PEPPER v HART: REFLECTIONS

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The schoolmasters have won their case - but at what cost?

A great deal has been written about this case, and the facts are so well known that they do not need even the customary summary. However, the result does leave one wondering about a number of issues.

The first point is why so much fuss was made about the reference to Hansard in the first place. The traditional view is that reference to parliamentary material as an aid to statutory construction is not permissible. As recently as 1982, Lord Diplock said in *Hadmor Productions v Hamilton* [1982] 1 AER 1042:

> "There are a series of rulings by this House, unbroken for a hundred years, and most recently affirmed emphatically and unanimously in *Davis v Johnson* [1979] AC 264, that recourse to reports of proceedings in either House of Parliament during the passage of the Bill ... is not permissible as an aid to its construction."

As far as ministerial speeches are concerned, Lord Wright in *Assam Railways & Trading Co Ltd v CIR* [1935] AC 445 left little room for doubt when he said:

> "It is clear that the language of a minister of the crown in proposing in Parliament a measure which eventually becomes law is inadmissible."

However, despite the apparent firmness of this principle, it has been suggested that the court retains the right to admit such matters if it thinks fit, and it would seem that this is a discretion which the courts have exercised many times. Indeed, as recently as last December in the case of *R v Warwickshire County Council ex parte Johnson* (*The Times*, 16th December 1992), it was suggested that the House of Lords reached their decision only after they had the benefit of referring to Hansard to interpret s.20 of the Consumer Protection Act 1987. Maybe they were just following *Pepper v Hart*.

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Nevertheless, despite the above, the rule has remained in existence, and their Lordships in *Pepper v Hart* gave the question of whether it should be retained in this case an exhaustive examination. It may seem strange that a court, when agonising over the wording of a statute and trying to divine the true intention of Parliament, deliberately excludes from its consideration the very material which might (and in this case did) provide the answer. However, things are never quite that simple, and it may be that events will soon show what a valuable rule it is - or was. Various difficulties were canvassed before their Lordships, particularly about the expense and time which would be involved in searching through Hansard for anything relevant to a particular point - and indeed, getting access to the parliamentary debates at all.

Lord Browne-Wilkinson was not troubled by these difficulties. He took the view that Hansard would just be another piece of research material. If a reading of Hansard indicated nothing of significance, further research would become pointless. This idea was echoed by Lord Griffiths, who suggested that if searching through Hansard resolves an ambiguity, it would save expense. However, it is respectfully submitted that one never knows whether research reveals anything of significance until the research is over. No advocate can afford to stop his research halfway, because the answer to his question may be contained in the other half.

It would seem much more likely that the results of the consideration of Hansard would not provide a clear answer to any question. As Lord Scarman said in *Davis v Johnson*:

> "Such material is an unreliable guide to the meaning of what is enacted, it promotes confusion not clarity. The cut and thrust of debate and the pressures of executive responsibility, the essential features of open and responsible government, are not always conducive to a clear and unbiased explanation of the meaning of statutory language. And the volume of parliamentary and ministerial utterances can confuse by its very size."

There would seem to be at least a possibility that ministers, knowing that their words will be examined in even more minute detail than usual by lawyers up and down the land for years to come, will make quite sure that their statements on any particular matter mean everything, or nothing (or possibly both). It would be just too dangerous to make anything clear - they will never know what circumstances might arise in the future which could cause them to rue a clear and unambiguous statement. And who can blame them? Careers have been blighted by less. Accordingly, confusion and not clarity will be promoted, just as Lord Scarman described.

Their Lordships explained that the purpose of looking at Hansard was not to construe the words used by ministers, but to give effect to the words used as long as they are clear. But what if the words are nearly clear, or if one side thinks they

are clear and the other side does not? I would suggest that one cannot look at the words in Hansard for the purpose of trying to ascertain the intention of Parliament, and not "construe the words used"; that surely is the whole process. And it will create an infinite source of argument.

Their Lordships concluded that reference to Hansard should be permitted only in certain circumstances:

a) where the legislation is ambiguous or obscure, or leads to an absurdity;

b) when a statement has been made by a minister or promoter of the Bill;

c) the statements relied on are clear.

The Lord Chancellor expressed the view (with which many will sympathise) that every question of statutory construction will involve an argument that it falls under one of these heads. The parties' legal advisers will therefore need to research Hansard in practically every case. If their own professional pride does not force them to do so, their insurers will.

However, another point arises which is deeply unsatisfactory, and that is why on earth did the Inland Revenue argue the point in the first place? They knew exactly what the relevant provisions were intended to mean - the Treasury Minister gave repeated explanations to Parliament about it and technical evidential points on admissibility cannot disguise that fact. There is something extremely disturbing about the Inland Revenue pursuing a taxpayer for tax on the basis of an argument which they know (along with everybody else) is contrary to the intention of Parliament - just because nobody was allowed to tell the court. This was not a case where the circumstances in issue were not in contemplation at the time the provisions were enacted. The very point was considered fully at the time, and specifically addressed by the Financial Secretary in his answers to Parliament.

It is interesting to speculate what will become of some important tax principles which have developed from the judicial examination of the anti-avoidance legislation over the years. Examples such as s.703 TA 1988 have been quoted before Mr Hart's children were even born. At the time of the introduction of s.703 in 1960, the Attorney-General said that it would not apply to an ordinary liquidation; perhaps we can now be sure that it does not.

Similarly, would an individual ordinarily resident in the UK now be within the scope of s.739 TA 1988 if he had made a transfer of assets before he became ordinarily resident? The Financial Secretary said not when the provision was introduced, but *Herdman v IRC* (1969) 45 TC 394 decided otherwise.

Unfortunately, we cannot just assume that the decision in *Herdman* no longer applies. The decision will need to be overruled, possibly after the court has read the ministerial statement - but that evidence has first to be admitted and it will be for the court to decide whether it makes any difference. (It did not do any good in *Massmould Holdings Ltd v Payne* [1993] STC 62).

Not a week goes past without some new revelation about how the law is not being applied as the minister said, and it will get worse. I have a feeling that the names of Financial Secretaries long since departed will become increasingly well known as their speeches are examined for pearls of previously unrecognised value.

Finally, I would enquire whether all this was necessary in the first place. Could not, or should not, the case have been decided in the same way without reference to Hansard?

The argument arises from the interpretation of s.63(2) FA 1976, which says that the amount of benefit is "the amount of any expense incurred in or in connection with its provision, and includes a proper proportion of any expense relating partly to the benefit and partly to other matters".

From this amount can be deducted any amount which is "made good" by the employee, and it was accepted in this case that the amounts paid were sufficient to cover the additional costs to the school of educating their sons. On a marginal costing basis, the cost to the employer was nil; however, the Inland Revenue sought to charge tax on the basis of the average cost of educating each pupil of the school.

Everybody agrees that s.63(2) is ambiguous; its wording is capable of bearing either meaning. This was apparent in its journey through the courts. It was no less ambiguous when it reached the House of Lords. The Lord Chancellor said that the ambiguity should be construed in favour of the taxpayer. Lord Bridge said that he found it difficult to decide, but he did not have to because Hansard resolved the matter. Lord Griffith said that he would have construed the provision in favour of the taxpayer, even without reference to Hansard. Lord Oliver said that the provision was ambiguous and that the absurdity arose from the average cost construction. Lord Browne-Wilkinson said that the words of the section could bear either meaning. Lords Ackner and Keith agreed with Lord Browne-Wilkinson's judgment without adding any words of their own.

It is beyond doubt that the intention of Parliament is unclear. However, this is hardly unique to this provision, and the courts last week, last month and last year have been resolving question of statutory interpretation without reference to Hansard. There is a presumption against a construction that provides an absurd result, because absurdity is unlikely to have been intended by Parliament. There is also the principle expressed by the Lord Chancellor that any ambiguity should be resolved in favour of the taxpayer. On these bases alone, one might have

thought that the taxpayer's arguments might have prevailed, even without reference to Hansard.

In case the absurdity is not as manifest as I suggest, the airline example is perhaps sufficient to demonstrate the point. An airline may offer its employees concessionary fares at 10% of the normal fare if seats are available. The cost of conveying one more passenger is negligible, considerably less than the concessionary fare. This is good for the airline, because it encourages employee goodwill, and they make profit out of it. Let us suppose that an airline employee boards a flight and finds there are only eight people on board. One-eighth of the cost of the flight would therefore be attributed to the employee, who would be taxed on the most spectacular benefit. However, this is not enough. It is not the cost of the single flight which needs to be considered. It is the whole cost of running the airline, including all the head office and administrative staff, backup crews, maintenance - everything. And what if the airline makes a loss? The costs would be considerably higher, and all would need to be taken into account in determining the cost to the employee of his single flight. It also needs to be decided for what period these costs have to be ascertained. Is it one year, five years, one week - or what? The very calculation seems to be absurd, let alone the resultant amount which would be charged as a benefit on the employee.

The alternative view is to take a much simpler calculation. If the employee does not travel on the flight, what would the total cost of that flight have been? If the employee does travel on flight, what would the total cost of the flight then be? The difference between the two figures represents the costs incurred by the employer in the provision of the benefit, which is to allow the employee to travel on the flight. Both accountants and lawyers may feel more comfortable with this approach.

Had Mr Hart lost his case as a result of the House of Lords' confirming the exclusionary rule, the result would have been most unfortunate for him and for many taxpayers. However, that might only have been a short term matter. The obvious injustice and the fact that the provisions were not (in fact) intended to, operate this way would surely have led to a change in the law. Such a change may not have restored the originally intended position, but it would probably have eliminated most of the absurdity. By winning his case on this basis, the parliamentary process has been opened up to examination, and many may feel that the cure is going to be much more painful than the original ailment.

Perhaps in time the position will be refined and end up like *Furniss v Dawson*, a sort of mystical fog which may descend at any time to cloud the process of interpretation - all in the name of clarity.