interpretation NOW!

Episode 35 – 27 April 2018

Australian Government
Australian Taxation Office

Michael Kirby has described interpretation as *'an art not a science'*[1]. As readers of statutes, we may forget that the exercise cannot be reduced to a scientific calculation or mechanistic formula[2]. It is not something a robot can do … yet. Interpretation involves a sympathetic quest for meaning, where context in the widest sense is consulted at the outset and in parallel. Sometimes the investigation of context may seem like a saga. *Alley v Gillespie* is a recent example[3]. To determine who had the call on who was eligible to sit in parliament, the High Court took a deep dive into historical developments and extrinsic materials. This case shows that, invariably, it is context which lights the path to reliable answers. **iTip** – recall our mantra, 'text > context > text'[4].

Joseph Tranzillo Tax Counsel Network

Court orders

Re Goyal and ACN 154 520 199 [2018] FCA 129

What happens when court orders are less than clear? This case (at [28-29]) makes 2 points – (A) if the orders are immediately plain, they 'speak for themselves', and (B) if they are ambiguous, the 'ordinary rules of construction' apply.

In situations of ambiguity, evidence of surrounding circumstances is then available to resolve the issue[5] – the 'primary reference point' being the judgment. Court orders, therefore, are interpreted broadly in the same way as contracts[6]. This is a little different to how legislation is approached where, by contrast, extrinsic materials are to be consulted at the outset and without the need first to find ambiguity.

Penal provisions

NSW v Wheatley [2018] NSWSC 178

This case (at [81]) re-confirms that the old rule about penal provisions being read strictly against liability really is one of 'last resort'. Even 40 years ago, the High Court said the rule had already 'lost much of its importance' and that the ordinary rules 'must be applied'[7]. Of course, penal consequences are part of the context, but a 'very minor consideration to be taken into account' when ascertaining meaning[8].

In theory at least, the old rule may have some role where ordinary principles of interpretation have 'run out' and 'all other indicia' fail to provide guidance[9]. **iTip** – in practice, however, it will be a rare case indeed which is resolved on this default basis.

Henry VIII clauses

ADCO Constructions v Goudappel [2014] HCA 18

Provisions delegating legislative power to administrators are often called 'Henry VIII clauses', due to their autocratic vibe[10]. Their constitutionality is seldom in doubt[11], but they attract greater scrutiny and are read strictly to their statutory purpose[12]. A recent example allows the Tax Commissioner, by legislative instrument, to modify the operation of new purchaser withholding provisions[13].

Courts now have less angst about Henry VIII clauses. In *ADCO* (at [61]), Gageler J said that parliamentary oversight and later judicial review diminish their 'pejorative labelling', and show a 'legislative balance between flexibility and accountability'.

Deeming provisions

Ellison v Sandini Pty Ltd [2018] FCAFC 44

This case reminds us that deeming provisions are to be read strictly in line with their purpose[14].

A general rule operated to engage CGT provisions 'as if you had received money or other property if it has been applied to your benefit … or as you direct'[15]. Jagot J (at [209]) said legal fictions are not construed beyond what is necessary to achieve their object. As a result, the CGT rule did not make a person the owner of shares merely because they were applied as she directed. This case underlines the care to be taken when assessing the purpose of a deeming provision, something often complicated by the need to make artificial assumptions.

- Writers – Joseph Tranzillo, Gordon, Ellis, Suna & Marcus.

[1] Kirby (2011) 35 MULR 113 (at 132), Episode 10.
[2] cf Middleton J (2016) 40 MULR 626 (at 632), Episode 22.
[3] *Alley v Gillespie* [2018] HCA 11.
[4] Episodes 4 and 7.
[5] *Codelfa* (1982) 149 CLR 337 (at 352), *Ellison* [2018] FCAFC 44 (at [155]).
[6] See Episodes 20 and 32.
[7] *Beckwith* (1976) 135 CLR 569 (at 576), *Aubrey* [2017] HCA 18 (at [39]).
[8] *Forestry* [2018] NSWLEC 10 (at [53]), *Grajewski* [2017] NSWCCA 251 (at [55]).
[9] *Lavender* [2005] HCA 37 (at [93]), *Imerva* [2017] VSCA 168 (at [87]).
[10] *PSA* [2012] HCA 58 (at [18]), *Lees* [1985] AC 930.
[11] *PSA* [2014] NSWCA 116 (at [102]), cf *Diakou* [2017] SASC 72 (at [34]).
[12] *Cvetanovski* [2015] VSCA 65 (at [53]), *Spath Holme* [2001] 2 AC 349 (at 382).
[13] s 14-250(3) of Schedule 1 to TAA53.
[14] Episode 4, *Comber* (1986) 10 FCR 88 (at 96), *Howard* [2012] FCAFC 149.
[15] s 103-10(1) of ITAA97 – Entitlement to receive money or property.

Episode 36 – legislative intention; planning instruments; status of tax laws; contractual definitions