THE RELATOR INJUNCTION

GOURIET v. *UNION OF POST OFFICE WORKERS & ORS.*

The Facts

On Thursday evening, 13th January, 1977, the BBC news reported that the executive of the Union of Post Office Workers (U.P.W.) had resolved to call for a ban on all mail to or from South Africa for one week commencing the following Sunday. The announcement so incensed one John Prendergast Gouriet, Secretary of "The National Association for Freedom", that he forthwith applied to the Attorney-General for his consent to a relator action for an injunction to prevent the Union's members interfering with the passage of mail, a criminal offence under the Post Office Act 1953. The Attorney-General refused his consent and gave no reasons. Mr. Gouriet thereupon applied in his own name to a High Court judge in chambers for an interim injunction. Stocker, J. held that he had no jurisdiction to grant the injunction. Mr. Gouriet appealed. The Court of Appeal strongly attacked the Attorney-General, Mr. Silkin, Q.C. It could see no legal reason for consent being refused, and in the absence of any reason being provided by Mr. Silkin, the Court denied his contention that it was without jurisdiction. On Saturday, 15th January the Court of Appeal granted an interim injunction against both the U.P.W. and the Post Office Engineering Union (P.O.E.U.). On Tuesday, 18th January the Court of Appeal held unanimously that Mr. Gouriet was entitled to apply for a declaration, and pending the final hearing, an interim injunction for the meantime. However, a majority of the Court held that Mr. Gouriet could not satisfy the legal requirements for a final injunction.

All parties appealed to the House of Lords:[1] Mr. Gouriet against the refusal of a final injunction; the Attorney-General and the Unions against the grant of a declaration to Mr. Gouriet.

The Nature of a Relator Action

The relator action is one of great antiquity. It stems from the fundamental principle of English law that the rights of the public at large are vested in the Crown. The Attorney-General, as the first law officer of the Crown, is responsible for protecting and enforcing those rights. Hence, if an individual wishes to bring an action in which his interest is no greater nor less than any other individual, he must approach

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[1] [1977] 3 All E.R. 70 (hereafter *Gouriet's Case*).

the Attorney-General and ask his consent to bring the action in the name of the Attorney-General *ex relatione*. If consent is given, thereafter the action is generally conducted by the individual, and the individual must bear the costs if the action fails. The Attorney-General, however, remains *dominus litis* and may interfere in the proceedings at any time. These propositions are rooted in the strongest authority; in the words of Jessel, M.R. in *Attorney-General* v. *Cockemouth Local Board*:

> Except for the purpose of costs, there is no difference between an *ex-officio* information and an information at the relation of a private individual. In both cases the Sovereign, as *parens patriae*, sues by the Attorney-General.[2]

I do not propose to discuss the following peripheral issues in the judgments of the House of Lords; firstly, procedural deficiencies in the Court of Appeal's award of an interim injunction against the P.O.E.U.; secondly, the privileged position of Trade Unions under the civil law of England; and thirdly, the desirability or otherwise of the Court of Appeal's practice of granting a declaration in exactly the same words as the statute in issue.

Two Preliminary Matters

Mr. Gouriet conceded two very important points before the House of Lords.

(a) At all times it was clearly stated that he had suffered no special damage as a result of the Union's actions, and that he had no greater interest than the interest that every member of the public has in the law being obeyed. In any event, he had nothing to gain by asserting that his "private rights" would be violated if the Union ban went ahead. Recourse to the civil courts would have been blocked by Section 14(1) of the Trade Union and Labour Relations Act 1974, which exempts Trade Unions from liability for torts; and private prosecutions in the criminal courts cannot be commenced until the alleged offence has actually been committed.

(b) He conceded that the Attorney-General's refusal to consent to the relator action is a decision which cannot be reviewed by a court of law. The Attorney-General cannot be overridden if the court feels that he has decided improperly, nor can he be required to give reasons for his decision. In the Court of Appeal, Lord Denning, M.R.[3] totally rejected this principle. Instead, he stated the novel view that the decision of the Attorney-General is unreviewable only if he decides to grant his consent, and not if he decides to refuse it. To assert otherwise would be "a direct challenge to the rule of law". The House of Lords dismissed this approach as contrary to the weight of authority, and as misconceiving the law as stated by Earl of Halsbury, L.C. in *London County Council*

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[2] (1874) L.R. 18 Eq. 172 at 176. Quoted by Lord Dilhorne [1977] 3 All E.R. 70 at 94.

[3] [1977] 1 All E.R. 696 at 715.

v. *Attorney-General.*[4]

The Main Issue

The central question put before the House of Lords was: given that Mr. Gouriet has no special interest in the proceedings, and given that the Attorney-General's refusal to consent to a relator action is unreviewable by the courts, is Mr. Gouriet barred from continuing the action without the Attorney-General's consent? At the very heart of Mr. Gouriet's claim, it is, in the words of Lord Edmund-Davies, "inescapable . . . that in truth he is seeking to bring what is essentially a relator action without the Attorney-General's consent".[5]

The proposition, that the refusal of consent by the Attorney-General to a relator action in support of public rights is an absolute bar to that action, is supported by such a massive volume of authority that the law was accurately described as a "mould". Mr. Gouriet invited the House of Lords to reshape the mould, or if need be, to break it. A number of arguments were put forward to support the claims of both sides, and it is worth discussing them individually.

The Arguments

1. It was argued for Mr. Gouriet that the role of the Attorney-General in relator actions is purely legal fiction, invented to facilitate procedure but of no substantive significance whatsoever. The individual is the real claimant. The Attorney-General serves no practical purpose; it is the individual who conducts the action, it is he who must bear the costs. This fiction ought to be discarded.

This argument received strong support from Ormrod, L.J. in the Court of Appeal[6] who cites the following passage from Edwards' *The Law Officers of the Crown*[7] in its support:

> Although the Attorney-General is the nominal plaintiff in the action, in reality the action is brought by the complainant. Once the consent of the Attorney-General is obtained the actual conduct of the proceedings is entirely in the hands of the relator who is responsible for the costs of the action.

The fiction has only gone unchallenged thus far, in the opinion of Ormrod, L.J., "because a crisis arising out of an irreconcilable disagreement between a complainant and the Attorney-General has not arisen".

This argument failed to stand up to analysis. The role of the Attorney-General is not a fiction. Consider again the words of Jessel, M.R. cited above. Apart from costs, the Attorney-General's powers are precisely the same as in an *ex officio* action — as Lord Wilberforce[8] and Lord Edmund-Davies[9] point out, he has the right to examine the state-

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[4] *Gouriet's Case, supra* n. 1 at 103 *per* Lord Edmund-Davies.
[5] *Id.* at 105.
[6] *Supra* n. 3 at 727-730.
[7] J. Ll. J. Edwards, *The Law Officers of the Crown* (1964) p. 288.
[8] *Gouriet's Case, supra* n. 1 at 80.
[9] *Id.* at 106.

ment of claim and any amendments to the pleadings, to be consulted on discovery, and to require his approval before a suit is compromised. Furthermore, if the relator dies, the suit does not abate.

2. Counsel for Mr. Gouriet pointed out that it is clearly the law that any person can start a prosecution for a criminal offence in a criminal court, without the consent of anyone, once the act alleged to constitute the offence has been committed. Surely, then, it is in the public interest to allow any member of the public access to the civil courts to apply for an injunction to prevent the criminal act being committed.

On the surface, this argument has a more convincing ring to it than the previous one. Lord Wilberforce confessed to being initially attracted by it.[10] Lord Fraser considered it to be Gouriet's strongest argument.[11] But closer examination reveals several flaws in it.[12] Firstly, the analogy drawn between private prosecutions at the suit of the individual and civil actions is imperfect: the Attorney-General does have control over a private prosecution just as he has control over relator proceedings; he has power to enter a *nolle prosequi*, or to take over any private prosecution and offer no evidence. Secondly, the argument fails to consider or chooses to ignore, the fundamental distinction between private rights, which the individual can enforce, and public rights, which the individual cannot enforce in the absence of special interest. The right to seek prevention of an offence against the criminal law in civil courts, is a public right and hence becomes the domain of the Attorney-General. Thirdly, an individual who lacks the resources of public office upon which to draw, lacks the ability to decide what is best in the public interest.

3. It was submitted on behalf of Mr. Gouriet that the purpose of the Attorney-General's absolute discretion was to sift out claims which were frivolous or vexatious and as this function can be fulfilled quite adequately by the courts, why not leave the whole matter to them? The House of Lords were unmoved by this argument. Lord Fraser[13] pointed out that there was no authority for such a severe limitation of the Attorney-General's discretion, apart from the *dictum* of Lord Denning, M.R. in *Attorney-General (on the relation of McWhirter)* v. *Independent Broadcasting Authority*[14] which will be more closely examined later. Lord Wilberforce[15] felt that decisions of such a political nature were not the proper preserve of courts of law; the Attorney-General is best equipped to contend with this type of discretionary problem.

4. Mr. Gouriet proposed to overcome the objection that only the Attorney-General is qualified to represent the public interest by joining

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[10] *Id.* at 84.
[11] *Id.* at 116.
[12] *Id.* at 116-117 *per* Lord Fraser.
[13] *Id.* at 117.
[14] [1973] 1 All E.R. 689 at 698, [1973] Q.B. 629 at 649.
[15] *Gouriet's Case, supra* n. 1 at 84.

him as a defendant to the action.

The tactic was a weak one and was disposed of quickly. In fact it had several fatal flaws. Firstly, if he did appear, we have established that the Court had no right to require the Attorney-General to give reasons for objections on the grounds of public interest. This is contrary to the opinion of Lawton, L.J. in the Court of Appeal,[16] who argued that the courts ought to have an executive discretion which could override the Attorney-General's discretion in exceptional cases where there appeared to be no discernable reason for his decision. The court could consider the Attorney-General's reasons, if he chose to give any, and could hear evidence as to public interest. Secondly, it is impossible to conceive how the Attorney-General's hostile presence can give any positive weight to the plaintiff's claim to usurp his right to represent the public; whether he appears as a party or *amicus curiae*. Thirdly, it is undesirable to join the Attorney-General as a defendant, for to do so would mean that he, and through him the public, would be bound by the decision without proper argument necesarily being presented.[17]

5. Mr. Gouriet cited in his support dicta of Lord Denning, M.R. (supported by Lawton, L.J.) in *Attorney-General (on the relation of McWhirter)* v. *Independent Broadcasting Authority*, in which the Master of the Rolls stated that in his view, an individual could proceed in an action to enforce public rights without the consent of the Attorney-General "if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly".[18]

Lord Denning's motive is quite clear. He would not stand by and watch the Attorney-General bar an individual's access to the courts of law if that individual had a "proper" case to be heard. More will be said about this approach later. We need only note here that the persuasiveness of these *dicta*, and the applicability to the facts of the case, were closely questioned by the House of Lords. The proposition is unsupported by authority; indeed it is contrary to the nature of the Attorney-General's office and to the well established principle that the courts cannot review the exercise of his discretions. If this case falls within any of Lord Denning's hypotheses at all, it would be to the extent that the Attorney-General has refused leave in a "proper case". But this is to deny that the Attorney-General, and not the court or the individual, is best equipped to decide what is a "proper case". Is it possible for the Attorney-General to act improperly in the exercise of his discretion? Sir Hartley Shawcross once expressed the view that "there is only one consideration which is altogether excluded, and that is the repercussion of a given decision upon my personal or my party's or the government's political fortunes".[19] There was no evidence or implication that Mr. Silkin

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[16] *Supra* n. 3 at 726.
[17] *Gouriet's Case, supra* n. 1 at 84, *per* Lord Wilberforce.
[18] [1973] 1 All E.R. 689 at 698.
[19] J. Ll. J. Edwards, *op. cit., supra* n. 6 at 222.

had any regard to such considerations here, and the House of Lords was emphatic that none could be inferred from his refusal to disclose the reasons for his decision.[20]

Lord Denning, M.R. claimed that his view had been supported in *Thorson* v. *Attorney-General of Canada*,[21] where an ordinary taxpayer was permitted to contest the constitutional validity of taxation legislation in his own name after the Attorney-General had refused to consent to a relator action. The House of Lords did not accept this authority;[22] in fact the court in *Thorson's Case* supported the English law on enforcement of public rights, but distinguished it where a constitutional question was at issue.

6. Mr. Gouriet sought to draw an analogy between applications by individuals for prerogative writs to compel public officials to perform their duty, or to prevent them from abusing it, and his own application. In recent years the courts have given a generous interpretation to the rules of *locus standi* in allowing individuals access to the courts to seek prerogative writs — see, for example, *R.* v. *Metropolitan Police Commissioner, ex parte Blackburn*.[23] Why should Mr. Gouriet be denied access to the courts to contest this action?

The analogy is misconceived. If Mr. Gouriet is seeking to force Mr. Silkin to "do his duty" indirectly by continuing the action as if the Attorney-General's consent had been given to it, then he is seeking to do indirectly something he could never do directly. No order can be made against the Attorney-General because he acts on behalf of the Crown. The true analogy is, as Lord Wilberforce demonstrates, "between a court exercising the prerogative power of controlling an abuse of authority or jurisdiction, and the Attorney-General under prerogative power considering whether the public interest will be served by a relator action".[24]

A majority of the Court of Appeal (Lawton and Ormrod, L.JJ.) agreed that no *final* injunction could be granted to Mr. Gouriet in the absence of the Attorney-General's consent to the relator action. Lord Denning, M.R. refused to concede this point, adopting the view that "if the court has jurisdiction when the Attorney-General is the plaintiff, so also it has a jurisdiction when a member of the public is the plaintiff".[25]

The majority attempted to side-step the Attorney-General by allowing, and indeed firmly advising, Mr. Gouriet to obtain a declaration against the Unions that their threatened conduct would be unlawful, and then permitting this to be used as a basis for granting an interim injunction until the final hearing. It will be apparent to the reader that this approach produces the peculiar situation that Mr. Gouriet is better off

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[20] *Gouriet's Case, supra* n. 1 at 90.
[21] (1974) 43 D.L.R. (3d) 1.
[22] *Gouriet's Case, supra* n. 1 at 82.
[23] [1968] 1 All E.R. 763 at 769, 777.
[24] *Gouriet's Case, supra* n. 1 at 84.
[25] *Supra* n. 3 at 718.

after the interim proceedings than he could possibly be after the final hearing. Lord Denning, M.R. was at least consistent in holding that if an interim injunction is available to the plaintiff, then a final injunction must be available too.

Logical difficulties aside, the majority's approach raises two questions:

1. Does the court have jurisdiction to make such declarations?
2. Does the court have jurisdiction to support the declaratory proceedings by interim injunction?

The Court of Appeal all held the view that they were entitled to grant a declaration to Mr. Gouriet notwithstanding that he had neither any special interest nor the Attorney-General's blessing. The court placed significance on the fact that if a declaration did not lie to Mr. Gouriet, he had no other claim to relief. This pressure seemed to influence them to overcome arguments from principle and authority, although Lawton, L.J. confessed reluctance in so doing.[26]

But courts of law have never had jurisdiction to declare the law in abstract or to give advisory opinions; if a court is to declare rights, then they must be rights, subsisting or future, of the parties contesting the action, and not of anyone else. An individual is entitled to enforce his private rights. Public rights vest in the Attorney-General. Strong authority for this position may be found in the judgment of Viscount Maugham in *London Passenger Transport Board* v. *Moscrop*.[27] It must follow from this argument that Mr. Gouriet was no more entitled to relief by way of declaration than he was to an injunction without the consent of the Attorney-General to a relator action.[28]

In granting an interim injunction to support the declaratory proceedings the Court of Appeal relied on R.S.C. Ord. 15, r. 16, which provides:

> No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

The Court of Appeal wrongly interpreted this provision as enlarging the jurisdiction of the courts so that any action will lie whenever declaratory proceedings are on foot. The House of Lords unanimously rejected that interpretation. It merely bars objection made only on the ground that a declaration is sought.

"Enforcing the Law"

Lord Denning, M.R. in the Court of Appeal repeatedly stated that he could not accept the proposition that the enforcement of the laws of England should not, in the final analysis, be the exclusive domain of the courts. And this was precisely how he viewed the Attorney-General's

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[26] *Id.* at 725.
[27] [1942] A.C. 332.
[28] *Gouriet's Case, supra* n. 1 at 85 *per* Lord Wilberforce; at 100 *per* Lord Diplock; at 112 *per* Lord Edmund-Davies; at 118 *per* Lord Fraser.

assertion that he was not answerable to the courts in the exercise of his discretion:

> If the contention of the Attorney-General is correct, it means that he is the final arbiter whether the law should be enforced or not. If he does not act himself — or refuses to give his consent to his name being used — then the law will not be enforced. If one Attorney-General after another does this, if each in his turn declines to take action against those who break the law, then the law becomes a dead letter . . . . We have but one prejudice. That is to uphold the law. And that we will do, whatever befall.[29]

Mr. Silkin, however, stood his ground. He appeared before the Court of Appeal on Tuesday, 18th January, and expressed his views forcefully:

> If the Attorney-General is wrong, he is answerable to Parliament and to Parliament alone . . . the court cannot question the Attorney-General's reasons for acting or refusing to act. It cannot question his reasons directly or indirectly or deduce what those reasons were. I say with the utmost respect to your Lordships but also with the utmost firmness that the courts must not assume the mantle of Parliament.[30]

Lord Denning, M.R.'s insistence that the law must be enforced raised still more dissenting cries from the House of Lords. Viscount Dilhorne characterised every statute of the Parliament which creates a criminal offence as having the same effect as an injunction restraining the commission of the acts made criminal: if the statute is defied, it generally provides for the punishment of the offender. It is superfluous to grant in addition an injunction in the civil courts to restrain the same conduct. It merely imposes liability for contempt to add to the penalty prescribed by the Statute. How can this be "enforcing the law"?[31]

Lord Denning, M.R. was clearly of that opinion that, unless Mr. Gouriet was entitled to an injunction in the *civil* courts against the Unions, then the law would not be enforced. To adopt this proposition is to deny the fundamental principle that the ordinary and primary means of enforcing the criminal law is by prosecuting the offender in the *criminal* courts *after* the offence has been committed.[32] The separate functions of the civil and criminal courts ought not to be blurred. The primary role of the civil courts is the determination of disputes and claims, not crime prevention. If the Attorney-General refuses to prosecute *ex officio* or *ex relatione* a breach of the criminal law committed or threatened, then indeed the civil courts may be powerless to prevent it; but this does not mean that the law will not be enforced. The proper authorities, or indeed any private individual, may prosecute the offender in the criminal courts once the offence has been committed. The right

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[29] *Supra* n. 3 at 717, 719.
[30] *Id.* at 707.
[31] *Gouriet's Case, supra* n. 1 at 90.
[32] *Id.* at 116 *per* Lord Fraser.

of the individual to launch a private prosecution, without the consent of anyone, is, in the words of Lord Diplock, "a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law".[33]

Moreover, it has been the long practice, and is likely to continue to be the practice of Attorneys-General, only to seek the aid of the civil courts in support of the criminal law in very exceptional cases,[34] whether the action be *ex officio* or *ex relatione*. The two most common instances have been where the penalty imposed by Parliament is completely inadequate to deter the commission of the offence, see for example *Attorney-General* v. *Sharp*,[35] and where the public safety is under imminent threat, see for example *Attorney-General* v. *Chaudry*.[36] Indeed, grave problems may arise if Attorneys-General exercise their discretion on a more regular basis to intervene in the normal prosecution of the criminal law. The penalty for contempt may be disproportionate to the sanction intended by Parliament for that offence. The Parliament may have provided that offenders are to be tried before a jury. This right is denied him if he is brought before a civil court for contempt. And in effect a potential offender is put in double jeopardy, for after he is punished by a civil court for contempt, he is still liable to be punished again for the same crime if he is found guilty by a court of criminal jurisdiction.

Conclusion

Mr. Gouriet invited the Court of Appeal to displace a long and respected line of authority to the effect that a private individual who had no special interest could not bring an action to enforce the rights of the public at large unless the Attorney-General consented to the action being brought in his name *ex relatione*. The Court of Appeal were prepared to do so. The majority sought to outflank the Attorney-General's refusal of consent by encouraging Mr. Gouriet to claim declaratory relief, and using this as a basis for the grant of an interim injunction until the final hearing. Lord Denning, M.R. refused to concede that the Attorney-General could ever be the ultimate arbiter as to whether the criminal law is to be enforced, and argued unsuccessfully that the Court had jurisdiction to grant Mr. Gouriet a final injunction. The Attorney-General, for his part, strongly asserted that his prerogative to grant or refuse consent is absolute, and that any action to enforce public rights must necessarily die without it.

The House of Lords rejected both the decision and the reasoning of the Court of Appeal. A number of arguments were put forward in support of Mr. Gouriet's contention that the "mould" into which the law had been shaped over hundreds of years should be broken. Each

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[33] *Id.* at 97 *per* Lord Diplock.
[34] *Id.* at 92 *per* Lord Dilhorne.
[35] [1931] 1 Ch. 121, [1930] All E.R. 741.
[36] [1971] 3 All E.R. 938, [1971] 1 W.L.R. 1614.

was rejected as contrary to principle and devoid of authority. The Court of Appeal was found to have no jurisdiction to make the orders it did. Lord Denning's insistence that the law must be enforced was held to be based on a misconception of the separate functions of the civil and the criminal courts. The law in this area has been restored and strengthened. The key issue has been unequivocally resolved: the refusal of consent by the Attorney-General to a relator action in support of public rights where the individual has no special interest is an absolute bar to that action.

KEITH P. REWELL, B.Ec. — Third Year Student.