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 - 3

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The purpose of this series is to explore ways of enabling the legal practitioner to acquire or improve skills in the handling of legislation. The present article discusses the fundamental question for the interpreter, namely what exactly is the nature of my task? The answer may seem obvious, but in truth it is not.

On a daily basis, the practitioner needs to find out what the law has to say on a particular point, so that the client may be correctly advised or the case may be properly argued or decided. The more learned practitioners may already know the answer. The more sanguine may think they do; but it is well to be cautious. In our modern society, people are constantly tinkering with the law. Often what one yesterday was taught, and learnt, is today rather different. Moreover our society is changing.

Differential Readings

I mentioned in the first article the problem of differential readings of an enactment. This is the phenomenon where different judicial minds conscientiously arrive at different assessments of the legal meaning.

The legal meaning of a broad term which is to be applied in relation to particular facts is determined as a matter of judgment in the light of the interpretative criteria. Here differential readings are commonly arrived at. For example in a recent case the House of Lord considered the broad term "token" in the Gaming Act 1968 s 34(3)(b) (which refers to a "token" which is exchangeable for other items).{*R v Burt & Adams Ltd* [1998] 2 All ER 417.} The majority held as a matter of judgment that a toy teddy bear exchangeable for another form of prize was not a "token", Lord Lloyd saying (at 420) "In my judgment 'token' in s 34(3)(b) is used in its ordinary sense, and does not include an exchangeable teddy bear". However Lord Hoffmann, dissenting, held that the form of the object was immaterial, since "the identifying characteristic of a 'token' must be the right to exchange it for something else".

Nowadays, with the increasing appointment as judges of women or persons of non-indigenous ethnic background, the likelihood of differential readings is greater. Here are two recent views.

"In terms of judging, the argument is made that as women have such different characteristics, more women

judges will lead to a radically different law and legal system, as women use their skills and perspectives to interpret the law in a different manner to men".{Clare McGlynn, "Will women judges make a difference?" (1998) 148 NLJ 813.} "Legal rules have evolved and developed to deal with specific disputes and problems arising within an *English* context, and are applied by *English* judges, whose experience is of things *English*. There have been few instances where the courts have given allowances for cultural difference . . ."{Susan Edwards, "Beyond belief - the case of Zoora Shah" (1998) 148 NLJ 667 at 668 (emphasis in original).}

We now have an equal-opportunities, multicultural society, and this needs to be recognised throughout the legal system. The (English) man on the Clapham omnibus, that old touchstone of what is "reasonable", must now it seems be joined by other types of passenger. However it would not be right for judges' readings of enactments to differ according to their sex or ethnic origin; and it is obviously necessary for the judiciary to strive for uniformity of approach in these matters. Such uniformity is to be presumed by the interpreter, but the same cannot be said for another important aspect of the technique of statutory interpretation. This may be called the basic approach.

As I have said, the purpose of statutory interpretation is to arrive at the presumed intention of the legislator in promulgating the enactment in question. This may be taken to be the same as the presumed intention of the person who composed the enactment, the legislative drafter. We need now to ask this question: what basic approach did the drafter intend the statute user to adopt? There are many possibilities, but for the moment we can narrow the choice down to three. Did the drafter intend the user always to adopt a literal interpretation, or where necessary depart from this and use a purposive but strained interpretation, or even on occasion arrive at a developmental interpretation departing altogether from the text and using it merely as a starting point? I will now discuss these in turn.

Literal Construction

The starting point in statutory interpretation must always be the ordinary linguistic meaning of the words used, that is their grammatical signification apart from legal considerations. The grammatical meaning of an enactment is the meaning it bears when, as a piece of English prose, it is construed according to the rules and usages of grammar, syntax and punctuation, and the purely linguistic canons of construction.

The grammatical meaning includes both what is expressed and what is implied. In ordinary speech or writing it is a recognised method to say expressly no more than is required to make the outline clear, obvious detail remaining unexpressed. The legislative drafter, striving for brevity, needs to adopt the same method. "It is sometimes said that a draftsman should leave nothing to implication. This is nonsense. No communication can operate without leaving part of the total communication to implication."{Reed Dickerson, *Materials on Legal Drafting*, p 133.} It has even been said, as in the following important dictum concerning the first Interpretation Act, that what is expressed *includes* what is implied-

> "It is not easy to conceive that the framer of [Lord Brougham's Act (1850) 13 & 14 Vict. c. 21 (repealed)], when he used the word 'expressly', meant to suggest that what is necessarily or properly implied by language is not expressed by such language. It is quite clear that whatever the language used necessarily and naturally implies is expressed thereby."{*Chorlton v Lings* (1868) LR 4 CP 374, *per* Willes J at 387.}

The grammatical meaning may be clear, ambiguous or obscure. It is clear when, apart from legal considerations, there is no real doubt about it. It is ambiguous when grammatically capable of more than one meaning. It is obscure when the language is disorganised, garbled or otherwise semantically confused or opaque.

An enactment may be clear, ambiguous or obscure in relation to all possible facts (absolute clarity,

ambiguity or obscurity), or certain facts only (relative clarity, ambiguity or obscurity). Where it is obscure, one first needs to determine what was the intended grammatical meaning. The version then arrived at, which may be called the corrected version, is thereafter to be dealt with as if it had been the actual wording.

The literal meaning of an enactment in relation to particular facts is arrived at as follows. Where the grammatical meaning is clear, that is the literal meaning. Where the enactment is ambiguous, any of the grammatical meanings may be called the literal meaning. Where the enactment is obscure the meaning of the corrected version, or, where the corrected version is ambiguous, any of its meanings, is the literal meaning.

To give an enactment a literal construction is to apply the literal meaning or, in the case of ambiguity, one of the literal meanings. The so-called literal rule of construction requires that an enactment should always be given a literal construction. This supposed rule is based on dicta such as the following: "Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences . . ."{*Warburton v Loveland* (1832) 2 D & Cl (HL) 480, *per* Tindal CJ at 489.} "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity."{*R v City of London Court Judge* [1892] 1 QB 273, *per* Lord Esher MR at 290.} "It seems to this court that where the literal reading of a statute . . . produces an intelligible result, clearly there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament."{*R v Oakes* [1959] 2 QB 350, *per* Lord Parker CJ at 354.}

Whatever may have been the case in the past, dicta like these are not followed today. The so-called literal rule dissolves into a rule that the text is the primary indication of legislative intention, but that the enactment is to be given a literal meaning only where this is not outweighed by more powerful legal factors.

Purposive and Strained Construction

One of these more powerful factors arises where to apply a literal construction would not further the purpose of the legislator in framing the enactment. The purpose of Parliament in passing an Act, other than a purely declaratory, codifying or consolidation Act, is to provide a new remedy to serve as a cure for the mischief with which the Act deals. The purpose of a particular enactment contained in the Act is to be arrived at accordingly.

Parliament is presumed to intend that in construing an Act the court, by advancing the remedy which is indicated by the words of the Act for the mischief being dealt with, including the implications arising from those words, should aim to further every aspect of the legislative purpose. A construction which promotes the remedy Parliament has provided to cure a particular mischief is now known as a purposive construction. Where a literal construction promotes this remedy there is no point in also calling it a purposive construction, except perhaps when choosing between possible grammatical constructions of an ambiguous passage. Accordingly the term purposive construction is usually confined to cases where the literal meaning is departed from. This is called a strained construction.

A strained meaning is any meaning other than the literal meaning. "When the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used . . . "{*Sutherland Publishing Co v Caxton Publishing Co* [1938] Ch 174, *per* MacKinnon LJ at 201.} However some judges have refused to accept the legitimacy of strained construction. Thus Lord Reid said-

> "It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach

> to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond that you must not go."{*Jones v DPP* [1962] AC 635 at 668.}

There are however very many cases where courts have quite properly attached meanings to enactments which by no stretch of the imagination could be called meanings the words are grammatically capable of bearing. Here is just one example, where the House of Lords approved a purposive-and-strained construction of the phrase "information contained in a publication" in the Contempt of Court Act 1981 s 10 (which cuts down the common law powers of the courts to deal with contempts in relation to a reporter's sources of information). The House widened the phrase to include information communicated and received for the purposes of a publication which had not yet come into existence and might never do so. "This seems to be a necessary interpretation; otherwise a defendant such as Mr Goodwin [a journalist whose information had not been published] would be worse off than if he had already published . . ."{*X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] AC 1, *per* Lord Lowry at 55. For numerous further examples of strained construction see Bennion, *Statutory Interpretation* (3rd edn, 1997) s 158 and index references.} The truth is that sometimes the arguments against a literal construction are so compelling that even though the words are not, within the rules of language, capable of another meaning they must be given one.

Strained construction is not be carried too far. Viscount Simonds, referring to the suggestion by Denning LJ in the court below that judges should "fill up the gaps and make sense of the enactment", said in words which have become famous that this "appears to me to be a naked usurpation of the legislative function under a thin disguise of interpretation".{*Magor & St Mellons RDC v Newport Corpn* [1952] AC 189 at 190.} While not an effective defence of the so-called literal rule, this dictum was justified in relation to Denning LJ's version of purposive construction. This followed the extreme Continental model, rather than the more limited British version. I will now briefly describe this extreme model, which may be called developmental construction.

Developmental Construction

Developmental construction was thus described by Lord Denning-

> "[European judges] adopt a method which they call in English by strange words - at any rate they were strange to me - the 'schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose . . . behind it."{*James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1977] 2 WLR 107 at 112.}

This was followed in 1983 by the following dictum of Bingham J{Now Lord Bingham of Cornhill CJ.}-

> "The interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires. These are matters which [the Court of Justice of the European Communities (CJEC)] is very much better placed to assess and determine than a national court.{*Commissioners of Customs and Excise v ApS Samex* [1983] 1 All ER 1042 at 1056.}

The then Prime Minister's private secretary, Sir Charles Powell, remarked in 1991 that the CJEC had by "interpretation" widened the powers conferred by the Single European Act on the Commission and the European Parliament.{*The Times,* 12 November 1991.} In 1995 Sir Patrick Neill QC{Now Lord Neill of

Bladen QC.} wrote an account containing extensive complaints about developmental construction of Community legislation by the CJEC.{*The European Court of Justice: a case study in judicial activism*, August 1995, published by European Policy Forum.} After discussing in detail a number of decisions of the CJEC{These included cases before and after the accession of the United Kingdom, beginning with *Van Gend en Loos v Nederlandse Administratie der Belastingen (Netherlands Inland Revenue Administration)* [1963] ECR 1 (Case 26/62).} he concluded that the CJEC sees itself as "a court with a mission", namely that of pushing the Community (now the European Union) forward towards the goals enshrined in the preambles to the various treaties. With this aim it has gone far beyond literal interpretation, and even beyond purposive construction as described above in this article. He warned: "A court with a mission is not an orthodox court. It is potentially a dangerous court - the danger being that inherent in uncontrollable judicial power."{*Loc. cit.*, p 48. Lord Neill told me in May 1998 that the CJEC "is now much more cautious".}

Conclusion

Our conclusion on the question whether the legislative drafter intends the user always to adopt a literal interpretation, or where necessary adopt a purposive but strained interpretation, or even on occasion arrive at a developmental interpretation departing altogether from the text, is this. Nowadays, the drafter never intends the first course. In the case of a Westminster enactment, or delegated legislation made thereunder, the drafter always intends the second course. In the case of Community legislation, the drafter intends the third course.

Summary

- Differential readings of an enactment arise where judicial minds arrive at different assessments of the legal meaning.

- Nowadays, with the increasing appointment as judges of women and persons with non-indigenous ethnic backgrounds, the likelihood of differential readings is greater.

- It would not be right for judges' readings of an enactment to differ according to their sex or ethnic origin; so the judiciary need to strive for uniformity. Such uniformity is to be presumed by the interpreter.

- Does the drafter intend the user always to adopt a literal interpretation, or where necessary use a purposive but strained interpretation, or even on occasion arrive at a developmental interpretation?

- The starting point must always be the ordinary linguistic meaning of the words used, that is their grammatical meaning apart from legal considerations.

- The grammatical meaning of an enactment is the meaning it bears when construed according to the rules and usages of grammar, syntax and punctuation, and the purely linguistic canons of construction. It includes implications.

- The grammatical meaning may be clear, ambiguous or obscure. It is clear when, apart from legal considerations, there is no real doubt about it. It is ambiguous when grammatically capable of more than one meaning. It is obscure when the language is disorganised, garbled or otherwise semantically confused or opaque.

- An enactment may be clear, ambiguous or obscure in relation to all possible facts (absolute clarity, ambiguity or obscurity), or certain facts only (relative clarity, ambiguity or obscurity).

- Where it is obscure, one first needs to determine what was the intended grammatical meaning. The version thus arrived at ("the corrected version"), is then to be dealt with as if it had been the actual wording.

- Where the grammatical meaning is clear, that is the literal meaning. Where it is ambiguous, any of the grammatical meanings may be called the literal meaning. Where it is obscure, the meaning of the corrected version, or, where that is ambiguous, any of its meanings, is the literal meaning.

- To give an enactment a literal construction is to apply the literal meaning or, in the case of ambiguity, one of the literal meanings.

- The so-called literal rule of construction requires that an enactment always be given a literal construction. This dissolves nowadays into a rule that the text is the primary indication of legislative intention, but that the enactment is to be given a literal meaning only where this is not outweighed by more powerful legal factors.

- One of these arises where to apply a literal construction would not further the purpose of the legislator. A construction which promotes the remedy Parliament has provided to cure a particular mischief is now known as a purposive construction. This term is usually confined to cases where the literal meaning is departed from. This is called a strained construction.

- A strained meaning is any meaning other than the literal meaning. Sometimes the arguments against a literal construction are so compelling that even though the words are not, within the rules of language, capable of another meaning they must be given one.

- Developmental construction requires the court occasionally to depart altogether from the text, using it merely as a starting point for developing the underlying juridical idea.

- Nowadays, the drafter never intends the literal rule to be adopted.

- In the case of a Westminster enactment, or delegated legislation made thereunder, the drafter now intends the interpreter where necessary to adopt a purposive but strained construction.

- In the case of European Community legislation, the drafter intends the interpreter where necessary to adopt a developmental construction.

Note Francis Bennion is pleased to deal with queries from readers about these articles or advise users of his textbook *Statutory Interpretation* (3rd edn, 1997) on finding answers to problems. He can be reached at: telephone 01865 735365; fax 01865 736807; e-mail francis.bennion@balliol.oxford.ac.uk.