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PUBLIC AND PRIVATE DRAFTING
Objectives, problems, styles and approaches

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Similarities and differences

Are there important differences between public and private drafting? Lord Blackburn:

I shall state as precisely as I can what I understand from the decided cases to be the principles on which the courts of law act in construing instruments in writing, and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used.¹

The only difference between statute drafting and private drafting is that the Interpretation Act 1978 applies to statutes; but how often is that relevant?

Are there important differences between legal drafting and other types of writing? Lord Hoffmann:

I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change² which has overtaken this branch of the law ... is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of “legal” interpretation has been discarded.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.³

¹ *River Wear Comrs v Adamson* (1877) 2 App Cas 743..

² When was this “fundamental change”? Those who identify it tend to attribute the change to the preceding generation. Lord Hoffmann in 1998 refers back to Lord Wilberforce. But in *Prenn v Simmonds* [1971] 1 WLR 1381 at p.1384–1386 Lord Wilberforce said that “*The time has long passed* when agreements ... were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations.”) The story goes back to at least the 1940’s. “I anticipate with satisfaction that henceforth the group of ghosts of dissatisfied testators who, according to a late Chancery judge, wait on the other bank of the Styx to receive the judicial personages who have misconstrued their wills, may be considerably diminished”. *Perrin v Morgan* [1943] AC 399 at p.415.

Pepper v Hart [1993] AC 593 can be understood as reflecting the trend to search slightly harder for intention at the cost of convenience (though subsequent experience has shown the cost/benefit ratio to be so high that the Courts have stepped back somewhat).

³ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at pp.912–3.

Slightly different approach to materials admissible as aid to construction:

(1) For statutes: Law Reform papers; explanatory notes (maybe?) Hansard (occasionally) on *Pepper v Hart* principles; textbooks all admissible.

(2) By contrast, the opinion of counsel relating to draft trust documentation⁴ and a contemporary memorandum recording the wishes of the testator,⁵ are not admissible for construction.

A wider approach to statutes makes sense as the Courts can rectify private documents but not acts of parliament. But other Acts of Parliament can and often do. Eg Finance Act 1984, Sch. 13, para. 10(2):

Paragraphs (b) and (c) of sub-paragraph (1) above shall not apply to any disposal falling within the provisions of—

(a) section 44(1) of the principal Act (disposals between husband and wife); or

(b) section 49(4) of that Act (disposals by personal representatives to legatees); or

(c) section 273(1) of the Taxes Act (disposals within a group of companies);

but a person who has acquired the new asset on a disposal falling within those provisions (and without there having been a previous disposal [not] falling within those provisions or a devolution on death) shall be treated for the purposes of paragraphs (b) and (c) of sub-paragraph (1) above as if the new asset had been acquired by him at the same time and for the same consideration as, having regard to paragraph 8 above, it was acquired by the person making the disposal.

The word “not” accidentally omitted; restored in the FA 1989.

For a recent example, see FA 2012 charity tax amendments. Explanatory Notes FB 2012 provides:

... in-year repayments were put on a statutory footing by paragraphs 4 to 7 of Schedule 8 to FA 2010. However, those changes to the Gift Aid legislation do not work as intended, so Schedule 15 amends the legislation to allow charities to make free-standing claims for Gift Aid and other income tax repayments.

22. HMRC allows registered CASCs to claim Gift Aid repayments on donations made to them provided that the donations are used for qualifying purposes. It is the intention that they should be able to claim Gift Aid in the same way as charitable companies. Owing to an error that occurred when legislation was re-written for Corporation Tax Act 2010, CASCs are not treated in the same way as charitable companies for the purpose of the Gift Aid legislation. Schedule 15 amends the legislation to allow CASCs to claim Gift Aid repayments and to put HMRC current practice on to a statutory footing.

⁴ *Rabin v Gerson Berger Association* [1986] 1 WLR 526 but it does not matter as the *remedy* of rectification should be available instead. The approach in is confirmed in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 110.

⁵ *Re Atkinson* [1978] 1 WLR 586 but the position for Wills has been altered by s.21 Administration of Justice Act 1982.

Profile

It is a national sport to criticise legislative drafting:

The Mikado: Unfortunately, the fool of an Act says “compassing the death of the Heir Apparent”. There’s not a word about a mistake—
Ko-Ko, Pitti-Sing and Pooh-Bah: No!
Mikado: Or not knowing—
Ko-Ko: No!
The Mikado: Or having no notion—
Pitti-Sing: No!
The Mikado: Or not being there—
Pooh-Bah: No!
The Mikado: There should be, of course—
Ko-Ko, Pitti-Sing and Pooh-Bah: Yes!
The Mikado: But there isn’t.
Ko-Ko, Pitti-Sing and Pooh-Bah: Oh!
The Mikado: That’s the slovenly way in which these Acts are always drawn. However, cheer up, it’ll be all right. I’ll have it altered next session. Now, let’s see about your execution—will after luncheon suit you? Can you wait till then?
Ko-Ko, Pitti-Sing and Pooh-Bah: Oh yes—we can wait till then!
The Mikado: Then we’ll make it after luncheon.
Pooh-Bah: I don’t want any lunch.
The Mikado: I’m really very sorry for you all, but it’s an unjust world, and virtue is triumphant only in theatrical performances.

But is private drafting different?

The Solicitors' word processors spew forth an ever increasing flood of garbage. A clearer case of a profession ‘conspiring against the public’ is hard to imagine.⁶

A role model

Statute (and statutory instrument) is often the drafter’s starting point. This applies not only to the precedents which the parliamentary drafter occasionally provides⁷ but to statutory material generally.

In a linguistically divided society, statutory drafting cannot meet all expectations. Eg the introduction to the CIOT annotated Finance Act 2012:

It is regrettable that the Parliamentary draftsman seems increasingly unable to distinguish between the different uses of the relative pronouns “that” and “which” ...

As to which see XKCD http://imgs.xkcd.com/comics/cautionary_ghost.png

⁶ The Times leader 30 November, 1990.

⁷ Eg. Sch.1 SLA 1925; Schs. 3 and 4 LPA 1925.

Modern styles – sometimes brought to focus by rewriting in consolidations:

Beginning sentences with “but”

Parliamentary Counsel often begin a sentence with But. They are supported by Fowler who derides the supposed rule that one should not begin a sentence with But as a superstition.

See eg Companies Act 2006:

136 Prohibition on subsidiary being a member of its holding company

(1) Except as provided by this Chapter—

(a) a body corporate cannot be a member of a company that is its holding company ...

137 Shares acquired before prohibition became applicable

(1) Where a body corporate became a holder of shares in a company—

(a) before the relevant date ...

it may continue to be a member of the company.

(4) But, so long as the prohibition in section 136 would (apart from this section) apply, it has no right to vote in respect of the shares mentioned in subsection (1) above ...

Contrast the predecessor, s.23 CA 1985:

23 Membership of holding company

(1) Except in the cases mentioned below in this section, a body corporate cannot be a member of a company which is its holding company ...

(2) This does not prevent a subsidiary which was, on 1st July 1948, a member of its holding company, from continuing to be a member; but (subject to subsection (4)) the subsidiary has no right to vote at meetings of the holding company ...

Punctuation

Punctuation was traditionally omitted in legal documents. Many trust drafters still use no punctuation. If it is used, a sense of guilt or unease or tradition causes drafters to use it sparingly and in a manner quite distinct from ordinary English composition.⁸

Punctuation has only just begun to appear in trust drafting. The parliamentary drafter led the way. Precedents in the Conveyancing Act 1881 have full stops at the end of them, though no other punctuation. Precedents in the Law of Property Act 1925 use commas in addition, though sparingly. The Statutory Will Forms 1925 use punctuation in the manner of ordinary English prose. Lord Shaw:

⁸ Thus one sees underlining or absurd spaces to avoid the ordinary use of commas:

This Deed is made by John Adam Peter Jones and Adam West ...

This Deed is made by John Adam Peter Jones and Adam West ...

This is at least better than the older form:

This Deed is made by John Adam Peter Jones and Adam West ...

where it is not clear how many parties there are to the deed.

Punctuation is a rational part of English composition ... I see no reason of depriving legal documents of such significance as attaches to punctuation in other writings.⁹

Informality

Gift Aid is the term for the tax relief for cash gifts to charity. The relief was introduced in 1990. Statute originally used the more formal and sober term “qualifying donations”. But in keeping with the zeitgeist, the catchy and colloquial name slipped into statutory usage in s.39 FA 2000 and it is now used all the time.

Gender-neutral drafting

In 2007 Jack Straw made the following statement in Parliament:

For many years the drafting of primary legislation has relied on section 6 Interpretation Act 1978, under which words referring to the masculine gender include the feminine. In practice this means that male pronouns are used on their own in contexts where a reference to women and men is intended, and also that words such as chairman are used for offices capable of being held by either gender. Many believe that this practice tends to reinforce historic gender stereotypes and presents an obstacle to clearer understanding for those unfamiliar with the convention.

I have worked with colleagues in Government to secure agreement that it would be right, where practicable, to avoid this practice in future and, accordingly, Parliamentary Counsel has been asked to adopt gender-neutral drafting... so far as it is practicable, at no more than a reasonable cost to brevity or intelligibility....¹⁰

In this respect, private drafting lags behind statutory drafting. It may catch up as the younger generation imposes its views.

Rhetoric

Nothing like the old days:

‘W H E R E by the common Laws of this Realm, Lands, Tenements and Hereditaments be not devisable by Testament, nor ought to be transferred from one to another, but by solemn Livery and Seisin, Matter of Record, Writing sufficient made bona fide , without Covin or Fraud; yet nevertheless divers and sundry Imaginations, subtle Inventions and Practices have been used, whereby the Hereditaments of this Realm have been conveyed from one to another by fraudulent Feoffments, Fines Recoveries and other Assurances craftily made to secret Uses, Intents and Trusts; and

⁹ *Houston v Burns* [1918] AC 337 at 348.

¹⁰ HC Deb 8 March 2007, col. 146 Written Ministerial Statement. See Williams, “The End of the ‘Masculine Rule’ ? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland” *Statute Law Review*, (2008) Vol 29 p.139.
For a general introduction to this somewhat fraught topic, see Garner’s *Dictionary of Legal Usage*, (3rd ed. 2011), entry under “Sexism”.

also by Wills and Testaments, sometime made by nude parolx and Words, sometime by Signs and Tokens, and sometime by Writing, and for the most Part made by such Persons as be visited with Sickness, in their extreme Agonies and Pains, or at such Time as they have scantly had any good Memory or Remembrance; at which Times they being provoked by greedy and covetous Persons lying in wait about them, do many Times dispose indiscreetly and unadvisedly their Lands and Inheritances; by reason whereof, and by Occasion of which fraudulent Feoffments, Fines, Recoveries and other like Assurances to Uses, Confidences and Trusts, divers and many Heirs have been unjustly at sundry Times disherited, the Lords have lost their Wards, Marriages, Reliefs, Harriots, Escheats, Aidspur fair fitz chivalier, & pur file marier , and scantly any Person can be certainly assured of any Lands by them purchased, nor know surely against whom they shall use their Actions or Executions for their Rights, Titles and Duties; also Men married have lost their Tenances by the Curtesy, Women their Dowers, manifest Perjuries by Trial of such secret Wills and Uses have been committed; the King's Highness hath lost the Profits and Advantages of the Lands of Persons attainted, and of the Lands craftily put in Feoffments to the Uses of Aliens born, and also the Profits of Waste for a Year and a Day of Lands of Felons attainted, and the Lords their Escheats thereof; and many other Inconveniences have happened, and daily do increase among the King's Subjects, to their great Trouble and Inquietness, and to the utter Subversion of the ancient Common Laws of this Realm ...

(Statute of Uses, 1535)

Still less:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

Contrast the prosaic Human Rights Act 1998:

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.

1 The Convention Rights.

(1) In this Act “the Convention rights” means the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the Convention

And indeed the Human Rights convention itself is not rhetorical. Perhaps it would be more inspiring and more popular if it were:

Article 2 Right to life

1 Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2 Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4 Prohibition of slavery and forced labour

- 1 No one shall be held in slavery or servitude.
- 2 No one shall be required to perform forced or compulsory labour.
- 3 For the purpose of this Article the term “forced or compulsory labour” shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations.

This is not what much like what Sir Geoffrey Bowman in his lecture calls “a sea-god speaking”.

Politics

“Bills are made to pass as razors are made to sell” (Henry Thring, the first First Parliamentary Counsel)

Cinematograph Act, 1909

An Act to make better provision for securing safety at Cinematograph and other Exhibitions.

1 Provision against cinematograph exhibition except in licensed premises.

1. An exhibition of pictures or other optical effects by means of a cinematograph, or other similar apparatus, for the purposes of which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with, or, save as otherwise expressly provided by this Act, elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act.

2 Provisions as to licences.

(1) A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine.

LCC v Bermondsey Bioscope Co [1911] 1 KB 445

A county council granted a licence under s. 2 Cinematograph Act 1909 on condition that the premises shall not be open on Sundays, Good Friday, or Christmas Day. The argument on behalf of the respondents, to which the magistrate has given effect, is that the conditions which the county council have power to impose are conditions for securing safety, and the title of the Act, ... was referred to as indicating the scope of the conditions which the county council may impose. ... The language of s. 2, sub-s. 1, seems to me to be quite clear, and we must therefore construe it according to its plain meaning. In my opinion that section is intended to confer on the county council

a discretion as to the conditions which they will impose, so long as those conditions are not unreasonable.¹¹

The wording was deliberately chosen to facilitate the passage of the Act through Parliament with the support of the film industry.

A recent example is the public benefit requirement now in the Charities Act 2011.

...in the context of private education, there were deeply held views, indeed entrenched positions, on each side of the debate about the place of private education in the society of England and Wales in the 21st century. We see the resulting legislation as something of a compromise, capable of meaning different things depending on the point of view of the reader. It is our function to decide what, as a matter of proper statutory interpretation, the 2006 Act does mean...¹²

But is private drafting different? Lord Wilberforce:

The words used may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get “agreement” and in the hope that disputes will not arise.¹³

Vagueness

Statute is often vague and in this respect different from private drafting.

Eg Section 620(1) ITTOIA:

In this Chapter “settlement” includes any disposition, trust, covenant, agreement, arrangement or transfer of assets...

Lord Hoffmann explains:

Not every transfer of property is a settlement for the purposes of [the settlement-arrangement definition]. There has to be an “element of bounty” in the transaction.¹⁴

A recent example is the disguised remuneration rules. The CIOT describe the legislation variously as impractical, disproportionate, complex, prescriptive,

¹¹ The same Act was discussed in the more famous case, *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1947] 1 KB 223 “Wednesbury unreasonableness”. (A licence to operate a cinema on condition that no children under 15 were admitted to the cinema on Sundays.)

¹² *AG v Charity Commission* [2011] UKUT 42 at [18].

¹³ *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384–1385.

¹⁴ *Jones v Garnett*, 78 TC 1 at [7].

subjective, and “a very blunt instrument.”¹⁵ The legislation consists of 47 sections unhelpfully numbered 554A to 554Z21. It is supplemented by guidance now in the Employment Income Manual. The EI Manual text is not countable by pages but the draft guidance already had more than 200.

Contrast the proposed General Anti-Avoidance Rule:¹⁶

Tax arrangements are “abusive” if they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action.

The vagueness is intended because Parliament cannot or will not specify what is intended to be caught.

You won’t often find provisions like this in private drafting; but of course, statutory drafting is here seeking to regulate a much wider range of activity.

(Very) Plain English

Small Charitable Donations Bill 2012 (Meaning of “Small Donation”) sch para 9:

There must be no benefits associated with the gift, or any benefits associated with the gift must be of negligible value (for example, a lapel sticker designed to acknowledge the making of a gift).

Do we really need the words in brackets?

Para 12 of the proposed Statutory Residence Test provides:

- (1) If P is present in the UK at the end of a day, that day counts as a day spent by P in the UK.
- (2) But it does not do so ... where—
 - (a) P would not be present in the UK at the end of that day but for exceptional circumstances beyond P’s control that prevent P from leaving the UK ...

Para 12(5) SRT schedule tries to explain “exceptional circumstances”:

- Examples of circumstances that may be “exceptional” are—
- (a) national or local emergencies such as war, civil unrest or natural disasters, and
 - (b) a sudden or life-threatening illness or injury.

You will not often find that in private drafting.

¹⁵ Comments on Finance Bill 2011 accessible www.tax.org.uk/tax-policy/public-submissions/2011/FB11subs/FB-No3-DisguisedRemuneration

¹⁶

http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_032113

The objection is based on an aesthetic point, perhaps. Roy Fuller:

Ideally, a legal document and a poem have both got to be “right” – accurate, useful, unpadding, elegant.¹⁷

Step-based drafting

The pre-2008 s.87 TCGA provided:

(4) Subject to the following provisions of this section, the trust gains for a year of assessment shall be treated as chargeable gains accruing in that year to beneficiaries of the settlement who receive capital payments from the trustees in that year or have received such payments in any earlier year.

(5) The attribution of chargeable gains to beneficiaries under subsection (4) above shall be made in proportion to, but shall not exceed, the amounts of the capital payments received by them.

(6) A capital payment shall be left out of account for the purposes of subsections (4) and (5) above to the extent that chargeable gains have by reason of the payment been treated as accruing to the recipient in an earlier year.

Contrast s.87A TCGA:

(2) The following steps are to be taken for the purposes of matching capital payments with section 2(2) amounts.

Step 1 Find the section 2(2) amount for the relevant tax year.

Step 2 Find the total amount of capital payments received by the beneficiaries from the trustees in the relevant tax year.

Step 3 The section 2(2) amount for the relevant tax year is matched with—

(a) if the total amount of capital payments received in the relevant tax year does not exceed the section 2(2) amount for the relevant tax year, each capital payment so received, and

(b) otherwise, the relevant proportion of each of those capital payments.

"The relevant proportion" is the section 2(2) amount for the relevant tax year divided by the total amount of capital payments received in the relevant tax year.

Step 4 If paragraph (a) of Step 3 applies—

(a) reduce the section 2(2) amount for the relevant tax year by the total amount of capital payments referred to there, and

(b) reduce the amount of those capital payments to nil.

If paragraph (b) of that Step applies—

(a) reduce the section 2(2) amount for the relevant tax year to nil, and

(b) reduce the amount of each of the capital payments referred to there by the relevant proportion of that capital payment.

Step 5 Start again at Step 1 (unless subsection (3) applies).

If the section 2(2) amount for the relevant tax year (as reduced under Step 4) is not nil, read references to capital payments received in the relevant tax year as references to capital payments received in the latest tax year which—

(a) is before the last tax year for which Steps 1 to 4 have been undertaken, and

(b) is a tax year in which capital payments (the amounts of which have not been reduced to nil) were received by beneficiaries.

¹⁷ (1969) 113 SJ 662.

If the section 2(2) amount for the relevant tax year (as so reduced) is nil, read references to the section 2(2) amount for the relevant tax year as the section 2(2) amount for the latest tax year—

- (a) which is before the last tax year for which Steps 1 to 4 have been undertaken, and
 - (b) for which the section 2(2) amount is not nil.
- (3) This subsection applies if—
- (a) all of the capital payments received by beneficiaries from the trustees in the relevant tax year or any earlier tax year have been reduced to nil, or
 - (b) the section 2(2) amounts for the relevant tax year and all earlier tax years have been reduced to nil.
- (4) The effect of any reduction under Step 4 of subsection (2) is to be taken into account in any subsequent application of this section.

No reader who labouriously works through the almost endless iterative steps of s.87A will consider the new style of wording is an improvement on the old. I first speculated whether the legislation was drafted by someone who trained to write computer programs rather than legislation. The correct explanation seems to be that "step-based drafting" was an innovation of the tax law rewrite project in the search for new and clearer methods of drafting; the drafter of the FA 2008 sought to adopt the same technique, but in more clumsy hands the technique delivered obscurity rather than clarity.

This does not necessarily mean that step-based drafting is a bad technique, but it certainly demonstrates how it can be used to bad effect. Finance Bills are generally drafted in a hurry (Sch 7 FA 2008 was a mad panic) and clarity was a victim of the process (among others).

You will not find much (if any) step based drafting in private drafting.

The fundamental problem however is not the drafting, but the need to match capital payments with trust gains for a year.

Objective principle

The objective principle of construction states that one does not look for the subjective intention of the author of a document.

Construction disassociated from the fetter of seeking subjective intention easily becomes very distant from it. Lewison quotes with approval the approach of Nourse L.J. (reversing the trial judge on the construction of a rent review clause):

I think it very probable that, in accepting the landlord's construction, the learned judge has correctly assessed what the parties did indeed believe and desire to be the effect of [the clause]. But a court of construction can only hold that they intended it to have that effect if the intention appears from a fair interpretation of the words

which they have used against the factual background known to them at or before the date of the lease ...¹⁸

Lewisson defends this since:

In the case of a lease there are potential successors in title of each party. Hence the court is right to insist that the intention must be made clear by the words of the contract read in the light of the admissible background.¹⁹

But if a judge can ascertain from the lease and intuitive context the “very probable” intention of the parties, so too can any other reasonably well informed reader of the lease.

The principle is sometimes said to be a logical consequence of those situations where a Court cannot find a subjective intention because none exists. There are circumstances where no subjective intention exists because the issue to be decided never came to the mind of the author. This can happen with private drafting, but is more common in wider ranging documents such as statutes.

“A Will is a soliloquy, while the language of a contract is addressed to another”.²⁰

However, although we cannot always find a subjective intention, it does not follow that we cannot or should not seek subjective intention *at all*.

Problems and solutions (comments restricted to tax statutes)

The Chartered Institute of Taxation expresses itself strongly: “the way tax law is developed and effected in the UK is deeply flawed.”²¹

There is one route and one route only to good tax legislation: sound tax policy devised by those with a sound understanding of the current tax system; a leisurely timetable of consultation and legislative drafting; and the 10 tax tenets of the Institute of Chartered Accountants of England and Wales.²²

The tax consultation framework promises a fresh start:

¹⁸ *Philpots (Woking) Ltd v Surrey Conveyancers Ltd* [1986] 1 EGLR 97. The decision of mainstream law reports not to report this case reflects tacit disapproval.

¹⁹ *Interpretation of Contracts* (5th edn., 2011), para.2.05.

²⁰ *Skelton v Younghouse* [1942] AC 571 at 579.

²¹ Letter from CIOT to George Osborne, 19 May 2010 accessible www.tax.org.uk/Resources/CIOT/Migrated%20Resources/t/to-santos_40.pdf

²² <http://www.icaew.com/~media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-02-00-Better-Tax-System.pdf>

2. There are five stages to the development and implementation of tax policy:
Stage 1 Setting out objectives and identifying options.
Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
Stage 3 Drafting legislation to effect the proposed change.
Stage 4 Implementing and monitoring the change.
Stage 5 Reviewing and evaluating the change.

3. Where possible, the Government will:

- engage interested parties on changes to tax policy and legislation at each key stage of developing and implementing the policy;
- make clear at what stage (or stages) the engagement is taking place so that its scope is clear;
- carry out at least one formal, written, public consultation in areas of significant reform;
- set out, as the policy develops, its strategy for stakeholder engagement including planned formal consultation periods, informal discussions, working groups and workshops;
- consult, where it can, on the policy design, draft legislation and implementation of anti-avoidance and other revenue protection measures, provided this does not present additional risk to the Exchequer;
- minimise the occasions on which it consults only on a confidential basis. Where confidential consultation has been necessary the Government will be as transparent as possible about its outcome and consult openly if pursuing the policy change further; and
- provide feedback which sets out the Government's response to the views received and makes clear what changes, if any, have been made to the planned approach as a result of those views.

4. At each stage of consultation, the Government will set out clearly:

- the policy objectives and any relevant broader policy context;
- the scope of the consultation, in particular what is already decided and where there is still scope to influence the outcome;
- its current assessment of the impacts of the proposed change and seek to engage with interested parties on this analysis. A final assessment of impacts will be published once the final policy design has been confirmed; and
- which department and official is leading on the consultation (or specific elements for joint HMT and HMRC consultations).

5. Informal consultation will be as transparent as possible, consistent with the need to protect revenue. The best principles of formal consultation will be applied to informal consultation to ensure clarity of scope, impact, accessibility, and meaningful feedback. Comments will only be attributed to a representative body when it is clear that the individual consulted is commenting on behalf of that representative body. It is recognised that individuals need time to consult others before they can provide comments on behalf of a representative body. Informal consultation can run alongside formal consultation but will often be most appropriate at the earliest and latest stages of tax policy development to identify options and then to fine-tune the detailed legislation and implementation of change.

Exceptions

8. The Government will generally not consult on straightforward rates, allowances and threshold changes, or other minor measures; recognising, however, that even in these cases some level of consultation can often be informative. It may also adopt a different approach for revenue protection or anti-avoidance measures where following this Framework could present a risk to the Exchequer. In other

circumstances where the Government decides not to consult during tax policy development it will explain the reasons for that decision.

9. There will be times when it will be necessary to deviate from this Framework. In these circumstances the Government will be as open as possible about the reasons for such deviations.²³

It is easier to announce good intentions than to abide by them. The editor of *Taxation* discussing the budget 2012 cap on charity reliefs concluded:

It seems that the policy has been abandoned, and we are back to the 'rabbit out of a hat' approach.²⁴

The CIOT comment on the new 10% IHT charity legacy relief in the FA 2012:²⁵

We object to the proposals ... Our objections are...

- The proposals are complex and run entirely counter to the tax policy objective of simplification;
- The Consultation process is flawed: it fails to meet the criteria set out in the Tax Consultations Framework ...

The other professional organisations said the same. HMRC summarised:

Overall, ... the responses were broadly supportive of the new incentive.

(See the definition of “consult” in Bierce’s Devil’s Dictionary.)

The same applies to the 2012 and 2013 reforms for taxation of companies holding residential property.²⁶

That is not an easy prescription, and it is tempting to look for an easier solution. Recent unsuccessful attempts include the tax law rewrite; the HMRC charter (perhaps); and the forthcoming General Anti-Avoidance Rule.

I can appreciate that at any rate some of the transactions with which section 43 and section 56 [FA 1940] appear to be concerned are deplorable from the point of view of those interested in revenue collection. But for all that, the taxpayer is entitled to be told with some reasonable certainty in what circumstances and under what conditions liability to tax is incurred or else to be told explicitly that the circumstances and conditions of liability are just those which the Commissioners of Inland Revenue in their administrative discretion may consider appropriate. The seventeen sections which constitute Part IV of the Finance Act, 1940, are expressed with what proves on investigation to be a vagueness so diffuse and so

²³ <http://www.hmrc.gov.uk/consultations/tax-consultation-framework.pdf>

²⁴ Truman, “Taxation” (2 May 2012).

²⁵ For a discussion, see Taxation of Charities Online www.taxationofcharities.co.uk

²⁶ See Kessler, *Taxation of Non-Residents and Foreign Domiciliaries*, (11th ed 2012) para 70.5 (Homes held by non-natural persons: commentary).

ambiguous that they may well produce in practice the second alternative while adopting in form the requirements of the first. This would be an unfortunate situation to have brought about. The prayer of Ajax - 'Εν δε Φαει Και ολεσσον²⁷ - has been heard before in your Lordships' House, but I think its appeal is even stronger when obscurity is created by deliberate legislation than when it arises from the less wilful confusions of the common law.²⁸

Perhaps the prayer of Ajax should form the mission statement of The Office of the Parliamentary Counsel.

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²⁷ Εν δε Φαει is "in the light", Και is just a random emphatic particle and ολεσσον means "destroy!"

²⁸ *St Aubyn v AG* [1952] A.C. 15 p. 44.