

## A naked usurpation?

*Francis Bennion looks at a recent decision that threatens the rule of law*

In the famous 1952 case of *Magor and St Mellons R.D.C. v Newport Corpn*<sup>1</sup> Viscount Simonds savagely criticised Denning LJ's wish to engage in judicial legislation, which he described as "a naked usurpation of the legislative function". I picked up that phrase in an article for the *Modern Law Review* about the same judge's attempt to abolish the doctrine of consideration by judicial ukase-

"To administer justice it is necessary to administer law' and it may be said with all respect that those who, from motives of compassion, show a want of consideration for principles of high and long-standing authority - either by choosing to ignore them or by formulating unreal distinctions - do only disservice to the true cause of justice. To usurp the function of the legislature in the name of a developing jurisprudence is surely to destroy the reality of the common law, to make its doctrines undependable and to leave those whom it should serve bereft in costly uncertainty."<sup>2</sup>

### **Kleinwort Benson**

I apologise for quoting my own words of nearly half a century ago, but unfortunately they are still apposite. Indeed they have become more so. The appetite of some judges for changing the law themselves, rather than waiting for Parliament to do it, is growing. The latest instance is the astonishingly ambitious decision of the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council*.<sup>3</sup> One could say this is indeed a bid for judicial power. Has it therefore been criticised? Not that you would notice, up till now.

The case arose out of the wish of some local authorities to evade the full rigour of the Government's capping system by entering into contracts for interest rate swaps. Under these the parties gambled on interest rates by reference to a notional capital sum. One party agreed to pay the other interest over a specified period at a fixed rate. The other agreed to pay, in relation to the same period and capital sum, interest at a floating rate geared to the money market's fluctuating rate. In essence this was a gamble on how the money market would perform over the given period.

At the time they were entered into, the general view of the legal profession was that such contracts by local authorities were valid. However in a 1991 decision<sup>4</sup> the House of Lords held them to be ultra vires and void. The bankers Kleinwort Benson then sought to recover payments they had made to some local authorities in the mistaken belief that swaps contracts were valid. At first instance Langley J, following well-established law, held that their statement of claim disclosed no cause of action. So far so good.

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<sup>1</sup> [1952] AC 189 at 190.

<sup>2</sup> 16 MLR (1953) 441 at 452.

<sup>3</sup> [1998] 4 All ER 513.

<sup>4</sup> *Hazell v Hammersmith and Fulham London Borough Council* [1991] 2 AC 1.

Then, in *Kleinwort Benson*, the House of Lords, by a majority of three to two, reversed Langley J. They purported to overturn, as if by parliamentary legislation, the long-standing rule of the common law that payments made under a mistake of law are irrecoverable (the mistake of law rule). One of the majority, Lord Goff, blatantly described what they were doing as the "abrogation" of this rule.<sup>5</sup> Abrogation equals repeal. Under our prized unwritten constitution judges do not possess the repealing power.

### **A move to judicial legislation?**

Lord Goff described his thought processes quite openly. He was considering whether the mistake of law rule "should remain part of English law".<sup>6</sup> What was in issue at the heart of the case was, he said, "the continued existence of a long-standing rule of law, which has been maintained in existence for nearly two centuries in what has been seen to be the public interest".

It was, he went on, for the House to consider whether this rule should be maintained, "or alternatively should be abrogated altogether or reformulated".<sup>7</sup> This is the language of Parliament. It is legislator's language, not judicial language.

The fault is made worse by the fact that another past Lord Chancellor had asked the Law Commission to examine the mistake of law rule with a view to its reform by legislation, which is of course the proper constitutional way. In response the Law Commission produced a report and draft bill, which awaits consideration by Parliament.<sup>8</sup> What Lord Goff had to say about this was-

"I am very conscious that the Law Commission has recommended legislation. But the principal reasons given for this were that it might be some time before the matter came before the House, and that one of the dissentients in [*Woolwich Building Society v IRC (No 2)*] [1993] AC 70] (Lord Keith of Kinkel) had expressed the opinion [at 154] that the mistake of law rule was too deeply embedded to be uprooted judicially. Of these two reasons, the former has not proved to be justified, and the latter does not trouble your Lordships *because a more robust view of judicial development of the law is, I understand, taken by all members of the Appellate Committee hearing the present appeals*.<sup>9</sup>

This lets the cat out of the bag. The Appellate Committee, of its own motion, decides to be more robust. So the British Constitution (and with it the rule of law) flies out of the window. Is this not truly a usurpation?

Apart from the constitutional objection, there are other drawbacks to this kind of judicial legislation. One was acknowledged by Lord Goff himself when he said that the majority ruling would affect concluded events-

". . . legislation which has an impact on previous transactions can be so drafted as to prevent unjust consequences flowing from it. That option is not, of course, open in the case of judicial decisions".<sup>10</sup>

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<sup>5</sup> At p 525.

<sup>6</sup> P 525.

<sup>7</sup> P 526.

<sup>8</sup> See *Restitution: mistakes of law and ultra vires public authority receipts and payments* (Law Com No 227) (1994).

<sup>9</sup> P 532 (emphasis added).

<sup>10</sup> P 537.

Lord Goff also admitted a further drawback when he said that the Appellate Committee's new found recognition of a right at common law to recover money on the ground that it was paid under a mistake of law "may call for legislative reform to provide some time limit to the right of recovery in such cases".<sup>11</sup>

### **The contrary argument**

Hitherto it has always been accepted without question that while judges, including Law Lords, have power to declare the common law and pronounce on the legal meaning of legislative provisions, they do not have direct power to legislate. European considerations apart, legislation is the exclusive function of Parliament. This basic principle of our constitution, which underpins the rule of law, is reflected in the formula all our judges are required to swear or affirm on taking office. It binds them to administer justice only "after the laws and usages of this realm".<sup>12</sup>

The *Kleinwort Benson* ruling, if treated as good law, will cause widespread disruption because it involves overturning a large number of transactions previously thought to have been closed years ago. I do not believe it is good law, but who is to decide? The House of Lords, our highest civil court, is the body by which this question would normally fall to be determined. It might be safer for Parliament to step in first and pass the bill drafted by the Law Commission.

If this does not happen it would be well for the health of our legal system if next time the point comes before the House of Lords they treat *Kleinwort Benson* as decided per incuriam and decline to follow it.

Unhappily it has already been followed in at least one High Court case, *Nurdin & Peacock plc v D B Ramsden & Co Ltd (No 2)*.<sup>13</sup> Here Neuberger J said of *Kleinwort Benson*-

"It was inevitable that that welcome change in the law would result in fresh questions which required to be resolved and the instant case appears to throw up such a question."

The change in the law may be welcome; the method of achieving it is not. The many loose ends it has left behind would have been tidied up by transitional provisions if the mistake of law rule had been abrogated by Parliament. More seriously, we are left with a future lack of confidence in every common law rule. Parliament amends or abrogates such rules after full publicity and widespread consultation. There are successive stages of the resulting Bill in both Houses of our democratic Parliament. What protection do citizens now have from the legislative ambitions of non-consulting appointed judges, perhaps deciding (as here) on the narrowest of majorities?

### **Postscript**

I conclude with the latest example of judicial legislation by the House of Lords. *Director of Public Prosecutions v Jones and Another* The Times March 5 1999 concerned a demonstration consisting of around 21 persons congregating on the highway near Stonehenge. In this case the House of Lords, again by a majority of three to two, purported to revolutionise the common law of highways. It is clearly established, by long authority, that the right of the

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<sup>11</sup> P 544.

<sup>12</sup> Promissory Oaths Act 1868 s 4.

<sup>13</sup> Reported at p 251 above.

public is limited to passing and repassing, together with uses incidental to that. In *Jones* Lord Irvine of Lairg LC decided this was too constricted for modern conditions He is reported as saying-

"To limit lawful use of the highway to that which is literally 'incidental or ancillary' to the right of passage would be to place an unrealistic and unwarranted restriction on commonplace day-to-day activities. The public highway is a public place that the public may enjoy for any reasonable purpose."

Mark that use of the term "unwarranted". The OED (second edition, 1994) defines "warranted" as "allowed by law or authority; approved, justified, sanctioned". The Lord Chancellor is saying that the well-established existing rule about highways is "unwarranted" when in fact it is just the opposite.

"When I use a word", said Humpty Dumpty . . .

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## Usurpations

Francis Bennion has done an important public service by castigating the two recent usurpations by the House of Lords in the doctrines of mistake of law and of highway use (*NLJ* March 19, p421). They are not the only ones. When Lord Gardiner occupied the Woolsack, the Lords and the Judicial Committee of the Privy Council decided, I suppose on the false analogy of the US Supreme Court., no longer necessarily to be bound by their own decisions. This scarcely noticed constitutional revolution represented, probably, the psychological basis of the two recent cases.

The matter seems to me to go very deep. Good faith is bound up with certainty, and both are now discounted. Opportunism and concealment have become habits. Let me adduce some widely separated examples.

- The adulteress Monica Lewinsky is conducted round Britain in triumph to sign books in the interests of profit.
- The Church of England seems to think that it can alter its doctrine by vote.
- No copies of the draft Maastricht treaty were available here during the negotiations, This enabled the Government to do what it liked.
- Under the bankruptcy legislation, corporate liquidators can help themselves to funds for which they are trustees.
- Fouls are now so usual in sport that a recent apologist said that they had always been inevitable. With such examples (and I could go on for pages) no wonder that crime increases steadily "To hell with rules. Grab the sparklers." Certainty and good faith are the bonds of society. Are we moving towards a breakdown?

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