Statutory Interpretation Using Legislated Examples: Bennion on Multiple Consumer Credit Agreements

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ABSTRACT

Its main focus is how legislated examples can, and should, feature in statutory interpretation. But it also addresses: (i) whether a drafter can rely on a legislated example to solve significant problems in the provision the operation of which the example illustrates; and (ii) the risks a drafter faces in trying to interpret authoritatively an enactment that he or she has drafted. Risks of that kind arise even if the drafter's life-long involvement with ('zeal for') statute law in general, and special knowledge of the relevant Act in particular, means that his or her views deserve the greatest of respect.

Purpose and Overview

This article discusses interpreting section 18 of the Consumer Credit Act 1974 (United Kingdom) (an Act drafted by Francis Bennion) using enacted examples of its intended operation, and the recent case *Southern Pacific Mortgage Ltd v. Heath* [2009] EWCA Civ 1135.

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Page 87

Consumer Credit Act 1974 (United Kingdom): Background

The Consumer Credit Act 1974 (United Kingdom) was based on recommendations in a 1971 Report and a 1973 White Paper.[1] It replaced a number of Acts on hire purchase, moneylenders, and pawnbrokers. It introduced a new and comprehensive system of licensing and controls on consumer credit. It was administered by the Director General of Fair Trading (established by Part I), until that office was (by the Enterprise Act 2002) abolished and replaced by the Office of Fair Trading (OFT).

As first enacted, many of the Act's provisions applied only to a regulated (not exempt) 'consumer credit agreement'; one between an individual (or partnership or other unincorporated body) ('the debtor') and any other person (the creditor) by which the creditor provides the debtor with credit not exceeding £5000.[2]

The £5000 financial limit in the Act's application to an agreement was increased twice (to £15,000,[3] then to £25,000[4]) then removed completely on 31 October 2008 by the Consumer Credit Act 2006.[5] That Act forged ahead with reform before the 2008 EU Consumer Credit Directive (CCD)[6] that followed the EC's proposal (published on 11 September 2002) for a revised CCD. But that harmonizing Directive is to give rise to further amendments, by June 2010, to the Consumer Credit Act 1974[7]

Page 88

Part V specifies the formalities to be followed in entering into a regulated consumer credit agreement. They include disclosure of information and requirements for the agreement's form, content, and signing. A regulated credit agreement is not properly executed unless (section 61(1)(a)) a document in the prescribed form itself containing all the prescribed terms and conforming to prescribed requirements is signed in the prescribed manner both by the debtor and by or on behalf of the creditor.

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[1] Crowther Committee's Report on Consumer Credit (Cmnd 4596, March 1971); White Paper on the Reform of the Law of Consumer Credit (Cmnd 5427,1973). 'The anomaly of including consumer hire agreements within the purview of the Consumer Credit Act 1974', say Palmer and Yates (1979) 38 Cam LJ 180,180, 'is more apparent than real.... The abuse to which this type of transaction was subject clearly justified an extension of the Act to certain forms of consumer hiring. This extension was consonant with the policy, advocated by Crowther, of regulating transactions according to their function rather than their form'. In *Office of Fair Trading v. Lloyds TSB Bank pic and others* [2006] EWCA Civ 268 at [15] Waller LJ for the Court said: 'Where the correct interpretation of the statute is in doubt it may be appropriate to have regard to the effect of preferring one construction rather than another, but in most cases that is likely to be of only marginal significance. Evidence of the background to the legislation derived from the Crowther Report and of the way in which the credit card industry operated at the time of its publication may be more relevant, but is unlikely to be determinative. The starting point must be the legislation itself.

[2] Consumer Credit Act 1974 (United Kingdom) section 8.

[3] Consumer Credit (Increase of Monetary Limits) Order 1983 (SI 1983/1878).

[4] Consumer Credit (Increase of Monetary Limits) (Amendment) Order 1998 (SI 1998/996).

[5] Consumer Credit Act 2006 (United Kingdom) sections 2(l)(b), 70,71(2), Schedule 4 and SI 2008/831, Art. 3(1)(2) and Schedules 2 and 3 (with Art. 4(1)) (as amended by SI 2008/2444, Art. 2). The 2006 Act received the Royal assent on 30 March 2006. It was part of a wider strategy to reform and modernize consumer credit regulation and deal with problems of over-indebtedness. See the December 2003 white paper: *Fair, Clear and Competitive the Consumer Credit Market in the 21st Century* (Cm 6040): http://www.berr.gov.uk/files/file23663.pdf. The removal of the financial limits (which did not constrain the courts' powers under the Act to re-open extortionate credit bargains) was ([3.61]) to 'ensure there is consistent and transparent protection for consumers entering into credit agreements of any value'.

[6] Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers (OJ No. L133, 22 May 2008, 66): http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:133:0066:0092:EN:PDE

[7] See the draft amending regulations on the Web site of the Department for Business, Innovation, and Skills: http://www.berr.gov.uk/whatwedo/consumers/consumer-finance/credit_regulation/ec-directives/page29927.html and http://www.berr.gov.uk/whatwedo/consumers/consumer-finance/credit_regulation/ec-directives/CCD-draft-regs/page52321.html.

An improperly executed regulated agreement is enforceable against the debtor on an order of the court only (section 65(1)). Until its repeal on 6 April 2007, section 127(3) prevented an enforcement order being made if section 61(l)(a) (signing of agreements) was not complied with unless a document itself containing all the prescribed terms of the agreement was signed by the debtor. 'The Court of Appeal held that [section 127(3)]', says Bennion,[8] 'which I myself had thought up, thinking it justified,[9] was incompatible with the European Convention on Human Rights. They held that section 3(1) of the Human Rights Act 1998 did not enable section 127(3) to be read and given effect conformably with these provisions. Accordingly they held that a declaration of incompatibility should be made by the court.[10] This was reversed by the House of Lords.[11] Nevertheless, section 127(3) was repealed by the Consumer Credit Act 2006,[12] presumably as being too draconian. This perhaps shows that drafters should stick to their proper function and not invent policy'.[13]

'Multiple' Agreements

'Multiple' consumer credit agreements are dealt with by section 18 which, says Bennion,[14] 'is both an anti-avoidance provision and a clarifying provision. In

Page 89

pursuit of the first purpose, it seeks to prevent credit grantors and hirers from evading the Act by combining in one agreement (a) transactions [of one kind] that it intends to regulate [with others, of a different kind, that it also intends to regulate; or (b) transactions it intends to regulate] with others it does not.[15] In pursuit of the second purpose, it states the consequences of the obvious fact that the whole or parts of a single agreement, even when it is not designed for evasion of the Act, will often fall into more than one category. It spells out what under earlier legislation had been left to the court to divine, and should be taken as declaratory of what the courts might have been expected to lay down even without its guidance'. Section 18(1) to (4) are as follows:

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[8] http://www.francisbennion.com/2009/043.htm.

[9] 'It seemed right to me that if the creditor company could not be bothered to ensure that all the prescribed particulars were accurately included in the credit agreement it deserved to find it unenforceable, and that the court should not have power to relieve it from this penalty. Nobody queried this, and it went through Parliament without debate'. F Bennion (2003) 167 JPN 773: http://www. francisbennion.com/2003/061.htm.

[10] *Wilson v. First County Trust Ltd* [2001] EWCA Civ 633, [2001] 3 All ER 229. The Court held that the exclusion of any judicial remedy in such a case engages Art. 6(1) of the Convention (which guarantees everyone a fair, expeditious, and public trial of disputes about his or her civil rights) and Art. 1 of the First Protocol (a prohibition against depriving a person of his or her possessions).

[11] *Wilson v. First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97. Their Lordships held that, if an agreement governed by the 1974 Act had been entered into before the implementation of the 1998 Act, no court could make a declaration of incompatibility in respect of the 1974 Act. Section 3(1) of the 1998 Act did not apply to such a case because Parliament could not have intended its application to have the effect of altering parties' existing rights and obligations under the 1974 Act.

[12] See sections 15, 70, and 71(2), and Schedule 4 (with Schedule 3 para. 11); and SI 2007/123, Art. 3(2), Schedule 2. 'Section 127(3) was repealed..., but not so as to affect improperly-executed agreements made before the repeal came into force': [2009] EWHC 103 (Ch) at para. [6] per Judge Purle QC. This is consistent with the general saving in the Interpretation Act 1978 (United Kingdom) section 16(1)(b); F Bennion, *Statutory Interpretation* (5th edn 2008) code section 89(ii), 307-09.

[13] On 'Drafters, Drafting and the Policy Process', see C Stefanou in C Stefanou and H Xanthaki (eds) *Drafting Legislation—A Modern Approach* (2008) ch. 20, and Sir Stephen Laws KCB, QC (9 February 2011) *The Loophole* 66: http://www.opc.gov.au/calc/docs/Loophole-Feb2011.pdf.

[14] [1999] CICC 1: http://www.francisbennion.com/1999/004.htm.

[15] This sentence has been amended to make clearer Bennion's intended anti-avoidance purpose in saying that section 18 'reverses *Mutual Finance Ltd v. Davidson* [1963] 1 WLR 134, where an agreement for the hire-purchase of a car, coupled with the advance of credit covering the premium insuring the car, was mistakenly held to be wholly a hire-purchase agreement . . . with a multi-agreement document... it is possible to collect from the document as a whole what amount to the respective terms of two or more separate agreements. When we have done this, we can decide in relation to each set of terms whether or not it constitutes an agreement falling within a category mentioned in the ... Act'.

18 Multiple agreements

(1) This section applies to an agreement (a 'multiple agreement') if its terms are such as—

(a) to place a part of it within one category of agreement mentioned in this Act, and another part of it within a different category of agreement so mentioned, or within a category of agreement not so mentioned, or

(b) to place it, or a part of it, within two or more categories of agreement so mentioned.

(2) Where a part of an agreement falls within subsection (1), that part shall be treated for the purposes of this Act as a separate agreement.

(3) Where an agreement falls within subsection (l)(b), it shall be treated as an agreement in each of the categories in question, and this Act shall apply to it accordingly.

(4) Where under subsection (2) a part of a multiple agreement is to be treated as a separate agreement, the multiple agreement shall (with any necessary modifications) be construed accordingly; and any sum payable under the multiple agreement, if not apportioned by the parties, shall for the purposes of proceedings in any court relating to the multiple agreement be apportioned by the court as may be requisite.

The first, anti-avoidance purpose is served by agreements being assessed by reference to their terms, and by groups of terms relating to different facilities or

Page 90

transactions being treated as separate agreements that, if regulated by the Act, are (once separated) under the applicable financial limit.

A Novel Feature: Examples of Application of Important Defined Terms

The Act has a novel (and, in UK legislation, rare[16]) feature: examples illustrating application of 31 important defined terms used in it. Section 188 makes it clear that the examples Schedule 2 gives are not exhaustive and that, if it were thought that any of them conflicts with any other provision of the Act, that other provision would prevail. Power is given (by section 188(4)) to add further examples (or amend existing ones) if thought desirable, but this power has not been used. Debating the Bill for the Act on 6 May 1974, Lord Jacques explained that this amendment power was initially only to change financial limits, but was widened to, among other things, allow recognition of changes in recognizable credit concepts; 'Since the examples merely illustrate the law contained in the body of

[16] 'The model of Schedule 2 has', Bennion says, 'not been repeated in British legislation'. He mentions also the following comment on Schedule 2 by Australian Attorney-General, P Durack QC, *Symposium on Statutory Interpretation* (Canberra 1983) para. [5.10]: 'The advantages of using such techniques in appropriate cases have perhaps been ignored or undervalued, or both': http://www.f rancisbennion.com/2009/043.htm. On use of legislated examples, see C E Odgers *The Construction of Deeds and Statutes* (3rd edn, Sweet & Maxwell, London, 1952) 234 and 235 (internal aids to construction: illustrations); Bennion, above n 12, code section 250; and Carter and Green (2007) 28(1) Stat LR 1 23-7. Both Odgers and Bennion mention the illustrations in the University Elections (Single Transferable Vote) Regulations 1918 (United Kingdom) (SR&O 1918 No. 1348) Schedule 1. See, however, the textual examples in the Banking Act 2009 (United Kingdom) sections 22(4), 38(4), and 57(4); Corporation Tax Act 2009 (United Kingdom) sections 264(2)(c), 332(l)(a), 1190(2)(b), and 1317(2). Compare Sexual Offences (Scotland) Act 2009 (asp 9) section 7(4) ('written communication'). See similarly the Medicines (Products for Human Use) (Fees) Regulation 2009 (No. 389) (United Kingdom) Schedule 1, Part 1, para. 21(o), and the Renewables Obligation Order 2009 (No. 785) (United Kingdom) Art. 54(3)(a) and (b). See also the Torts (Interference with Goods) Act 1977 (United Kingdom) sections 3(6), 6(2), 7(4) (noted by David Elliott); Adoption and Children Act 2002 (United Kingdom) section 69(3) (compare the Legitimacy Act 1976 (United Kingdom) section 5(5)); and Consumer Credit (Early Settlement) Regulations 2004 (No. 1483) (United Kingdom) Reg. 4(3) and Schedule. Ghana's First Parliamentary Counsel from 1960-65, S Namasivayam *The Drafting of Legislation* (Ghana Universities Press Accra 1967) 11,130, and 131, says examples of enacted illustrations in Ghana law include those in the Rent Act 1963 (1963 Act 220) (Ghana) section 16.

the Bill, there is no question of [any use of the power to amend or add examples also] altering substantive legislative provisions'.[17]

Schedule 2 contains 2 Parts: Part I (a table listing defined terms and giving the section by which the terms are defined and the examples by which the terms are illustrated) and Part II (the examples themselves). Part I indicates that multiple agreement is defined by section 18 and illustrated by examples 16 and 18, which are as follows:

Page 91

Example 16

Facts. Under an unsecured agreement, A (Credit), an associate of the A Bank, issues to B (an individual) a credit-card for use in obtaining cash on credit from A (Credit), to be paid by branches of the A Bank (acting as agent of A (Credit)), or goods or cash from suppliers or banks who have agreed to honour credit-cards issued by A (Credit). The credit limit is £30.

Analysis. This is a credit-token agreement falling within section 14(1)(a) and (b). It is a regulated consumer credit agreement for running-account credit. Since the credit limit does not exceed £30, the agreement is a small agreement. So far as the agreement relates to goods it is a debtor-creditor-supplier agreement within section 12(b), since it provides restricted-use credit under section 11(1)(b). So far as it relates to cash it is a debtor-creditor agreement within section 13(c) and the credit it provides is unrestricted-use credit. This is therefore a multiple agreement. In that the whole agreement falls within several of the categories of agreement mentioned in this Act, it is, by section 18(3), to be treated as an agreement in each of those categories. So far as it is a debtor-creditor-supplier agreement providing restricted-use credit it is, by section 18(2), to be treated as a separate agreement; and similarly so far as it is a debtor-creditor agreement providing unrestricted-use credit. (See also Example 22.)

Example 18

Facts. F (an individual) has had a current account with the G Bank for many years. Although usually in credit, the account has been allowed by the Bank to become overdrawn from time to time. The maximum such overdraft has been is about £1,000. No explicit agreement has ever been made about overdraft facilities. Now, with a credit balance of £500, F draws a cheque for £1,300.

Analysis. It might well be held that the agreement with F (express or implied) under which the Bank operate[s] his account includes an implied term giving him the right to overdraft facilities up to say £1,000. If so, the agreement is a regulated consumer credit agreement for unrestricted-use, running-account credit. It is a debtor-creditor agreement, and falls within section 74(l)(b) if covered by a direction under section 74(3). It is also a multiple agreement, part of which (i.e. the part not dealing with the overdraft), as referred to in section 18(l)(a), falls within a category of agreement not mentioned in this Act. (Compare Example 17.)

Drafter as Interpreter

What Bennion calls the drafter's 'usual anonymity'—failure or refusal to explain or interpret his or her own drafting—is supported and opposed on various

Page 92

grounds.[18] '[I]n construing a statute', Lord Halsbury famously uttered, 'I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse

[17] HL Hans vol 351, col 340.

[18] See the authorities in Bennion, above n 12, code section 6, 33, and section 237, 712. See also Green-berg (2006) 27(1) Stat LR15,27-28 on *Hinks v. R* [2000] 4 All ER 833 (HL) and 'The suggestion that a letter from the draftsman could be adduced in aid of construction of legislation [being] made and rejected'. See also *Poon v. Police* [2000] 2 NZLR 86 (HC) at [22] per Baragwanath J ('The actual intention of Parliamentary counsel is

what he intended to do with the effect of the language which in fact has been employed'.[19] Bennion, in contrast, said in 1962 that 'It is obvious that no one can know the structure and mechanism of an Act so well as its author. If a doubt arises he is often able to point to the provisions which will resolve it'.[20]

Bennion on Section 18's Intended Application

Bennion in 1999 explained section 18's intended application, saying 'It seems desirable to do this in view of the widespread misapprehension concerning section 18'.[21]

Some of this 'misapprehension' was analysis of section 18 that Bennion regarded as misapprehending it. This was analysis by, on the one hand, Goode in *Consumer Credit Legislation* (1977), paragraphs 559, 561, 564, 571, and 2419, and, on the other, by Guest and Lloyd in *Encyclopaedia of Consumer Credit Law* (1975) notes to section 18 (and echoed by Macdonald in *Credit*, April 1986, 20).

Bennion thought section 18 effectual to require parts of an agreement falling within discrete but regulated categories to be treated as two or more separate regulated agreements.

But Goode's analysis, which involved an agreement falling either within section 18(l)(a) or within section 18(l)(b) (but not, as Bennion said was intended to be possible, within both), was that some agreements could, by combining two or more distinct credit bargains each with some uniform terms, escape all regulation by exceeding the financial limit.

Page 93

'My analysis is confirmed', Bennion said, 'by Example 16 in Schedule 2 . . . The example concerns the issue of a credit card for use in obtaining on credit either cash or goods. The analysis attached to this statutory example says that so far as it relates to goods the agreement is to be treated as a separate debtor-creditor-supplier agreement, while so far as it relates to cash it is to be treated as a separate debtor-creditor agreement. In defence of his own analysis, Professor Goode finds himself compelled to say that Example 16 is erroneous. He also says that Example 18 is erroneous! That statutory examples are admitted by him to be inconsistent with Professor Goode's own analysis might rather be thought an indication that it is the latter that is out of keeping with the legal meaning and intention of the Act'.

Bennion also considered incorrect the result in the county court case of *National Home Loans Corporation PLC v. Hannah (Aidan Ellis)* [1997] CCLR 7. The *Hannah* case concerned whether a remortgage coupled with a further cash advance was properly regarded as (a) a single agreement for unrestricted use credit or, instead, (b) two agreements, one (the remortgage) for 'restricted-use credit', and the other (the top-up loan) for 'unrestricted-use' credit. Judge Mellor preferred analysis (a).

Section 11(1)(c) provides that 'A restricted-use credit agreement is a regulated consumer credit agreement— •••(c) to refinance any existing indebtedness of the debtor's, whether to the creditor or another person— and "restricted-use credit" shall be construed accordingly'.

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never admitted') and Carter [2009] NZLJ 205, 207 on *CIR v. BNZ Investments Ltd* [2009] NZCA 47 at para. [29] per O'Regan J.

[19] *Hilder v. Dexter* [1902] AC 474,477 (HL). Lord Halsbury abstained from deciding the meaning of the Companies Act 1900 because he had been 'largely responsible for [its] language' and his exceptional stake in the matter as a drafter of it raised a danger specific to the drafter (subjective partiality) that would prevent him from appreciating fully the objective, literal meaning of the words it used. He did, however, endorse the other judges' unanimous interpretation of it as reflecting not 'my intention, but the intention of the Legislature'. Hutton, *Language, Meaning and the Law* (2009), 75, says that: 'On close inspection, [Lord] Halsbury's statements collapse into contradiction'.

[20] *Constitutional Law of Ghana* (1962), 346: http://www.francisbennion.com/1962/001/ch7.htm. *Bennion on Statute Law* (3rd edn 1990), 21, http://www.francisbennion.com/1990/002/020.htm.

[21] http://www.francisbennion.com/1999/004.htm.

But section 11(3) also provides that 'An agreement does not fall within [section 11(1)] if the credit is in fact provided in such a way as to leave the debtor free to use it as he chooses, even though certain uses would contravene that or any other agreement'.

Judge Mellor relied on section 11(3), holding that the whole loan (including the remortgage part) was for unrestricted-use credit. He did this on the basis that the debtor would have been entitled to repay the existing mortgage from any source and, if he did, then he would have been free to use the whole of the new loan for any purpose he wished.

'However this is', said Bennion, 'a question of evidence. If, as seems to have been the case, the facts were that the debtor lacked the means to repay the existing mortgage loan in any other way then he was not in fact free to use the whole of the new loan for any purpose he wished. A finding to the contrary needs to have been based on evidence that he was free in the actual circumstances of the case, which it was not. On the contrary the jointly instructed solicitor who received the money advanced from the new lender would not have been entitled to pass to the debtor the portion required to redeem the existing mortgage. So *Hannah* was wrongly decided'.

'Section 18 has not so far come before the courts at any level higher than a county court', said Bennion, 'When it does do so they are likely to be asked to decide between Professor Goode's analysis and my own. No one can say which will be found to be correct, but there is a possibility that mine will be upheld'.

Page 94

Judicial Consideration of Section 18

before *Southern Pacific Mortgage Ltd v. Heath*

The first case on section 18 to reach the Court of Appeal—*National Westminster Bank PLC v. Story*[22]—revealed however what Bennion, in an addendum[23] to his 1999 article, called 'an uncertain judicial grasp of the intended working of the section'.

The Story case concerned an agreement between the bank and the appellants made in November 1986 by which the bank agreed to advance a total of £35,000 by three separate credit facilities: an overdraft of £15,000 to Mr Story and two separate loans of £5000 and £15,000, to the appellants jointly. The question was whether, under section 18, the November 1986 agreement, so far as it related to the two loans, should be treated for the purposes of the Act as two separate agreements, one for each loan. If that was so, the two separate agreements would on the facts be regulated agreements that were improperly executed, and so subject to section 65(1) (consequences of improper execution).

The only ground on which it was alleged by the appellants that the two loans should be so treated was that the loan for £5000 was a restricted-use credit agreement as defined by section 11(1) while the other loan was an unrestricted-use credit agreement as defined by section 11(2).

Judge Jack in the Bristol Mercantile Court held that in fact both loans were for unrestricted-use credit, and that the November 1986 agreement was a single agreement that therefore did not fall within section 18. Both these findings were upheld on appeal. Bennion criticized that result on grounds that included the following:

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[22] [1999] CCLR 70 (EWCA).

[23] http://www.francisbennion.com/1999/029.htm. In a later letter published at (1999) 149 NLJ 1068 on the article on *Story* by I MacDonald QC, 'What's the Story with Multiple Agreements' (1999) 149 NLJ 962, Bennion's co-author of *Consumer Credit Control* (and since 1987 its sole editor), Professor Paul Dobson said 'Francis Bennion's article addresses a number of the issues discussed in *Story*. It is possible that if in *Story* the court had considered the arguments advanced in that article, the court would not have found them persuasive. It is a shame, however, that in a judgment delivered in May the court was, it seems, left unaware of the existence of these arguments put forward in an article published in February and for many years set out, albeit less fully, in the text of our loose leaf work. One wonders why these authorities were not, if (as it appears) they were not, drawn to the attention of the court'.

- Judge Jack, as quoted by Auld LJ at 3B and 8G, said 'it would be artificial to break [the transaction] down into three separate agreements and contrary to the way it was made'. This is an inadmissible argument. Section 18(2) clearly and peremptorily says that, where a part of an agreement falls within section 18(1), that part *shall* be treated for the purposes of the Act as a separate agreement. Section 18(2) is necessarily artificial because *ex hypothesi* the parties themselves made only one agreement.
- Auld LJ at 6E repeats, without refuting it, a suggestion by counsel that section 18 could have been got round if the parties had negatived its

Page 95

application by an express stipulation in their agreement. This overlooks the fact that section 173(1) of the Act forbids contracting out.

- Auld LJ at 14A-D appears to give support to the suggestion in paragraph 4.5 of the OFT's discussion paper of June 1995 'Multiple Agreements and section 18 of the Consumer Credit Act 1974'[24] that an agreement is not in parts if the categories are so interwoven that they cannot be separated without affecting the nature of the agreement as a whole. This suggestion runs contrary to the plain wording of section 18 and is without any foundation.
- Judge Jack and Auld LJ overlooked the effect of section 18(l)(a) in rendering the overall agreement a multiple agreement by reason of two distinct facts. The first (Case A) is that one part of it (the £15,000 overdraft) is a running-account agreement while the other part (the £20,000 loan) is a fixed-sum credit agreement. The second (Case B) is that one part of it (covering £12,000 of the credit advanced) is, as argued in the Comment appended to the CCLR report of the case, a restricted-use credit agreement (being a refinancing agreement falling within section 11(1)(c)), whereas the remainder is an unrestricted-use credit agreement. Section 18(2) then requires each part to be treated as a separate agreement.

Dimond v. Lovell[25] reached the House of Lords. It involved an agreement under which a car was hired on credit to a person whose usual car was damaged in a road accident, on the basis that the hirer would not pay for the hire, but the hire car company would pursue the hirer's accident claim and satisfy its claim for hire out of any damages recovered on the hirer's behalf. Insurers for the road accident defendant argued that the accident hire agreement was an improperly executed regulated agreement, and so unenforceable. The Court of Appeal and House of Lords agreed. As Lord Hoffman explained, the hire car company advanced an argument that the hiring agreement was under section 18 a multiple agreement: 'One part was the hiring of the car and the other the provisions for pursuit of the claim. If the [part as to hiring] were construed as a separate agreement, it would not include any provision for credit and not be a regulated agreement. The credit provisions, if any, would belong to the part that dealt with the pursuit of the claim'. Lord Hoffmann, giving the main speech, rejected this argument: 'The difficulty I have with this argument is that it seems to sever the provisions that create the debt (hiring the car) from the provisions that allow credit for

Page 96

payment of the debt. Whatever a multiple agreement may be, one cannot divide up a contract in that way. The creation of the debt and the terms on which it is payable must form parts of the same agreement... I accept that the hiring agreement was a single contract. But I do not accept [counsel's submission as to what that contract was ... the [hire car company's] only primary obligation ... was to

[24] RB Mawrey QC, an editor of *Goode: Consumer Credit Law & Practice*, and author of *Blackstone's Guide* to the Consumer Credit Act 2006, has commented (in 'Clear the way' (22 December 2009) Solicitors Journal) that 'As long ago as 1995, the then DTI conducted a consultation on section 18. The response of the Bar contained a detailed critique of section 18 and concluded: "The Bar's preferred solution would be to repeal section 18 in its entirety but to achieve its objectives by different means."
This submission was adopted by the main trade association as its own response. It is hard to believe that anyone (except possibly Bennion himself) could have argued in favour of total retention of the status quo. But that is what happened'.

[25] [2000] UKHL 27; [2000] 2 All ER 897; [2002] 1 AC 384; [2000] 2 WLR 1121 (HL).

provide the car. The rest of the agreement dealt with the conditions upon which it would be entitled to recover the hire. To such an agreement section 18 has, of course, no relevance'.

In *Watchtower Investments Ltd v. Payne*,[26] Peter Gibson LJ said of section 18 only that 'It is unnecessary to go into the complexities of that provision'.

In *Clark v. Tull (t/a Ardington Electrical Services),*[27] the Court of Appeal described the case as 'the third round of a contest between the motor insurance market and credit hire companies which provide the innocent victims of motor accidents with car repair and hire services at little or no cost to them. The commercial success of such schemes has substantially increased the cost of motor claims borne by insurers. This has no doubt motivated their sustained legal attack on the schemes. Their first line of attack was that the car hire agreements were champertous. This failed in *Giles v. Thompson* [1994] AC 142. Next, it was contended that the hire agreements were regulated consumer credit agreements which did not meet the statutory requirements laid down by the Consumer Credit Act 1974 so were unenforceable. This succeeded in *Dimond v. Lovell*..., although Lord Hoffman described it as "a technical defect which more sophisticated drafting can easily correct." At both these earlier stages of the contest the House of Lords accepted that the credit hire companies fulfilled a real need and bridged a gap in the market and noted that there were many county court cases awaiting their decisions which they obviously hoped would put an end to further controversy. This was not to be. In four of the cases before us the challenge is now to the whole scheme to provide credit for repairs and car hire which is said to be a pretence designed to avoid the restrictions imposed by the 1974 Act. Alternatively it is contended that the agreements are still unenforceable under specific provisions of the Act. Substantial issues relating to the measure of damages are also raised. Again thousands of cases in county courts up and down the country await the decisions of the higher courts on these issues'. The Court rejected an attempt, using section 18, to enable recovery under part of the agreements even if other parts of them were unenforceable. It was submitted that the court must 'analyse the agreements ... carefully and separate out those parts of them which contain obligations which are regulated by the Act and those which are not. Here the obligations in conditions 9(v) and (vi) in the Helphire credit hire agreement and the corresponding provisions in their and Accident Assistance's credit repair agreement are free-standing and enforceable even though the credit provisions are not. So, the argument goes, the risk of double recovery disappears because if

Page 97

the claimants sue and recover from the defendants they will be obliged to pay over what they recover under these free-standing and enforceable provisions ... this [submission] has some superficial attraction, but on closer analysis we cannot accept it. Condition 9 and its equivalent in the Helphire credit repair agreement is expressed to contain conditions for "Helphire's provision of credit." In the Accident Assistance agreement credit is provided "in accordance with this agreement" which contains the condition in question. We do not think it is possible to regard these terms as having a free-standing life of their own. They are simply part of the terms on which credit is granted'.

London North Securities Limited v. Meadows[28] involved a credit agreement loan of £5750 and a related charge over the defendants' home (subject to two prior mortgages), and their inability to keep up payments under the credit agreement, with the result that the creditor sought possession and was granted a suspended possession order. The defendants argued the agreement was not properly executed because of its failure to comply with section 61 of the Act and with the Consumer Credit (Agreements) Regulations 1983, and was unenforceable by virtue of section 65 of the Act because it failed correctly to state the amount of the total charge for credit. This point involved a failure to deduct an amount used to pay-off arrears on the prior mortgages, and also the deduction of £750 in respect of a loan repayment insurance premium. The Court of Appeal disagreed with County Court Judge Howarth that the amount to clear the arrears was part of the total charge for credit, not part of

[26] [2001] EWCA Civ 1159.
[27] [2002] EWCA Civ 510.
[28] [2005] EWCA Civ 956.

the credit itself, but agreed with the Judge that that the £750 spent on the insurance premium was part of the total charge for credit (which was thus misstated making the agreement unenforceable).

Giving the Court's decision, Lloyd LJ considered, but regarded it as unnecessary to decide,[29] whether section 18 required the agreement to be regarded as three separate agreements, one within section 11(1)(b) (restricted-use credit to finance a transaction with a third party insurer) as regards the £750, another within section 11(1)(c) (restricted-use credit to refinance any existing indebtedness of the debtor) as regards the arrears, and the rest within section 11(2) (unrestricted-use credit). Lloyd LJ said (at [70]): 'In relation to section 18 of the Act, Counsel made submissions ... as to whether, if the agreement is to be dissected into three separate agreements ... the document failed to comply with the Act in another respect namely by not stating the amount of credit under each part of the agreement separately. We were shown passages from Goode on Consumer Credit and an article by Mr Francis Bennion on the application of section 18 from which it is apparent that the matter is far from clear and open to some controversy. It is unnecessary for the purposes of dealing with this appeal to enter into that debate, which would only arise if . . . the insurance premium [is (contrary to

the Court's conclusion) properly to be treated as] being part of the credit rather than the total charge for credit. In those circumstances we say nothing more about section 18'.

Goshawk Dedicated (No 2) Ltd v. Governor and Company of the Bank of Scotland[30] involved a management scheme for claims by persons who had suffered injury. The scheme included conditional fee agreements with solicitors, credit agreements with a litigation funder, legal insurance agreements providing cover for various expenses if the claims failed, and assignments to give the litigation funder a direct claim against the insurer if (as in many instances occurred) the claims failed. The insurers (represented by one of their number, Goshawk) rejected liability. It was common ground that each credit agreement was one of a kind regulated by the Act. But the insurers asserted that credit agreements in the form used did not comply with the requirements of the Act, and accordingly were unenforceable. A further consequence, according to the insurers, was that the insurance policies could not be resorted to in order to obtain payment of unenforceable debts. Goshawk brought proceedings in order to test the validity of those assertions. In the High Court (Chancery Division), Sir Francis Ferris rejected the allegations of non-compliance with the Act, and thus Goshawk's claim for declaratory relief in the proceedings.

One group of those allegations involved section 18. Sir Francis said (at [88]) the arguments concerned were, like others in the case, 'of considerable complexity'. After quoting part of section 18, Sir Francis said (at [89]) that 'This section has generated acute controversy amongst lawyers practising in the field of consumer credit law. One of the main problems is the meaning of the terms "part" and "category." For my part I fully appreciate why there should be such controversy'. Among the disputed allegations in the case were the following propositions about the credit agreement used in the scheme:

- it provided both a fixed-sum credit and a running-account credit;
- it is thus a multiple agreement within section 18;
- in particular it is a multiple agreement in parts, each of which is to be treated for the purposes of the CCA as a separate agreement;
- therefore, the requirements concerning the documentation of a fixed-sum credit agreement must be complied with in respect of the fixed-sum part, and the requirements concerning a running-account credit agreement must be complied with in respect of the running-account part;
- it has been documented as a running-account credit agreement only; and

[29] In *Southern Pacific Mortgage Ltd v. Heath* [2009] EWCA Civ 1135 at [32] Lloyd LJ said that: 'In . . .*Meadows* ..., decided by Lord Phillips of Worth Matravers MR, Waller LJ and myself, it was, again, unnecessary to decide any point arising under section 18'.

[30] [2005] EWHC 2906 (Ch); [2006] 2 All ER 610. See http://www.francisbennion.com/2006/001.htm.

- it is thus unenforceable against the debtor.

Sir Francis held that the agreement was purely a running-account credit agreement. He added (at [105] and [106]) that 'My earlier conclusion makes it unnecessary for me to address [the proposition that the credit agreement is a multiple agreement within section 18]. This proposition depends on matters which are the

Page 99

subject of the acute controversy referred to earlier. It is one in which the main academic commentators, Professors Goode and Guest, are to be found on one side and Mr Francis Bennion, the draftsman of the CCA, on the other (see *Goode: Consumer Credit Law and Practice*, Section 1C, paragraphs 25.105 to 1C [25.125]; *Guest and Lloyd's Encyclopaedia of Consumer Credit Law*, pages 2022/7 to 2024/5; *Chitty on Contracts* 29th edition, Vol 1, paragraphs 38-044 to 38-048; Bennion, Multiple Agreements under the Consumer Credit Act 1974). There is virtually no reported judicial consideration. In National Westminster Bank v. Story [2000] GCCR 2381 at pages 2388 to 2390 Auld LJ made certain observations which suggest that 'category' in section 18 has a restricted meaning, but these observations were both obiter and tentative ... I have given careful consideration to whether or not I should enter into this controversy, particularly having regard to the fact that the issue was fully argued before me. But to do so would inevitably add considerably to the length of this judgment and the questions raised are of great difficulty. In the light of what I have said on the fixed-sum/running-account issue, whatever I might say would not be decisive of this case. In the end, therefore, I have decided to say nothing more on this issue'.

In *Office of Fair Trading v. Lloyds TSB Bank plc*,[31] Waller LJ for the Court of Appeal set out (at [39]-[41]), as part of an overview of the Act, sections 18(l)-(3) and 188, and Example 16 in Schedule 2. In doing so, Waller LJ did not take issue with any aspect of the analysis in Example 16, but the Court was not required to express a view on that analysis in order to deal with the case, which concerned whether (as the Court held) credit provided under an agreement where there was a four-party structure was a restricted-use credit agreement within section 11(1)(b), and whether (as the Court held) section 75(1) of the Act (Liability of creditor for breaches by supplier) applied in cases where the supply transaction was entered into abroad.

Southern Pacific Mortgage Ltd v. Heath: Background

Southern Pacific Mortgage Ltd's predecessor advanced £28,932.50 to Jayne Elizabeth Heath under a mortgage dated 7 May 2002 secured on her home at 52 Lowton Street, Worksop, Nottinghamshire. Approximately £19,000 of the advance was required under the terms of the 2002 mortgage to be applied to discharge a previous mortgage on the property granted by another lender.[32] The rest was used by Heath for her own purposes. Heath fell into arrears. Possession orders were made against her by District Judge Smith on 18 June 2004 and on 29 September 2006. Heath wished to appeal those two possession orders, and for that purpose sought, from the High Court of Justice Chancery Division at

Page 100

Birmingham, permission to appeal out of time. Her counsel contended that the mortgage was an improperly executed regulated consumer credit agreement, and so unenforceable under section 127(3) which, despite its repeal on 6 April 2007, continued to apply to the agreement.

At the time of the making of both of the possession orders, Heath was receiving advice from the Citizens Advice Bureau. It did not alert her to the potential availability of the defence she later advanced. In July 2007, the Appellant contacted Framework, a local housing charity. Whilst their in-house Barrister was considering her papers, a Warrant of Execution was issued out of the Worksop

[31] [2006] EWCA Civ 268; [2006] 2 All ER 821.

[32] The relevant 2002 Mortgage condition is as follows: 'If the Property is mortgaged to another lender when the Company makes the Loan, the other lender's mortgage must be paid off out of the Loan'.

County Court. Heath's solicitors were instructed on 12 September 2007 and on 4 October 2007 obtained for her case public funding. On 16 October 2007, District Judge Hudson stayed the Warrant pending appeal provided an appeal notice was filed by 13 November 2007. This condition was satisfied. The appeal notice also sought an extension of time. Following further procedural orders on 30 November 2007, 15 January 2008, and 20 May 2008, the matter came before the High Court of Justice Chancery Division at Birmingham, which gave judgment on 29 January 2009.[33]

Judge Purle QC, sitting as a High Court Judge, granted permission to appeal, and an extension of time, saying (at [8]) 'There is some controversy over the ambit of section 18, and there are conflicting judgments at County Court level. I have no doubt that, for that reason alone, this is a proper case for permission to appeal to be given', and adding (at [19] and [20]) Southern Pacific Mortgage Ltd 'is in no worse position, as a result of the delay, in answering the Consumer Credit Act point than it would have been had the point been taken at the outset. Moreover, I do not think that [Heath] can realistically be blamed for not having this point in mind until she was alerted to it following consideration by Framework's barrister of the matter. The point is not obvious, either to a lay person or indeed to most lawyers. I am neither surprised nor remotely critical that the Citizens Advice Bureau did not spot the point. In those circumstances, there is considerable merit in granting an extension of time for the purposes of what is otherwise an entirely proper appeal. If [Heath's counsel] is correct, [Heath] is at risk of being turned out of her home when Parliament has declared the 2002 mortgage to be unenforceable. The possession orders, though made some time ago, have not been enforced and the interests of justice are in favour of allowing [Heath] now to take the Consumer Credit Act point'.

The 2002 mortgage appeared on its face to escape the consumer protection provisions of the Act, as it exceeded the then limit of £25,000. The advance included charges for credit but, even with those stripped out, still exceeded £25,000. But the point taken (outlined by Judge Purle QC at [5]) was 'that the mortgage was a multiple agreement in 2 parts within section 18(1)(a). The first part was the advance of approximately £19,000. This was in the category of restricted-use credit falling within section 11(1)(c), as the advance was to refinance [Heath's]

Page 101

existing indebtedness to the previous mortgagee. The rest was in the different category of unrestricted-use credit falling within section 11(2), as [Heath] was free to do whatever she wanted with it. Under each part, credit of less than £25,000 was provided. Each part was therefore to be regarded as a separate consumer credit agreement regulated by the Act. This result follows, [Heath's counsel] contends, from section 18(2)'.

That analysis, which follows closely both Example 16 in Schedule 2 and an ex-ample in Bennion's 1999 article on multiple agreements, had been accepted twice at County Court level in two cases in which Heath's counsel appeared for the borrower.[34] So why did Judge Purle QC feel unable to adopt (and hold wrong) that analysis, and dismiss Heath's appeal against the possession orders, concluding that the mortgage was not a multiple agreement within section 18(1)(a), and was therefore enforceable?

Southern Pacific Mortgage Ltd v. Heath:

Chancery Division of High Court

Judge Purle QC held that, assessing the substance of the agreement by reference to its terms (and not the parties' subjective intentions), it was not an agreement 'in parts', and thus section 18(2) did not apply to it. 'There was just one advance', said the Judge (at [28]), 'and one cannot get from the terms

[33] [2009] EWHC 103 (Ch).

[34] *Ocwen v. Coxall and Coxall* [2004] C.C.L.R. 7, and the unreported decision of *London North Securities Ltd v. Williams and Williams*, Reading County Court, 9 September 2005.

of the 2002 mortgage separate bargains which have been rolled up into one'.[35] The Judge added (at [31]) that 'it is difficult to see from the terms of the 2002 mortgage how it can be split up into parts at all'. The Judge disagreed with a suggestion by Heath's counsel that 'it is wrong to adopt a contractual approach and look at the form of the agreement rather than its substance', saying (at [44] and [45]): 'the Act positively requires the interpreter to address the "terms" of the agreement and, by that process (which must be contractual) to identify whether the agreement is in parts and (if so) whether the parts are in different categories, at least one of which must be mentioned in the Act. . . The debate is not. . . materially advanced by invoking substance over form'. The Judge noted (at [39]) the suggestion[36] in the 'OFT discussion paper of June 1995 ... that an agreement was not in parts if the categories were so interwoven that they could not be separated without affecting

Page 102

the nature of the agreement as a whole. If that is right (as I think it is) then the 2002 mortgage could not be separated into parts without affecting its essential character, which was to make one advance, not two'.

Judge Purle QC noted (at [25]) that 'commentators on the Act appear to agree that section 18 is an anti-avoidance provision', and accepted 'So it is (at least in part)'. The Judge (at [62]) held section 18's text, even with that purpose in mind, inapt 'to allow an agreement to be transformed into something which it is not. It was open to lenders at the time to avoid regulation, consistently with Parliament's wishes, by lending more than £25,000. That does not justify the Court in treating a loan beyond the limit as one within the limit simply because the loan could have been but was not structured as 2 smaller loans'.

Despite holding that the agreement was not one in, and so did not have, 'parts', Judge Purle QC said (at [31]) that 'it may well be appropriate to regard the 2002 mortgage as falling within more than one category'. However, 'even if the 2002 mortgage is properly regarded as falling within more than one category', said the Judge (at [32])) 'it is not regulated by the Act, as the advance was for more than £25,000. For apportionment to come about, the agreement needs to be in parts, so that subsections (2) and (4) come into play'. However, in a postscript (at [69]-[71]), the Judge considered whether 'it might have been argued that section 11(3) applied, a conclusion that commended itself to Judge Mellor in the *Hannah* case, so that this never was an agreement falling within 2 different categories, but an agreement which, as a whole, was for unrestricted-use credit': 'the monies might be said to have been provided to the Appellant via her solicitors as her agent in a way which left her free to use them as she chose, so that the whole of the borrowing was unrestricted-use credit as a result of section 11(3). I need not, however, reach a final view on this point as it is not necessary for my decision and was not fully developed in argument'.

Judge Purle QC thus gave section 18 a restricted reading, holding that it enables notional division of a credit agreement in a single document or group of documents only if the terms of the agreement make it in substance two or more essentially distinct bargains. As so construed, section 18 does not enable the credit-card agreement in Example 16 in Schedule 2 of the Act to be divided notionally in the way mentioned in that example (that is, into (1) a debtor-creditor-supplier agreement providing restricted-use credit (goods), and (2) a debtor-creditor agreement providing unrestricted-use credit (cash)). As so construed, section 18 also does not enable the notional division of the 'top-up loan

[35] '[Heath] borrowed one sum alone', said the Judge at [38]. 'Had she for example, chosen not to draw down the amount needed for redemption of the existing mortgage, and paid it off out of other re- sources, the 2002 mortgage would have needed rewriting, as she did not have separate facilities, but one loan in a fixed amount. She did not have the option to draw down a defined part only of the loan'. The Judge also said, at [30], '"The Loan" was .. . the total advance. There was one loan, not two. It was merely a term that the existing mortgage should be paid off out of that total advance, not that it should be paid out of any particular part of it. Moreover, had [Heath] paid off the existing loan from another source, the total advance would not have been any different'.

[36] This suggestion was referred to with apparent approval by Auld LJ in the *Story* case, but is one that Bennion has said 'runs contrary to the plain wording of section 18 and is without any foundation'.

agreement' fully worked example[37] in Bennion's 1999 article on multiple agreements, the facts of which follow fairly closely those in *Heath's* case.

Page 103

Judge Purle QC regarded his approach as consistent with Judge Mellor's in the Hannah case. Judge Purle also mentioned the Court of Appeal's 1999 decision in the Story case (which, as discussed above, Bennion also considers wrong), but distinguished it as involving an agreement for two separate credit facilities (loans) both of which were held by the Court of Appeal to be for unrestricted-use credit. The Judge also regarded as wrongly decided, as to the proper construction of section 18, two earlier county court decisions[38] notionally dividing under section 18 an agreement for a single credit facility comprising restricted-use and unrestricted-use components. Judge Purle QC also regarded his approach as analogous with Lord Hoffmann's 'process', in *Dimond v. Lovell*, 'of construing the agreement to ascertain whether it is a single contract or a contract in parts'.

As Judge Purle QC noted (at [46]), he was made aware of 'an article published by Mr Francis Bennion in 1999. Mr Bennion was the draftsman of the Act. That does not, of course, give his article any particular status,[39] as [Southern Pacific's counsel] tactfully pointed out. Nonetheless, the arguments it deploys are entitled to be treated with respect'. The respect Judge Purle QC accorded it consisted of discussion of issues other than the meaning and application of sections 18(l)(a) and (2). The Judge discussed (at [47]-[57]) section 18(l)(b) (which was not directly in issue), whether 'category' of agreement had (as the Judge concluded) the same meaning in section 18(l)(a) and (b), and whether (as the Judge was 'unable to accept') an agreement in different categories is necessarily in separate parts. Judge Purle QC concluded (at [58]) that "Section 18(l)(b)... clearly assumes the contrary... I am conscious that Examples 16 and 18 in Schedule 2 ... assume the correctness of what I am unable to accept, but the construction of section 18 is not

Page 104

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[37] That example in Bennion's 1999 article is of a single 'top-up loan' comprising (i) a restricted-use credit component 'refinancing' facility to refinance existing indebtedness of the debtor (which may be for an amount exceeding £25,000 or for an exempt purpose) and (ii) an unrestricted-use credit component 'further advance' facility of an amount not exceeding £25,000 and for a non-exempt purpose. That example contemplates the further advance part of the agreement being notionally divided into a separate and regulated agreement.
In *Heath's* case, the issue of whether any 'refinancing' component of the formally single loan would be exempt did not need to be, and was not, addressed—Judge Purle QC noted (at [48]) that Bennion's 1999 article 'worked example' of the 'top-up loan' 'is not dissimilar from the transaction with which this case is concerned (except that the respondent is not in a position to claim exemption for any part of the 2002 mortgage, if it is properly to be regarded as divided into parts)
However, if the issue had arisen, the Court would need to have considered the exemptions in section 16 of the Act. For example, section 16(1) and Art. 2(2)(c) of the Consumer Credit (Exempt Agreements) Order 1989 (SI 1989/869) exempt land mortgages to refinance any existing indebtedness of the debtor, whether to the creditor or to another person, if the creditor is a body specified in Part I of Schedule 1 of that Order, or a building society authorized under the Building Societies Act 1986, or an institution that is or is a wholly owned subsidiary of an authorized institution under the Banking Act 1987. See also the other land mortgage exemptions noted in OFT's webpage on exempt agreements and in its December 2008 leaflet on 'regulated and exempt agreements': http://www.oft.gov.uk/advice_and_resources/resource_base/legal/cca/exempt/; http://www.oft.gov.uk/shared_oft/business_leaflets/consumer_credit/oftl40.pdf.

[38] *Ocwen v. Coxall and Coxall* [2004] CCLR 7, and the unreported decision of *London North Securities Ltd v. Williams and Williams*, Reading County Court, 9 September 2005.

[39] Bennion suggests this remark displays a sort of dismissive attitude that makes doubtful whether his concern to make the Act as comprehensible to the [legal] profession as possible through explanatory books and articles was justified: http://www.francisbennion.com/2009/043.htm. As the ludge says, Bennion's views deserve respect because of (i) his life-long involvement with ('zeal for') statute law in general (as drafter, academic, adviser, advocate, and writer) and (ii) his special knowledge of the 1974 Act in particular (as its drafter and as a writer on it). Both are traced in this article's Appendix.

controlled by those examples. On the contrary as those examples conflict in my judgment with section 18 on its proper construction, section 18 prevails: see section 188(3). Professor Goode has also expressed the view that these examples are wrong,[40] and I agree with him'.

Southern Pacific Mortgage Ltd v. Heath: Court of Appeal

Heath appealed Judge Purle QC's decision. The Court of Appeal (Waller, Dyson, and Lloyd LJJ) heard Heath's appeal on 13 October 2009 and, in a judgment[41] given on 5 November 2009, dismissed it. Lloyd LJ, who gave the Court's reasons for decision, said 'at once' (at [8]) that T would dismiss the appeal, largely for the same reasons as were expressed by Judge Purle in his clear and admirable judgment'.

After reviewing the parties' submissions, many (but not all) of the decided cases, and 'the academic debate', Lloyd LJ gave his reasoning under the heading 'discussion', indicating that, 'having noted the general lines of the academic debate, I propose to focus on the points advanced by Counsel and on their application to the present case'.

Lloyd LJ (at [41]) preferred Southern Pacific's submissions: 'it is from the terms of the agreement that one must find out whether the agreement is one under which there are two or more parts, in different categories, or whether it, or part of it, falls into two or more categories. It is not correct to start from the proposition that more than one disparate category is concerned, and to conclude from this that the agreement must fall into two or more parts ... it is significant that it is the agreement which is to be placed in one or more categories, not the credit provided under the agreement'.

'"Categories" in section 18(l)(b)', Lloyd LJ said (at [42]), 'means disparate categories, just as it does in section 18(l)(a) ... I would expect the same word, used in two different parts of one subsection, to mean the same thing in each, and . .. the alternative reading, that it means any categories in section 18(1)(b), would mean that there is no point to this paragraph'.[42]

Page 105

Lloyd LJ considered (at [39] and [43]) that the meaning of section 18 proposed by Heath's counsel and by Bennion 'would present would-be lenders with serious practical difficulties' in ensuring that their documentation complies with the Act. 'They may not be insuperable, but it seems to me that this practical consequence is one which it is legitimate to bear in mind when interpreting the Act'.[43]

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[40] 'My approach accords', Judge Purle QC says (at [34]),'with the following views set out in *Goode: Consumer Credit Law and Practice*, at para 25.106a'. Judge Purle QC does not explain why Professor Goode considers Example 18 to be erroneous. However, presumably the Professor's reasoning re- lates to whether the express or implied terms of the agreement to which Example 18 relates are divisible notionally at all. If the terms of the agreement are such as to make it divisible notionally into two parts, an overdraft part, and another part (on all other operation of the bank account), then presumably Professor Goode would agree the non-overdraft part falls in a category of agreement not mentioned in the Act.

[41] [2009] EWCA Civ 1135.

[42] Lloyd LJ does not discuss whether section 18(l)(b), in issue only as context to section 18(l)(a) and (2), achieves its purpose of clarifying in a declaratory way the consequences of the fact that the whole or parts of a single agreement, even when not designed to evade the Act, may well fall into more than one category. Lloyd LJ also did not attribute significance to the fact that section 18(l)(a) refers to 'a category mentioned in the Act', 'a different category mentioned in the Act', and 'a category not mentioned in the Act', and that section 18(l)(b) refers only to two or more categories mentioned in the Act. Example 16 may suggest that section 18(2) is meant to relate only to 'parts of an agreement' that fall within section 18(l)(a). If so, it is an interesting question whether that preferred reading could be achieved by an Inco Europe correction (as to which see, for example, *McAlister v. Air New Zealand Ltd* [2009] NZSC 78, [95]-[101] ('Power to remedy drafting errors'), per Tipping J (and also [12] per Elias CJ).

[43] Bennion's comments (at (2003) 167 JPN 773: http://www.francisbennion.com/2003/061.htm) about creditors bothering accurately to include prescribed particulars suggests compliance was expected to involve some effort. Bennion has also said that 'the Government's intention when the Act was drafted was that a transaction that was in substance a loan within the monetary limit laid down by it should be caught however it

As to section 18's purpose, Lloyd LJ said (at [44]): T agree that [section 18] is in part aimed against attempts to avoid the application of the Act. Auld LJ said the same in *Story*. The reading of [section 18] which I prefer does not defeat that object'.[43A]

The significance of Examples 16 and 18 in Schedule 2 was, Lloyd J said ([45]-[51]), that Example 16 assumes an agreement can fall within both section 18(l)(a) and section 18(l)(b). Lloyd LJ considered this aspect (but not the conclusion) of the analysis in Example 16 wrong; 'the better reading ... is that paragraphs (a) and (b) of section 18(1) are mutually exclusive'. 'As regards that aspect of the analysis, it seems to me that it is wrong in the light of the correct interpretation of the primary provisions in section 18. It must give way, as section 188(3) provides, in the case of inconsistency with other provisions in the Act'. But Lloyd LJ differed from Judge Purle QC, and from Professor Goode, in concluding that, 'As regards [Example 18 ... the statutory analysis may be correct... the agreement may very well fall into parts, the current account aspect being distinct from the overdraft facility. Each of them is available to be used separately, and they will be governed by different terms. On that basis I agree that section 18(l)(a) would apply'.

Page 106

Legislated Examples and When Ranking Provisions Properly Invoked

In *Southern Pacific Mortgage Ltd v. Heath*, Judge Purle QC and Lloyd LJ held Example 16 to be inconsistent with, and thus under the ranking provision (section 188(3)) to be disregarded in construing, section 18. They read section 188(3) as triggered by 'any inconsistency' (and not only by an irreconcilable 'conflict'[44]) with section 18.

Bennion advises that section 188(3) expresses the general rule in *Mahomed Syedol Arifftn v. Yeoh Ooi Gark*.[45] The *Ariffin* case was about the meaning of section 32 of the Evidence Ordinance 1893 of the Straits Settlements,[46] a provision similar to the Indian Evidence Act 1872 (drafted by Sir James

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was dressed up. I drafted the anti-avoidance provisions accordingly, and in my opinion they are effective for the intended purpose'.

[43A] Howell (2010) 126 LQR 617, 625-627 says "The Goode approach has been supported by the majority of courts... The Court of Appeal in *Heath*... has now considered the Bennion/Goode debate and decided in favour of Goode . . . The Goode interpretation reduces the risk of the agreement being unenforceable, which explains its appeal to courts not wanting to allow reliance on technical defences . . . [Section 18] could, however, usefully be clarified. Weightless drafting has been construed as ambiguous drafting. Goode concedes his approach will lead to few agreements being classified as multiple agreements, which is strange given the attention that was given to the section when the CCA was adopted. The importance of the section as regards avoidance is diminished due to the removal of the statutory limits in the consumer context, but there is still the question of the apportionment of payments [CCA section 18(4)]. A different interpretation might have prevailed if the courts had been posed the question of whether they should have discretion as to how repayments are apportioned."

[44] 'Conflict' in section 188(3) has OED *Online's* sense 2c: 'The clashing or variance of opposed statements'.

[45] [1916] 2 AC 575 (JCPC). See also the legislated examples in the Sex Discrimination Act 1975 (another Act drafted by Bennion) being used in arriving at a preferred reading of that Act in *Amin v. Entry Clearance Officer, Bombay* [1983] 2 All ER 864 at 872 (HL) per Lord Fraser ('the examples in section 29(2) are not exhaustive, but they are, in my opinion, useful pointers to aid in the construction of sub-section (1)') and in *Kassam v. Immigration Appeal Tribunal* [1980] 2 All ER 330 at 335 (EWCA) per Ackner LJ ('These examples support the view which I have expressed above'). In *R v. Massey* [2007] EWCA Crim 2664 at [17]-[19] Toulson LJ said: 'It is contrary to the normal practice of Parliamentary Counsel to include examples in Acts of Parliament (by contrast with some forms of legislation such as European Directives) but examples in explanatory notes can be helpful in casting light on the mischief against which a particular statute is aimed .... The example and language of the explanatory note to section 49 are instructive'. See also Interpretation Act 1999 (NZ) section 5(2) and (3).

[46] The Straits Settlements was a British colony which comprised Singapore, Penang, and Malacca, on the Strait of Malacca. Originally established in 1826 as part of the territories controlled by the British East India Company, the Straits Settlements came under direct British control as a Crown colony on 1 April 1867. The colony was dissolved with effect on 1 April 1946, with Singapore becoming a separate crown colony (and ultimately an independent republic), while Penang and Malacca joined the new Malayan Union (a predecessor of modern-day Malaysia).

Stephen, and also containing enacted illustrations).[46A] Gark, a moneylender sought to recover sums advanced to Ariffin, whose defence was that, when the loans sued upon occurred, Ariffin was an infant. The question was whether a handwritten record of the date of Ariffin's birth, made by his late father in a book of family births, deaths, and marriages, was admissible in evidence. The Evidence Ordinance 1893 section 32(5) made admissible, as an exception to hearsay, written statements as to the existence of a blood relationship made by a person with a special means of knowledge and who, since making the statement, has died. Enacted

Page 107

Illustration (1) showed that, in a case where A's date of birth was in issue, section 32(5) would make admissible a letter from A's deceased father announcing the birth of A on a given date. Indian case law confirmed a corresponding enacted illustration in the Indian Evidence Act 1872 as showing correctly that Act's intended operation. The court below had rejected section 32(5) operating to make the father's handwritten record admissible, holding that outcome to be inconsistent with the prohibition against hearsay, and holding also that 'the illustration given in the statute does not in fact illustrate the section'. The Judicial Committee of the Privy Council held that the English common law hearsay principles could not vary or deny the statute's true meaning. As to the Illustration, Lord Shaw (at p 581) said that:

> ... it is the duty of a Court of law to accept, if that can be done, [legislated] illustrations given as being both of relevance and value in the construction of the text... [I]t would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute should not thus be impaired.

The Privy Council agreed with Indian case law that 'there is no repugnance between a statement which relates to the existence of a relationship and the illustration by a statement as to when A was born, that is to say, when the relationship began'. A's deceased father's statement was thus admissible and proved A's minority.

Unlike the *Ariffin* case, in the *Heath* case Judge Purle QC and Lloyd LJ did not use legislated Example 16 at all in arriving at their preferred meaning of section 18. In addition, having arrived at their preferred meaning of section 18, they relied on section 188(3) to disregard Example 16 even though it is capable of being reconciled with, and has been endorsed by the UK Parliament[47] as

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[46A] Criminal codes were enacted throughout the British Empire (for example, in Jamaica, Victoria, Canada, New Zealand, and Queensland) but not in England. Enacted illustrations, as in the Indian Penal Code 1860, were then also unknown in England. But they still feature in that Code, the Indian Evidence Act 1872, decisions of the Supreme Court of India (for example Criminal Appeal No 1069 of 2004 citing *Rajesh Bajaj v State NCT of Delhi* (1999) (3) SCC 259, and Criminal Appeal No 729 of 2003, citing *Shamnsaheb M Multtani v State ofKarnataka* (2001) 2 SCC 577), and reports of the Law Commission of India (for example 185th report, March 2003, pages 62 and 77—recommending the dropping of an illustration and the insertion of an explanation). For discussion see, for example, Friedland (1981) 1 OJLS 307; White (1986) 16 VUWLR 353; Skuy 0uly 1998) 32(3) Modern Asian Studies 513; J Finn in B Godfrey and G Dunstall (eds), *Crime and Empire 1840-1940: Criminal Justice in Local and Global Context* (Willan Publishing, England, 2005) at 224; and Wright (2007) 26(1) UQLJ 39.

[47] The Bill for the 1974 Act began in the Lords. A similar Bill on 1 November 1973 began in the Commons. This first, Commons Bill contained examples in its body (not in a schedule) including, in clause 17(4), 2 'examples of a multiple agreement'. The Commons Journal for 1973/74 suggests that this Bill did not proceed further after Standing Committee D reported it with amendments on 5 February 1974. The Bill for the 1974 Act was presented in the Lords on 28 March 1974. During its committee of the whole stage, on 6 May 1974, Lord Jacques explained (HL Hans vol 351, col 348) that 'Examples of new terminology were given in the body of the first Bill. The use of examples was highly complimented, but the view was expressed that they would be better put in a Schedule at the end of the Bill. That has now been done. However, since that was done we have found that a number of important terms used in the Bill are not illustrated by examples in the Schedule. It is accordingly proposed to replace the Schedule .... In addition, because the many of the examples

Page 108

illustrating the intended application of, section 18. Example 16 had little more interpretative role or significance than inconsistent extrinsic material. If legislated examples are of such limited use and significance in interpretation of the illustrated enactments, devising, and enacting legislated examples is not worthwhile. Section 188(2) ensures that the provision illustrated prevails in the event of irreconcilable conflict with a legislated example. But if and in so far as the example is reasonably reconcilable with an open or tenable meaning of the provision, the example should be able to influence, and even to control, the provision's meaning.[47A]

Why avoid, or limit, use of enacted examples when interpreting enactments? Does it conduce to proper separation of powers (to legislators, in making laws, not interfering with adjudicators' interpreting and applying those laws)? Does it also confirm that legislation (as opposed to case law) should generally rely on logic that is deductive, not inductive (logic that reasons from generals to particulars, not the reverse)[47B]? But what if an enacted example is based purely on case law,[48] and purely declaratory? And must not an enacted law be interpreted and applied even if, and insofar as, it illustrates with a high level of particularity how its provisions apply or operate?

This article provides, some may think, a careful and sound analytical basis for the general, but perhaps largely instinctive, reluctance that exists in the United Kingdom to use (draft and enact) legislated examples. They are, however, used routinely and fairly extensively in Australasian legislation, even though drafters in Australia and New Zealand know that decisions on whether and how to use them require care. The main focus of this article is instead how (if drafted and enacted) legislated examples can, and should, feature in statutory interpretation. But it also helps to show that a drafter cannot rely on a legislated example to

Page 109

solve significant problems in the provision the operation of which the example illustrates, and that a drafter faces risks in trying to interpret authoritatively an enactment that he or she has drafted. That is so even if the drafter's life-long involvement with ('zeal for') statute law in general, and special knowledge of the relevant Act in particular, means that his views deserve the greatest of respect.

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may be used to illustrate a number of terms, the arrangement of the Schedule has been altered'. Lord Helsby not only replied T think that [the examples as proposed to be set out] are most valuable and very well done' but also asked whether Example 19 was (as it purported to be) an example of 'running account credit'. Amendment No. 86 moved on 16 May 1974 by Lord Jacques (HL Hans vol 351, cols 1148 and 1149) made it clear it dealt with such credit. Another (No. 87) adjusted examples in the light of amendments to the Bill. Viscount Amory said 'the inclusion of these examples ... is a very interesting innovation and it will be extremely interesting as a guide in the future to see how they work out in practice'.

[47A] Compare the Acts Interpretation Amendment Bill 2011 introduced by Attorney-General Robert McClelland into the Australian Parliament on 12 May 2011. Clause 3 and item 24 of Schedule 1 of that Bill amend section 15AD of the *Acts Interpretation Act 1901* (Aust) so that a legislated example 'may extend the operation of the provision' whose operation is illustrated by the example if a court assesses that this outcome is in fact appropriate when interpreting that provision. The amendment brings the Act in line with more recent interpretation legislation in the States and Territories of Australia. For an example of a similar provision, see section 132(1) of the Australian Capital Territory's *Legislation Act 2001*.

[47B] "So where the law on a topic is uncodified the practitioner reasons inductively, but as soon as it is codified switches to deductive reasoning.": F Bennion, *Statutory Interpretation* (5th ed, 2008) comment on Code section 358 (nature of deductive reasoning), which instances Chalmer's use of decided cases in the codifying Sale of Goods Act 1893 (UK). See also Code section 357 (use of deductive reasoning).

[48] In his *Digest of the Law of Evidence* (1879) xii and xiii, Sir James Stephen wrote of the illustrations in the Indian Evidence Act 1872: 'I have in nearly every instance, taken cases actually decided by the Courts for the purpose . ... [T]hey not only bring into clear light the meaning of abstract generalities, but are, in many cases, themselves the authorities from which rules and principles must be deduced'. A case where the High Court, applying HCR 9, quoted case-law-based illustrations, in an extrinsic commentary (*McGechan*), of use of HCR 9 is *Smith v. Covington Spencer Ltd* (No. 2) (HC, Akd, CIV-2005-404-3020,5 October 2006) at [62] per Heath J; (reversed on grounds of inconsistency with HCR 60): [2008] 1 NZLR 75 (CA) at [11] and [40] per Arnold J. See also the case-examples, falling within various sentence guideline bands, in *R v. AM* [2010] NZCA 114.

No Further Appeal to UK Supreme Court, which Refused Permission to Appeal

'The recent decision of the Court of Appeal in *Southern Pacific Mortgage Limited v Heath . . .*", said a Nottingham barristers' chambers December 2009 consumer credit litigation newsletter,[49] 'may yet be subject to further challenge. An application for permission to appeal to the Supreme Court, was lodged on 2nd December 2009'. Permission to appeal had to be sought by an application to 'the court below' (that is, to the Civil Division of the England and Wales Court of Appeal) but, on that court refusing to give it, could also be sought from the UK Supreme Court.[50] The UK Supreme Court on 5 March 2010 refused permission to appeal.[51]

Page 109

Appendix: Factual Outline of Bennion's Life-Long Involvement with ('Zeal for') Statute Law in General, and Special Knowledge of 1974 Act in Particular

by Ross Carter[*]

Francis Alan Roscoe Bennion[52] was born on 2 January 1923 at Wallasey, Cheshire, England. He attended preparatory school and school at Harrow from 1931-39. From 1940-41, he was a bank clerk at Gosling's Branch of Barclays Bank, 19 Fleet Street, London EC4. He did Royal Air Force Volunteer Reserve Aircrew training at St Andrews University, Scotland, in 1941, and was an RAFVR commissioned pilot from 1941-1946. After university study at Oxford (Balliol College) from 1946-48, and being an editor of *Halsbury's Statutes* with Butterworths in 1948, he was awarded a BA in law in 1949, and called to the Bar of England and Wales in 1951.

Bennion practised law at that Bar from 1951-94 (except 1965-73), and held office as a parliamentary counsel (drafter of UK government legislation) twice, initially from 1953-65, then again from 1973-75. In 1956, Bennion did constitutional

Page 110

drafting in Pakistan. From 1959-61, he drafted on secondment in Ghana (including the Constitution turning it into a republic under the notorious Dr Nkrumah), produced a new (looseleaf) system of publishing statutes and statutory instruments, and wrote *Constitutional Law of Ghana* (1962).

Back in the United Kingdom, Bennion founded the Statute Law Society in 1968, and the Statute Law Review in 1980. His publications include *Bennion on Statute Law* (1st edn 1980, 2nd edn 1983, 3rd edn 1990); *Bennion on Statutory Interpretation* (1st edn 1984, 2nd edn 1992, 3rd edn 1997, 4th edn 2002, 5th edn 2008), and *Understanding Common Law Legislation* (2002). He was (until retiring on age grounds) a Member of the Law Faculty of the University of Oxford and Congregation from 1984-2002. Since 1984, he has been a Research associate at the University of Oxford Centre for Socio-Legal Studies. In 2007, he said 'In 2009 I shall (if spared) celebrate sixty years of professional

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[49] www.ropewalk.co.uk/news/ah_consumer_credit_newsletter.pdf.

[50] Constitutional Reform Act 2005 (United Kingdom) section 40(2) and (6), and Supreme Court Rules 2009 (United Kingdom) r 10(2). Compare Supreme Court Act 2003 (NZ) sections 7 and 12-14. See also Report of the Advisory Group *Replacing the Privy Council: A New Supreme Court* (2002), para. [143] and 65 (Appendix D, para. [24]): http://www.crownlaw.govt.nz/uploads/JusticePCReport.
pdf.

[51] http://www.supremecourt.gov.uk/docs/pta-1002-1003.pdf.

[*] Parliamentary Counsel, New Zealand Parliamentary Counsel Office, Wellington, New Zealand. Francis Bennion very kindly arranged to have sent to me a copy of the 2008, 5th edn of his *Statutory Interpretation—A Code*. It was a great help to me in preparing the (4th edn, 2009) edition of J F Burrows and R I Carter, *Statute Law in New Zealand* (a copy of which I gladly sent him in return). This article, mainly finalized on 31 March 2010, was on 3 February 2010 sent to Francis Bennion in draft for, and has been revised in the light of, comments he had on it. Minor final additions were made in February and May 2011.

[52] Biographical information is from 'About FB': http://www.francisbennion.com/fb/aboutfb.htm.

working in the field of statute law - as parliamentary draftsman, academic, adviser, advocate and writer. This may seem a lengthy period for one man, but I find that the longer I go on the more I discover about the subject'"[53]

Bennion's First Period as Parliamentary Counsel

First Parliamentary Counsel (at UK PCO or OPC) since 1947

1947-1953: Sir Alan Ellis	1953-1956: Sir John Rowlatt
1956-1968: Sir Noel Hutton	1968-1972: Sir John Fiennes
1972-1977: Sir Anthony Stainton	1977-1981: Sir Henry Rowe
1981-1987: Sir George Engle	1987-1991: Sir Henry de Waal
1991-1994: Sir Peter Graham	1994-1999: Sir Christopher Jenkins
1999-2002: Sir Edward Caldwell	2002-2006: Sir Geoffrey Bowman
2006-: Sir Stephen Laws	

Bennion's experience at the Westminster PCO[54] in the 1950s is discussed in published extracts from his journal from 1953-58.[55] 'When I entered the Westminster

Page 111

Parliamentary Counsel Office in 1953', Bennion recollected much later, in 2008, 'I received no formal instruction in legislative drafting... it was learnt on the job, a tyro working in conjunction with an experienced drafter [(initially Sir Alan Ellis KCB QC)] in what Americans call the buddy system'.[56] In 1980, Bennion dedicated his book *Bennion on Statute Law* to Sir John Rowlatt (First Parliamentary Counsel 1953-56), saying 'What he would have thought of this/I cannot say, but he knew how to/encourage, and he knew how to inspire'.[57] This article focuses, however, on Bennion's second period as a Parliamentary Counsel, from 1973-75, as it was in that period that Bennion drafted the Consumer Credit Act 1974 (United Kingdom).

Bennion's first period as a parliamentary counsel at Westminster started in 1953 and ended (in year 9 of Sir Noel Hutton's 12 years as First Parliamentary Counsel) in 1965. From 1965-68, Bennion

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[53] 171JPN (13 October 2007) 715, 715: http://www.francisbennion.com/2007/022.htm.

[54] The data in the above table of UK First Parliamentary Counsel is drawn from sources including: B McGill, 'A Victorian Office: The Parliamentary Counsel to the Treasury, 1869-1902' (1990) 63 (150) Historical Research, 110: http://onlinelibrary.wiley.eom/doi/10.llll/j.1468-2281.1990.tb00875.x/abstract; A G Donaldson, 'High Priests of the Mystery: A Note on Two Centuries of Parliamentary Draftsmen' in W Finnie, C Himsworth, and N Walker (eds) Edinburgh Essays in Public Law (Edinburgh University Press, 1991) 99 ('Donaldson'); G Engle, 'The Rise of the Parliamentary Counsel' (1996) 16 Parliaments, Estates and Representation 193; A Samuels, 'Henry Thring: The First Modern Drafter' (2003) 24(1) Stat LR 91; 'Editorial: Henry Thring—A Hundred Years on' (2007) 28(1) Stat LR iii; CALC Newsletter August 2006, 22-23: http://www.opc.gov.au/calc/docs/ CALCNEWSLETTER-August2006v2.doc and the notice of appointment at http://www.number10.gov.uk/Page8953. See also "History of OPC" at http://www.cabinetoffice.gov.uk/parliamentarycounsel/history.aspx. Page [2009] PL 790,791 says 'Parliamentary Counsel Office [(PCO)] appeared to be the official name for the [UK's law drafting] Office until 2007 when it changed to Office of Parliamentary Counsel [(OPC)]'. The Office was set up in 1869 as the Office of [First and other] Parliamentary Counsel to the Treasury. See also C Ilbert, *Legislative Methods and Forms* (1901) ch. 5; H Kent, *In on the Act: Memoirs of a Lawmaker* (1979), described by Bennion as 'the only autobiographical work produced by a member of the Parliamentary Counsel Office in the [then] 111 years of its existence': (1980) 130 NLJ56& 243: http://www.francisbennion.com/1980/004.htm and http://www.francisbennion.com/1980/001.htm. On the UK PCO and law reform Bills, see Hutton (1961) 24 MLR 18; Cretney (1996) 59 MLR 631 and Law, Law Reform and the Family (1998); and http://www.francisbennion.com/1964/001.htm and http://www.francisbennion.com/1988/002.htm.

[55] http://www.francisbennion.com/1958/001.htm.

[56] 172 JPN (6 December 2008) 802; http://www.francisbennion.com/2008/031.htm.

[57] 'Sir John Rowlatt often said "We'll have to take a flying fuck at this one"': Bennion (1980) 130 NLJ 243: http://www.francisbennion.com/1980/004.htm. See also Bennion's remarks on Rowlatt's death of a heart attack on 4 July 1956: http://www.francisbennion.com/1958/001.htm.

was Chief Executive at the Royal Institution of Chartered Surveyors (RICS). 'This position brought me into contact', Bennion has said, 'with other professional bodies, such as the RIBA [(Royal Institute of British Architects)], the Law Society and the Institute of Chartered Accountants, whose members, like those of the RICS, were heavily involved in the operation of Acts of Parliament. I speedily realised that there was great dissatisfaction among the professions with the state of our statute law, and the difficulties it caused for professional people. Indeed, I was informed by Sir Henry Wells, the RICS President, that one reason why they had appointed a draftsman as Secretary was the hope that he might be able to do something about it'.[58]

Bennion's Making His Critical Views Known

From 1965-75, Bennion grew increasingly critical, publicly, of the Westminster PCO's then current legislative drafting techniques and style.[59] He founded the Statute Law Society in 1968, which called unsuccessfully for programmatic consolidation.[60] From 1968-71, he was also a member of the official working party on Classification of UK statutes, and a member of the Heap Committee and the

Page 112

Vice-Chairman of the Stow Hill Committee (both set up by the Statute Law Society—and whose reports advocating reforms, in particular greater use of textual amendment, were published in 1970 and 1972 respectively). 'Statute law today is what Parliamentary counsel have made it', said Bennion in a 1970 book, 'Its virtues and defects reflect their own, and their responsibility is correspondingly great'.[61] Speaking in 1971 on the Stow Hill Report,[62] and to the Commons Select Committee on Procedure, he said T feel my position is a little delicate because some of the views I hold on the subject under discussion tonight differ from the views of Sir John Fiennes who was a senior and very much respected colleague of mine in former days. But such is my zeal for the statute law that I feel such things should not prevent me making my views known'.

Bennion's written evidence to the Renton Committee, which reported in May 1975, was given when Bennion was a parliamentary counsel, but Bennion said it 'was prepared, and is submitted, entirely as my personal evidence to the Committee. It does not represent in any way the views of the Parliamentary Counsel Office, or any other official body. I am grateful to Mr. A. N. Stainton, C.B., First Parliamentary Counsel, for permission to prepare and submit the paper, given without his having seen it'.[63]

T was rendered free to write', Bennion recollected in 2005, 'by giving up my official drafting post in the Whitehall Parliamentary Counsel Office'.[64]

In 1979, the Statute Law Society published a book called *Statute Law: Renton and the Need for Reform*. 'Ten years after the founding of the Statute Law Society', said the book's introduction, 'it has to be admitted that little progress has been made in attaining its objects. In Britain the drafting of legislation remains an arcane subject. Those responsible do not admit that any problem of obscurity exists. They resolutely reject any dialogue with statute law users. There is resistance to change, and to the adoption (or even investigation) of new methods'.[65]

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[58] http://www.francisbennion.com/1979/004/pt3and4.htm.
[59] As shown by Bennion's written evidence to the Renton Committee: http://www.francisbennion.com/1979/004/pt3and4.htm.
[60] http://www.francisbennion.com/1968/001.htm; http://www.francisbennion.com/1983/002.htm.
[61] F Bennion, *Tangling with the Law* (Chatto & Windus London 1970) 9. See also F Bennion Reforming Statutory Drafting (University of Ottawa Press Ottawa 1971) 115: http://www.francisbennion.com/1971/002.htm.
[62] http://www.francisbennion.com/1972/002.htm.
[63] http://www.francisbennion.com/1979/004/pt3.htm.
[64] (14 May 2005) 169 JP 368,368: http://www.francisbennion.com/2005/028.htm.
[65] http://www.francisbennion.com/1979/004/intro.htm.

Bennion's criticisms of, or disappointment with, the UK PCO continued (after it had, as the Renton Report[66] recommended, switched to textual amendment as the preferred method of amendment) in an article at (1980) 130 NLJ 56,[67]

Page 113

in his book *Bennion on Statute Law* (1st edn, 1980) (17-20), and also in later articles.[68]

Bennion's Second Period as Parliamentary Counsel

In these circumstances, it might be wondered how, precisely, Bennion came to hold office as a parliamentary counsel at Westminster a second time, from 1973-75. Perhaps agreeable to Bennion's return was Sir Anthony Stainton, who at the UK PCO in 1956 shared with Bennion the same room,[69] who was Bennion's predecessor on secondment from London to Ghana,[70] and who (Bennion said) displayed an interest in Bennion's use of a computer to draft the Bills for the Children Act 1975 and the Sex Discrimination Act 1975.[71] In any event, in a 2003 blog (and in 2004 evidence to the Commons' Public Administration Committee considering the UK Honours System), Bennion said T am the only person who has resigned twice from [the Westminster Office of Parliamentary Counsel], having been invited back in 1973'.[72]

Bennion on 1974 Act: Clarity and Availability, Composite Restatement, Redaction, and so on

'The [Act's] system', Bennion has observed,[73] 'was not complete without the mass of regulations, orders and other subordinate instruments made under it. Inevitably, the final structure was complex and elaborate. Yet it had to be operated without undue difficulty (and with expert advice when needed) by hundreds of thousands of people forming a wide cross-section of our commercial life.

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[66] See Bennion (1975) 119 SJ 346 (http://www.francisbennion.com/1975/002.htm) and (1975) 125 NLJ 660 (http://www.francisbennion.com/1975/003.htm). See also Simon (1985) 6(1) Stat LR 133; Renton (1985) 6(3) Stat LR 60; Renton (2006) Clarity 56, 5 and 6 (http://www.clarity-international.net/journals/56.pdf); the Times obituary of Lord Renton at http://www.timesonline.co.uk/tol/comment/obituaries/article1837821.ece; Cutts (2007) Clarity 57,24 (http://www.clarity-international.net/journals/57.pdf); and Quint (2007) Clarity 58, 10 and 11 (http://www.clarity-international.net/journals/58.pdf).

[67] http://www.francisbennion.com/1980/001.htm. See also http://www.francisbennion.com/1980/004.htm. Bennion criticizes in particular Sir Noel Hutton, with whom Bennion worked on the drafting of the Law Commissions Act 1965: http://www.francisbennion.com/1964/001.htm. Hutton, says Donaldson, 114, 'went to the Law Commission when he retired and, emulating Brougham and Ilbert, drafted the Interpretation Act 1978. Another public duty he performed was to sit on the Renton Committee on the preparation of legislation, assessing the evidence of his two immediate successors (Fiennes and Stainton)...'. In *Bennion on Statute Law* (1980) at 19 and 20, Bennion criticizes the 1978 Act as a 'straight consolidation' and thus a lost opportunity for reform, and says 'it is not the best arrangement to make [legislative drafting] what Sir Noel Hutton has called [(in (1979) LX *The Parliamentarian* No. 4)] "a life engagement"'.

[68] See, for example, Bennion, 'The controversy over drafting style' (1983) LSG 2355,3211: http://www.francisbennion.com/1983/005.htm. See also [1986] 7 Stat LR 57-58 and [1987] 8 Stat LR 68: http://www.francisbennion.com/1987/003.htm.

[69] http://www.francisbennion.com/1958/001.htm.

[70] VCRAC Crabbe, *Legislative Drafting* (1st edn 1993, 1994 reprint), acknowledgements, i:

[71] See http://www.francisbennion.com/1979/016.htm; F Bennion, 'A computer experiment in legislative drafting' (November 1975) Computers and the Law: http://www.francisbennion.com/1975/004.htm; and *Bennion on Statute Law* (1st edn 1980) 19.

[72] See http://www.francisbennion.com/2003/056.htm and http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/212/212we85.htm.

[73] http://www.francisbennion.com/2009/043.htm.

Page 114

The [Act] was drafted with that fact very much in mind. Statutory regulation inevitably adds to the costs of the traders it governs. Such costs are ultimately borne by the consumer and, since it is pointless to give people financial protection with one hand while dipping heavily into their pocket with the other, every effort was made to keep them to the minimum. One obvious way of keeping down costs is to make the legislation as comprehensible to the profession as possible, and we tried hard to do this. It was for that reason that I departed from the usual anonymity of the legislative drafter and over the years published a number of explanatory books and articles.[74] . . . One contribution was the four-volume looseleaf work *Consumer Credit Control* in which I tried to help the profession by including a composite restatement of the legislation.[75] Through amalgamations the book came in time to be owned by a publisher who also owned another large work on the same subject, so it bit the dust'.

In those remarks on the Act, Bennion contemplates making legislation comprehensible not to non-lawyers, but instead only 'to the [legal] profession'. 'Non-lawyers ought', Bennion has said, 'to be able to understand the law that binds them, and in a perfect world they would. In our world they can't. Not fully, and safely. If they think they can, and act on that, they may find they have inadvertently broken the law, or taken on an unwanted obligation, or missed an entitlement, or suffered in some other way. So they had better not try. Many lawyers rail against this situation. Here is an example from the judiciary relating to an Act I drafted myself, the Consumer Credit Act 1974 ("the CCA"). The drafting was criticized by Clarke LJ, who started one of his judgments with the following: "These appeals raise a number of issues under [the CCA] which has recently provided so much work for the courts. Like others, this case demonstrates the unsatisfactory state of the law at present. *Simplification of a part of the law which is intended to protect consumers is surely long overdue so as to make it comprehensible to layman and lawyer alike*. At present it is certainly not comprehensible to the former

Page 115

and is scarcely comprehensible to the latter."[76] With his legal training and experience, Clarke LJ ought to know that he is demanding the impossible here. It simply is not practicable for legislation which is required to do the work that the CCA is required to do to be "comprehensible to the layman." It would be dangerous for lay persons to think they could extract the legal meaning of such texts without skilled help. ... a movement that wishes the public to read and act on raw legislation without professional guidance obviously does not truly believe law to be an expertise'.[77] In 2009,

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[74] See http://www.francisbennion.com/topic/consumercreditact1974.htm.

[75] On the composite restatement method ('where the text of an Act is conflated with the texts of delegated legislation made under it') see 'Statute Law Processing: The Composite Restatement Method' (1980) 124 SJ 71,92 and Bennion on Statute Law (2nd edn 1983), ch 27 and Appendix B: http://www.francisbennion.com/1983/006/ch27.htm, http://www.francisbennion.com/1983/006/apb.htm. The method is designed to help statute law users comprehend text by addressing the vices of statute law that Bennion calls 'compression', 'anonymity', 'distortion', and 'scatter'. Bennion envisaged such restatements being produced and promulgated in a range of subject areas and by an official body such as the Law Commission, or a body set up for the purpose. In 1983, Bennion gave an account of the only practical demonstration of it there had so far been: 'This was my book Consumer Credit Control, published in loose-leaf by Oyez Publishing Ltd in 1976. In the following seven years, no less than 15 looseleaf supplements have been needed to keep it up to date'. (Section 192(4) of the Act (unusually) required the Secretary of State to make an order bringing into operation the Act's repeals and amendments, but did not say when that must be done, and it was 11 years before the Act was brought fully into force—Bennion has said that 'This long delay attracted criticism. It is arguable that it is unlawful as being unreasonable'). In 2009, he said composite restatement as a proposed reform of statute law had been met with indifference by the legal profession, 'not having proved popular': http://www.francisbennion.com/2009/011.htm.

[76] *McGinn v. Grangewood Securities Ltd* [2002] EWCA Civ 522 at 1. Italics added.

[77] http://www.francisbennion.com/2009/011.htm. See also http://www.francisbennion.com/2009/043.htm ('It simply is not practicable for legislation which is required to do the work that the [Act] is required to do to be comprehensible to the layman') and http://www.francisbennion.com/2007/ 018.htm, where Bennion in 2007 said 'it is not the function of a legislative text to explain the law. Explanations should be given *aliunde* [(from

Bennion suggested ‘a practical alternative to the admittedly unsatisfactory position that, while ignorance of the law is no excuse for the citizen, he or she cannot expect to know the law without professional assistance’. Bennion’s proposal (which ‘builds on [his] device of composite restatement’) is ‘that when an Act is passed it should be accompanied by an official redaction of it which is in the nearest thing that can be managed to plain English’.[78]

Website: www.francisbennion.com
Doc. No. 2011.004.NFB *SLR* 32(2), 86-115, doi:10.1093/slr/hmr003
For full version of abbreviations click ‘Abbreviations’ on FB’s website.

another person or place; from elsewhere)], as we lawyers say. They naturally lie outside what they explain. In New Zealand the authorities have recently departed from classic doctrine and begun inserting explanations as an integral part of legislative texts. This is a mistake’. (Compare the *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions* (2003) para. 4.1: ‘good legislative style is the succinct expression of the key ideas of the text. Illustrative clauses, intended to make the text clearer for the reader, may give rise to problems in interpretation’) Bennion does not, in that 2007 article, make explicit whether he had by 2007 also come to regard as ‘a mistake’ the legislated examples in Schedule 2 of the Consumer Credit Act 1974 (UK).
Adler (Aug 2008) *The Loophole* 15,34 regards that 1974 Act, with its unusual legislated examples, as ‘only one instance of [Bennion’s] own commitment to clarity’:
http://www.opc.gov.au/calc/docs/Loophole/Loophole_Aug08.pdf.
In 2010, Bennion indicated that, in the Sex Discrimination Act 1975 (another Act he drafted), he ‘pursued my policy of inserting examples wherever I thought it would be useful’.
On UK Bills’ explanatory notes, expanded for and after 1998-1999 Parliamentary session, see: http://www.cabinetoffice.gov.uk/parliamentarycounsel/bills_and_acts/explanatory_notes_article.aspx. For Bennion’s views on them, see http://www.francisbennion.com/specialism/plainlanguagelaw.htm.

[78] ‘Complex Legislation: Is Redaction The Answer?’ (2009) 18 *The Commonwealth Lawyer*, 23, http://www.francisbennion.com/2009/011.htm.