

## Statute Law

FRANCIS BENNION, MA (OXON)

*Barrister, Research Associate of the University of Oxford Centre for Socio-Legal Studies, former UK Parliamentary Counsel*

### *Introductory note*

For the convenience of readers this article, like its predecessors in the All ER Annual Review series, conforms to the Code set out in the author's book *Statutory Interpretation* (1984, Suppl 1989). A reference to the relevant section of the Code is given after each heading in the notes below.

### **Ignorantia juris neminem excusat (Code s 9)**

In *Greenwich London Borough Council v Powell* [1989] 1 All ER 65 the House of Lords took judicial notice of the fact that an enactment which it was called on to construe originated as a government Bill, and relied on that in arriving at the legal meaning of the enactment (see the note on p 299 below related to Code s 316).

### **The subject: mandatory and directory requirements (Code s 10)**

Where a statutory power or discretion is conferred on a court or other body, but the enactment is silent on whether it can be exercised conditionally, that question can be decided only by considering the purpose of the enactment. The court, when pronouncing on the exercise of statutory powers, is disposed to allow maximum flexibility. Principle tends to give way to convenience, mainly because of the difficulty of foreseeing future circumstances.

In *R v Crown Court at Southwark, ex p Customs and Excise Commissioners* [1989] 3 All ER 673 the Divisional Court was required to decide whether conditions could be imposed on the making of an order under the Drug Trafficking Offences Act 1986, s 27(2) (which empowers a Crown Court to order production of, or access to, certain material for the purpose of an investigation into drug trafficking). The Act being silent on the point, the Divisional Court held that the Crown Court, if it decided to make an order, must make it in the unconditional terms laid down by s 27(2). It would however be open to the Crown Court, in an exceptional case (which did not exist here), to decline to make the order unless specified undertakings were given by the party seeking it. The giving of these would be equivalent to the imposing of conditions when making the order.

### **Enforcement agencies: courts and other adjudicating authorities (Code s 19)**

#### *No jurisdiction by consent*

Parties to litigation cannot by their mutual agreement confer upon a court or other adjudicating authority any jurisdiction which, under the Acts

establishing or regulating it, it does not possess: *R v Secretary of State for Social Services, ex p Child Poverty Action Group* [1989] 1 All ER 1047.

#### *Stare decisis*

A court must not decline a jurisdiction which it is satisfied Parliament intended to confer on it, even though to exercise the jurisdiction means treating an otherwise binding decision as having been arrived at per incuriam.

In *Rickards v Rickards* [1989] 3 All ER 193 the Court of Appeal declined to follow its own previous decision in *Podbury v Peak* [1981] Ch 344. This decided that the House of Lords decision in *Lane v Esdaile* [1891] AC 210 that there is no right of appeal against a grant or refusal of leave to appeal applied to a refusal to extend the time for appeal. In *Rickards* Balcombe LJ said (at 201):

'We are justified in refusing to follow *Podbury v Peake* because to do so would require us to decline a jurisdiction which I am satisfied Parliament has conferred on us.'

He said (ibid) that the true ratio of *Lane v Esdaile*

'is that where there is a provision that an appeal shall lie only with the leave of a particular court or courts neither the grant nor the refusal of leave is itself appealable, otherwise the introduction of the "filter" requiring leave would be pointless.'

#### *Transactions between states*

Municipal courts do not have the competence to adjudicate on or enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law (*Machine Watson & Co Ltd v International Tin Council* [1989] 3 All ER 523, per Lord Oliver at 544; see also *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PCC 22 at 75 (15 ER 9 at 28-29) and *Cook v Sprigg* [1899] AC 572 at 578).

#### *Court orders valid until quashed*

In *Barclays Bank plc v Taylor* [1989] 3 All ER 563 at 565 Lord Donaldson MR said 'a court order which is valid on its face is fully effective and demands compliance unless and until it is set aside by due process of law.'

### **Enforcement agencies: judicial review (Code s 24)**

#### *Terminology*

In *Rv Inland Revenue Commissioners, ex p Taylor (No 2)* [1989] 3 All ER 353 at 357-358 Glidewell LJ delivered an important dictum concerning the terminology used in judicial review—

'[The argument] is that, in the circumstances of this case, the use by the Board [of Inland Revenue] of s 20(2) [of the Taxes Management Act 1970] . . . was unreasonable in the *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). That phraseology, though we still adhere to it out of usage if not affection, is one that properly has been replaced by the use of the word "irrational" derived from the well-known

speech of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, [1985] A C 374. It will be remembered that Lord Diplock made it clear that in order for a court to find that a particular decision or action on the part of a body whose traverse was irrational, it had to be—"a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." (See [1984] 3 All ER 935 at 951, [1985] A C 374 at 410.)'

In *Al-Mehdawi v Secretary of State for the Home Department* [1989] 3 All ER 843 at 846 Lord Bridge confirmed that in relation to the three heads of illegality, irrationality and procedural impropriety laid down by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410 as the grounds for judicial review it is 'the third head which embraces breaches of natural justice.'

#### **Enforcement agencies: dynamic processing of legislation by (Code S 26)**

Where a sub-rule laid down by judicial decision has through the passing of subsequent legislation become inappropriate, it ceases to apply. It may then be disregarded even by a court inferior to that which laid down the sub-rule.

In *Pittalis v Grant* [1989] 2 All ER 622 the Court of Appeal reviewed the decision of the House of Lords in *Smith v Baker & Sons* [1891] AC 325 laying down that under the enactments providing for an appeal from a county court to the Court of Appeal a point of law could not be taken in the Court of Appeal if it had not been raised in the court below. Held In view of the change made by the Supreme Court Act 1981 removing the restriction whereby an appeal from a county court lay only on a point of law, the rule in *Smith v Baker & Sons* was no longer applicable and should be treated as obsolete. Nourse LJ said (at 632)—

'We are conscious that it may seem a strong thing for this court to hold thus of a rule established by the House of Lords, albeit one enfeebled by exceptions, the statutory support which gave it life at last turned off. But, where it can see that the decision of the higher court has become obsolete, the lower court, if it is not to deny justice to the parties in the suit, is bound to say so and to act accordingly.'

#### **Delegated legislation: doctrine of ultra vires (Code s 58)**

##### *Presumption of validity*

It was stated by Lord Bridge in *Factortame Ltd v Secretary of State for Transport* [1989] 2 All ER 692 at 709, following *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, that it is a principle of English law 'that delegated legislation must be presumed to be valid unless and until declared invalid'.

##### *Severance*

Where a person is prosecuted for infringement of a byelaw it is not a defence to show that a provision of the byelaw is ultra vires if the accused would still

have been guilty of the offence even had that provision not been included in the byelaw.

The case of *DPP v Hutchinson* [1989] 1 All ER 1060 concerned byelaws made with respect to common land under the Military Lands Act 1892, s 14(1) (which states that no byelaw made under it shall authorise interference with rights of common). The applicant, who was convicted of an offence under the byelaws, possessed no right of common in respect of the land. The byelaws thus interfered with no rights of common of hers, even though they may have interfered with rights of common possessed by other persons. *Held* The conviction was lawful. Schiemann J said (at 1070) that in upholding the conviction the court was performing an exercise which was essentially the alteration of a decision made by another authority (namely the authority which made the byelaws in question). It should do this only when sure that the altered decision represented that which that authority would have enacted had he appreciated the limitation on his powers. Here it was clear that if this limitation had been appreciated the byelaws would still have been made, but would have been restricted to non-commoners. In that case the applicant would have been justly convicted.

*Presumption against extra-territoriality*

In *Holmes v Bangladesh Biman Corp* [1989] 1 All ER 852 the House of Lords held that a power to make delegated legislation may by implication be treated as narrowed by the application of the presumption against extra-territoriality (see the note on p 296 below related to Code s 223).

**The enactment: challenges to validity of (Code s 75)**

*European Community law*

The European Communities Act 1972, s 2(1) was stated by Lord Bridge in *Factortame Ltd v Secretary of State for Transport* [1989] 2 All ER 692 at 701 to have precisely the same effect in relation to any subsequent Act as if a section were incorporated in the later Act which in terms enacted that the provisions of the later Act were to be without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC. Earlier (at 697) Lord Bridge suggested that the phrase 'directly enforceable Community rights' was a convenient expression to use to denote 'those rights in Community law which have direct effect in the national law of member states of the EEC'. He defined 'Community law' as embracing 'the EEC Treaty, subordinate legislation of institutions of the European Economic Community (the EEC) and the jurisprudence developed by the Court of Justice of the European Communities'.

In *Factortame* the House of Lords held that a court had no power to make an order postponing the coming into force of a British statute pending the determination of a reference to the European Court to determine its validity. Lord Bridge said (at 702-703) that—

'the presumption that an Act of Parliament is compatible with Community law unless and until declared to be incompatible must be at least as strong as the presumption that delegated legislation is valid unless and until declared invalid.'

**Filling in the detail: implications (when legitimate) (Code s 109)***Incidental statutory powers*

In *Bodden v Commissioner of Police of the Metropolis* [1989] 3 All ER 833 the question arose whether a magistrate was empowered by the Contempt of Court Act 1981, s 12(2) to order a person who was committing a possible contempt of court *outside* the court (in this case by using in the street a loud-hailer which interrupted court proceedings) to be brought before him immediately, when all that the enactment says is that the court may order the offender to be detained until the rising of the court. The Court of Appeal held that the power was implied. Beldam LJ said (at 837)—

'In giving the magistrates' court jurisdiction to deal with the different kinds of contempt referred to in s 12(1)(a) and (6), Parliament obviously intended to confer all incidental powers necessary to enable the court to exercise the jurisdiction in a judicial manner.'

The common law rule that a statutory power by implication carries with it all incidental powers necessary for its operation is very important. It is for example the basis for the well-known rule that, except where the contrary intention appears, the exercise of a statutory power cannot in itself amount to a nuisance (see Code pp 738-739). (As to this case see also the note on p 299 below related to Code s 284).

**Filling in the detail: implications affecting related law (Code s no)***Where courts reject statutory analogy*

The case of *Singh v Observer Ltd* [1989] 2 All ER 751 provides— a further example of the tendency of the courts not to follow the lead set by Parliament in abolishing a criminal offence or tort (for earlier examples see Code pp 248-249). Notwithstanding that the Criminal Law Act 1967, ss 13 and 14 abolished criminal and civil liability for the maintenance of actions Macpherson J held that this remained contrary to public policy, so that it was open to the court to order a maintainer to disclose his identity and pay the costs of the maintained action.

On the other hand in *Kirkham v Chief Constable of the Greater Manchester Police* [1989] 3 All ER 882 Tudor Evans J followed the lead of the Suicide Act 1961, s 1 (by which suicide ceased to be a criminal offence) in rejecting the argument that because of its unlawful nature damages could not be recovered where police had negligently allowed a prisoner known to be suicidal to be kept without proper safeguards, so that he did in fact commit suicide (affirmed by the Court of Appeal: *The Independent* 16 January 1990). However *R v City of London Coroner, ex p Barber* [1975] Crim LR 515; Code p 248, which went the other way, was not cited to the court. (As to this case see also the note on p 294 below related to Code s 126).

**Commonsense construction rule (Code s 122)***Meaning of forthwith'*

Where an enactment requires that a thing is to be done 'forthwith' this does

not mean it is to be done before the conditions necessary for doing it are satisfied. The Social Security Act 1975, s 98 requires a claim for benefit to be 'submitted forthwith to an adjudication officer'. In *R v Secretary of State for Social Services, exp Child Poverty Action Group* [1989] 1 All ER 1047 the Court of Appeal held that this did not require a claim to be submitted for determination at a point in time when it was incapable of being determined because relevant facts had not yet been ascertained.

### Statutory definitions (Code s 125)

#### *Potency of the defined term*

It is pointed out at Code p 276 that the natural meaning of a defined term may have a potency sufficient to override the literal meaning of the statutory definition. An extraordinary example of judicial ignoring of this important principle arose in *R v Brixton Prison Governor, exp Kahan* [1989] 2 All ER 368, where the defined term was 'designated Commonwealth country'. The definition of this contained in the Fugitive Offenders Act 1967, s 2(1) states that it is a country designated by an Order in Council made under s 2(1) (which empowers designation of any country for the time being mentioned in the British Nationality Act 1981, Sch 3 'or any other country within the Commonwealth'). Fiji was so designated by the Fugitive Offenders (Designated Commonwealth Countries) (No 3) Order 1970, art 2. Despite the fact that Fiji left the Commonwealth on 15 October 1986 this Order had not been amended.

The applicant for habeas corpus, Mr Kahan, was the subject of an authority to proceed against him under the 1967 Act issued by the Home Secretary on 26 September 1988. This authority would have been invalid if on that date Fiji was not a 'designated Commonwealth country' within the legal meaning of that expression. Since on that date it was not a Commonwealth country at all, the argument could scarcely be stronger for saying that the literal meaning of the definition was overridden. When it is considered that the 1967 Act is penal to a very strong degree, the argument becomes overwhelming. Nevertheless the Divisional Court applied the literal meaning and dismissed Mr Kahan's application.

#### *The term 'person'*

It is submitted that it is clear law, as well as common sense, that unless the contrary intention appears the term 'person' in an enactment does not include a foetus in utero.

This question again came before the Court of Appeal in *R v Tail* [1989] 3 All ER 682. The court considered it afresh, even though it might be thought to have been concluded by the earlier Court of Appeal decision in *Re F (in utero)* [1988] 2 All ER 193. In that case the court held that since a foetus has no existence independent of its mother it does not become a person unless and until born, and so cannot be made a ward of court.

The enactment in question in *Tait* was the Offences against the Person Act 1861, s 16, as substituted by the Criminal Law Act 1977, s 65 and Sch 12. This says (emphasis added):

'A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out, to kill that other or a third person shall be guilty of an offence.'

The question was whether a threat made to a pregnant woman to kill her foetus contravened this provision.

Although strangely the Court of Appeal did not deal with the point in this straightforward way, it clearly begins and ends with the question whether a pregnant woman's foetus falls within the legal meaning of the phrase 'a third person' (the first and second persons respectively being the one making the threat and the one to whom it is made).

The foetus cannot be 'a third person' unless it is a person, so the question is simply whether a foetus is in law a person. The court declined to treat *Re F (in utero)* as a relevant authority on the ground that it related to civil or family law, though it is submitted that this is not a sound reason for disregarding it. It confirms what has been a general principle of our law, that a foetus is not a person in its own right since it is part of the person of its mother.

After much difficulty, which it is submitted did not truly arise, the court reached the obvious conclusion (at 688): 'We feel constrained to say that the fetus in utero was not, in the ordinary sense, "another person", distinct from its mother.' The court did not specify in what extraordinary sense it might be held to be 'another person' in a different context. It seems that a clear contrary intention would need to be spelt out in the enactment for such a construction to be correct.

#### **Principles derived from legal policy: nature of legal policy (Code S 126)**

In ascertaining and applying legal policy for the purposes of statutory interpretation the court will have regard to the underlying principles of all systems of law comprised in the common law, using that term in the widest sense. In *Kirkham v Chief Constable of the Greater Manchester Police* [1989] 3 All ER 882 at 892-893 Tudor Evans J, in considering whether legal policy required damages for negligence to be disallowed where it consisted in allowing a suicidal person an opportunity (which he took) actually to commit suicide, had regard to the fact that suicide is an ecclesiastical offence. He cited the dictum of Lord Denning M R in *Hyde v Tameside Area Health Authority* [1981] CA Transcript 130 that suicide is contrary to the ecclesiastical law 'which was, and still is, part of the general law of England'. Lord Denning had cited the following dictum of Lord Blackburn in *Mackonochie v Lord Penzance* (1881) 6 App Cas 424 at 446:

'The ecclesiastical law of England is not a foreign law. It is a part of the general law of England—of the common law—in that wider sense which embraces all the ancient and approved customs of England which form law, including not only that law administered in the Courts of Queen's Bench, Common Pleas, and Exchequer, to which the term Common Law is sometimes in a narrower sense confined, but also that law administered in Chancery and commonly called Equity, and also that law administered in the Courts Ecclesiastical, that last law consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm—and form, as is laid down in *Caudre's Case* 5 Rep 1, the King's ecclesiastical law.'

(As to *Kirkham v Chief Constable of the Greater Manchester Police* [1989] 3 All ER 882 see also the note on p 292 above related to Code s 110.)

### **Presumption that updating construction to be applied (Code s 146)**

In *Smith v Braintree District Council* [1989] 3 All ER 897 the House of Lords, in determining that the power conferred by the Insolvency Act 1986, s 285(1) to stay any legal process brought 'against the property or person of the debtor' extended to proceedings for commitment under the General Rate Act 1967, s 102, declined to follow *Re Smith, Hands v Andrews* [1893] 2 Ch 1 and *Re Edgcome, exp Edgcome* [1902] 2 KB 403. Those cases were decided, under a similar provision in the Bankruptcy Act 1669, on the ground that proceedings for recovery of rates were 'coercive', following a dictum of Lord Hatherley in 1871. In rejecting these authorities Lord Jauncey of Tullichettle said (at 907):

'. . . not only has the legislative approach to individual bankruptcy altered since the mid-nineteenth century, but social views as to what conduct involves delinquency, as to punishment and as to the desirability of imprisonment have drastically changed. It is, for example, most unlikely that anyone today analysing the six exceptions in s 4 of the 1869 Act would conclude, as did Lord Hatherley LC in 1871, that they all involved an element of delinquency.'

(Compare *Rayware Ltd v Transport and General Workers' Union* [1989] 3 All ER 583, discussed in the note on pp 296-297 below related to Code s 231.)

### **Weighing the interpretative factors (Code s 158)**

In *A-G's Reference (No 1 of 1988)* [1989] 2 All ER 1 the House of Lords considered the legal meaning of the word 'obtained' in the Company Securities (Insider Dealing) Act 1985, s 1(3). This restricts the use by an individual of 'information which he knowingly obtained (directly or indirectly) from [an insider]'. The question was whether this covers only information acquired by purpose and effort or also covers the case where the individual merely receives the information without doing anything active. Finding for the wider meaning, the House rejected the argument that since the statute was penal the narrower meaning must be preferred. Giving the principal judgment, Lord Lowry (at 8) said that 'having carefully weighed the points on either side' he was satisfied that the wider meaning was correct. This confirms the argument of Code s 158 that all relevant interpretative factors are to be weighed in the balance.

### **Commencement of an enactment (Code ss 164-169)**

*judicial postponement of commencement date*

In *Factortame Ltd v Secretary of State for Transport* [1989] 2 All ER 692 the House of Lords held that a court has no power to make an order postponing the coming into force of a statute pending the determination of a reference to the European Court to determine its effectiveness. (As to this case see also the note on p 290 above related to Code s 58).

*Judicial alteration of commencement date*

A court has no power effectively to alter the commencement date appointed for an enactment by adjourning until after that date a matter which has come before it earlier.

In *R v Walsall Justices, exp W(a minor)* [1989] 3 All ER 460 the prosecution indicated on the date fixed for the trial before magistrates of a person accused of wounding a boy of twelve that it would offer no evidence unless the magistrates adjourned the trial until after the commencement of the Criminal Justice Act 1988, s 34(1). This enactment abolished the rule requiring the unsworn evidence of a child to be corroborated. In the present case no corroborating evidence was available. The magistrates adjourned the trial accordingly. *Held* They had no power to do so. Although the power of adjournment conferred by the Magistrates' Courts Act 1980, s 10(i) is in terms unconditional, by implication it does not empower a court to circumvent the date fixed by the legislature for the coming into effect of a change in the law. To do so contravenes the rule laid down in *R v Boteler* (1864) 4 B & S 959, 122 ER 718 that a court is not entitled to refuse to apply the current law on the ground that in their opinion it is lacking in justice.

**Extra-territorial application of Act (Code s 223)**

The Carriage by Air Act 1961, s 10(1) says that an Order in Council may apply Sch 1 to the Act, which sets out the 1955 Hague Convention, 'to carriage by air, not being carriage by air to which the Convention applies, of such descriptions as may be specified in the Order'. In *Holmes v Bangladesh Biman Corp* [1989] 1 All ER 852 the House of Lords held that this literally-unrestricted wording must be treated as impliedly cut down by the presumption against extra-territoriality. It therefore did not authorise the making of an Order in respect of non-Convention carriage by air where none of the following were within British territory: (1) the place of departure, (2) any agreed stopping place en route, or (3) the place of destination. The House rejected the argument that s 10(1) could be given an unrestricted construction because, under the doctrine of *forum non conveniens*, the carrier would be likely to obtain in the appropriate foreign court a stay of any proceedings inappropriately commenced in a British court.

The case illustrates that just because an enactment is to some extent extra-territorial (perhaps because, as here, its purpose is to implement an international convention), that does not mean the presumption against extra-territoriality ceases to apply to it in other respects. As Lord Griffiths said (at 864):

'If as a result of international co-operation a number of countries agree to adopt the same law, the domestic legislation that gives effect to this international agreement in this country is not extra-territorial within the meaning of the rule. In such circumstances our domestic legislation is not an interference with the sovereignty of the other countries but the recognition of their wish that we should alter our own law to accord with the common will.'

**Pre-enacting history: the earlier law (Code s 231)**

In using earlier legislative treatment of a particular mischief as a guide to

interpretation, the court must keep in mind changes of approach. In *Rayware Ltd v Transport and General Workers' Union* [1989] 3 All ER 583 the Court of Appeal was required to construe the Trade Union and Labour Relations Act 1974, s 15(1), which authorises an employee to take part in picketing provided it is 'at or near his own place of work'. The nearest point at which it was possible to picket the place of work without trespassing was just over half a mile away. Holding that in the circumstances this satisfied the test of nearness, May LJ (at 587) said of the history of earlier versions of s 15: 'The approach of different generations to what may appear to be the same or a similar problem sometimes alters radically.' (Compare *Smith v Braintree District Council* [1989] 3 All ER 897, discussed in the note on p 295 above related to Code s 146.)

*Rayware* illustrates the judicial treatment of a term which has been previously processed by the courts. Both May LJ (at 587) and Nourse LJ (at 589) adopted the dictum of Byles LJ in *Tyne River Keelmen v Davison* (1864) 16 CBNS 612 at 622; 143 ER 1267 at 1271 that 'the word "near" is not a restraining, but an expanding, word, to be extended so far as to give effect to the intention of the legislature'.

**Enacting history: as an indication of Parliament's intention** (Code s 240)

*Government policy*

For the court's reference to government policy as an indication of legislative intention see the note on pp 299-300 below related to Code s 316.

**Enacting history: special restriction on parliamentary materials** (Code s 241)

*Speeches by Ministers*

In *Machine Watson & Co Ltd v International Tin Council* [1989] 3 All ER 523 at 531 Lord Griffiths, after saying that we do not, as yet, have resort to the parliamentary history of an enactment as an aid to statutory interpretation, quoted from the speech of a Government minister on the second reading of the Bill that became the Diplomatic Privileges (Extension) Act 1944. His purpose was to show that the power conferred by the 1944 Act (later reproduced in the International Organisations Act 1968, s 1(2)) to confer the legal capacities of a body corporate on an international organisation by Order in Council was not intended to deprive persons dealing with such an organisation of relief in case of default, but that such relief was intended to be given by state action rather than a legally-enforceable remedy.

This illustrates the reluctance of judges to be bound by the self-imposed restriction on reference to parliamentary materials when they feel this has a distorting effect on their construction of an enactment. The truth is that, despite the restriction, the court is master of its procedure and will be influenced by parliamentary materials where this is necessary in order to do justice.

**Enacting history: international treaties (Code s 242)***Uniform construction*

Where a treaty is referred to in the construction of an enactment, the court should ensure that its interpretation of it is not out of line with that of other countries which are parties to the treaty. Accordingly the use in a treaty of a term which has a particular meaning in the municipal law of the court does not require that it be given that meaning if to do so would be out of step with the general treatment of the term in countries which are parties to the treaty.

*C v C* [1989] 2 All ER 465 concerned the legal meaning of the term 'custody' in the Child Abduction and Custody Act 1985, which implements provisions of the 1980 Convention on the Civil Aspects of International Child Abduction. Lord Donaldson MR said (at 472):

'The whole purpose of such a code is to produce a situation in which the courts of all contracting states may be expected to interpret and apply it in similar ways, save in so far as the national legislatures have decreed otherwise. Subject then to . . . [such exceptions] . . . the definitions contained in the convention should be applied and the words of the convention, including the definitions, construed in the ordinary meaning of the words used and in disregard of any special meaning which might attach to them in the context of legislation not having this international character.'

**Post-enacting history: judicial decisions on Act (Code s 256)***Tacit legislation*

Where it is alleged that a previous judicial decision on the legal meaning of an enactment was erroneous, the court will be influenced by the fact that, although Parliament has had an opportunity to rectify the alleged error, it has not chosen to do so. This may indicate tacit approval of the decision in question.

In *Phillips v Mobil Oil Co Ltd* [1989] 3 All ER 97 it was argued that the decision of Buckley J in *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, [1960] 1 WLR 549 that a renewal covenant in a lease falls within the definition of 'estate contract' in the Land Charges Act 1925, s 10, and is therefore registrable as a Class C(iv) land charge, was erroneous. The Court of Appeal rejected the argument partly on the ground that on two occasions since the ruling in that case Parliament had made amendments to the 1925 Act without taking the opportunity to reverse it.

**Unamendable descriptive components of Act: format (Code s 283)***Division of Act into Parts*

In *R v Inland Revenue Commissioners, exp Taylor (No 2)* [1989] 3 All ER 353 the Divisional Court rejected the contention that when an appeal is pending the power to require production of documents conferred by the Taxes Management Act 1970, s 20 (which is in Pt III of the Act) is replaced by the somewhat different power conferred by s 51 (which is in Pt V). Glidewell LJ (at 357) gave valuable guidance on the significance of an Act being divided into Parts. After pointing out that Pt III of the 1970 Act is concerned with tax

returns and information, Pt IV with assessments and claims, and Pt V with appeals, he went on—

'The fact that the 1970 Act proceeds in a logical order, first of all dealing with returns and then with assessment and claims and then with appeals, does not mean that, so to speak, each section is in watertight compartments or that procedures provided in one part of the Act necessarily supersede or rule out the use of procedures provided in other parts of the Act. If that were the case, there would have to be some words in the statute that made it clear.'

### **Unamendable descriptive component of Act: punctuation (Code S 284)**

#### *Use of commas*

An example of where the presence or absence of commas can make a difference to the meaning of an enactment arose in *Bodden v Commissioner of Police of the Metropolis* [1989] 3 AllER 833. The enactment in question was the Contempt of Court Act 1981, s 12(i)(fe), which gives a magistrate jurisdiction to deal with any person who 'wilfully interrupts the proceedings of the court or otherwise misbehaves *in court*' (emphasis added). The draftsman had taken this wording from provisions deriving from the County Courts Act 1846, s 113, which said that if 'any Person . . . shall wilfully interrupt the Proceedings of the Court, or otherwise misbehave in Court, it shall be lawful [to take him into custody]'. *Bodden* concerned a person who had interrupted court proceedings by using, in the street outside the court house, a loud-hailer for the purpose of addressing a demonstration protesting about another case which was being heard inside. In rejecting the argument that the words 'in court' governed the first limb of the enactment as well as the second, the Court of Appeal had regard to this legislative history, though it appears they would have come to the same conclusion anyway. (As to this case see also the note on p 292 above related to Code s 109).

### **Purposive-and-strained construction (Code s 315)**

#### *Potency of defined term*

An important category of cases where a purposive-and-strained construction is required is that where the potency of a defined term overrides the literal meaning of the definition. For an example see the note on p 293 above related to Code s 125.

### **Purposive construction: statements of purpose (Code s 316)**

#### *Purpose based on government policy*

In interpreting an enactment the court may refer to a line of government policy which Parliament clearly had in mind when framing the enactment. In *Greenwich London Borough Council v Powell* [1989] 1 All ER 65 the House of Lords construed the definition of 'protected site' in the Mobile Homes Act 1983, s 5(1) by reference to government policy regarding the provision by local authorities of caravan sites for gypsies. The definition says that the term

'does not include any land occupied by a local authority as a caravan site providing accommodation for gipsies'. Lord Bridge, who delivered the only judgment, relied on government advice to local authorities contained in a Department of Environment circular as an indication that the definition referred to sites for gipsies who were nomadic for part of the year only as well as those who were continuously nomadic. He said (at 70):

'The Bill which became the 1983 Act was a government Bill and it would be quite unrealistic not to recognise that the distinction between the two classes of site made in [the definition of "protected site"] must have been made with full knowledge of the policy which had been followed since 1970 . . . [and which] . . . is, in my opinion, fully cognisable as a powerful pointer to the intention of the legislature . . .'

**Purposive construction: Community law (Code s 320)**

In *Litster v Forth Dry Dock and Engineering Co Ltd* [1989] 1 All ER 1134 the House of Lords, following its decision in *Pickstone v Freemans plc* [1988] 2 All ER 803, [1989] AC 66, held, as Lord Templeman put it (at 1139), that where necessary to implement their purpose—

'the courts of the United Kingdom are under a duty to follow the practice of the European Court by giving a purposive [that is purposive-and-strained] construction to directives and to regulations issued for the purpose of complying with directives.'

The applicants, employees of Forth Dry Dock, were dismissed one hour before Forth Dry Dock's transfer to Forth Estuary Engineering took effect. Held They must be treated for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 5 as having been employed by Forth Dry Dock 'immediately before' the transfer. Otherwise there would not be compliance with the spirit of EC Council Directive 77/187, art 3, the clear object of which is to protect the rights of employees in the event of a change of employer.

**Avoiding a futile or pointless result (Code s 324)**

For an example see *Lane v Esdaile* [1891] AC 210, as explained in the note on p 289 above related to *Rickards v Rickards* [1989] 3 All ER 193.

**Implied application of ancillary rules: constitutional law rules (Code S 334)**

*Parens patriae doctrine*

For reasons that are not clear or convincing, under current constitutional doctrine as laid down by the courts the Crown cannot act directly as *parens patriae*. Therefore in a particular case the Crown cannot act in this capacity where no functionary is for the time being appointed by the Crown to act in such matters on its behalf.

On the commencement of the Mental Health Act 1959, which contained provisions corresponding to those previously exercised under the *parens patriae* doctrine, the warrant dated 10 April 1956 by which the jurisdiction of

the Crown in lunacy had been assigned to the Lord Chancellor and judges of the Chancery Division, was revoked by a further warrant. The consequence was, as it was put by Lord Brandon in *F v West Berkshire Health Authority* [1989] 2 All ER 545 at 552, that 'so much of the *parens patriae* jurisdiction as related to persons of unsound mind no longer exists'. (Although Lord Brandon gave as an additional reason the provisions of the 1959 Act itself, now embodied in the Mental Health Act 1983, this was clearly erroneous. The 1959 Act made no reference to the royal prerogative, and did not affect it.)

### Hearing both sides: *audi alteram partem* (Code s 346)

The decision of the Court of Appeal in *R v Diggines, exp Rahmani* [1985] 1 All ER 1073, [1985] QB 1109; All ER Rev 1985, p 266; Code Supplement p 82, which at [1986] 1 All ER 921, [1986] AC 475 was affirmed by the House of Lords on grounds not relevant to the *audi alteram partem* rule, was reversed by the House of Lords so far as it related to that rule in *Al-Mehdawi v Secretary of State for the Home Department* [1989] 3 All ER 843. The House held that an appellant under the Immigration Act 1971, s 1 s (i) who had been deprived of the opportunity to be heard on the appeal through the negligence of his solicitors in sending notice to him at the wrong address was not entitled to judicial review on the ground of breach of natural justice. There can be no such breach where the process of justice has not itself proved defective. In this connection a litigant must be identified with his legal adviser. If the adviser proves deficient the litigant's remedy (if any) can only be against the adviser, since the state's administration of justice is not at fault.

Lord Bridge confirmed (at 846) that, in relation to the three heads of illegality, irrationality and procedural impropriety laid down by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410 as the grounds for judicial review, it is 'the third head which embraces breaches of natural justice'.

### Ordinary meaning of words (Code s 363)

*Word with no ordinary meaning*

Where a word used in an enactment has no settled meaning, its legal meaning as so used must be determined from the context. In *Inglewood Investment Co Ltd v Forestry Commission* [1989] 1 All ER 1 it was held by the Court of Appeal that the word 'game' in relation to hunting, shooting and other sporting rights 'is without comprehensive basic definition' (per Dillon LJ at 4).

### Implication where statutory description only partly met (Code s 396)

*Exercise of power partly ultra vires*

In *Robbins v Secretary of State for the Environment* [1989] 1 All ER 878 the House of Lords considered a case where a repairs notice served under the Town and Country Planning Act 1971, s 115 required the carrying out of work some of which was within the power conferred by the section and some of which was

not. *Held* The notice was not invalidated by the inclusion of invalid items of work, since the appeals machinery provided by the Act was enough to prevent hardship to the building owner. Lord Ackner said (at **890**):

**'so long as there is not inextricably mingled in the repairs notice works which have not the character of work of preservation, such works can properly be excised from the repairs notice, leaving the notice valid as respects [the remainder].'**