Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

The Taxing Business of Statutory Interpretation

Delivered by Mr Justice Donal O'Donnell, Chief Justice, at the inaugural meeting of the Tax Bar Association on 5 October 2022

I am very pleased to have been asked to address this inaugural meeting of the Tax Bar Association of the Bar of Ireland. I would firstly like to warmly welcome the initiative of the founders of the association in establishing a formal tax bar association which is itself a recognition of the degree of specialisation within the Bar of Ireland in the field of tax law, and, indeed, the need to promote that specialisation, and knowledge and expertise within the members of the association.

I am reluctant to make generalisations about practice at the Bar since I am now almost 12 years out of it, and since my view of legal practice in Ireland is limited to what is, by any definition, an unrepresentative sample of the work regularly done by barristers and solicitors, but it does seem apparent to me that there has been a significant degree of specialisation in recent years. I have to say that it is something which I think beneficial. There is no doubt that specialisation, just like generalisation, is a response to the market. It can only develop if there is sufficient need/market in a specialist area to support a specialist bar, but I think it is important in itself that a specialisation and the development of a specialist association taking the initiative in communication and education can only lead to the improvements of standards of advocacy oral and written and the quality of advice which is given to clients. That is the ultimate *raison d'être* of an independent referral bar.

I thought I might venture some thoughts on what might be called the taxing business of statutory interpretation. Lord Russell of Killowen made his own chief judicial contribution to the question of interpretation of taxation statutes in *Attorney General v. Carlton Bank* [1899] 2 QB 158. He was a very brilliant barrister

who came from Ireland and rose to be Lord Chief Justice of England. When he died, such was his reputation that a statue was commissioned of him by his admirers in the US and, at the unveiling, a speech was delivered by the American Ambassador Rufus Choate who spoke of the impact he had had on American lawyers. He said this:-

> "*There is no royal road to eminence at the bar. It comes by merit, or it does not come at all and so that merit is sure to be worthily appreciated when it is manifested".*

Merit is the key selling point of an independent referral bar, and the identification of specialisation can only improve the standards of practice and attract and retain work and provide the best service to clients.

It is, however, increasingly my experience that there are very few things that can be said with any confidence, which don't require some qualification. I think that there are very few people here who can or would wish to claim to have their practice *exclusively* in a single area of law. Nor, in my view, should that be something which should be aspired to. There is, I think, a significant difference between specialist expertise and practice on the basis of exclusivity. One of the strengths of the Irish Bar, I think, is that members are almost always exposed to fairly wide areas of practice, particularly in their formative years, and many here would wish to practice in other areas of law as well as that of tax. I suppose in this sense the business of being a judge in an appellate court is a comparator. It is obvious that within any appellate court there are areas of specialisation, and the members of the court treat the views of members who have particular expertise with considerable respect. In any case, we all have to make up our minds as to whether we have practised in the area or not. Sometimes colleagues from other jurisdictions express some surprise but I am inclined to say that after all, it is all law. Everything we do in an appellate court is an issue of law, and the reasoning process is often the same, and the truth is that the understanding of any area of law benefits, and sometimes considerably so, from an understanding of other comparable areas or issues, or from an ability to place a specialist area of law in a broader context. One of the dangers of what I would describe as 'exclusive' rather than specialist practice is that, almost by very definition, the practitioner who practices exclusively in one area does not know what it is that

they do not know. Even in an area which is as self-contained as tax, it is arguably necessary, if not indeed essential, to have a very firm understanding of the principles of administrative law in general (judicial review in particular), the law of evidence, the rules of practice and procedure, and perhaps on occasions criminal law. Any one of these areas can be critical in the resolution of a case, and cases, as you perhaps know better than anyone, do not come neatly presented as raising a single set piece academic issue. Instead, they are a sometimes a confusing jumble of fact and different issues, and any one of which may be decisive in the particular case.

It is with some trepidation therefore that I wish to discuss briefly an issue which addresses the question of where a specialist area of law sits within the general legal universe, and in particular, with reference to the principles of statutory interpretation. When I was first invited to address this conference, I did ask myself what I had done to deserve this signal honour, since my only recent forays into the area had been my judgment in *Revenue Commissioners v. O'Flynn Construction Ltd & anor* [2013] 3 I.R. 533, [2011] IESC 47, my concurrence with the judgment of McKechnie J. in *Dunnes Stores v. Revenue Commissioners* [2020] 3 I.R. 480, [2019] IESC 50, and my subsequent judgment in *Bookfinders Ltd. v. Revenue Commissioners* [2020] IESC 60 containing some very public recanting. Was this not enough, I asked myself? Was this tax conference an elaborately constructed intervention when people claiming to care for me deeply, would confront me with the error of my ways? Or was I being summoned before a Hogwarts-like wizengamot of angry wizards to be taxed – if you'll excuse the term – with the error of my ways before being handed over to the dementors? Or perhaps more benignly, was this a way of thanking me for sowing such confusion in the area, that there had been inevitably a great increase in appeals, litigation generally, advice and the demand for tax lawyers?

Briefly – very briefly – can I suggest that a lot of the controversy in relation to the interpretation of statutes in the context of taxation particularly in the *O'Flynn – Dunnes Stores – Bookfinders* trilogy is perhaps overdone, and I freely acknowledge that some of that may be as a result of the judgments, indeed my judgments. The structure of decisions with majority and dissenting judgments tends to emphasise disagreement.

It is, however, possible to look at this in another way and, I would suggest in this case, the correct way, and see that there was always a large measure of agreement among the judiciary as to the correct approach.

First, and perhaps importantly, there is a discernible trend in recent jurisprudence which is resistance to the idea propagated in some quarters that taxation has a uniquely strict system of statutory interpretation. I would emphasise the words *uniquely strict*. I think, for example, that my colleagues who have particular expertise in the field of criminal law where strict construction is a fundamental aspect of criminal procedures since time immemorial, are often surprised by the interpretations seriously advanced in the field of taxation.

Secondly, in retrospect, *O'Flynn* was perhaps not an ideal case in which to discuss a general approach to statutory interpretation. That was because it did not itself concern the interpretation of a provision imposing a tax liability, or providing for an exemption from taxation. It concerned rather the interpretation of what was a relative novelty, a statutory anti-avoidance provision, and that fact, coupled with the intrinsic difficulty of the case and the consequent narrow division in the Court on the outcome together the reference back to *McGrath v. McDermott* [1988] I.R. 258, may have led to misunderstanding about what was advanced in the majority judgment.

Thirdly, I think it is clear that in many cases where liability is imposed or an exemption provided, the question of interpretation will start and finish with the words used. Often, the relevant provision is inserted into an omnibus piece of legislation – most commonly the Finance Act – and can therefore take no colour from any surrounding provision or the thrust of the legislation as a whole. There is no necessary coherence to that piece of legislation. It is often a collection of individual provisions, and when a provision or section falls to be interpreted by the Court, it is often the case that there is no other clue to the meaning of the provision other than the words of the section or sections themselves.

When, however, there are clues to the meaning of provision either in the surrounding text of the same legislation, the structure of other legislation which is to be interpreted along with it, or the pre-existing law, or well understood conventions and presumptions as to the meanings of language, then these clues

should not be and are not required to be ignored. Furthermore, the business of drafting these statutes is not simple and as lawyers, we should not indulge the lazy criticism that it would all be very simple if plainer or clearer language was used. In 2006, a drafter driven beyond endurance by easy criticism of the why-can't-law-be-in-plain-English variety wrote to the Times:-

> *"Sir, I am irritated by letters complaining about the language used in the drafting of statutes.*
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> *In 1970 I was one of the team of lawyers drafting the original VAT legislation. In the run-up to the 1970 general election the Conservatives had stated that they were going to introduce a value-added tax law but that "the tax would not apply to the working man's fish and chips".*
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> *Accordingly, we were instructed by the Treasury that the supply of fish and chips was to be zero-rated. We asked the Treasury if they wished to zero-rate Dover sole and French-fried potatoes served in the Grill Room of the Savoy Hotel. We were told that this supply was to be taxable at the standard rate. Perhaps Martin Cutts or Andy Bowles (letters, June 9) would like to say how this dichotomy could be solved by a clause written in plain language.*
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> *The best that we came up with then was to zero-rate food supplied in the course of catering for consumption off the premises on which it was supplied. This gave rise to the question, what were the premises from which the supply came. At a wedding reception was the supply made by the caterer from his premises or at the place where the wedding reception was being held. The former would be tax-free; the latter would attract tax at the standard rate.*
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> *I wish that people who have had no experience in trying to translate the wishes of the legislature into law, in a way that would not be a total goldmine for lawyers, would consider the difficulties involved in the interpretation of English language "into the language spoken by the rest of the country."* Hugh Mainprice, London W2

If legislation, or at least legislation reaching the courts, is rarely absolutely crystal clear and it is both permissible and sensible to use all available clues to decipher its meaning I considered, and still consider, that if the *purpose* of a provision can be discerned it *may* be of assistance in understanding and interpreting the words of that provision. I would, however, emphasise something which perhaps I did not sufficiently distinguish in *O'Flynn* and that is that there is a distinction I think, between the concept of the *purpose* of legislation which can assisting in its interpretation and an approach described as *purposive* interpretation, or indeed, the more specific terms of section 5 of the Interpretation Act, 2005.

Purposive interpretation is often understood in the sense as *teleological interpretation,* an approach most commonly associated with the interpretation of European law, and in its strongest form suggests the specific words used are secondary to the apparent or asserted objective of the provision, that the legislation should be interpreted or construed to achieve that object, and the fact that the words may not themselves be capable of bearing that meaning is not an obstacle.

I do not think that that is what the case law on statutory interpretation, much of it cited in *Bookfinders* means, when it speaks of the purpose of a legislation. As one of the great judges of the 20th century Learned Hand said:-

> *"But it is one of the surest indexes of a mature developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."*

That is ultimately no more than common sense. It is a generally applicable principle of statutory interpretation, and it should not be excluded in the field of taxation, subject to the qualification I have just mentioned; that it is not always clear that the purpose of a statute can be discerned at all, or if it can, that it can be discerned other than from the words of a specific provision.

I would accept entirely that in *O'Flynn* I went further than was necessary. In fact, it can be seen that there was general agreement in *O'Flynn* that the approach of the Appeal Commissioners had over-emphasised dicta from *McGrath* v. *McDermott* and taken an unduly narrow approach on any view to the question of interpretation

that arose in that case. It was not necessary to go further. There is a lot of wisdom in the judge's saying – if it is not necessary to decide it, it is necessary not to decide it.

More particularly, I think it was wrong to make any reference to section 5 of the Interpretation Act. I agree that it is by no means clear that that provision intended to change the approach to the interpretation of taxation statute, and this is all the more regrettable because I do not think the reference to it added anything to the case, or anything to the law other than an avoidable level of misunderstanding.

In any event, I should say that section 5 of the 2005 Act is a provision that arguably promises more than it delivers.

If I can short-circuit the language of that provision, it can be understood as providing four different triggers for the application of the interpretative approach it permits. It may apply when a provision is (1) obscure, (2) ambiguous, (3) would on literal interpretation be absurd; or (4) would fail to reflect the plain intention of the Oireachtas. If any of these qualifying criteria are satisfied, then the provision is to be given an interpretation that reflects the plain intention of the Oireachtas. But the section also adds a substantial qualification:-

"When that intention can be ascertained from the Act as a whole".

It is, I think, well known that section 5 had its origins in the more ambitious provision proposed by the Law Reform Commission. It is often presented as a radical approach and that is certainly the case at the level of theory as it does allow for a type of purposive interpretation in the sense which I have referred – one that departs from the meaning of the words and does not seek to interpret those words, but rather applies a meaning to them, and which it is to be inferred, they would not otherwise bear.

But the practical scope of the provision is much narrower than this might suggest, and, indeed, the structure of the section is somewhat misleading because it can easily suggest that it is the entirety of the law relating to statutory interpretation and there were only two types of interpretive approaches: a strict literal approach, and a section 5 approach where that is permissible. However, as Mr Justice McKechnie observed, interpretation is not limited to the literal meaning of the

words, and there are in truth a large number of techniques designed to assist in interpreting the words of a statutory provision. Indeed, as he also observed, these canons of interpretation point in different directions, and there is a significant skill, and therefore, the possibility of significant disagreement, in the business of interpretation. This is not however a new insight: since Karl Llewellyn's famous Thrust and Parry article, it has been recognised that the rules on statutory interpretation are not a self-contained code.

Section 5 even on its own terms is however less wide ranging and radical than it might appear, because the intention of the Act is normally to be found in the words used. That is, after all, why they are chosen. They are, as it has been said, the surest guide to what the Oireachtas intended. The words were deliberately chosen as part of what is a careful and formal drafting process. If we leave aside the case of obvious omissions, typographical errors and clear mistakes, then the potential application of section 5 does not appear to be anything as extensive as it might appear at first sight.

It is, I suppose, logical that if the fourth condition in section 5 is met, i.e., that the literal interpretation would fail to reflect the intention of the Act as a whole, then there may be little difficulty in agreeing that the construction should be given which reflects that intention (although I have to say that it is more than a little question begging), but in the other categories, i.e., absurdity, obscurity or ambiguity, there is a very real difficulty in doing what the section supposes. Where a provision is truly ambiguous, obscure or absurd, it unlikely that the self-same Act will nevertheless clearly reveal the intention behind that obscure, absurd or ambiguous provision. The fact that the section limits the interpreter to seeking the plain intention of the Act in the Act itself, and by necessary inference nowhere else, means that it may become difficult in anything but the very clear cut case to be confident as to the plain intention of the Act which has after all resulted in an obscure, ambiguous or absurd provision. If so, then the scope of application of the purposive construction permitted by section 5 is limited and that is how it has transpired in practice.

Returning to the question of the interpretation of taxation statutes, therefore, section 5 even it were applicable, would not likely be of much assistance. Once the distraction of that section is removed and the language about purposive

construction is removed it becomes apparent that there is a large amount of agreement between the judgments in *O'Flynn* themselves, and as subsequently clarified in *Dunnes Stores* and *Bookfinders.*

Both the judgments in *O'Flynn* were agreed that the provisions of s. 86(2) of the TCA 1997 were plainly satisfied in the transaction in question and the only question then became whether the taxpayer could benefit from the provisions of s.86(3) i.e. whether it could be said that "*the transaction was undertaken or arranged for the purposes of obtaining the benefit of any relief… and that transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for it was provided*".

Both judgments were agreed that the key issue was whether the scheme could be said to be a misuse or abuse. Also, both were agreed that the approach of the Appeal Commissioners was too narrow and, furthermore, that the terms abuse and misuse should not be separated, and given individual and narrow interpretation. Ultimately, the case came down to a difference of opinion as to whether a complex and artificial transaction involving more than 40 individual steps over a 50 day period could be said to be misuse or abuse. There were respectable reasons for either view, and at the margins, some cases will always resolve themselves into fine decisions upon which people may disagree – that is after all why they arrive in the Supreme Court. I don't have time, or perhaps the inclination to go over old ground, but I do think that it was permissible to have regard to the fact that the section was introduced as an anti-avoidance measure helped to resolve that question, and I would not with respect, think that *Bookfinders* indicates that the result would be any different if argued today.

One final point is worth making in the present context. I was struck by some commentary on the decision in *O'Flynn*. It was said that the area of tax law is primarily navigated by tax professionals but that those experts can only navigate when a literal interpretation is observed. If a broader approach is taken, it will be difficult for those experts to advise with confidence and the understanding of the law would become dependent on intermediaries and, therefore, fees. This latter complaint seems more than a little self-serving. But it is, I think, a mistake to address the issue as if there was a binary choice between a strict literal

interpretation and a purposive approach. The case law explains, I think, that the interpretation of a statute is a more nuanced exercise.

This criticism is, however, an example of why I think that while specialisation is important, it must occur within the broader context. I do not think that the task of interpretation *requires* a literal approach be employed - it is more accurate perhaps to say that the task of constructing tax avoidance schemes is facilitated by insisting on a rigidly literal approach. But I do not, with respect, think that the application of legislation enacted in the public interest should be driven by the needs of professionals. Nor do I see that it is beyond the wit of skilled professionals to advise if they are required to consider something other than a strictly literal approach. After all, professional lawyers outside the field of tax do just that regularly, and even advise on the application of s. 5 of the Interpretation Act, 2005. If, as it were, ordinary lawyers can do this, I do not think it should be beyond the skills of tax lawyers and certainly not of the members of the Tax Bar Association! For reasons I have just been able to touch on, I think that the developing case law from *Dunnes Stores* to *Bookfinders* shows in any event that it is a mistake to see the question of interpretation as a crude and binary choice between a strict and at times artificial and obdurate literalness on the one hand and free form purposive interpretation on the other. It is important to recognise instead that there is a lot of careful precise work when it comes to interpretation, and I do hope that the members of this association will find much gainful employment in doing it.