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# Spotting the Key Text that Solves the Case

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**Preliminary**

This article discusses the lawyer's problem of spotting or finding the key law text which contains the answer to the problem. This may be a legislative text or some other type of law text, for example a court judgment. The judgment may throw light on a legislative text or may relate to the common law or some other matter such as a treaty. We refer to a law text in the singular, but it is important to remember that, as in legislation generally, unless the contrary intention appears 'words in the singular include the plural and words in the plural include the singular'.[1]

This reference to spotting or finding a relevant law text takes us to the specialism known as legal research. There are books which deal with this specialism, and I do not aim to duplicate them here. The specialism will help you to find the relevant law text, but the point I want to stress in this article is that a special additional is skill is needed to enable you to *identify* the crucial text that matters, once you have got on its track. This can be very difficult to do, as is shown by the case I have selected to illustrate in depth the technique required. It is ***R (on the application of Haw) v Secretary of State for the Home Department and another***.[2] I shall refer to it as *Haw*. My treatment of it is simplified for the sake of clarity.

*Haw* is a striking example of how failure to deploy correctly the technique of finding the key law text can lead to unnecessary delay and expense. It was not until it reached the Court of Appeal that anyone spotted the key text and thus solved the case.

**The facts in *Haw***

The case concerned a permanent demonstration against the Iraq war mounted by Brian Haw in Parliament Square, London, next to the Houses of Parliament. This was formerly the churchyard and streets adjoining St Margaret's Church. In the early 1780s, the buildings were demolished and the churchyard cleared and grassed. To complement the Houses of Parliament, their architect Sir Charles Barry laid out the square in the 1850s. It was redesigned after the Second World War and now comprises a square lawn, paved walkways and seats on the northern and western edges.

There are six statues of political and historical significance on the square, most of which are grade II listed structures. The Greater London Authority (GLA) is responsible for the management of Parliament Square Garden up to and including the kerb that separates the pavement from the road with the exception of the pavements on the east and south sides, which are the responsibility of Westminster City Council. Byelaws made under the Greater London Authority Act 1999 s 385 regulate conduct within the square. In 2002 the Mayor of London set out the following vision for the square:

> 'Parliament Square should provide a symbolic and dignified setting for Parliament and the surrounding historic buildings, in keeping with its role as a World Heritage Site. It should be both accessible and meaningful to Londoners and visitors . . . Rallies and

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[1] Interpretation Act 1978 s 6.

[2] [2005 EWHC 2061 (Admin), [2006] EWCA Civ 532, [2006] 3 All ER 428.

> demonstrations on the Square are not therefore considered appropriate due to the disruption that they would cause both to Parliament and to surrounding traffic systems.'[3]

Nevertheless in June 2001 Brian Haw started his demonstration. It was described as follows by Clarke MR in *Haw*-

> 'He lives on the pavement and displays a large number of placards . . . In 2002 Westminster City Council sought an injunction requiring him to remove his placards on the basis that they were an obstruction to the highway. The application for an injunction failed. Gray J held that the respondent's demonstration neither caused an obstruction of the highway nor gave rise to any fear that a breach of the peace might arise. He held that the demonstration was accordingly lawful. The respondent has been there ever since.'[4]

On 7 April 2005 the Serious Organised Crime and Police Act 2005 received royal assent. Sections 132-138 were headed *Demonstrations in vicinity of Parliament*. Section 132(1) reads-

> 'Any person who—
> (a) organises a demonstration in a public place in the designated area, or
> (b) takes part in a demonstration in a public place in the designated area, or
> (c) carries on a demonstration by himself in a public place in the designated area,
> is guilty of an offence if, when the demonstration starts, authorisation for the demonstration has not been given under section 134(2).

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Section 132(6) reads-

> 'Section 14 of the Public Order Act 1986 (imposition of conditions on public assemblies) does not apply in relation to a public assembly which is also a demonstration in a public place in the designated area.'

The designated area includes Parliament Square. Mr Haw applied to the Divisional Court for judicial review seeking a declaration that s 132(1) did not apply to him because, as the 2005 Act had not been passed when his demonstration started, it had been impossible for him to apply for authorisation.

The objection had been foreseen by the Home Office when drafting the commencement order bringing s 132 into force. This was the Serious Organised Crime and Police Act 2005 (Commencement No 1, Transitional and Transitory Provisions) Order 2005[5]. Article 4(1) of the order says that the reference in s 132(1) to a demonstration starting is to take effect as if it were a reference to a demonstration starting *or continuing* after the commencement date of 1 August 2005. If valid, this caught Mr Haw.

I pause to take stock. The Home Secretary, the Commissioner of the Metropolitan Police, and the Conservative-controlled Westminster City Council, with others, wished for a finding that Mr Haw's demonstration was unlawful so that it could be removed. Mr Haw and his supporters wished for a finding that his demonstration was lawful so that it could remain. There were various law texts that might or might not be relevant. Section 132(1) of the 2005 Act was in Mr Haw's favour unless the amendment made by the commencement order was valid. Section 132(6) meant that if Mr Haw was right on the application of s 136(1) neither the Public Order Act 1986 s 14 nor its replacing provision in the 2005 Act applied to him. And what of the byelaws which regulated behaviour in Parliament Square? Have you spotted the key law text which decided the matter?

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[3] Mayor of London, *Squares Annual Report 2002* (Greater London Authority, November 2002), p. 5.
[4] CA paragraph [1]. The date of this judgment was 8 May 2006.
[5] SI 2005/1521.

**Divisional Court proceedings in *Haw***

Counsel for the Home Secretary argued before the Divisional Court that it was clear that in enacting the 2005 Act Parliament intended to give power to regulate demonstrations in Parliament Square whenever they started. She cited my *Statutory Interpretation* to argue that the court should not apply a literal construction of s 132(1) but a purposive-and-strained construction.[6] The court rejected this argument on the ground that a purposive-and-strained construction could not be applied to a penal provision since 'it is a principle of legal policy that a person should not be penalised except under clear law'.[7]

With regard to the validity of the commencement order Smith LJ said in the Divisional Court-

> 'In my judgment, Article 4(2) of this Order, which alters the effect of section 132(1), so as to make a person conducting a demonstration which began before 1 August 2005 and continues after it criminally liable for conduct which, but for that alteration, would not be criminal cannot be described as a provision made for a transitional purpose in connection with the coming into force of the Act. In plain language, a provision which has that effect is, in my judgment, an amendment. Section 178 does not carry a power to amend and I am satisfied, therefore, that Article 4(2) is ultra vires.'

McCombe J agreed with Smith LJ. He said that however wide the principle of purposive construction may be it is undesirable to strain the natural meaning of an enactment so as to impose criminal liability where none would otherwise exist.[8] The third judge in the Divisional Court, Simon J, dissented on the question of applying a purposive-and-strained construction.[9] He thought that in some cases, of which this was one, it would be right to correct even a penal provision in this way.[10] It followed that in his view the commencement order did not amend the Act but merely reflected its true effect, and was not therefore ultra vires.

So by two to one the Divisional Court ruled in Mr Haw's favour. It found that the key law text was s 132(1), and applied its literal meaning. The Home Secretary and the Commissioner of the Metropolitan Police appealed to the Court of Appeal.

**Court of Appeal proceedings in *Haw***

Enter Mr Adam Clemens, counsel for the Commissioner of the Metropolitan Police in the Court of Appeal. The judgment of the court was delivered by Sir Anthony Clarke MR, who said-

> 'We have reached the conclusion that the parliamentary intention was clear. It was to regulate all demonstrations within the designated area, whenever they began. In reaching this conclusion we have been much influenced by a point which was not put to the Divisional Court. It was included for the first time, not in the skeleton argument lodged on behalf of the [Home Secretary], but in the skeleton argument lodged by Mr Clemens on behalf of the Commissioner. It depends on the terms of s 132(6) of the 2005 Act and upon the terms of s 14 of the Public Order Act 1986.'[11]

The terms of s 132(6) are given above. Section 14 enables a senior police officer to give directions regarding public order to persons organising or taking part in a 'public assembly', defined as an assembly of two or more persons in an open air public place. This would not catch Mr Haw's demonstration, but that was not the point. Section 132(6) disapplies s 14 as respects any type of demonstration in the designated area which qualifies as a 'public assembly' within the meaning of s 14. Instead the 2005 Act substitutes s 132(1) 'in the case of

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[6] See DC paragraphs [42]-[47], citing F A R Bennion, *Statutory Interpretation*, 4th edn, 2002 (which I shall call Bennion 2002), pp. 810-812.
[7] DC paragraph [52]; Bennion 2002, pp. 705-706.
[8] DC paragraph [63].
[9] See DC paragraph [77].
[10] DC paragraph [83].
[11] CA paragraph [19].

demonstrations in the designated area whenever they started'.[12] Clarke MR added: 'Any other conclusion would be wholly irrational and could

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fairly be described as manifestly absurd'.[13]

Clarke MR went on to say that if the literal construction leads to the conclusion that such a demonstration would be left unregulated by any statute at all 'we would not give it that literal construction'.[14] The court was thus prepared to give a purposive-and-strained construction in order to achieve what from the context Parliament was taken to have intended. In answer to the objection that a person should not be penalised except under clear law Clarke MR said-

> 'We should refer in this regard to two cases . . . The first is *McMonagle v Westminster City Council* [1990] 2 AC 716, where the House of Lords treated words as surplusage in a statute which contained criminal sanctions in order to avoid what Lord Bridge described as the substantial frustration of the object of the Act: see especially at page 726 C-F and 727F-G.[15] The second is *DPP v McKeown* [1997] 1 WLR 295, where in a breathalyser case the House of Lords refused to give the words of a statute their literal meaning because to do so would produce a result which Lord Hoffmann (with whom the other members of the House agreed) said would produce a result which was "quite irrational".[16] Thus all depends upon the circumstances of the particular case, even if the case involves the construction of a statute which contains penal provisions.'

**Further refinements**

The Court of Appeal judgment in *Haw* displays familiar defects. It fails to examine what might be called refinements of reasoning which could have been applied with advantage. Most judges and legal practitioners lack the knowledge necessary to do this because it has rarely been taught to them as students. This is an opportunity for students of today. They can refine their arguments in ways that will show them as better lawyers and help them win cases. With this in mind I add the following brief commentary to the judgment delivered by Clarke MR in *Haw.*

The judgment does not make up its mind whether the legal meaning of s 132(1) is 'clear' or not. At one point it says-

> 'However, whether or not there is "clear law" depends in this context upon the true construction of the relevant statute. We have reached the conclusion that in the case of the Act, once the intention of Parliament is ascertained from the language used, construed in its context, there is in the relevant sense clear law.'[17]

This comes near to saying that once the court has made a finding as to the legal meaning of a doubtful enactment it is thereafter to be regarded as 'clear', which is unsatisfactory. As stated above, the court indicated that it was prepared to give the relevant enactment a purposive-and-strained construction, which would not be necessary if the legal meaning was truly 'clear'.

Moreover there are recognised interpretative criteria which if cited would clothe the judgment with greater authority as a precedent. As stated above, the judgment said that 'Any other conclusion would be wholly irrational and could fairly be described as manifestly absurd'. It is well recognised that the court will adopt a strained construction to avoid 'absurdity'. No fewer than six types of 'absurdity' are recognised in this connection.[18]

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[12] See CA paragraph [22].
[13] CA paragraph [23].
[14] CA paragraph [29].
[15] On this case see Bennion 2002, p. 464 (Example 191.3).
[16] On this case see Bennion 2002, p. 821 (Example 306.2B).
[17] CA paragraph [27].
[18] See Bennion 2002, Part XXI. In *Haw* the type of absurdity would be the anomalous or illogical result

A further point is that there are two relevant presumptions that were not mentioned at all in the Court of Appeal judgment. The first is that it is presumed that a consequential construction is to be given. I express this as follows-

> 'It is presumed to be the legislator's intention that the court when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, should assess the likely consequences of adopting each construction, both to the parties in the case and (where similar facts arise in future cases) for the law generally. If on balance the consequences of a particular construction are more likely to be adverse than beneficent this is a factor telling against that construction.'[19]

The other presumption is that where a drafting error has been made a rectifying construction is to be given. I state this as follows-

> 'It is presumed that the legislator intends the court to apply a construction which rectifies any error in the drafting of the enactment, where it is required in order to give effect to the legislator's intention. This may be referred to as a rectifying construction.'[20]

**Conclusion**

In the end the key law text in *Haw* was s 132(6), but so far as we know it was not spotted until the case reached the Court of Appeal. It was the deciding text because when correctly analysed it was seen to produce the result that if Mr Haw's argument was accepted any demonstration involving two or more persons that was in progress in the designated area on the commencement date would fall out of control, being caught neither by the old regime (s 14 of the 1986 Act) nor the new regime (s 132(1) of the 2005 Act). This would be a preposterous result that clearly could never have been intended by Parliament. It was the clinching argument, or in the language of the times the smoking gun.

There is not always a smoking gun in a case requiring law-text analysis. Where there is one, it may take an acute lawyer to spot it. Moreover it will be a lawyer with a close knowledge of statute law. Despite the fact that nowadays statute law rules us all, it is still not a subject that is thoroughly taught in law schools. The remedy is in the hands of the individual lawyer, who must make it a lifelong study.

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Another point may be mentioned here. We say of the key law text that 'so far as we know it was not spotted'. It might have been spotted earlier by those representing Mr Haw, but they would have kept quiet about it because it was against them. Counsel have certain professional duties to the court to disclose points that are against them, but the duties do not go that far.[21]

This chapter illustrates the great difficulties that often lie in law-text analysis and in finding the key text that will solve a case. It is not an easy subject, and requires mastery of a special expertise. The days when law texts were expected to be drafted so that non-lawyers could understand them have long passed, if indeed they ever existed. It needs to be recognised that modern law is an expertise. That is why we have lawyers – and law students.

The observant reader may still have a query. What about those byelaws? The byelaws printed in the Mayor's Squares Annual Report 2002[22] say that no person shall fail 'to comply with a reasonable direction given by an authorised person to leave' the square.[23] They say that unless

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(Bennion 2002, section 315).

[19] Bennion 2002, section 286.

[20] Bennion 2002, section 287.

[21] For an example where counsel did have a professional duty of disclosure to the court see *Haw* DC paragraph [47], where Smith LJ spoke of counsel acting 'in the best tradition of the Bar'.

[22] See footnote 3 above.

[23] Byelaw 3(6).

having written permission no person shall within the square 'exhibit any notice, advertisement or any other written or pictorial matter'.[24] And so on. Plenty in that particular law text to put a stop to Mr Haw's little game. Why wasn't it used?

That we don't know. There is no mention of the byelaws in the report of *Haw*. My guess is that if the matter were investigated we would find that a decision whether to proceed under the byelaws lies with the Mayor Mr Ken Livingstone and he might not like to be seen to be proceeding against a demonstrator like Mr Haw. After all there is article 10 (freedom of expression) of the European Convention on Human Rights to consider. That too was not mentioned in the report of *Haw*.

[24] Byelaw 5(3).