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Legislative Technique

Another Reverse for the Law Commissions' Interpretation Bill

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The draft Bill appended to the Law Commissions' 1969 report *The Interpretation of Statutes* (Law Com No 21; Scot Law Com No 11) has once again failed to reach the statute book. In 1975 the Renton Committee recommended 'the early enactment of a suitably modified version' (Cmnd 6053, para 19.31). The Government continued to do nothing. Last year Lord Scarman, who was chairman of the Law Commission at the time of the report, introduced the Bill (without modifications) in the House of Lords. After heavy criticism on second reading he withdrew it. This year he introduced a version modified mainly as suggested by Renton. It passed the Lords but was objected to on the motion for second reading in the Commons. It is dead for the present session.

This seems a suitable moment to review the history of the Bill, which clearly has many opponents. The original version contained three main clauses, of which the first specified various 'aids to interpretation', the second set out 'principles of interpretation' and the third laid down a presumption in favour of the existence of a civil remedy for breach of statutory duty. Lord Scarman has made it clear that he regards the second clause as far more important than the other two.

Aids to Interpretation

The five aids are preceded by a formula which says they are to be included among the various matters which, apart from the Bill, are allowed to be considered in ascertaining the meaning of any statutory provision. This formula is notable in two ways. First, it indicates that despite the Law Commissions' statutory duty to codify the law (Law Commissions Act 1965 s 3(1)), they did not attempt it here. Second, the formula treats statutory interpretation as a one-stage operation. In fact there is a preliminary stage of deciding whether or not a doubt exists. If the conclusion is that it does, the interpreter must go on to the further stage of determining how the doubt is to be resolved.

Interpretative material ruled out of consideration at the second stage may nevertheless be admissible at the first. The words of an Act are to be given an *informed* construction, not one arrived at in ignorance of relevant factors. Before deciding whether the meaning is plain or doubtful, it is necessary to discern and consider all relevant and available matters that may illuminate the text and throw light on its meaning. This is subject to practicability, and the need not to protract litigation unduly. Of these restrictive factors the court is the arbiter, being always in control of its own proceedings.

(1) *Punctuation, sidenotes etc*

> '(a) all indications provided by the Act as printed by authority, including punctuation and side-notes, and the short title of the Act;'

In addition to the substantive text, all other 'indications', may be considered in ascertaining meaning. These fall into two categories. First, those that are amendable in Parliament (long title, preamble or recital, short title). Second, those that are not (punctuation, heading,

sidenotes). This provision mingles items in both categories (though they really need to be tackled separately). The long title is required for procedural reasons: on royal assent it becomes vestigial. A preamble or recital is explanatory. The short title is purely for convenience of reference. In the second category, punctuation is an ordinary aid to any reader of English while sidenotes and headings give a quick guide to content. Each 'indication' has its own functions, which needs to be understood by the reader. He can then give it the weight it deserves as a guide to interpretation (often negligible).

Judges have uttered conflicting dicta here. Old Acts, as entered on the Parliament Roll, were not punctuated (this is only partly true). So punctuation, some judges say, must be ignored. Acts 'as entered on the Parliament Roll' (in modern reality the two vellum copies endorsed by the Clerk of the Parliaments), now *are* punctuated. So why ignore the punctuation? Another reason advanced by some judges (not always the same ones) applies to all 'indications' in the second category. They can be altered by Parliamentary officials (usually in consultation with the draftsman). But this is no justification for ignoring them. They are part of what Parliament has given out as its Act. They are in the vellum copies. To question them is to run counter to art 9 of the Bill of Rights, which says that proceedings in Parliament (which certainly include everything to do with the enactment of a Bil1) ought not to be impeached or questioned in any court or place outside it. Furthermore, although certain 'indications' can be thus altered informally this is only done by responsible officials answerable to Parliament. Members can raise points on these elements in debate, and can ask for changes to be made. If they are not satisfied they can say so. In any case this objection cannot apply to statutory instruments, and it would surely be absurd to have a different rule of interpretation for them.

The most serious problem posed by these 'indications' is not dealt with by the above provision. It is this. What do you do if one of the 'indications' contradicts the substantive text -even when (as it should be) the text is given an informed construction? The right answer, laid down by the House of Lords in *Attorney-General* v *Prince Ernest Augustus of Hanover* [19571 AC 436, is that you prefer the text. Unfortunately some judges do not always do this. A recent example is the House of Lords' decision in *Infrabrics Ltd* v *Jaytex Ltd* [1981] 1 All ER 1057, where the clear purport of the text was held to be overridden by a narrower heading (see 131 NLJ 749). Perhaps the true verdict on the need for this provision was delivered by the late Lord Dilhorne in the debate on last year's Bill (col 296):-

> 'I do not think that {the provision] is really worth enacting. Cross-headings, punctuation and sidenotes, and the short title, are things that one cannot fail to see when one reads any Bill or Act of Parliament. I know of no authority for saying that a judge must shut his eyes to what is in the Bill or Act he is reading.'

(2) *Reports of Royal Commissions etc*

> '(b) any relevant report of a Royal Commission, Committee or other body which had been presented or made to or laid before Parliament or either House before the time when the Act was passed;'

This is mainly intended to allow reference to a report upon which the Act in question is based. It has provoked acute controversy. The Renton Committee opposed it on several grounds. Parliament may have intended to depart from the report. There might be difficulty in deciding whether a report was 'relevant'. 'Above all, the provision would place too great a burden on litigants and their advisers, and indeed on the courts, and would create even greater difficulties for lawyers trying to advise their clients before a specific controversy had arisen' (paras 19.15 and

19.23). The last objection proved decisive. Although Lord Scarman disregarded the Renton Committee's view and included the provision in each of his Bills, he was in the end forced to give way. An amendment backed by both the Senate and the Law Society removed it from this year's Bill at committee stage in the Lords.

Lord Hailsham LC was derisive. What he said in criticism of the movers of the amendment repays study, for it contains the essence of the matter.

> 'If they really think that courts and practitioners do not read blue books in order to find out what statutes mean, they are living in a complete fool's paradise. When I was at the bar I was constantly having to advise as to the meaning of statutes and as constantly I was finding, as I do in this House and as I do when I sit judicially, that the words of the Parliamentary draftsman are *at first sight incomprehensible*. . . I always look at *Hansard*, I always look at the blue books, I always look at everything I can . . . The idea that this is going to generate a lot of expensive work - dear , dear solicitors; dear, dear barristers, do grow up!' (cols 1345-6; emphasis added).

The 1969 report by the Law Commissions had foreshadowed this speech in two passages of crucial importance. The report pointed to the need for an *informed* construction by saying that initially 'a judge might wish to inform himself about the general legal and factual situation forming the background to the enactment' (para47). It is this process of self-informing which throws light on passages that, in Lord Hailsham's words, 'are at first sight incomprehensible'. Moreover, the 1969 report continues, 'there do not seem to be any specific limitations on the information to which the court might refer' for this purpose (para 48).

In view of the penetrating insight shown by these two passages, it is surprising that when they came to draft the above provision the Law Commissions failed to differentiate between admissibility of reports for securing an informed construction and their use for determining how a doubt found to exist is ultimately to be resolved. For the latter purposes, while the interpreter cannot without absurdity be asked to discard the knowledge he has acquired it must not be used to produce an unexpected result. As Lord Diplock said in the debate on last year's Bill, 'the public is entitled to look *at the legislation* to see what it says' (co1 289; emphasis added). This refers to the important principle of *foreseeability* laid down by Lord Diplock in the *Black-Clawson* case ([1975] 1 All ER 810, 836).

(3) *International agreements*

> '(c) any relevant treaty or other international agreement which is referred to in the Act or of which copies had been presented to Parliament by command of Her Majesty before the time when the Act was passed, whether or not the United Kingdom were bound by it at that time;'

This was included to reverse the ruling of the House of Lords in *Ellerman Lines v Murray* [1931] AC 126. An international agreement was set out in the Schedule to an Act and referred to elsewhere in its provisions. Yet the House of Lords held that it was not proper to resort to the text of the agreement in order to give a section other than its natural meaning. The ruling has been eroded by subsequent decisions (notably *Saloman* v *Commissioners of Customs and Excise* [1967] 2 QB 116). It does not in any case prevent an agreement being looked at for securing an informed construction of the Act, or as the 1969 report puts it 'before deciding whether it is clear and unambiguous' (para 74). If on an informed construction the Act *is* clear and unambiguous it would be contrary to principle to alter its meaning by reference to an agreement.

In the debate on last year's Bill, Lord Dilhorne said that in so far as this provision went beyond existing law it was too wide. This is difficult to follow, in view of the inclusion of the word 'relevant'.

(4) *Other documents*

> '(d) any other document bearing upon the subject-matter of the legislation which had been presented to Parliament by command of Her Majesty before that time;'

This would allow reference to white papers and other command papers. It was attacked by the Renton Committee for the same reasons as apply to Royal Commission reports (see above). In

the debate on last year's Bill it was criticised by Lord Elwyn-Jones on the ground that it would interfere with the drafting of Bills:-

> 'I cannot help thinking that as far as the parliamentary draftsmen would be concerned, if the Bill was preceded by a white paper they would be having to look over their shoulders in the drafting of the Bill at the white paper in their work of construction. It would probably be prudent to ask parliamentary draftsmen also to draft the white papers . . .' (col 286).

Because of such criticisms the provision was dropped from this year's Bill. In its place the following was included:-

> '(d) any provision of the European Communities Treaties and any Community instrument issued under any of the Treaties to which the Act is intended to give effect.'

Lord Scarman offered no explanation of this, and its inclusion is puzzling. Almost certainly it represents the position under existing law. Moreover it duplicates the paragraph discussed above relating to international agreements.

(5) *Documents declared relevant*

> '(e) any document (whether falling within the foregoing paragraphs or not) which is declared by the Act to be a relevant document for the purposes of this section.'

This was inserted in the original draft Bill to pave the way for adoption of the practice, recommended in the 1969 report, of accompanying an Act with specially-prepared official explanations. The Renton Committee considered it superfluous. Lord Dilhorne dismissed it as of little importance. It was dropped from this year' s Bill.

Principles of Interpretation

We pass now to the two principles of interpretation, to which in this year's Bill Lord Scarman added a third. He described them as 'really vital'. The first principle enshrines the purposive approach:

> '(a) that a construction which would promote the general legislative purpose underlying the provision in question is to be preferred to a construction that would not.'

In one sense this is a statement of the obvious, as many critics have pointed out. In another sense it begs the question. In order to contemplate applying a construction that would not promote the legislative purpose, the court must have a powerful reason. The most likely reason is that this is the clear literal meaning. Does the principle override the literal meaning in all cases, or only when the literal meaning is doubtful? The latter (assuming an informed construction) seems to be the present law.

The Renton Committee gave the principle a tepid welcome. They reported that criticisms of it made to them included the two following. (1) The test should be the general legislative purpose of the Act, rather than that 'underlying the provision in question.' (2) It is doubtful whether this principle should be elevated at the expense of others such as those protecting personal liberty and property.

In last year' s debate Lord Scarman justified the inclusion of the principle in the following words:-

> 'The old habit of sticking to the literal meaning of the words used, and refusing to depart from them even when they produce a result which is clearly inconsistent with the intention of Parliament but no departure because the words are clear, is still lurking in the back corridors of the legal system, and must be exterminated . . .' (co1 279).

To this his fellow Law Lords gave a cool response.

The second principle is concerned with the comity of nations:-

> ‘(b) that a construction which is inconsistent with the international obligations of Her Majesty's Government in the United Kingdom is to be preferred to a construction which is not.’

This is open to the same objections as were levelled at the first principle. Moreover it is even less necessary to give it statutory form since the judicial dicta are not in conflict. The 1969 report admits this, merely adding: ‘In the light of our consultations we think it would be useful to embody the substance of such judicial pronouncements in a statutory form’ (para 75).

Little was said about this principle in the Parliamentary debates. In remarks in last year's debate applying to both principles, Lord Elwyn-Jones said: ‘Whether advantage is gained by giving them express statutory authority, I know not. I should have thought it might not be very advantageous . . .’ (col 287). Lord Dilhorne was predictably dismissive. The principles, he said, apply now. He added: ‘There is no need for legislation, as I see it, on that subject at all’ (co1298).

The third principle, new to this year's Bill, dealt with retrospectivity:-

> ‘(c) that, in the absence of any express indication to the contrary, a construction which would exclude retrospective effect is to be preferred to a construction which would not;’

Very little was said about this in the Parliamentary debates. It was originally proposed by the Renton Committee, again without explanation (para 19.32). Although apparently simple and harmless, it in fact papers over the difficulties that in practice arise. I dealt with some of these in a previous article (131 NLJ 356). Even its simplicity is not enough to avoid difficulty. The reference to a contrary indication here but not in the other two principles suggests, on the *expressio unius* principle, that with them contrary intention does *not* displace the principle - but of course it must do so.

Breach of Statutory Duty

The final provision, too lengthy to set out here, states that where a future Act imposes a positive or negative duty it is to be presumed, unless the Act expressly negatives this, that any person who sustains damage by breach of the duty is entitled to sue for damages or other civil remedy.

In justifying the inclusion of this provision, the 1969 report pointed out that the existing law was in some disarray. (It is in better shape now, following Lord Diplock's masterly exposition in *Lonhro* v *Shell Petroleum* [1981] 2 All ER 456.) The case for a statutory presumption rather than a codification was not argued. In the debate on last year's Bill Lord Elwyn-Jones criticised the clause as too wide. It would cover, for example, the breach by a Minister of a duty to make a scheme or hold an inquiry. He feared that a practice would develop of expressly excluding the presumption in Government Bills. Lord Dilhorne agreed, adding ‘One will get quite unreasonable results because Parliament has failed to make the exception’ (col 289). No other peer, except Lord Scarman himself, referred to the clause. It was dropped from this year's Bill.

Conclusion

Lord Scarman has had a rough ride with his two attempts to secure the enactment of the Law Commissions' Bill. For this one is bound to extend respectful sympathy. At the same time there is a sense of relief. The Bill is inadequate, and if enacted is likely to make matters worse. It is so incomplete as codification that doubts are bound to arise from it. Do the principles thus singled out for mention in an Act of Parliament thereby gain increased potency over those which are not? What priority is one principle (enacted or not) to be given when it conflicts with another? Clause 1(3) says that nothing in the section is to be construed as authorising Hansard reports to be considered ‘for any purpose for which they could not be considered apart from this section’. For what purposes (if any) can they be so considered?

There are other difficulties, some of which have been touched on in the course of the above discussion.

The fact is that this subject is much too complex to be tidied up by one or two simple clauses. Instead of a handful of general principles it needs a large number of carefully-constructed statements each going no farther than it is practicable to go, and each dovetailing with the others. In other words a full-scale code. Failing this, the view of most people who have considered the Bill appears to be that we will do better if we continue to rely on judicial development.