

## **Interpreting Taxing Statutes # 17 – Opposing construction**

**The usual circumstances in which an enactment falls to be construed is where the respective parties each contend for a 'different' legal meaning of the enactment in its application to the facts of the case.<sup>^1</sup>**

### **SYNOPSIS**

Opposing construction

Consequences of each opposing construction

### **Opposing construction**

The interpreter needs to decide the meaning of the enactment in question. This is best achieved when each party advances its construction of enactment.<sup>^2</sup>

It follows that where a particular legal meaning is being contended for, the advocates and thereafter the court should express this in specific words.<sup>^3</sup>

A construction of language, however slight or tenuous, which could be preferred to the obvious and literal meaning need to be identified.<sup>^4</sup>

These contending constructions of different parties has been termed by Bennion as opposing constructions and this is the starting point for interpretation.

The court are concerned with the practical business of determining a *lis*, and when the plaintiff puts forward one

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<sup>1</sup> Bennion 2020 s 10.3

<sup>2</sup> Bennion 2020 p 363

<sup>3</sup> Bennion 2020 p 364

<sup>4</sup> Secretary Department of Social Security v Clear (1991) 23 ALD 22 cited in Bennion 2020 p 364

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construction of an enactment and the defendant another, it is the court's business, after informing itself of the legal and factual context, to consider whether the enacting words admit of both the rival constructions put forwards.<sup>5</sup>

When the enactment is ambiguous, the opposing constructions put forward are likely to be alternative meanings each of which is grammatically possible. On the other hand, where the enactment is grammatically capable of one meaning only, the opposing constructions are likely to construct an emphasized version of the grammatical meaning with strained construction.<sup>6</sup>

### Consequences of each opposing construction<sup>7</sup>

When considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, the court should assess the likely consequences of adopting each construction, both the parties in the case and for the law generally (ie when similar facts arise in future cases). If on balance the consequences of a particular construction are more likely to be adverse than beneficent this is a factor telling against that construction.

The consequences of a particular construction may be regarded as **adverse** if they are such that in the light of the principles of interpretation the court views them with disquiet in the sense that it frustrates the purpose of the Act, or works injustice, or is contrary to public policy, or is productive of inconvenience or hardship, and so on. The legislature is presumed not to intend such consequences.

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<sup>5</sup> A-G v HRH Prince Ernest Augustus of Hanover [1975] AC 436 cited in Bennion 2020 p 363

<sup>6</sup> Bennion 2020 p 364

Any other consequences (whether merely neutral or positively advantageous may be called **beneficent**. However, a consequence clearly intended by the legislature is to be treated as beneficent even though the judge personally dislikes it.

The court is not permitted to canvass the merits of what the legislature has undoubtedly willed. It is only where there is ‘real doubt’ as to the legislature’s true intention regarding the meaning of the enactment in relation to the facts of the instant case that the **adverse-beneficent test** comes into play.

In judging consequences, it is important to distinguish consequences to the parties in the instant case and consequences for the law generally. It will usually be a straightforward matter to determine the effect on the court’s final order of a finding in favour of one possible construction rather than the other. The court must also bear in mind that under the doctrine of precedent its decision may be of binding, or at least persuasive, authority for future cases. Before reaching any decision on a new point of principle, whether in common law or statute, the court must carefully weigh its **future effect** on the law.

Sometime the advocate opposing a particular finding paint, in grim contours, the likely consequence. Counsel says, in effect, that if the court adopts the opponent’s view of the legal rule in question this will open the floodgates to a spate of unmeritorious future claims. Such argument is properly called as the **floodgate argument**.

The court may be less unwilling to adopt an ‘adverse’ construction where some official is interposed whose discretion may be so exercised as to reduce the practical ill-effects.

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<sup>7</sup> Bennion 2017 p 302 Sec 9.6

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**Clear literal meaning<sup>8</sup>:** References to the consequences can rarely change the interpretation of an enactment if the grammatical meaning is incontrovertibly clear. The consequences may, however, sometime be so dire as virtually to compel the court to depart from it, even where the grammatical meaning is clear.

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<sup>8</sup> Bennion 2017 p 305

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