Lord Denning in Perspective

*Gilbert Kodilinye**

Lord Denning – The Judge and the Law
Edited by J. L. Jowell & J. P. W. B. McAuslan
[London: Sweet & Maxwell, 1984. xxxv & 486 pp. Hardback £25.00]

This volume of essays is perceived by the editors as an assessment of Lord Denning's contribution to the development of English Law during his 38 years on the Bench. Legal scholars in the United Kingdom have traditionally been preoccupied with the exposition and analysis of legal principles and, unlike their North American counterparts, have generally shown little interest in assessing the contributions made by individual judges to the development of the law. The editors express the hope that this book will set a new trend, and that other authors will be encouraged to produce similar volumes on other distinguished and long-serving judges of our time. In the present volume, a team of prominent academic lawyers has surveyed Lord Denning's judgments in the fields of Contract, Tort, Equity and Trusts, Family Law, Land, Planning and Housing Law, Administrative Law and Labour Law, and there are additional chapters on Lord Denning's approach to Human Rights, his role as Jurist and his influence on Commonwealth Law.

It would be impossible in a review of normal length to comment in any detail upon every area covered by this volume. It is proposed, therefore, to look at four 'core' areas in which Lord Denning's influence has made the greatest impact, namely Contract, Tort, Equity and Trusts and Land Law.

The Chapter on Contract and Tort is contributed by Professor P. S. Atiyah. He points out that any survey of Lord Denning's contribution in this area will initially require an account of the development of the common law throughout the whole period since the end of the Second World War. It is indeed astonishing how many fundamental principles of Contract and Tort have been moulded by Lord Denning, and it needed a book of this nature to remind all concerned of the vastness of his influence. The author further emphasises that a survey of Lord Denning's judgments in Contract and Tort will serve to dispel the popular belief that His Lordship's decisions were constantly rejected by his brethren on the

*Lecturer in Law, University of Birmingham

Bench or overturned on appeal. On the contrary, in the majority of cases his views were either followed from the outset or, though initially viewed with suspicion, were eventually vindicated through the judicial process or by legislation.

Starting with the Law of Contract, Lord Denning's imprint can be seen in every area. His best-known contribution is undoubtedly the development of the principle of promissory estoppel which he first enunciated in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*.[1] Professor Atiyah emphasises that Lord Denning never regarded promissory estoppel as being a reliance-based doctrine, but a promise-based one. It was sufficient that the promise was intended to be acted upon and had in fact been acted upon, and there was no need to show that the promisee had acted to his detriment. Another major contribution was the doctrine of fundamental breach which Lord Denning used for many years in his role as champion of the consumer. This may be cited as an example of a "holding operation" which Lord Denning has frequently conducted pending statutory intervention – in this case the Hire Purchase Acts of 1964-1965 and the Unfair Contract Terms Act 1977. In offer and acceptance it was Lord Denning who, in *Entores Ltd.* v. *Miles Far East Corporation*,[2] established the rule that, in determining the time and place of acceptance of an offer, communication of acceptance by telex was to be equated with communication *inter praesentes* and not with postal ones. In another context, that of a council tenant seeking to enforce an alleged agreement for the sale of a council house against a local authority, Lord Denning was able to find a concluded contract on seemingly flimsy grounds, but the decision was overruled by the House of Lords *(Gibson* v. *Manchester City Council).*[3]

This case is an example of the kind of approach for which Lord Denning has often been criticised. It seems that in his determination to support a political policy – that of giving council tenants the right to purchase the freeholds of properties let to them – he was quite ready to ignore the fact that in this case the prospective purchaser had not secured mortgage finance. To hold the contract binding in such circumstances was detrimental both to the council and to the purchaser.

In several other areas of Contract Law Lord Denning has been profoundly influential. In particular, he has sought to loosen many of the traditional bonds which tended to inhibit growth and he has introduced a much-needed flexibility. Some of these innovations have already become established principles; others have yet to be accepted. Instances discussed by Professor Atiyah include: the partial integration of the law of misrepresentation, warranties and negligence *(Esso Petroleum Co. Ltd.* v. *Mardon);*[4] the Court's power to imply "reasonable" terms into a contract *(Liverpool City Council* v. *Irwin);*[5] the concept of inequality of bargaining power *(Lloyd's Bank Ltd.* v. *Bundy);*[6] the equitable power to set aside a contract

1. [1947] 1 K.B. 1301.
2. [1955] 2 Q.B. 327.
3. [1978] 1 W.L.R. 520; [1979] 1 W.L.R. 294.
4. [1976] Q.B. 801.
5. [1976] Q.B. 319.
6. [1975] Q.B. 326.

entered into under a fundamental mistake *(Solle* v. *Butcher);*[7] and the Court's power to award damages for mental upset and inconvenience *(Jarvis* v. *Swan's Tours Ltd.).*[8]

In Tort, being a more fluid area than contract, Lord Denning has had greater scope to develop his public policy ideas, and his influence has been far-reaching. Negligence has always been His Lordship's particular *forte*, and many of his most memorable *dicta* are to be found in negligence cases. Perhaps his greatest contribution in this area was his famous dissenting judgment in *Candler* v. *Crane Christmas & Co.*,[9] which was so triumphantly vindicated 13 years later in *Hedley Byrne & Co.* v. *Heller & Partners*,[10] though the expansive approach to liability for negligent misstatements taken by him in *Candler* contrasts oddly with the restrictive one which he later took, in *Spartan Steel & Alloys Ltd.* v. *Martin & Co. Ltd.*,[11] with respect to recovery for other forms of purely economic loss. Another notable success for Lord Denning was his decision in *Dutton* v. *Bognor Regis U.D.C.*,[12] which opened the door for claims by house purchasers against negligent local authority building inspectors and which was followed by the House of Lords in *Anns* v. *Merton London Borough.*[13] The latter case is also significant in that it finally put the seal of approval on Lord Denning's view – which judges had for a long time rejected – that liability in negligence actions ultimately depends upon public policy, and it serves as an example of what Professor Atiyah describes as "Lord Denning blazing the trail and the House of Lords subsequently giving their approval."[14]

Lord Denning's statements of principle in Tort cases have not always met with approval and he has lost a number of important struggles which he had carried on with his customary zeal. For instance, he failed to overturn the well established rule that the employer's duty to fence under the Factories Act 1961 and its predecessor of 1937 was a duty to keep workers out and not the machinery in, so that a workman could not claim in respect of injuries suffered when a piece of the unfenced machinery escaped and struck him.[15]

Again, Lord Denning's attempt to introduce a "family car" principle in vicarious liability cases was rebuffed by the House of Lords in *Morgans* v. *Launchbury*[16] (though, it may be noted, not because the House disapproved of the principle but because their Lordships felt that any change in the law should be brought about by Parliament, after due investigation and deliberation, and not by the judiciary). And a third example of lack of success by Lord Denning is to be

7. [1950] 1 K.B. 671.
8. [1973] 1 Q.B. 233.
9. [1951] 2 K.B. 164.
10. [1964] A.C. 465.
11. [1973] Q.B. 27.
12. [1972] 1 Q.B. 373.
13. [1978] A.C. 728.
14. At p. 61.
15. *Close* v. *Steel Co. of Wales* [1962] A.C. 367.
16. [1973] A.C. 127.

found in *Cassell* v. *Broome & Co. Ltd.*,[17] where he was sternly rebuked by the House of Lords for refusing, in the Court of Appeal, to follow the rules relating to exemplary damages which had been laid down by the House in *Rookes* v. *Barnard*,[18] an action on Lord Denning's part which the House regarded as unconstitutional.

In his concluding remarks, Professor Atiyah suggests that Lord Denning's innovations have proved more successful in Contract and Tort than in other fields and this may be due at least to two factors. First, since legislation has not intruded in this area to any great degree, Lord Denning has been able to "give full rein to his policy – orientations without having to contend with the often different policy of Parliament."[19] Secondly, in both Contract and Tort Lord Denning has been "fundamentally in sympathy with the underlying trends in the law",[20] for instance the trend towards giving greater protection to the consumer in Contract and the basic ideal that parties who are at fault should be required to pay compensation in Tort.

Lord Denning's work in the area of Equity and Trusts is discussed by Mr D. J. Hayton. Here again the impact of Lord Denning has been considerable, but his judgments have, in general, been less well received than those in Contract and Tort. In a sense, the Chancery judge is in a most uncomfortable position. On the one hand, he must remind himself that the doctrines of Equity are "progressive, refined and improved",[21] that courts of Equity are invested with many broad discretionary powers, and that the underlying philosophy of Equity is that justice should be done between the parties. On the other hand, he must be aware that much of Equity lies within the boundaries of Property Law, and that conveyancers, landowners and all other persons who have interests in property require a high degree of certainty in the law, and that for such persons well settled and clearly defined principles are infinitely preferable to vague, flexible concepts. Many commentators take the view that Lord Denning was too ready to sacrifice certainty in the law in order to reach what he believed to be a fair solution in the instant case, and in so doing he had not only ridden roughshod over many well established principles, but actually confused and muddled the law by attempting to formulate new principles when it was not strictly necessary for the case in hand. Mr Hayton discusses Lord Denning's decisions in a wide variety of topics, starting with 'the deserted wife's equity'. This was a major doctrinal innovation of Lord Denning, whereby a wife was invested with an equitable interest in the matrimonial home which would prevail against successors in title of the husband with notice of her status. The principle was decisively rejected by the House of Lords in *National Provincial Bank Ltd.* v. *Ainsworth*,[22] on the ground that the wife's right to occupy was personal to her and it would be unfair to the husband's creditors if those rights

17. [1972] A.C. 1027.
18. [1964] A.C. 1129.
19. At p. 76.
20. At p. 77.
21. *Re Hallett's Estate* (1880) 13 Ch. D. 696, 710 *per* Sir George Jessel, M.R..
22. [1965] A.C. 1175.

were to prevail against his trustee in bankruptcy. In the Matrimonial Homes Act 1967 Parliament attempted a compromise between the two positions and provided that a spouse, whether deserted or not, could protect her or his interest in the matrimonial home by registering a Class F Land Change which would be good against the whole world except the other spouse's trustee in bankruptcy.

Other important contributions of Lord Denning in the field of Equity are the development of the *Mareva* injunction (which enables the court on an *ex parte* application to freeze the assets of a foreign – and in some circumstances a locally resident – defendant) and the *Anton Piller* order (which enables a plaintiff to inspect and seize documents and articles specified in the order, and which has proved to be a useful weapon against vendors of pirate cassettes and against record bootleggers). Still in the area of equitable remedies, Lord Denning has always been hostile to the House of Lords decision in *American Cyanamid Co.* v. *Ethicon Ltd.*,[23] which purported to remove the long-established requirement that in an application for an interlocutory injunction, the plaintiff must show a strong *prima facie* case. Mr Hayton points out that, by ingenious manipulation of certain *dicta* in *American Cyanamid*, Lord Denning and other judges have been able to pay lip-service to that decision whilst in effect deciding cases in the same way as they would have been decided pre-*Cyanamid*. In the author's view, the *Cyanamid* principles are too "artificial and elaborate for pragmatic judges to be controlled by them."[24] And in the very different area of discretionary trusts, it was Lord Denning who first expressed the view that the test for certainty of objects should be assimilated to the test in mere powers, and his view was eventually accepted by the House of Lords in the landmark case of *McPhail* v. *Doulton*.[25]

It is perhaps in the areas of licences, constructive trusts and family property that Lord Denning's decisions have provoked the most controversy and where he is most open to the charge of having 'muddied the waters'. Certainly, the practitioner or the academic who seeks clear-cut and logical principles is likely to be overcome by a sense of frustration when confronted with many of Lord Denning's judgments in this area.

For instance, Lord Denning would impose a constructive trust "wherever justice and good conscience require it", since the concept is "a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep . . . property for himself alone, but ought to allow another to have the property or a share in it."[26] Lord Denning has readily sought to impose a "constructive trust of the new model" in cohabitation cases, where the house is purchased by the man, his cohabitee not contributing towards the purchase price and not therefore acquiring any equitable interest in the property under traditional principles. According to His Lordship in such cases the

23. [1975] A.C. 396.
24. At p. 99.
25. [1971] A.C. 424.
26. *Hussey* v. *Palmer* [1972] 1 W.L.R. 1286, 1289.

cohabitee is entitled to a share in the house by virtue of the time and effort she puts into looking after the house and caring for her man and any children of the union. Quite apart from the uncertainty and unpredictability which so wide a principle generates, as Mr Hayton points out Lord Denning's approach in the cohabitation cases cannot be reconciled with the firm view taken by the House of Lords in *Gissing* v. *Gissing*[27] that the court cannot impose a constructive trust unless there is evidence of a common intention that the claimant should acquire an interest in the home. Moreover, the imposition of a constructive trust has serious implications for third parties, whether they be purchasers, donees or creditors, for the beneficiary has the right to trace the property into the hands of any person other than a *bona fide* purchaser for value without notice, and he or she has priority to recover his full share in the property before the general creditors of the constructive trustee.

An even more controversial use of the constructive trust concept by Lord Denning occurred in *Binions* v. *Evans*,[28] where he held that if P contracts with V to purchase property from V expressly subject to T's contractual licence, then after the purchase P holds the property on constructive trust for T, since it would be unconscionable for P to ignore T's rights. Such a proposition runs counter to the well established principle that a contractual licence does not bind third parties and seems to be a complete misuse of the constructive trust concept. Mr Hayton rightly suggests that such a fundamental change in the law is best left for Parliament, which could provide for the registration of contractual licences as land charges.

Finally, Lord Denning has sought to widen the scope of proprietary estoppel by suggesting that it is not necessary for the claimant to have expended money on the property or otherwise to have acted to his detriment. This is clearly contrary to a long line of cases following from Fry J.'s classic exposition of proprietary estoppel in *Willmott* v. *Barber*,[29] and there is no legal justification for it. It must be admitted, however, that the broad flexible discretion which Lord Denning advocates in both proprietary and promissory estoppel cases has found favour with some judges, and he may ultimately be correct in his assessment that "all these various estoppel principles can now be seen to merge into one general principle shorn of limitations [that] when the parties to a transaction proceed on the basis of an underlying assumption . . . on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unjust or unfair to allow him to do so."[30]

In a most comprehensive Chapter entitled "Land, Planning and Housing", Professor McAuslan points out that Lord Denning has been in the forefront of the movement of Land Law, since the end of the Second World War, from a system concerned with private relations between two parties – as envisaged in the 1925

27. [1971] A.C. 886.
28. [1972] Ch. 359.
29. (1880) 15 Ch. D. 96.
30. *Amalgamated Investment and Property Co. Ltd.* v. *Texas International Bank Ltd.* [1982] Q.B. 84, 122.

legislation – to a largely public system in which the law is concerned with such matters as housing and rent control, the use and development of land and the rights and duties of owners, occupiers and dealers in land. The author suggests that, in recent years at least, Lord Denning's judgments in this area became infused with his political and moral beliefs and, in particular, His Lordship appears to have evolved a doctrine of abuse of rights. The themes of balance, responsibility and prevention of abuse of rights became more pronounced in Lord Denning's judgments after his return to the Court of Appeal as Master of the Rolls in 1962. For instance, he dealt with abuse by landlords in *Luganda* v. *Service Hotels Ltd.*[31] and *Drane* v. *Evangelou,*[32] both cases in which landlords were guilty of harassment against their tenants. In Lord Denning's view, there was no difficulty in granting injunctions and exemplary damages in such cases since the landlords were challenging not so much the tenants' rights as the role and power of the judicial process. Examples of so-called abuses by tenants are *Bickel* v. *Duke of Westminster*[33] and *Central Estates Belgravia Ltd.* v. *Woolgar,*[34] in which Lord Denning prevented tenants from "taking advantage of" the Leasehold Reform Act 1967. In checking what he perceived as abuses of rights, Lord Denning paid scant regard to the convenience of conveyancers and, as has often been pointed out, was prepared to strain legal rules to their limits in order to do justice in the individual case. Indeed, he once admitted that "I prefer to see that justice is done; and let the conveyancers look after themselves."[35] An admirable sentiment, to be sure, but hardly calculated to ensure that Lord Denning's more maverick decisions will become established precedents.

In this survey Professor McAuslan also observes that Lord Denning showed clearly where his personal preferences lay, and, like the Lord Chancellors of old, infused his decisions with his own individual sense of 'right' and 'wrong'. For instance, he obviously had great sympathy for elderly widows (*Binions* v. *Evans*)[36] and admiration for the game of cricket *(Miller* v. *Jackson),*[37] with a corresponding dislike of estate agents *(Dennis Reed Ltd.* v. *Goody),*[38] recalcitrant local councillors *(Asher* v. *Secretary of State for the Environment)*[39] and caravan site owners *(James* v. *Minister of Housing and Local Government).*[40] A more objectionable aspect of His Lordship's personal preferences is his occasional insensitivity towards 'foreigners', which is perhaps a manifestation not so much of xenophobia as of an obsessive attachment to what he sees as purely 'English' qualitites. Offending phrases mentioned by the author include "a large Greek Cypriot was barring the

31. [1969] 2 Ch. 209.
32. [1978] 1 W.L.R. 455.
33. [1976] 3 W.L.R. 805.
34. [1971] 3 All E.R. 647.
35. *Brikom Investments Ltd.* v. *Carr* [1979] 2 All E.R. 753, 760.
36. [1972] Ch. 359.
37. [1977] Q.B. 966.
38. [1950] 2 K.B. 277.
39. [1974] Ch. 208.
40. [1965] 3 All E.R. 602.

entrance",[41] and "the tenant Mr McCall comes from Dominica in the West Indies; he has been here for 17 years."[42] In dealing with a number of cases arising under the Housing (Homeless Persons) Act 1977, Lord Denning showed little sympathy for 'foreign' claimants and seemed to take the view that in seeking the assistance of the courts in order to secure council housing, such claimants were abusing their privileges. Choice epithets include "an advancing tide",[43] a "coloured woman"[44] and "true born Englishmen".[45] Professor McAuslan suggests that behind Lord Denning's judgments in such cases lies the notion of the deserving and the undeserving poor, the former of whom are exercising their rights (*e.g.*, council house tenants seeking to purchase their council houses from local authorities) and the latter (*e.g.*, homeless foreigners or council tenants complaining of breaches of duty on the part of local authorities) seeking to abuse their rights. The author regrets that these cases have done "little to enhance Lord Denning's reputation for seeking the just solution."[46]

Lord Denning's judgments in planning cases are influenced by his concern for traditional rights and customs in respect of land and by his desire to preserve the beauty of the countryside, as exemplified by his hostility towards caravan site owners and industrial development. On a more technical level, Professor McAuslan points out that, unlike several other judges, Lord Denning adjusted quickly to the new approach to land use control under which the traditional concepts of nuisance, trespass, waste, easements and restrictive covenants were downgraded in favour of statutory control in the form of planning permissions, enforcement notices and the like. But he emphasises that although Lord Denning accepted the new statutory régime, he was able to engraft on to it a framework of principles based upon the same notions of balance and prevention of abuse of rights which he had applied in private law cases, and that "in the guise of setting what appeared to be reasonable limits to the discretion of public authorities [he substituted] a wide judicial discretion for a wide administrative discretion."[47]

In conclusion, there is no doubt that this volume of essays will be most welcomed by academic lawyers, research students and those undergraduates to whom the literature of the law is more than mere examination fodder. It is a truly original conception, and it is a tribute to the authors that they have been able to present such a lucid, substantial and penetrating account of the work of arguably the greatest judge of this century. One can only echo the wish of the editors that this work will inspire others to produce commentaries of a similarly high standard and that such ventures will receive the support which they undoubtedly deserve.

41. *Drane* v. *Evangelou* [1978] 2 All E.R. 437, 439.
42. *McCall* v. *Abelesz* [1976] Q.B. 585, 591.
43. *De Falco* v. *Crawley D.C.* [1980] Q.B. 460, 472.
44. *R.* v. *Slough B.C., ex p. Ealing L.B.C.* [1981] 1 All E.R. 601, 611.
45. *De Falco* v. *Crawley D.C., supra* n. 43, at p. 473.
46. At p. 203.
47. At p. 178.