

Any footnotes are shown at the bottom of each page
For full version of abbreviations click 'Abbreviations' on FB's website.

Introductory Note by Francis Bennion

Other relevant documents are included on this website in the topic *Pepper v Hart* (www.francisbennion.com/topic/peppervhart.htm).

See also the valuable article on *Pepper v Hart* by Philip Ridd in *Tax Journal*, 19 December 2010. This may be accessed at <http://taxjournal.com/tj/node/21110>.

How they all got it wrong in *Pepper v. Hart*

by Francis Bennion

In a forthcoming book I venture to suggest that many legal practitioners, even including some judges, are deficient in the technique of law management.¹ I define this as-

... the general intellectual skill, applied in the context of particular facts (whether actual or hypothetical) and supplemented where necessary by detailed knowledge of the area of law in question in a case, of identifying the legal issues involved, formulating the relevant legal rule(s) and, by intellectual manipulation of the materials (witness statements, case reports, legislative enactments etc.), reaching the legal resultant (or arguable legal resultant) of applying the rule(s) to the facts.

A striking example of this deficiency is revealed in the Law Reports version of the decision in *Pepper (Inspector of Taxes) v. Hart* [1993] AC 593, which largely abrogated the exclusionary rule prohibiting recourse to Hansard in statutory interpretation. Now that we can see the full arguments of counsel I respectfully submit, as a former Finance Act draftsman, that everyone in the case got it wrong. The following first explains *how* they got it wrong, and then attempts to say *why* they got it wrong. Finally, some conclusions are drawn.

I am not here much concerned with the question whether recourse to Hansard should be allowed, or on what terms. My main point is that through defective law management the Appellate Committee applied the wrong criterion and did not perceive that the relevant enactment failed to satisfy the very tests the Committee laid down allowing such recourse. The enactment was not ambiguous or obscure, and its literal meaning did not lead to absurdity.

This leads us to the remarkable conclusion that the case was decided *per incuriam*, and so is no authority at all for recourse to Hansard in statutory interpretation.

The man in the street and 'commercial realities'

The case concerned what were referred to as in-house benefits provided by employers to their staff at a

¹ 'Teaching law management' in *Reviewing Legal Education* (ed. Professor Peter Birks), Oxford University Press. The book collects together papers on legal education delivered at a recent All Souls seminar held under the chairmanship of Lord Griffiths, a leading exponent of the theory that Hansard should be used in statutory interpretation and a member of the enlarged Appellate Committee in *Pepper (Inspector of Taxes) v. Hart* [1993] AC 593.

concessionary charge. These are benefits of a type which it is the employer's business to provide to the public anyway. They are to be contrasted with so-called external benefits, specially bought in by the employer for distribution to staff. I start with the following crucial passage in the argument of Mr Anthony Lester Q.C. for the taxpayers-

'In the circumstances of the present case, the cost of the benefit is limited to the additional costs over and above those incurred in providing, maintaining and running the undertaking as a going concern, i.e., the sum of the direct additional costs incurred by Malvern College in providing for the education and maintenance of the taxpayers' sons. Those are the expenses which would not have been incurred but for such provision to them. This construction accords with the understanding of the man in the street when asked how much the provision of an in-house benefit would cost an employer operating with surplus capacity ... [It] accords with what the special commissioner described as "the commercial realities of the situation:" [1990] S.T.C. 6, 11F.²

How far did this mislead the Appellate Committee? The truth is that neither the opinion of the man in the street nor the commercial realities had anything whatever to do with the matter. It was a question of construing statutory words that were entirely plain and straightforward if properly understood. Before turning to those I will briefly set the scene for the benefit of anyone still not familiar with the facts. To simplify, I will take the case of just one of the taxpayers, Mr Hunter, and limit it to just one of the relevant years of assessment, 1983-84. The principles and arguments relating to the other taxpayers, and the other years of assessment, are precisely the same, so why complicate matters by referring to them as well? This concentration of attention is just one of the techniques, much neglected, that make up the science or art of law management.

Mr Hunter was the bursar of Malvern College. At the appeal before the Special Commissioner the evidence was restricted mainly to a consideration of the facts surrounding Mr Hunter's son Bruce.³ Bruce attended the school throughout the year of assessment 1983-84, for which his father paid fees amounting to only one-fifth of the amount charged to parents who were not on the school staff. Mr Hunter was assessed to income tax for that year as having received a notional emolument in respect of the reduction in the school fee. The charging provisions were contained in the Finance Act 1976 ss. 61(1) and 63(1) and (2).⁴ It is convenient to present them here using what I call selective comminution, another law management technique. This retains the official wording of the crucial enactments but breaks them up so that every word can easily be perceived and considered. British drafting today is precision drafting, and each word is carefully weighed by the drafter. Failure by interpreters to realise this and act accordingly produces frequent error, as I believe it did in *Pepper v. Hart*.

Selective comminution

A selective comminution of the Finance Act 1976 ss. 61(1) and 63(1) and (2) produces the following-

(1) Where in any year a person is employed in higher-paid employment

and

(2) by reason of his employment there is provided for him, or for others being members of his family, any benefit to which the Finance Act 1976 s 61 applies

and

² [1993] AC 593, 611-612.

³ [1990] S.T.C. 6 at 8.

⁴ They are now contained, with immaterial variations, in the Income and Corporation Taxes Act 1988 ss. 154(1) and 156(1) and (2).

- (3) the cost of providing the benefit is not (apart from that section) chargeable to tax as his income
- (4) there is to be treated as emoluments of the employment, and accordingly chargeable to income tax under Schedule E, an amount equal to whatever is the *cash equivalent* of the benefit.
- (5) The cash equivalent of the benefit is an amount equal to the *cost of the benefit*, less so much (if any) of it as is made good by the employee to those providing the benefit.
- (6) The cost of a benefit is the amount of any expense incurred in or in connection with its provision, and includes a proper proportion of any expenses relating partly to the benefit and partly to other matters.

It will be noted that clauses (4) to (6) lay down a precise three-stage definition, intended to be precisely applied stage by stage. Tax is levied on the *cash equivalent* of the benefit. This is defined as the *cost* less anything paid by the employee. The cost is defined as the *expense* incurred in or in connection with the provision of the benefit, including a proper proportion of any expenses relating partly to the benefit and partly to other matters. The dispute as to interpretation in *Pepper v. Hart* related solely to clause (6).

Where they went astray

Those concerned arrived at varying answers on the following points.

(a) What was the 'benefit' provided to Bruce Hunter? Lord Mackay of Clashfern L.C. mistakenly thought it was his placing in a surplus place at the school, 'if as a matter of discretion the college agreed to do so'.⁵ Lord Browne-Wilkinson put him right-

'It has throughout been common ground that the benefit in this case to each taxpayer is that "his son is allowed to participate in all the facilities afforded by the school to boys who are educated there". These facilities are exactly the same as those afforded to every boy in the school, whether his parents are paying full or concessionary fees.'⁶

(b) What was the expense incurred (by the employer) in or in connection with the provision of this benefit to Bruce? As stated above, Mr Lester argued that the expense was 'limited to the additional costs over and above those incurred in providing, maintaining and running the undertaking as a going concern' (the so-called 'marginal basis'). Why should it be so limited? The words are plain, and Lord Browne-Wilkinson put Mr Lester right-

'On the literal meaning of the words, the expense to the school of providing these facilities is exactly the same for each boy in the school, i.e., a proportion of the total cost of running the school ... The words "in connection with" have the widest connotation and I cannot see how they are to be restricted in the absence of some context permitting such restriction.'⁷

This is the so-called 'average basis', under which the overhead expenses (staff salaries, board, maintenance costs etc.) are divided equally between all the pupils. Also to be included are the expenses of items relating solely to Bruce, characterised by Lord Browne-Wilkinson as 'additional food, laundry, stationery etc.'⁸ These are Mr Lester's 'marginal costs'. For Bruce they totalled ,400 in 1983-84.⁹

⁵ P. 613.

⁶ P. 643.

⁷ P. 643.

⁸ P. 622.

⁹ [1990] S.T.C. 6 at 9.

So according to Lord Browne-Wilkinson, in agreement with Vinelott J.¹⁰ and the Court of Appeal,¹¹ if he had not had recourse to Hansard he would have been of the view that this was the basis on which Mr Hunter should have been taxed on his notional emolument. However Lord Browne-Wilkinson was troubled by the following, which it seems helped him to reach the conclusion (false I submit) that there was a real doubt about whether this basis was correct-

'The strongest argument in favour of the taxpayers is the anomaly which would arise if the employer's business were running at a loss or was subsidised by endowment. As I have explained, in such a case the adoption of the literal meaning of the statutory words would lead to a result whereby the taxpayer is assessed at an amount greater than that charged by the employer to the public for the same service. The Crown have no answer to this anomaly as such.'¹²

A non-existent 'anomaly'

Why did the Crown have no answer? Because there is an answer. It is staring you in the face if you understand, and apply, the techniques of law management. Before saying what it is I must set the scene.

On appeal from the Special Commissioner, Vinelott J. described the basis provided by our clause (6) as 'the expense incurred in or in connection with the facilities afforded and so far as shared with the other boys at the school *a rateable proportion* of the facilities afforded to them all'.¹³ Clearly he was referring to the average basis, under which the share of expenses allotted to each boy in the school is an equal aliquot share. He did not discuss the point, but assumed without argument that the wording was open to no other construction. His statement was expressly concurred in by Slade L.J. on appeal, again without any examination or discussion of the reasoning supposedly leading to adoption of a rateable proportion as the meaning.¹⁴ Slade L.J. lamented that it seemed harsh that on this basis if a school was running at a loss the notional emoluments would include a sum greater than the normal school fees. However he found the wording too clear to allow this to be avoided.¹⁵ In the House of Lords it was again generally accepted that if the marginal basis were rejected the correct construction of the wording of clause (6) produced in all cases a rateable or average basis.

Let us get back to Mr Hunter. Clause (6) does not say anything about payment of a rateable or average proportion of the total expenses. It says that he must pay a *proper* proportion of any expenses (the school overheads) relating partly to the benefit enjoyed by Bruce and partly to other matters. It was assumed by everyone concerned that a proper proportion must always be a rateable or average proportion. That is not what the word means. It means a proportion which on the facts of Mr Hunter's case would be proper. Normally no doubt this would be the average basis. But if the school had been running at a loss, that could have been taken into account and the proportion reduced accordingly. If it had been subsidised by endowment, a similar reduction could and should have been made. A reduction could have reflected the fact (if such was the case) that staff receiving a benefit may not be in as good a position vis-a-vis the employer as an independent member of the public: they may be expected to help out, or accept a lower standard of service.¹⁶

Those familiar with techniques of law management will be aware that 'a proper proportion' is one of those

¹⁰ [1990] 1 W.L.R. 204.

¹¹ [1991] Ch. 203.

¹² [1993] A.C. 593 at pp. 643-644.

¹³ [1990] 1 W.L.R. 204 AT 209. Emphasis added.

¹⁴ [1991] Ch. 203 at 214.

¹⁵ 216-217.

¹⁶ A Minister cited by Lord Browne-Wilkinson said in relation to airline staff: 'It was never intended that the benefit received by the airline employee would be the fare paid by the ordinary passenger. The benefit to him would never be as high as that, because of certain disadvantages that the employee has. Similar considerations, although of a different kind, apply to railway employees.' (p. 626). Lord Mackay considered that the taxpayers' sons in *Pepper v. Hart* were in a position inferior to that of ordinary pupils (p. 613).

phrases by which the drafter signals that he is leaving the matter to the judgment or discretion of the interpreting agency without giving it any further guidance. It will then be for the agency to consider whether it needs to formulate guidelines indicating how the judgment or discretion is to be exercised by its staff so as to ensure consistency. If the matter comes before the court on appeal or review it will be for it to determine whether to approve such guidelines or lay down guidelines or sub-rules of its own.

The phrase 'a proper proportion', or any similar statutory term, is not necessarily intended to leave matters to the unguided judgment or discretion of individual officials, since in many cases (of which *Pepper v. Hart* was one) this would lead to an intolerable degree of uncertainty and inconsistency. Its use contemplates that so far as necessary a system of guidelines will be worked out (whether by an administrative agency such as the Board of Inland Revenue or the court on appeal or review) which will carry through the imputed intention of the legislator in different categories of case.

Use of the phrase 'a proper proportion' in our clause (6) also indicated that, contrary to the view taken by all the judges in *Pepper v. Hart*, the drafter did not intend one uniform test to be applied invariably. If that were so, he would have specified the test in the legislation. That is normal drafting practice.¹⁷ Clearly the drafter's intention was that the object of the legislation should be realised by taxing employees on a fair and reasonable quantification of the benefit they actually received, omitting any element of profit to the employer.¹⁸

Why did the Inland Revenue not realise that this was the true construction of the enactment and instruct their counsel accordingly? Why did not counsel pick it up anyway? Why did it not occur to any of the judges in the case? The only answer I can suggest is that few lawyers are instructed in the principles of law management, so that often they simply do not know how to interpret an Act correctly. I have been complaining about this for a long time. Fourteen years ago I published a book largely devoted to law management techniques.¹⁹ Twelve years ago I published an article about it.²⁰ I have made other attempts since, but little notice is taken.

The case of the errant Financial Secretary

The inadequate handling of statutory interpretation by courts and others presents a serious constitutional problem. I conclude by mentioning another such problem, perhaps even more serious.

In *Pepper v. Hart* the Appellate Committee was induced to look at and follow Hansard because they felt that otherwise injustice would be done. This was because in parliamentary proceedings on the Bill that became the Act containing our clauses (1) to (6) the Financial Secretary to the Treasury, Mr Sheldon (an engineer by profession), had given assurances that their meaning was that the marginal basis would be applied in all cases and that in relation to teachers the charge to tax under it would be 'very small indeed'.²¹ It is a serious matter when the clear legal meaning of statutory provisions is that tax will be charged on a certain basis but the responsible minister has assured MPs debating the Bill that it will be charged on a different basis, much less onerous.

As a legislative drafter, my inclination is to deprecate recourse to Hansard. I have striven to express the law clearly and comprehensively in the Act. Outside references may cut across this. However the drafter cannot be indifferent to the problem just mentioned. What is to be done?

¹⁷ The need to treat the phrase 'a proper proportion' in this variable way was demonstrated by Martyn Gower in his note at [1993] B.T.R. 185.

¹⁸ In *Westcott (Inspector of Taxes) v. Bryan* [1969] 2 Ch 324, where the relevant wording, contained in the Income Tax Act 1952 s. 161(6), was virtually identical, it was held that 'a proper proportion' of expenses had to be ascertained by reference to fairness (see pp. 343-344).

¹⁹ *Statute Law* (1st edn., 1980). See now the third edition (1990).

²⁰ 'The need for training in statute law', (1982) *Law Society's Gazette* 219.

²¹ See Lord Browne-Wilkinson at pp. 625-630, especially p. 629.

One answer is that ministers should be less ready to give assurances about the meaning of Bills. There are signs that this is developing. In proceedings on the 1994 Finance Bill Sir John Cope, a Treasury minister, said: 'The fact that the words of a Minister on such a clause as this might be used in court inclines Ministers to be much more careful and not produce examples that may prove to be illustrative but not particularly precise'.²² Another Treasury minister, Mr Stephen Dorrell, said in debate on the same Bill: 'Following *Pepper v. Hart*, people apparently look at what Ministers say to determine liability, so I shall not seek to interpret the law on the circumstances in which public officials are liable'.²³

Another thing that may help is that judges should be wary of acting on ministerial statements obviously made without full consideration. In the unreported case of *Doncaster Borough Council v. Secretary of State for the Environment* (Court of Appeal, Civil Division, 21 December 1992) the court rejected reliance on Hansard on the ground that 'The Minister's final remarks were necessarily extempore responses to various points raised by Mr Rossi during the debate'.²⁴

There is a political angle to all this. In *Pepper v. Hart* Lord Browne-Wilkinson said that from 1948 the Revenue, acting under similar statutory provisions, charged in-house benefits on the marginal cost. Then in the 1960s they sought to charge tax on the average cost. This was rejected by the tax commissioners, so the Revenue reverted to the marginal basis.²⁵ On the 1976 Bill that was the origin of our clause (6) the Financial Secretary assured MPs, as mentioned above, that tax under it would be charged at the marginal rate. At some point in the later administration of the provision the Revenue attempted to revert to the average cost basis, and that precipitated the case of *Pepper v. Hart*. The political point is this. It would have been possible to raise in the Commons the fact that the Revenue were seeking to go back on an assurance given to MPs. A debate could have followed. A motion of censure could have been put down. Political pressure could have been put on the Revenue to think again, and *Pepper v. Hart* might never have come to court. Rather than being a matter for the courts, it should be a concern of the House of Commons, perhaps acting through the medium of a select committee, when the government resiles on tax assurances given to MPs.

One more point calls for mention. I have sought to demonstrate that the true matter at issue in *Pepper v. Hart* was the question of how the functionaries entrusted by Parliament with the duty of exercising their judgment on what was a 'proper' proportion of Malvern College's overhead expenses to allocate to Bruce Hunter's education should have carried out that duty. The Financial Secretary purported to settle this question *in advance*. He was the wrong person to do this, and he was doing it at the wrong time. Although in practice it would be done in a wide variety of cases, where each type of case would depend on its own facts, he laid down a simple blanket answer.

I suggest that it can never be right for a court to take notice of such an answer, let alone allow it to dictate their decision. Parliament, in adopting the wording of our clause (6), must have contemplated not only that the conferred power of judgment would be exercised by officials rather than Ministers (and on appeal or review the courts), but that it would produce answers that would be different in different cases and might, in the light of experience or changing circumstances, be varied over time. Instead of this intended flexibility we have the Appellate Committee's rule, inscribed in stone, that the 'proper' proportion must always be the marginal cost.

²² *Parl. Deb. (Commons)* Stg. Cttee. A, 10 February 1994, cols. 173-174. This is striking testimony to the unreliability of parliamentary statements by ministers pre-*Pepper v. Hart*.

²³ *Parl. Deb. (Commons)* Stg. Cttee. A, 24 March 1994, col. 847.

²⁴ *Per* Simon Brown L.J. See 10 *Construction Law Digest* 06-24-31.

²⁵ See p. 625.

