

interpretation NOW!

Episode 32 – 31 January 2018



Australian Government

Australian Taxation Office



Justice Kirby spoke at Cambridge University in 2002 on movement ‘towards a grand theory of interpretation’ for statutes and contracts¹. He noted a ‘need for caution’ in embracing any grand theory, but pointed to trends which narrow the differences. Two of these were a greater appreciation of the choices available², and moves towards wider contextual analysis. Sixteen years on, these trends continue. That no ‘grand theory’ yet emerges, however, is not unexpected. Contracts and statutes are born from different motivations: they serve different purposes and constituencies. Contracts live for the duration of the deal but statutes, like diamonds, are forever³. Understanding both sides of the fence is crucial in any application of statutes to transactions.

Gordon Brysland Tax Counsel Network

Statutory principles

[SZTAL v Minister \[2017\] HCA 34](#)

Three High Court judges in *SZTAL* (at [14]) re-stated some of the fundamentals. Start with the text while ‘at the same time’ having regard to purpose and context⁴, the latter in its widest sense⁵. Ordinary meaning is important, but if purpose or context suggests another meaning which is inconsistent with purpose, ordinary meaning ‘must be rejected’.

These uncontroversial propositions have set the theme for decades. They flow naturally from moves to purposivism starting in 1981, and they contain the seeds of ‘constructional choice’ theory. At their centre is rejection of the text-only literalism that sometimes dogged interpretation in the past.

Statutory issue

[Esso v Australian Workers’ Union \[2017\] HCA 54](#)

In *Esso* (at [52]), another High Court majority said the ability to depart from ordinary meaning is limited to construing the provision in a way ‘which, despite its terms, it is plain that parliament intended it to have’. Courts cannot overcome unintended consequences of the intended operation by adopting a meaning that parliament did not intend – to do so would be to enter the ‘legislative realm’⁶.

These comments stand in odd contrast to *SZTAL*. They set a darker tone; they cite old cases decided in radically different circumstances; and they pay no regard to the modern role of legislative intention. Does *Esso* suggest a turning back towards the past?

Contractual principles

[Bazzo v FCT \[2017\] FCAFC 139](#)

This case (at [5]) stresses that contractual interpretation is an objective exercise, subjective beliefs etc being irrelevant. The meaning of terms ‘is to be determined by what a reasonable person would have understood them to mean’⁷. The language used, known surrounding circumstances and commercial objects all must be considered⁸.

In 1982, however, the High Court held that evidence of surrounding circumstances was only admissible to assist interpretation in cases of ambiguity⁹. This came to be seen as out-of-step with later cases, foreign approaches, and the way we read statutes¹⁰. Courts then sought to reason around the old rule¹¹.

Contractual issue

[Cherry v Steele-Park \[2017\] NSWCA 295](#)

In 2011, the High Court sternly told all courts to follow the old rule¹² – but not many bowed. In *Cherry* (at [68-85]), Leeming JA explains (A) why surrounding circumstances have to be consulted **before** any finding of ambiguity can be made, and (B) why the High Court must be taken to agree¹³. Why is this controversial and why does it matter?

[1] the 2011 case entrenches an anomaly, [2] recent High Court statements are less than clear, [3] state courts are inconsistent on the issue¹⁴, [4] commercial disputes invariably raise the point, and [5] academic criticism of the present situation persists. This is an issue which needs to be settled once and for all.

■ Writer – Gordon Brysland, Producer – Suna Rizalar.

■ Special thanks to Jo Stewart.

¹ See the [conference](#). Later published Kirby (2003) 24 *Statute LR* 95.

² Kirby (at 102), *James Hardie* (1990) 20 *NSWLR* 713 (at 719), cited.

³ At least at the point of enactment and until amended or repealed.

⁴ *Project Blue Sky* [1998] HCA 28 (at [69-71]), *Alcan* [2009] HCA 41 (at [47]).

⁵ *CIC Insurance* (1997) 187 CLR 384 (at 408), cited.

⁶ *Magor* [1952] AC 189 (at 191), *Marshall* (1972) 124 CLR 640 (at 644, 649).

⁷ *Toll (FGCT) v Alphapharm* [2004] HCA 52 (at [40]), quoted.

⁸ *Woodside Energy* [2014] HCA 7 (at [35]), quoted.

⁹ *Codelfa* [1982] HCA 24 (at [22]).

¹⁰ *CIC Insurance* (1997) 187 CLR 384.

¹¹ *Franklins* [2009] NSWCA 407.

¹² *Jireh* [2011] HCA 45.

¹³ *Tatts Group* [2016] HCA 5 (at [51]), *Simic* [2016] HCA 47 (at [78]).

¹⁴ *Cherry* (at [78]), cf *Technomin* [2014] WASCA 164 (at [35-45]).