THE ACTS INTERPRETATION ACT, SECTION 5(j):

A Case of Legislated "Equity of the Statute"?

In 1574, in a note to *Eyston* v *Studd*,[1] Plowden spoke of the "equity" of a statute as something which "enlarges or diminishes the letter according to its discretion . . . It is a good way, when you peruse a statute, to suppose that the lawmaker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present."

This counsel bears a surprising similarity to Section 5(j) of the Acts Interpretation Act 1924, which says:

> Every Act, and every provision or enactment thereof, shall be deemed remedial, whether the immediate purpose is to direct the doing of anything parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction, and interpretation as will best insure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

There has been a good deal of discussion as to what effect s. 5(j) has had on the traditional canons of statutory construction in New Zealand courts. Most of this discussion has been based on textual analysis of the section, often concentrating on the meaning of "fair, large and liberal" and how to ascertain the "object of the Act". For example, in *Union Motors* v *Motor Spirits Licensing Authority*,[2] Wilson J. says that "fair" in the section means that a word must be given a meaning that it can "fairly bear". This, however, adds little to our understanding of the section since, in the present context, "fair" could itself "fairly bear" other meanings, such as "equitable", than that ascribed to it by His Honour. Indeed, Wilson J.'s words add little to the remarks of Lord Simonds in *Magor and St. Mellons Rural District Council* v *Newport Corporation*,[3] where His Lordship says: "The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited . . ."

The Privy Council has gone a little further. In *Attorney-General* v *Lower Hutt City* the Judicial Committee refers to s. 5(j) in the course of a fluoridation case: "Their Lordships are of opinion that an Act empowering local authorities to supply 'pure water' should receive a 'fair large and liberal' construction as provided by s. 5(j) of the Acts Interpretation Act 1924. They are of the opinion that *as a matter of common sense* there is but little difference for the relative purpose between the adjectives 'pure' and 'wholesome' . . ." (emphasis added).[4] And in *Haldane* v *Haldane*[5] the Board applied s. 5(j) to the relationship between the Matrimonial Property Act

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[1] (1574) 2 Plowd. 459.

[2] [1964] NZLR 146, 150.

[3] [1952] AC 189.

[4] [1965] NZLR 116, 124.

[5] [1976] 2 NZLR 715, 720.

1963 and the Matrimonial Proceedings Act 1963. Their Lordships said: "This provision seems to give statutory force to the common law canon of construction which generally goes by the name of 'the rule in *Heydon's Case*' . . . Their Lordships therefore first approach the construction of this difficult statute by endeavouring to ascertain what was conceived to be wrong with the New Zealand matrimonial property law before 1963 . . ."

Academic commentary has taken a similar approach. Cross opines that the only effect of s. 5(j) is to displace the presumption of strict interpretation of penal statutes,[6] which is doubtless true, if the section is itself to be interpreted strictly, but does not advance us much in understanding the overall potential of the section.

A far more thorough analysis of the section was undertaken by J. F. Burrows,[7] who examines it in terms of the traditional canons of construction and suggests that it might be viewed as a delegation to the court of a discretion to enable legislation to be interpreted as beneficially as possible. This is a considerable advance on the views of Wilson J. and Cross, but it still stops short of asking what seems to the present writer to be the crucial question: Given that the judiciary is faced with a bewildering array of contradictory guides to the interpretation of statutes, what is the effect of applying Burrows's notion of discretion a step further? If s. 5(j) is interpreted according to the principles it itself lays down, as s. 28 says it must be, it is possible to arrive at a position very close to Plowden's.

Plowden's doctrine of the equity of a statute extended to two main situations: to the *casus omissi* which the legislator did not foresee; and to cases similar to those which the legislator intended to cover, but which are not expressly within the words of the statute. This second group of cases resembles the civil law approach to statutory interpretation by analogy,[8] the essence of which is that a statutory provision is stripped of its "non-essential" parts and in this "purified" form is applied to cases which are different. This has always been regarded as alien to the common law,[9] but civil lawyers, according to Zweigert and Puttfarken, use analogy as but one special technique of statutory interpretation. The English scholar, Sir Fortunatus Dwarris examined the judicial extension of statutory provisions in this way in his "Construction of Statutes" (1830) as a part of his consideration of the equity of a statute. Allen comments that Dwarris's examples "amount to little more than an array of various sets of unexpected circumstances which have arisen under certain statutes, and which have therefore raised problems, by no means extraordinary in themselves, of interpretation. And indeed . . . Plowden's grandiloquent principles crystallize merely into a *general doctrine of liberal and intelligent interpretation* . . ." (emphasis added).[10]

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[6] "Statutory Interpretation", Sir Rupert Cross, p.162.

[7] 3 NZULR 253.

[8] See Zweigert and Puttfarken, 44 Tulane LR 704.

[9] Recently a new judicial trend, coming close to reasoning by statutory analogy, has become discernible. See, for example, *Matthews* v *McLaren* (1969) 4 DLR 3d 557; *Bowen* v *Paramount Builders* [1977] 1 NZLR 394; per Cooke J.; *R* v *Lemon* [1979] 2 WLR 281, 314 per Lord Scarman; *Warnink* v *Townend* [1979] 3 WLR 68, 75 per Lord Diplock.

[10] "Law in the Making", Sir Carleton Kemp Allen, 7th ed. p.453.

The "equity" of the statute, for Plowden, was a natural off-shoot of the courts of equity, which were engaged in his time, and in Lord Coke's, in a struggle for power with the courts of common law. The outcome of this struggle was that equity should exist to fill the gaps and to soften the harshness of the common law, but not to interfere where the common law was adequate. These principles of "conscience" were expressed in the maxims of equity, such as "equity follows the law" and "equity looks to the intent rather than the form". Construction by the equity of the statute was quite consistent with this. Coke himself explained it by saying "for that the lawmakers could not possibly set down all cases in express terms". Indeed, it is perfectly possible to see the classic exposition of the "mischief" rule in *Heydon's* case[11] as being merely one facet of this. *Heydon's* case, after all, was decided only ten years after *Eyston* v *Studd*. As Lord Blackburn noted in *Bradlaugh* v *Clarke*,[12] "much more weight is given to the natural meaning of words than was done in the time of Elizabeth". Yet even then it was felt necessary to look beyond the strict words of the enactment to ascertain the object of the legislature, although, as Lord Diplock points out in *Black-Clawson International* v *Papierwerke Waldhof-Aschaffenberg AG*,[13] "when it was laid down, the 'mischief' rule did not require the court to travel beyond the actual words of the statute itself to identify 'the mischief and defect for which the common law did not provide', for this would have been stated in the preamble." However, as equity developed, it slowly became infected with the common law's vices. Its ossification has been well described by Sir Alfred Denning, as he then was, in an article entitled "The Need for a New Equity".[14] Having fallen victim to the very rigidity it once sought to cure, Conscience became Dogma and equity lost much of it effectiveness.

By the seventeenth and eighteenth centuries the doctrine of the equity of a statute had fallen into desuetude. Lord Mansfield, for example, dismissed it cursorily as "synonymous to the meaning of the legislator".[15] In the nineteenth century it was categorically rejected by high authority.[16] But the debate about statutory interpretation in English law has continued, and to a large extent the principles expounded by the great British judges of the twentieth century are seminal in New Zealand law as well. However, as the remainder of this paper attempts to demonstrate, New Zealand judges have one significant advantage over their British counterparts in that it is at least arguable that, in this country, the equity of a statute lives on in the form of s. 5(j) of the Acts Interpretation Act 1924.

The modern cure for the ills once dealt with by Chancery is the statute; and just as equity built up its own set of guidelines, in the form of maxims, so it was inevitable that statute law would build up a body of principles and guides to interpretation—its own equivalents of the maxims of equity—

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[11] (1584) 3 Co. Rep. 7a.

[12] (1883) 8 App. Cas. 354.

[13] [1975] 1 All ER 810.

[14] Current Legal Problems, 1952 p.1.

[15] *R* v *Williams* (1758) 1 W.Bl. 95.

[16] For example, by Lord Tenterden in *Brandling* v *Barrington* (1827) 6 B&C 467, 475; and Pollock C.B. in *Miller* v *Salamons* (1852) LJ 21 Ex. 161, 197.

the canons of statutory construction. These canons share important characteristics with the maxims of equity: to use Dworkin's terminology, they are not rules, but rather principles. Indeed, they embody such confusion and mutual contradiction that were they rules, there would be something seriously wrong with the law. But seen as principles, as guides in the way that the maxims of equity are guides, they represent a considerable body of commonsense, assembled to meet the great variety of day-to-day needs of a conscientious judiciary. This does not mean that individual judges may not have gone off on tangents or plotted eccentric courses from time to time, but only that there usually exists a sensible solution among the many dicta available for even the most embattled court of construction. What has been felt to be lacking in all this, what prompted Lord Wilberforce to describe statutory interpretation as a "non-subject", is some sort of unifying principle. It is true that trends are apparent. In *Carter* v *Bradbeer*[17] Lord Diplock pointed out a movement in the House of Lords away from a literal approach towards "a more purposive one." But it is a cautious trend, with which the judiciary appears to feel insecure. It is enough to look at the divergence of opinion in the *Black-Clawson* case to perceive the tension between dissatisfaction with the present state of statutory construction and nervousness at the prospect of reform. In that case only Viscount Dilhorne and Lord Simon appear to be willing to confront the problem squarely. Lord Simon, for example, says he can see no reason why a court of construction should insist "on groping for a meaning in darkness or half-light".[18] Their Lordships are disputing what access, if any, may be had by a court to the parliamentary history of an enactment, and in particular to *travaux préparatoires*. The reason for such a dispute is, in the present writer's opinion, that there is no single unifying principle available to the judiciary, even at this level. In New Zealand, however, a general rule does exist which may be able to bring clarity and cohesion to statutory interpretation: section 5(j) of the Acts Interpretation Act 1924.

Once it is accepted that section 5(j) is a modern instruction to the courts to adopt an approach closely akin to "the equity of the statute", it is submitted that the difficulties associated with the traditional canons and presumptions are largely eliminated. But this can only be so if s. 5(j) is read in its own light. Taken literally, it seems to be instructing the courts to treat all statutes alike, both qualitatively and quantitatively. Two important questions immediately arise: how do the courts respond to this in practice; and how are the courts to ascertain the object of a statute? The section has been condemned by commentators as ineffective because the New Zealand courts are said to pay little attention to it, notwithstanding cases like *Aburn* v *Police*[19] which rely upon it. And it has been pointed out that in many cases a statute may have no clear object. It has been said that where the words of a section are clear, the courts can interpret them without recourse to s. 5(j); and that where there is no such clarity s. 5(j) is of no help and the courts are inevitably thrown back on the words of the section, at which point they can only call on the traditional canons and presumptions for assistance.

[17] [1975] 1 WLR 1204, 1206.
[18] [1975] 1 All ER 810, 842.
[19] [1964] NZLR 435.

It is submitted that this analysis fails to consider what happens if section 5(j) is interpreted according to its own precepts. The moment s. 5(j) ceases to be what Wilson J. referred to as a command to the court,[20] and is instead itself given a "fair, large and liberal" interpretation, it can be seen as a unifying principle which says to the courts, in essence, that they should use their historical heritage of precedent and convention to give the section in question a meaning which will do justice in the particular case, always bearing in mind that the statute is the first point of reference. Seen this way, the instruction that all statutes are to be regarded as "remedial" means no more than that, if a statute appears to do an injustice according to one mode of interpretation, the court should be free to adopt another mode, providing only that the mode adopted will not strain the meaning of the words beyond reasonable bounds.

It is apparent, as a consequence, that there is nothing to prevent a court from applying any of the traditional presumptions about interpretation if it sees fit, including the presumption that a penal statute should be construed literally. This is supported by the wording of s. 5(j), which does not treat "remedial" as a term of art by contrasting it with another word indicating "penal" or "restrictive", but rather uses it in isolation and follows it with the words

> whether its immediate purpose is to direct the doing of anything parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good. . . .

What the section is saying, in other words, is that the courts should follow their normal practice of trying to give effect to the will of parliament as it is expressed in written form, and that whichever means is adopted in any given case is for the courts to decide. This is, indeed, the only justifiable approach which the legislature could take. Imperfect as our system of separation of powers may be, it has never been doubted that the sole authoritative interpreters of statutes are the courts,[21] and that if a court chooses to say that "and" means "or",[22] or that "other cattle" does not include "bull",[23] then for the purposes in hand, that pronouncement is definitive, changeable only by a higher court or new legislation.

It is therefore suggested that, in section 5(j), the legislature has provided the courts with a unifying device for statutory interpretation which has a good deal more potential than appears to have been recognised to date. In a real sense, s. 5(j) represents a new equity, a new regime of conscience. It is not a blank cheque for the courts to do as they please. It recognises the background principles and presumptions and merely gives the courts a new freedom in choosing from amongst them, a freedom which the courts have on occasion sought.[24] Indeed, in *Wiseman* v *Borneman*[25] Lord Reid said: "For a long time the courts have without objection from parliament

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[20] *Union Motors* case, loc. cit.

[21] See Lord Wilberforce in *Black-Clawson* case, loc. cit. at 828.

[22] *R* v *Oakes* [1959] 2 QB 350.

[23] *Ex parte Hill* (1827) 3 C&P 225.

[24] For example: *R* v *Sigsworth* [1935] Ch 89; also Cross, op.cit. pp.142ff.

[25] [1971] AC 297, 308.

supplemented the words laid down by parliament by reference to the common law." Section 5(j) simply formalises this. Inherent in it is the notion that equity must be served: "remedial" means that wrongs must be redressed, absurd literalism avoided, excessive liberality eschewed and commonsense adhered to. Section 5(j), interpreted with reference to itself, may well go part of the way towards supplying the "new equity" sought by Lord Denning.

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CONTENTS