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 - 4

FRANCIS BENNION*

*MA (Oxon.), Barrister, former Parliamentary Counsel. Author of *Statutory Interpretation* (3rd edn 1997); *Bennion on Statute Law* (3rd edn 1990); *Statutes* in Halsbury's *Laws of England* (4th edn reissue 1995).

In the last article{Previous articles in this series are at pages 356, 436 and 516 above.} we saw that the so-called literal rule of construction of legislative texts dissolves nowadays into a somewhat different rule. The text is indeed the primary indication of legislative intention, but the literal meaning is to be applied only when not outweighed by more powerful legal factors. There are occasions when, as Parke B said, the language of the legislature must be modified in order to avoid inconsistency with its manifest intentions.{*Miller v Salomons* (1852) 7 Ex 475 at 553.}

As we saw in the last article, not to apply the literal meaning is to give the enactment a strained construction. Four main reasons may justify (and in some cases positively require) this: (1) where the consequences of applying a literal construction are so undesirable (for example failing to carry out the legislator's purpose) that Parliament cannot have intended them, (2) an error in the text which falsifies Parliament's intention, (3) a repugnance between the words of the enactment and those of some other relevant enactment, and (4) a lengthy passage of time since the enactment was originally drafted. In this article I describe the first two of these.

Consequential Construction

We should all have regard, if possible before acting, to the consequences of what we do. The consequential construction rule echoes this truism. It is presumed to be the legislator's intention that when considering, in relation to the facts of the instant case, which of the possible readings of the enactment corresponds to its legal meaning, the court should assess the likely consequences of adopting each construction. This means the consequences not only for the parties in the instant case but also (if similar facts should arise in future) for the law generally.

Mustill J said that "a statute . . . cannot be interpreted according to its literal meaning without testing that meaning against the practical outcome of giving effect to it".{*R v Committee of Lloyd's, ex p Moran* (1983) *The Times* 24 June.} If on balance the consequences of a particular construction are more likely to be *adverse* than *beneficent* this tells against that construction.

". . . the prima facie rule is that words have their ordinary meaning. But that is subject to the qualification that if, giving words their ordinary meaning, we are faced with extraordinary results which cannot have been intended by Parliament, we then have to move on to a second stage in which we re-examine the words . . ."{*Re British Concrete Pipe Association* [1983] 1 All ER 203, *per* Donaldson MR at 205.}

The cynical Lord Radcliffe remarked that "it sometimes helps to assess the merits of a decision if one starts by noticing its results and only after doing that allots to it the legal principles upon which it is said to depend."{*ICI Ltd v Shatwell* [1965] AC 656 at 675.} This echoes the extraordinary remark by Judge Posner that an American judge "rarely starts his inquiry with the words of the statute, and often if the truth be told, he does not look at the words at all".{Posner, "Statutory Interpretation - in the Classroom and in the Courtroom" (1983) 50 University of Chicago Law Review 800, 807-808.}

Consequences should be considered not only where a strained construction may be necessary but also where the grammatical meaning is ambiguous. As Lord Reid said: "It is always proper to construe ambiguous words in the light of the reasonableness of the consequences".{*Gartside v IRC* [1968] AC 553 at 612.}

Where the literal application of an enactment would yield adverse results this indicates that the court should *curtail* its application, a precedure known as strict construction. Where the application yields a beneficent result the opposite applies and the court may *widen* its application. This is known as liberal construction.

The consequences of a particular construction are "adverse" if the court views them with disquiet, though a consequence clearly intended by Parliament is not to be treated as adverse just because the judge personally dislikes it. Any other consequences (whether neutral or positively advantageous) may be called "beneficent". The prospect of a strongly adverse consequence in itself raises doubt.

The consequential test covers a wide field. A result is "adverse" if it frustrates the purpose of the Act, or works injustice, or is contrary to public policy, or is productive of inconvenience or hardship. There are many other possibilities.

If a consequence is beneficent, the court will wish to give effect to it. So Peter Gibson J said, in a case concerning the Building Societies Act 1962 s 1(1), that he would be loath to find that "the very sensible proposals" made by the scheme before the court lay outside that enactment.{*Nationwide Building Society v Registry of Friendly Societies* [1983] 1 WLR 1226 at 1230-1231,}

Rectifying Construction

The court is there to put things right where it can. When it comes to statutes, it is presumed that the legislator intends the court to apply a construction, called a rectifying construction, which puts right any error in the drafting of the enactment where this is required in order to give effect to the legislator's purpose.

Drafting errors frequently occur. So we find for example Nourse J saying of the Law of Property Act 1925 s 3(3) that the draftsman either overlooked or misunderstood the fact that the opening words were rendered inappropriate by changes made in the 1925 property legislation itself.{*In re Rowhook Mission Hall, Horsham; Channing-Pearce v Morris* [1985] Ch 62 at 80.}

Such human mistakes must not be allowed to frustrate Parliament's will. Occasionally Parliament itself steps in to correct them.{See for example the Acts of Parliament (Mistaken References) Act 1830 (repealed) and the unsuccessful attempt made by the Government in 1977 to procure the enactment of the

Acts of Parliament (Correction of Mistakes) Bill.} More usually, Parliament leaves rectification in the hands of the judiciary.

Sometimes it is obvious what change of wording is needed. Thus where an enactment authorised a defendant to apply to have the action transferred to "the County Court in which he resides or carries on business" the court clearly had to read in the words "for the area" after "Court". In other cases the error may not be so easy to rectify.

A famous example of an incomplete text is the Statute of Frauds Amendment Act 1828 (Lord Tenterden's Act) s 6. This says "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the [character etc] of any other person, *to the intent or purpose that such other person may obtain credit, money, or goods upon,* unless such representation or assurance is made in writing [and signed]."{Emphasis added.} Clearly some words are missing at the end of the italicised passage, but in the leading case{*Lyde v Barnard* (1836) 1 M & W 101} three judges each took a different view on what the missing words should be.

Instead of intended words being omitted, unintended words may be included. In a case on the Lands Clauses Consolidation Act 1845 s 9 Brett J said{*Stone v Yeovil Corpn* (1876) 1 CPD 691 at 701.}-

> "the word 'such' . . . is insensible. It is a canon of construction that, if it be possible, effect must given to every word of an Act of Parliament . . . but that if there be a word or phrase therein to which no sensible meaning can be given, it must be eliminated. It seems to me therefore that the word "such" must be eliminated . . ."

A further possibility is that the words are confused. The Queen's printer will correct minor typographical errors, as with the Landlord and Tenant (Rent Control) Act 1949 s 11(5). This referred to s 6, instead of s 7, of the Furnished Houses (Rent Control) Act 1946. The error was corrected in subsequent published copies of the 1949 Act.

Sometimes an error is made in transcribing an enactment for inclusion in a consolidation Act. Here there is an inference that the original wording should be followed. Section 125(2) of the Law of Property Act 1922 empowered trustees to appoint agents for "executing and perfecting assurances of property". In the Trustee Act 1925 s 23(2) this appears as *insurances* of property.

Two errors appear in the repeal Schedule to the Interpretation Act 1978 (a consolidation Act).{Sch 3.} The short title of the National Health Service Reorganisation Act 1973 is given as "The National Health Reorganisation Act 1973", while a reference is made to Sch 5 to the Medical Act 1978 instead of Sch 6. In neither case is there any doubt as to what was meant, and the court would read the references in their intended form.

Rectification of a more substantial kind may be required where the error is latent rather than apparent. The drafter may have misconceived the legislative project, or based the text on a mistake of fact. Alternatively an error may have been made as to the applicable law. If the drafter misconceives the factual nature of the legislative project the wording is likely to be ineffective. The court may be able to remedy this by applying a strained construction which accommodates the true facts without causing injustice or other disadvantage. Here is an example.

Section 8(1) of the Food and Drugs Act 1955 said that a person who sold "any *food* intended for, but unfit for, human consumption" committed an offence.{Emphasis added.} This misconceived the legislative project, which was to safeguard the public from being supplied (as food) with any *deleterious substance.* It should be immaterial whether the substance supplied is truly food or not. What matters is that it is supplied as being food. In one case under this provision children asked for lemonade in a shop and were given

corrosive caustic soda, some of which they drank.{Section 151(1) of the 1955 Act defined "food" as including drink.} The defence argued that caustic soda is not food. It was held that to rectify the misconceived project, a strained construction was necessary. The expression "sells any food" must be taken to mean "sells anything (whether a food or not) *as* a food".{*Meah v Roberts* [1977] Crim LR 678.}

The casus omissus

Where the literal meaning of the enactment goes narrower than the object of the legislator (*casus omissus)*, the court may need to apply a rectifying construction widening that meaning. Nowadays it is regarded as not in accordance with public policy to allow a drafter's ineptitude to prevent justice being done. It was not always so, as the following example shows.

Section 21 of the Matrimonial Causes Act 1857 empowered a magistrate to make an order protecting the property of a deserted wife. It allowed the husband to apply for the discharge of such an order to "the magistrate . . . by whom the order was made". When a Mr Sharpe sought to exercise this right "[h]e discovered that the magistrate who had made the order was dead; and the question what was now his proper course of action came before a bench composed of Cockburn CJ, Blackburn and Shee JJ, who decided unanimously that this was a *casus omissus*, and that it was not competent for the husband to apply to some other metropolitan magistrate who might present the advantage of being alive".{Amos, "The Interpretation of Statutes" (1934) 5 CLJ 163. Although Amos did not give the case reference, it was presumably *Ex p Sharpe* (1864) 5 B & S 322.} Here we have the classic conflict, between an unimaginative drafter and an unyielding court. Sandwiched between them, incapable of helping himself, the innocent litigant was crushed. It is safe to say it would not happen today.

It is correlative to the principle that law should be coherent and self-consistent that, where two different statutory systems do not occupy all the required space, the court should be ready to fill the gap. For example it was held that since magistrates were not empowered to issue a search warrant to deal with the proceeds of an alleged crime held in a bank account, the High Court should fill the gap by using the power to preserve the subject matter of a cause of action which is conferred by RSC Ord 29 r 2.{*West Mercia Constabulary v Wagener* [1982] 1 WLR 127.} Forbes J said{At 131.} that "this court should be ready to fill that particular gap".

Again, where a literal construction of the phrase "a matter relating to trial on indictment" in the Supreme Court Act 1981 s 29(3) (which withdraws such a matter from the jurisdiction of higher courts) would have had the result that no appeal lay from certain Crown Court decisions, the House of Lords avoided this by applying a narrow meaning to the phrase.{*Re Smalley* [1985] AC 622.}

Gap-filling by the courts must not be carried too far. In the previous article I described how in 1952 Viscount Simonds rejected the suggestion by Denning LJ (as he then was) that judges should "fill up the gaps and make sense of the enactment". Lord Denning returned to the attack thirty years later in *R v Barnet London Borough Council, ex p Nilish Shah* [1981] where he said that the rebuff by Viscount Simonds no longer hurt and the court must fill in the gaps in a case where an updating construction was needed.{Updating construction will be described in the next article.} It has been suggested that a distinction should be drawn between "interpretative gap-filling", which is legitimate, and "substantive gap-filling", which is not.{Bankowski and MacCormick in chapter 10 of MacCormick and Summers, *Interpreting Statutes: A Comparative Study* (1991).}

Just as a case which is within the object of an enactment but outside its wording is described as a *casus omissus*, so it is appropriate to describe the reverse as a *casus male inclusus*., a term suggested by the late Professor Glanville Williams. The literal meaning of many enactments takes their coercive force wider than is necessary to remedy the mischief aimed at. As Harman LJ remarked of the Leasehold Property (Repairs) Act 1938: "Like most remedial Acts of that sort, it catches the virtuous in the net which is laid for the

sinner".{*Sidnell v Wilson* [1966] 2 QB 67 at 79.} Here is another example.

Section 32 of the Sexual Offences Act 1956 makes it an offence for a man "persistently to solicit or importune in a public place for immoral purposes". The courts have held that s 32 must be treated as limited to immoral purposes of a sexual nature.{*R v Kirkup* [1993] 1 WLR 774.} At one time it was even thought that it applied only to homosexual acts.{*Crook v Edmondson* [1966] 2 QB 81.}

Conflicting texts

Some form of rectification is essential where the court is faced with conflicting texts. "In such a situation . . . the court is affirmatively required to give the enactment a 'rectifying construction'. . ."{*R v Moore* [1995] 4 All ER 843, *per* Sedley J at 850.} If the texts are within the same Act, the conflict is generally to be resolved by construing the Act as a whole. If the texts are in different Acts, the later Act usually prevails. I will consider conflicting texts in more detail in the next article.

Summary

- There are four main reasons for a strained construction: (1) where the consequences of a literal construction are so undesirable that Parliament cannot have intended them, (2) an error in the text, (3) a repugnance between the words of the enactment and those of another enactment, and (4) passage of time since the enactment was originally drafted.

- It is presumed to be the legislator's intention that when considering, in relation to the facts of the instant case, which of the possible readings of the enactment corresponds to its legal meaning, the court should assess the likely consequences of adopting each construction not only for the parties in the instant case but also (if similar facts should arise in future) for the law generally.

- Consequences should be considered not only where a strained construction may be necessary but also where the grammatical meaning is ambiguous.

- If on balance the consequences of a particular construction are more likely to be *adverse* than *beneficent* this tells against that construction. The prospect of a strongly adverse consequence in itself *raises* doubt.

- Where the literal application of an enactment would yield adverse results this indicates that the court should *curtail* its application, a precedure known as strict construction. Where the application yields a beneficent result the opposite applies, a procedure known as liberal construction.

- It is presumed that the legislator intends the court to apply a construction, called a rectifying construction, which puts right any error in the drafting of the enactment.

- Intended words may be omitted, or unintended words included, or the words may be confused. The Queen's printer will correct minor typographical errors.

- Rectification of a more substantial kind may be required where the error is latent rather than apparent. The drafter may have misconceived the legislative project, or based the text on a mistake of fact. Alternatively an error may have been made as to the applicable law.

- Where the literal meaning goes narrower than the object of the legislator (*casus omissus),* the court may need to apply a rectifying construction widening that meaning. A distinction can be drawn between "interpretative gap-filling", which is legitimate, and "substantive gap-filling", which is not.

- The opposite of a *casus omissus* is a *casus male inclusus*, where the wording of the enactment goes wider than is necessary to remedy the mischief aimed at.