

empower the Minister to revoke a licence. For him to attempt to do so simply because it would generate additional revenue for the Treasury was a 'misuse of power'.³⁷

Congreve might broadly be construed as supporting the notion that 'misuse of power' is a distinct sub-category of the illegality doctrine. As such, it would demand that courts always be willing to inquire into the motives which underlay the impugned decision. That inquiry was unproblematic in *Congreve* itself, as the Home Secretary candidly stated that his purpose was to raise money. In other cases, where the defendant was less forthcoming, an inquiry into motives could lead the court into rather delicate political territory. The case might therefore better be construed more narrowly, as an illustration of the simple point that the courts have consistently maintained that governmental powers to levy taxation can only be created by explicit statutory language.³⁸

The uncertainties inherent in the 'four corners of the Act' characterisation of illegality are further magnified when we recall the judicial presumption that many (if not most) statutory provisions can properly be regarded as 'always speaking'.³⁹ This point is nicely illustrated—in respect of a rather prosaic issue—by the judgment of the House of Lords in *Akumah v LB of Hackney*.⁴⁰ Mr Akumah had repeatedly parked his car on a local council housing estate in breach of the parking scheme that the local authority had established. He had received a good many penalty tickets and eventually his car was impounded. The issue before the court was whether the council derived the power to run such a scheme from s 21(1) of the Housing Act 1985. Section 21(1) was cast in very general terms:

The general management, regulation and control of a local housing authority's houses is vested in and shall be exercised by the authority and the houses shall at all times be open to inspection by the authority.⁴¹

Section 21(1) of the 1985 Act was a re-enactment of a provision first enacted in the 1930s, at a time when very few people owned cars and there was no need for councils to control parking. Seventy years later, car parking had become an important issue in many cities, but Parliament had not altered the text of the original provision to give local authorities express powers to deal with the matter.

The interpretive technique adopted by the House of Lords in *Akumah* might be seen as either teleological or always speaking in nature:

21 [I]t is inherent in the management of houses in a housing estate that parking on the estate should be regulated. Unregulated parking could in many housing estates lead to congestion of the roads and the unavailability of places for residents to park their cars if other persons can park there at will. It is also important to ensure access for service and emergency vehicles to the houses on the estate. Those factors are clearly capable of affecting the amenity of life for the residents and their access to and enjoyment of their houses and flats on the estate. I find no difficulty in accepting that safeguarding and improving that amenity and facilitating that access and enjoyment are proper functions of a council managing a housing estate.⁴²

As in *Fulham* however, it is difficult to fashion a compelling argument to support the proposition that the House of Lords could not have equally credibly come to the opposite

³⁷ *Ibid.*, at 651.

³⁸ Cf *Roskill I.*, *ibid.* at 657–658: 'If the Secretary of State wishes to put his position in this respect beyond all argument, he should seek the necessary Parliamentary powers—if he can obtain them'; and Denning at 652: '[The Home Office letters] were an attempt to levy money for the use of the Crown without the authority of Parliament; and that is quite enough to damn them: see *A-G v Wilts United Dairies*' (1922) 38 TLR 781, HL.

³⁹ See 'Complicating the literal rule: (most) statutory provisions are "always speaking"' pp 64–65 above.

⁴⁰ [2005] UKHL 17, [2005] 1 WLR 985.

⁴¹ *Ibid.*, at 993; per Lord Carswell (for a unanimous court).

Rights Critical Introduction

Stuart McAnulla



Rights Critical Introduction:

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