

## **FB's Column in *Criminal Law & Justice Weekly* (No. 3)**

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### ***Olla Podrida***

An Occasional Medley of Legal Snippets

**FRANCIS BENNION**

#### **Howling Dog Kennels**

Within a residential area of Southampton, in Hythe, said Moses LJ in an appeal by way of case stated<sup>1</sup>, the Manleys own and operate kennels known as the Howling Dog Kennels in which, certainly at the time of the judgment, there were 24 huskies, dogs in pairs. Mrs Manley and her husband are highly successful in the breeding, showing and racing of Siberian Huskies. But, as the name of the kennels reveals, the dogs unfortunately make a noise. There are certain times of day when spontaneously, what is described as pack howling reaches a level which, as was found as a fact both by the District Judge and by the Crown Court, amounts to a nuisance.

Readers are indebted to Neil Parpworth for an interesting article on this case<sup>2</sup>. Two things struck me forcibly when I read what he wrote.

The first thing was that reg. 2(2)(c) of the Statutory Nuisance (Appeals) Regulations 1995<sup>3</sup>, provides that it is a ground of appeal for the defendant to show that "the best practicable means were used to prevent, or to counteract the effects of, the nuisance". So where the best practicable means fail of effect, so that the neighbours are still plagued by what was in this case insufferable noise, it's just too bad. They must suffer it without legal redress. That doesn't strike me as justice, though Moses LJ had no comment to make on it.

The other thing that struck me most forcibly was the impudent name that the Manleys chose to give their kennels. They might just as well have called them the Public Nuisance Kennels, because premises where 24 huskies are kept in a residential district are practically certain to be that. Talk about cocking a snook at the neighbours! Again, Moses LJ did not comment.

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#### **Mortgage Repossessions: Law Making By Stealth**

One of the first things New Labour did on attaining power was to pass the Civil Procedure Act 1997. Section 6(1) of this provides for the setting up of the Civil Justice Council, which it describes as "an advisory body". This sounds harmless enough. A purely advisory body would not possess any executive or legislative powers. But wait.

Switch to 22 October 2008, when the Treasury announced the following:

"The Master of the Rolls has today approved the Civil Justice Council's new protocol for the courts in mortgage repossession cases. This sets out clear guidance on the steps that lenders are expected to take before bringing a claim in the courts to ensure that repossessions are a last resort. Lenders will now be expected to demonstrate that they have tried to discuss and agree alternatives to repossession when borrowers get

<sup>1</sup> *Manley & Anor v New Forest District Council* [2007] EWHC 3188 (Admin) at [2].

<sup>2</sup> 172 JPN (29 November 2008), pp. 784-786.

<sup>3</sup> SI 1995/2644.

into trouble with their mortgage repayments. If a case reaches court, lenders will be required to tell the court precisely what they have done to comply with the protocol.”<sup>4</sup>

This uses s. 6(1) to go well beyond the giving of advice: it attempts to effect a major change in the law. But does it succeed? I suggest that the purported protocol is ultra vires and void.

The same Treasury announcement contains the following statement by Yvette Cooper, the Chief Secretary of the Treasury: “We need to make sure we help those who might be hardest hit in the tougher times ahead, ensuring repossession is the last resort not the first”. “We” here refers to the Treasury, a branch of the Executive. This is legislation by the Government.

That impression is confirmed by a message in the same announcement by the Justice Minister Bridget Prentice, who says: “The new Civil Justice Council protocol forms part of a wider package of measures which demonstrate this Government’s commitment to provide the best possible support to debtors and vulnerable borrowers.”

We are supposed to live under the rule of law. This is not law, it is Government ukase. For those unfamiliar with that word I give the OED definition: “An order or regulation of a final or arbitrary nature”. The OED gives the following as an example: “The Empress of Russia issued an ukase, whereby various taxes are abolished”.

Yvette Cooper MP may be surprised to find herself likened to the Empress of Russia under the Tsar.

### **A New Bill of Rights?**

There are nowadays fads and fancies in law, which used not to be the case (truly, law is too important for that). One of these is for having a new Bill of Rights for the United Kingdom, simply (as my White Russian friend Prince Igor puts it) because the idea is fashionable and imagined to be “with it”. Apparently there is also going to be an additional one for Northern Ireland. The *Observer* published an item headed “Failure to share housework to be a breach of partner’s rights”.<sup>5</sup> The paper said it had obtained a draft of a Bill of Rights for Northern Ireland which is to be enacted by the Westminster Parliament in pursuance of the Good Friday Agreement. It is alleged to include the following:

“All workers, including those working in the home or in informal employment, are entitled to rest, leisure, respite and reasonable limitation of working hours, as well as appropriate provision for retirement.”

This carries social engineering by Government to remarkable lengths. It parallels the announced intention of Prime Minister Gordon Brown to introduce a new Bill of Rights for the whole United Kingdom. On 16 January 2008 I received an invitation from Roger Smith, head of *Justice*: “Would you be interested in attending a short discussion between myself and Jack Straw [the Lord Chancellor] on the subject of a Bill of Rights, to take place at the *Guardian* Newsroom, opposite the *Guardian* main building in Farringdon Road, from 9.30-11am on Monday morning 21 January? I declined, adding that I would however like to send through him the following message to the Lord Chancellor:

“On no account inflict a new Bill of Rights on us. Practising lawyers in that field love the idea, it promises more work. The said work will (if the thing happens) be for everyone else an unproductive nuisance.

More than that, it will inevitably mean more power to the judges and less practical democracy. It will clash with the Human Rights Act 1998 and the new European Charter of Fundamental Rights (which already clash with each other).

The tangled complexity of the legal system that now operates in this country (also bearing in mind the effect of devolution) is already intolerable from the point of view

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<sup>4</sup> See Treasury website [http://www.hm-treasury.gov.uk/press\\_108\\_08.htm](http://www.hm-treasury.gov.uk/press_108_08.htm).

<sup>5</sup> *Observer*, 30 March 2008.

of knowing and teaching the law and administering justice. I can see no advantage to anyone, except certain lawyers, in piling on another layer in the form of a new Bill of Rights.

The extraordinary thing is that no one has said what would be in a new Bill of Rights, or why we are supposed to need it. It seems to be embraced in a thought-free way as being the latest must-have fashion accessory.”

Undeterred by this, Mr Straw has recently tried to get Cabinet approval for the new Bill of Rights. Apparently the Cabinet are not having it. According to a report, the Prime Minister’s high-profile plan to introduce a “Bill of rights and responsibilities” is in disarray following a cabinet revolt. Ministers have warned him that his proposed charter laying out the rights and duties of citizens is unworkable and “could pave the way for a deluge of court cases”<sup>6</sup>.

The report adds that the Government’s legal advisers warned of “massive difficulties”, questioning how social and economic rights could ever be justiciable and doubting whether a new right to equality is necessary given also that the Government was also promoting an equalities Bill (now the Equality Act 2006).

So there’s hope for us yet. Igor says it will be a close-run

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thing though. (His command of English idiom is growing.)

### **The Minister Intervenes**

In the United States the naming of an Act (whether formal or informal) is regarded as having political significance. William Safire discusses what he calls acronymania, or the naming of legislation based on acronyms, and the effect of calling the post 9/11 rallying enactment the Patriot Act by an acronym from the slogan Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.<sup>7</sup>

In the United Kingdom the short title of an Act is normally devised by the drafter of the Act without particular attention to its political effect.<sup>8</sup> It is felt by drafters that the selection of the wording should follow normal practice and not be designed to score party-political points.

The two viewpoints came into collision over the wording of the short title to the Tenants’ Rights, Etc (Scotland) Act 1980, which has recently come into prominence in a radio programme.<sup>9</sup> The politician in question was Sir Malcolm Rifkind. I put it in Rifkind’s own words:

“The draft Bill came from the parliamentary draftsmen and the Bill was headed Housing (Scotland) Bill and I thought that’s a very uninteresting title, not something that is very politically stimulating, so I sent back a note saying If they didn’t mind I’d rather it be called the Tenants’ Rights (Scotland) Bill because I not only thought that met the Government’s political objectives but I knew that it would be particularly irritating for the Labour party to have to vote against something called “tenants’ rights”.

I got a message back from the draftsmen saying, no, that would not be possible. All Scottish housing legislation had always been called Housing (Scotland) Bills and in any event although its main purpose was tenants’ rights there were other things in it. So I said ‘OK, I offer you a compromise’ and the compromise, which was the one they, without any great enthusiasm, had to accept, was that it became known as the

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<sup>6</sup> *Sunday Times*, 2 November 2008.

<sup>7</sup> William Safire, *The Right Word in the Right Place at the Right Time* (New York: Simon & Schuster 2004), p 5.

<sup>8</sup> See *Bennion on Statutory Interpretation* (5<sup>th</sup> edn, 2008), p. 737.

<sup>9</sup> Shaun Ley in *The Westminster Hour*, BBC Radio 4, 7 December 2008.

Tenants' Rights, Etc (Scotland) Bill and it is now the Tenants' Rights, Etc (Scotland) Act. So ministers had the last word I'm relieved to say."

In fact ministers did not have the last word. The provisions Rifkind wished to trumpet constituted Parts I and II of the 1980 Act. Seven years later another Act took these provisions into itself and repealed them as they stood in the 1980 Act. This later Act was a consolidation Act. Its short title was the Housing (Scotland) Act 1987.

The function of an Act of Parliament is to lay down the law, not be a vehicle for politicians' grandstanding. There are reasons for the drafter's preference for the form "Housing (Scotland) Act". It is short and snappy, and accurately descriptive. Where a short title has been used before in a series, it is important to show that the present Act is part of that series, i.e. is *in pari materia* with the earlier Acts. Furthermore the series may have been given the collective title "The XYZ Acts [year] to [year]". This is convenient for reference, though not always actually used. Where used it needs to be maintained.

Those are sober technical factors which told against what the simple-minded Rifkind insisted on doing. The state of the Statute Book was just that little bit the worse – for a time.

### **Absurdity Over Voyeurism**

Voyeurism has never been a crime at common law. By the Sexual Offences Act 2003 Parliament made it a crime for the first time in our history. In 2007 various people took leave of their senses by treating as criminal voyeurism under the Act the photographing of a *showering man wearing bathing trunks*. The convicted victim was a man named Kevin Bassett.

Our Judges once firmly proclaimed the superiority of common law over statute. Peter Landry said:

"The common law exists as a result of a natural sequence which hardened first into custom and then into law. It did not come about as an act of will, as an act of some group aware only of the instant moment, unaware of the nature and history of man. It came about as a result of a seamless and continual development. Through processes we can hardly begin to understand; it evolved along with man."<sup>10</sup>

I wish this attitude of respect for the common law still prevailed among our judiciary. Many of them now accept the crudity of legislation meekly and uncritically. One such is Lord Justice Hughes, who did however quash Mr Bassett's ridiculous conviction<sup>11</sup>. In the Court of Appeal he gave the only judgment. I would have liked it to run on the following lines.

It is preposterous and ridiculous that anyone should be held guilty of criminal voyeurism for photographing a man wearing bathing trunks having a shower. If the 2003 Act appears to require that it should be closely scrutinized to see if there is any way out. One exit would be by applying the commonsense construction rule.<sup>12</sup> Another would be resort to the presumption that Parliament does not intend an absurd result.<sup>13</sup> Particularly relevant is the presumption against an anomalous result.<sup>14</sup>

Next, it is desirable to examine carefully the precise words in the Act that seem to lead to the preposterous and ridiculous result. They are the following, found in s. 68(1)(a): "the person's genitals, buttocks or breasts are exposed". In the court below Judge Plumstead had held that "breasts" here included male breasts. This was because the word "person" includes both males and females. However that is only where the context does not otherwise require. In this

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<sup>10</sup> Peter Landry, *The Common Law: Tradition and Stare Decisis* (2004). Accessed on 27 October 2008 at <http://www.blupete.com/Literature/Essays/BluePete/LawCom.htm>.

<sup>11</sup> *R v Bassett* [2008] EWCA Crim 1174. See 172 JPN, p. 708.

<sup>12</sup> See *Bennion on Statutory Interpretation* (5<sup>th</sup> edn, 2008) s. 197.

<sup>13</sup> *Ibid.*, s. 312.

<sup>14</sup> *Ibid.*, s. 315.

case, in relation to the word “breasts”, the context plainly does otherwise require. The plural word is not normally applied to males, and the bare chest of a male, unlike the bare breast of a female who has reached puberty, is not regarded as having erotic attributes.

In ruling thus in the judgment I would also have castigated

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the author of this sloppy wording.

Hughes LJ did none of these things. Moreover he committed the solecism of misusing the term “begs the question”<sup>15</sup>, which properly refers to the logical fallacy known as *petitio principii*. He also transgressed in saying that the definition in s. 68(1) “does carry the difficulties inherent in such definitions”<sup>16</sup>. As a legislative draftsman of wide and long experience, I can assure him that the difficulty was caused by bad drafting, and is not in any way “inherent in such definitions” if they are properly drawn.

Why didn’t our enacting process get rid of the nonsense of saying “the person’s . . . breasts are exposed” with its obvious difficulties in relation to male persons (or even female persons when they have not attained puberty)? What was our famed revising chamber doing? Why do so many of our Judges seem to know little or nothing about the common law principles of statutory interpretation?

One last complaint about Hughes LJ’s judgment. It does not mention the name of the judge he is reversing, which I had to get from a newspaper report.<sup>17</sup> This is an unwelcome break from former practice.

### **Important Private Rights**

In a 2006 article I criticised Lord Bingham of Cornhill, the Senior Law Lord, for calling the citizen’s historic right to bring a private prosecution an anomalous historical survival which is of questionable value and can be exercised in a way damaging to the public interest.<sup>18</sup> This judicial comment was particularly questionable in view of the fact that the right has been carefully preserved by a modern Act of Parliament<sup>19</sup>.

Other legislation upholding a private of this kind is rule 32.14 of the Civil Procedure Rules. It allows a private citizen, with the permission of the court, to bring proceedings for contempt of court against a person “if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth”.

Allowing a recent appeal against refusal to give permission to a private citizen to bring proceedings for contempt under CPR r 32.14, Moore-Bick LJ, giving the judgment of the Court of Appeal, said:

“When the court gives a private person permission to pursue proceedings for contempt against a witness who is alleged to have told lies in a witness statement it allows that person to act in a public rather than a private role, not to recover damages for his own benefit, but to pursue the public interest.”<sup>20</sup>

He added that the conclusion of the judge below that proceedings for contempt in the present case would be unlikely to promote the integrity of the legal process or respect for it in the future was unacceptable. While only prominent examples that are widely reported in the press can be expected to make an impression on the public at large, that ignores the fact that the

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<sup>15</sup> Paragraph 8 of the judgment.

<sup>16</sup> Paragraph 14.

<sup>17</sup> *The Daily Telegraph*, 16 May 2008, <http://www.telegraph.co.uk/news/1962326/Breasts-not-for-looking-but-pecs-are-okay%2C-say-Court-of-Appeal.html>.

<sup>18</sup> See F A R Bennion, “*Jones v Whalley*: Constitutional Errors by the Appellate Committee”, 170 JPN (4 November 2006) pp. 847-850.

<sup>19</sup> See Prosecution of Offences Act 1985 s. 6(1).

<sup>20</sup> *KJM Superbikes Limited v Hinton* [2008] EWCA Civ 1280 at [11].

pursuit of contempt proceedings in ordinary cases may have a significant effect by drawing the attention of the legal profession, and through it that of potential witnesses, to the dangers of making false statements. His Lordship went on:

“If the courts are seen to treat serious examples of false evidence as of little importance, they run the risk of encouraging witnesses to regard the statement of truth as a mere formality. That is not a matter which the judge appears to have taken into consideration. In my view the prosecution of proceedings for contempt in the present case would be likely to have a salutary effect in bringing home to those who are involved in claims of this kind, of which there are many, the importance of honesty in making witness statements and the significance of the statement of truth.”<sup>21</sup>

### **Work experience at the Bar**

The Rt Hon. Earl Forsooth K.G. holds forth about a schoolgirl who gave herself airs.

#### *Montmorency Castle*

#### *Rutland*

21 December 2004

Miss Henrietta Lacey

Dear Miss Lacey,

#### *Juvenile arrogance*

As the friend and patron of a number of distinguished barristers I am writing about your impudent letter in the *Times*.

You should have felt honoured at having been accorded the high privilege, at the mere age of sixteen, of a week's work experience in barristers' chambers. Instead you childishly object to having been expected to make the tea, and clearly show you think others should have made the tea for you. You resent having been asked to run errands. What arrant nonsense!

I suppose this is not really your fault; clearly you have been badly brought up. You should know that even pupils in chambers, who are qualified barristers with years of arduous training, expect to be treated as dogsbodies. That has long been considered part of the process of being licked into shape at the Bar.

Instead of grumbling in this puerile way, if you possessed any of the right qualities you would appreciate having had the rare opportunity (at sixteen!) to get the feel of barristers' chambers, and meet some of the august people involved. Humility, not insufferable arrogance, would have been a becoming attitude for you to adopt.

From what you write it seems you expected to handle a brief in the High Court on your first day in chambers. I do hope that in the course of time you manage to grow up.

Yours faithfully,

*Forsooth*

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<sup>21</sup> *Ibid.* at [23].