. We also understand that it is Mr Lyons' view that the appeal is unlikely to succeed. Again, we respectfully agree. However our client cannot take part in the appeal on his own, for that would mean *his* having to run the risk of an adverse order of costs (should the appeal succeed), when the true dispute is in reality now between SCC and the Herricks. We say that the true dispute is between SCC and the Herricks because, as we hope the council will now unambiguously accept, the gates, walls and piers constitute an actionable obstruction of the highway which it is the council's duty to have removed by the exercise of its powers under section 143. See further paragraph 5 below.

2. In these circumstances it seems to us that the proper course is for the council and Mr Kidner to make common cause in resisting the appeal, with the council taking the lead. Mr Kidner's presence is desirable, if not essential, because of a highly technical, though potentially difficult, point being taken by the appellants. The point is this. The appellants say that in the section 137 proceedings before the magistrates in 2006 the Court decided, in effect, that it was only the mechanism on the gates which rendered them an obstruction. They ordered the Herricks to dismantle the mechanism and (though belatedly) that has now been done. The appellants say that so long as the big gates can be pushed open (as the pedestrian gates can) the magistrates have bindingly decided there is no obstruction. The appellants say that that is not an argument which it is now open to SCC to contradict in the present proceedings. They say that SCC is effectively estopped from contending that the gates, walls and piers themselves also constitute an obstruction. One way of defeating

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the argument is to contend that the 2006 magistrates court could only convict if an obstruction was proved beyond a reasonable doubt. They were not satisfied beyond a reasonable doubt that the gates, walls and piers constituted a criminal obstruction. That does not mean that SCC is now estopped from contending in the present civil proceedings that the gates, walls and piers constitute *on a balance of probabilities* an actionable obstruction.

3. That is the argument. We believe it will succeed. But it *may* not. If it does not succeed, it means that as between SCC and the appellants there may be an estoppel. It is however arguable that Mr Kidner is not estopped. He was not present in 2006. Had he been, the case would have been differently presented. For all we know the council may have been prepared to concede before the Court in 2006 that the obstruction would be sufficiently abated as long as the big gates could be pushed open in the same manner as the pedestrian gate had to be. If so, the order of the magistrates that the mechanism should be disabled or turned off would not have been tantamount to a decision that the gates etc were not an obstruction. On this view Mr Kidner should not now be bound by the outcome of the 2006 criminal proceedings even if SCC is.

4. That is why we think Mr Kidner's presence will be potentially helpful, quite apart from its being possibly necessary because he was the original complainant.

5. So we are asking you urgently to reconsider your view that the council can properly confine its role to that of *amicus curiae*. We consider that the appeal should be jointly resisted on the basis that the council is entitled and bound and intends, in the exercise of its duty under section 130 HA 1980 to assert and protect the public right of way, to take action under section 143 HA to have removed all the offending structures from the full width of the highway. We propose that Mr Kidner attend and be represented at his own expense to assist the council to achieve that outcome. If the council were prepared now to make clear to our client that it will make arrangements to remove the structures (or such of them as the Crown Court, in dismissing the appeal, decides are obstructions which significantly interfere with the public right of passage), then our client sees no need as between himself and the council for there to be an order at all.

6. Indeed, the court would refuse to make such an order - see section 130B(5)(c). For in that event the position would be similar to the position which would have obtained in 2006 immediately before Mr Kidner served his first notice under section 130A. Had the council then said that it proposed to take immediate action under section 143 to have the structures removed, our client would have taken no action under section 130A and would have been content to await the outcome of the section 143 proceedings. No doubt Mr and Mrs Herrick, raising their estoppel point, would have challenged the right of the council to act under section 143. If that challenge had failed, they would no doubt have appealed. The council would have resisted *that* appeal (just as we say it should now

be resisting *this* one). Mr Kidner would not have been at risk as to costs, because the litigation would have been, as it should have been, purely between SCC and the Herricks. The fact that Mr Kidner is now involved at all is only because the council has not up to now made unequivocally clear its intention to take action against the Herricks.

7. We therefore ask that the council now confirm to our client in writing

   (i) its undertaking to secure removal of the entire obstruction after the present appeal has been finally disposed of (or so much thereof as the Crown Court decides significantly interferes with the public right of passage);

   (ii) that it will be playing a full part in the appeal in order to resist it; and

   (iii) that if, contrary to expectation, the appeal should be allowed and an order to pay the appellants' costs is made against the council and Mr Kidner, the council will pay the appellants' costs and not look to Mr Kidner for a contribution.

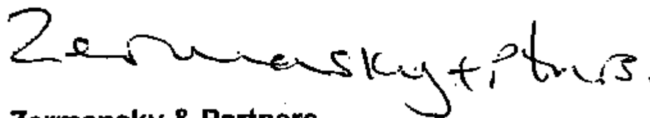
8. We have additionally considered whether there is a way of resolving this potentially expensive litigation by agreement. The appellants have previously offered to keep the gates physically wide open so that they do not even have to be pushed. (Letter 19/11/2007 to Poole & Co attached). Mr Kidner made a counter-offer (to which he has not yet had a reply) which would have involved partial demolition. (Letter Zermanskys to ET Landnet Ltd dated 27/11/2007 attached). However, Mr Kidner believes that the original offer by the Herricks may well have been a sensible one in all the circumstances. We suggest that on the basis of an undertaking by the Herricks to keep the gates permanently open the appeal could be allowed by consent. SCC would have to be party to any such settlement. We appreciate that SCC may be reluctant to do so on the ground that that would appear to condone an outcome which was at variance with the council's own view that the structures need to be demolished in full in order for the obstruction to be properly abated. We appreciate also that the gates and piers and flywalls and forbidding CCTV system would all remain unattractively *in situ* as a result of such a settlement.

9. Nevertheless we urgently ask the council to consider whether it is not desirable (to improve the chances of resisting the appeal) for the council and Mr Kidner to write a joint *Calderbank*-type letter to the Herricks stating that although the parties consider all the structures to constitute an actionable obstruction which significantly interferes with the exercise of public rights over the way, they are prepared for there to be a solution under which, as long as the appellants undertake to the Court, as part of

the compromise, that they will keep the main gates standing wide open, the appeal may be allowed. In this way, even if the appellants refuse the offer, the only way they can later succeed in getting their costs on appeal is to win on their estoppel argument (i.e. the argument which permits them to keep the gates shut though unlocked). If no such letter is written, we perhaps unnecessarily hand to the Herricks an additional means of winning their appeal. For if the court were to take the view that as long as the gates were kept wide open, the remaining obstructions did not significantly interfere with the exercise of public rights of way over the lane (see section 130B(4)(c)), the Herricks would be able to claim that they had had to appeal in order to procure that result. So we think that a joint *Calderbank*-type letter along the lines of the enclosed draft would be a good safeguard against that possibility.

We await hearing from you as a matter of extreme urgency please.

Yours faithfully



Zermansky & Partners

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Messrs Zermansky and Partners
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Your ref: FC/SC/KID11-1/352814

31 January 2008

Dear Sirs

Herrick v Kidner and Somerset County Council

Thank you for your fax transmission of 9.59 am on 29 January. It has always been the County Council's position that the totality of the Herricks' construction (gates, pillars, walls etc) amounts to an unlawful obstruction of the highway and that we are under a duty to remove the same. That is why we prosecuted Mr Herrick under s.137 Highways Act and sought an order, upon his conviction, under s.137ZA. That is why we also made it clear to the Court at the first hearing of your client's application on 12 April last year that we did not oppose the making of the order that he sought.

Accordingly, if you feel the need for further confirmation, you may accept this letter as our undertaking to remove the entirety of the obstruction in accordance with whatever order the Crown Court makes upon determination of the appeal. It is only the institution of this appeal and the provisions of s.130B(3)(b) that have prevented the County Council from implementing the District Judge's order from 15 October 2007.

The County Council now accept that it will play a full part in the appeal. As these gates are an unlawful obstruction, they must be removed and the wording of s.130B(3)(b) is all that is preventing their removal at present. Thus, the County Council accepts that a final determination of this issue needs to be made. I note that, by virtue of s.130B(5)(c), it could be argued that the court no longer needs to make any order if satisfied that we will secure the removal of the obstruction. I would concede however that the intervention of the Herricks may persuade the court that the Council are unable to offer sufficient satisfaction to entitle the court to decline, under s.130B(5)(c), to make an order.

It will not be until the gates are removed that the County Council can be satisfied that its duties under s.130 are being fully met and that it is no longer at risk of applications of this type being brought by other members of the public.

I am still awaiting instructions on your request that the County Council offer your client an indemnity on costs. This is an unusual request given that the County Council is on the receiving end of proceedings instituted by your client and will thus require very careful consideration.

In addition, the County Council does not consider it appropriate to agree to the suggested

offer being put to the appellants, for that would still leave the gates in place and would technically amount to an obstruction – or the risk of an obstruction – to the highway. Until the obstruction is removed in its entirety, the County Council would remain at risk of further applications under s.130B being brought against it.

Yours faithfully

for County Solicitor

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CONFIDENTIAL
For the attention of Fiona Chantrey
Messrs Zermansky & Partners
DX 12061 LEEDS

Your ref: FC/ZL/kid11-1/356079

18 February 2008

By Fax: 0113 246 7465

RECEIVED
20 FEB 2008
ZERMANSKY & PARTNERS

Dear Sir or Madam

Herrick v Kidner (1) Somerset County Council (2)

I refer to previous correspondence and contacts between Counsel in respect of the question of costs should the appellant Mr Herrick succeed in his appeal. I emphasize here the necessity that this correspondence is kept confidential and that it is privileged.

It is common ground between counsel and solicitors that Mr herrick is very unlikely to succeed in this appeal. Any proper interpretation of the legislation would and must hold that the gates, pillars and walls are obstructing the highway and should be removed. To do otherwise would be to fly in the face of the purpose of the legislation. In the circumstances, it is highly unlikely that any compromise offered by Mr Herrick which did not involve the removal of these obstructions in their entirety would be acceptable to the Council, charged as it is with a duty to assert the rights of users of the highway. It is the present view of the Council that it could not lawfully consent to such a compromise.

Having carefully considered its position, duties and powers under the Highways Act 1980 and the Local Government Acts and having taken Counsel's opinion on the matter, the Council has concluded that in the unlikely event that Mr Herrick should succeed in his appeal and in the further event that the Court then makes an order that his costs are paid by the Respondents, the Council will not resist an application that it should bear those costs on its own and will not seek a contribution from your client. Should the Council be advised and/or decide at any point in the future that resistance on its and your part to the appeal is futile, then of course the position would be reviewed. However, the Council remains convinced that this appeal will fail and that both its and your costs will be met by Mr Herrick.

I trust that you will find this limited assurance of assistance in considering your future participation in this appeal.

Yours faithfully

for County Solicitor