

The Shifting Sands of Statutory Interpretation

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Many months ago, I was asked by Lord Rodger to give this address. There were three features of the request that made it irresistible. First, it was made many months before I had to speak. The future would take care of itself. Secondly, the request was made with Lord Rodger's characteristic charm. Thirdly, he said that I could talk on any subject that I fancied. It was, I suppose, a reasonable inference that the subject had to be related in some way to statutes, but otherwise I believed that I had a free hand. Later in the year, he pressed me gently for a title. I was rather busy adapting to my new life in Parliament Square and had not decided what to talk about. So I chose a title that gave me maximum room for manoeuvre. When I started to think about what I wanted to say, I looked at the Statute Law Society's website and found to my dismay that the theme of this year's conference is "Legislation and the Supreme Court". What did that mean? It obviously did not mean "legislation about the Supreme Court". "The attitude of the Supreme Court to statutory interpretation" seemed a more likely candidate. There are those who believe that in time the Supreme Court will become more bold in its approach to constitutional and human rights issues. That is, of course, possible. Time will tell. But at the present time, there is no evidence to suggest that the Supreme Court will adopt a different approach from that which would have been adopted if the Appellate Committee of the House of Lords had continued in being. And why should the Supreme Court have a different attitude to statutory interpretation from, say, the High Court or the Court of Appeal?

I could, I suppose, have enquired whether there were any *travaux preparatoires* of the decision to choose the theme of the conference. But I decided to let sleeping dogs lie and rely on my broad title. As will become apparent, I have devoted a significant part of this lecture to an analysis of a recent decision of the Supreme Court on a pure question of statutory interpretation. To that extent at least, I am faithful to the theme of today's conference. But I confess at the outset that I shall not be suggesting that the Supreme Court does have a different approach to statutory interpretation except in the mundane sense that it is not bound by earlier court decisions as to the true meaning of any particular statute.

Looked at very broadly, I do not think that the current approach to statutory interpretation in a purely domestic context without regard to the ECHR is any longer in doubt. The days when the literalists held sway are long gone. As so often, Lord Bingham, whose death we all mourn, has encapsulated the modern approach with beautiful simplicity. For example, in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at para 8 he said:

“The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to the difficulty. Such an approach not only encourages immense prolixity in drafting....It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will. Because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute.... The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the historical context of the situation which led to the enactment.”

This is the general approach that is adopted by the courts today. These days, the problems are almost always of how to apply this general approach and it is striking how often judges can differ in their application of it. But this was not always the general approach. Statutory interpretation has undergone many twists and turns over the centuries. As I shall explain, changes have sometimes been introduced as a response to changes in external circumstances; sometimes as a response to the problem raised by a particular case; and sometimes as the individual response of a particular strong-minded judge who happens to believe that a change of approach is necessary. It may be surprising, but occasionally we need to remind ourselves that judges are human beings. They respond to problems in different ways. Some are cautious and acutely conscious of precedent and the need for certainty. Others have an altogether more adventurous spirit, although one might be hard-pressed to name a judge who could fairly be described as “swashbuckling”. But this is not the place to embark on a psychological study of judges. Nor is it possible even to begin to conduct a comprehensive review of the changes over time in the approach of the courts to statutory interpretation. I shall, however, pick out a few landmark stages along the way before I examine two modern cases in a little detail.

The approach of the judges to statutory interpretation in the first half of the 14th century has been the subject of a fascinating and erudite study by Theodore Plucknett (1980). As he points out, the formal side of judicial interpretation at that time was so little developed that the courts themselves had no ordered ideas on the subject and were apt to regard each case purely on its merits, without reference to any other case, still less to any general canon of interpretation. But cases and decisions began to repeat themselves. It was only gradually that the courts made a practice of examining

the intention of a statute in order to find a clue to its interpretation. Until the early years of Edward II's reign, the approach to interpretation was informed by the fact that, although statutes were the acts of the "King in Parliament", they were generally framed by the King's justices. The judges had inside information as to what the statutes were intended to mean. It was entirely natural, therefore, for judges to interpret statutes on the basis of what had been discussed and agreed in Parliament. Thus, for example, in one case Hengham J settled a matrimonial dispute ruling that: "We agreed in Parliament that the wife if not named in the writ, should not be received." He is reported as having said to counsel: "Do not gloss the statute for we know better than you, we made it": *Aumeye v Anon* YB 33 & 35 Edw I 82 (1305-1307). There were also occasions when judges decided that consultation with their legislator brethren was appropriate in order to ascertain the meaning of the statute. Thus in *Bygot v Ferrers* YB 33 & 35 Edw. I 585 (1305-1307), Brabazon CJ had cause to consider the nature of *Scire Facias* in the Statute of Westminster II, c 45 and simply said: "We will advise with our companions who were at the making of the statute." Another striking example is to be found in *Belyng v Anon* YB 5 Edw II, I 176-177 (1311-1312). The statute *De Donis* enacts that lands given upon "condition", that is entailed, cannot be alienated by the donee to the disinheritation of his issue. The statute provided that the word "issue" did not extend beyond the first generation. Bereford CJ agreed that this was the literal meaning of the statute, but said: "He that made the statute meant to bind the issue in fee tail as well as the feoffes until the tail had reached the fourth degree, and it was only through negligence that he omitted to insert express words to that effect in the statute; therefore we shall not abate by this writ." So at this early stage, what we would describe as a purposive approach to interpretation, and an exorbitant one at that, was applied. The judges had inside

knowledge as to what was intended (or could get it from their brethren) and saw no reason not to use it.

But there came a time when the judges of Edward 1's day were no longer living, and the new generation of judges could only learn the intentions that produced his epoch-making statutes from the tradition preserved among themselves. Later still, the court gradually started to infer the intention of the law-maker from the statute without the aid of personal knowledge, or professional tradition.

Thus it was that a more literal approach to statutory interpretation began to take root. Indeed, Bereford CJ himself adopted this approach on occasions. Thus in *Stirkeland v Brunolfshed* YB 3 Edw II, 108 (1310), he said: "You allege a Statute for the case, and the words of the Statute do not accord with your case, whereas they and your writ should be accordant....No writ is maintainable outside of the course of the common law [and] 'by the form of the Statute' unless it be expressly given by the Statute." Another example is *Waughan v Anon* YB 20 Edw III, ii, 198 (1346-1347), a case on whether an amendment to a writ should be allowed, Shareshulle J said: "[T]he statute says only that the process shall be amended in respect of such mistakes and it does not say that mistakes in writs are to be amended in such manner, and therefore we cannot carry the statute further than the words expressed in it."

This literal approach was fortified by later developments. The introduction of the printing press and the replacement of manuscript statute-books after 1480 meant that there was a single authoritative and carefully printed text of current statutes. As Sir John Baker has said in Volume VI of *The Oxford History of the Laws of England* at p

76, proposed legislation now started life as a draft statute, the exact wording of which could be debated and amended, usually with the combined legal expertise of judges, law officers and legally qualified members of the lower house. As a consequence, the finished product could be regarded as of considerable textual significance. The printed text created a culture of draftsmanship, where, as Sir John Baker has said (p 77), the draftsman would take “increasingly elaborate care to furnish bills with preambles setting out their objects, and to ensure that they provided for every contingency in the operative provisions, piling clause upon clause, qualifying them with provisos, savings and exceptions.

Thus, Fyneux CJ advocated a strict literal construction wherever this could be sensibly achieved. In difficult cases, however, he said that there were three relevant factors, namely (i) the words of the statute, (ii) if the words were difficult “the mind of those who made it” and (iii) previous interpretation by “wise men” all of which should be combined with “good reason”: see *Anon* (1516) Chaloner 278 no 1. It was therefore understood that a strict literal interpretation should not be adopted if this produced a result which was not sensible. A basic interpretative theory was implemented. “Negative” statutes (ie ones which were penal or in derogation of common right or in abridgement of the common law) were interpreted strictly and “affirmative” or beneficial statutes (which “enlarged” the common law or remedied a mischief at common law) were interpreted generously “for the common profit of the realm”: see Baker pp 77-8. But the distinction between abridgment and enlargement statutes became difficult to apply. Thus the attempt to create a hybrid literal and purposive approach to statutory interpretation gave rise to problems. In *Marmyon v Baldwin* (1527) 120 Selden Soc. 61 at 63, for example, Shelley J said: “a statute is

always taken as it has been applied, and is not taken strictly [even] if it is penal. For no statute is more penal than the *praemunire*, and yet no statute has been more largely construed. Thus the intention of the makers [is paramount]”. And a little later: “the sense and intent of the makers of any statute, and the mens statuti, should alone lead a judge to an upright judgment in construction of any statute.”

By the middle of the 16th century, the shift away from literalism and towards Parliamentary intention was well established. Thus, for example, in *Partridge v Straunge* (1553) Plowd 77v at 82, Serjeant Saunders said:

“[T]he efficacy of statutes is not solely in the wording of the statutes but in the intent of the statutes, which ought always to be greatly weighed, and the words ought to be bent thereto; and upon like reason a penal statute shall be extended by the equity if the makers thereof may be so perceived.”

In *Heydon’s Case* (1584) 3 Co Rep 7a, at the instance of the King, the Barons of the Exchequer amplified the purposive approach by introducing what we now call the “mischief rule”. In the 17th century, Coke was to say that the court’s duty was to interpret an Act “according to the true intent of them that made it” (4 Inst 330) a dictum which has been judicially approved many times.

During the 17th, 18th and first half of the 19th centuries, there was an explosion of legislation, much of it complex and badly drafted. Public law statutes were drafted by committees of the House of Commons that met in Middle Temple Hall. They at least had the benefit of the expertise of lawyers. Private bills were drafted by their promoters without the benefit of the same expertise. As Holdsworth has described in his *History of English Law* (1924, XI 370):

“Thus the style in which the statutes were drawn became more and more variegated. The result was increased difficulty in interpreting them, and sometimes in ascertaining their relations to one another. And since, during this period, the style of legal draftsmanship, which was used in the drawing of pleadings, conveyances, and other documents, was tending to become more verbose, the statutes which these lawyers drew exhibited the same quality: and so the difficulties of understanding and applying the growing body of statute law were increased.”

By the 19th century, the prevailing state of affairs led Jeremy Bentham to observe characteristically: “The English lawyer, more especially in his character of Parliamentary composer, would, if he were not the most crafty, be the most inept and unintelligent, as well as unintelligible of scribblers” (*The Works of Jeremy Bentham*, Bowring (ed) v 3 [1843] p 242. As Holdsworth notes (p 377), in 1838, Arthur Symonds of the Board of Trade wrote to C.P. Thomson, the President of the Board of Trade, complaining that “during the last 250 years our statute law has been a topic of ridicule and sarcasm” and that its quality had been condemned by “statesmen, judges, lawyers, wits, poets and public writers of all kinds”. The voices of dissatisfaction grew ever louder until 1869 when the office of Parliamentary Counsel was established. From then onwards, public Acts were (on the whole) drafted with precision and in a uniform style. Thus it is not surprising that the courts started to adopt an approach to interpretation which, although still seeking to reflect the intention of Parliament, paid more respect to the literal language of the text. Jessel MR put it this way in *Lowther v Bentinck* (1874) LR 19 Eq 166 at 169: “Now in construing instruments, I have always followed the rule laid down by the House of Lords in *Grey v Pearson* which is to construe the instrument according to the literal import, unless there is something in the subject or context which shows that that cannot be the meaning of the words”.

In *Eastman Photographic Material Co Ltd v Comptroller-General of Patents, Designs and Trademarks* [1898] AC 571, 575, Lord Halsbury LC approved this statement: “We have therefore to consider not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject.”

At the risk of gross over-simplification, it can be fairly said that for the most part this approach has been followed ever since, although it has been amplified and elaborated upon. Hence the many so-called canons of construction so helpfully and comprehensively described and analysed by Francis Bennion in his magisterial tome on *Statutory Interpretation*. Of course, there have been deviations from time to time. The most obvious example was the excursion taken many times by Lord Denning and heavily criticised by some judges, of whom perhaps Lord Simonds was the most vehement. In *Magor and St Mellons RDC v Newport Corporation*, Denning LJ had said: “We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis”. In the House of Lords ([1952] AC 189 190), Lord Simonds said that:

“[T]he general proposition that it is the duty of the court to find out the intention of Parliament—and not only of Parliament but of ministers also—cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited”.

As for Denning LJ's statement about filling in gaps, Lord Simonds said that this could not be supported. "It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. And it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act". How Lord Simonds must have enjoyed writing this piece.

When he became Master of the Rolls, Lord Denning continued to express an "expansive" approach to interpretation. But it was roundly rejected by the House of Lords in a number of decisions. It is perhaps sufficient to refer to what Lord Salmon said in *Buchanan (James) & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, 160H: "For a court to construe a statute is one thing but to graft a provision on to it on the ground that the court thinks it is reasonable to do so would bring the law into chaos....For the courts to graft a provision on to a statute or a contract is a practice which is entirely foreign to our jurisprudence and, as far as I know, to any other."

The extreme positions adopted by Lord Denning on the one hand and Lord Simonds on the other were more in the nature of personal deviations from the conventional approach than part of a general trend. They do, however, indicate that judges have idiosyncratic views. The different approaches of Lord Denning and Lord Simonds were the product of different world views of the role of a judge. That judges do so differ may be as welcome to academics as it is unwelcome to those who believe that the law should be certain. But it is a fact of life.

I have attempted to show in this extremely superficial survey that there have been dramatic shifts in the approach of the courts to statutory interpretation from time to time. There have been various explanations for this including the fact that the judges drafted some of the most important early legislation; the advent of the printing press; improvements in the quality of the drafting; and the gradual realisation that the intention of Parliament would not always be reflected in a strict literal interpretation of the words used. And that is to say nothing of the fascinating voyages of adventure undertaken by some individual judges and the deprecation of them by others.

Moving from the general to the particular, I would now like to consider the shifting attitude of the courts to the question of whether it is permissible to refer to Parliamentary material in order to interpret a statutory provision. Prior to *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, the general rule was that references could not be made to Parliamentary material as an aid to statutory construction. This was a judge-made rule. As Lord Reid explained in *Beswick v Beswick* [1968] AC 58, 74A:

“For purely practical reasons we do not permit debates in either House to be cited: it would add greatly to the time and expense involved in preparing cases involving the construction of a statute if counsel were expected to read all the debates in Hansard, and it would often be impracticable for counsel to get access to at least the older reports of debates in Select Committees of the House of Commons; moreover, in a very large proportion of cases such a search, even if practicable, would throw no light on the question before the court.”

The facts in *Pepper v Hart* are probably well known, but I need to summarise them. The taxpayers, who were members of the staff of a fee-paying public school, were higher-paid employees for the purposes of section 61 of the Finance 1976 Act. The school operated a concessionary fees scheme that enabled the taxpayers, as members

of staff, to have their sons educated at one fifth of the fees charged to parents of other pupils. During the relevant years, the school had surplus pupil capacity and was therefore able to take the sons of the taxpayers without turning away other boys. The taxpayers were assessed to tax on the basis that they had received benefits that were to be treated as “emoluments” of their employment under section 61, the cash equivalent of the benefits being chargeable to income tax in accordance with section 63. On appeal, the taxpayers contended that the cash equivalent of the benefit had to be determined under the principle of marginal costing to the school. The special commissioner found that the school incurred no additional expenditure in educating the taxpayers’ sons other than on some minor items and allowed the appeals.

The judge allowed an appeal by the Crown, holding that the cash equivalent of the benefit was a rateable proportion of the overall expenditure incurred by the school on providing its facilities to all of the pupils. The Court of Appeal dismissed the appeals by the taxpayers.

The taxpayers appealed to the House of Lords. The committee, comprising Lord Bridge, Lord Emslie, Lord Griffiths, Lord Oliver and Lord Browne-Wilkinson heard the appeals. At the conclusion of the argument which lasted one day, three members of the committee, Lord Bridge, Lord Oliver and Lord Browne-Wilkinson were subsequently to say that they were in favour of dismissing the appeals. Although no judgments were delivered at that time, in their judgments they were later to make it clear that, adopting well-established and orthodox principles of statutory interpretation, they were of the view that the words in section 63(2) “the cost of a benefit is the amount of any expense incurred in or in connection with its provision”

referred to the average cost of the provision of the benefit to all pupils and not to the marginal cost of providing the benefit to the sons of the taxpayers. Alan Moses QC (now Moses LJ), who represented the Revenue, has told me that at the end of the first hearing it was plain that the appeal would be dismissed. In fact, he had only been called upon to address the House in what he has described as a “desultory way”. Importantly, everybody (including the courts at each level) had been aware of the Parliamentary material which was to assume such significance. At no stage did the taxpayers submit that it was permissible to use it in order to construe the statute. The point was raised by nobody.

As for the other two members of the committee of the House, Lord Griffiths was to explain in his judgment that he considered the language of section 63(2) to be ambiguous. He saw the strength of the linguistic argument in favour of the average cost construction. Nevertheless, he said: “I could not believe that Parliament intended such a construction because it will produce what I regard as such unfair and absurd results”. I have not been able to discover what Lord Emslie thought. Perhaps it does not matter since, unlike the others, he was not a member of the committee that sat when the House reconvened for further argument.

As is well known, after several months, the parties, no doubt to their great surprise, were told to return for further argument on the question whether the Parliamentary material could be used as an aid to construction. Their Lordships had decided of their own motion to revisit the long-standing exclusionary rule and to sit in a constitution of seven. The excerpts from Hansard included material which showed that during the debate in committee, the Financial Secretary to the Treasury (who was promoting the

Bill), when responding to a question about the impact on the children of staff at fee-paying schools of clause 54(4), which was to become section 63 of the Act, said: “The removal of clause 54(4) will affect the position of a child of one of the teachers at the child’s school, because now the benefit will be assessed on the cost to the employer, which would be very small indeed in this case”. In other words, the Financial Secretary was saying that the effect of the statutory provision would be that the cost of the benefit would be the marginal cost of the benefit to the employer and not the average cost of the provision of the benefit.

After 6 days of further argument, judgment was reserved for a further few months. In the event, by a majority of 6:1 (Lord Mackay of Clashfern LC dissenting), the House decided that the rule excluding reference to Parliamentary material as an aid to statutory interpretation should be relaxed so as to permit such reference where (i) legislation was ambiguous or obscure or led to absurdity, (ii) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together with such other Parliamentary material as was necessary to understand such statements and their effect; and (iii) the statements relied on were clear. Lord Mackay dissented primarily on the ground that legal advisers would require to study Hansard in many cases and that as a result there would be a significant increase in the cost of litigation. This was no more than a restatement of what Lord Reid had said in *Beswick v Beswick*. Perhaps this could be called “the Scottish objection”.

It is not my aim in this lecture to add to the litany of writings on the question of whether *Pepper v Hart* was a good decision. It has been subject to great scrutiny and criticism and, I think, the general view now is that the majority opinions were

seriously flawed not least because they mistakenly equated the intention of government spokesmen in the House of Commons with the intention of Parliament. Rather, I have referred to the case because it is an interesting example of a decision where a long-standing judge-made rule was revised, albeit in carefully circumscribed terms. Why did the House do it? As Francis Bennion says in *Statutory Interpretation* at p 635:

“*Pepper v Hart* was an unsuitable vehicle for a major change in the law governing resort to Hansard in relation to statutory interpretation. It was not the ordinary case where the court simply has to decide on the disputed legal meaning of an enactment. It was an income tax case that had unusual background features.”

The main background feature was that the Board of Inland Revenue managed the income tax legislation under its control in a special way. It exercised a discretion as to how its statutory powers would be employed. It also operated a complex and extensive system of extra-statutory concessions. Prior to the introduction of the Finance Bill 1976, the Inland Revenue never conceded that the marginal cost was the appropriate measure, but had acquiesced in what Alan Moses QC has described as a “practice of compromise or fudge and muddle” (“*Pepper v Hart: Why it happened*”, unpublished talk 15 and 16 April 1994 referred to in *Bennion* at p 634).

In view of the position taken by the majority after the conclusion of the first hearing, it is worth asking why they decided to abrogate the long-standing rule against the use of Parliamentary material in this case. Lord Bridge said: “I should find it very difficult, in conscience, to reach a conclusion adverse to the appellants on the basis of a technical rule of construction requiring me to ignore the very material which in this case indicates unequivocally which of the two possible interpretations of section 63(2)

of the Act of 1976 was intended by Parliament. But for all the reasons given by my noble and learned friend, Lord Browne-Wilkinson, with whose speech I entirely agree, I am not placed in that invidious situation.” Lord Griffiths said that the object of the court was to give effect so far as the statutory language permitted to the intention of the legislature. “Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament?”

Lords Keith, Ackner and Oliver also agreed with Lord Browne-Wilkinson who gave the most comprehensive speech. He said that as a matter of principle, although the court could not attach a meaning to words which they could not bear, if the words were capable of bearing more than one meaning, the court should be able to look at all available materials to ascertain the true intention of Parliament and this should include a ministerial statement made in Parliament. He considered all the practical and constitutional objections that had been advanced against this innovation and rejected them one by one.

So why was the rule changed in this case? The basic rule of interpretation was well established and was not in issue. Put very simply, as Lord Browne-Wilkinson recognised, it was to interpret the language of the statute in such a way as to give effect to the intention of Parliament. In most cases, this involved giving the words used their ordinary and natural meaning when read in their context. But in some cases, the language was ambiguous, obscure or produced absurdity. In those cases, Lord Browne-Wilkinson said, principle required the court to take account of what was said during the passage of the Bill through Parliament as evidence of Parliament’s

intention. But why was it in this case (and no earlier case) that the House of Lords decided to find a new principle and depart from the long-established rule against using such material as an aid to construction? Could the answer be no more complicated than that the majority were of the view that an application of conventional principles of statutory interpretation was bound to produce a result which was contrary to the meaning which the promoter of the Bill said he intended and that such a result was simply so unjust and unfair to the taxpayers that it could not be accepted?

Lord Griffiths was not prepared to adopt what he called the linguistic argument since it produced a result that was so unfair and absurd that it could not have been intended by Parliament. But surely it did not produce an absurd result. And it was not inherently unfair. It would not have been unfair if nothing had been said during the course of passage of the Bill through Parliament. It was only unfair because of what the Finance Secretary had said in committee. Lord Bridge agreed that it should be possible to have recourse to Hansard, subject to the conditions proposed by Lord Browne-Wilkinson, because in that way he avoided being placed in the “invidious situation” of ignoring the material which indicated which interpretation was intended by Parliament. But that situation was only invidious because of the clear promise that had been made by the Financial Secretary. It was not inherently invidious to be called upon to ascertain the intention of Parliament without recourse to what was said during the passage of the Bill. Courts had been doing that for centuries, apparently without turning a hair or at least without turning too many hairs. They were quite accustomed to interpreting obscure and arguably ambiguous provisions. The fact that a provision was obscure or ambiguous had not previously caused the court to abandon the well-

established exclusionary rule. It is, however, fair to say that in *Pickstone v Freemans Plc* [1989] AC 66, the House of Lords, in construing a statutory instrument, did have regard to what was said by the Minister who initiated the debate on the regulations. But that seems to have been in support of a conclusion reached on other grounds. At all events, there was no reasoned analysis of the exclusionary rule or the reasons why or the circumstances in which it was legitimate to depart from it.

I should add that the judge-made tests of “obscurity” and “ambiguity” as pre-conditions for the application of the new principle are in any event not easy to apply. What do they mean? Once a judge decides on the meaning of a statutory provision, however difficult it may be to do so, he usually reaches the peaceful haven of believing that any obscurity that he may initially have thought to exist has been replaced by clarity and any possible ambiguity resolved. It is curious that, at the close of the first hearing in *Pepper v Hart*, Lords Bridge, Oliver and Browne-Wilkinson were all of the view that, applying orthodox principles of statutory interpretation, section 63(2) of the 1976 Act bore the meaning for which the Revenue contended. They were so sure of their ground that, as I have said, counsel for the Revenue was scarcely troubled in argument. The statutory words were not so obscure or ambiguous that it was not possible for their Lordships to arrive at what they considered to be the correct meaning. And yet Lord Browne-Wilkinson was able to say in his speech (p 640G) that he had no hesitation in holding that section 63 was ambiguous and obscure. In saying that the section was ambiguous, he was clearly using the word “ambiguous” in the sense that it was *possible to argue* that the section 63 was capable of two meanings, rather than that, applying orthodox principles of interpretation, it was capable of two meanings between which it was impossible to choose.

But I have not come here to praise or to criticise *Pepper v Hart*. As regards why the House changed a long-established rule of statutory interpretation in this case, it is surely because, as I have suggested, the Crown's position was so unattractive and so unjust in the particular circumstances of the case. On any view, the State (through the Revenue) was reneging on the promise it had made (through the Financial Secretary) as to how it intended the statutory provision to be interpreted. If the majority had felt able to agree with Lord Griffiths that the taxpayers' interpretation was correct, it is clear that the case of *Pepper v Hart* would have been of interest only to lawyers and accountants practising in the field of tax and would have not have aroused any general interest at all. I expect that it would have been reported in Simon's Tax Cases, but I suspect nowhere else. As it is, the case is an interesting recent example of a shift in the sands of statutory interpretation. Only time will whether it proves to be an important and enduring shift. The signs are not propitious.

I would now like to spend a little time considering the recent decision in of (*Electoral Commission*) v *City of Westminster Magistrates' Court* [2010] 3 WLR 705. A little detail is necessary. A donor who was entitled to be registered as an elector made 69 donations to a registered political party of which he was a member in a period when he was not registered in an electoral register and therefore did not qualify as a permissible donor within the meaning of section 54 of the Political Parties, Elections and Referendums Act 2000. Section 54 identifies those who are permissible donors. They include an individual registered in an electoral register and registered companies carrying on business in the UK. The party failed to make any of the relevant checks and did not return any of the donations. Section 56(2) provides that if the party

receives a donation which it is prohibited from accepting, it must be sent back to the donor within 30 days of the date of receipt. Section 56(3) provides that, if the party fails to return an impermissible donation within 30 days, the party and its treasurer are each guilty of an offence. The Commission applied to the magistrates' court for a forfeiture order under section 58 in the sum of c £350,000 which represented all the impermissible donations over £200 made by the donor to the party during the relevant period.

Section 58 provides:

- “(1) This section applies to any donation received by a registered party—
 - (a) which, by virtue of section 54(1)(a) or (b), the party are prohibited from accepting, but
 - (b) which has been accepted by the party.
- (2) The court may, on an application made by the Commission, order the forfeiture by the party of an amount equal to the value of the donation.”

It is sufficient to say that the Court of Appeal concluded that section 58(2) conferred a narrow discretion, that there was a strong presumption in favour of forfeiture which was only displaced by exceptional circumstances and that an order for forfeiture, if made, was to be made in the full amount and not for a lesser sum.

The party's appeal was allowed by the Supreme Court by a majority of 4:3 (Lord Rodger, Lord Walker and Lord Brown dissenting). It was common ground that (i) the primary object of the Act was to prohibit the receipt of foreign funding by a political party and (ii) section 58(2) gave the court a discretion to forfeit an amount equal to the value of an impermissible donation. The members of the court were divided as to

the nature of the discretion. Was it a broad discretion or was there a strong presumption in favour of forfeiture exercisable in all but exceptional circumstances?

Lord Phillips (with whom Lord Clarke agreed) reviewed the legislative history. The Committee on Standards in Public Life under the chairmanship of Lord Neill of Bladen QC produced a report in 1998 recommending that only those who live, work and carry on business in the United Kingdom should be entitled to give financial support to the operation of the political process here. Foreign donations were to be outlawed. They recommended that political parties should be able to receive donations from (i) people who are registered voters in the UK and (ii) those who are eligible to be put on an electoral register in the UK. In due course, the government issued a White Paper in which they accepted the committee's recommendations on foreign donors, but they introduced a significant modification: only individuals who were registered voters should be permitted to make donations to political parties. Lord Phillips said that, if Parliament had enacted the Neill Committee scheme, there would have been a strong presumption in favour of forfeiting the whole of a donation from an impermissible source: it would, or would be likely to be a foreign source and objectionable as such. But Parliament adopted a scheme under which impermissible donations may or may not be foreign. It made the power to forfeit discretionary with the intention that the magistrates' court should discriminate between cases where forfeiture was warranted and cases where it was not. Proof of acceptance of a donation from an impermissible source should raise a presumption that the donation is foreign. If the party cannot rebut that presumption, forfeiture should follow. If the party succeeds in showing that the donor was entitled to be placed on an electoral register, forfeiture should depend on whether it is an appropriate sanction for such

shortcomings as led to the acceptance of the donation. Lord Phillips considered that, where the donor is shown not to be foreign, “Parliament would have intended, by conferring a discretion whether or not to forfeit, that there would be a careful evaluation of all the circumstances in order to decide whether the draconian step of forfeiture was justified”. In other words, a proportionate response. He then addressed the question whether the power to forfeit was an all or nothing power. That raised the question of the true meaning of the words “an amount equal to the value of the donation” in section 58(2). Having regard inter alia to the fact that the Neill Committee contemplated that the amount to be forfeited would be variable, Lord Phillips held that the better interpretation was to treat the power to order forfeiture of an amount equal to the value of the impermissible donation as implicitly including the power to order forfeiture of a lesser sum.

Lord Mance said that the discretion introduced by section 58(2) was on its face an open discretion capable of responding to different circumstances, in particular the difference between foreign donations and donations made irregularly by a person who was entitled to be on a register, but who by mistake was not. He also agreed with Lord Phillips that section 58(2) permits partial forfeiture. A conclusion that partial forfeiture is possible and that the discretion is broad is more consistent with the policy of the legislation than that adopted by the minority, the policy being the elimination of inappropriate “foreign” donations.

Lord Kerr said that the critical question was whether forfeiture of a sum of less than the full amount of the donation was possible. If it was, the discretion was wide; if it was not, the discretion was not. If one concentrated exclusively on the language of

section 58(2), it was difficult to resist the conclusion that partial forfeiture was not possible. But there were strong policy reasons for interpreting section 58(2) as permitting partial forfeiture. The culpability of the offender is more easily reflected in the penalty if one has a calibrated reaction to the gradations of impermissibility that will arise; the impact on the party of the proposed forfeiture order can be assessed; whether it is a foreign donation can be taken into account; and the inaction of the Electoral Commission after it has discovered the impermissible donation can also weigh in the balance. Lord Kerr said that the most convincing argument, however, was that it was never intended that there be forfeiture where the donor was someone who was entitled to be on the electoral register, but was not registered because of an administrative error. There was no sign of this in the Neill Report, which spoke of the courts taking into account the degree of culpability in setting the level of forfeiture. And there was nothing in the White Paper that signalled a movement by the government away from the essential purpose identified by the Neill Report. It was therefore possible to hold that, “since the primary function of the Act was to ban foreign donors, Parliament must have intended that where others were caught because of the simplicity and breadth of the provision that was actually adopted to achieve that aim, it cannot have been intended that they would be subject to the same draconian penalty as those to whom the legislation was principally directed.”

Lord Rodger started by observing that nothing could be clearer than the intention behind the language of section 54 of the Act: political parties were not to accept donations from any individual who was not registered on an electoral register. He agreed with Lord Phillips that the ultimate aim of the Act was to catch foreign donors. But Parliament had chosen to pursue that aim by prohibiting parties from accepting

donations from all except a narrowly defined class of permissible donors. That class excludes foreign donors who are not entitled to be registered, but it also excludes donors who are entitled to be, but are not, registered. As the White Paper explained, there were good practical reasons for adopting this legislative approach. Lord Rodger said that section 58(2) did not permit partial forfeiture. The plain meaning of the language could not be displaced by reference to the Neill Report which stood at two removes from the statute. Nor was there the slightest hint in the wording of the statute of the elaborate scheme for the exercise of the discretion that had been constructed by Lord Phillips. In a case, like the present, where the party had held on to the donations which section 56 required it to return to the donor, it was difficult to see how the court could properly do other than make an order for forfeiture, since forfeiture so clearly promoted the statutory object of preventing parties from accepting donations from individuals who were not permissible donors.

Lord Brown gave a judgment essentially agreeing with Lord Rodger. As he trenchantly asked: how could a court properly allow a party to retain the value of a donation which Parliament has plainly ordained that it should never have accepted? Lord Walker agreed with both Lord Rodger and Lord Brown.

I have set all of this out at some length partly because it is a very recent case on statutory interpretation and the commentators have not yet had time to get their sharp teeth into it; and because it contains judgments by Lord Rodger and Lord Brown with which I entirely agree. It shows the court at work uninhibited by human rights considerations or by the constraints of EU law. All members of the court seem to have been of the view that their task was the orthodox one of ascertaining the

intention of Parliament and giving effect to the true meaning of what Parliament had said. In a sense, therefore, the decision is unremarkable. No member of the court identified a novel principle of statutory interpretation. Nevertheless, the differences of approach to the ascertainment of the true meaning of section 58 were striking. I cannot help thinking that what drove the majority to their conclusion was their belief that the result that had been reached by the Court of Appeal on the facts of the present case was so draconian, disproportionate and unfair that it could not have been intended by Parliament. But none of the judges in the majority put it quite like that. It will be recalled that this is precisely how Lord Griffiths reached his conclusion as a matter of construction without reference to the Parliamentary material in *Pepper v Hart*. But in view of the fact that the discretion is exercisable only where a party has received a donation from an impermissible donor and the party has not discharged its statutory obligation to return the donation within 30 days, it is surely impossible to argue realistically that it is so unfair and disproportionate to order forfeiture of the donation save in exceptional circumstances that this cannot have been intended by Parliament.

Rather, the majority derived their conclusion as to what Parliament intended mainly from the Neill Report. I find this rather surprising. As Lord Browne-Wilkinson said in *Pepper v Hart* at p 630G, it is permissible to have regard to reports such as the reports of commissioners, including law commissioners, and white papers, but only for the purpose of ascertaining the mischief which the statute is intended to cure, and not for the purpose of discovering the meaning of the words used by Parliament to effect such cure. It is true that in *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85, the House of Lords went further and had regard to a

Law Commission report not only for the purpose of ascertaining the mischief, but also for the purpose of drawing an inference as to the intention of Parliament from the fact that it had not expressly implement one of the Law Commission's recommendations.

But I am not aware of any case where the court has used a report to construe the meaning of a statutory provision in the way that the majority did in this case. It was a particularly striking case because, as Lord Rodger said, the Neill Report stood at two removes from the statute and the statute radically changed the scheme envisaged by the report. Clearly, the report could be looked at in order to identify the mischief which the Act was intended to cure, namely foreign donations to UK political parties. So much was common ground. But it is difficult to see what else could be gleaned from the report as an aid to the ascertainment of the true meaning of its provisions. All the more so, since Parliament made such important changes to the scheme recommended in the Neill Report. The majority did not explain why it was permissible to look at the report for an altogether more exorbitant purpose.

The court disagreed on the question whether section 58(2) permits a partial forfeiture. It seems to me that it was (as most of their Lordships said) to regard the question of whether partial forfeiture is possible as central to the enquiry whether the discretion to order forfeiture was broad or narrow. A power to forfeit either all or nothing does not sit happily with the notion of a wide discretion. The majority (certainly Lord Phillips and Lord Kerr) considered that the natural and ordinary meaning of the words "an amount equal to the value of the donation" was "the full amount of the donation" and not the strained meaning of "an amount up to the full amount of the donation". That was obviously right. As Lord Brown pointed out, there is a variety of other

phrases that could have been used if the strained meaning had been intended. But the majority felt able to adopt the strained meaning mainly because the Neill Committee contemplated that the amount to be forfeited would be variable and *therefore* Parliament must have so intended. The objection to this course is the one I have already mentioned. In this context too it is surprising that the majority relied on the Neill Report in view of the fact that the White Paper and then the Act radically changed the scheme envisaged by the report. Surely, Lord Rodger was right to say that in these circumstances the report could not displace the plain meaning of Parliament's words.

I cannot leave this case without wondering, no doubt disrespectfully, whether the decision of the majority would have been the same if the amount forfeited had been £350, not £350,000. On any view, it is a striking modern example of a case where judges have taken different views as to the true meaning of a statute whose subject-matter is straightforward and which is expressed in simple words.

I return to almost where I started. The general approach to statutory interpretation is today not in doubt. But if this brief and inevitably superficial survey achieves anything, it is surely that it would be a mistake to think that there is no room for further development in the area of statutory interpretation. After all, *Pepper v Hart* was something of a bolt out of the blue. Nothing is fixed. I do not believe that the sands have necessarily ceased to shift for ever.

