Trade Descriptions, or How to Tackle a Problem of Statutory Interpretation

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My friend Hamish Henderson, Senior Lecturer in Law at Edinburgh University, recently wrote to ask my opinion of the problem of statutory interpretation posed in an article in the September 1984 issue of the Journal of the Law Society of Scotland (p 367). The article, by the Legal Advisory Group of the Scottish Consumer Council, is entitled Does the Trade Descriptions Act 1968 apply to buildings?. It argues that it does.

Hamish asked me to frame a response by reference to the method for solving such problems laid down in my recent book Statutory Interpretation (which takes the form of a Code and accompanying commentary). The present article is the result. I have sought to word it so as to demonstrate generally the system laid down by the book. Unless the contrary intention appears, section and other references below relate to the Code and commentary.

The two approaches

The Legal Advisory Group's article aimed to show that the provisions of the 1968 Act which afford protection against misleading trade descriptions of 'goods' give consumers the like protection against misleading trade descriptions of buildings. This depended on the contention that the definition of 'goods' in section 39(1) of the Act is wide enough to include buildings.

Now there are broadly two ways of tackling problems of statutory interpretation. One, the usual way, is to concentrate on the most obvious point and let that decide. The other is to deal with the problem fully, and in detail. These may be called the crude and the systematic approaches.

The crude approach to this particular problem is to say that in a modern Act, framed by precision drafting (s 76), the term 'goods' would never be defined to include buildings. It would be like defining 'monkey' to include a lion.

Statutory definitions are of various kinds (s 125). Whatever meaning may be expressly attached to a defined term, the dictionary meaning exercises some sway over how the statutory definition will be construed by a court. As Richard Robinson remarked in his book Definition (Oxford 1952, p 7): 'it is not possible to cancel the ingrained emotion of a word merely by an announcement'.

The potency of the term itself will rightly guide a court in construing the wording of its statutory definition. The term 'goods' does not in any way suggest buildings. Its whole aura and ambience is to the contrary. If some incompetent draftsman perversely desired 'goods' to include buildings in his draft he would have to say so very clearly and strongly in order to overcome the 'ingrained emotion' of the former term.

So on the crude approach we reject the argument put forward by the Legal Advisory Group.

The systematic approach

The crude approach is usual, because most problems of statutory interpretation arise in the course of hurried practice. It is obviously unsatisfactory however; and this is compounded by the fact that the search for a single determining factor is not always expertly conducted,and often ends up with the wrong one.

Too many judges and practitioners still think they must apply 'the literal rule', or 'the golden rule', or 'the ejusdem generis rule', or some other talisman. The correct method is different; and rather more difficult to apply. Considerable learning is required, and professional skill and judgment of a fairly high order.

The first thing to grasp is that problems of statutory interpretation cannot usually be decided in the abstract. That, with respect, is the first error made by the Legal Advisory Group's article. The 1968 Act contains many different provisions; and an infinity of factual situations are capable of falling, or arguably falling, within its purview. Thus when section 7 of the Act speaks of 'the interests of persons by whom any goods are exported' it scarcely seems credible that the export of buildings was contemplated.

The Group might retort that its argument is solely concerned with the legal meaning of a statutory definition of 'goods'. Surely it makes sense to assert that generally speaking (that is in most if not all applications) this includes buildings? I would answer that where such an unexpected meaning is suggested it is essential to test it by reference to specific provisions of the Act. This the article failed to do.

Going into detail

Statutory interpretation is properly a search for the legal meaning (s 85) of an enactment which is the unit of enquiry (s 72). A definition by itself cannot be an 'enactment' in this sense, for it lacks a legal thrust (s 79). A possible enactment here, derived from the language of sections 1(1) and 39(1) of the Trade Descriptions Act 1968, can be expressed as follows-

Any person who, in the course of a trade or business, applies a false trade description to any goods shall be guilty of an offence; and for this purpose 'goods' includes ships and aircraft, things attached to land and growing crops.

The controversy concerns the phrase I have italicised, as to which there are two opposing constructions (s 84). The first, which we will call construction W (for wide) is that argued for in the Legal Advisory Group's article. It would give the phrase a legal meaning which can be articulated (s 112) as things attached to land (including things such as buildings which in law form part of the land). The alternative construction (N for narrow) might be articulated as things attached to land (excluding things, other than growing crops, which in law form part of the land).

We must now assemble the interpretative factors (s 155) which are decisive of the question whether construction W or construction N correctly expresses the legal meaning. There turn out to be rather a large number of these.

The interpretative factors

We begin with four purely verbal or linguistic factors (dealt with in Part XXI of the Code).

1. One verbal factor, the potency of the term 'goods', has been mentioned above.

2. We are concerned with an enlarging definition (p 282), namely one designed to make clear that the defined term ('goods') includes one or more matters that otherwise would or might be taken to lie outside it. In modern drafting such a definition is not used to bring in a major matter (buildings) which would otherwise most certainly be taken to be outside the term defined.

3. Is the term 'growing crops' to be construed as establishing a genus, so as to cut down the width of the term 'things attached to land' by application of the ejusdem genus principle (s 378)? It is clear that one term can establish such a genus (s 380). It is also clear that the principle cannot apply unless the genus in question can be identified, and the alleged genus-describing term is within it (s 379).

In his annotation to the Current Law Statutes edition of the 1968 Act Professor Treitel says that 'things attached to land' in the definition of 'goods' contained in section 39(1) must be construed ejusdem generis with 'growing crops' and so be construed 'to exclude houses and other structures'. It is far from clear what genus or class Professor Treitel has in mind here, unless it be things growing on land. But the draftsman can scarcely have intended his phrase 'things attached to land' to be so circumscribed, or he would have used the one phrase 'things growing on land' instead of the combined phrase 'things attached to land and growing crops'. In my view the ejusdem generis principle has no application here.

4. This brings us to a particular sub-rule of the principle expressio unius est exclusio alterius (s 391). This sub-rule says that where it is doubtful whether a term ('goods') does or does not include a certain class of things (things to do with land), and words of extension ('things attached to land and growing crops') are added which cover some only of the members of the class, it is implied that the remaining members of the class are excluded. Since growing crops, which are part of the land, are specifically mentioned, the implication from this is that buildings, which are also part of the land but are not mentioned, are not intended to be brought in.

The inference from the above is that the phrase 'things attached to land' was included to make clear that goods were not taken out of the Act merely because they were attached to land (though not part of it). Mr Alec Samuels has given a garden gnome as an example (Journal of the Law Society of Scotland December 1984, p 488).

Mischief and purpose

Next we pass to factors connected with the mischief which Parliament aimed to remedy, and the purpose of its enactment (dealt with in Parts XIV and XV of the Code respectively). This is a large area, which there is not space to dwell on in any detail here.

5. Parliament intends that an enactment shall remedy a particular mischief (s 300). In using this concept for interpretation it is necessary to determine the precise scope or ambit of the mischief Parliament actually intended to remedy (s 305). This may well not be the entire area of the social mischief existing (overreaching of consumers by traders).

6. One way of establishing the precise scope of the mischief aimed at is by reference to the long title of the Act (s 271). Here the long title is 'An Act to replace the Merchandise Marks Acts 1887 to 1953 by fresh provisions prohibiting misdescriptions of goods, services, accomodation and facilities provided in the course of trade ...' This indicates an intention to widen the former law, since the Merchandise Marks Acts applied only to 'goods or things'. It is inconceivable that if the widening had been intended to embrace buildings they would not have been mentioned in the long title.

7. Another way of determining the mischief is by reference to the legislative history (Part X of the Code). Generally speaking, reference to Hansard is not permitted in court (s 241). Committee reports leading up

to a Bill can however be cited (s 237). It is well known that the Trade Descriptions Act 1968 was based on the Report of the Committee on Consumer Protection 1962, otherwise known as the Molony Report (Cmnd 1781). This clearly did not deal with protection in relation to buildings.

Literal construction

It appears that the Legal Advisory Group's article bases itself mainly on what is sometimes loosely called the literal rule. We must therefore not omit to include this as a factor.
8. Prima facie, the meaning of an enactment which was intended by the legislator (in other words its legal meaning) is taken to be that which corresponds to the literal meaning (s 137). What is the literal meaning of 'things attached to land' in this context? The Group say that literally speaking buildings are attached to land, and therefore are included.

It is true that judges sometimes loosely refer to things such as growing trees as being 'attached' to land when in law they are truly part of it (see, e g, Lord Keith of Avonholme in Hood Barrs v Inland Revenue Commissioners [1957] 1 All ER 832, at p 847). But Acts, unlike judgments, are formal legal instruments; and we are entitled to presume that an Act's draftsman was legally competent (s 77). Moreover a building is not usually referred to as a 'thing'.

It seems therefore that the literal meaning of 'things attached to land' in the 1968 Act definition of 'goods' does not include buildings.

Conclusion as to buildings
Other interpretative factors might be adduced. The 1968 Act is a penal statute, so the presumption against doubtful penalization (s 129) applies. An Act is to be construed as a whole (s 149), and the whole flavour of this Act is against its extending to buildings (for which many special provisions would need to be included if a statute of this kind were truly to extend to them). The opinion of the profession, including commentators, is also against this construction. That amounts to contemporanea expositio, a powerful factor in interpretation (s 6 and pp 371- 372).

Perhaps most conclusive of all, the Interpretation Act 1978, reinforcing the common law, defines 'land' as including buildings and other structures. How can an edifice be 'attached' to something of which it already forms part?

Normally, the systematic approach to a problem of statutory interpretation ends with a careful weighing of the factors telling for and against each of the opposing constructions (ss 158-163). To save space, I have here telescoped the process by briefly suggesting a view in relation to each factor mentioned. It seems they all point one way.

So, if my reasoning is accepted, we find that in the present case the systematic and the crude approach lead to the same result. This often happens, since lawyers develop a 'feel' for the answer, and the best of them arrow on to the right result almost by instinct. In more evenly-balanced arguments it may not be safe to rely on 'feel' however. It is better, and more scholarly, to be able to quote chapter and verse for one's conclusion.

A more limited view?

Despite all that, something may be rescued from the wreckage of the Legal Advisory Group's thesis. While a building as a whole is not within the 1968 Act's definition of 'goods', it is arguable that a building's fittings and fixtures, even though in law they have become part of the land, may be. These should perhaps be limited to things which before attachment were 'goods' in the ordinary sense, and which can be detached

without significant damage either to the building or the article.

Remembering what is said above about the need to avoid abstract propositions, let us postulate a specific case (based on one known to me that actually happened).

The case of the leaky bath

P purchased from V (a house-building company) a house for his own occupation. Six months later the bath sprang a leak, causing water damage to the ceiling below. P promptly wrote a letter of complaint to V.

In a brochure issued by V the houses on the estate were said to be fitted with high-quality baths manufactured by M (a noted British manufacturer). On receiving P's complaint, V asked S1 (the sub-contractor who contracted with V to supply and fit the bath) to inspect it. S1 passed this on to S2, his sub-contractor who was the actual supplier of P's bath. S2's representative Mr R inspected the bath. Immediately after doing so he told P orally that the bath was after all not of M's manufacture, that the leak was located at the base of a dripping tap which had been defective from the start and should be replaced by S1, and that S1 was clearly liable to repair and redecorate the damaged ceiling.

P then wrote to V confidently asking V to ensure that Mr R's findings were implemented. P was in for a nasty shock. V replied enclosing a photocopy of a letter from S2 to S1. This said that Mr R confirmed that the bath was manufactured by M as required by V's specification and that there was no sign of any damage or faults. In the covering letter V tartly informed P that V considered the matter closed.

Is there a contravention?

In determining whether the letter written by S2 contravened the 1968 Act we need to work out which provisions of the Act constitute the enactment under enquiry. Without departing from the language of the Act, we can set these out in three clauses. The first is the enactment given earlier in this article, namely-

(1) Any person who, in the course of a trade or business, applies a false trade description to any goods shall be guilty of an offence; and for this purpose 'goods' includes ships and aircraft, things attached to land and growing crops.

The next clause is derived from section 2(1) of the Act-

(2) A trade description is an indication, direct or indirect, and by whatever means given, of any of the following matters with respect to any goods or parts of goods, that is to say-
(a) fitness for purpose;

(b) performance;

(c) any physical characteristics not included in (a) or (b);

(d) person by whom manufactured.

Finally we have a clause derived from section 4(1)(c) of the Act-

(3) A person applies a trade description to goods if he uses the trade description in any manner likely to be taken as referring to the goods.

Clearly the case is within the clear literal meaning of clauses (2) and (3), and there is no reason why this should be treated as cut down by implication (see Fletcher v Budgen [1974] 2 All ER 1243). So we are back to finding opposing constructions for the last italicised phrase in clause (1).

This time we might frame construction W as things attached to land (including things forming part of the land which are identifiable and detachable). Construction N might remain as before, as things attached to land (excluding things, other than growing crops, which in law form part of the land).

It would lengthen this article too much to go through with these opposing constructions the same process as was carried out above in relation to the earlier pair. There are some obvious pointers however. The phrase 'things attached to land' must be given some meaning (pp 375-376). The noscitur a sociis principle (s 377) perhaps suggests that, like growing crops, the intended things form part of the land (attached things not forming part of the land being taken to be within the ordinary meaning of 'goods'). The Molony Report did discuss certain household fittings, namely electric sockets (paras. 228-229). Things like baths, sinks and boilers do retain their characteristics as 'goods' even though plumbed in.

Perhaps we might after all save the summerhouse mentioned as a prime example at the end of the Legal Advisory Group's article, at least if it is of the DIY variety.