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Judgment and discretion revisited: pedantry or substance?

1. In a 2000 article I discussed in this journal the distinction between the exercise of judgment and the exercise of discretion as different types of judicial decision-making.[1] In 2001 I expanded this treatment in a book.[2] I have also published other recent articles on the topic, which need not be detailed. In the 2004 case of ***Drury***[3] Ward LJ, in an interesting obiter dictum, called the distinction between judgment and discretion 'pedantic', which suggests I have been wasting my readers' time and my own. This article examines the question.

The decision in *Drury*

2. I begin with a detailed examination of the Court of Appeal decision in *Drury*, with its interesting obiter dictum. The case offers a model example of the exercise of judicial judgment (as opposed to discretion). It concerned the court's jurisdiction to grant relief in respect of trespass to land owned by the respondent, namely Fermyn Woods and 30 other parcels of woodland within a 20-mile radius thereof. The appeal was by Angela Drury against an order made under CPR r 55 against persons unknown by Judge Waine, sitting as a judge of the Queen's Bench Division. At her request, Angela Drury was added as a named defendant after the making of the order. The order was that the defendants give possession of the said land to the respondent forthwith. The evidence showed that certain travellers including Angela Drury were in occupation of Fermyn Woods and that, based on the previous history, there was cause to fear that similar trespasses (not necessarily by the same persons) might follow in the future on one or more of the 30 other specified woodlands. Judge Waine 'delivered no judgment other than to state that, in the light of the history of trespass upon the respondent's other woodlands within a 20-mile radius of Fermyn Woods, an order relating to them was fully justified'.[4] Here the ancient remedy of a *quia timet* injunction is relevant. Wilson J cited[5] the following description from ***Snell's Equity***[6] of the nature of this form of relief:

> Although the claimant must establish his right, he may be entitled to an injunction even though an infringement has not taken place but is merely feared or threatened; for 'preventing justice excelleth punishing justice'. This class of action, known as *quia timet*, has long been established, but the claimant must establish a strong case; 'no one can obtain a *quia timet* order by merely saying '*Timeo*' [I fear]'. he must prove that there is an imminent danger of very substantial damage . . .'

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3. Two questions arose: first, the exact nature of the court's jurisdiction to issue orders such as that made by Judge Waine; second, the way the jurisdiction is to be exercised. It is on

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[1] F. A. R. Bennion, 'Distinguishing judgment and discretion' [2000] P.L. 368.
[2] F. A. R. Bennion, *Understanding Common Law Legislation* (Oxford University Press, 2001), chaps. 13 and 14.
[3] *Drury v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 200, [2004] 2 All ER 1056, at [44].
[4] Paragraph [9], *per* Wilson J.
[5] At paragraph [20].
[6] 30th edn, 2000, p 719, paragraph 45-13.

the second question that the distinction between judgment and discretion arises; but the nature of the jurisdiction needs to be examined first.

4. *Nature of the jurisdiction* The jurisdiction in question empowers the court to grant a possession order *in rem* to an owner of specified land in respect of *apprehended* trespass to that land. Although granted against a named person, because it is a real remedy in equity it operates also against any other person who, while the order is in force, trespasses on any part of the specified land. Paradoxically, an order under this jurisdiction can be made only where the named person is, or has recently been, a trespasser on some other part of the claimant's land. The following questions concerning the nature of the jurisdiction arose in *Drury*:

   1. Can the jurisdiction be exercised only in relation to land the defendant is currently occupying?
   2. If the claimant fears that the defendant will decamp to another area of land of the claimant's must the claimant apply for a specific injunction relating to the latter land?
   3. In such cases would the equitable *in personam* remedy of a *quia timet* injunction be an adequate remedy?

5. The Court of Appeal returned negative answers to all these questions. It held that the critical issue was 'to identify the relevant criteria for delimiting the territorial extent of a possession order',[7] and that the nature of the jurisdiction led to the following conclusions:

   A. The possession order could extend to the whole area of Fermyn woods even though the defendants trespassed only on part of it. (This followed a ruling in *University of Essex v Djemal*[8]).
   B. So far as the other land was concerned 'the *in rem* nature of the order, which means that the order takes effect against all persons found on the land, whether or not they are defendants in the proceedings, continues to reinforce a cautious approach to defining the area covered by it'.[9]
   C. It is a 'legitimate, incremental development' of the ruling in *University of Essex v Djemal* that the possession order can extend beyond the particular area of the actual trespass to other areas owned by the claimant.[10]

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   D. Such an extension should be effected in relation to other land of the claimant only if a *quia timet* injunction would be granted in respect of that land.[11]

6. *How the jurisdiction is to be exercised* In this article we are concerned only with paragraphs B to D of the above. The jurisdiction is to make a possession order *in rem*, taking a cautious approach, in relation to other land in the vicinity owned by the claimant if, on the evidence before the court, a *quia timet* injunction *in personam* would be granted in respect of that land. A way of treating the situation is to apply the doctrine of the factual outline and the legal thrust.[12] A legal rule can be expressed in terms which show that the operation of the rule (the legal thrust) is triggered by the existence of certain facts, which can be indicated in outline form. Any actual facts which fall within the outline trigger the legal thrust. In the present instance the legal thrust is the making of a possession order. The factual outline is a state of affairs where-

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[7] Paragraph [29], *per* Mummery LJ.
[8] [1980] 1 WLR 1301 at 1304. The ruling was cited by Mummery LJ in *Drury* (see paragraph [28]).
[9] Paragraph [32], *per* Mummery LJ.
[10] Paragraph [35], *per* Mummery LJ.
[11] Paragraph [20], *per* Wilson J. The other judges laid down a less precise test, but did not dissent from this convenient formulation.
[12] See F A R Bennion, *Statutory Interpretation* (4th edn 2002), sections 143 (factual outline) and 144 (legal thrust).

(i) the land in question is liable to be trespassed on in future by the defendant; and

(ii) the claimant owns other land which is currently being trespassed on by the defendant.

7. Paragraph (i) poses the crucial question. The term 'liable' must be assessed by reference to what is required for the grant of a *quia timet* injunction. On this Ward LJ cited Lord Upjohn: it can be granted 'only where the plaintiff shows a very strong probability on the facts that grave danger will accrue to him in the future . . . It is a jurisdiction to be exercised sparingly and with caution, but, in the proper case, unhesitatingly'.[13]

8. So the court has to decide whether the necessary 'very strong probability' has been established by the claimant. There needs to be an assessment of the proved facts to determine whether this is so or not. They have to be weighed and balanced. How do the scales fall out? Is the answer yes or no? This is where I need to examine the interesting obiter dictum by Ward LJ referred to above. Here it is in full:

> Whether or not to make an order in respect of all or some [of the claimant's land] is a matter of *judgment*. (I prefer to say 'judgment', rather than 'discretion', but ***the process is the same*** and the distinction pedantic).[14]

9. Is the process really the same? First I need to examine a different question: does the distinction matter? Some might think it enough to say judges ought to get things right. Why did Ward LJ prefer to say 'judgment'? Surely because

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he preferred to get things right. It would be whimsical to express a preference if the process was really the same and the distinction did not matter. We are uncomfortable if judges act merely upon a whim. When Ward LJ says that the distinction is pedantic is he accepting that there is a distinction but implying that he prefers people not to recognise and act on it? But he acted on it himself. To say a distinction is pedantic implies that people who respect it are pedants, a term of opprobrium. The dictionary says a pedant is 'one who lays excessive stress upon trifling details of knowledge'.[15] Is this a trifling detail? Am I laying excessive stress upon it? Ultimately that must be a matter for the reader's judgment. It might be thought decisive if I could produce instances where the distinction really did make a difference. I will now examine some other recent cases.

R v Flint

10. In *R v Roderick Flint*[16] the judgment of the Court of Appeal was given by Judge LJ. The appellant had been convicted of three specimen counts of rape and two specimen counts of gross indecency with a child. The complainant, the appellant's stepdaughter, alleged that she had been subjected to systematic sexual abuse and repeatedly raped by the appellant from 1979 (when she was seven years old) until 1988. Between 1991 and 1995 the complainant and the appellant had lived together and shared a full consensual sexual relationship but the prosecution alleged that her behaviour was consequential on 'grooming', that she was passive and scared of what the appellant might do. The appellant asserted that the complainant had initiated the sexual relationship between them when she was about 18 and that her complaints were false and were motivated by a desire for revenge after he had brought the relationship to an end.

11. The trial judge had considered the Youth Justice and Criminal Evidence Act 1999 s 41 and concluded that the fact of the adult relationship could be adduced before the jury.

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[13] *Redland Bricks Ltd v Morris* [1970] AC 652, *per* Lord Upjohn at 665. The citation by Ward LJ is in *Drury* paragraph [41].
[14] *Drury* paragraph [44]. The first emphasis is Ward LJ's; the second mine.
[15] *Oxford English Dictionary* (2nd edn 1989), meaning 2.
[16] [2005] EWCA Crim 493.

However he had refused to allow evidence to be adduced or questions asked of the complainant about some photographs and two videotapes. Judge LJ said of the photographs:

> Some photographs taken when the couple were on holiday were exhibited . . . these photographs show the [adult] complainant posing in a number of different ways for the appellant . . . one impression given by them may very well be that the complainant was totally at ease and entirely happy, and indeed thoroughly amused when the appellant took these photographs of her, in one case topless running towards him on the beach, and in another posing naked with her jeans pulled halfway down her thighs with her back to him while leaning forward against a wooden fence, with her face turned towards the appellant's camera.[17]

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12. Of the videotapes Judge LJ said:

> The video tapes were self-made by the complainant as an adult . . . They were divided into twelve parts, some showing the complainant, in effect stripping for the appellant, for use in their lovemaking, and some pornographic, showing among other things, the complainant masturbating, with an accompanying soundtrack in which her voice can be heard suggesting in coarse language how much she would prefer to be having sexual intercourse with the appellant. Sir Jonah Walker-Smith for the appellant suggested that the complainant is entirely happy during the striptease parts of the video, and thoroughly enjoying what she is doing in the pornographic parts. The Crown accepts that she 'appears' to be happy, and 'appears' to be enjoying herself.[18]

13. The question was whether the trial judge was right to rule that section 41 of the 1999 Act precluded evidence and cross-examination regarding the photographs and videotapes. The relevant provisions of section 41 are-

> (1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—
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> (a) no evidence may be adduced, and
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> (b) no question may be asked in cross-examination,
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> by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.
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> (2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—
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> (a) that subsection (3) or (5) applies, and
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> (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.
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> (3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—
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> (a) that issue is not an issue of consent; or
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> ….
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> (4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to

[17] Paragraph [18].
[18] Paragraph [17].

establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

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(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

14. Of the trial judge's reasons for excluding the photographs and videotapes Judge LJ said:

> [The judge] said that the videos were made because the complainant was under the appellant's influence and she did so in the hope that the sexual part of the relationship 'might not continue'. Although the judge recorded the appellant's case that the complainant made the videos voluntarily, he concluded that they would not advance the defendant's case and that they could not be used on the issue of credibility. His conclusion, of course, assumed that the complainant's evidence about the nature of the adult relationship was true, and failed to recognise that the videos and photographs might serve to demonstrate that it was not.[19]

15. Judge LJ held that the crucial issue was whether the trial judge's decision on whether or not to admit the photographs and videotapes was an exercise of discretion or an exercise of judgment. He said:

> It is sometimes loosely suggested that the operation of s 41 involves the exercise of judicial discretion. In reality, the trial judge is making a judgment whether to admit, or refuse to admit evidence which is relevant, or asserted by the defence to be relevant. If the evidence is not relevant, on elementary principles it is not admissible. If it is relevant, then subject to s 41(4) and assuming that the criteria for admitting the evidence are established, in our judgment the court lacks any discretion to refuse to admit it, or to limit relevant evidence which is properly admissible. In short, once the criteria for admissibility are established, all the evidence relevant to the issues may be adduced.

16. Accordingly the convictions were quashed and a new trial ordered. The court held in effect that despite the use of 'may' in s 41(2) the court was under an imperative duty to give leave where in its judgment the relevant factual conditions were satisfied, and that it had no discretion in the matter. The result would have been otherwise if the judge had indeed possessed a discretion.[20]

Campbell v South Northamptonshire DC

17. In *Campbell and others v South Northamptonshire District Council and another*[21] the Court of Appeal were required to consider regulation 7 of the Housing Benefit (General) Regulations 1987[22] as amended by regulation 3 of the Housing Benefit (General) Amendment (No 2)

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[19] Paragraph [21].
[20] Compare *Julius v Lord bishop of Oxford* (1880) 5 App Cas 214 at 223, 241.
[21] [2004] EWCA Civ 409, [2004] 3 All ER 387.
[22] SI 1987/1971.

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Regulations 1998[23]. The relevant part of regulation 7 ('the non-commercial exception') reads:

> (1) A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where –
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> > (a) the tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis . . .
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> (1A) in determining whether a tenancy or other agreement pursuant to which a person occupies a dwelling is not on a commercial basis regard shall be had inter alia to whether the terms upon which the person occupies the dwelling include terms which are not enforceable in law.

18. Where the non-commercial exception applies the effect is to deny the tenant the right to housing benefit. The appeal was from the finding of a social security and child support commissioner that the four appellants were not entitled to housing benefit because the non-commercial exception applied to their tenancies. Jacob LJ described the tenancies as follows:

> All the appellants are members of the Jesus Fellowship Church. They have become what are called 'Style Three' members. This means that they have agreed to live communally, pooling their income in a common purse, and giving all their capital to the Church Trust. They occupy properties owned by the Church under agreements of various types. These agreements are genuine legal agreements, not shams. There are real legal liabilities for rent.[24]

19. The original tribunal, upheld by the commissioner, had set out in what Jacob LJ called a model way its reasons for holding that the non-commercial exception applied, first identifying the 'commercial' factors and then those which were 'non-commercial'.[25] It did not take any account of the European Convention on Human Rights (ECHR) or the Human Rights Acts Act 1998. The main argument for the appellants was that in deciding whether or not the non-commercial exception applied the tribunal should have taken into account the following provisions of the ECHR: art 8 (right to respect for private and family life), art 9 (freedom of thought, conscience and religion), art 14 (prohibition of discrimination), and art 1 of protocol I (protection of property). Jacob LJ said of the argument put forward by counsel for the appellants:

> His argument is that the overall evaluation of whether there is a *commercial basis* involves taking into account a number of primary detailed facts – as the tribunal so clearly set out. Thus the question is analogous to the exercise of a discretion where one weighs relevant factors. In his skeleton argument he actually went so far as to suggest that the determination of

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> whether or not there was a commercial basis was an exercise of discretion. Perhaps recognising that would not do (and it obviously will not) in oral argument he shifted his position. He said the overall evaluation 'had a lot in common' with the exercise of a discretion in which one weighed a number of factors. And, he submitted, in weighing the various factors, the weight to be given to those factors the reason for which was religious belief should be nothing or very slight. This was because the Convention was engaged - the factors were manifestations of the belief. To take into account factors due to manifestation of religion was to take into account factors which were not lawfully relevant.[26]

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[23] SI 1998/3257.
[24] Paragraph [2].
[25] See paragraph [6], where the tribunal's full reasoning is set out.
[26] Paragraphs 10 and 11. Emphasis in original.

20. Jacob LJ rejected this argument. He said the issue of whether the non-commercial exception applied was one of fact. True it involved weighing a number of factors, but everything in the evaluation was purely factual. The ECHR cannot and does not purport to change facts or make evidence relevant to a factual inquiry inadmissible. The tenancy arrangements were non-commercial for religious reasons. As a matter of fact, religious, or indeed any other, reasons could not turn what was non-commercial into what was commercial.[27]

21. Peter Gibson LJ agreed. If the tribunal were indeed given a discretion, then undoubtedly it must be exercised conformably with the ECHR. However, it was plain that regulation 7 (1)(a) gave no discretion at all. What had to be decided was a pure question of fact as to whether or not the tenancy agreements were on a commercial basis. If a relevant factor had some relation to the appellants' religious beliefs, it was not for the tribunal to leave that factor out of account, for that would be to distort the statutory test.[28] Here the judge was plainly contrasting discretion and judgment. The question whether a factual test is satisfied is one of judgment, not discretion. This was a vital distinction here, because if the question had been one of discretion account would have had to be taken of what the ECHR and the Human Rights Act 1998 required. As it was, these requirements did not operate.

Conclusion

22. In another recent case Lightman J showed that he clearly understood the distinction between discretion and judgment when he said that the Wildlife and Countryside Act 1981 s 28(1) 'affords scope for judgment: it affords no scope for discretion'.[29] Lord Steyn recently said the grant of a declaration 'is not an entirely discretionary matter: rather it involves an exercise of judgment'.[30] Lord Steyn neatly showed the distinction between judgment and discretion when he said of the discretionary remedy of an injunction conferred by the Town and Country Planning Act 1990 s 187B-

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> The critical provision is sub-s (2) which provides that the court ***may*** grant such an injunction ***as the court thinks appropriate*** for the purpose of restraining the breach. 'May' does not mean 'shall'. The notion of 'appropriate' relief necessarily involves an exercise of judgment weighing the factors for and against the grant of an injunction'.[31]

23. Mummery LJ has pointed out that Coke 'warned the court against substituting the crooked cord of discretion for the golden metwand of the law'.[32] This illustrates the public's preference for firm rules importing the exercise of judgment over the grant of discretionary powers. As Sir Courtenay Ilbert said: 'Englishmen prefer to be governed (if they must be governed) by fixed rules rather than by official discretion'.[33]

24. Judgment and discretion are difficult concepts to pin down in a few words. I suggest the following by way of summary. Judgment involves judicial assessment of a fact-based situation, while discretion involves judicial selection from a range of two or more available options. With judgment there is notionally only one 'right' answer, and the judge has conscientiously to work out what in his opinion that objective, unique answer is. With discretion on the other hand there are always two or more 'right' answers and the judge is

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[27] See paragraph [13].
[28] See paragraph [60].
[29] *Fisher and others v English Nature* [2003] EWHC 1599 (Admin), [2003] 4 All ER 366, at [18]-[21].
[30] *R (on the application of Rusbridger and another) v Attorney General* [2003] UKHL 38, [2003] 3 All ER 784, at [20].
[31] *South Bucks District Council v Porter, Chichester District Council v Searle and others, Wrexham County Borough Council v Berry* [2003] UKHL 26, [2003] 3 All ER 1, at [50]. Emphasis in original.
[32] *Pelling v Families Need Fathers Ltd* [2001] EWCA Civ 1280, [2002] 2 All ER 440, at [20].
[33] *Legislative Methods and Forms* (Oxford University Press, 1901), p. 209.

required to choose between them. Here 'right' does not mean that any competent judge would always arrive at the same answer. Rather it means that, while 'right' answers may differ with different judges, a given answer is acceptable as 'right' only if it lies within what is the permitted range in the instant case, that is the range which an appellate or reviewing court would allow. In the case of statute this range is indicated by the rules, principles, presumptions and canons laid down for statutory interpretation, including the compatible construction rule imposed by the Human Rights Act 1998 s 3(1). In any case the rules are also relevant which govern the form of appeal or review which is available in the instant case.

25. So the conclusion is that, with respect, Ward LJ was wrong to say in his interesting obiter dictum that with regard to judgment and discretion the process is the same. On the contrary it is fundamentally different, and the difference matters. It can require evidence to be admitted in the one case but not in the order. It can mean that the ECHR and Human Rights Act 1998 apply in the one case and not in the other. It has other effects. In the past, as I have shown at length elsewhere, courts have tended to muddle the two concepts. Now it seems the distinction is becoming judicially recognised, accepted and acted upon.

Francis Bennion

Updating Material.

The above text shows the article as originally published, except that numbering has been added. The following are amendments the author wishes to make in the light of later developments.

After paragraph 9 insert-

Giles v Law Society

9A. In *Giles v Law Society* (1996) 8 Admin LR 105 at 118-119 Sedley LJ said regarding an application under the Solicitors Act 1974 Sch 1 para 6(4): '. . . it is by common consent a matter for the court's judgment (I prefer not to use the word discretion in this context) whether it should direct withdrawal . . .' (referred to in *Sritharan v Law Society* [2005] EWCA Civ 476, [2005] 4 All ER 1105, at [39]).

AWG Group v Morrison

9B. In *AWG Group Ltd and another v Morrison and another* [2006] EWCA Civ 6, [2006] 1 All ER 967, the Court of Appeal, Civil Division, ruled that whether a judge should recuse himself on the ground of bias is a matter of judgment not discretion. Mummery LJ said at [19], [20]-

> 'If the judge had a discretion whether to recuse himself and had to weigh in the balance all the relevant factors, this court would be reluctant to interfere with his discretion, unless there had been an error of principle or unless his decision was plainly wrong. As already indicated however, I do not think that disqualification of a judge for apparent bias is a discretionary matter.'

Obviously if it is not a discretionary matter it must be a matter of judgment, though Mummery LJ did not say this expressly.