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 - 9

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In the final four articles of the series, beginning with this one, I propose to draw the threads together.[1] Over the past months we have looked at a number of the problems connected with drafting, interpreting and applying United Kingdom legislation, though there are many more we do not have space to touch on. There remains the basic question. What really are the interpretative criteria, or guides to legislative intention? There is talk of a golden rule. Does it really exist? What of the so-called literal rule, and the mischief rule? I wrote about the literal rule in the third article. Now I must describe how I first came to hear of these three supposed "rules" of statutory interpretation. Many people still think (and write) as if they sum up the whole story. In fact they are largely illusory.

Sir Rupert Cross's puzzlement

I first heard of the three supposed rules when, more than twenty years ago, I first read a little book entitled S*tatutory Interpretation.* It was written by an old friend, the late Sir Rupert Cross, who had been Vinerian Professor of English Law in the University of Oxford. His brief monograph first appeared in 1976. It was the preface to it that stimulated me to write my own much larger book with the same title. Cross wrote-

> "When teaching law at Oxford in the 1950s and 1960s I treated my pupils as I had been treated and told them to write essays criticising the English rules governing the subject . . Each and every pupil told me that there were three rules - the literal rule, the golden rule and the mischief rule, and that the Courts invoke whichever is believed to do justice in the particular case. I had, and still have, my doubts, but what was most disconcerting was the fact that whatever question I put to pupils or examinees elicited the same reply. Even if the question was What is meant by 'the intention of Parliament'? or What are the principal extrinsic aids to interpretation? back came the answers as of yore: 'There are three rules of interpretation - the literal rule, the golden rule and the mischief rule.' I was as much in the dark as I had been in my student days about the way in which the English rules should be formulated."

Obviously Cross did not think these three so-called rules provided the answer. Having thought about the matter closely over the intervening years, I am convinced he was right. So where does the truth lie? It starts with what I have worked out to be the basic rule.

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[1] Previous articles in the series are in volume 162 (1998) at pages 356, 436, 516, 596, 696, 856, 995 and in volume 163 (1999) at page 264.

The basic rule of statutory interpretation

It is taken to be the legislator's intention that an enactment shall be construed according to the numerous general guides laid down for that purpose by law; and that where these conflict (as they often do) the problem shall be resolved by weighing and balancing the interpretative factors concerned. That is the basic rule, and it is simple enough. A distinguished nineteenth century judge confirmed it by saying that those on the bench "are bound to have regard to any rules of construction which have been established by the Courts".[2] This is correct if one adds to it the rules laid down by Parliament. Contrary to what is often said, the court does not "select" any one of these many guides and then apply it to the exclusion of the rest. What the court does (or should do) is take an overall view, weigh all the relevant interpretative factors, and arrive at a balanced conclusion.

The approach indicated by the basic rule has been described as pluralistic. This is by comparison with the old literal rule, formerly regarded as universal. The modern development, useful though it is, has been said to deepen the contingency or uncertainty of the law.

> "Because pluralism in statutory interpretation embraces more approaches than literalism, the contingency appears to have deepened in the sense that it is 'grounded' in the values of plural concepts and approaches. However, another way to view this shift is to see it as a shift from the values of literalism to those of pluralism. The difficulty with accepting pluralism's values as the new basis for statutory interpretation is in identifying them."[3]

I believe a start in identifying these plural values lies in grouping them into four main categories.

The four categories

The guides to legislative intention, otherwise known as the interpretative criteria, can be broken down into four distinct types, which may be respectively identified as rules, principles, presumptions and canons. Expanding this slightly, we may say these are: (1) common law and statutory rules; (2) principles derived from legal policy; (3) presumptions based on the nature of legislation; and (4) general linguistic canons applicable to any piece of prose.

These interpretative criteria are peculiar in that, while most general legal rules etc. directly govern the actions of the subject, these directly govern the actions of the court. There is however an indirect effect on the subject. Since the court is obliged to apply an enactment in accordance with the interpretative criteria, persons governed by the enactment must read it in that light. The law in its practical application is not what an Act says but what a court says (or would say) the Act means.[4]

The interpretative criteria can be broadly distinguished as follows. A rule of construction is of binding force, but in cases of real doubt rarely yields a conclusive answer. A principle of construction reflects the policy of the law, and is mainly persuasive. A presumption of construction arises from the essential nature of legislation and affords a prima facie indication of the legislator's inferred or imputed intention as to the working of the Act. A linguistic

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[2] *Ralph v. Carrick* (1874) 11 Ch. D 873, *per* Cotton LJ at 878.
[3] Jeffrey W. Barnes, "Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law" Pt II (1995) *Federal Law Review* (Australia) p.77 at 127.
[4] As explained in the first article in the series, this is known as its legal meaning.

canon of construction arises from the nature and use of language and reasoning, and is not especially referable to legislation.

I will now go on to discuss these four categories in turn. The remainder of this article deals with the first category, rules of construction.

Rules of construction: (1) common law rules

A criterion is not deserving of the name *rule* unless it is compelling. The basic rule of statutory interpretation set out above is compelling, but does not take one very far. This tends to be the case with rules of statutory interpretation: where a real doubt as to meaning exists, the matter becomes one of judgment rather than predetermined response.

Rules of statutory construction can be divided into those laid down at common law and those laid down by statute. Criteria laid down at common law which are worthy of the name *rule* are relatively few. They include the following among those not already described in this series.

Juridical nature of an enactment In construing an enactment of any kind, the interpreter must treat it with due regard to its juridical nature as an enactment of that kind. There are various types of enactment. Some are comprised in primary legislation, whereas others are derivative or secondary. Some legal qualities are common to all types, while others relate only to a particular type or types (for example European, constitutional or human rights aspects). The interpreter needs to be aware of the juridical nature of what is being interpreted, and construe it accordingly.

Plain meaning rule It is a rule of law, sometimes called the plain meaning rule, that where, in relation to the facts of the instant case, the enactment under inquiry is grammatically capable of one meaning only, and on an informed interpretation of that enactment the interpretative criteria raise no real doubt as to whether that meaning is the one intended by the legislator, the legal meaning of the enactment corresponds to that meaning. For this purpose a meaning is "plain" only where no relevant interpretative criterion (whether relating to material within or outside the Act or other instrument) points away from it. This rule determines the operation of nearly every enactment, simply because nearly every enactment has a straightforward and clear meaning with no counter-indications. As Cross put it, if it were not a known fact that, in the ordinary case in which the normal user of the English language would have no doubt about the meaning of the statutory words, the courts will give those words their ordinary meaning, it would be impossible for lawyers and others to act and advise on the statute in question with confidence.[5]

It is salutary to bear this in mind. The science or art of statutory interpretation deals in the main with the pathology of law, when something has gone wrong. Usually nothing does go wrong. Lawyers, like medical practitioners, need to be on guard against losing sight of the general prevalence of healthy conditions. Sir MacKenzie Chalmers, celebrated draftsman of such enduring codes as the Sale of Goods Act 1893 and the Marine Insurance Act 1907, remarked that "lawyers see only the pathology of commerce, and not its healthy physiological action, and their views are therefore apt to be warped and one-sided".[6] The same can apply in relation to the pathology of law.

Commonsense construction rule It is a rule of law (sometimes known as the commonsense construction rule) that when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, the

[5] R. Cross, *Statutory Interpretation* (1st edn), p.1.
[6] *Sale of Goods* (12th edn, 1945), p.182.

court should presume that the legislator intended common sense to be used in construing the enactment. As Lord Goddard CJ said, "A certain amount of common sense must be applied in construing statutes".[7] So when a particular matter is not expressly dealt with in the enactment this may simply be because the drafter thought that as a matter of common sense it went without saying. Section 4(2) of the Courts Act 1971 provided that lay justices when sitting with a judge of the Crown Court were themselves to be treated as judges of that court. Lord Widgery CJ said that in arriving at decisions the full court must play its part. "All one need add today is really a glimpse of the obvious, so obvious that no doubt the draftsman did not think it necessary to put it in the Act, namely, that in matters of law the lay justices must take a ruling from the presiding judge in precisely the same way as the jury is required to take his ruling when it considers its verdict."[8]

It is common sense to assume that if a particular proposition is expressly laid down by an enactment, the converse, though not expressed, also applies. So if A is to be treated for the purposes of an enactment as residing with B, it follows as a matter of common sense that B is to be treated for those purposes as residing with A.[9]

Rules of construction: (2) statutory rules

Statutory rules of interpretation are principally laid down by the Interpretation Act 1978, which re-enacts propositions first placed on the statute book in Lord Brougham's Act.[10] Most rules of construction laid down by statute consist of definitions, which I dealt with in the sixth article of the series. However some rules are in oblique form, as with the following: "Every court in dealing with a child or young person . . . shall have regard to the welfare of the child or young person".[11] Many interpretative provisions laid down by the Interpretation Act 1978 and other Acts are not in form definitions, though they do have a defining effect. They state general propositions about the legal meaning an enactment is to be taken to have "unless the contrary intention appears" (to quote the exclusionary phrase used throughout the 1978 Act).

The easiest way to become acquainted with the rules laid down by the Interpretation Act 1978 is to study the Act. Lord Thring, first head of the Parliamentary Counsel Office (where most government Bills are drafted) said of its equivalent in his day, the Interpretation Act 1889, "it is the duty of every draftsman to know it by heart and to bear its definitions in mind in every bill which he draws".[12] I would go further and say it is the duty of every judge, and every other person concerned with the legal meaning of legislation, to be familiar with its provisions. There are many instances in the law reports of ignorance or neglect of the Act giving rise to expensive problems and even miscarriages of justice.[13] Here are just a few of its more important provisions.

The term "person" The meaning of the commonly used word "person" gives rise to a surprising amount of difficulty. To start with, it includes a body of persons, whether corporate

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[7] *Barnes v. Jarvis* [1953] 1 WLR 649 at 652.
[8] *R v. Orpin* [1975] QB 283 at 287.
[9] For a case where regulations were expressly (and as it proved unnecessarily) amended to spell out this plain truth see *Bate v. Chief Adjudication Officer* [1996] 2 All ER 790 at 800.
[10] (1850) 13 & 14 Vict. c.21. The basic idea of an Interpretation Act is indicated by the long title to Lord Brougham's Act: "An Act for shortening the Language used in Acts of Parliament".
[11] Children and Young Persons Act 1933 s.44(1), which may affect the construction of any enactment to which it is applicable: see *R. v. Secretary of State for the Home Department, ex p. Venables* [1997] 3 All ER 97 *per* Lord Browne-Wilkinson at 120.
[12] Lord Thring, *Practical Legislation* (1902), p.14.
[13] See eg *R. v. Adams* [1980] QB 575; *Wilson v. Colchester JJ* [1985] AC 750; *R. v. Pinfold* [1988] 2 WLR 635; *R. v. Immigration Appeal Tribunal, ex p. Secretary of State for the Home Department* [1990] 1 WLR 1126.

or unincorporate.[14] As invariably, this statutory definition does not apply if, whether expressly or by implication, the context otherwise requires. So it was held that, because of the nature and attributes of a solicitor as an officer of the court, the term "person" in the Solicitors Acts is confined to a person who could become a solicitor, thus excluding corporations.[15] In the Criminal Justice Act 1988 s.133(1), which requires compensation to be paid where "a person has been convicted of a criminal offence and subsequently his conviction has been reversed", the word "person" does not include a company.[16] Where the intention is to confine the statutory reference to *natural* persons, the drafting practice is to use the term "individual".[17] A human fœtus *in utero* is not in law a person or individual, since up to the moment of birth it does not have any separate interests capable of being taken into account by the court.[18]

The Interpretation Act 1978 is silent on the question whether a reference to a person is confined to persons of full age and capacity. As always it is a question of the intention of Parliament. For example it seems, although no authority can be cited, that for reasons of public safety the term "person" in an enactment enabling a person to apply for a firearms certificate should be taken not to include a minor, or one who is otherwise not of full mental capacity. On the other hand it is possible for a term indicating an adult to be construed as including children where the legislative intention so requires. The Homicide Act 1957 s.3, dealing with the defence of provocation, says "the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury". Clearly "man" includes a woman.[19] But does it include a boy? Since boys (and girls too for that matter) are in law capable of committing murder it necessarily follows that it does.[20]

Gender Unless the contrary intention appears, words importing the masculine gender include the feminine and vice versa.[21] In the days before sexism was frowned on, this was not always implemented. For example the Representation of the People (Scotland) Act 1868 s.27 gave voting rights to every "person" whose name was on the register of the general council of a Scottish university. In 1868 only males were entitled to be entered on such registers, but by virtue of the predecessor of the current provision, s.4 of Lord Brougham's Act, all words importing the masculine gender were to be "deemed and taken to include females . . . unless the contrary . . . is expressly provided". In s.27 of the 1868 Act the contrary was not expressly provided, and when the University of St Andrews later opened its doors to women they claimed to be within s.27, and to be therefore entitled to vote. It was held that this had not been unequivocally expressed to be Parliament's intention, and the claim could not be admitted.[22] In another case the House of Lords denied a peeress the right to sit in the House of Lords despite unequivocal words in the Sex Disqualification (Removal) Act 1919 s.1.[23]

Number Unless the contrary intention appears, words in the singular include the plural and vice versa.[24] This rule may cause difficulty when the drafter forgets that an enactment expressed in terms of what one person does may not work for plural cases, since the people concerned may each choose to do different things. The simple phrase "words in the singular include the plural" can disguise a number of problems, and may require selective pluralising

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[14] Interpretation Act 1978 s.5 and Sch. 1.
[15] Law Society v. United Services Bureau Ltd. [1934] 1 KB 343.
[16] *R. v. Secretary of State for the Home Department, ex p. Atlantic Commercial (UK) Ltd.* (1997) *Times*, 10 March.
[17] *Whitney v. IRC* [1926] AC 37 at 43.
[18] *In re MB (an adult: medical treatment)* [1997] 2 FCR 541; *Attorney General's Reference (No. 3 of 1994)* [1997] 3 All ER 936.
[19] See below.
[20] So held in *DPP v. Camplin* [1978] AC 705.`
[21] Interpretation Act 1978 s.6.
[22] *Nairn v. University of St Andrews* [1909] AC 147.
[23] *Viscountess Rhondda's Claim* [1922] 2 AC 339.
[24] Interpretation Act 1978 s.6(c).

or singularising in complex cases. The Magistrates' Courts Act 1980 s.20(3) says that in certain circumstances the court, after explaining specified matters to "the accused", shall "ask him whether he consents to be tried summarily or wishes to be tried by a jury". This caused acute difficulty with multiple defendants in *Nicholls v. Brentwood Justices* [1991] 3 All ER 359, where the House of Lords disagreed with the Court of Appeal.

The reverse rule that plural references include the singular is frequently overlooked in practice. For example a single letter was, probably erroneously, held not to be "correspondence" within the meaning of the Law of Property Act 1925 s.46.[25]

Time Subject to the Summer Time Act 1972 s.3 (references to points of time during the summer time period), whenever an expression of time occurs in an enactment this is taken to refer to Greenwich mean time, unless it is otherwise specifically stated.[26] References to a "month" mean a calendar month.[27]

Land A reference to "land" includes buildings and other structures, land covered by water, and any estate, interest, easement, servitude or right in or over land.[28] This is an extremely important definition, which is often overlooked. Failing to take it into account can lead to difficulty because it is an enlarging definition of unexpectedly wide extent. An unsuspecting reader might be surprised to find, for example, that a reference to "land" includes a right of way and a restrictive covenant.[29]

Powers and duties Where an enactment confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires.[30] This important rule is often overlooked in practice. It does not apply where the scheme of the legislation so indicates.[31]

Summary

- The basic rule of statutory interpretation is that enactments shall be construed according to the numerous general guides laid down for that purpose by law; and that where these conflict the problem shall be resolved by weighing and balancing the interpretative factors concerned.

- The guides to legislative intention, otherwise known as interpretative criteria, are: (1) common law and statutory *rules*; (2) *principles* derived from legal policy; (3) *presumptions* based on the nature of legislation; and (4) general linguistic *canons* applicable to any piece of English prose.

- Rules of statutory construction can be divided into those laid down at common law and those laid down by statute.

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[25] *Stearn v. Twitchell* [1985] 1 All ER 631. The judgment contained no reference to the rule that plural references include the singular.
[26] Interpretation Act 1978 s.9.
[27] Interpretation Act 1978 s.5 and Sch.1.
[28] Interpretation Act 1978 s.5 and Sch.1.
[29] See *R. v. Hammersmith and Fulham London Borough Council, ex p. Beddowes* [1987] QB 1050.
[30] Interpretation Act 1978 s.12(1).
[31] As in *R. v. Crown Court at Stafford, ex p. Chief Constable of the Staffordshire Police* [1998] 2 All ER 812 (scheme of the Licensing Act 1964 indicated that justices could not grant a special hours certificate in respect of premises for which one was already in force).

- Rules laid down at common law include: (1) the rule that regard must be had to the juridical nature of an enactment; (2) the plain meaning rule; and (3) the commonsense construction rule.

- Statutory rules are principally laid down by the Interpretation Act 1978. Main rules so laid down include definitions of "person" and "land", and provisions as to gender, number, time, and powers and duties.

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