John Griffith

The Law Lords and the GLC

A publicity shot for the launch of the Fare's Fair scheme showing GLC transport committee chairman Dave Wetzel

As everyone knows, this case concerned the validity of a supplementary precept issued by the Greater London Council to, amongst others, the London Borough of Bromley, and through that borough, to the ratepayers of all London, for the levying of a rate of 6.1p in the £ for the period 1 October 1981 to 31 March 1982. The Labour majority on the GLC so resolved on 21 July 1981 in implementation of a commitment in their election manifesto of May 1979 the purpose of which was to make certain improvements, and to reduce fares on buses and underground trains by, broadly, 25%. Strictly, only 3.6p in the £ was required by this purpose, the remaining 2.5p being to meet a deficit incurred by the previous Conservative administration.

In English law there are two grounds on which the exercise of powers by a public authority can be challenged. Those powers are conferred by Act of Parliament and are, more or less precisely, defined by the Act. It an exercise is held by the courts to fall outside that definition, then it is illegal and void. But, in addition, even if a public authority is acting within its powers, an exercise may be held to be illegal and void for a variety of reasons, invented over the years by the courts, and including the grounds that the exercise was unreasonable or that the authority did not take into account relevant considerations or took into account irrelevant considerations. Those grounds are highly imprecise and have become a happy hunting-ground for lawyers and judges. Whether the courts will decide that one or other of these grounds applies to the case in front of them is anyone's guess.

Bromley brought this action, lost in the High Court, and won in the Court of Appeal where Lord Denning presided. The GLC appealed to the Law Lords who rejected the appeal.

The five Law Lords

Unlike most countries, it is the frequent English practice for each of the judges (usually three in the Court of Appeal, five in the House of Lords) to deliver a separate judgement. No doubt they confer with one another but it can happen that they arrive at the same result on quite different grounds. This does not, to speak mildly, either make for certainty in the law or help to persuade the losing side that English justice is rational. This case is an excellent example of judges (in the Court of Appeal and House of Lords) disagreeing with one another while arriving at the same conclusion. So it is both necessary and instructive to look at the reasons given by the five Law Lords.

The relevant statute is the Transport (London) Act 1969. Under the previous legislation the London Passenger Transport Board had been the responsible authority. It had been required to balance its revenue account over the years but the Minister of Transport could make grants to meet deficits. The GLC had no place in this structure but the Act of 1969 transferred the powers of the LPTB to the GLC and its subordinate: the London Transport Executive. The general duty of the GLC is stated to be to develop and encourage measures which will promote the provision of 'integrated, efficient and economic transport facilities and services for Greater London'.

Lord Wilberforce is the most senior of the Law Lords. He began his judgement by considering the meaning of the word 'economic' about which there was, throughout all the proceedings, much argument. Unlike some of the other judges, Wilberforce adopted an interpretation broadly favourable to the GLC ie, 'making the most effective use of resources in the context of an integrated system'.

Section 3 of the Act of 1969 gives the GLC power to make grants to the LTE 'for any purpose' and it was generally accepted that this could include grants for revenue as well as capital purposes.

At this point Wilberforce introduced one of those vague concepts, much beloved by judges who want to attach special and limited meanings to general words. The GLC, he said, owed 'a duty of a fiduciary character' to its ratepayers, as well as to transport users. For good measure, Wilberforce noted that 62% of the rates came from commercial ratepayers. The relevance of this was not made clear.

Under the Act of 1969, the LTE is to act in accordance with principles laid down by the GLC with due regard to efficiency, economy and safety of operation. Wilberforce said it would be reading 'economy' too narrowly to treat it as requiring the LTE to try to make a profit. But it did, he said obscurely, 'prevent the LTE

from conducting its undertakings on other than economic considerations'. Section 7 of the Act puts duties on the LTE. This section is too long to be quoted in full but Wilberforce summarised the contrary arguments about its meaning thus. Bromley argued that the section meant the LTE must run its undertaking on business principles and so far as practicable must meet its revenue charges out of fares and other *internal* (ie, excluding grant) revenue; that the power of the GLC to make grants in aid of revenue must be exercised with due regard to the LTE's duty, so far as practicable, to balance its own accounts; that the GLC could not allow or encourage the LTE to abdicate any duty, or renounce any effort, to avoid a deficit. The GLC and LTE argued that the LTE in putting forward fare proposals might take account of a prospective grant on revenue account from the GLC and was not limited to internally generated revenue alone.

Wilberforce recognised that there had been for some years political discussion as to whether, and to what extent, public transport, especially in capital cities, should be financed as a social service. But he was 'unable to see' from the Act of 1969 that Parliament had then 'taken any clear stance' on the question. He concluded that it was clear that neither the LTE nor the GLC could have power totally to disregard any responsibility for ensuring, so far as practicable, that outgoings were met by revenue and that the LTE ran its business on economic lines.

Lord Diplock

Lord Diplock's approach was quite different. He regarded section 1 with its reference to the duty of the GLC to develop 'economic' services as the crucial provision. He explicitly rejected the view that the LTE was bound to maximise the income generated from the operation of its undertakings at least to the extent necessary to avoid an operating loss and build up a general reserve. Instead he read the Act to mean that the LTE must operate the services efficiently, economically (in avoiding overmanning and the running of excessive numbers of buses and trains having regard to the number of users) and safety. The LTE, in his view, was not bound to do its best to cover the expenses of its operations from fares. Section 7, which so influenced Wilberforce in his conclusion, was not regarded by Diplock as sufficient in itself to make the GLC precept invalid. Instead he fell back on the 'general fiduciary duty' which, he said, included a duty not to expend monies 'thriftlessly'. At this point he emphasised one aspect of the whole matter which Wilberforce disregarded wholly: that the GLC decision to reduce fares entailed a loss of rate support grant from the Government amounting to some £50m. (This was the operation of Heseltine's punishment for what he deemed overspending). The decision which led to the loss of this £50m was, said Diplock, clearly a thriftless use of monies obtained by the GLC from ratepayers and a deliberate failure to deploy to the best advantage the full financial resources available to it by avoiding any action that would involve forfeiting grants from central government funds.

So Diplock founded his decision not primarily on the terms of the Act of 1969 but on this 'fiduciary duty' imported from case law and applied to the GLC's wholly legitimate attitude to government policy.

A business venture

Lord Keith decided similarly, this time basing himself on a case in the middle fifties involving Birmingham Corporation where a ratepayer persuaded the court of Appeal to declare invalid a concessionary fare scheme which enabled old age pensioners to travel free on buses in offpeak periods. This 'loony' decision (as Frank Dobson MP rightly called it in the debate on 22 December 1981) invalidated hundreds of similar schemes in other parts of the country and Parliament immediately passed a statute reversing it. The 'principle' of the Birmingham case, quoted by Keith, was that the transport undertaking was to be run 'as a business venture' and fares fixed 'in accordance with ordinary business principles'. He concluded that it was contrary to the LTE's duties under the Act to submit proposals which involved an arbitrary reduction in the existing general level of fares; nor could the GLC approve such proposals.

Lord Scarman also relied on the Birmingham case and construed section 1 of the Act of 1969 in the light of the principle of that case, with 'the fiduciary principle' thrown in for good measure. However, like Wilberforce, he found section 7 critical. He agreed that the LTE could treat GLC grant as part of LTE revenue account. But he argued, mysteriously, that nevertheless the view that GLC grant should be excluded from LTE revenue account 'captures the spirit' of section 7. This spirit was that the LTE must, under the direction of the GLC, conduct its operations so as, so far as practicable, to avoid loss. The GLC might, indeed, make grants not only for past, but also for anticipated, losses. But the Act did not entitle the GLC and the LTE 'to accept as an objective of policy' a deficit upon trading account merely because it best met what they regarded as the interests of the travelling public and 'transport need'. This was to disregard the duty owed to ratepayers. 'Loss may be unavoidable: but it does not thereby become an acceptable object of policy'. So section 7 require the LTE to follow, so far as practicable, a financial policy of 'break even'.

Finally Lord Brandon based himself on the narrow ground that the LTE must, in so far as it was practicable for them to do so, balance expenditure with self-generated income and the GLC could only make income grants in order to assist the LTE to do so to the extent that it was not practicable for the latter to do so on their own. (The Ernie Wise syntax is his, not mine).

They are remarkably powerful and they are not a collection of muddleheaded old buffers out of touch with the real world

The functions of the judiciary

So much for what was said.

The political Left have a regrettable tendency to jump up and down with a Thurber-like frenzy, all the more unconvincing for being transparently synthetic, when the establishment behaves as the establishment always behaves. Highpitched complaints that the Law Lords had delivered 'political' judgements show a simple misunderstanding of the role of the judiciary in this country. That role and the system that surrounds it are of much greater importance than the idiosyncrasies of particular judges. The judiciary are expected to perform certain functions and have the means to do so. They are remarkably powerful and they are not a collection of muddleheaded old buffers out of touch with the real world. Sometimes, indeed, they show unusual ignorance but not more than you or I when asked to comment outside our experience. They certainly lack omniscience, along with the rest of us, but most of the time they know what they are at. They certainly know more about the working of the political establishment on its higher levels, just as they know less about its working at the grassroots, than we do. They can talk the language of senior civil servants and Ministers of the Crown. They would be unlikely to understand what was actually happening at a ward meeting of the local Labour Party even though they could follow the spoken proceedings.

One of the things they know about is that Acts of Parliament are

often imperfect instruments for conveying meaning. This is sometimes because events are not foreseen when bills are being drafted, sometimes because ambiguities are left deliberately as compromises, sometimes because words themselves are not wholly efficient as vehicles for expressing ideas. Judges frequently get cross about this. But blaming the draughtsman is often no fairer than shooting the pianist. And judges derive much of their power from the imperfections of the draughting.

Political answers

Judges must give meaning to words and phrases. They must also decide whether the facts before them fall within the statutory rule as interpreted by them. And then they may inquire whether there are any other grounds on which the activities of the public authority whose powers they are considering should be declared illegal. This is often expressed, though not in the case we are considering, as taking into account the public interest. It is in this sense that the judiciary are powerful because a phrase like the public interest is so imprecise that a great variety of different meanings can be attributed to it. Similarly, as we have seen, judges use phrases like 'owing a fiduciary duty', or having regard to 'the spirit of the Act'. What does the duty to act 'economically' mean? Are grant monies part of revenue? The answers to all these and similar questions are, in my vocabulary, political because they involve the making of political choices. When Diplock said that the Law Lords were 'not concerned with the wisdom or indeed the fairness of the GLC's decision to reduce by 25% the fares charged' he dug his own trap. I don't suppose the judges asked if the GLC were acting foolishly. But they or some of them certainly had in mind that the GLC had acted unfairly. And I am not clear what Diplock's 'thriftlessness' is if it is not unwise and politically unacceptable (to him).

So also Wilberforce made a political judgement when he said that the GLC and the LTE must run London transport on 'business lines'. So did Scarman when he decided there had been the breach of a fiduciary duty. So did Keith with his 'business principles'. Only Brandon managed to find an interpretation so narrow that it could be said to be value free. And had the other Law Lords decided in the opposite direction, their judgements would have been no less political.

Diplock thought the language of the 1909 Act was sometimes 'opaque and elliptical'. He continued: 'Its lack of clarity *is demonstrated* by the fact that although the House (ie, the Law Lords) has reached a unanimous conclusion that, taken as a whole, the language of the Act leads *ineluctably* to the conclusion, that the GLC had acted illegally, he disagreed with the other Law Lords on the meaning of some provisions of the Act. This suggests the existence of hidden hands leading their Lordships, albeit by different routes, to the same inescapable conclusion. The truth is that they all came to the same political decision: that the GLC and LTE had acted unfairly to London ratepayers.

had the other Law Lords decided in the opposite direction, their judgements would have been no less political

In the debate in the House of Commons on 22 December 1981, George Cunningham said: 'Each of the five judgements rambles over the territory in what can only be called a head-scratching way, making it impossible for the consumer of the judgement to know at the end just what the law is held to be, except negatively, and then only negatively on a few points. When one puts the five judgements together, the effect is chaos'.

This points to a major weakness in the English system of adjudication at the higher levels. No doubt there are conferences of some sort between their Lordships but too often, as in this case, no attempt seems to be made to produce a rational coherent set of principles or, if there is no unanimity, two sets of alternative principles.

The most serious consequence

The most serious consequence of the judgements in this case is that public authorities of all kinds, including Ministers, will be even more uncertain of what they may or may not do. 'Fiduciary duty', 'reasonableness', 'businesslike principles' and the rest provide no kind of guide to conduct. The courts have in recent years chosen to venture more and more deeply into political battlegrounds and are in danger of becoming casualties in the process. And because, by their education, training and class, they exercise their powers of interpretation in accordance with a particular code and a particular set of values, they are becoming more and more distrusted by those having other codes and values. Their intervention is rooted in particular political beliefs so that, for example, in this case they seem to have been unable to take any other view.

In practice they had at least two other possible choices. One was to have said that Parliament had by statute vested certain political powers in the hands of the GLC and the LTE and that, unless those authorities could be shown to have acted corruptly or in bad faith, the way they exercised those powers was for them, as politically responsible bodies, to decide. There would be no logical or legal difficulty in so interpreting the Act of 1969 and to do so would have been in accordance with the good principle that, so far as possible, political questions (especially when those questions divide political parties) should be left to politicians and the electorate.

Alternatively, the Law Lords could have really tried to act like politicians in which case they would have talked about social cost and social benefit to the community of a cheap fares policy. This no doubt is what the Supreme Court of the USA would have done.

For myself I would prefer judges to be limited in their political role. But acting as they do, making short term political judgements without showing any awareness of their consequence, following instincts which seem naturally to eschew the raising of additional revenue for social gain, both we and they get the worst of all worlds.

I confess I had thought that the Law Lords would probably in this case, following their policy in the recent industrial law cases (especially the steel strike decision), have refused to intervene in the political dispute between Conservative and Labour in London government. I was wrong. And the moral seems to be that the great wave of judicial interventionism which first lifted its snowy head some twenty years ago is still rolling forward. Who knows what it might not seek to submerge if some future left wing government applies more generally even the moderate measure of Ken Livingstone's socialism.