AN APPROACH TO STATUTORY INTERPRETATION

Williams v. Hutt Valley and Bays Fire Board [1967] N.Z.L.R. 123 C.A.

The approach of the New Zealand Court of Appeal to the correct interpretation of a statutory provision stated in unambiguous language, is well illustrated by the recent case of *Williams v. Hutt Valley and Bays Fire Board* [1967] N.Z.L.R. 123 C.A.

The case concerned an action for damages by a fireman, against the Fire Authority employing him, for negligence resulting in injuries to him while he was engaged in fighting a gorse fire.

Williams, the plaintiff, and another fireman had been detailed by the Chief Fire Officer in charge of fighting the fire to take a rubber lined hose and "wet down" an area of gorse along a track which had been slashed through high gorse in an attempt to contain a hillside fire. A sudden change of wind caused the fire to flare up and travel towards the two firemen. The heat melted the rubber lining of the hose. The water supply dwindled and the firemen were left without protection. Both were severely burned.

In the Supreme Court the case was heard before a judge and jury, and is reported in [1966] N.Z.L.R. 842. The jury found that the plaintiff's injuries had been caused by the negligence of the Fire Authority under three separate heads:

1. Failure to have a predetermined plan of action for fighting gorse fires.

2. Failure to have sufficient unlined hose reasonably available.

3. Failure to train the plaintiff adequately in rural fire fighting.

There was no allegation of any negligence by the Chief Fire Officer nor by any member of the brigade present at the fire. The allegations had been framed to establish a cause of action arising from tortious conduct outside the actual circumstances of the fire in an attempt to avoid the provisions of s. 46(2) of the Fire Services Act 1949. This section as it was when this cause of action arose stated that:—

> No action or proceedings shall be brought against the Crown, or the Council, or any Urban Fire Authority, or any officer or servant of any of them, or against any brigade or officer or servant or member of a brigade to recover damages for any loss or damage or bodily injury or death which is due directly or indirectly to fire, where the loss or damage or bodily injury or death is also due to or contributed to by any Chief Fire Officer or officer or member of a brigade taking any action, or failing to take any

> action, while he is acting in good faith in performance of his duties under this Act and is in attendance at a fire.

In the Supreme Court the judge held that the action was statute barred. But for the action of the fire officer in sending Williams up the hillside with a rubber lined hose he would not have been burned. Once a causal link had been established between the injuries suffered and the action of the fire officer the provisions of section 46 (2) applied; then there was "bodily injury . . . due directly . . . to fire where the . . . bodily injury [was] also due to or contributed to by any Chief Fire Officer . . . ." The failure of the Fire Authority here to have sufficient unlined hose reasonably available was, as a cause of the injuries, closely linked with the action of the Chief Fire Officer in sending Williams up the hillside with a rubber lined hose. The same cannot be said of the Authority's negligence under heads 1 and 3 above. Yet the court held that on a proper construction of the sub-section the Authority escaped liability on all three heads of negligence. It refused to limit the application of the provision to causes of action arising from what was done at the fire.

The Plaintiff appealed against the decision, arguing that the interpretation of s. 46(2) was wrong, first, as being contrary to the object of the legislation and, second, as leading to an unjust result.

The approach to statutory interpretation

In interpreting a statute a court may take one of three broad approaches.[1] It may interpret the particular statute literally regardless of the result . . . "even though it does lead to an absurdity or manifest injustice" *Abley* v. *Dale* (1851) 20 L.J.C.P. 235 per Jervis C.J.; or it may modify a literal interpretation to avoid absurdity or injustice—the "golden rule" of statutory interpretation so called by Lord Wensleydale in *Grey* v. *Pearson* (1857) 6 H.L.C. 61. Finally, the court may adopt the "mischief rule", sometimes called "the rule in *Heydon's Case*" (1584) 3 Co. Rep. 7a., which treats statutes as being remedial of some mischief.

At this point it is convenient to pose the question whether section 5(j) of the Acts Interpretation Act 1924 lays down for New Zealand courts a further approach independent of the three mentioned. That section says:

> Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport 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 ensure the attainment of the object of the

1. Willis (1938) 16 Can. B. Rev. 1.

> Act and of such provision or enactment according to its true intent, meaning, and spirit:

It has been contended that section 5 (j) enacted the mischief rule. In a paper delivered at the Dominion Legal Conference in 1963 Mr D. A. S. Ward the New Zealand Law Draftsman said:[2]

> . . . it cannot be stressed too often that nearly seventy-five years ago the New Zealand Parliament gave an express direction to the Courts as to the manner in which its legislation was to be interpreted . . . It now appears as s. 5(j) of the Acts interpretation Act 1924 . . . . When this provision is compared with the full rule in *Heydon's case* . . . it is apparent that it is a modern restatement of that rule.

If this is so, the approach adopted by superior courts to the mischief rule will be a helpful and compelling guide to our courts on the usefulness of s. 5 (j).

In the present case the court refused to depart from the literal approach in favour of:

(a) an interpretation giving effect to the object of the legislation or
(b) an interpretation which avoided unjust or absurd results.

The whole approach of the court in refusing to follow either of these alternatives rested on the basis that the words used by the legislature were clear and unambiguous.

Object of the Legislation

In *Williams* v. *Hutt Valley and Bays Fire Board,* both the court below and North P. in the Court of Appeal recognised that the general object of s. 46 (2) of the Fire Services Act 1949 was

> to give fire authorities and officers and members of brigades complete freedom of action in fire fighting to do what seems best to them in the circumstances of any particular fire without involving the authority or the brigadesmen in the risk of liability for what they have done in good faith in fighting a fire (per North P. at page 129 citing Tompkins J. in the court below). As North P. continued (at page 129 line 16)—

> A fire is no place for deliberate decisions . . . the only requirement is that they should act in good faith (line 29).

The learned President came to these conclusions by examining the long title of the Act, looking at the Act as a whole, and looking at the present Act in relation to previous legislation.

2. [1963] N.Z.L.J. 293 at 294.

Although North P. recognised the objective of protecting the Fire Authority and its servants for acts done or omitted in the context of an emergency situation, he found it necessary to examine the actual wording of the subsection. He found that he could not give effect to the object as he had stated it because the words "or contributed to" in s. 46 (2) meant that the protection was not "limited to cases where the damage was 'due' to the acts and omissions of the men on the spot".

> . . . the Legislature thought it necesary to afford protection . . . in cases where one of the causes of the damage lay with the behaviour of the men attending the fire, even although there was initial negligence . . . earlier in point of time (page 130 line 4 ff).

Here the President was finding the intention of Parliament solely from the words used and he was disregarding what he considered to be the object of the Act or, more particularly, he was finding that the words used spread the umbrella of protection wider than was necessary to achieve the apparent object of the Act.

As authority for his conclusion that he was obliged to apply the literal rule—in order to give effect to the provisions of the subsection because they were "plain and unambigous" (page 130 line 40)—the learned judge relied on *Westminster Bank Limited* v. *Zang* [1966] A.C. 182, 222. There Lord Reid had said that no principle of statutory interpretation—

> . . . is more firmly settled than the rule that the Court must deduce the intention of Parliament from the words used in the Act.

In *Zang's* case the House of Lords was faced with a somewhat parallel case to the present when it was required to interpret s. 2 of the Cheques Act 1957 (U.K.). Before s. 2 of the Cheques Act 1957 (U.K.) was passed the payee of an order cheque had to endorse it before presenting it for collection to his bank. Section 2 was passed in order to eliminate the necessity for the endorsing and checking of millions of cheques which were collected for the payee and paid into his account by his bank; it reads:—

> A banker who gives value for, or has a lien on, a cheque payable to order which the holder delivers to him for collection without indorsing it, has such (if any) rights as he would have had if, upon delivery, the holder had indorsed it in blank.

It was argued that the section referred only to cheques paid into the account of the payee on the cheque. Lord Reid admitted that this was the real intention of the legislature and he very much doubted whether " . . . Parliament or those who advise Parliament . . . " (at 222) ever intended the section to apply to cheques paid into the account of a third party. Yet the plain and unambiguous terms of s. 2 applied to such cheques and the court was therefore bound by a literal con-

struction that led to a general weakening of protection to the payer by cheque. The section was too widely drawn but it was clear; therefore its literal meaning was the law.

Turner J. was much more circumspect on the issue of the object of the Act. The present s. 46(2) had no counterpart in the prior legislation, the Fire Brigades Act 1926. Section 52 of that Act (now contained in and extended by s. 46(1) of the present Act) gave protection to Fire Authorities in respect of property damage occurring in the emergency context of fire fighting. It had been contended on behalf of the plaintiff that in the present s. 46(2) the legislature, following the hint given by Reed J. in *Tolly* v. *Motueka Borough* [1939] N.Z.L.R. 252, 255, had extended this immunity to cover personal injuries occurring in the same circumstances.

In very guarded language Turner J. said:

> I will go so far as to say that I should have thought it quite possible that the Legislature, when consolidating the legislation in 1949, might have wished to include as a subject of immunity the liability in respect of personal injury caused by negligence on the part of an officer in the course of his duties at the fire, to which attention had been drawn by Reed J. in 1939 . . . (Page 132 line 36 ff).

Although Turner J. found obscurities in the wording of the subsection (see page 134 lines 5 and 15) he felt himself bound by the literal rule because—

> the text of the section . . . cannot be said to be incapable of conveying a plain meaning, and it is not ambiguous. (Page 134 line 17).

He relied on the famous case of *Magor and St Mellons Rural District Council* v. *Newport Corporation* [1952] A.C. 189, 191, where Lord Simonds stressed that—

> The duty of the Court is to interpret the words that the Legislature has used . . . .

McCarthy J. canvassed the arguments of Counsel for the plaintiff that s. 46(2) should be interpreted, as Reed J. had interpreted s. 52 of the Fire Brigades Act 1926, as having the purpose—

> . . . to excuse acts exercised in circumstances where little or no time would be given for consideration . . . (See McCarthy J. page 136 line 12 ff).

McCarthy J. considered that he was not free to look into the legislative purpose in this way as a basis for interpreting the subsection because of the plain and unmistakable language used.

The acceptance of an unjust result

The members of the Court of Appeal were more unanimous in recognising that the interpretation of s. 46(2) by the Supreme Court

led to consequences "unsatisfactory from the appellant's point of view" (per North P. at page 130 line 36); "difficult to justify from the point of view of public justice" (per Turner J. at page 132 line 28). McCarthy J. also agreed that the construction resulted in "manifest injustices" (at page 136 line 43). He further agreed with Counsel on behalf of the plaintiff that—

> One cannot imagine that Parliament intended that an injured person's right of action arising out of tortious conduct away from the scene of the fire should be rendered nugatory by the mere fact that at the fire there was also some conduct on the part of a brigadesman which, in a casual sense, contributed to the claimant's injury. (page 136 line 44 ff).

Turner J. dealt with the argument that the justice of the case demanded that the court should adopt an approach corresponding to the golden rule. In particular, he considered certain notional amendments to s. 46(2) of the Fire Services Act 1949 that might be regarded as avoiding the illogicalities and injustices that the section appeared to establish. The learned judge recalled that the "procrustean method of construction" had been adopted by the New Zealand Court of Appeal in *Murdoch* v. *British Israel World Federation* [1942] N.Z.L.R. 600, 625. There the court had substituted the word "and" for the word 'or" in s. 43 of the Crimes Act 1908 to give effect to the true intention of the legislature. Nevertheless he was not prepared to make such a substitution in the present case:—

> Finally, and in my opinion, fatally, the text of the section in its unamended version cannot be said to be incapable of conveying a plain meaning, and it is not ambiguous (page 134 line 17 ff).

McCarthy J. also fully considered the argument that the manifest injustice resulting to the plaintiff from the construction placed on the subsection by the court below required that a different interpretation be adopted. This argument was rejected. McCarthy J. simply said:

> . . . I find no ambiguity in the subsection. In that situation, the rules of construction require, I apprehend, that inconvenient consequences be disregarded. (page 137 line 10 ff).

He continued:

> Doubtless, if literal adherence produces a manifest absurdity or injustice, a Court of construction will inquire whether a restricted or secondary meaning may be attributed . . . (Page 137 line 12 ff).

But the learned judge concluded that here the language was so clear and explicit that no secondary or restricted meaning was possible (page 137 line 30 ff) and in such a case—

> . . . the words of the statute must be allowed to speak the intention of the Legislature. (Page 137 line 25).

McCarthy J. relied on *Inland Revenue Commissioners* v. *Hinchy* [1960] A.C. 748. This case gives strong support to the strict interpretation school as Professor A. L. Goodhart points out in an enlightening note in (1960) 76 L.Q.R. 215. The unambiguous words of a tax statute on a literal interpretation led to an unjust result but nevertheless—

> . . . their Lordships have felt that they were compelled to hand to the executive a sword that can be used by the Treasury at its unfettered will. (at page 220).

The conclusion is therefore clear. Where the language of a statutory provision is clear and unambiguous the court is bound by the actual words of the statute and is not free to adopt the approach represented by the golden rule of construction.

What now of the section 5 (j) approach and the remarks of Mr Ward cited earlier in this note?

The status of s. 5 (j) of the Acts Interpretation Act 1924

The difficulty facing any court in statutory construction is the meaning it is going to give to the phrase "the intention of Parliament". In some cases it has been understood in a wide context. For example, in *Attorney-General* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436, 465 (H.L.) Lord Normand said:

> In order to discover the intention of Parliament it is proper that the court should read the whole Act, inform itself of the legal context of the Act . . . and of the factual context, such as the mischief to be remedied, and those circumstances which Parliament had in view . . . .

This and other statements from the same case were cited as authoritative and used as guiding principles in *Campbell* v. *Russell* [1962] N.Z.L.R. 407.

Mr Ward argues that in New Zealand this approach is made mandatory by Section 5 (j)—

> It has been said that a composite body can hardly have a single intent . . . . The truth is that a statute is a legislative scheme enacted by Parliament to give effect to an agreed policy. To decide whether the words used cover the facts of any given case the Court must ascertain the intent and object of the Act.[3]

This raises the question whether section 5 (j) has merely enacted the mischief rule so that it remains one of three main approaches which the courts may adopt or whether it is in effect the sole rule of statutory interpretation to be applied in New Zealand.

3. [1963] N.Z.L.J. 293, 294.

The attitude of the Court of Appeal in the present case suggests that the first alternative is the correct one because despite the mandatory nature of s. 5 (j) the Court of Appeal impliedly rejected the approach giving to the provision of the Fire Services Act 1949—

> such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision . . . according to its true intent, meaning, and spirit:

as required by the Acts Interpretation Act 1924, and held itself bound by the literal rule of interpretation.

The court by its reliance on English decisions has impliedly treated s. 5 (j) as being on all fours with the mischief rule. However, reliance on the House of Lords may not be the final answer. In *Police* v. *Christie* [1962] N.Z.L.R.[11] 109, 1112 it was said:

> The cardinal rule of statutory construction in New Zealand is that contained in s. 5 (j) of the Acts Interpretation Act 1924.

This statement suggests that the second alternative is the correct one and that s. 5 (j) contains the basic rule of statutory interpretation in New Zealand. If s. 5 (j) is indeed the "cardinal rule" it is arguable that even where there is no ambiguity in the actual words being interpreted the court is entitled to look at the object of the legislation and to interpret the legislation accordingly. This was done in *Mason* v. *Borough of Pukekohe* [1923] N.Z.L.R. 521 where the court was interpreting the enacting words of s. 31 of the Finance Act 1923. These words were clear and unambiguous yet the court looked outside them to find—

> . . . a key to the intention of the Legislature as expressed in the enacting words.

If the second alternative were adopted as the correct one, New Zealand courts would avoid the sharp conflict which exists in England between the literal rule approach and that required by the mischief rule, and which came to the surface in a striking way in *Magor and St Mellons Rural District Council* v. *Newport Corporation* (supra), the authority relied on by Turner J.

Denning L.J. in the Court of Appeal had said:

> We do not sit here to pull the language of Parliament and of ministers to pieces and make nonsense of it . . . . We sit here to find out the intention of Parliament . . . and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis. ([1950] 2 All. E.R. 1226, 1236).

This approach found favour with Lord Radcliffe but was severely criticized by Lord Morton of Henryton and also Lord Simonds who devoted

the whole of his judgment to its criticism. He said at 191—

> . . . the general proposition that it is the duty of the court to find out the intention of Parliament . . . cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used;

Of filling in the gaps he said that it was—

> . . . a naked usurpation of the legislative function under the thin guise of interpretation.

These remarks drew from Sir Carleton Allen the retort—

> Thus we have it on the authority of the House of Lords that it is not the business of the courts to try to discover what an Act of Parliament means; and that although . . . the courts have been stopping up holes in leaky statutes throughout the whole history of our law, this has been mere usurpation.[4]

It may be asked; Is this not just what s. 5 (j) should be used for? Yet Turner J. in the present case (at page 135 line 10) found Lord Simond's words strictly applicable. To have adopted anything but the literal approach would have been to legislate rather than interpret.

It is submitted that on the authority of the present case and the House of Lords decisions there relied on, two contexts are relevant in statutory interpretation. Where words in their immediate context are clear and unambiguous the court may not look beyond that context; in such a case "the intention of Parliament" is what is meant by the actual words used. Further, if the meaning is plain, even though its application to a particular case leads to an unjust result or is inconsistent with the general purpose of a particular Act, Parliament must be taken to have intended that result.

On the other hand, where words in their immediate context are not "clear and unambiguous" the court can then interpret them in the context of the whole Act. In such case "the intention of Parliament" is to be ascertained by looking at the object of the legislation.

If s. 5 (j) were to be treated as providing the sole rule of statutory interpretation these distinctions would disappear and the court could adopt a much less cautious approach to its interpretative role. However, so long as the New Zealand courts look to the House of Lords for guidance on the question of statutory interpretation it seems that they will continue to take a conservative view of the court's function in contruing a statute.

P.D.M.

4. Allen, Law in the Making (7th ed. 1964) 525.