Interpreting Taxing Statutes # 45 – Principles of updating construction

When considering whether an enactment applies to a new state of affairs, the court will pay particular attention to the wording of the enactment, its purpose, and whether the new state of affairs is of a similar nature to that in respect of which the enactment was passed.^[1]

SYNOPSIS

Principles of updating construction

An updating construction of an enactment may be defined as a construction which takes account of relevant changes which have occurred since the enactment was enacted.^[2]

Concepts underlying the enactment do not change: Although relevant changes are to be taken into account, the concepts underlying the enactment do not change. Said as follows:

> "In one respect, however, the law permits, indeed requires us, to look at matters from the perspective of 2017. Section 1 of the 1973 Act is an "always speaking" statute: see R v Ireland [1998]

[1] Bennion 2020 s 14.2

[2] Bennion 2020 p 507

> AC 147,158. Although one cannot construe a statute as meaning something "conceptually different" from what Parliament must have intended (see Birmingham City Council v Oakley [2001] 1 AC 617, 631, per Lord Hoffmann), where, as here, the statue is "always speaking" it is to be construed taking into an account changes in our understanding of the natural world, technological changes, changes in social standards and, of particular importance here, changes in social attitudes.'^[3]

In Royal College of Nursing of the United Kingdom v Department of Health and Social Security (1981) AC 800 Lord Wilberforce described the considerations to be taken into the account when considering whether an Act applies to a new state of affairs:

> "In interpreting an Act of Parliament, it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to the state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the court have to considered whether they fall within the parliamentary intension. **They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may be also to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made.** How liberally these principle may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in

[3] Owens v Owens (2017) EWCA Civ 182 cited in Bennion 2020 p 508

> kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the questions "What would parliament have done in this current case- not being one in contemplation – if the fact had been before it?" attempt themselves to supply the answer, if the answer is not to be found in the term of the Act itself."

Limits on updating construction

An updating construction may be applied only where this would be consistent with the legislative intention.^[4]

Nature of the enactment should not change: An updating construction should not change the nature of the enactment, though in some cases fine distinctions may be drawn between what is regarded as permissible updating and what is regarded as a change in the nature of enactment.^[5]

Not for all future developments: Further, the mere fact that an Act is regarded as 'always speaking' does not justify it being applied to all future developments, whatever they may be.

Applications of principles of updating construction

New state of affairs: A straightforward application of the updating principle is where a **new state of affairs** clearly falls within the wording or purpose of the enactment in question, and the new state of affairs is of the same kind as other states of affairs to which the enactment applies.

In Baker v Quantum Clothing Group Ltd (2011) UKSC 17 a case involving noise-induced hearing loss, the court considered the

[4] Bennion 2020 p 508

[5] Bennion 2020 p 509

extent of the duty, to keep any work premises "safe for any person working there". Lord Mance said:

> "Whether a place is safe involves a judgment, one which is objectively assumed of course, but by the reference to the knowledge and standards of the time. There is no such thing as an unchanging concept of safety."^[6]

Changes in the terminology: Another straightforward application of the updating principle is where there are **changes in the terminology** used in connection with a particular matter. Here, as elsewhere, what matters is the concepts underlying the enactment.

In R v Secretary of State for Health, ex p Hammersmith and Fulham LBC (1999) 31 HLR 475:

> "It is undoubtedly the law that an Act of Parliament is not to be confined to those situations which are covered by its wording when it was first enactment. One could not, for example, say that a nineteenth century enactment dealing with "infection" or "diseases" did not apply to Aids, which (as far as we know) did not then exist. In that sense almost all Acts are "always speaking"^[7]

Changes in social conditions: Changes in social conditions may affect meaning of legislation.

Developments in technology: The nature of an always speaking Act requires the court to take account of changes in technology, and treat the statutory language as modified accordingly when this is needed to implement the legislative intention. Similarly, developments which take place in medical science and

[6] Cited in Bennion 2020 p 509

[7] Cited in Bennion 2020 p 510

techniques may require an updated construction of statutory language.^[8]

In Attorney General v Edison Telephone Co of London Ltd (1880) 6 QBC 244 the court considered whether the Telegraph Act 1896, which gave the Postmaster-General an exclusive right of transmitted telegrams, applied to communications by telephone (which was invented after the Act had been passed). The term ‘telegram’ was defined as ‘any massage or other communication transmitted or intended for transmission by a telegraph’. The term ‘telegraph’ included ‘any apparatus for transmitting messages or other communications by means of electric signals’. Held, the exclusive right applied to communications by telephone. The fact that the telephone was a new invention did not prevent the Act applying in relation to it. As Stephen J said:

> ‘Of course, no one supposes that the legislature intended to refer specifically to telephone many years before they were invented, but it is highly probable that they would, and it seems to us clear that they actually did, use language embracing future discoveries as to the use of electricity for the purpose of conveying intelligence.’^[9]

If, however changed technology produces something which is altogether beyond the scope of the original enactment, the court will not treat it as covered.

Other policy considerations: Other policy considerations may cause the court to decline to develop the meaning of the language.^[10]

[8] Bennion 2020 p 515

[9] Cited in Bennion 2020 p 511

[10] Bennion 2020 p 516