PURPOSE OR INTENDMENT: SPOT THE DIFFERENCE

by Michael Flesch

The purposive construction of tax statutes is all the rage nowadays. In the landmark House of Lords decision in *Barclays Mercantile Business Finance Ltd v. Mawson* their Lordships refer to "purpose" or "purposive construction" no fewer than eight times in the critical paragraphs of their (single) speech, paragraphs which occupy less than three pages of the report.[1]

It was not ever thus. In *Cape Brandy Syndicate v. IRC*, Rowlatt J. famously said this[2]:

> "... in a taxing Act one has to look merely at what is clearly said. *There is no room for any intendment.* There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used" (my emphasis).

The Shorter Oxford English Dictionary defines "intendment" as (inter alia) "What a person aims at; purpose, intention" (my emphasis).

Mr. Justice Rowlatt's statement has, over the years, been regularly cited with approval in both the House of Lords and the Privy Council: see e.g. *Canadian Eagle Oil Company v. The King* (HL)[3] and *Mangin v. IRC* (PC).[4] Indeed, in *WT Ramsay Ltd v. CIR*[5] itself – the case that spawned the so-called '*Ramsay* principle'[6] – Lord Wilberforce echoed Rowlatt J's famous words. The first of the "familiar principles" re-stated by Lord Wilberforce in *Ramsay* commences[7]:

> "A subject is only to be taxed on clear words, *not on intendment* or on the 'equity' of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle" (my emphasis).

So that seems pretty clear. No room for any intendment.

But hang on a minute. Was it not Lord Wilberforce's speech in *Ramsay* to which the House of Lords in *Barclays Mercantile* referred in support of purposive construction? Indeed it was. In para.29 of their speech in *Barclays Mercantile*, their Lordships say[8] that it is worth quoting a passage from the influential speech of Lord Wilberforce in *Ramsay* on the general approach to construction:

> "What are "clear words" is to be ascertained on normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded."

Now what immediately strikes one about that citation from Lord Wilberforce in *Ramsay* is that something is missing. As it stands it does not really make sense. Surely there must have been an earlier reference to "clear words". And of course there *was* such an earlier reference. Because the passage cited by their Lordships in *Barclays Mercantile* follows on immediately from the passage (set out earlier) from Lord Wilberforce's speech in *Ramsay* in which he echoes Rowlatt J's statement in *Cape*

Brandy Syndicate; the opening of Lord Wilberforce's first "familiar principle". Lord Wilberforce's opening words are worth repeating:

> "A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle."

It is against the background of that statement that Lord Wilberforce's subsequent comment about "clear words" has to be read. But their Lordships in *Barclays Mercantile*, by omitting those critical opening words of Lord Wilberforce and starting their citation in the middle of Lord Wilberforce's first principle, totally distort Lord Wilberforce's meaning. It is not clear whether this was by accident or design. Clearly their Lordships were anxious to demonstrate top-level judicial support for purposive construction. But one trembles to think what the reaction of the House of Lords – or indeed any Court – would be to Counsel who chose to cite so selectively and misleadingly from an earlier judgment. In the House of Lords however – as Cole Porter famously wrote – anything goes.[9]

But the important point is this. The purposive construction of taxing statutes is here to stay: the 'no intendment' principle has gone. And the practical consequence of this is that Judges can now decide tax cases – and in particular tax cases involving perceived avoidance – very much as they wish. Adapting Lewis Carroll's words in Alice Through the Looking Glass:

> "'When [Parliament uses] a word' [Mr. Justice] Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean – neither more nor less'."

And that, I am afraid, is where we are today.

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[1] See [2005] STC 1, at pp.11c – 14a, paras.28-39.
[2] [1921] KB 64, at p.71.
[3] [1946] AC 119, per Viscount Simon L.C. at p.140.
[4] [1971] AC 739, per Lord Donovan at p.746D.
[5] [1981] STC 174.
[6] Or should it be 'non-principle'? See *Barclays Mercantile* [2005] STC 1, at p.12, para.33. But then what about the reference to "the value of the *Ramsay* principle" in *IRC v. Scottish Provident Institution* [2005] STC 15, at p.26, para.23? An example of the House of Lords 'having its cake and eating it'.
[7] [1981] STC 174, at p.179j.
[8] [2005] STC 1, at p.11, para.29.
[9] Perhaps it should now be: "anything went". Will it be any different in the new Supreme Court? Don't hold your breath.