

## **Interpreting taxing Statutes # 46 – Presumption of rectifying construction**

**It is presumed that the legislature intends the court to apply a construction which rectifies any error in the drafting of the enactment. <sup>^1</sup>**

**In giving a statute a rectifying construction, the court is performing its constitutional role in giving effect to the legislative intention rather than engaging in an act of judicial legislation. <sup>^2</sup>**

### SYNOPSIS

Drafting errors

Inco test

- Applicability of Inco test to delegated legislation

Court's approach where Inco conditions not met

Court's approach in cases of textual conflict

Nature of rectifying construction

### **Drafting error**

There are occasions when the language of the legislature must be modified, in order to avoid inconsistency with its manifest intentions. Drafting errors occur, and often escape everyone's eyes until spotted by some alert observer.

### **Inco test**

In order to construe an Act in such a way as to correct a drafting error the court must be abundantly sure of the following matters:

- a) the intended purpose of the provision in question;

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<sup>1</sup> Bennion 2020 s 15.1

<sup>2</sup> Bennion 2020 s 15.2

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- b) that the drafter and the legislature inadvertently failed to give effect to that purpose in that provision;
- c) the substance of the provision the legislature would have made (though not necessarily the precise words it would have used) had the error in the Bill been noticed.

This test was laid down in **Inco Europe Ltd v First Choice Distribution (2000) 1 WER 586** in following terms:<sup>3</sup>

‘It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words.’

The court cited following passage from Cross to support its view:

‘In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intention of the drafter of the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.’<sup>4</sup>

The court further added:

‘This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So, the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way, the court must be abundantly sure of three matters: (1) the intended

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<sup>3</sup> Bennion 2020 p 519

<sup>4</sup> Cross’s Statutory Interpretation, 3rd ed. (1995), p 103 recited in *Inco Europe Ltd v First Choice Distribution* (2000) 1 WER 586 cited in Bennion 2020 p 520

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purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise, any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation ...'^5

The Court further cautioned:

‘Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd. v. Schindler* [1977] Ch. 1, 18, Scarman L.J observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation.’^6

**Applicability of Inco test to delegated legislation:** The principles set out above apply also to drafting errors in delegated legislation.^7

### **Court’s approach where Inco conditions not met**

The court’s task of construing an enactment may require it to resolve errors (for example, ambiguities or inconsistencies) in the legislative text, whether or not the Inco conditions are met. In cases where the court is unable to construe the enactment in question in such a way as to remedy the error construction, and

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<sup>5</sup> *Inco Europe Ltd v First Choice Distribution* (2000) 1 WER 586 cited in Bennion 2020 p 520

<sup>6</sup> *Inco Europe Ltd v First Choice Distribution* (2000) 1 WER 586 cited in Bennion 2020 p 520

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the Inco conditions are not met, the matter will need to be left to the legislature.

### **Court's approach in cases of textual conflict**

Where the court is required to construe a garbled text, or to construe an Act that contains a textual conflict, the court must make sense of the overall text. The court will need to resolve the matter in one way or another, even if the Inco conditions are not met. It may well need to apply a strained construction as there will be no grammatical construction for the court to fall back on. Said as follows:

‘You have to try and reconcile the provisions as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other.’<sup>8</sup>

### **Nature of rectifying construction**

The court does not rectify or amend the legislative instrument rather gives it its true meaning. Said as follows:

‘Although in this judgment I have used the expression “rectifying interpretation” as a convenient shorthand expression for the process of construction pursuant to the guidance in Inco Europe, I should make clear that properly speaking the court does not rectify or amend the legislative instrument. It gives it its true meaning, arrived at by the process of objective interpretation described in the authorities referred to above.’<sup>9</sup>

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<sup>7</sup> R (Confederation of Passenger Transport UK) v Humber Bridge Board [2003] EWCA Civ 842 cited in Bennion 2020 p 520

<sup>8</sup> Institute of Patent Agents v Lockwood [1894] AC 347 recited in R v Moore (1995) 4 All ER 843 cited in Bennion 2020 p 524.

<sup>9</sup> Bogdanic v Secretary of State for the Home Department (2014) EWHC 2872 (QB) cited in Bennion 2020 p 526

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