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Statutory Powers: a Dubious Decision

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Introductory

> *Judge* The legal meaning of this statutory phrase is different to its grammatical meaning.
> *Counsel* May I ask why, my Lord?
> *Judge* Because I say so.

The above interchange will not be found expressly set out in any law report, but it is often there by implication. I have written before about Judges who fail to provide an adequate explanation of some step in their reasoning, but in effect give Nanny's response: "Because I say so".[1] The present article offers another example.

If a person who holds a statutory power chooses to exercise it, does he need to explain what he is doing? Does the efficacy of his exercise of the power depend on his identifying its source? Of course he must conform to any conditions laid down by the enactment conferring the power. If he does that, is he also required to accompany his exercise of the power by a recital of the name and details of that enactment?

In principle the answer is clearly no. If I possess a power I can exercise it without having to explain its source. If challenged, I may as a practical matter have to convince a court, on a balance of probabilities, that I do indeed possess the power. However the validity of its exercise cannot depend on any explanations I do or do not choose to give concerning my authority. So much, it is submitted, is as clear as anything can be in the law. Yet in a recent case, which I shall call *Vibixa*[2], the Court of Appeal upheld the court below in deciding otherwise.

Before considering *Vibixa* I will explore the general proposition a little further. Suppose I hold two different statutory powers, A and B, and make a mistake over which one I am using. I do something which is only covered by A, but announce that I am doing it in exercise of B. Does my mistake render what I have done invalid? In principle the answer is clear. If I am empowered to do something, I can do it – even though I make a mistake over where the power to do it comes from. If an ancient warrior armed with two swords, respectively named Hrunting[3] and Skrep[4], had slain an enemy with Skrep believing he was wielding Hrunting the man would have stayed dead despite the mistake.

Vibixa concerned the type of statutory power which authorises the making of delegated legislation. To this the principle I have discussed applies as it does to any other statutory

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[1] See for example "Bingham's Finger", 169 JPN (14 May 2005), p. 368 at p. 370 ("his judgment was of the 'because-I-say-so' variety"). This is on the internet at http://www.francisbennion.com/pdfs/fb/2005/2005-028-binghams-finger.pdf.

[2] See *Vibixa Ltd v Komari UK Ltd & Others, Spectral Technology Ltd; Polestar Joweths Ltd v Komari UK Ltd & Another, Spectral Technology Ltd* [2006] EWCA Civ 536.

[3] The name of a sword mentioned in the Anglo-Saxon epic poem *Beowulf*.

[4] A sword owned by the Mercian king Offa.

power. The practice is to preface statutory instruments with a recital of the power or powers under which they are made, but there is no legal requirement for this. An item of delegated legislation would be just as effective without there being any such prefatory recital. What matters is that the power exists, and that any conditions to which its exercise is subject are complied with. It is also of course necessary that any instrument issued in exercise of the power should somehow make clear by whom it is made.

The same reasoning must apply, and for the same reasons, where there is a mistake in the prefatory recital. All this is confirmed by the leading authority *Craies on Legislation*[5], which I will refer to as *Craies*. Writing of the principal type of delegated legislation, the statutory instrument, *Craies* says:

> ". . . the preamble of a statutory instrument is generally confined to a recital of the powers under which it is made and the fulfilment of any statutory pre-conditions . . . The preamble is not part of the text of an instrument and has no legal effect: in particular, failure to cite a relevant enabling provision would not result in the invalidity of the instrument."[6]

In *Vibixa* the Court of Appeal took issue with this statement by *Craies* that the preamble "has no legal effect", dismissing it as "simple".[7] That was because in *Vibixa* the question at issue was not whether the instrument was valid; there was no doubt that it was. The question was under which particular power the instrument was made, because that made a difference in law.

I will return to this point. First it is necessary, in view of the importance of the Court of Appeal's decision in *Vibixa*, to examine the decision of Field J at first instance.

The decision of Field J

The case concerned a statutory instrument, the Supply of

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Machinery (Safety) Regulations 1992[8], ("the machinery regulations"). The preamble runs:

> "The Secretary of State, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to measures relating to the design and construction of, and to the placing on the market and putting into service of, machinery, in exercise of the powers conferred on him by that section ["the 1972 Act powers"] ***and of all his other enabling powers***, hereby makes the following Regulations . . ."[9]

Vibixa related to the italicised phrase, which I will refer to as "the sweeping-up words". It is a common-form phrase in which as a legislative draftsman I have often taken comfort. One may not know whether in fact there are any other relevant enabling powers. But one knows that if there are, and there turns out to be any inadequacy in the powers expressly cited, this formula will come to the rescue. One thinks of it as a belt-and-braces provision.

There did turn out to be other enabling powers in the case of the machinery regulations, namely those contained in the Health and Safety at Work, etc. Act 1974 s. 15(1) ("the 1974 Act powers"). This subsection confers on the Secretary of State "power to make regulations (in this Part referred to as 'health and safety regulations') for any of the general purposes of this Part except as regards matters relating exclusively to agricultural operations".[10]

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[5] London, Sweet & Maxwell, eighth edition (2004) edited by Daniel Greenberg, Parliamentary Counsel.
[6] *Craies*, pp. 112-113.
[7] Para. 26.
[8] SI 1992 No. 3073.
[9] Emphasis added.
[10] Agricultural operations were not involved in *Vibixa*.

Field J held that the expressly-recited powers, namely the 1972 Act powers, were sufficient in themselves to found the machinery regulations, so that there was no need to rely on the sweeping-up words to ensure their validity. This view was not challenged by the claimants. However they wished to establish that the machinery regulations were also "health and safety regulations" made under the 1974 Act powers. This was because section 47(2) of the 1974 Act says "Breach of a duty imposed by health and safety regulations . . . shall, so far as it causes damage, be actionable except in so far as the regulations provide otherwise". So the claimants, who were claiming damages, relied on the sweeping-up words to bring in section 47(2).

Lord Neill QC, who appeared for the claimants, submitted that the sweeping-up words in and of themselves mean that the regulations were made not only under the 1972 Act powers but also under the 1974 Act powers, since undoubtedly the latter were among the Secretary of State's "other enabling powers". He argued that the subject matter of the regulations was such that they must be construed as having been made under the 1974 Act as well as the 1972 Act. The following was Field J's response dismissing this argument:

> "The 1992 regulations specifically identify s. 2(2) of the 1972 Act as the source of the power under which they are being made. In my judgment it is plain that the Secretary of State was proceeding on the basis that that power was sufficient to achieve the regulations' purpose. And, as I have held, it is not to be inferred from the regulations themselves and their statutory setting that part of their purpose was to confer a right of suit for breach. It follows in my opinion that the words 'all his other enabling powers' are intended to refer to such of the Secretary of State's other powers that would authorise the making of regulations *that would have the same effect as if they were made under s. 2(2)*. In other words, if it had been intended that the regulations should confer a right of suit for breach, the regulations would have clearly declared that they were being made under the 1974 Act. In the absence of such a declaration, they cannot be taken to have been made under that Act."[11]

Earlier Field J quoted with apparent approval some words of counsel for the defendants:

> "In their submission the words 'in exercise . . . of all his other enabling powers' are simply a sweeping up formula and as such cannot be construed as a declaration that the regulations were made under the 1974 Act with the highly significant consequence that a breach of the regulations will sound in an action for damages."

Here we find ourselves in because-I-say-so country. Field J sets out no reasoning and cites no authority for the proposition that sweeping-up words of this kind are to be treated as a mere incantation virtually without meaning. Yet there is judicial authority on the point:

> "*Every word to be given meaning* On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded."[12]

On this Sedley LJ said:

> "Bennion *Statutory Interpretation* (4th edn, 2002) pp 992-995 stresses the presumption against holding words in an Act to be idle but also cites judicial decisions which have had to go against the presumption . . . If absolutely necessary, words may have to be held to be idle."[13]

Field J produced no argument rendering it "absolutely necessary" to depart from the literal meaning of the sweeping-up words. The same applies to his above-cited statement that the Secretary of State was proceeding on the basis that the 1972 Act power was "sufficient to

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[11] [2005] EWHC 1674 (QB), paragraph 17 (emphasis added).
[12] F A R Bennion, *Statutory Interpretation* (4th edn 2002), p. 993.
[13] *Collins v Royal National Theatre Board* [2004] EWCA Civ 144, [2004] 2 All ER 851, at [33].

achieve the regulations' purpose". If that statement had been true the inclusion of the sweeping-up words would have been tautologous. But it is a canon of construction that statutory words are not to be treated as tautologous and that, "if it be possible, effect must be given to every word of an Act of

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Parliament or other document . . ."[14] The same rule applies in Ireland, where Egan J stated:

> "There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislator must be deemed not to waste its words or to say anything in vain."[15]

Another relevant rule of statutory interpretation is the plain meaning rule. As it is put in Halsbury's *Laws of England:* "If there is nothing to modify, nothing to alter, nothing to qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning."[16] Field J did not cite any concrete factor which modified, altered or qualified the plain meaning of the sweeping-up words and it is submitted that they should have been applied with that meaning. Nor did he cite any authority or reasoning justifying the inclusion in his judgment of the italicised words, which are it is submitted pure invention.

The official *Statutory Instrument Practice*

At this point it is relevant to mention a Government manual titled *Statutory Instrument Practice,*[17] though it was not cited in *Vibixa*. The manual is intended primarily for the use of civil servants and others concerned with the preparation and making of statutory instruments and with the parliamentary procedures relating to them. It relates only to United Kingdom statutory instruments. The manual says of itself:

> "It is a guide to practice, not a textbook of the law, and incorporates the substance of the Statutory Instrument Practice (SIP) circulars put out from time to time by the HMSO Division of the Cabinet Office and previously by the Office of Public Service, its predecessors, and by the Treasury."[18]

In other words the manual has no legislative effect, being merely the Government's instructions to its civil servants. Nevertheless it has its uses in throwing light on the intention which is to be taken as underlying the wording of a statutory instrument. The manual states:

> "There is no express rule of law as to the manner in which subordinate instruments are to be made. Orders in Council have been made by the oral assent of the Sovereign in Council, and it is generally accepted that other subordinate legislation is made when it is signed by, or by the delegate of, the person authorised in that behalf by the enabling Act. Sometimes, however, the Act provides that the instruments [*sic*] must also have the approval, consent or concurrence of some other authority . . . and it will not acquire the force of law until this condition has been fulfilled."[19]

With regard to the interpretation of statutory instruments the manual states:

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[14] *Stone v Yeovil Corpn* (1876) 1 CPD 691 at 701.
[15] *Cork County Council v Willock* [1993] 1 IR 231 at 239.
[16] 4th edn, Vol. 36 para. 585.
[17] Cabinet Office/HMSO, 3rd edn 2003. The full text of *Statutory Instrument Practice* is available on the HMSO website www.hmso.gov.uk/services/si_practice.htm and on LION (the Legal Information Online Network).
[18] Para. 1.1.1.
[19] Para. 1.2.4.

> "The statute law relating to the interpretation of subordinate legislation has . . . been assimilated to that applying to Acts, and in general the two pieces of legislation are subject to the same rules of construction."[20]

On the subject of the preamble the manual says:

> "The preamble should recite every enabling provision, whether in primary or secondary legislation, from or through which the instrument derives its validity, and specify the relevant section, subsection and paragraph, or as the case may be . . . To the specific enabling provisions there may be added, if the draftsman thinks it expedient, such words as 'and of all other powers enabling him in that behalf'. These words, however, should generally only be used in limited circumstances (e.g. where reliance is placed on prerogative powers). They should not be included merely because there is an exercise of the general power to revoke, amend or re-enact conferred by section 14 of the Interpretation Act 1978 (see paragraph 1.2.9)."[21]

The last sentence spells out a case where, as discussed above, an enabling power is not mentioned in the preamble although relied on. The statement that sweeping-up words should "only be used in limited circumstances" is designed to encourage civil servants to cite specific powers wherever possible, because this is convenient for users. It has no force in law.

Judicial legislation by the Court of Appeal

There were more dicta of the because-I-say-so variety in the single judgment of the Court of Appeal upholding Field J, which was prepared by Lady Justice Arden. It laid down new doctrines which one can only describe as invented out of thin air. No authority was cited to justify them. The judgment summarized them as follows.[22]

"(1) *General enabling words*

General enabling words in the preamble to a statutory instrument may be interpreted as referring to an enabling power, not expressly invoked, in situations such as the following:

> i) where, in order for the SI to have effect, the maker

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> of the instrument must necessarily have invoked that power, or
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> ii) where the operative provisions of the SI make it clear that its maker must have invoked that power; or
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> iii) where it is necessary to adopt that interpretation in order to make the SI conform to Community law or if that interpretation would make the SI compatible with the rights conferred by European Convention on Human Rights ('the Convention').

However the general enabling words will not be interpreted as including an enabling power simply because the maker of the SI could have used that power.

(2) *Effect of the general enabling words in the machinery regulations*

The general enabling words in the preamble to the machinery regulations did not invoke the enabling power contained in section 15(1) of the 1974 Act.

(3) *Health and safety regulations and property damage*

In any event, health and safety regulations made under section 15(1) of the 1974 Act cannot form the basis of a claim by the purchaser of machinery in respect of property damage or consequent loss of profits."

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[20] Para. 1.2.8.
[21] Para. 2.4.2.
[22] Para. 13.

The finding in paragraph (3) of the above was enough to determine the outcome of the case, and I have no comment to make on it. The findings in paragraph (1) constitute judicial legislation. Thankfully in view of the finding in paragraph (3) they can be treated as *obiter* and therefore not binding.

Analysing the judicial "legislation"

One reason given by it for the Court of Appeal's "legislation" in purporting to limit the effect of the sweeping-up words is:

> ". . . if the appellants [claimants] are right, the result would be that when a question arose as to the effect of a statutory instrument the court would have to conduct an inquiry across the statute book to see whether there was some *unexpressed* enabling power that could have been invoked by the person making the statutory instrument . . . this could lead the court to make an impermissible journey across the dividing line between the interpretation of legislation, which is the constitutional role of the courts, and the making of legislation, which is the role of Parliament".[23]

This, with respect, this is an absurd argument. As stated above, there is no legal duty to recite enabling powers at all. The court is normally assisted by counsel, whose job it is to lay necessary information before it. Very rarely does a court need to conduct its own inquiries. If the sweeping-up words are given their natural meaning they cover any available power. There is no question of constitutional impropriety because the courts' jurisdiction to inquire into the validity of legislation is undoubted. Moreover the word "unexpressed" indicates confusion of thought. What the court would be looking for would be an *expressed* power.

Another reason given in the judgment is that reliance on general enabling words "may mislead Parliament [*sic*] into believing that it is enacting an instrument with different effect from that which it actually has". Here is more confusion. It is not Parliament which enacts a statutory instrument but a Minister or other executive authority. Even if Parliament or one of its committees does have occasion to consider the instrument there is no way inclusion of sweeping-up words could mislead in the way suggested; and no example of this was cited in the judgment. A vivid imagination is at work here.

More imagination is displayed in other reasons given in the judgment. It says the court may not be able to construe the sweeping-up words literally because "our domestic law would not then conform with Community law, or because, under section 3 of the Human Rights Act 1998, the general enabling words must be given some other interpretation to make the SI compatible with Convention rights under section 3 of the Human Rights Act 1998".[24] No examples are given of this unlikely scenario.

The Court of Appeal were obviously swayed by the fact that the 1974 Act powers were not expressly mentioned in the proviso. That does indeed suggest that they were not in the forefront of the mind of the drafter of the regulations. However the judgment includes a finding that the reasoning of the drafter "is to be assessed objectively from the terms of the instrument" rather than on a subjective basis.[25] That suggests a literal construction. If the sweeping-up words had not been included the literal construction would have been that sole reliance was being placed on the 1972 Act powers. Their inclusion irresistibly means that reliance was also being placed on the 1974 Act powers because that is what the words clearly mean.

It is submitted that, for the reasons I have given, the Court of Appeal's finding that the machinery regulations were not made under the 1974 Act powers cannot be supported and is wrong in law. It also contravenes the Statutory Instruments Act 1946 s 1(1), which creates legal consequences in relation to a specified document, namely "any document by which [a

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[23] Paras. 18, 19 (emphasis added).
[24] Para. 25.
[25] Para. 23.

power to make subordinate legislation] is exercised". The court has found, I submit incorrectly, that the machinery regulations are not, as respects the 1974 Act powers, such a document.

Conclusion

There are many objections to the mistaken decision in *Vibixa*. It is contrary to well-established rules of statutory interpretation, which were not cited or discussed in the Court of Appeal judgment. It is contrary to the plain meaning of a simple statutory formula with a long history. It introduces unnecessary complications when the law is already complicated enough. It contravenes an Act of Parliament, the Statutory Instruments Act 1946.

Perhaps the most worrying feature is that neither Field J at first instance nor the Court of Appeal made any attempt to refer to, and be guided by, established principles of

statutory interpretation. The sole exception was *Craies*, whose authority they rejected. With this exception, the court acted as though the matter was one of first impression when it was not. They fell back on the "because I say so" technique, which used to be known scathingly as palm-tree justice. This is one more blow at the integrity and comprehensibility of our battered legal system.

There is a further point. *Vibixa* was a case where there were two or more available powers and it made a difference whether or not one of them, which gave a particular remedy, was to be taken to have been used. My contention is that all the available powers should have been taken to have been used, but that was rejected by the Court of Appeal. This sort of case is not mentioned in the Government manual *Statutory Instrument Practice*. It seems that an amendment to the manual is required.