F W Guest Memorial Lecture 1999

Interpreting Statutes - A Judge's View

(The F W Guest Memorial Lecture delivered at the University of Otago by the Rt Hon Sir Ian McKay 6.5.99)

This lecture is dedicated to the memory of the late Professor Francis William Guest, MA, LLM. He was the first Professor of Law and the first full time Dean of the Faculty of Law in the University of Otago. He held these positions from 1959 until his death in 1967. He has been described by a former student as a philosopher, scholar, teacher and practitioner of the law. As a teacher, he was said to be quiet, incisive and compelling, with an obvious love of law and philosophy, and the ability to inspire his students to strive for the same qualities.[1] Many jurists of distinction have delivered this annual memorial lecture, and it is an honour to be invited to follow in their footsteps.

I have chosen as the subject of my address 'Interpreting Statutes - a Judge's View'. The subject is important for two reasons. The first is because so much of our law is now contained in statutes. When I started work in the law the statutes were contained in the nine volumes of the 1931 Reprint, and in the 16 annual volumes for the following years to 1947. The 1957 Reprint filled 16 volumes. The latest and still incomplete Reprint already totals 38 volumes. The annual output of statutes is commonly four volumes. Areas that were covered by the common law when I commenced practice have been either codified or overlaid with statutory provisions. Most of our litigation today, in so far as it involves legal issues, turns on statutory interpretation.

The second reason why the subject is important is because the way in which the Courts go about their task of interpreting statutes is not well understood. There are a number of misconceptions. Our legislators sometimes leave gaps in our legislation, either through too little consideration or through inability to decide. When Judges try to fill in such gaps, they are criticised for legislating. When they are able to apply the law as enacted by Parliament, they are criticised for doing so if the circumstances are such that the result is felt to be unfair. Counsel arguing a case will not infrequently show a lack of understanding of the Court's role in regard to legislation, and will argue policy rather than interpretation.

The Role of the Courts

A fundamental principle common to western democracies is the separation of powers. The legislature makes the laws, the judiciary interprets and applies them, and the executive administers them and governs the country in accordance with them. It was not always so. The Queen in Parliament, the Queen's Judges and the Queen's Ministers were at one time different aspects of the one monarchy.

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1 C S Withnall QC in (1990) 7 *Otago Law Review* at 189

The form remains, but the substance has changed. The Lord Chancellor survives in Britain as an officer of state who combines a role in all three functions. Montesquieu, writing in the 18th century, noted the separation of the three functions in Britain. His analysis had a major influence on the United States' constitution, and on the constitutions which were developed in European countries in the century following the French Revolution. It is inherent in the separation of powers that the Courts have the necessary role of ascertaining the meaning of legislation in order to apply it correctly.

In the English and Commonwealth jurisdictions it is usual for laws to be drafted comprehensively, so that the primary focus is on the words of the statute. Other countries prefer to establish principles, leaving the Courts greater flexibility to adapt their application to the particular case. A prime example of such a law is the United States' constitution, which enshrines some very broad concepts such as freedom of speech, and leaves it to the Courts to work out their practical effect. Our own legislature has done much the same in our New Zealand Bill of Rights Act 1990, and in s.9 of the State Owned Enterprises Act 1986. That section states that nothing in the Act is to permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi. It was left to the Courts to deduce what those principles were, in order to be able to apply them. Earlier examples are Part II of the Family Protection Act 1908, now the Family Protection Act 1955 ("such provision as the Court thinks fit"), the Contributory Negligence Act 1947 ("such extent as the Court thinks just and equitable"), the Matrimonial Property Act 1963 ("such order as appears just"), the Contractual Mistakes Act 1977 ("such order as it thinks just"), and the Contractual Remedies Act 1979 ("if it is just and practicable ... make such order or orders granting relief ... direct any party to the proceedings to pay .. such sum as the Court thinks just . . .").

Whether a statute is drafted in great detail or only in broad principle will obviously affect the scope for judicial interpretation. It will not, however, change the essential nature of the Court's role. That role is to ascertain the meaning of the statute, and then to apply it to the case before the Court. It is a role which the Court also has in the wider field of construing documents generally. The approach is basically the same. The so called canons of construction apply to statutes just as they apply to deeds or wills or contracts. "The object of all interpretation of a written instrument is to discover the intention of the author as expressed in the instrument."[2]

A will or a deed of trust confers rights on beneficiaries and powers and authorities on trustees. A contract confers rights on the parties. If there is a dispute, the assistance of the Court may be sought. The Court must first ascertain from the document what rights it confers. It sees its task as being to ascertain the meaning of the words in their particular context. In the case of a contract, it is seeking the intention of the parties as expressed in the words they have chosen to express it. The Court is not concerned with the pre-contract aspirations of either party, but with their common agreement as expressed in their contract. In the case of legislation, the law is what Parliament has enacted. It is not what any particular politician intended, or may have thought the words meant. Nor is it

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[2] *Laws NZ* Statutes para 126; *44 Halsbury* 4 ed 856.

what Parliament might have done if its members or advisers had thought the matter through. It is what is expressed in the words used.

An example is *Wood* v *Thomson and the NZ Seamen's Union*[3], where an industrial award required the employers of ships' watchmen to give preference to members of the Seamen's Union whose rating on the membership roll of the union was that of watchmen. Thus the union officials, who decided on the rating, decided who could be employed. This was contrary to the previous 80 years of our industrial history, where the Arbitration Court had power to give preference to unionists, but not to prefer some unionists to others. Compulsory unionism had not restricted freedom of employment, but had merely required the worker, once employed, to join the union, and gave him the right to do so. The abolition of compulsory unionism and its replacement by qualified preference provisions purported, seemingly inadvertently, to allow the Arbitration Court to make an award which enabled the union officials to decide who could be employed. As counsel, I found the Court of Appeal sympathetic, but unable to get around the words of the statute. As Turner J said:[4]

> But it is one thing to be persuaded that Parliament would have dealt with such a situation if it had foreseen the possibility of it; it is quite another to say that the statute which the Legislature enacted without seeing this possibility is effective as it stands to stop it.

The Natural and Ordinary Meaning

Words, however, are capable of many different meanings and shades of meaning. The Court has the task of deciding what the words mean, even in their natural and ordinary meaning. This may not be easy. Thus in *R* v *Tauililiili*[5] the respondent had been charged with abduction of his own child. He had uplifted the child in accordance with the agreed access arrangement, but had failed to return the child as agreed, alleging it was being ill treated by the mother. The statute referred to any person who "takes or entices away or detains the child". The issue was whether "detains" connoted keeping in confinement or restraint, or was used in the wider sense of keeping or holding back something.The Court by a majority adopted the wider meaning. The minority, Richardson P and Neazor J, adopted the narrower meaning, but began with the proposition:

> In a statute imposing criminal liability words should be given their ordinary and natural meaning where the context allows.[6]

The problem was that the word "detains" had more than one natural and ordinary meaning.

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3 [1972] NZLR 53, CA.
4 *Ibid.*, at 63.
5 [1997] 1 NZLR 525, CA.
6 [1997] 1 NZLR 525 at 531.

How is one to ascertain the meaning of words in a particular context? There are means available, sometimes referred to as the rules or canons of construction. These are not rules in the sense of laws, some legal device or technicality by which legal documents or statutes are to be interpreted differently from ordinary language. They are rather principles of common sense. They would be equally applicable, for example, to an historian or archaeologist looking at an ancient document.

The first and fundamental rule is that words are to be given their natural and ordinary meaning unless there is some valid reason for doing otherwise. The Court will want to know what is the natural and ordinary meaning before being asked to consider other possible meanings. Counsel who ignore this do so at their peril. Lord Lowry expressed the principle, in a judgment in which the other members of the House of Lords concurred, as follows:

> The cardinal rule, as stated in the textbooks on interpretation, for example *Maxwell on the Interpretation of Statutes* 12 ed 28-29, is that words in a statute prima facie bear their plain and ordinary meaning.[7]

Our own Court of Appeal, in a judgment of a Court of five Judges delivered by Blanchard J, expressed the same principle:

> In any question of construction of a statute the starting point must obviously be the language chosen by the legislature. It is only if the Court is left unclear about the legislative intent after reading the provision in question, or if, notwithstanding its apparent clarity, a literal application would lead to a result seemingly in conflict with the policy of the Act, that the Court need go further.[8]

One might have thought that to start with the words of the section or statute which is to be construed is so obvious as not to be worth saying. Sadly this would seem not to be the case. Government servants who advise on policy tend to regard their policy intentions as more important, even if they have failed to communicate them to the draftsman or if the draftsman has failed to understand and express them. I have sat in the Court of Appeal listening to counsel, on an issue of interpretation of a section of an Act, where half a day was spent on the previous law, the policy documents and papers, the Select Committee's Report and the Minister's statement in the House, before there was any reference to the words we were being asked to construe. Eventually our patience gave out, and we insisted on bringing counsel to confront the words of the section.

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7 *Attorney-General* v *Associated Newspapers Ltd*, [1994] 2 AC 238 at 255, [1994] 1 All ER 556 at 561, referred to in the judgment of the NZ Court of Appeal in *Alcan* v *Commissioner of Inland Revenue*, [1994] 3 NZLR 439 at 443.

8 *Auckland City Council* v *Glucina*, [1997] 2 NZLR 1 at 4.

Other Canons of Construction

A consideration of some of the other rules of construction will show that they are no more than principles of common sense.[9] Thus technical terms are *prima facie* to be given their technical meaning. Words must be understood in their total context, which will include the general intention of a statute as gathered from considering it as a whole. Where two meanings are possible, the one which is more consistent with the purpose is likely to be the true meaning. Every word should if possible be given some meaning, although sometimes words may be discarded as having been added from a mere excess of caution. One should not adopt a strained meaning merely because no other meaning is available. Words can only be given meanings which they are capable of bearing. Where it is clear that words have been inserted by error or inadvertence they can be disregarded. Words that have been omitted by mistake or inadvertence can be supplied if it is obvious from the context that they are intended.

If two provisions appear to be inconsistent with each other, one must endeavour to construe them in such a way that they can stand together. Specific provisions will where necessary take precedence over general provisions. An error of description will not prevent giving effect to the intention, where that intention is clear. Where a provision is capable of two meanings, that which is consistent with what appears to be the intention will be preferred to that which appears contrary to it. The Court will where possible avoid an interpretation which would result in absurdity, injustice or inconsistency. Where the same word or phrase appears more than once it is presumed that it is intended to bear the same meaning, unless the context requires otherwise. Similarly if a different word or phrase is used in a similar context there is a presumption that the change is deliberate, and that a different meaning is intended. Relative words such as "who", "which" or "that", and the personal pronouns "he", "she", "it" and "they" should grammatically refer to the last antecedent. However, even the best writers of English do not always comply with the strict rules. The relative is therefore to be understood as referring to the antecedent with which it makes the best sense, consistent with the intention as a whole. Where general words follow a number of specific words or descriptions which all apply to members of a particular group or class, it is presumed that the general words are intended to refer only to members of the same class.

It is of the nature of these so called rules that they cannot be applied rigidly in every case. They are a tool to be used to help ascertain the meaning of the document. They jostle with each other, and vary from case to case in their relative importance. Common sense is the great touchstone. Lawyers are sometimes accused of twisting words, but in my experience good lawyers cannot hold a candle to lay persons in this regard, and good Court lawyers do not try. I have often had clients putting up the argument, as to a section in a statute or a clause in a contract, "couldn't you read it this way?". The answer is yes, as a matter of grammar and words such a construction would be *possible*. You *could* so read it,

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[9] Excellent expositions of these principles can be found in *Interpretation of Documents* by Roland Burrows KC in Part 1 of the Introduction to *Words and Phrases Judicially Defined* (1943), and in *Laws NZ - Statutes* paras 145-161.

but no sensible person would ever do so. The intention is clear, and what you suggest is obviously not what is intended.

A recent example comes to mind from an arbitration I completed in Sydney last year. The contract was for a multi-million dollar modification and refurbishment of a mechanical engineering plant. It required certain plant to be "refurbished in order to extend the operational life to 20 years". The contractor had floated the argument that as the plant was already 16 years old, all that was required was to provide a further 4 years. The words of the clause could be read either in that sense, or as requiring a life extending over the next 20 years. Both the context and common sense indicated the latter as being the intended meeting. That particular argument was dropped before the matter came to arbitration.

Penal Statutes

Statutes differ from other documents in their purpose and effect, and as with any document regard must be had to their purpose and effect if one is correctly to ascertain their meaning. They may restrict the rights and liberties of the subject, and may impose penal sanctions. The Courts have always been the guardians of our liberty, and in the last resort are our only safeguard against autocratic government. The Courts adopt a restrictive approach to penal statutes. In other words, they are reluctant to ascribe to the words of a statute a meaning which restricts individual freedom, or which penalises individuals, unless that intention is clearly indicated by the words used. The Courts assume that Parliament will not generally intend to encroach on our liberties, and that when it does so intend it will say so in clear terms.

That assumption may not always be correct. It may be giving Parliamentarians an undeserved compliment. It artificially ascribes an intention to them, for reasons based on the importance of individual freedom. Parliamentary draftsmen understand the principle, and know that if an encroachment on individual freedom is intended it must be clearly expressed. In this way Parliament itself will be made aware of what it is doing, and the citizen is able to know in what way and to what extent liberties are being curtailed. Because the restrictive approach to penal statutes is based on the presumed intention of Parliament, it is consistent with the basic premise that the Court's task is to ascertain the intention of Parliament as expressed in the words of the statute.

The Purposive Approach

Much has been written of the so-called "purposive" approach. It is not something new, although it has in recent years been given more emphasis.[10] Properly understood, it expresses the common sense principle that the words of a statute or of any other document should be construed in the light of their purpose and consistently with that purpose. If the words used or their context suggests that the statute or contract had a particular purpose, or that the section or clause had a particular purpose, one should resolve any doubt in favour of the meaning that is consistent with that purpose and most likely to achieve it.

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[10] See for example *Pepper (Inspector of Taxes)* v *Hart* [1992] 3 WLR 1032 per Lord Griffiths at 1040 C-D and per Lord Browne-Wilkinson at 1057 B.

The word "purposive" has, unfortunately, sometimes acquired a life of its own. A purposive approach should not be made an excuse for starting with an assumption as to the underlying purpose, and then forcing the words into a preconceived and strained construction to fit that assumption.

The purpose of an Act can sometimes be gleaned from looking at the Act as a whole. Sometimes the long title to an Act is a useful statement of its purpose. In a complex statute, a number of different purposes may be enshrined in different parts of the Act. A statement of purpose at the commencement of the particular part may provide a useful aid to the Court in resolving which of two possible meanings is intended. It is useless, however, to insert as a statement of purpose a section which is no more than a description. That will provide no assistance at all in interpreting what follows. It adds nothing to what is already obvious in the sections which follow.

An example is s.AA1 of the Income Tax Act 1994. It provides:

> The main purposes of this Act are:
> (a) to impose a tax on income:
> (b) to impose obligations in respect of tax;
> (c) to set out rules to be used to calculate the tax and to satisfy the obligations imposed.

Paragraph (a) states what is already obvious from the short title to the Act. It shows the intention is to tax income rather than capital, and this may be helpful if a section can be interpreted in either of these ways. It does not suggest that the purpose is to maximise taxation, so does not suggest one should prefer an interpretation which favours the Revenue. The other paragraphs are descriptive, but of no help in interpretation. This section was criticised in the Report of the 1998 Committee of Experts on Tax Compliance. Also criticised was s.AA3(1), which provides:

> The meaning of a provision of this Act is found by reading the words in context and, particularly, in light of the purpose provisions, the core provisions and the way in which the Act is organised.

The matters referred to would be considered by the Court in any event. The section gives them a special, more significant status, but it is unclear what this is or what difference it will make. The core provisions and the way in which the Act is organised are in the case of this Act of no perceivable help in interpretation.

An interesting example where consideration of the purpose or effect of a statute overcame the ordinary meaning of the words is *NZ Forest Products Ltd* v *Accident Compensation Corporation*.[11] The statutory words in issue were "the disposal or cessation of . . . business". The question was whether the company was entitled to an adjustment of its liability for accident compensation levies consequent upon the restructuring of its operations. It had ceased carrying on some businesses, but not all of its businesses. The Court of Appeal held:

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[11] [1994] 3 NZLR 150 CA, [1955] 3 NZLR 257 PC.

> On the ordinary and natural meaning of the words they are directed only to those cases where the only business, or each and every business of the employer is disposed of or otherwise ceases.[12]

The Court held there was no basis for reading down the reference in the section as if it read "his business or any of his businesses".

The Privy Council took a different view. They accepted that the phrase could be construed as meaning the disposal of his entire business, and if it stood alone that might be the correct interpretation. The phrase was capable of either interpretation, but they found pointers in other sections of the Act. They concluded that one of the objects of the Act was to remove unfairness to employers. It would be strange, they said, if in removing one unfairness the legislature had deliberately created an unfairness between an employer who ceased business entirely and one who ceased some or, perhaps, all but one of his businesses.[13]

All these rules or principles are of their nature means to an end, namely the ascertaining of the meaning of the words of the statute. They cannot be ranked in some artificial order of priority. They are not in themselves inconsistent with one another, although if considered singly they may on occasion point in different directions. In any particular context some will be more relevant than others. There would be obvious dangers in attempting to prescribe by statute that certain rules should be given greater importance than others.

The Acts Interpretation Act 1924

As long ago as 1584, in *Heydon's Case*,[14] the Courts adopted a principle which is applied to what is called remedial legislation. The Court will endeavour to ascertain the purpose of the legislation, and the mischief it was intended to correct. It will then adopt the meaning most likely to suppress the mischief and advance the remedy. Section 5(j) of the Acts Interpretation Act 1924 deems all Acts to be remedial, and requires that they "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act ... according to its true intent, meaning and spirit". Neither *Heydon's Case* nor the Acts Interpretation Act invites the Court to improve on the statute by going beyond the words used. It is limited to interpreting those words in the light of their purpose or object.

Deeming all Acts to be remedial seems unlikely to be of value. If an Act is in fact remedial, difficulties in interpretation will often be resolved by identifying the mischief and the remedy proposed, and preferring the interpretation that will best suppress the mischief and advance the remedy. If an Act is not of this kind, artificially deeming it to be so will do nothing to assist in its interpretation.

Section 5(j) has not been regarded as superseding the conservative approach to penal statutes. The section still requires the Court to ascertain the "true intent, meaning and spirit" of the statute or section in question, and to ascertain its

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12 [1994] 3 NZLR 150 at 155.

13 [1995] 3 NZLR 257 at 261.

14 (1584) 3 Co Rep 7a.

object in order to adopt the "fair, large and liberal construction and interpretation" that will best ensure its attainment. The Courts will continue to hesitate before imputing an intention or object which is penal or which encroaches on liberty where such an intention has not been clearly expressed. What s.5(j) requires is that the Court should not adopt an excessively literal approach. It is not so much a change in the law as a statutory endorsement of the best judicial practice, and a reminder to any judge who might be prone to excessive literalism. I recall referring their lordships to s.5(j) when arguing a case in the Privy Council in 1966,[15] and intending to refer to its use by our Court of Appeal in other cases. I was promptly cut short, on the basis that the section said nothing new. I think their lordships were right, but the section is valuable as underpinning what is the correct approach.

Tax Statutes

Tax statutes are construed in the same way as any other statute. They do not have some special status requiring different treatment. Their nature and purpose is, as with any statute, a relevant and important consideration. In *Mangin* v *Commissioner of Inland Revenue*[16] the Privy Council considered the tax avoidance section of the then New Zealand legislation. It set out the relevant principles as follows:

> First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate avoidance devices. As Turner J says in his (albeit dissenting) judgment in *Marx* v *Commissioner of Inland Revenue* [1970] NZLR at p.208, moral precepts are not applicable to the interpretation of Revenue Statutes.
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> Secondly, "one has to look merely at what is clearly said. There is no room for intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." (Per Rowlatt J in *Cape Brandy Syndicate* v *Inland Revenue Commissioners* [1921] 1 KB 64,71, approved by Viscount Simons LC in *R* v *Canadian Eagle Oil Co Ltd* [1946] AC 119; [1945] 2 All ER 499.)
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> Thirdly, the object of the construction of a statute being to ascertain the will of the Legislature it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.
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> Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.[17]

The reference by Rowlatt J to there being "no equity about a tax" uses the word "equity" in its archaic meaning, as in speaking of the equity of a statute. It

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15 *Boots the Chemist (NZ) Ltd* v *Chemists Service Guild of New Zealand*, [1968] AC 457, 468; [1969] NZLR 78, 85.

16 [1971] NZLR 591.

17 *Ibid.*, at 594.

means the spirit or underlying meaning of the statute. The whole of the passage quoted from *Mangin* was explained by our Court of Appeal in a single judgment of a Court of five judges in *Commissioner of Inland Revenue* v *Alcan New Zealand Ltd*[18] as follows:

> It would be a mistake to read this passage as putting revenue statutes in some different category from other legislation with their own particular rules of interpretation. All statutes are to be interpreted on the same basic approach enshrined in the classic formula expressed in *Heydon's Case* ... The modern equivalent in New Zealand has been given statutory force, and makes no distinction between revenue statutes and other statutes. Section 5(j) of the Acts Interpretation Act provides ...
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> The first proposition of Lord Donovan, in the passage cited from the Privy Council in *Mangin's* case, is that words are to be given their ordinary meaning. This is fundamental to all statutory interpretation. There must be strong and sufficient reason before words can be given some other meaning which they are capable of bearing in a particular context. If the object of a tax statute is to frustrate tax avoidance devices which would otherwise be legitimate, that alone may not be enough. If, however, the words are capable of more than one meaning and the object of the legislation is clear, then the words must be given "such fair, large and liberal construction" as will best ensure the attainment of the object of the Act.
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> The statements by Lord Donovan (including his citation from Turner J) that moral precepts are not applicable to revenue statutes, and that there is no room for intendment, no equity about a tax, no presumption, must be similarly understood. In the complex economic world of the present day it is perhaps inevitable that anomalies can be found in our tax laws. The statements referred to sound a note of caution against too readily assuming that the legislation has a particular objective which the words of the statute must be made to fit. Not infrequently the particular purpose is unclear. Parliament may have tolerated anomalies in the interests of avoiding excessive complexity. In such cases the safest guide to meaning will be found in the actual words of the statute.

The Intention of Parliament

If the role of the Court is to ascertain the objective meaning and intent of the words in their context, then the Court should not be concerned with the subjective intentions of the legislators. What was in their individual minds should be as irrelevant as the subjective intentions of the parties when one is construing a contract. The Courts can properly take notice of the perceived problem which a statute was intended to remedy. This is similar to the approach adopted in the construction of a contract, where evidence is admissible as to the background of facts known to both parties at the time the contract was made, under such cases as *Prenn* v *Simmonds*.[19] Similarly when the Court is construing a will, evidence of surrounding facts known to the testator is admissible to assist in identifying the intention expressed in the will, so that the Court can in effect put itself into the armchair of the testator.[20]

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[18] [1994] 3 NZLR 439 at 443.

[19] [1971] 1 WLR 1381, [1971] 3 All ER 237 HL.

[20] *Laws NZ* Wills para 190.

It can become a fine line as to how far this exercise should go. It should never go beyond interpretation, so that it should never go beyond a meaning that the words are capable of bearing. Nor should it transgress the principle that it is the words of the enactment which are to be construed, not the subjective intentions of the legislators or their policy makers.

Parliamentary Materials

What then should be the attitude towards Parliamentary materials? This term can be used to cover the parliamentary history of the Act, including the reports of committees or commissions, such as the Law Commission or the previous Law Reform Committees, the explanatory note when the bill was introduced, the Minister's speech in introducing it, the debates in the House and the changes made during the progression of the bill through the parliamentary process. It is now settled that the Court can look at such material, but it is rare that any help is obtained from it. In *Marac Life Assurance Ltd* v *Commissioner of Inland Revenue,*[21] after drawing certain inferences from the relevant statutes, Cooke J noted that they were confirmed by the Minister's statement in the House. He said:[22]

> A governmental statement in the House could not be allowed to alter the meaning of an Act of Parliament in plain conflict with it; but in my view it would be unduly technical to ignore such an aid as supporting a provisional interpretation of the words of the Act, or as helping to identify the mischief aimed at or to clarify some ambiguity in the Act.

The other members of the Court also referred to the extra statutory material in their judgments. In *NZ Maori Council* v *Attorney-General*[23] Cooke P said:

> Before finally rejecting the limited interpretation put forward on behalf of the Crown, or any variant of it, I think it right to refer to the parliamentary debates. This Court has been willing to look at *Hansard* to see whether any significant help in ascertaining the purpose of legislation is to be obtained: see for instance *Marac Life Assurance Ltd* v *Commissioner of Inland Revenue* [1986] 1 NZLR 694, 701, 708, 713, 716, 718; compare *Proprietors of Atihau-Wanganui* v *Malpas* [1985] 2 NZLR 468, 478. Not to do so in a case of the present national importance would seem pedantic and even irresponsible. Counsel on both sides were content that we should do so. As is so often the case, however, *Hansard* ultimately provides no significant help.

The issue was raised a year later in the House of Lords in a case where it did make a substantial difference to the result. *Pepper* v *Hart*[24] was an appeal by a taxpayer on a point of statutory interpretation. After the original hearing in the House of Lords it was decided that there should be a further hearing before an Appellate Committee of seven Law Lords. This would decide whether, and in

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21 [1986] 1 NZLR 694.
22 *Ibid.*, at 701.
23 [1987] 1 NZLR 641 at 658.
24 [1993] AC 593.

what circumstances, Parliamentary debates on a bill might be used as an aid to construction of the ensuing Act. Previous authority was against the use of such material. The leading judgment was delivered by Lord Browne-Wilkinson. He held that the exclusionary rule should be relaxed in certain cases so as to permit reference to Parliamentary materials:

> where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear. Further than this, I would not at present go.[25]

The rule was thus relaxed to a limited extent. Three of their Lordships, namely Lord Bridge of Harwich , Lord Oliver of Aylmermerton and Lord Browne-Wilkinson said they would have reached a different construction of the statute if they had not consulted *Hansard*.[26]

There is, however, force in the dissenting judgment of Lord Mackay of Clashfern. He said:[27]

> If reference to Parliamentary material is permitted as an aid to the construction of legislation which is ambiguous, or obscure or the literal meaning of which leads to an absurdity, I believe as I have said that in practically every case it will be incumbent on those preparing the argument to examine the whole proceedings on the Bill in question in both Houses of Parliament. Questions of construction may be involved on what is said in Parliament and I cannot see how if the rule is modified in this way the parties' legal advisers could properly come to court without having looked to see whether there was anything in the Hansard Report on the Bill which could assist their case. If they found a passage which they thought had a bearing on the issue in this case, that passage would have to be construed in the light of the proceedings as a whole.

Following *Pepper* v *Hart* the question was again considered by our Court of Appeal in *Wellington International Airport Ltd* v *Air New Zealand Ltd*.[28] In a single judgment of a Court of five judges, the principle was summarised as follows:

> To determine the object and purpose in the present context, he *(counsel)* invited us to refer to the parliamentary debates on the Bill, to the ministry papers and departmental correspondence which preceded it, and to the minutes of the select committee. In our view, it is inappropriate to do this.
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> The law is to be found in the enactment itself, and not in the subjective intentions of the draftsman or of the department, nor in those of the Minister or of other members of the legislature. In a very few cases the Court may find it helpful to refer to such extraneous material "as supporting a provisional interpretation of

25 *Ibid.*, at 640.
26 [1993] AC 596 at 616, 620, and 643, 644, 646.
27 *Ibid.*, at 616.
28 [1993] 1 NZLR 671.

> the words of the Act, or as helping to identify the mischief aimed at or to clarify some ambiguity in the Act" per Cooke J in *Marac Life Assurance Ltd* v *Commissioner of Inland Revenue* [1986] 1 NZLR 694 at p.701.
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> We were referred also to *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641 where *Hansard* was referred to in the judgment of Cooke P at p.658, but with the comment, "As is often the case, however, *Hansard* ultimately provides no significant help".
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> As the Court has often said, it would not wish to encourage reference to such materials, except in the exceptional case. For observations to that effect, see *Attorney-General* v *Whangarei City Council* [1987] 2 NZLR 150, 152; *Devonport Borough Council* v *Local Government Commission* [1989] 2 NZLR 203, 208-209; *McKenzie* v *Attorney-General* [1992] 2 NZLR 14, 19. To do otherwise may not only burden the Court with irrelevant material, but may result in counsel feeling they must research such extraneous material in every case of statutory interpretation in case they may find something, thereby adding unnecessarily to the burden of cost on the litigant. The material we were invited to consider in the present case does not, in our view, add anything to what is implicit in the words of the section, and in the context provided by the Act as a whole.[29]

The New Zealand Courts have not adopted as liberal an approach as that which found favour in *Pepper* v *Hart*, although even the House of Lords will only do so where the words are ambiguous. We have affirmed that our Court has power to consider Parliamentary materials, but has generally found it of little help, unless as confirming a view already reached. We have tried to discourage the excessive citation of such materials. It is to be hoped that this line can be held. We should spare some thought for the citizen, who is presumed to know the law. Citizens and their advisers may be able to read some statutes which apply to their situations, but they should not have to read the parliamentary debates and the earlier reports.

Where counsel introduce and rely on parliamentary material, the Court will tend to consider it. Even if it does no more than confirm the view that the court would have reached without it, the Court will tend to make this point in its judgment. Referring to such material at all can send a signal to the bar that the Courts not only use but expect to receive such material. The result can be a great expenditure of time by counsel and their clerks dredging through *Hansard* and through committee and other material, and burdening the Court with a raft of material often of no practical value. The additional financial cost is borne by the unfortunate litigant, while the cost in Court time is a burden on the unfortunate Judges. If all counsel were impeccable in their judgment, and raised such matters only where they were really helpful, there would be no problem. Such is not the case, and the Court cannot blame counsel if it is sending out the wrong signals. The cost of litigation is already a major problem in our society, and has increased by many times the rate of inflation since I commenced in practice.

As Cooke P said in *McKenzie* v *Attorney-General*,[30] in delivering the judgment of a Court of five Judges:

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[29] [1994] 3 NZLR 439 at 443.

[30] [1992] 2 NZLR 14 at 19.

> While the Court is prepared to look at *Hansard* if real help can be obtained thereby, we take the opportunity of repeating that reference to *Hansard* in argument is neither necessary nor desirable as a matter of course.

Conclusion

In this paper I have endeavoured to give a Judge's view on this important subject. It is *a* Judge's view, not *the* Judges' view, in the sense that it is my personal view. But having sat on the Court in many of the cases to which I have referred, and written the judgments of the Court in some of those cases, I do not believe my views are at any significant variance from those of my former colleagues.

The longer one is involved in the law, the more one recognises the basic good sense of much of our common law. One should be reluctant to depart from past practices without first understanding the reasons for them, and considering all the likely effects of any proposed change. A Judge must always remember that he or she sees only the tip of an iceberg, the small group of cases that arise from disputed questions that cannot be resolved except by the Court. The success of our legal system should be judged by its predictability, and by the ability of the vast number of situations to be resolved without dispute.

In the field of statutory interpretation, the important things to remember are that the role of the Court is to interpret the words of the statute, and that the ultimate touchstone is common sense.