

interpretation NOW!

Episode 34 – 29 March 2018



Australian Government

Australian Taxation Office



Resource Capital is a decision of Pagone J, now on appeal, about the tax treatment of limited partnership profits¹. One issue was whether the judge was bound by a superior court decision that the partnership in question was a legal entity². Pagone J said (at [6]) that, while he was bound by precedent, there was no obligation to follow a case where a proposition of law had only been assumed rather than decided³. This is a principle well-known in the law. The difficulties come, as they often do, when disentangling its operation in practice. Because the appeal court had assumed the entity point, Pagone J was free to decide it for himself. **iTip** – always check that the proposition you are investigating has not simply been assumed.

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! 'may' and 'must'

[Anchorage Capital Partners v ACPA \[2018\] FCAFC 6](#)

The High Court recently reminded us that 'may' can be used 'in more than one sense'⁴. It can mean 'must' if there is an obligation to exercise power on defined criteria being met⁵. Context is the key.

In *Anchorage*, the Act in question consistently used 'must' to signify obligation. Nothing else in the text or beyond showed that 'may' was to be other than discretionary⁶. It followed, the court held, that 'may' did not mean 'must' in this legislative context. The outcome was that the court had a genuine discretion to grant rectification by cancelling trademark rights. **iTip** – we must be wary of may, and should be careful with must⁷ (Suna says).

🔗 Extrinsic materials

[Ian Street Developer v Arrow \[2018\] VSC 14](#)

The judge in this case (at [53-55]) said that, while extrinsic materials are part of the context to be consulted, they can only be used to assist in determining meaning when the text is ambiguous⁹. Another court later made similar comments¹⁰.

Both cases refer to remarks in *Saeed* that it is wrong to look at extrinsic materials before exhausting ordinary rules of interpretation. At that time, some took this as an indication the 'modern approach' was being rolled back¹¹. This has turned out not to be the case. As *Ian Street* shows, extrinsic materials are to be looked at up-front for context, but their ability to influence interpretation directly is more limited.

📏 Constructional choice

[Xiao v R \[2018\] NSWCCA 4](#)

Episode 32 quotes from the High Court in *SZTAL* on how purpose and context may displace the ordinary meaning of provisions. The appeal court in *Xiao* (at [223-224]) does likewise, stressing the 'importance of considering context in the first instance'.

The judges in *Xiao* quote Gageler J in *SZTAL* for the point that constructional choice between ordinary meaning and some other meaning 'turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified objects or policies'⁸. **iTip** – this is a central principle in the interpretation of statutes, reinforced by parliament and applied too often now to be doubted.

📄 Trust deeds

[Mercanti v Mercanti \[2016\] WASCA 206](#)

This case, about the scope to vary a trust deed, restates (at [72-73]) the important principle that trust deeds are interpreted in the same way as contracts¹². It is the objective meaning of the words we are looking for, not what the parties may have subjectively intended, thought or meant to say¹³.

It follows that the differences between contractual and statutory interpretation apply equally to trust deeds. This means that the wider context of surrounding circumstances can only be taken into account for interpretation purposes where the trust deed is ambiguous¹⁴. **iTip** – always look objectively at the words used, not to subjective intent.

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¹ *Resource Capital Fund IV LP v FCT* [2018] FCA 41.

² *Resource Capital* [2014] FCAFC 37 (at [8]).

³ Hetherington [1990] Ch 1 (at 9-10), *Eddy* [2005] HCA 64 (at [13]) quoted.

⁴ *AFP v Hart* [2018] HCA 1 (at [104]).

⁵ See Episodes 12 and 22.

⁶ cf s 33(2A) of the *Acts Interpretation Act 1901*.

⁷ *Adams* [2006] HCA 10 (at [29]), *Power* [2013] NSWCA 428 (at [24]).

⁸ *Taylor* [2014] HCA 9 (at [66]) cited, cf *Esso* [2017] HCA 54 (at [71]).

⁹ *Saeed* [2010] HCA 23 (at [33]), *Di Paolo* [2015] VSCA 230 (at [36]) cited.

¹⁰ *CFMEU* [2018] FCA 83 (at [52]), citing *Comcare* [2016] HCA 43 (at [46]).

¹¹ *Wentworth* [2010] FCA 862 (at [35]), cf *Skyy Spirits* [2015] FCA 509 (at [47]).

¹² *Royal Botanic* [2002] HCA 5 (at [9-10]) cited, *Blenkinsop* [2017] WASCA 87.

¹³ *Byrnes* [2011] HCA 26 (at [53, 102-107]), *Segelov* [2015] NSWCA 156 (at [83]).

¹⁴ See Episode 32.