Document NO. 1998.011 162 JPN (1998) 696

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 - 5

FRANCIS BENNION*

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

A century ago, in south-west Ireland, a little girl was sent by her grandmother to buy boiled crabs for supper. The crabs were bad, and the matter came to trial at the Cork Assizes. In the witness box the little girl turned to the judge and said of the fishmonger "My Lord, I asked him to pick out the crabs, so as to show that I relied upon the seller's skill and judgment". The judge: "And where did you learn the fourteenth section of the Sale of Goods Act, my good girl?" The child became confused, and could not answer. Upon being told that she attended the nearby Black Rock convent, the judge said: "Such is the progress of modern education that children are taught by heart sections of Acts of Parliament in convents and by Holy Nuns!"{See A. M. Sullivan QC, *The Last Serjeant* (1952), p. 117.}

We are at the half-way stage in the series.{Previous articles are at pages 356, 436, 516 and 596 above.} I retell this story as a reminder to the faithful of what we are about. Up and down the land, statutes are not some out of the way dusty nuisance. They are part of everyday life, and we had better understand them if we can.

Last time I explained the nature of strained construction and suggested that there are four main reasons requiring this. I went on to discuss the first two, namely (1) where the consequences of a literal construction are so undesirable that Parliament cannot have intended them, and (2) where an error in the text would, if taken literally, falsify Parliament's intention.

Now we turn to the other two reasons for departing from the literal meaning. First comes the case where there is a repugnance between the words of the enactment and those of another relevant enactment, whether in the same Act or elsewhere.

Repugnance

When two relevant texts contradict each other, both cannot be given a literal application without contravening the logical principle of contradiction or *principium contradictionis*. This was stated by Aristotle in the form that contradictory statements cannot both at the same time be true. Thus one cannot without defect of reasoning advance both a universal affirmative proposition ("all S is P") and a particular

negative proposition ("some S is not P"). Equally one cannot legitimately advance both a universal negative proposition ("no S is P") and a particular affirmative proposition ("some S is P").

A common application of the logical principle of contradiction is in relation to contradictory enactments within the same Act. In itself enactment A may be clear and unambiguous. So may enactment B, located elsewhere in the Act. But if they contradict each other they cannot both be applied literally. A undoes B, or B undoes A. The court must do the best it can to reconcile them, but this can be achieved only be giving one or both a strained construction.

Judges often complain of such inconsistency within an Act. Lord Hewart CJ said of the Shops (Sunday Trading Restrictions) Act 1936 Schs 1 and 2: "Sir William Jowitt, appearing on one side in this case, frankly admitted that the provisions of these two Schedules, taken together, and compared and contrasted with each other, were, to his mind, unintelligible."{*London County Council v Lees* [1939] 1 All ER 191 at 196.}

An Act is to be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its context as part of the Act. As the American Justice Holmes said, "you let whatever galvanic current may come from the rest of the instrument run through the particular sentence".

Where, on the facts of the instant case, the literal meaning of the enactment under inquiry is inconsistent with the literal meaning of one or more other enactments in the same Act, the combined meaning of the enactments is to be arrived at. An amalgamated text must notionally be produced before the interpreter can advance towards the legal meaning. The way this is done is similar to the producing of a "corrected version" of the text in a case of semantic obscurity.{See the third article, at p 516 above.}

The essence of "construction as a whole" is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act. Coke referred to this as construction *ex visceribus actus* (from the guts of the Act).{1 Co Inst 381 1b.}

Construction as a whole requires that, unless the contrary appears, three principles should be applied. These are (1) every word in the Act should be given a meaning, (2) the same word should be given the same meaning, and (3) different words should be given different meanings. Lord Herschell LC said that where there is a conflict between two sections in the same Act: "You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other".{*Institute of Patent Agents v Lockwood* [1894] AC 347 at 360.}

Failing any other way of reconciliation, the court may under the rule in *Wood v Riley* adopt the principle that the enactment nearest the end of the Act prevails.{*Wood v Riley* (1867) LR 3 CP 26 at 27 ("the known rule is that the last must prevail").} Nicholls LJ said in 1990 that this rule was obsolete. "Such a mechanical approach . . . is altogether out of step with the modern, purposive, approach to the interpretation of statutes and documents".{*Re Marr and another (bankrupts)* [1990] 2 All ER 880 at 886.} This overlooks the possibility that there may be no means of deciding between conflicting provisions on purposive grounds, when a rule of thumb is needed. Moreover it used to be the practice, and in the case of private and personal Acts still is, to place saving clauses at the end, with the intent that they should override anything inconsistent in the earlier part of the Act.

Where the literal meaning of a general enactment covers a situation for which specific provision is made elsewhere in the Act, it is presumed that it was intended to be dealt with by the specific provision. This is expressed in the maxim *generalibus specialia derogant* (special provisions override general ones). Acts often contain general provisions which, when read literally, cover a situation for which specific provision is made elsewhere in the Act. This maxim gives a rule of thumb for dealing with such a situation. The more

detailed a provision is, the more likely is it to have been tailored to fit the precise circumstances of a case falling within it.

Under the doctrine of implied repeal, if a later Act makes contrary provision to an earlier, Parliament (though it has not expressly said so) is taken to intend the earlier to be repealed. In an early case it was held that a statute creating a capital offence was impliedly repealed by a later Act imposing a penalty of ,20 for the like offence.{*R v Davis* (1783) 1 Leach 271.}

The courts presume that Parliament does not intend an implied repeal. This is stronger where modern precision drafting is used. It is also stronger the more weighty the enactment. Lord Wilberforce said he was reluctant to hold that an Act of such constitutional significance as the Union with Ireland Act 1800 was subject to implied repeal.

A similar doctrine applies to amendment. Where the provisions of a later Act are repugnant to those of an earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency. Parliament (though it has not said so) is taken to intend an amendment of the earlier provision. Again this is a logical necessity, since two inconsistent texts cannot both be valid without contravening the principle of contradiction.

Updating Construction

The last of the four reasons for departing from the literal meaning and adopting a strained construction concerns what is known as updating construction.

Usually an Act is intended to develop in meaning with changing circumstances. This type is called an ongoing Act, in contrast to the comparatively rare case of the Act intended to be of unchanging effect (a fixed-time Act). I will briefly deal first with the latter type, to get it out of the way.

A fixed-time Act has a once and for all effect. Contrary to the usual rule, it is intended by Parliament to be applied in the same way whatever changes might occur after its passing. It is to such an Act, and not to an ongoing Act, that the oft-quoted words of Lord Esher apply: "the Act must be construed as if one were interpreting it the day after it was passed".{*The Longford* (1889) 14 PD 34, at 36.} Thus it was held that the statute 39 Geo 3 (1798) s 25, which exempted "any hospital" from land tax, was intended by Parliament to apply only to hospitals in existence at the time the Act was passed.{*Lord Colchester v Kewney* (1866) LR 1 Ex 368 at 380.}

A common case is where the Act has the nature of a contract, an obvious instance being a private Act. The courts treat this as a contract between its promoters (or that portion of the public directly interested in it) and Parliament.{*Milnes v Mayor etc of Huddersfield* (1886) 11 App Cas 511.} It is said that when divorce was possible only by Act of Parliament an unhappily married town clerk was promoting a local waterworks Bill. In clause 64, mingled with technical provisions about filter beds and stopcocks, appeared the phrase "and the marriage of the Town Clerk of ---------- is hereby dissolved". Nobody noticed it while the Bill was going through Parliament, but when Royal Assent was given the town clerk duly found himself divorced. Since this was evidently a fixed-time enactment, it did not apply to future town clerks of the named town.{The story is told in Sir Robert Megarry, *Miscellany-at-Law* (1955), p 345.}

It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed. Because it is to be treated as always speaking, the language of such an Act, though necessarily embedded in its own time, is to be construed in accordance with the need to treat it as current law. As Lord Woolf MR said of the National Assistance Act 1948: "That Act had replaced 350 years of the Poor Law and is a prime example of an Act which is 'always speaking'. Accordingly it should be construed by continuously updating its wording to

allow for changes since the Act was written."{*R v Hammersmith and Fulham London Borough Council, ex p M* (1997) *The Times* 19 February.}

Different types of change can call for an updating construction. While the enactment may continue in force, the mischief at which it was originally directed may change, or even (if Parliament's remedy works) disappear altogether. Next, there may be changes in relevant law. Later amendments of the law may mean that the legal remedy provided by the Act to deal with the original mischief has become inadequate or inappropriate if construed literally. The court must make allowances for the fact that the surrounding legal conditions have changed. It also follows that legal references in an enactment must be updated to allow for change. Thus "lords" in Magna Carta was taken to include new ranks of nobility.{2 Co Inst 35} A reference to "tax" in a pre-income tax enactment was held to include income tax.{*Gissing v Liverpool Corpn* [1935] Ch 1.}

Changes in social conditions may affect construction. Section 17 of the London Hackney Carriage Act 1853 makes it an offence for a cab driver to "demand or take more than the proper fare". The literal meaning clearly precludes taking a tip, but the tipping of cab drivers became an accepted social custom. It was held in 1981 that tipping did not contravene s 17.{*Bassam v Green* [1981] Crim LR 626.} Precedents on the meaning of "family" are likely to go on being departed from as public perceptions of sexual and familial morality, especially regarding homosexuality, continue to change.{See *Fitzpatrick v Sterling Housing Association Ltd* [1997] 4 All ER 991.}

Developments in technology call for changed interpretation. See for example *Gambart v Ball* (1863) 32 LJCP 166 (photography held to be within the Engraving Copyright Act 1734); *A-G v Edison Telephone Co of London Ltd* (1880) 6 QBD 244 (telephone held to be a "telegraph"*); Chappell & Co Ltd v Associated Radio Co of Australia Ltd* [1925] VLR 350 (radio broadcast a "performance in public" under pre-broadcasting Copyright Act); *Grant v Southwestern & County Properties Ltd* [1975] Ch 185 (tape recording of telephone conversation a "document"); *Barker v Wilson* [1980] 1 WLR 884 ("bankers' books" in Bankers' Books Evidence Act 1879 s 9 held to include microfilm); *R v South London Coroner, ex p Thompson* (1982) *The Times* 9 July (requirement that coroner should "take a note" satisfied by use of tape recorder); *Hawkins v Harold A Russett Ltd* [1983] 1 All ER 215 (clip-on container held to be part of a lorry for purpose of overhang restrictions); *Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652 (reference in RSC Ord 24 to a "document" includes computer database).

Finally we consider changes in the meaning of words. Where an expression used in an Act has changed its original meaning, the Act may have to be construed as if there were substituted for it a term with a corresponding modern meaning.{*The Longford* (1889) 14 PD 34.} The old meaning of the word "engine" was very wide. It derives from the Latin *ingenium*, and formerly meant any product of human ingenuity. Its modern meaning is much narrower, and denotes a mechanical contrivance with moving parts. Section 31 of the Offences against the Person Act 1861 makes it an offence to set or place "any spring gun, mantrap, or other engine" calculated to endanger life. In one case the accused rigged up a trap designed to inflict an electric shock when his wife opened a french window. He was convicted of placing an engine, contrary to s 31, but on appeal the conviction was quashed. Lord Parker CJ said-

> " ... as a matter of common sense, it is difficult to see how today at any rate one could aptly refer to these two electric wires as amounting to a spring gun, mantrap or other engine. The court has come to the conclusion that, particularly as this is a penal statute, the meaning to be given to it is the more limited meaning of 'engine' as meaning a mechanical contrivance. It also accords with common sense, it seems to this court, as to the natural meaning today of 'engine'."{*R v Munks* [1964] 1 QB 304 at 307.}

It is submitted that this decision was incorrect, since the intention of Parliament was to punish use of anything falling within the old meaning of "engine". The court should have construed s 31 as if it used a

word such as "contraption" rather than "engine".

Examples of expressions used in legislation whose meanings have changed include "blackmail" (once confined to the extorting of protection money), "discover" (which used to mean uncover rather than find), "fraudulent" (which once had a wide meaning equivalent to wrongful), "indecent" (formerly unbecoming or indecorous), "police" (which formerly meant the peace or good order of a place), "sad" (sober and discreet), and "trespass" (which formerly denoted any wrongdoing).

Summary

Repugnance

- The third of the four main reasons for a strained construction is where there is a repugnance between the words of the enactment in question and those of another enactment, whether in the same or another Act.

- When two relevant texts contradict each other, both cannot be given a literal application without contravening the logical principle of contradiction or *principium contradictionis*.

- An Act is to be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its context as part of the Act.

- Where, on the facts of the instant case, the literal meaning of the enactment under inquiry is inconsistent with the literal meaning of one or more other enactments in the same Act, the combined meaning of the enactments is to be arrived at.

- Construction as a whole means three principles should be applied: (1) every word in the Act should be given a meaning, (2) the same word should be given the same meaning, and (3) different words should be given different meanings.

- If no other method of reconciliation seems possible, the court may under the rule in *Wood v Riley* adopt the principle that the enactment nearest the end of the Act prevails.

- Where the literal meaning of a general enactment covers a situation for which specific provision is made elsewhere in the Act, it is presumed that the situation was intended to be dealt with by the specific provision. This is expressed in the maxim *generalibus specialia derogant* (special provisions override general ones).

- Under the doctrine of implied repeal, if a later Act makes contrary provision to an earlier, Parliament (though it has not expressly said so) is taken to intend the earlier to be repealed. A similar doctrine applies to amendment.

Updating construction

- The last of the four reasons for departing from the literal meaning and adopting a strained construction is concerned with what is known as updating construction.

- Usually an Act is intended to develop in meaning with developing circumstances (an ongoing Act).

- A fixed-time Act has a once and for all effect. A common case is where the Act is of the nature of a contract, an obvious instance being the private Act.

- It is presumed that Parliament intends the court to apply to an ongoing Act (which is to be treated as always speaking) a construction which continuously updates the language of the Act.

- Different types of change can call for an updating construction: changes in the mischief, changes in relevant law, changes in social conditions, developments in technology and medical science, and changes in the meaning of words.