Introductory Note by Francis Bennion

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Pepper v Hart and Executive Estoppel

FRANCIS BENNION*

Introductory

"We are hardly in the presence of a fully worked-out theory" observed Roderick Munday of the new system of Explanatory Notes to Acts of Parliament in a recent article[1]. As if anything to do with statutory interpretation were supported by a fully worked-out theory![2]

Dr Munday's article is packed with challenging observations about the way the courts use this novel aid to statutory interpretation. The observations need to be read very carefully by our Judges, and I hope this will happen. At the moment I do not myself feel a need to add to them, or dissent from them in any way. I warmly support them and am grateful to Dr Munday for his contribution to a difficult area of jurisprudence. I would like to brood on it for a while, and perhaps make some comments at a later date. Certainly the issues he raises are important.

Meanwhile what Dr Munday's article has done with immediate effect is prompt me to revisit a widely-cited article of my own, "How They All Got It Wrong in *Pepper v Hart*"[3]. Dr Munday mentions the article[4] as an example of the "strong debate" stimulated by the great case of *Pepper (Inspector of Taxes) v. Hart*[5] in which the House of Lords relaxed the long-standing rule against reference to *Hansard* in cases concerning statutory interpretation. Was I right to give it that sensational title? Has the position been affected by developments since? That is what I propose to examine in the present article. I reach what you might think is a surprising conclusion.

An unsuitable vehicle

Pepper v Hart was an unsuitable vehicle for a major change in the law governing statutory interpretation. Why? Because it was not the ordinary case where the court simply has to decide on the disputed legal meaning of an enactment. It was an income tax case that had background features of a sort which became familiar to me in my days as a Finance Bill draftsman.

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[1] "Explanatory Notes and Statutory Interpretation", above p. 124.

[2] I of course except the treatment in my book *Statutory Interpretation* (4th edn 2002, updating supplement 2005).

[3] [1995] Brit. Tax Rev. 325.

[4] See above, p. 127.

[5] [1993] AC 593.

The main background feature was the presence of HM Board of Inland Revenue, as it then was.[6] The Board managed the income tax legislation under its control in a special way. For example it did not always exact the maximum amount of tax that the legislation imposed according to its legal meaning. The Board operated a complex and extensive system of extra-statutory concessions, which is still in operation. That meant the Board sometimes displayed a cavalier attitude to the exact wording of current or prospective income tax legislation because it would not necessarily govern its actual practice.

A connected background feature was that when a Treasury minister was in charge of a Bill promoted by the Board he tended to share this cavalier attitude because that was the climate in which he was operating. In debates on the Bill the minister would give answers directed to how the Board would use the powers conferred by the Bill rather than what the wording of the Bill actually was. In *Pepper v Hart* the leading judge Lord Browne-Wilkinson tended to go along with that instead of precisely analysing the actual language of the Bill in question (later the Finance Act 1976).

All this led to some remarkable circumstances. The minister gave assurances during the passage of the Bill that were considerably more favourable to the taxpayer Mr J T Hart than was indicated by the clear legal meaning of the enactment in question. At first the Board operated the resulting legislation in accordance with those assurances, but later tried to go back on them and implement the legal meaning. That was what gave rise to the *Pepper v Hart* litigation.

The Judges in *Pepper v Hart*, up to and including the Appellate Committee of the House of Lords, found for the clear legal meaning. Then it was discovered by a member of the Appellate Committee Lord Griffiths that the minister had given the assurances just referred to. So the Appellate Committee rescinded its first hearing, added two Law Lords to the usual number, and reheard the matter. After that they declared that the enactment in question was after all ambiguous (which it is submitted it was not) and that justice required that reference be made to Hansard in order to investigate the ministerial assurances. The rest, as they say, is history.

When I alleged in the previous article that they all got it wrong in *Pepper v Hart* I meant that the promoting government department the Board of Inland Revenue got it wrong (because they should have had regard to the exact wording of legislation they were promoting), that the minister got it wrong (because he should not have given assurances that disregarded the actual wording of the Bill he was in charge of), and that the Appellate Committee got it wrong (because they should not have used Hansard to contradict what the legislation plainly said). Was this right?

Judgment Versus Discretion Again

As I will show, *Pepper v Hart* concerned at its heart the faculty of *judgment*. In 2000 I contributed a three-part article

to this journal on the distinction between this and discretion.[7] I have also written two articles on the topic in *Public Law*[8] as well as devoting two chapters of a book to it[9].

In relation to the judicial function, the ingredients of judgment and discretion are difficult concepts to pin down. Judgment involves judicial assessment of a fact-based situation, while

[6] On 18 April 2005 it was merged with HM Customs and Excise Departments to form HM Revenue & Customs (HMRC).

[7] "Jaguars and Donkeys: Distinguishing Judgment and Discretion", 164 JP (2000) 316, 336, 361.

[8] "Distinguishing judgment and discretion", [2000] PL 368; "Judgment and discretion revisited: pedantry or substance?" [2005] PL 707.

[9] F. A. R. Bennion, *Understanding Common Law Legislation* (Oxford University Press, 2001), chaps. 13 and 14.

discretion involves judicial selection from a range of two or more available options. With judgment there is notionally only one "right" answer, and the judge has conscientiously to work out what in his or her opinion that objective, unique answer is. With discretion on the other hand there are always two or more "right" answers and the judge is required to choose between them, of course on proper grounds.

Here "right" does not mean that any competent judge would always arrive at the same answer. Rather it means that, while "right" answers may differ with different judges, a given answer is acceptable as "right" only if it lies within what is the permitted range in the instant case, that is the range which an appellate or reviewing court would allow as legitimate. In the case of statute this range is indicated by the rules, principles, presumptions and canons laid down for statutory interpretation (including the compatible construction rule imposed by the Human Rights Act 1998 s 3(1) where relevant).

Pepper v Hart concerned the charge to income tax of perquisites, vulgarly called "perks", which were enjoyed by certain higher-paid employees. The perks consisted of the use of facilities (such as a passenger seat in a train or aircraft operated by the employer or a place in a school run by the employer) which were normally provided by the employer to the public at the market rate. The tax assessment was based on the cost to the employer of providing his employee with the perk. Where an item of cost extended to that employee's perk together with services provided generally, as would normally be the case, the tax official had to decide what was the "proper" proportion of that item to attribute to the employee's perk. That is where the faculty of judgment was required. It was not a question of discretion.

At this point I need to get down to the detail.

The detail in *Pepper v Hart*

Although that was not how the Appellate Committee treated it, the case turned on the precise wording of the governing enactments, the Finance Act 1976 ss 61(1) and 63(1) and (2). A selective comminution[10] of these enactments produces the following. (It is necessary to pay close attention to the exact words.)

> (1) Where in any year a person is employed in higher-paid employment
> *and*
> (2) by reason of his employment there is provided for him, or for others being members of his family, any benefit to which the Finance Act 1976 s 61 applies
> *and*
> (3) the cost of providing the benefit is not (apart from that section) chargeable to tax as his income
> (4) there is to be treated as emoluments of the employment, and accordingly chargeable to income tax under Schedule E, an amount equal to whatever is the *cash equivalent* of the benefit.
> (5) The *cash equivalent* of the benefit is an amount equal to the *cost of the benefit*, less so much (if any) of it as is made good by the employee to those providing the benefit.
> (6) The *cost of a benefit* is the amount of any expense incurred in or in connection with its provision, *and includes a proper proportion of any expenses relating partly to the benefit and partly to other matters*.

The taxpayer Mr Hart, a school teacher, satisfied clauses (1)-(3) so under clause (4) he was chargeable in respect of the cash equivalent of the benefit, which was a reduced-rate place for his son Bruce in his employer's boys' school. In the words of Lord Browne-Wilkinson[11] this reduced rate was one-fifth of the sum charged to members of the public.

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[10] Select comminution reproduces the relevant words of the enactment(s) omitting inapplicable words: see F A R Bennion, *Statutory Interpretation* (4th edn, 2002), pp 342-344.
[11] At p 621.

The carefully-drafted provisions spell out precisely what is meant by "the cost of the benefit". In the case of a school place one first has to arrive at the amount of any expense incurred in or in connection with the provision of the benefit. The benefit to Mr Hart was made up of two kinds of component, respectively referred to by the not very informative labels of "in-house" and "external" components. An in-house component was one shared generally by the schoolboys, such as the provision of dormitory accommodation. An external component was one confined to a particular pupil, such as the supply to him of a school blazer.

The dispute was restricted to in-house components. These brought into play the words in clause (6) "and includes a proper proportion of any expenses relating partly to the benefit and partly to other matters". This precision wording required very careful handling, which unfortunately it did not get from the Appellate Committee.

The school had the capacity to accept 625 pupils, but in the relevant years it was not full. Suppose in a relevant year of assessment there were on average 600 pupils, of whom 20 were enjoying the perk in question. Suppose that in that year the total expenses of staff salaries, building maintenance, heating, lighting, food and other "in-house" components was £600,000. It is clear that this sum fell to be apportioned in accordance with the phrase "and includes a proper proportion of any expenses relating partly to the benefit and partly to other matters".

On what basis was it to be apportioned? Overlooking the full significance of the vital word "proper", all concerned adopted a conclusion that was too crude. They thought the opposing constructions[12] were that the apportionment should be either on (1) the marginal basis (favouring Mr Hart the taxpayer) or (2) the average basis (favouring the Revenue).

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Marginal basis, average basis – and true basis

The taxpayer claimed that the marginal basis applied. The school had spare capacity, so its in-house expenses were not marginally increased by admitting the taxpayer's son Bruce. They were the same as they would have been if Bruce had not been there as a pupil.

The Revenue claimed that the average basis applied, under which the in-house expenses would fall to be divided equally among all the pupils. So it was said that the "proper proportion" was (on the hypothetical figures we have chosen) nil on the marginal basis and £1,000 on the average basis. All the courts decided for the average basis. Then, as I have described, the Appellate Committee held another hearing and decided in the end for the marginal basis.

There are some things wrong with the reasoning employed here. The marginal basis did not accord with the wording of clauses (4) to (6) above. Commonsense said that each boy in the school cost the employer in reality the same amount so far as concerned in-house expenses. To say that adding the taxpayer's son Bruce to the school did not increase the school's in-house expenses was beside the point. One could have said the same thing about any other single boy in the school. This would have produced the absurd result that none of the boys cost the school a penny!

Does that mean that the right answer was the average basis? That was the basis that seemed to be the literal meaning to all the courts considering the matter including the Appellate Committee – until it changed its mind. In fact it was the right answer only where no special factor was present. By "special factor" I mean a factor such as was referred to in the following passage from the speech of Lord Browne-Wilkinson:

> "The strongest argument in favour of [Mr Hart the taxpayer] is the anomaly which would arise if the employer's business were running at a loss or was subsidised by endowment . . . in such a case the adoption of the literal meaning of the statutory words [that is the average basis] would lead to a result whereby the taxpayer is assessed at an

[12] For the opposing constructions in statutory interpretation see F A R Bennion, *op. cit.* s 149.

> amount greater than that charged by the employer to the public for the same service. The Crown have no answer to this anomaly as such."[13]

Yet there was an answer. Before I say what it is, I will mention that there were other possible "special factors" apart from running at a loss or endowment income. Staff receiving a perk of this kind may not be in as good a position vis-à-vis the employer as an independent member of the public: they may be expected to help out, or accept a lower standard of service.[14] A Minister cited by Lord Browne-Wilkinson[15] said in relation to airline staff:

> "It was never intended that the benefit received by the airline employee would be the fare paid by the ordinary passenger. The benefit to him would never be as high as that, because of certain disadvantages that the employee has. Similar considerations, although of a different kind, apply to railway employees."

Another "special factor" would be any profit element included in the amount charged to the public. It would scarcely be fair (that is "proper") to tax the employee on a notional profit element in the deemed cost of his perk.[16]

What then was the answer? I said above that all concerned overlooked the full significance of the vital word "proper" in our clause (6), where it said the cost of a benefit included a proper proportion of any in-house expenses. As I have said, this is where the exercise of judgment was called for.

It would no doubt be "proper" to adopt the average basis where there were no "special factors", but this was unlikely to happen. As I said above, the fee charged for Bruce was one-fifth of the sum charged to members of the public. It would clearly not be "proper" for the notional amount on which Mr Hart his father was taxable to take the total (allowing for the one-fifth actually paid by Mr Hart) beyond the sum charged to members of the public. In any "perks" case where one of the "special factors" applied it would be "proper" to make a compensating reduction to take account of that. That was the answer to Lord Browne-Wilkinson's "anomaly" point mentioned above.

Use of the phrase "a proper proportion" in our clause (6) indicated that, contrary to the view taken by all the Judges in *Pepper v Hart*, the drafter did not intend one uniform test to be applied invariably. If that had been so, he would have specified the test in the legislation in accordance with normal drafting practice.[17] As drafted, the provision required variations depending on the position regarding what I am calling "special factors" in the instant case.

The result in *Pepper v Hart* depended on correct interpretation of the key phrase "a proper proportion", yet all the judges missed its significance. They failed to analyse it, and passed it by. They wrongly labelled the provision "ambiguous" when in reality it was not ambiguous at all, though it did leave the exact sum *uncertain* until it had been decided by the exercise of the judgment of those responsible.

By "those responsible" I mean in the first instance the tax inspector who worked out the assessment on the taxpayer, Bruce's father - guided no doubt by the inspector's instructions as to Inland Revenue practice.. Then I mean successively the special commissioner and the courts whose function it was, in deciding the appeals from the assessment, to determine whether or not the tax inspector had used the correct reasoning.

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[13] At pp 643-644.

[14] Lord Mackay (at p 613) considered that the taxpayer's son in *Pepper v. Hart* was in a position inferior to that of ordinary pupils.

[15] At p 626.

[16] In *Westcott (Inspector of Taxes) v. Bryan* [1969] 2 Ch 324, where the relevant wording, contained in the Income Tax Act 1952 s 161(6), was virtually identical, it was held that what was "a proper proportion" of expenses had to be ascertained by reference to fairness (see pp 343-344).

[17] The need to treat the phrase "a proper proportion" in this variable way was demonstrated by Martyn Gowar: see [1993] *Brit. Tax Rev.* 185.

This sort of uncertainty is inevitable where an enactment leaves a question to the judgment or discretion of an official

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or Judge. The posing of such questions is an essential part of legislative functioning, since Parliament cannot itself give a decisive answer for every case. That such questions arise in the application of the legislation does not mean that it is ambiguous or obscure, or that its drafting is in any way unsatisfactory.

Was I right?

So I was right. They did all get it wrong in *Pepper v Hart*. Or did they?

The note of doubt is sounded because it could be contended that what the Appellate Committee decided at its second hearing transcended mere statutory interpretation and struck a blow for justice. The government had persuaded MPs to pass this tax legislation by telling them it would be administered by the Revenue on the marginal basis, one more favourable to taxpayers than the average basis or even the basis of what is "proper" where there are "special factors".[18] This rightly troubled their Lordships. Lord Bridge of Harwich said:

> "But once the parliamentary material was brought to our attention it seemed to me, as, I believe, to others of your Lordships who had heard the appeal first argued, to raise an acute question as to whether it could possibly be right to give effect to taxing legislation in such a way as to impose a tax which the Financial Secretary to the Treasury, during the passage of the Bill containing the relevant provision, had, in effect, assured the House of Commons it was not intended to impose."[19]

Lord Griffiths said: "In my view this case provides a dramatic vindication of the decision to consult Hansard; had your Lordships not agreed to do so the result would have been to place a very heavy burden of taxation upon a large number of persons which Parliament never intended to impose."[20]

Lord Browne-Wilkinson cited Lord Wilberforce's extra-judicial plea in 1983 that the rule against citing Hansard should be relaxed where the government went back on a parliamentary statement that a Finance Bill was not intended to tax a particular class of beneficiary.[21]

The principle adumbrated here is not confined to government statements recorded in Hansard. Lord Steyn recently applied it to the Explanatory Notes mentioned at the beginning of this article:

> "If exceptionally there is found in Explanatory Notes a clear assurance by the executive to Parliament about the meaning of a clause, *or the circumstances in which a power will or will not be used*, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court. This reflects the actual decision in *Pepper v Hart* [1993] AC 593. What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."[22]

The final part of this dictum is contrary to the express view of Lord Browne-Wilkinson when he insisted in *Pepper v Hart* that it was right to attribute to Parliament as a whole the same

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[18] The story of these ministerial assurances was spelt out by Lord Browne-Wilkinson at pp 626-630.
[19] P. 616.
[20] P. 619.
[21] P. 636.
[22] *R (on the application of Westminster City Council v National Asylum Support Service* [2002] UKHL 38, [2002] 4 All ER 654, at [6] (emphasis added).

intention as that repeatedly voiced by the Financial Secretary.[23] It is submitted that Lord Steyn is right. Lord Browne-Wilkinson was viewing the matter as one of the intention of Parliament as respects the legal meaning of the words of the future Act. It was really about something quite different: the intention of the government as to the way it intended to administer the Act.

In the article mentioned above Dr Munday describes a statement of the latter as something whereby the executive "effectively estops itself from employing a provision in the Act in a specified manner in the future" and says where it does so "the executive will not be entitled to renege on that undertaking".[24]

Executive estoppel

What we have here is the emergence of a doctrine, which might be called "executive estoppel", whereby the executive is in law prevented from going back on an assurance as to its future conduct in relation to the legislation, given by it as part of the enacting process.

This is a matter not of the interpretation of the resulting Act but of its future administration. Where the executive has committed itself in this way the courts will not assist it to enforce the Act in an alternative manner which runs counter to what has been pledged to the public.

This applies even though the alternative manner conforms to the legal meaning of the enactment in question. Furthermore it seems to apply even where, as in *Pepper v Hart*, the pledged manner is *not* in accordance with that meaning. This somewhat startling result means that the court will enforce an incorrect legal meaning just because that is what the executive promised that it would apply.

This doctrine of executive estoppel obviously allows reference to Hansard to be made by the court in order to establish that the commitment in question was given by a representative of the executive. The courts need to distinguish carefully between the giving of such an assurance and the existence of ambiguity or obscurity in the wording of the enactment. The wise words of Lord Steyn in the citation above need always to be remembered: "The object is to see what is the intention expressed by the words enacted". If the intention was to confer a power of judgment or discretion on the executive, and the executive gave an assurance about the way in which it intended to exercise that power, it will not be allowed to renege on that assurance.

[23] P. 642.
[24] *Loc. cit*., p 125.