

# Statutory Interpretation in the Supreme Court

Justice Susan Glazebrook, DNZM<sup>1</sup>

## Statutes in New Zealand

In New Zealand, there are over 1,100 public statutes in force.<sup>2</sup> There is an average of around 100 new or amendment statutes passed every year.<sup>3</sup> These statutes cover a wide range of subject matter, from animal welfare<sup>4</sup> to wills.<sup>5</sup>

Legislation binds all people and entities in New Zealand and everyone is assumed to know the law (albeit in somewhat of a legal fiction).<sup>6</sup> As such legislation must be accessible to those it binds. Statutes must also be understandable and drafted with sufficient precision to allow people to order their affairs according to law and, importantly, to allow those who administer legislation to do so according to law.

A major step forward with regard to accessibility has been the legislation online project.<sup>7</sup> This means that legislation is available at any time on any internet capable device which has really transformed the way we can work with statutes. So the heartiest congratulations to all those involved with that project.

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<sup>1</sup> Judge of the New Zealand Supreme Court. This paper elaborates on an address given at the Parliamentary Counsel Office, Wellington, on 4 September 2015. The Parliamentary Counsel Office's core functions are the drafting and publishing of Bills, Acts, legislative instruments and advising departments, agencies and the Attorney-General regarding Bills and legislative instruments: Legislation Act 2012, s 59(1). I am grateful to Supreme Court clerks, Andrew Row and Aidan Lomas, for their invaluable assistance with this paper. The views expressed in the paper are my own and do not necessarily represent those of the Supreme Court. Portions of this paper are based on my article, S Glazebrook "Do they say what they mean and mean what they say? Some issues in statutory interpretation in the 21<sup>st</sup> century" (2015) 14 Otago L Rev (forthcoming).

<sup>2</sup> This figure does not include local, private, provincial and imperial Acts. While the figure is high, plans are afoot to reduce the number. A consultation draft Bill has been circulated by the Honourable Steven Joyce which intends to repeal 120 entire Acts and parts of eight other Acts: Steven Joyce "120 Redundant Laws to be Repealed" (press release, 13 October 2015); and see the draft Bill itself: Treasury and Parliamentary Counsel Office "Statutes Repeal Bill: Consultation Draft" Parliamentary Counsel Office <<http://www.pco.parliament.govt.nz/srb-exposure-draft/>>.

<sup>3</sup> These figures were reached using the database on <[www.legislation.govt.nz](http://www.legislation.govt.nz)> as at 10 January 2016.

<sup>4</sup> See, for example, the Animal Welfare Act 1999.

<sup>5</sup> See, for example, the Wills Act 2007.

<sup>6</sup> This fundamental principle is encapsulated by the Latin maxim *ignorantia juris non excusat* which means that "ignorance of the law does not excuse". In the criminal law, this principle is codified by s 25 of the Crimes Act 1961.

<sup>7</sup> See Geoff Lawn "Improving Public Access to legislation: The New Zealand Experience (So Far) (2004) 6 UTSLR 49 at 57–58 for an overview of project. See also <[legislation.govt.nz](http://www.legislation.govt.nz)> for the public "front-end" result of the project.

The constitutional importance of individuals being able to understand the law, and order their affairs accordingly, is a key tenet of any legitimate legal system. Lord Bingham relates it to the rule of law which he says requires, among other things, that the law be accessible and so far as possible, intelligible, clear and predictable.<sup>8</sup>

In recent years there has been a concerted effort to improve legislative drafting to make statutes more understandable.<sup>9</sup> The Parliamentary Counsel Office's "Principles of Clear Drafting"<sup>10</sup> includes a preference for simple sentences, positive framing rather than negative, using the active voice and gender-neutral language amongst many other guidelines.<sup>11</sup> And I have to congratulate the Parliamentary Counsel Office on its success in this regard with the new drafting style.

The new drafting style is to be extended to existing Acts through the "Revision Bills" procedure. The Legislation Act 2012, ss 28-36 provide for the Attorney-General and the Parliamentary Counsel Office to recommend revision bills updating the language and style of old legislation without changing the content. The current "Revision Bill Programme 2015–2017"<sup>12</sup> includes 18 Acts.<sup>12</sup> This is an important part of the agenda to ensure accessible legislation. Many Acts remain in force for decades and fall far behind modern standards.

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<sup>8</sup> Thomas Bingham "The Rule of Law" (2007) 66 CLJ 67. Professor Lon Fuller, an American jurist, went so far to say that "law" would not be law if it was so unclear that it was impossible to understand: Lon Fuller *Morality of Law* (New Haven, Yale University Press, 1969). There is an extended discussion of Fuller's eight criteria of law at 46–91.

<sup>9</sup> See, for example, George Tanner "Confronting the Process of Statute-Making" in Rick Bigwood (ed) *The Statute: Making and Meaning* (Wellington, Lexis Nexis, 2004) 49 at 66–74 for a history of how legislative drafting has developed in New Zealand. In addition, see R I Carter *Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 20015) [*Burrows and Carter*] at 107–154. See also Law Commission "A New Interpretation Act" (NZLC R17, 1990); Law Commission "The Format of Legislation" (NZLC R27, 1993); and Law Commission "Legislation Manual Structure and Style" (NZLC R35, 1996).

<sup>10</sup> Parliamentary Counsel Office "Principles of Clear Drafting" (August 2009) <[www.pco.parliament.govt.nz/assets/Uploads/pdf/clear-drafting.pdf](http://www.pco.parliament.govt.nz/assets/Uploads/pdf/clear-drafting.pdf)>.

<sup>11</sup> At 3.10 and 3.12.

<sup>12</sup> *Revision Bill Programme 2015 to 2017* <[www.pco.parliament.govt.nz/pco-news/](http://www.pco.parliament.govt.nz/pco-news/)>. The programme sets out justifications as to why these Acts ought to be updated. The most common justification is the use of "archaic language." Other justifications include that the Act would benefit from renumbering, the Act's structure could be simpler, and the Act has many repealed provisions. Of note is the historic spread, the earliest Act is from 1908 and the most recent Act is from 2002. An example of a provision to be updated is s 6 of the Partnership Act 1908 which provides: "In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last preceding section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his or her creditors less than 100 cents in the dollar, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his or her loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of

Another agency seeking to improve our statutes is the new Legislation Design and Advisory Committee (LDAC). Replacing the old Legislation Advisory Committee (LAC), LDAC provides guidance to ensure new legislation is better designed and substantively appropriate, including ensuring compliance with international law obligations.<sup>13</sup> The key change between the old LAC and the new LDAC is that the Committee “will provide advice to government agencies about the design and content of bills earlier on in their development.”<sup>14</sup>

But does this concerted effort to simplify and improve legislation mean our problems are over? Well, hopefully it will eliminate the worst examples of obscure legislation, but interpretation issues will remain. Words are symbols of meaning but they are not mathematical symbols so, because words are used in statutes, there may be a number of possible meanings and legitimate arguments over which meaning is the correct one.

Further, unexpected situations arise which raise questions as to whether the words in question apply to those situations. Indeed one result of the modern style of drafting may be that there are simpler provisions which are more general and therefore there might be more scope for argument as to what they cover.<sup>15</sup> Statutory interpretation will, therefore, occupy the minds of judges, lawyers and citizens for some time longer. Although hopefully, the interpretation exercise will be less strenuous than it once was.

### **Statutory interpretation and the Supreme Court**

Since the Supreme Court’s inception in 2004,<sup>16</sup> it has dealt with numerous cases involving statutory interpretation – some easier than others. The importance of statutory interpretation to the Court’s workload is evident from the recent empirical research of two Auckland

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profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money’s worth have been satisfied.”

<sup>13</sup> Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014 ed, October 2014) available at <<http://www.ldac.org.nz/>>. Note, the LDAC is now responsible for these guidelines and with the additional “design” focus these guidelines will likely change. However, as yet the LDAC has not released its first set of guidelines.

<sup>14</sup> Christopher Finlayson “Establishment of Legislation Design and Advisory Committee” (press release, 29 June 2015).

<sup>15</sup> *Burrows and Carter*, above n 9, at 135–137.

<sup>16</sup> See Supreme Court Act 2003, whereby the Act establishing the Supreme Court came into force on 1 January 2004. However, it was statutorily restrained from hearing appeals until 1 July 2004: s 55.

University of Technology Law School academics who found that, in the Court's first 10 years, at least 60 per cent of all appeals involved the interpretation of a statutory provision.<sup>17</sup> Coupled with this, the Supreme Court's most commonly cited text is Burrows and Carter *Statute Law in New Zealand*.<sup>18</sup>

In this paper, I do not intend to transverse every conceivable statutory interpretation issue that the Court has dealt with, but rather highlight five main topics. First, I examine some aspects of the purposive approach to interpretation in the Supreme Court, with an emphasis on the Court's approach to taxation cases. Then I look at legislative history and the Supreme Court. Thirdly, I look at how the Court has dealt with interpreting legislation when there is a clash between provisions in a statute. Fourthly, I examine how the Supreme Court has used the common law when interpreting statutes. Finally, I look at how international law, in particular international human rights law, has influenced the Supreme Court's approach to statutory interpretation.

### **Purposive approach**

Section 5(1) of the Interpretation Act 1999 states that the "meaning of an enactment must be ascertained from its text and in the light of its purpose." This section underscores the modern purposive approach to statutory interpretation. As the Supreme Court stated in *Commerce Commission v Fonterra*, under s 5, text and purpose are the two main drivers of statutory interpretation.<sup>19</sup> The Court also stated that "[e]ven if a meaning of any text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5."<sup>20</sup>

The purposive approach is not new. Even in the old Acts Interpretation Act 1924, s 5(j) mandated that legislation should "receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision

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<sup>17</sup> M Russell and M Barber "Empirical Analysis of Supreme Court Decisions" in *The Supreme Court of New Zealand: 2004–2013* (Thomson Reuters New Zealand, Wellington, 2015) at 19.

<sup>18</sup> At 19 and 20.

<sup>19</sup> *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

<sup>20</sup> At [22].

or enactment according to its true intent, meaning, and spirit”. However, until relatively recently this subsection was honoured in the breach.<sup>21</sup>

As Justice Harlan Stone, former Chief Justice of the United States Supreme Court, put it, in the past statutes were often treated as “an alien intruder in the house of the common law”.<sup>22</sup> As a result, there was a restrictive and narrow approach to the interpretation of statutes, and especially those that could be seen as embodying the coercive power of the State. The courts developed presumptions that certain statutes, in particular criminal and tax statutes, must be interpreted in favour of the individual.<sup>23</sup> This is no longer the case, as the Supreme Court made clear in the context of taxation cases.

*Burrows and Carter Statute Law in New Zealand* has identified three interpretive eras for taxation statutes.<sup>24</sup> The first era was a period last century in which tax statutes were construed vigorously in favour of the taxpayer against the state; in essence, “the taxpayer was caught only if the Act on its narrowest interpretation covered him or her”.<sup>25</sup> The second era of interpretation gained its footing around the end of the First World War and the interpretative approach was that tax statutes should be construed literally but neutrally rather than from the premise that taxes are extractions from which the subject should so far as possible be protected.<sup>26</sup> The third, and more modern, era has seen the emergence of a purposive approach to the interpretation of tax statutes. This was the case well before the advent of the Supreme Court but this has not stopped enterprising counsel arguing for a strict interpretation before the Supreme Court. Ultimately, however, to no avail.

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<sup>21</sup> See further DAS Ward “Trends in the Interpretation of Statutes” (1957) 2 VUWLR 155 at 160 and 168–171; and *Burrows and Carter*, above n 9, at 223–227.

<sup>22</sup> Harlan Stone “The Common Law in the United States” (1936) 50 Harv L Rev 4 at 14.

<sup>23</sup> See *Burrows and Carter*, above n 9, at 233–236.

<sup>24</sup> *Burrows and Carter*, above n 9, at 234–236.

<sup>25</sup> *Burrows and Carter*, above n 9, at 234. See for example, *Mosley v George Wimpey & Co Ltd* [1944] 2 All ER 135 at 137 where Macnaghten J said “I do not think that any taxing Act should be construed generously; it should be construed strictly. From the very foundation of the courts of common law at Westminster it has always been the duty of His Majesty’s judges to protect the subject from extractions by the Crown”. See also Ivor Richardson “Appellate Court Responsibilities and Tax Avoidance” (1985) 2 Australian Tax Forum 3.

<sup>26</sup> Richardson, above n 25, at 5. See also *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 (CA) at 71 where Rowlatt J said “there is no room for any intendment. There is no presumption as to tax. One can only look fairly at the language used”.

The first relevant Supreme Court case is *Stiassny v Commissioner of Inland Revenue*.<sup>27</sup> In that case, the Supreme Court stated that the general purposive approach to the interpretation of a tax statute is “much the same as for other statutes”.<sup>28</sup> The Court went on to say, however, that the words themselves will in that context usually be the clearest guide to purpose. It then said:<sup>29</sup>

In construing and applying a taxing provision, a court leans neither for nor against the taxpayer, but should require that before the provision is effectual to make the taxpayer amenable to the tax, it uses words which, on a fair construction, must be taken to impose that tax in the circumstances of the case.

Not daunted by the strong view expressed as to the proper interpretive approach and, indeed, encouraged by the reference to fair construction, an appellant tried to revive the strict interpretation approach in the case of *Terminals (NZ) Ltd v Comptroller of Customs*.<sup>30</sup> Again to no avail. The Supreme Court referred to the passage in *Stiassny* and stated:<sup>31</sup>

Taxation statutes are construed purposively in the same manner as any other statute. The comment about “fair construction” in *Stiassny* was not intended as a gloss on that principle. It was a reference back to there being no presumption in favour of either party and to the purposive construction accorded to all statutes.

Much was also made in argument of the fact that the legislation at issue in *Terminals (NZ) Ltd* did not have a general anti-avoidance provision.<sup>32</sup> The Supreme Court held that this does not change the principles of interpretation that are to be applied.<sup>33</sup> Where there is a general anti-avoidance provision, the case of *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* requires a two stage inquiry.<sup>34</sup> First, the Court needs to assess whether the legal substance of the relevant tax arrangement comes within the specific provisions of the statute construed purposively.<sup>35</sup> Secondly, if the arrangement comes within the specific provisions construed purposively, the court must assess whether that arrangement contravenes

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<sup>27</sup> *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453.

<sup>28</sup> At [23].

<sup>29</sup> At [23].

<sup>30</sup> *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121.

<sup>31</sup> At [39].

<sup>32</sup> Customs and Excise Act 1996.

<sup>33</sup> At [40].

<sup>34</sup> *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

<sup>35</sup> At [47]–[48], [103], [106], [107] per Tipping, McGrath and Gault JJ.

the general anti-avoidance provision.<sup>36</sup> Where there is no anti-avoidance provision the court undertakes only the first stage of the inquiry: the purposive interpretation of the specific provision in question.<sup>37</sup> This approach was endorsed by the Supreme Court in 2015 in the case of *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Inc.*<sup>38</sup>

So, as mandated by the Interpretation Act, the Supreme Court has developed a clear line of jurisprudence that legislation, regardless of its context, is required to be interpreted purposively.

### **Legislative history**

In most cases the purpose of the provision is relatively clear from the text itself, read in the context of the statute as a whole, including any purpose provisions. However, sometimes judges need to go beyond the words. In ascertaining an enactment's purpose, the legislative history of a provision, including parliamentary speeches, may shed light.

In the past, the courts developed an exclusionary rule whereby the courts restricted what parliamentary materials could come in. While a law reform committee or commission report might have been considered by a court, this could only be for the limited purpose of discovering the mischief that the Act was meant to remedy and not to ascertain the intended effect or meaning of the legislation proposed.<sup>39</sup> However, other materials such as changes made to a Bill during its passage through the House, select committee commentary or the debates in Parliament could not be referred to at all.<sup>40</sup>

However, since the 1980's courts in New Zealand have expressly abandoned the old strict exclusionary rule and admitted various types of legislative history, including parliamentary

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<sup>36</sup> At [107] per Tipping, McGrath and Gault JJ.

<sup>37</sup> At [40].

<sup>38</sup> *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Inc* [2015] NZSC 59, [2015] 1 NZLR 672 at [13].

<sup>39</sup> *Burrows and Carter*, above n 9, at 278–279.

<sup>40</sup> See for example, *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL) and *R v Allen* [1985] 1 AC 1029 (HL).

speeches, in interpreting statutes.<sup>41</sup> Lord Denning was a very enthusiastic supporter of the use of legislative history:<sup>42</sup>

Some may say, and indeed have said, that judges should not pay any attention to what is said in Parliament. They should grope about in the dark for the meaning of an Act without switching on the light. I do not accede to this view.

The Supreme Court has continued the shift away from the exclusionary rule and has, in Lord Denning's words, often "switched on the light" when searching for the meaning or purpose of a provision. My clerk, Andrew Row, did some rough statistics and found that since the Court's inception to September 2015, Parliamentary debates have been cited in 40 cases (and 47 separate judgments). In an attempt to roughly classify how they were used, he categorised the judgments according to whether Hansard was said to be helpful, unhelpful, or whether the citation of it was just a part of the background of the case. Out of the 47 Supreme Court judgments, 32 found Hansard useful, three explicitly found it not useful, and in 12 judgments it was cited as mere background and did not appear to influence the judges' decisions. The above statistics may be slightly misleading as to the helpfulness of Hansard given that it, if Hansard is equivocal or unhelpful, a judge may not mention in his or her judgment at all.

For myself, I have relatively rarely found Parliamentary debates particularly helpful, except as a further cross check. The main reason for this is that the cases that come before courts are usually the ones where the situation has not really been anticipated or dealt with in the course of the Parliamentary process or where the Parliamentary history is equivocal. In such cases both parties often seize on different aspects of the Parliamentary debates as supporting their cause.

Indeed, it is sometimes the case that the parties (and even judges) rely on the same aspect of the Parliamentary materials to support different positions. For example in the Supreme Court

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<sup>41</sup> *Burrows and Carter*, above n 9, at 282. See *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 (CA); and *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA). See also the more detailed analysis of the propriety of this approach in *Pepper v Hart* [1993] AC 593 (HL).

<sup>42</sup> *Davis v Johnson* [1979] AC 264 (HL) at 276. Contrast the view of Kirby J in *Victorian WorkCover Authority v Esso Australia Ltd* [2001] HCA 53, (2001) 207 CLR 520 at [64], where he said that the process of using external material is "adjunct to the primary duty of the person with the obligation of interpretation of the statute, to construe its words viewed in their context and for the purpose for which the provision appears to have been enacted".



case of *Greenpeace NZ Inc v Genesis Power Ltd*<sup>43</sup> both the majority (Blanchard, Tipping, McGrath and Wilson JJ) and minority (Elias CJ) saw a particular sentence in the Parliamentary debates as supporting their respective views.<sup>44</sup>

Legislative history in the wider sense can, however, be helpful. One example is the Supreme Court's decision in *Worldwide NZ LLC v NZ Venue and Event Management Ltd*.<sup>45</sup> The case concerned the power to award interest on judgment sums in any proceeding for the recovery of "debt or damages" pursuant to s 87(1) of the Judicature Act 1908.

The Court of Appeal had held that, for a sum to be a debt, it had to be an ascertained or readily ascertainable sum.<sup>46</sup> The Supreme Court disagreed. The Supreme Court's judgment started by examining the wording of the provision at issue, noting that the term debt could be one of wide import and that there were no explicit qualifications in the section.<sup>47</sup> As to the immediate legislative context, the fact that the word "debt" was coupled with the word "damages" suggested that it was not intended to be interpreted narrowly. By their very nature, damages are not ascertained until judgment.<sup>48</sup>

The Court then examined the legislative history.<sup>49</sup> Two aspects of the legislative history were of particular importance. The first was that the current provision replaced an earlier provision which gave the power to award interest on "debts or sums certain". That wording had not been carried over into the new provision. The second was that New Zealand had deliberately copied the equivalent United Kingdom provision. The intention behind the United Kingdom reform was to ensure the courts should have the discretion to award interest in all cases. The fact that the New Zealand provision copied the United Kingdom provision meant that the English cases were of particular relevance and the United Kingdom caselaw favoured a wide interpretation of the word "debt".<sup>50</sup> The same applied to the Australian cases and, to some extent the New Zealand cases, although this particular point had not arisen before.

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<sup>43</sup> *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112, [2009] 1 NZLR 730.

<sup>44</sup> See at [34] per Elias CJ and at [62] per Blanchard, Tipping, McGrath and Wilson JJ.

<sup>45</sup> *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2014] NZSC 108, [2015] 1 NZLR 1.

<sup>46</sup> *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2013] NZCA 130, [2013] 3 NZLR 329.

<sup>47</sup> *Worldwide NZ LLC v NZ Venue and Event Management Ltd*, above n 45, at [16].

<sup>48</sup> At [16].

<sup>49</sup> [17]–[22]. This was examined after the consideration of the words in context.

<sup>50</sup> See at [25]–[31].

The legislative history therefore supported the Supreme Court’s interpretation of the word “debt” as used in the context of the statute.

## **Legislative Clashes**

Statutes are not always internally coherent. In fact, they can often contradict themselves. This part of my paper examines the difficulties where there appears to be an inconsistency between provisions in the same piece of legislation. Burrows and Carter *Statute Law in New Zealand* explain how such an issue can arise:<sup>51</sup>

Sometimes in a long Act the framers may fail adequately to spell out the relationship between various sections; sometimes amendment of a Bill in the course of the parliamentary process may add a section that does not square satisfactorily with provisions in other parts of the Act; sometimes a later amendment to the Act, perhaps years after its original passage, may add provisions that do not fit comfortably with the rest of it; sometimes consolidation of several Acts may draw together sections that are not in harmony with each other.

While the reasons may be understandable, conflicting provisions can cause real difficulties as the next two cases I discuss show.

### *Jennings Roadfreight*

The first case is *Jennings Roadfreight*.<sup>52</sup> This concerned priority for GST on liquidation of a company. Section 167 of the Tax Administration Act 1994 was at issue.

To summarise, essentially, s 167(1) provided that all PAYE tax withheld or deducted was to be held in trust for the Crown, and that, in the case of liquidation, was to remain apart and form no part of the liquidation. Section 167(2), by contrast states that any PAYE that has been held or deducted, but that has not been paid when due, was upon the liquidation of a company to rank in accordance with sch 7 of the Companies Act 1993. This would mean the Revenue would rank behind a number of other creditors.

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<sup>51</sup> *Burrows and Carter*, above n 9, at 463.

<sup>52</sup> *Jennings Roadfreight Ltd (in liq) v Commissioner of Inland Revenue* [2014] NZSC 160, [2015] 1 NZLR 573.

As the Court recognised, there was a conflict between s 167(1) and (2) as both purported to apply in the event of liquidation. The Court resolved this apparent conflict by holding that s 167(1) is a general subsection and applies even when there is no question of insolvency; by contrast, s 167(2) is a specific subsection, dealing with priorities in an insolvency or receivership situation.

Thus, the Court said “[i]n our view, s 167(2) must be read as a specific qualification of s 167(1) in the circumstances where s 167(2) applies. This means that, in cases where it applies, the specific s 167(2) will prevail over the general s 167(1).”<sup>53</sup>

This approach to statutory interpretation is not novel. It has its genesis in a rule of interpretation, *generalia specialibus non derogant*, meaning that general provisions do not override specific ones. While this approach may appear to be a highly formulaic way of dealing with the issue, this textual conclusion was not the end of the Court’s inquiry in *Jennings*. In light of the purposive approach, and before concluding, the Court extensively traversed the caselaw, legislative scheme and legislative history to cross-check the textual interpretation against the purpose of the legislation. The Court held that all of these elements (the wording, the caselaw, the legislative scheme, and the legislative history) supported the Court’s interpretation.<sup>54</sup>

This case shows that while the Court could have been seen as applying an old rule or canon of statutory interpretation (the general is subject to the specific), the Court only settled on its interpretation after ensuring that its interpretation was in congruence with the purpose of the legislation as illuminated by the preceding caselaw, the legislative scheme, and the legislative history. Thus, while specific statutory rules of interpretation may continue to be applied, this will only be when they accord with the purposive approach to interpretation.

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<sup>53</sup> At [19].

<sup>54</sup> At [145].

## *New Zealand Fire Service Commission*

The next case is *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Inc.*<sup>55</sup> This concerned levies payable by insurance companies to the Fire Service. The facts are very complicated, but in essence the issue was whether levies were payable when insurance policies had been structured to take advantage of a provision that said that levies were not payable on cover for any excess over the insured indemnity value, s 48(7) of the Fire Service Act 1975.

To deal with the case, the Court considered a hypothetical policy in which the actual indemnity value of the insured property was \$600 million.<sup>56</sup> Under the policy, the indemnity sum insured was \$300 million and the excess of indemnity cover was \$400 million. The issue for the Court was whether fire service levies were payable on the \$300 million indemnity sum, or on the \$600 million actual indemnity value.

The case turned on the interpretation of s 48(6) and s 48(7) of the Fire Service Act. Section 48(6) was engrafted onto the Act in 1993. Without getting into the fine and complicated particulars, suffice to say that the Court recognised there was an apparent conflict and incongruity between the two subsections. The Court accepted that its interpretation could be seen as making s 48(7) at least partially redundant, but also recognised the other contended interpretation would have made s 48(6) redundant.<sup>57</sup> In essence, one subsection had to prevail over the other. In deciding which one, the Court said “[t]he enactment of s 48(6) in 1993 notwithstanding the existence of s 48(7) lends weight to the conclusion that the former, subsection 6, takes precedent over the latter, subsection 7. This also gives better recognition to the purpose of setting the levy on a basis reflecting the property owner’s level of insurance cover”.<sup>58</sup>

While again it may appear that the Court was applying another old formulaic rule or canon of statutory interpretation (the later enacted provision takes precedence over the earlier enacted provision), the Court cross-checked its interpretation against the purpose of the Act. The

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<sup>55</sup> *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Inc.*, above n 38.

<sup>56</sup> See at [36].

<sup>57</sup> At [82].

<sup>58</sup> At [82].

Court considered that its interpretation “properly reflects the words of the section, and if anything the statutory history and the legislation purpose support this interpretation of those words.”<sup>59</sup>

### **The common law and statutory interpretation**

One obvious issue in statutory interpretation that arises is the interpretation of statutes that codify the common law, either fully or partially. The classical statement as to the relationship between the common law and codes is found in *Bank of England v Vagliano Bros*,<sup>60</sup> which held that a court should interpret the words of a code “in their natural meaning” without reference to the common law.<sup>61</sup> Under the principle established in *Vagliano Bros*, resort can only be had to the common law if a provision is of “doubtful import” or if its words have acquired a “technical meaning”.<sup>62</sup>

In most cases this approach is very sensible. But there are cases where the common law remains relevant. Where there is only partial codification, there will obviously still need to be recourse to the common law. But this is not the only situation where recourse to the common law may be needed. Most codes are derived from centuries of common law decisions; in the words of Lord Hoffmann, codes do not “spring fully formed from the legislative head”.<sup>63</sup> This means that, despite the drafter’s best efforts, the code, if it is to make sense, may need to be read in the light of its common law history.

The interpretative approach taken to codes will depend on the context. In some cases, codes are enacted to replace unsatisfactory common law rules; to interpret the code to conform to the common law would therefore frustrate the statutory purpose. In other cases, however, interpreting a code to align with the common law will cause no real problems because the legislature did not intend to depart from the common law. Parliament may even have incorporated the common law into legislation in a way that means the previous caselaw is intended still to apply.

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<sup>59</sup> At [83].

<sup>60</sup> *Bank of England v Vagliano Bros* [1891] AC 107 (HL).

<sup>61</sup> At 145.

<sup>62</sup> At 145. This principle and the case was cited with approval of the Court of Appeal in *R v Healy* [2007] NZCA 451, (2007) 23 CRNZ 923 at [53].

<sup>63</sup> *Goodes v East Sussex County Council* [2000] 1 WLR 1356 (HL) at 1360.

An example of this is *Re Greenpeace of New Zealand Inc.*<sup>64</sup> That case concerned the definition of “charitable purpose” under s 5 of the Charities Act 2005. The legislative history made it clear that the wording of the statute had been deliberately chosen to retain the concepts of charity developed in the caselaw.<sup>65</sup> As a result, to understand the term “charitable purpose,” it was necessary to consider that caselaw. What is particularly interesting about this case is that the majority said that the “[r]eference in statutes to the common law without more is to the common law as it develops from time to time”.<sup>66</sup> The majority of the Supreme Court therefore held that, in referring to common law concepts in the Charities Act, Parliament must have expected the common law to develop and that any statutory definition would develop accordingly. In accordance with this approach, the majority rejected a political purposes limitation in determining the extent of “charitable purpose” under the Charities Act.<sup>67</sup>

Another example where the Supreme Court has had recourse to the common law when interpreting a purported code is in respect of the Contractual Remedies Act 1979 in the cases *Mana Property Trustee Ltd v James Developments*<sup>68</sup> and *Kumar v Station Properties Ltd.*<sup>69</sup> A more nuanced approach is required. The Supreme Court in *Mana* expressed no concluded view on whether the Contractual Remedies Act ousted a particular common law doctrine given that it would not be applied in the particular case.<sup>70</sup> In *Kumar*, however, the Court considered that a common law rule had been retained.<sup>71</sup> This indicates that the relationship between the common law and statutes is not black and white. The answer lies in the purposive approach to statutory interpretation and inquiring whether the legislation, read purposively, was designed to oust or to retain the common law.

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<sup>64</sup> *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, (2014) 26 NZTC ¶21-088.

<sup>65</sup> At [16] per Elias CJ, McGrath and Glazebrook JJ.

<sup>66</sup> At [56].

<sup>67</sup> See at [113]–[118] and [124] per William Young and Arnold JJ (dissenting).

<sup>68</sup> *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805.

<sup>69</sup> *Kumar v Station Properties Ltd* (in liq and in rec) [2015] NZSC 34, [2016] 1 NZLR 99.

<sup>70</sup> *Mana Property Trustee Ltd*, above n 68, at 32.

<sup>71</sup> *Kumar*, above n 69, at [65]–[66]; considered that the following common law rule continued to apply: “that where a party cancelled a contract for an insufficient reason, the cancellation might nevertheless be justified if there was a sufficient reason at the time of cancellation even though the party cancelling was not aware of it.”

## International law and the Supreme Court

The orthodox starting point for a New Zealand court<sup>72</sup> in relation to unincorporated international instruments is the constitutional maxim set out by Lord Atkin in *Attorney-General for Canada v Attorney-General for Ontario* that the executive does not, by entering into a treaty, change the domestic law.<sup>73</sup> Legislative implementation is required to give the international obligation domestic effect. Thus, the courts cannot give direct effect to unincorporated international instruments.

I think it is fair to say, however, that it has become established in recent years that there is a presumption that Parliament intends to legislate consistently with international obligations.<sup>74</sup> This means that, to the extent that the words allow, legislation will be interpreted accordingly. It has also become clear in recent years that, if there is a broad based discretion given to the executive, then this discretion must be exercised consistently with international obligations.<sup>75</sup> The influence of international law and unincorporated treaties on statutory interpretation is evident in a number of New Zealand Supreme Court decisions.

### *Ye v Minister of Immigration*

The Supreme Court in *Ye v Minister of Immigration*, in interpreting the legislative immigration provisions then in force, had resource to the Convention on the Rights of the

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<sup>72</sup> New Zealand is a dualist state where treaties only have domestic effect if incorporated into legislation domestically. In monist states international treaties have immediate domestic effect as soon as they are entered into by the state in question.

<sup>73</sup> *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 (PC) at 347–348. The decision was adopted in New Zealand in *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA).

<sup>74</sup> On the traditional view, a prima facie ambiguity was required to trigger the presumption. Thus the New Zealand Court of Appeal originally held that an open-ended administrative discretionary power could not be confined by implied limits derived from international law: see *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 229 per Richardson J. This is no longer the case and the courts have read open-ended administrative discretionary powers as being subject to the limits of international law: see for example *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA). See also Philip A Joseph “Exploratory Questions in Administrative Law” (2012) 25 NZULR 73 at 99–100.

<sup>75</sup> See *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA); *Tavita*, above n 74.

Child, even though this is not incorporated in legislation.<sup>76</sup> This approach was not new of course.<sup>77</sup>

The Supreme Court in *Ye* was, however, being invited to extend previous caselaw to hold that the best interests of the child was the overriding test. The Supreme Court declined the invitation.<sup>78</sup> This is because the Convention on the Rights of the Child does not seek, at least in the immigration context, to make the best interests of the child *the* primary consideration to be taken into account.<sup>79</sup> It only seeks to make the interests of the child *one of the* primary considerations.<sup>80</sup> The Convention thus recognises that there will be other considerations that may override the best interests of the child, including the right of the state to control its borders.<sup>81</sup> This is why the Supreme Court in *Ye* said that the Convention must be taken into account as an important consideration, but not necessarily the overriding one.<sup>82</sup>

This case illustrates the point that the nature of the Convention obligation (and the nature of the statute in question) impacts on the approach taken by the courts as to how it is taken into account.

#### *Attorney-General v Zaoui (No 2)*

The Supreme Court case of *Attorney-General v Zaoui (No 2)*, is also a good illustration that the approach taken by the courts differs according to the nature of the international obligations involved.<sup>83</sup> *Zaoui* concerned the prohibition on torture, which is contained in our domestic New Zealand Bill of Rights Act 1990, as well as in a number of international

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<sup>76</sup> *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24]–[25].

<sup>77</sup> *Tavita*, above n 74; *Helu v Immigration and Protection Tribunal* [2015] NZSC 28. See also Claudia Geiringer “Tavita and all that: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law” (2004) 21 NZULR 66; and Alice Osman “Demanding Attention: The Roles of Unincorporated International Instruments in Judicial Reasoning” (2014) 12 NZJPIL 345.

<sup>78</sup> At [25].

<sup>79</sup> United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 3(1).

<sup>80</sup> United Nations Convention on the Rights of the Child art 3(1).

<sup>81</sup> United Nations Convention on the Rights of the Child, arts 10(2), 13(2)(a) and 15(2).

<sup>82</sup> *Ye*, above n 76, at [24]–[25].

<sup>83</sup> *Attorney-General v Zaoui (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.



instruments and under customary international law.<sup>84</sup> In particular, however, the case concerned the prohibition on deporting people who face a risk of torture in another jurisdiction. The Supreme Court interpreted the Minister's power to deport as requiring both procedural safeguards and the substantive result was that there would be no risk of deporting Mr Zaoui to a risk of torture.<sup>85</sup> The strength of the obligation with regard to torture appeared to be a major factor in the Supreme Court's interpretation of the legislation in that case.<sup>86</sup>

### *Helu v Immigration and Protection Tribunal*

Again in the immigration context, *Helu v Immigration and Protection Tribunal* considered the relationship between domestic law and international law.<sup>87</sup> This case is interesting in that McGrath J, in his judgment, provided a summary of the effect that international obligations have on the interpretation of New Zealand legislation.<sup>88</sup> This summary reiterated the principle of interpreting consistently with international obligations and noted that, although the international text may not be used to contradict or avoid applying the terms of the domestic legislation, legislative terms may be clarified by reference to international instruments.<sup>89</sup>

## **Conclusion**

Given statutes pervade almost all fields of law, it is not surprising that in its first 11 years, the majority of the cases that have come before the Supreme Court have involved issues of

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<sup>84</sup> New Zealand Bill of Rights Act 1990, s 9; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 7; and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987); and, as to the customary international law status of the prohibition, see Malcolm Shaw *International Law* (7th ed, Cambridge University Press, Cambridge, 2014) at 88 and 490 and the citations therein.

<sup>85</sup> See *Attorney-General v Zaoui (No 2)*, above n 83, at [91]–[93].

<sup>86</sup> For Professor Geiringer's comments on the case, see C Geiringer "International Law through the Lens of Zaoui: Where is New Zealand at?" (2006) 17 PLR 300 where she commented on the Supreme Court's approach as "expansive" (at 318); and C Geiringer "Zaoui revisited" (2005) NZLJ 285. See also my paper "From Zaoui to Today: a review of Recent Developments in New Zealand's Refugee and Protected Persons Law" (Paper presented for the International Association of Refugee Law Judges Regional Conference, 23 March 2013).

<sup>87</sup> *Helu v Immigration and Protection Tribunal*, above n 77.

<sup>88</sup> See at [144]–[145]. The Supreme Court split 3-2 on the disposition of the case, Elias CJ, McGrath and Glazebrook JJ allowed the appeal; while a different configuration, McGrath, William Young and Arnold JJ, indicated the appropriate test to apply in interpreting s 105 of the Immigration Act 1987. William Young and Arnold JJ would have dismissed the appeal.

<sup>89</sup> At [143].

statutory interpretation. Given the multitude of statutes currently in force in New Zealand, the pace at which new ones are being created, and existing trends, it is likely statutory interpretation will continue to be key aspect of the Court's role as it moves into the future.