Bennion on Statute Law – 2nd edition

Francis Bennion

Chapter Twenty

The Administrative Processor

Modern statute law often leaves it to officials to resolve doubts as to its meaning. It does so despite the citizens' antipathy to this, noted by Sir Courtenay Ilbert: 'Englishmen prefer to be governed (if they must be governed) by fixed rules rather than by official discretion' (Ilbert 1901, p 209).

The most formal way of effecting this delegation is by conferring on the Minister in charge of the appropriate government department power to spell out detail by statutory instrument. We saw above (p 150) how vague is the key word 'supply' as a basis for value added tax. The Finance Act 1972, which imposes the tax, does not leave the matter there however. Section 5 lays down guidelines as to what is and is not to be treated as a supply of goods or services for the purposes of the Act. Even this is not enough. Subsection (7) adds:

> 'Subject to the preceding provisions of this section, the Treasury may by order provide with respect to any description of transaction —
> (a) that it is to be treated as a supply of goods and not as a supply of services; or
> *(b)* that it is to be treated as a supply of services and not as a supply of goods; or
> (c) that it is to be treated as neither a supply of goods nor a supply of services.'

This is an example of what may be called *peripheral drafting,* which is a most useful technique. The reason for the name is that the drafting pays special attention to the periphery, where doubts are particularly likely to arise (see the section headed 'Core and penumbra' on p 146 above). Peripheral doubt may be dealt with by the draftsman in either of two ways, one bad and one good. The

bad way, which is unfortunately the most common, is to lay down complex provisions over the whole field. The good way is to use peripheral drafting, which confines the drafting complexity to the area where it is needed.

Take for example a concept like theft. Peripheral drafting would say 'It is an offence to steal' and then go on to deal in detail with peripheral cases where the meaning of this might be doubtful (for example where the defendant has a claim of right). The other way, followed by the Theft Acts 1968 and 1978, is to make the definition of theft complex *in every case.* Nine out of ten cases are likely to be straightforward, but to find out the law the statute user has to plough through the complexity every time. Greater use of peripheral drafting would simplify the law. Its main principles could be stated briefly, and separately. One would need to consult the fine print in difficult cases only.

To give a Minister power to resolve doubt by regulations is really to usurp the function of the courts, but it is increasingly done as a matter of convenience. It is justified on Chalmers" principle that legislation is cheaper than litigation. Under s 5(7) of the Finance Act 1972, set out above, the Treasury determined that a gratuitous loan of goods by a taxable person in the normal course of business should be treated as neither a supply of goods nor a supply of services (Value Added Tax (Treatment of Transactions) (No 1) Order 1972, SI 1972 No 1170). By this the Treasury set at rest doubts which had arisen among certain traders. Without such machinery, the doubts could have been resolved only by the courts in the course of litigation.

This form of doubt-resolving is mentioned here for completeness. As we have seen, it is not strictly a form of processing, but a type of legislation. Processing of doubts arises through the piecemeal exercise of judgment or discretion in particular cases. By this the doubtful provision is underpinned by sub-rules lending exactness.

The processors

Many different types of official are vested with processing authority. This may be conferred directly or indirectly. It is conferred directly when the official is named in the enactment. (The naming is by office rather than personal identification.) It is conferred indirectly when the official who actually exercises the judgment or discretion does so as an employee in the department of the named officer. As before, we take as an example the Consumer Credit Act 1974. This demonstrates the hierarchical nature of the arrangements commonly made.

Section 1 of the Act confers on the Director General of Fair Trading the duty -

(a) to administer the licensing system set up by the Act, and
(b) to exercise the adjudicating functions conferred on him by the Act

in relation to the issue, renewal, variation, suspension and revocation of licences, and

(c) generally to superintend the working and enforcement of the Act.

Section 2 empowers 'the Secretary of State' to regulate the carrying out by the Director General of his functions under the Act. (By virtue of Sched 1 to the Interpretation Act 1978 this means 'one of Her Majesty's Principal Secretaries of State', the one in question being selected by the Prime Minister.) Section 3 places the adjudicating functions of the Director General under the supervision of the Council on Tribunals. By virtue of Sched 1 to the Fair Trading Act 1973, anything authorized or required by or under the Consumer Credit Act to be done by the Director General may be done by any member of his staff. The Director General and his staff are collectively known as the Office of Fair Trading.

The result of these provisions is that central administration of the Consumer Credit Act is divided between officials of the Department of Trade and officials of the Office of Fair Trading. Local enforcement of the Act is entrusted to officials of local authorities. This follows the usual pattern of central and local administration, repeated with numerous regulatory Acts.

Other types of Act confer processing powers on central and local officials. The most important of these Acts are the ones relating to income tax, customs and excise duties, value added tax and other forms of taxation, those containing health, social security and welfare provisions, and those concerned with education, employment and registration. The police too possess processing powers, together with similar functionaries such as traffic wardens and immigration officers.

Whenever relatively junior officials exercise judgment or discretion they are likely to do so in accordance with guidelines laid down by their superiors. The superior may or may not be the office-holder on whom the statutory authority is directly conferred. The Director General of Fair Trading is such an office-holder, and duly issues guidelines to his staff. But a police constable may be given direct authority by being mentioned as such in the statute. Yet he is obliged to carry out his statutory duties in accordance with the instructions of his superior officers.

Such policy guidelines or instructions are not likely to be regarded by a court as prejudging individual cases or improperly fettering the official's discretion, provided they do not preclude fair consideration of all relevant issues (seei? v *Port ofLondon Authority, ex parte Kynoch Ltd* [1919] KB 176, 184; *Stringer* v *Minister of Housing and Local Government* [1970] 1 WLR 1281). Any such policy must be reasonable and not capricious *(Cummings* v *Birkenhead Corpn* [1972] Ch 12). Where a proper policy has been laid down, exercise of judgment or discretion in accordance with the policy cannot be regarded as

a failure to exercise it, and thus tantamount to a refusal entitling a person aggrieved to appeal.

It is important to bear in mind that the scope for official processing is cut down where judicial processing of the point has already occurred. Official processing mainly takes place in areas not considered by the court. Once the court has resolved the doubt in question, officials (like everyone else) must abide by the court's decision.

Processing intentional doubt-factors

We now look at some examples of how officials process the various kinds of intentional doubt-factor discussed in chapters 12 to 14.

Ellipsis

When government inspectors seek to enter premises under statutory powers they need to be quite sure that they conform to the statutory requirements. Where these are or may be elliptical, a policy judgment by the department concerned must be taken. Thus until the courts decided that the common phrase 'has reasonable cause to believe' was elliptical, and meant 'has reasonable cause to believe *and does believe',* departments in charge of an inspectorate had to reach their own judgment on the meaning of the phrase and instruct their officials accordingly. To be on the safe side, the tendency in such cases is to adopt the meaning which ensures legality whichever way the doubt is resolved. This was not done *inR* v *Adams* [1980] 1 All ER 473 (p 137). Here the police mistakenly relied on an ellipsis by which (if it had existed) a search warrant could have been used more than once. The result was that their second entry of premises under the warrant turned out to be unlawful.

Safety-first tactics are often impracticable. If the dock officials had adopted them in *London and India Docks* v *Thames Steam Tug and Lighterage Co Ltd* [1909] AC 7 (p 136) there would have been a loss of revenue from lighter owners which the House of Lords ultimately held to be payable. The police had considerable difficulty with the breathalyzer provisions before the necessary sub-rules were worked out by the courts (p 200). Safety-first interpretation by the police would have rendered the legislation inoperative from the start.

Broad terms

Section 62 of the Highways Act 1959 entitles a highway authority to recover expenses incurred through repairing damage caused by 'excessive'weight passing along a highway, or other 'extraordinary' traffic thereon. The only clue given by the Act to what these broad terms are intended to mean is that the entitlement must appear to the authority 'by a certificate of their surveyor'. 'Surveyor' here is also a broad term, since it lacks exactness. The provision derives from an

earlier Act, and much processing has been required to establish the necessary sub-rules. Must the surveyor be on the staff of the authority? If so must he hold an established post? Can his certificate apply to more than one road? Must it particularize the roads included? Is its issue a condition precedent to recovery of the expenses? Must it contain an estimate and apportionment of the expenses? These questions and many more had ultimately to be determined by the courts. Meanwhile highway authorities and their surveying staff grappled with them as best they could, adopting their own provisional sub-rules. *[Note* Since the foregoing was written the Highways Act 1959 has been repealed and replaced by the Highways Act 1980, s 59 of which reproduces s 62 of the 1959 Act. The phrase 'by a certificate of their surveyor' has now become 'by a certificate of their proper officer', another broad term.]

The Tribunals and Inquiries Act 1971, s 12 requires tribunals to give 'the reasons' for their decisions if asked. Various courts have held that this implies that proper and adequate reasons must be given, that they must be in clear and intelligible form, that they must deal with all substantial points raised, and so on. Subject to these rulings the clerks to the tribunals have had to work out for themselves just what the requirement involves in the way of practical administration.

Part II of the Housing Act 1957 gives wide powers to local authorities in relation to houses 'unfit for human habitation'. We have already considered the meaning of this mobile phrase (pp 153-4). Although there has been the usual amount of judicial processing of the phrase, in the main it has been for housing authorities to work out the effective sub-rules. In this, as often happens, they are aided by central advisory sources such as relevant government departments, associations of local authorities and professional housing management organizations.

Politic uncertainty

We saw in chapter 14 (pp 160-1) how officials responsible for instructing the draftsman usually like to see their powers expressed in vague terms, so as to minimize effective challenge. In some policy areas however officials may dislike administering an Act so flexible that it leaves wide scope for criticism of their practice. An example of wide discretion is given by the town and country planning legislation. Although in theory this places decision-making in the hands of elected local government representatives, in practice planning officials determine policy. Moreover this is an area where processing by the courts has been of relatively little importance.

Unintentional doubt-factors

We turn now to examples of administrative processing of doubts which are caused by unforeseeable developments or drafting error.

Unforeseeable developments

We considered these in chapter 15. One example given there should not have arisen, since it was really due to drafting error. This was *The Longford* (1889) 22 QBD 239 (p 166). When the Judicature Act of 1873 amended the courts system the draftsman should have made consequential amendments in the earlier Act referred to in that case. It was one more instance of the 'missed consequential', a common occurrence. Parliamentary changes do not properly belong in the category of unforeseeable developments because when they occur parliament has the opportunity to make the necessary adjustments in existing legislation.

Another example referred to on p 166, *A-G* v *Edison Telephone Co* (1880) 6 QBD 244, was a triumph for the draftsman. He managed to find words which were apt to include the telephone although it had not yet been invented! The Post Office officials who considered that on policy grounds their monopoly powers should cover telephone messages were vindicated in their practice.

Official practice may have to change to correspond with social change, as occurred in relation to rent officers over developments in the meaning of 'family'(P 152).

Drafting errors

Officials are frequently put in difficulty by mistakes of the kind described in chapters 15 to 17. What is the rate collector to do if he cannot fix a notice of the rate on the church door because the district has no church? *(R* v *Dyott* (1882) 9 QBD 47 - p 188). How can the official administering the hackney carriage licensing system proceed if he does not know whether a proprietor convicted of a second offence under the Licensing Act is or is not liable to have his licence revoked? *{Bowers* v *Gloucester Corporation* [1963] 1 All ER437 - p 173).iWhat does ACAS do when the Act tells it to consult a party who refuses to be consulted, or to ascertain the opinion of workers whose identity is not discoverable? *(Grunwick Processing Laboratories Ltd* v *Advisory, Conciliation and Arbitration Service* [1978] AC 655 - see p 194). What does the City of London treasurer do when the City is liable for costs directed to be paid out of the 'county fund' and he knows perfectly well that the City does not possess a county fund? (p 201).

The nature of official processing

The answer to such questions depends on whether the official processing is ante-judicial or not. By ante-judicial processing I mean processing which anticipates judicial processing. Even though judicial processing of the point may never in fact occur, the official (often with the aid of legal advice) attempts to forecast what a court would decide. It follows that ante-judicial processing can

happen only if, and to the extent that, a court would have jurisdiction to entertain a case in which the doubt could be settled. Sometimes the department may bring a test case for this purpose.

Processing which is not ante-judicial occurs where the court does not have jurisdiction to resolve the doubt, or its jurisdiction is peripheral. The main category is where the doubt-factor is the use of a broad term. The Competition Act 1980 is based on the concept of what it calls 'an anti-competitive practice'. No definition of this broad term is given, except the obvious (and almost equally broad) statement that it concerns the restricting, distorting or preventing of competition in connection with the production, supply or acquisition of goods or the supply or securing of services (s 2). The result is that it is for the Office of Fair Trading to process the phrase and supply what will no doubt become a network of sub-rules underpinning it. Will it include the giving of loyalty rebates or discriminatory discounts? Will it extend to full line forcing or the refusal to supply goods to price cutters? The trade will not know until the Office of Fair Trading chooses to tell it. An Opposition attempt to add to the Bill a list of twenty-six practices to be treated as anti-competitive was defeated.

The sub-rules under the Competition Act 1980 will be based on business judgment. They will draw on the findings of the Liesner Committee, an inter-departmental committee which reported in 1979. Investigations by the Monopolies and Mergers Commission will be an additional source. As one commentator has remarked:

> 'Some of the judgments of the Commission could well provide the beginnings of a body of case law guiding the Office of Fair Trading' *(The Times,* 28 March 1980).

The same article significantly reports that the Confederation of British Industry has complained that the new Act 'will lead to serious uncertainties for companies'.

The body of case law referred to, or as we call it the body of sub-rules, is given the description 'practice'. In introducing estate duty, the Finance Act 1894, s 8(1) perpetrated an appalling piece of asifism:

> 'The existing law and practice relating to any of the duties now leviable on or with reference to death shall, subject to the provisions of this Act and so far as the same are applicable, apply for the purposes of the collection, recovery, and repayment of Estate duty ... as if such law and practice were in terms made applicable to this Part of this Act.'

The result of this disgraceful evasion of the draftsman's duty (for which the draftsman himself may well not have been personally responsible) was that

throughout the eighty years estate duty endured it was never possible to consolidate the enactments relating to it. This was so even though they were supplemented by almost every annual Finance Act from 1894 onwards.

Official practice changes from time to time, and it is often very difficult for the outsider to discover exactly what the practice of an earlier time was. Unlike judicial processing, much administrative processing takes place out of public view and its results are not embodied in accessible records. The way a doubt is officially resolved may remain unknown unless the officials concerned choose to reveal it. Equally, ^*change* in the official interpretation of a doubtful statute may pass unnoticed if not revealed. Some government departments include such matters in their annual or other reports. Thus a 1979 report by the Civil Service Department revealed a reinterpretation of s 8(2)(a) of the Pensions (Increase) Act 1971. As a result of this, the report said, 300,000 files would need to be reviewed at a cost of some £250,000 *(Legal Entitlements and Administrative Practices* (1979), para 31 and App 2; cited Miers and Page 1982, p241).

Policy handouts

Government departments frequently issue booklets, leaflets and other guides informing interested parties how doubt-resolving processing is carried out and what its results are. The Supplementary Benefits Commission publishes a *Handbook* explaining how its various discretionary powers are exercised and the way it resolves doubts on the wording of the parent Act. In *Supplementary Benefits Commission* v *Jull* (1980) *The Times,* 21 March, the court referred to para 16 of the *Handbook* in support of its view on how such a doubt should be determined. Another example is furnished by the planning circulars issued by the relevant government department, eg the circular entitled *The Use of Conditions in Planning Permissions* issued in 1968 by the Ministry of Housing and Local Government (the circular is referred to in *Newbury DC* v *Secretary of State for the Environment* [1980] 1 All ER 731, 740).

Where a non-governmental body has statutory functions it may issue similar guidance. An example is the Notes for Guidance issued by the Law Society in connection with the legal aid scheme administered by it (see *Hanlon* v *The Law Society* [1980] 1 All ER 763,770). Some Acts *require* the administering department to issue guidance of this kind. Thus s 4 of the Consumer Credit Act 1974 requires the Director General of Fair Trading to arrange for the dissemination of information and advice about the operation of the Act. Section 12 of the Housing (Homeless Persons) Act 1977 requires housing authorities to have regard, in exercising their discretion, to guidance issued by the Secretary of State. A Code of Guidance has accordingly been issued by the Department of the Environment *(seeA-G* v *Wandsworth LBC* (1980) *Tlie Times,* 20 March).

An important publication of this kind is the booklet issued by the Board of

Inland Revenue which details the extra-statutory concessions made by the Board in relation to income tax, corporation tax, capital gains tax etc. These concessions are an important method of mitigating the literal effects of taxing Acts where these are contrary to current government policy. The concessions also serve to indicate, where doubt exists on the meaning of a particular taxing provision, that the authorities have adopted the practice of collecting tax in accordance with the less onerous reading.

Judicial control

The courts retain some degree of control even over processing that is not ante-judicial. The usual principles of judicial review apply to restrain abuse of power by orders of certiorari, or compel the carrying out of statutory duties by orders of mandamus.

These prerogative orders do not exhaust the courts' powers of control over administrative authorities. The doctrine of *ultra vires* can always be resorted to by those who claim that an authority has gone too far or has failed to exercise a judgment or discretion in accordance with the terms of the empowering statute.

In *Lally* v *Kensington and Chelsea RB* (1980) *Tlie Times,* 27 March,Browne-Wilkinson J considered the practice of the borough council in setting up a sub-rule with regard to the exercise of its discretion under the Housing (Homeless Persons) Act 1977. The sub-rule was that in all cases an intentionally homeless person would be granted temporary accommodation for a period of fourteen days only. The judge, while accepting that he was not sitting as a court of appeal from the local authority, nevertheless made an order against the council. He pointed out that the court could intervene 'only if the local authority had misdirected themselves and had reached a conclusion that no reasonable council could have reached'. They had done this by applying a rigid fourteen day rule instead of allowing in each case a period suited to the circumstances of the family in question.

The courts will not hesitate to cut down powers given by wide wording if they consider this necessary to give effect to the purpose of the Act. A well-known example concerns the imposition of conditions on the grant of planning permission. Section 29(1) of the Town and Country Planning Act 1971, reproducing earlier legislation, authorizes a local planning authority to grant planning permission 'either unconditionally or subject to such conditions as it thinks fit'. In terms this gives power to impose any condition at all, but the courts have curtailed this width. The following statement of law by Lord Denning in *Pyx Granite Co Ltd* v *Ministry of Housing and Local Government* [1958] 1 QB 554,572 has been approved by the House of Lords in several subsequent cases (see *Newbury DC* v *Secretary of State for the Environment*

[1980] 1 All ER 731, 739):

> 'Although the planning authorities are given very wide powers to impose "such conditions as they think fit", nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest'.

This is one more example of ellipsis. Unexpressed in the planning permission formula are words having the effect of this statement by Lord Denning.

Formerly, Acts of Parliament not infrequently contained provisions ousting the jurisdiction of the courts to carry out judicial review. The exclusionary clause was to the effect that an exercise of the administrative judgment or discretion should be 'final' or 'conclusive', or should not be questioned in any legal proceedings (see *Ridge* v *Baldwin* [1964] AC 40). The courts resisted such provisions, and they are not used in current legislation. Their death-knell came in s 11(1) of the Tribunals and Inquiries Act 1958, which provided that existing provisions of this kind should not prevent judicial review (see now s 14(1) of the Tribunals and Inquiries Act 1971).