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 - 8

FRANCIS BENNION

After a short break, this resumes the series of articles on statutory interpretation.[1]

Pairs of words

It is a common feature in legal expression to favour use of pairs of words, whether in antithesis or apposition, in preference to a single term. The most common reason for this (often illusory) is the drafter's reluctance to rely on a solitary word, with the comforting feeling that a pair of terms somehow conveys more than the sum of its parts. A historical reason going back to the Norman Conquest was the need to supply both a French and an Anglo-Saxon version of equivalent meaning (not to mention a Latin version). This explains conjunctions such as 'last will and testament', combining Old English *will* and Old French (from Latin) *testament.*

[*Added after publication:* We find that in medieval English translations of Latin texts the translator sometimes felt a need to supply, in translating a Latin term, *two* English words, one with a Latin root and the other with an English root. An example, noticed by Andrew Clark in editing *The English Register of Godstow Nunnery, near Oxford* (1905), which was translated into English c. 1450, Clark gives an example (p. 302) where 'seu ratione dotis mee' was translated 'by the reson or skille of her dowre'.
Sometimes terms of virtually identical meaning are used together, as in the Children Act 1989 s 22(3)(a). This imposes a duty to 'safeguard and protect' the welfare of a child. It is mere surplusage, since either term would have sufficed on its own.]

A modern example of pairing of words is the fair dealing defence in the Copyright, Designs and Patents Act 1988 s 30(1), which refers to dealing with a work "for the purposes of criticism or review". Another is the phrase "fit and proper" when used to describe a person qualifying for some privilege such as the grant of a licence.[2] Here the addition of "proper" adds little if anything to "fit", which is no doubt why the drafter of the Consumer Credit Act 1974 was content to use the latter term only.[3] A similar example is "harsh and unconscionable", the phrase employed to describe what used to be called a catching bargain in the Moneylenders Act 1900 s 1 (repealed). The successor provision in the Consumer Credit

[1] Previous articles in the series are in volume 162 (1998) at pages 356, 436, 516, 596, 696, 856 and 995.
[2] See, eg, the Licensing Act 1964 s 3(1).
[3] See, eg, s 25 of the Act.

Act 1974 (s 138(1)) dropped the idea of using conscience and referred to an "extortionate" bargain.

Yet another example is "unsafe or unsatisfactory" as formerly applied to a criminal conviction by the Criminal Appeal Act 1968 s 2(1). Of this Lord Devlin said that it might be that one or other of the two words was tautologous, but that a guilty verdict not reached after a proper direction and consideration of all the influential evidence would be "unsatisfactory" whether or not it was "unsafe".[4] "The new provision, in confining the test to one of safety of the conviction, may be, in this respect, narrower than before, depending on whether the word 'unsatisfactory' signified an additional and independent ground for quashing a conviction or merely another way of saying 'unsafe'".[5]

A phrase which is obviously tautologous is "just and equitable" as used for example in the Companies Act 1985 s 666(5)(c), where it is given as a ground for making a winding-up order. A thing which is just must also be equitable, and vice versa. Twenty years ago I wrote an article referring to such a term as a belt and braces phrase.[6] I gave as an example of use of a belt and braces phrase the Companies Act 1948 s 147 (repealed), requiring day-to-day books of account to be kept. It stated that such books would not be deemed proper if they did not give a "true and fair view" of the company's affairs. When in 1976 it was proposed to replace s 147 by more sophisticated provisions the phrase was at first retained.[7]. Then an alert member of a working party set up by one of the professional bodies pointed out that the requirement in section 147 could not be met in practice. At any one time books would not have complete entries, let alone adjustments necessary for consistency and fairness. The department yielded and the Companies Act 1976 s 12 required current accounting records to be sufficient to "show and explain" the company's transactions. Another belt-and-braces phrase? I think not, since here the two words have somewhat different meanings.

A frequent difficulty when pairs of words are used is whether both terms need to be satisfied, or whether one will do. Words like "and" and "or" may be used disjunctively or conjunctively. The Court of Appeal held that in article 10 of the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children, given the force of law by the Child Abduction and Custody Act 1985, the statement that "recognition and enforcement" of a foreign judgment may be refused was to be construed disjunctively. This meant that a judgment might be recognised but not enforced.[8]

Here much depends on the context, and the purpose of the enactment. If an applicant is required to be "fit and proper" then obviously he must be both fit and proper (assuming there is some difference in meaning). But if, as with the definition of "town or village green" in the Commons Registration Act 1965 s 22(1), the use of a green is required to be for the indulging by the inhabitants in "lawful sports and pastimes" then it will obviously not matter if a particular green is devoted exclusively to sports (but not other pastimes) or to pastimes other than sports. The portmanteau is labelled "sports and pastimes", and as long as the particular thing done is to be found within it all is well. This example shows that of two broad terms

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[4] *The Judge* (1979), p 158.

[5] *R v Chalkley* [1998] 2 All ER 155, *per* Auld LJ at 172. The change was made by the Criminal Appeal Act 1995 s 2(1). As shown at length in Blom-Cooper, *The Birmingham Six and other cases* (1997), chapter 5, the new elliptical formula is pregnant with uncertainty because it leaves a range of complex situations undescribed (for ellipsis as a cause of doubtful meaning see Bennion, *Statute Law* (3rd edn, 1990), chapter 15).

[6] 129 New Law Journal (1979) 748.

[7] Clause12(1) of the Companies (No 2) Bill (1976).

[8] *Re H (a minor) (foreign custody order: enforcement)* [1994] Fam 105. The court had regard to the statement in *Dicey and Morris on the Conflict of Laws* (12th edn, 1993) I 453–454 that "while a court must recognise every foreign judgment which it enforces, it need not enforce every foreign judgment which it recognises".

linked in one phrase one may be broader than the other: all sports are pastimes, but not all pastimes are sports.

This definition also uses another pair of terms. It refers to land allotted "for the exercise or recreation of the inhabitants". These terms are mutually overlapping *in part*: not all exercise involves recreation and not all recreation involves exercise. Does it make any difference that the linking word here is "or", whereas with the other phrase it was "and"? I would say not. Again there is a portmanteau. For the purposes of the definition it does not matter whether individual members of the public use the common exclusively for exercise, or exclusively for recreation, or for both. In such cases it is important that there is a multiple subject, in this case the inhabitants at large. The linking word "or" is more likely to be disjunctive where the subject is a single entity.

Hendiadys

The device known as hendiadys, from a Greek phrase meaning "one by means of two", may be employed by the drafter. This is defined by the OED (2nd edn 1994) as a figure of speech in which a single complex idea is expressed by two words connected by a conjunction; e.g. by two substantives with *and* instead of an adjective and substantive. An old example of its use in law is the term *law and heraldry*, meaning heraldic law.

If an Act made it an offence "to take and drive away" a motor vehicle, this would be a hendiadys. It would not be an offence merely to take a vehicle, nor merely to drive one away. Both elements would be required to be proved. Professor Pearce gives as an example of hendiadys the enactment dealt with in an Australian case which read: "Every insurer shall promptly co-operate with the Committee and assist it to carry out its duties under this section." *Held* One obligation only was imposed by this, and it was insufficient merely to charge failure to co-operate.[9]

With hendiadys the meaning is conjoint, the signification of each term merging with, and partaking of, that of the other.

Weightless drafting

The above leads to discussion of a related topic, weightless drafting. Good drafters, who usually have much to do, decline to waste time on matters that carry no weight. Wherever possible they engage in weightless drafting, which shortens and simplifies wording where there is no weight on its exact meaning. For example the Sexual Offences Act 1956 s 44 says-

> "Where on the trial of any offence under this Act it is necessary to prove sexual intercourse (whether natural or unnatural), it shall not be necessary to prove the completion of the intercourse by the emission of seed, but the intercourse shall be deemed complete upon proof of penetration only".

Why was no definition of "sexual intercourse" provided here? It was not because the drafter had no doubts about what it meant. It was because there was no weight on its meaning and so it was unnecessary to spend time devising a definition. In effect the drafter was saying "whatever this phrase may or may not mean, it does not require emission of seed, just

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[9] *Traders Prudent Insurance Co Ltd v Registrar of Workers' Compensation Commission* [1971] 2 NSWLR 513. See D C Pearce, Statutory Interpretation in Australia (2nd edn, 1981) p 48. See further on the question whether "and" and "or" are used conjunctively or disjunctively *Maxwell on the Interpretation of Statutes* (12th edn 1969) pp 232-234.

penetration". The purpose was limited to resolving a doubt relating to the question of the need for emission.

There is another piece of weightless drafting in s 44. If it mattered, there would be hot dispute nowadays about exactly what the 1956 drafter thought he was talking about when he referred to "unnatural" intercourse. Probably he did not stop to think just what he meant about that term either, because again there was no weight on it. Its sole purpose was to prevent anyone arguing that s 44 did not apply to offences such as buggery because it was by implication limited to "natural" sexual intercourse. The phrase "whether natural or unnatural" used two words that taken together were exhaustive, and it does not matter where the statute user draws the dividing line.

The same applies to the vague phrases "sports and pastimes" and "exercise or recreation", mentioned above. It is unnecessary to argue about whether when the public indulge in a particular activity, say rabbiting, it is a "sport" or a "pastime" because if it is not one it is the other (unless of course it is neither). With this sort of portmanteau phrase it does not make any practical difference where the dividing line is drawn between the meanings of the two terms. Indeed there are likely to be overlapping meanings. The precise meaning of each term never needs to be ascertained, because there is no weight on it. In this particular instance, some members of the public will indulge on the green or common in sports, some in pastimes, and some in both. It would be absurd to suggest that the definition is not satisfied unless *all* members of the public who go on the green or common indulge in *both* activities.

Words used in pairs are often found to overlap in meaning. The House of Lords considered the composite expression "repair or maintenance" in Sch 4 (repealed) to the Finance Act 1972. Section 12 (repealed) of the Act, dealing with zero-rating for VAT, relieved from tax supplies of a description specified in Sch 4. Section 12(4) empowered the Treasury to vary Sch 4 by order. Section 46(2) said that Sch 4 should be interpreted in accordance with the notes contained therein, and that the power to vary Sch 4 extended to these notes. As varied by paragraph 3 of the Value Added Tax (Consolidation) Order 1976 SI 1976/128, Sch 4 exempted supplies of services in the course of building or engineering work. An appended note said that this did not include "any work of repair or maintenance". The question was whether the latter phrase included the underpinning of foundations. *Held* It did not. Lord Roskill said: ". . . the argument in the court below appears to have proceeded on the basis that the words "repair or maintenance" are used in antithesis to one another . . . The two words are not used in antithesis to one another. The phrase is a single composite phrase repair or maintenance and in many cases there may well be an overlap between them . . . ".[10]

N*oscitur a sociis*

We should not forget the *noscitur a sociis* principle, which requires terms to be construed in the light of their surrounding words.[11] The Capital Allowances Act 1990 s 18(1) defines the term "industrial building or structure" as one used for "a trade which consists in the manufacture of goods or materials or the subjection of goods or materials to any process". Nourse LJ said "the close proximity between the two phrases requires that the word "goods" in the second should be given the same meaning as in the first".[12]

Summary

[10] *ACT Construction Ltd v Customs and Excise Comrs* [1982] 1 All ER 84 at 88.
[11] See Bennion, *Statutory Interpretation* (3rd edn, 1997) s 378.
[12] *Girobank plc v Clarke (Inspector of Taxes)* [1998] 4 All ER 312 at 315.

- Pairs of words used in statutes may have opposite meanings (antonyms), identical meanings (synonyms), shared meanings (overlapping terms), conjoined meanings (hendiadys) or different meanings.

- *Examples of antonyms* "natural or unnatural", "British or non-British".

- *Examples of synonyms* "fit and proper", "unsafe or unsatisfactory" (?), "just and equitable", "true and fair".

- *Examples of overlapping terms* "harsh and unconscionable", "show and explain", "sports and pastimes", "exercise or recreation", "repair or maintenance", "building or structure", "goods or materials", "building or engineering work".

- *Examples of hendiadys* "law and heraldry", "co-operate and assist".

- *Examples of different meanings* "criticism or review", "recognition and enforcement", "town or village".

- Where there are overlapping terms or hendiadys the meaning is conjoint, the signification of each term merging with, and partaking of, that of the other.

- A pair of words may be linked conjunctively (requiring both terms to be satisfied) or disjunctively (requiring only one term to be satisfied).

- It is not the case that where the link is "and" the terms are conjunctive and where it is "or" the terms are disjunctive. The terms "and" and "or" are often indistinguishable in English usage.

- Weightless drafting occurs when no weight rests on the exact meaning of the language used.

- One example of weightless drafting is the use of a pair of terms where a doubtful case must fall within one or other of the terms but it does not matter which because the legal effect of the enactment is the same either way.