Bending the rules

Andrew Hogan looks at the interpretation of costs rules by the courts

I have lost count of the number of decisions in the last three years on various aspects of the rules prescribing fixed costs or governing part 36. Sometimes it has appeared that on an almost monthly basis, an important case has been handed down, which establishes a new set of principles.

On a conservative estimate, the White Book for 2018 devotes nearly 500 pages to rules and commentary on the rules concerning costs. The actual page count is far higher when one takes into account various provisions scattered throughout the sections of the book dealing, for example, with case management and interim remedies, and the useful supplement that has been published in recent times.

At a stroke it can be seen that one of the principal causes of costs litigation in recent years has been the sheer volume of law created by lawyers to govern the field of costs. Lawyers cannot resist tinkering with the law which governs the award and assessment of costs.

Most of this law is contained in the Civil Procedure Rules and practice directions drafted to explain the rules, and ever burgeoning case law to explain the effect of the rules and the practice directions.

Despite the sheer volume of material that is thrown out by the creation of new rules, and appellate decisions explaining what they mean, most lawyers who deal with costs will feel a sense of frustration – because the rules do not appear to cover or explain with certainty what costs are recoverable in certain scenarios, or because the rules are ambiguous. Such frustrations are not new.

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STATUTORY INTERPRETATION

In order to determine what rules are likely to mean, and thus to be able to predict what the result may be of the rules' application to any given case, it is necessary to understand how rules are interpreted by the courts; because whatever a rule appears to say, it might actually mean something quite different, when the court declares its meaning.

A common complaint often expressed in the case law is that the rules are poorly drafted and hence obscure. Often a prayer is made that the rules may be amended to be made clearer.

But often the reason a rule is made is to reflect policy announced by the government and legislated for by parliament. A policy steer may be given, or not given, by the Ministry of Justice as to what the rules should prescribe. The provisions on qualified one-way costs shifting are a good example of rules that have been made with the lightest of policy touches as to their detail.

The Civil Procedure Rules are not made by parliament. They are delegated legislation made by the Civil Procedure Rule Committee, and given force of law by statutory instrument. But this means in turn that they are not drafted by parliamentary counsel, trained for many years in the discipline of statutory drafting.

Instead, like all products of a committee, they represent a compromise between the views of those who gamely 'have a go' at framing general rules to fit particular cases, and those who try to anticipate the scenarios within which the rules will be applied.

Often the results are unhappy: and an interesting study could take place into the comparative costs of employing parliamentary counsel to produce a more skilled and certain set of provisions, and the wasted costs thrown away in satellite litigation over the years, seeking to achieve the same end.

The starting point to note is that delegated legislation is to be construed in the same way as primary legislation. This proposition leads us then to consider what are the appropriate ways to consider primary legislation.

Of all the canons of construction, the most important is that the courts should give effect to the purpose behind the legislation. Legislation is thus to be given a purposive construction which considers the statute as a whole, and read in the context of the situation which led to its enactment.

Purposive interpretation as a phrase must be considered in context: it certainly does not mean that the court is free to consider in a vacuum what parliament intended, or to carry out a far-ranging review to hypothesise what parliament meant and give effect to its own view.

Instead, a purposive construction is one either following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose, or applying a strained meaning where the literal meaning is not in accordance with the legislative purpose.

Purposive construction is therefore not a principle which conflicts with the literal wording of a statute; rather, the courts take the view that the literal meaning must be taken to reflect the purpose that parliament intended a set of provisions to have. Parliament uses the literal meaning to explain its purpose, if you like.

Statutory interpretation thus requires the court to identify the meaning borne by the words in question in the particular context. The phrase 'intention of parliament' is shorthand for the intention the court reasonably imputes to parliament in respect of the language used.

Prima facie, the literal meaning of an enactment is taken to be what the legislator intended. This directs the court to consider the natural and ordinary meaning of the word or phrase in question; that is, its proper and most known signification. If there is more than one ordinary meaning, the most common and well established is preferred (other things being equal).

This in turn poses the interesting question 'natural and ordinary' to whom? A set of words may mean one thing to an educated *Guardian*-reading academic, quite another to a semi-literate manual labourer, and something different again depending on which region of the UK they come from.

Conversely, a strained construction is applied where it is apparent that something has gone wrong in the drafting. This is where the court plays Humpty Dumpty in Wonderland, taking the view that words mean what the court says they mean, as a nice knock-down point.

A 'strained' construction will be justified when there is a repugnance between the words of the enactment and some other enactment, or the

consequences of a literal construction are so undesirable that parliament cannot have intended them, or there is an error in the text which plainly falsifies parliament's intention, or the passage of time since the enactment was originally drafted.

Technical terms of law or expertise are to be given their technical meaning unless the contrary intention appears. This in turn poses the question of what is a technical term of law or expertise, but usually the context will again provide a steer. The Civil Procedure Rules are littered with technical terms of law, which are so well known to lawyers that they require no deeper definition of their meaning .

These days, there is usually a plethora of consultative material or ministerial statements which precede significant developments, including in relation to the Civil Procedure Rules, as recent reforms to part 45 demonstrate.

But it is far too simplistic to simply point to this material and suggest that it fills in the gaps in obscure provisions. It is for the courts to interpret legislation, not the executive; and even precisely framed official statements are of limited assistance at best in interpreting legislation.

The court may under proper safeguards have regard to the enacting history of an act as an aid to its construction, but must bear in mind that the creation of statute law is subject to a continuous process of development. Measures can go through multiple drafts.

While explanatory notes are admissible as an aid to construction, private notes are not - as it is fundamental that all materials relevant to the proper interpretation of an instrument should be available to any person who wishes to inform himself about the meaning of the law.

Finally, the courts take as a working assumption the view that the drafter of legislation is assumed to be competent with a sufficient knowledge of the law, which as a legal fiction is probably a necessary assumption, even if honoured sometimes as much in the breach as the observance.

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