Introductory Note by FB

The article below is a further addition to my writings on understanding legislation. Others are included within the Topic 'Understanding legislation'. The Topic can be found on this website at *www.francisbennion.com/topic/understandinglegislation.htm*.

Threading the Legislative Maze - 2

FRANCIS BENNION*

*Former U.K. Parliamentary Counsel. Author of works on legislation including *Statutory Interpretation* (3rd edn 1997), *Bennion on Statute Law* (3rd edn 1990) and *Statutes* title in Halsbury's *Laws of England* (4th edn reissue, 1995).

The first article in the series (pp. 356-358 *ante*) described some basic concepts in statute law, mainly concerned with the importance of the enactment as the unit of inquiry. It was shown that the legal meaning of an enactment is what matters, since it is taken to correspond to the original legislator's intention. In practical terms this is the meaning thought most likely to be adopted by the House of Lords, as the final court of appeal.

The practitioner, so far as necessary for his or her case, must try to work out precisely what the legal meaning of a relevant enactment is. Where there is an existing judicial decision on the point, say by the High Court, it is usually assumed that the law is as indicated by that decision. This is not necessarily true. Doubts may exist about the correctness of the decision. It may have been decided *per incuriam*, or without full argument. The profession may expect it to be overruled if it comes before a higher court. Even where the profession does not expect this, it may still be overruled.{As for example happened when in *Bacchiocchi v Academic Agency Ltd* [1998] 2 All ER 241 the Court of Appeal surprisingly overruled *Department of the Environment v Royal Insurance plc* [1987] 1 EGLR 83: see Bennion, "Last Orders at *La Pentola*" Sol J [reference to follow].}

The true analysis is that whenever it becomes necessary to decide what the legal meaning of a doubtful enactment is, whether by a practitioner advising a client, a court disposing of a case, or in any other way, all relevant interpretative factors must be found out and applied. The existing court decision is only one of these, and the weight of argument may on balance fall the other way. The interpreter's duty is not discharged if this process is not fully carried out, especially where a serious issue, perhaps affecting the liberty of the subject, depends upon it.

A temporal element may enter the process. As indicated in the previous article, even where the

legislature has not intervened the legal meaning of an enactment may appear to be X at one moment in time and Y at a later date. If this is due to the overruling of an earlier decision, the later authority will on normal principles operate retrospectively. This can present problems, still not altogether resolved by the law, in relation to persons who in the meantime quite properly acted on the basis that meaning X was correct. In a later article I will attempt a detailed account of this, but before doing so I need to give more explanations of basic concepts.

Legal and Factual Issues

The importance of the enactment as the unit of inquiry is that it is usually the operation of an enactment that gives rise to relevant issues of fact or law. The point in a particular case can usually be reduced to a small compass, though care and effort may be needed to define it. This is worth while, for it avoids unnecessary argument and consequent lengthening of court proceedings. It also avoids confusion. As Sir Edward Coke said in the seventeenth century about complaints that too many authorities were cited to the court: 'This were easily holpen, if the matter (which ever lieth in a narrow room) were first discerned, and then that everyone that argueth at the bar would either speak to the purpose or else be short.'{Co. Rep: Preface to Part X.}

An issue of fact may be whether a party committed a certain act. Before it can be determined whether that really is a material issue, it must first be ascertained whether a fact of that kind is required by what in the previous article I described, citing an example, as the factual outline laid down by the enactment. I now take as another example the circumstances in *Parkin v Norman* [1983] QB 92. This concerned the legal meaning of an enactment which, without departing from the official text, can be rendered as follows-

> (1) Any person who in any public place
> (2) uses insulting behaviour
> (3) whereby a breach of the peace is likely to be occasioned
> (4) shall be guilty of an offence.

Here clauses (1) to (3) constitute the factual outline, whilc clause (4) expresses the legal thrust. The case turned on clause (2). The defendant (D) argued that the legal meaning could be fully expressed as follows-

> (2) uses behaviour which is of an insulting nature, and which he intends to be insulting, and which in fact insults another person

However the prosecutor (P) argued for the following version-

> (2) uses behaviour which is of an insulting nature, whether or not he intends it to be insulting, and whether or not another person is in fact insulted

Before the issue of fact arose of whether or not P had committed a relevant act, it was necessary to settle an issue of law, namely which of these two versions was correct. The court favoured P's version. This leads us to another conclusion. In most cases where statutory interpretation is required, the argument boils down to which of two *opposing constructions* the court will prefer.

Opposing Constructions of an Enactment

Lord Wilberforce said of the Rent Act 1968 s 18 (repealed): "the section is certainly one which admits, almost invites, opposing constructions".{*Maunsell v Olins* [1974] 3 WLR 835 at 840.} This applies to any enactment where there is real doubt as to its legal meaning.

It is sometimes said of the opposing constructions that one presents a wider and the other a narrower legal meaning. Here it is necessary to remember that one is speaking of a wider or narrower construction of the enactment forming the unit of inquiry, and not necessarily of the Act as a whole. For example the unit of inquiry may be a proviso cutting down the effect of a section. A wider construction of the proviso then amounts to a narrower construction of the section.

An example of a case where one of the opposing constructions was narrower and the other wider is *Inland Revenue Commissioners v Hinchy* [1960] AC 748. This turned on the meaning of a phrase in the Income Tax Act 1952 s 25(3) (repealed) which concerned the legal thrust of that provision where an item of the taxpayer's income had been understated and a penalty was due. The argument concerned the amount of the penalty. Lord Reid said{At p 766.}-

> "I can now state what I understand to be the rival contentions as to the meaning of s 25(3). The appellants [the Crown] contend that 'treble the tax which he ought to be charged under this Act' means treble his whole liability to income tax for the year in question . . ."

The rival construction, put forward by the taxpayer, was treble the tax which he would have been charged for that item of income if it had been correctly declared.

In a few cases, there may be no sense in which one of two constructions is "wider" or "narrower" than the other. For example an enactment may determine whether a person who undoubtedly needs a licence for some activity needs one type of licence (say a category A licence) or another type (category B). If the legal meaning of the enactment is uncertain, the opposing constructions will respectively require a category A and a category B licence.

Although the rival advocates put forward opposing constructions, the court may reject both and substitute its own. It may even hold that the case does not, after all, turn on a point of construction, which amounts to saying that there is no real doubt as to the legal meaning of the enactment.

In *Green v Turkington* [1975] Crim LR 242 an enactment regulating taxis made it an offence for an unlicensed cab to display a notice which "may suggest" that the vehicle is being used for hire. The opposing constructions for "may suggest" put forward in the magistrates' court were (a) "is reasonably likely to suggest" and (b) "might possibly suggest". The court rejected both constructions. It held that, on the facts of the case before it, opposing constructions were not needed, since there could be no doubt that the notice in question fell within the wording of the enactment as it stood.

Judgment and Discretion Contrasted

One type of case where, although there may be genuine doubt over an enactment, opposing

constructions do not arise is where the enactment confers a discretion or requires the exercise of judgment. Here more than one correct answer may be possible, though it is not right to say (as is sometimes done) that the enactment is therefore ambiguous.

Except for a judgment on a question of fact, both these types of enactment (which must be carefully distinguished) require evaluation of a conceptual question, that is one related to a particular abstract concept such as justice or reasonableness, or what is "proper". Judgment of what was a "proper" proportion of expenses was the point at issue in the famous case of *Pepper (Inspector of Taxes) v Hart* [1993] AC 593. Without exception, the judges involved failed to perceive that its being left as a matter for the judgment of the relevant tax officer made reference to opinions expressed in Hansard inappropriate.{See Bennion, "How they all got it wrong in *Pepper v Hart*", [1995] *British Tax Review* 325.}

The decision may be objective (for example related to justice in general) or subjective (related to what appears to the authority to be just). Certain express criteria may be superimposed (for example ministerial guidelines). In addition, there are a host of implied criteria laid down by the usual interpretative guides. Even with objective decisions, there will inevitably be variations in the way different minds view the matter, because of the phenomenon of differential readings discussed in the previous article.

The effecting of judgment, otherwise called judgment-forming, means that the appointed judgment former must relate the particular facts to the abstract concept in question, usually expressed as a broad term. In this sense, concerned with formal logic, "judgment" is defined as the action of mentally apprehending the relation between two objects of thought.{*Oxford English Dictionary* (2nd edn), meaning 9.} The various concepts may conflict, when weighing and balancing becomes necessary. There is a point beyond which analysis cannot go: ". . . even when judicial reasoning is based on the cumulative effect of several independent premisses, a time inevitably comes when all that the judge can say is 'I have weighed the pros and cons which I have stated and I now give judgment for so and so in accordance with the principle I have formulated after weighing the stated pros and cons'. The important thing is that it is of the essence of the judicial process that the pros and cons should first be weighed."{Cross, *Precedent in English Law* (3rd edn, 1977), pp 196-7.}

Here are two examples illustrating the types of concept concerned in forming a judgment. In *Hunter v Chief Constable of West Midlands* [1982] AC 529 the question arose whether a certain act was an abuse of process. Lord Diplock, stressing that the question was one of judgment, said{At p 536.} "I disavow the word discretion". In *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23 Lord Mustill, pronouncing on the meaning of "substantial" in the Fair Trading Act 1973 s 64(3) (which allows a merger reference to be made where services are supplied "in a substantial part of the United Kingdom"), said{At p 32.}: "Even after eliminating inappropriate senses of 'substantial' one is still left with a meaning broad enough to call for the exercise of judgment . . ."

Discretion on the other hand is to be applied where it is left to the authority to make a determination at any point within a given range, for example in fixing the sentence following conviction of an offence. Here is a more detailed example.

The Chronically Sick and Disabled Persons Act 1970 s 2(1) requires a local authority to ascertain the "needs" of certain persons as a preliminary to deciding what benefit they should receive.

Swinton Thomas LJ said the argument that the requisite assessment of "needs" involved a discretion was fundamentally flawed, adding: "A need is a question of assessment and judgment, not discretion."{*R v Gloucestershire County Council, ex p Barry* [1996] 4 All ER 421 at 438.} In this case the Court of Appeal neatly showed the nature of the distinction between judgment and discretion by holding that while a local authority could not take its own financial means into account when deciding, as a matter of judgment, whether a person had "needs" it could do so when deciding, as a matter of discretion, how it was to meet those "needs".{Reversed in *R v Gloucestershire County Council, ex p Barry* [1997] 2 All ER 1, when the House of Lords held the financial resources of the local authority *could* properly be taken into account when assessing "needs". The reasoning of the Court of Appeal is to be preferred, as shown by the later House of Lords decision in *R v East Sussex County Council, ex p Tandy*, Times 21 May 1998.} This illustrates the fact that where a discretion is to be exercised there may be a need for the exercise of judgment as to ancillary matters falling to be decided before the discretion can be exercised.

Central Function of Practitioner

The formulating and resolution of opposing constructions of an enactment, and the exercise of judgment or discretion, are aspects of the central function of a legal practitioner who is involved in a particular case. Whether the practitioner is advising a client, acting as the client's advocate before the court, or acting as the court itself, this function can be stated as follows-

> In law the central function of the practitioner involved in a case is to go through the mental process of reaching a legal conclusion by applying the relevant law to the relevant facts.

This is a continuous two-way operation. Without considering all the facts of the case (including possible facts currently unknown), the practitioner cannot determine which legal rules (whether laid down by statute or otherwise) are relevant. At the same time, without considering all the relevant law the practitioner cannot determine which facts are relevant.

When acting as an *adviser* in a case the practitioner conveys the legal conclusion reached to the client, along with the reasoning supporting it and a statement of the consequences. When later acting as an *advocate* in the case, the practitioner seeks to persuade the court of the correctness of the conclusion previously reached when giving advice. When acting as the *court*, the practitioner evaluates the arguments put forward on both sides and determines which is the correct legal conclusion.

Which Type of Construction?

I end this article with a basic question. What underlies any doubts there may be as to the legal meaning of an enactment? Before we even start on trying to understand, let alone master, the technique of handling or managing statutes we need to ask what exactly the interpreter of a particular legislative text is supposed to be doing. Is the interpreter's task to arrive at the literal or grammatical meaning of the text and apply that every time? Or is it, at least occasionally, to go further and apply a purposive but strained meaning? Or is the remit wider still, sometimes requiring the interpreter to depart altogether from the text, using it merely as a starting point for developing the underlying juridical idea?

These may be called respectively literal construction, purposive construction, and developmental construction. Each has its place in the spectrum of law, as I shall explain in the next article.

Summary

- Where there is an existing court decision on the the legal meaning of an enactment this does not necessarily represent the law, since the decision may later be held incorrect.

- The importance of the enactment as the unit of inquiry rests on the fact that it is usually the operation of an enactment that gives rise to crucial *issues* of fact or law.

- An issue of fact may be whether a party committed a certain act. Before it can be determined whether that really is material, it must first be ascertained whether a fact of that kind is required by the relevant factual outline.

- Before the issue of fact can arise of whether or not a party committed a relevant act, it may be necessary to settle an issue of law, namely which of the opposing constructions is correct?

- It can sometimes be said of the opposing constructions that one presents a wider and the other a narrower legal meaning.

- Although the rival advocates put forward opposing constructions, the court may reject both and substitute its own. Or it may hold that there is no real doubt as to the legal meaning.

- One type of case where, although there may be real doubt over an enactment, opposing constructions do not arise is where the enactment requires the exercise of judgment or confers a discretion. Here more than one correct answer may be possible, though it is not right to say that the enactment is therefore ambiguous.

- The exercise of judgment, otherwise called judgment-forming, requires the appointed judgment former to relate the particular facts to the abstract concept in question, usually expressed as a broad term.

- Discretion is to be applied where it is left to the authority to make a determination at any point within a given range.

- The formulating and resolution of opposing constructions of an enactment, and the exercise of judgment or discretion, are aspects of the central function of a legal practitioner to go through the mental process of reaching a legal conclusion by applying the relevant law to the relevant facts. This is a continuous two-way operation.

- Is the interpreter's task (a) to arrive at the literal meaning and apply that every time (literal construction), or (b) sometimes go further and apply a purposive but strained meaning (purposive construction), or (c) occasionally to depart altogether from the text, using it merely as a starting point for developing the underlying juridical idea (developmental construction)?