

Executive estoppel: *Pepper v Hart* revisited by Francis Bennion

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).

Reference should also be made to the note on executive estoppel at *Bennion on Statutory Interpretation* (5th edn, 2008), pp 633-640.

When I wrote the following article I was not aware of an important article by Professor Stefan Vogenauer that I would have wished to take into account. This is ‘A Retreat from *Pepper v Hart*? A Reply to Lord Stein’ 25 *Oxford Journal of Legal Studies* (1 Dec 2005) 629.

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Executive estoppel: *Pepper v Hart* revisited

The dust has died down on the great case of *Pepper (Inspector of Taxes) v Hart*¹ in which the House of Lords relaxed the long-standing rule against reference to Hansard in cases concerning statutory interpretation. A fresh look at the Appellate Committee opinions after more than a decade confirms the misgivings many lawyers had at the time.

This article, while not examining the general question of resort to Hansard for interpretative purposes, seeks to show that the majority opinions were seriously flawed with regard to the substance of the case.² They failed to perceive that the enactment in question left the crucial decision to the judgment of the then Board of Inland Revenue³, acting quasi-judicially, and that far from rendering the enactment ambiguous (as the Appellate Committee found), this is a normal and proper feature of legislation.

The majority also failed to perceive, on consulting Hansard, that the Minister had acted improperly in telling the House of Commons in advance how the Board would exercise its judgment and basing this information on an incorrect reading of the relevant enactment.

It now seems that the Appellate Committee’s correct course would have been to find that the Government were estopped by the Minister’s misstatements from asking the courts to enforce a version of the enactment that was contrary to the assurances he had given to the House of Commons. It is suggested that the whole amounted to a failure of law-text analysis (a neglected topic) by the courts concerned.⁴

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Wording of key enactment

¹ [1993] AC 593.

² Some arguments presented here have been put forward in two previous articles of mine, “How They All Got It Wrong in *Pepper v Hart*”, [1995] *Brit. Tax Rev.* 325, www.francisbennion.com/1995/003.htm and “*Pepper v Hart* and Executive Estoppel”, 170 *JPN* (11 March 2006) 167, www.francisbennion.com/2006/012.htm.

³ On 18 April 2005 the Board was merged with HM Customs and Excise Departments to form the Commissioners for Her Majesty’s Revenue and Customs: see Commissioners for Revenue and Customs Act 2005.

⁴ On law-text analysis see Francis Bennion and Kay Goodall, “A New Skill? Law-Text Analysis” [2006] 3 *Web JCLI*, www.francisbennion.com/2006/030.htm.

Parliamentary Counsel nowadays draft with precision, expecting the courts to pay careful attention to the exact wording of their enactments. It seems that the Appellate Committee paid insufficient attention to the wording of the key enactments in *Pepper v Hart*, or as it was put by Alan Moses QC (now Lord Justice Moses), counsel for the Inland Revenue in *Pepper v Hart*: “The words in the clause were not construed at all”.⁵

The key enactments were sections 61(1) and 63(1) and (2) of the Finance Act 1976. A selective comminution⁶ of these produces the following, where numbering and emphasis have been added:

- (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
- (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 is submitted that this is a perfectly clear enactment, with no ambiguity whatsoever. In order to be applied it requires, as is commonly the case with statutory interpretation, first the ascertainment of certain facts and secondly the exercise of judgment in relation to those facts.⁷

The true analysis

Pepper v Hart concerned masters at Malvern College, an independent fee-paying school. Simplifying the facts without altering the substance, it can be said that a taxpayer Mr Hart, one of the masters, satisfied clauses (1)-(3) above so

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that under clause (4) he was chargeable in respect of the cost of the benefit he received, which was a reduced-rate place at the College for his son Bruce.

The carefully-drafted provisions spell out precisely what is meant by “the cost of the benefit”. The benefit to Mr Hart was made up of two kinds of component, respectively referred to at the hearing as “in-house” and “external” components. An in-house component was one shared generally by the schoolboys, such as staff salaries and payments for food, heating, and

⁵ “*Pepper v Hart*: Why It Happened” (typescript of unpublished talk given at a seminar on *Pepper v Hart* held at Balliol College, Oxford, on 15 and 16 April 1994), p. 3.

⁶ Select comminution reproduces the relevant words of the enactment(s) omitting inapplicable words: see F. A. R. Bennion, *Statutory Interpretation* (4th edn, 2002), pp 342-344.

⁷ As to the nature of judgment in this connection see two previous articles by the present author in this journal: “Distinguishing judgment and discretion”, [2000] PL 368; www.francisbennion.com/2000/042.htm, “Judgment and discretion revisited: pedantry or substance?” [2005] PL 707, www.francisbennion.com/2005/059.htm.

maintenance. An external component was one confined to a particular pupil, such as the supply to him individually of a replacement school blazer.

The dispute was restricted to in-house components, so it was necessary to determine first “the amount of any expense incurred in or in connection with [their] provision” during the relevant period, and second what was “a proper proportion” of that amount to allocate to Mr Hart. There is no doubt about the broad meaning of the phrase “the amount of any expense incurred in or in connection with [their] provision”. Clearly it includes out of pocket expenses incurred during the period, such as payment of staff salaries or the cost of food bought for the school kitchen. There might be some doubt about whether to include items such as amortization costs for school assets, but matters of that kind would obviously be dealt with according to the practice of the Board of Inland Revenue (as it then was) and would cause no difficulty. Certainly there cannot be said to be any material ambiguity in that respect. It was a matter left to the judgment of the Board, subject to rights of appeal. In *Pepper v Hart* there was no dispute over this aspect.

What of that phrase “a proper proportion”, over which the dispute lay? Here there was no ambiguity either. The statute contemplated that the Board would instruct the tax officials who would actually carry out the calculation on what basis to determine this. It would be a quasi-judicial function, requiring the exercise of judgment coupled with fairness.⁸ The statute no doubt contemplated that normally the expenses would be treated as equally divided between all the pupils of the school, but as we shall see there might be good reasons for departing from this in particular instances.

The courts dealing with the case did not view it in that way. Until the point at which parliamentary debates were brought into consideration, the courts construed what we are calling clause (6) as laying down a crude average cost basis applicable in all cases. This began in the High Court, where on appeal from the Special Commissioner, Vinelott J. described the basis provided by 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”.⁹ Clearly he was referring to what came to be called the average basis, under which the share of expenses allotted to each boy in the school was an equal aliquot portion. Vinelott J did not discuss the point, but assumed without argument that the wording was open to no

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other construction. His dictum was expressly concurred in by Slade L.J. on appeal, again without any examination or discussion of the reasoning.¹⁰ The same reasoning was adopted by the Appellate Committee in the first of its two hearings. At that stage they rejected an argument put forward by Mr Anthony Lester Q.C. (now Lord Lester of Herne Hill) for the taxpayers. This urged that “the cost of the benefit” was limited to the *additional* costs over and above those incurred in providing, maintaining and running the undertaking as a going concern, that is it was “the sum of the direct additional costs incurred by Malvern College in providing for the education and maintenance of the taxpayers’ sons”. Mr Lester argued that it was only these that were the expenses which would not have been incurred but for such provision to them. He added:

“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

⁸ In a case 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 *Westcott (Inspector of Taxes) v. Bryan* [1969] 2 Ch 324 at 343-344.

⁹ 1990] 1 W.L.R. 204 at 209. Emphasis added.

¹⁰ [1991] Ch. 203 at 214.

surplus capacity . . . [It] accords with what the special commissioner described as ‘the commercial realities of the situation’: [1990] S.T.C. 6, 11F.”¹¹

This advocated the so-called marginal basis, the one that was finally adopted by the Appellate Committee, though the fact 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. The marginal basis, as counsel for the Revenue pointed out,¹² ignores the words “in connection with” in clause (6). Proper interpretation does not ignore carefully crafted words.¹³

The true analysis, it is submitted, was this. The formula in clause (6) was created to provide for the exercise of judgment by the Board of Inland Revenue. The Board might exercise this judgment in various ways, for the formula was not ironclad. It left scope for variety in its application if this should seem expedient. The only limitation was the usual one that fairness must always be shown, and that the Board must not stray beyond the confines of the formula in a way that would justify interference by a reviewing or appellate court. But it was the judgment of the Board through its officials, and not of any other person or body, which was to be deployed. This even meant that over time the Board could if it thought fit change the way it exercised this judgment, provided the parameters just mentioned were observed.

Failure to follow the true analysis

Lord Browne-Wilkinson, who delivered the leading speech in the Appellate Committee, was troubled by the following, which it seems helped him to

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reach the conclusion that there was a real doubt about whether the average 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.”¹⁴

This shows that Lord Browne-Wilkinson was assuming, incorrectly it is submitted, that the literal meaning was that the average basis should be adopted in an ironclad one-method-fits-all manner instead of in the flexible way just outlined. He said that the Crown had no answer to this so-called anomaly. The Crown might have given the answer I have just suggested, but apparently did not think of it. In the Court of Appeal Slade LJ had also referred to the so-called anomaly. He lamented that it seemed harsh that on the average 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 Again it is submitted that this was misconceived.

Clause (6) does not say anything about payment of a rateable or average proportion of the total expenses. It says that the taxpayer in an individual case must pay what is in that case a *proper* proportion of any expenses (the school overheads) relating partly to the benefit enjoyed by the taxpayer and partly to other matters. Until the parliamentary proceedings were brought in, it was assumed by everyone concerned that “a proper proportion” must always be a rateable or average proportion. That is not what the phrase means. It means a proportion which *on the facts of the individual taxpayer’s case* would be “proper”.

¹¹ [1993] AC 593 at 611-612.

¹² *Ibid* at 612.

¹³ For the principle that every word of an enactment is to be given meaning where possible see F. A. R. Bennion, *Statutory Interpretation* (4th edn, 2002), pp 993-994.

¹⁴ [1993] A.C. 593 at 643-644.

¹⁵ [1991] Ch. 203 at 216-217.

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 been made to reflect 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). In *Pepper v Hart* Lord Mackay considered that the taxpayers' sons were in a position inferior to that of ordinary pupils.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

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employee has. Similar considerations, although of a different kind, apply to railway employees.”¹⁷

Use of the phrase ‘a proper proportion’ 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 he had intended that, he would have specified the test in the legislation according to normal drafting practice.¹⁸ Clearly the drafter’s intention was that the object of the legislation should be realised by taxing each employee on a fair and reasonable quantification of the benefit they actually received, omitting any element of profit to the employer.

Introducing the parliamentary proceedings

At its first hearing the Appellate Committee followed the well-established exclusionary rule and did not refer to Hansard. At the conclusion of that hearing it is clear that they would have upheld the courts below and found for the Revenue on the basis that the inflexible average basis applied. However after the conclusion of the first hearing it came to their Lordships’ attention that an examination of the proceedings in Parliament in 1976 which led to the enactment of sections 61 and 63 might give a clear indication of which of the two rival contentions represented the intentions of Parliament in using the statutory words. The case was therefore relisted for rehearing before a committee of seven Law Lords not all of whom sat on the original committee.¹⁹

In his opinion at the second hearing Lord Browne-Wilkinson proceeded to examine the parliamentary proceedings, taking up more than five pages of the report in doing so.²⁰ It suffices to quote one brief extract. The Bill was being debated in House of Commons Standing Committee E. A member of the committee asked about the position of school teachers enjoying concessionary fees. The Financial Secretary to the Treasury responded as follows:²¹

“He mentioned the position of teachers. 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’.”

Later Lord Browne-Wilkinson explained that in various contributions to the debates the Financial Secretary had made it clear that in each case (including that of teachers) the charge would be on the cost to the employer of providing the services and that in each case that cost

¹⁶ [1993] A.C. 593 at 613.

¹⁷ [1993] A.C. 593 at 626.

¹⁸ The need to treat the phrase “a proper proportion” in this variable way was demonstrated by Martyn Gower a [1993] B.T.R. 185.

¹⁹ [1993] A.C. 593 at 623.

²⁰ [1993] A.C. 593 at 625-630.

²¹ [1993] A.C. 593, *per* Lord Browne-Wilkinson at 629.

would either be nil or very small.²² Lord Browne-Wilkinson relied on this in concluding that the Financial Secretary had meant that the marginal basis for which Mr Lester argued, and not the

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average basis, was the one that the Revenue would apply.²³ In crucial words Lord Browne-Wilkinson went on:

“The question then arises whether it is right to attribute to Parliament as a whole the same intention as that repeatedly voiced by the Financial Secretary. In my judgment it is. It is clear from reading Hansard that the [Standing] Committee was repeatedly asking for guidance as to the effect of the legislation . . . That Parliament relied on the Ministerial statements is shown by the fact that the matter was never raised again . . .”²⁴

An unsuitable vehicle

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 of a sort which became familiar to me in my days as a Finance Bill draftsman. The main background feature was the presence of HM Board of Inland Revenue, as it then was. The Board managed the income tax legislation under its control in a special way. For example it did not always exact the maximum amount of tax that the legislation imposed according to its legal meaning. It exercised a discretion in the matter. It entered into agreements with bodies representing taxpayers about how its statutory powers would be employed. One such agreement in relation to the “perks” of railway workers is referred to by Lord Browne-Wilkinson²⁵ Elsewhere it was referred to by Alan Moses QC as “a deal which had been struck with those representing railway employees in the late 1940s, when they were a political force to be reckoned with”.²⁶

The Board also operated a complex and extensive system of extra-statutory concessions, which is still in operation. The Board sometimes displayed a cavalier attitude to the exact wording of current or prospective income tax legislation because that would not necessarily govern the Board’s actual practice. Alan Moses QC said that “Prior to the introduction of the Finance Bill in 1976, the Inland Revenue had never conceded that marginal cost was the appropriate measure but had acquiesced in a practice of compromise or fudge and muddle”.²⁷ Later he referred to “the pre-existing unhappy practice of muddle and illogicality with no one knowing how the practice was to be applied to a series of employees [school teachers] who had not previously been affected by the charge”.²⁸

A Treasury Minister who was in charge of a Bill promoted by the Board tended to share this cavalier attitude to the precise wording of the Bill because that was the climate in which he was operating. In debates the Minister would

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give answers directed to how the Board would use the powers conferred by the Bill rather than what the wording of the Bill actually was. The answers, like most answers given by politicians about the legal meaning of legislation, tended to be rough and ready. In *Pepper v Hart* the Financial Secretary repeatedly said that on concessions by employers “the effect of

²² [1993] A.C. 593 at 630.

²³ [1993] A.C. 593 at 641.

²⁴ [1993] A.C. 593 at 642.

²⁵: See [1993] A.C. 593 at 625.

²⁶ *Loc. cit.*, p. 7.

²⁷ *Ibid.*

²⁸ *Loc. cit.*, p. 8.

the Bill would be to leave their position unchanged from the previous law”²⁹ notwithstanding that the wording of the previous law was quite different.

All this led to some remarkable circumstances. The Minister gave assurances during the passage of the Bill that were considerably more favourable to the taxpayer than was indicated by the clear legal meaning of the enactment in question. At first the Board operated the resulting legislation in accordance with those assurances, but later tried to go back on them and implement the legal meaning, as strictly speaking it had power to do. That was what gave rise to the *Pepper v Hart* litigation.

Whether or not the Appellate Committee was right in finding that the legislation in question was ambiguous (it is submitted they were not right) the fact has to be faced that the Minister misled the MPs who were deciding whether or not to approve the legislation. He did not tell them the true legal meaning of the proposed enactments. This was not a course of deliberate deceit, but was no doubt due to inadvertence. The Minister in question, now Lord Sheldon, was trained as an engineer not a lawyer. He was not equipped to understand the finer details of financial legislation. Was this a proper basis for the Appellate Committee to determine the legal meaning of the legislation?

Executive estoppel

It could be contended that what the Appellate Committee decided at its second hearing transcended mere statutory interpretation and struck a blow for justice. The government had persuaded MPs to pass this tax legislation by telling them it would be administered by the Revenue on the marginal basis, one more favourable to taxpayers than the average basis or even the basis of what is “proper” where there are “special factors”.³⁰ This naturally troubled their Lordships.

Lord Bridge of Harwich said it raised an acute question as to whether it could possibly be right to give effect to taxing legislation in such a way as to impose a tax which the Financial Secretary to the Treasury, during the passage of the Bill containing the relevant provision, had, in effect, assured the House of Commons it was not intended to impose.³¹ Lord Griffiths said the case provided a dramatic vindication of the decision to consult Hansard: “had your Lordships not agreed to do so the result would have been to place a very heavy burden of taxation upon a large number of persons which Parliament never intended to impose.”³²

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Lord Browne-Wilkinson cited Lord Wilberforce’s extra-judicial plea in 1983 that the rule against citing Hansard should be relaxed where the government went back on a parliamentary statement that a Finance Bill was not intended to tax a particular class of beneficiary.³³ This pointed the way to at least a partial solution of the problem, which was picked up by Lord Steyn in *NASS*.³⁴ In *Pepper v Hart* the Government had told Parliament how a body for which the Government was responsible (the Board of Inland Revenue) would exercise a power of judgment about to be conferred on it by legislation. In *NASS* the Government had likewise told Parliament (this time by way of explanatory notes accompanying the bill for the Immigration and Asylum Act 1999) how powers conferred by that Act were to be exercised. Lord Steyn said that while he would not rely on these notes he would clarify their status.³⁵ He stressed that such explanatory notes may be used as establishing the context of an enactment whether or not it is ambiguous. His key dictum is:

²⁹ [1993] A.C. 593, *per* Lord Browne-Wilkinson at 630.

³⁰ The story of these ministerial assurances was spelt out by Lord Browne-Wilkinson at pp 626-630.

³¹ [1993] A.C. 593 at 616.

³² *Ibid* at 619.

³³ *Ibid* at 636.

³⁴ *R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 4 All ER 654.

³⁵ Lord Steyn’s observations are in paras [2]-[6] of *NASS*.

“If exceptionally there is found in Explanatory Notes a clear assurance by the executive to Parliament about the meaning of a clause, *or the circumstances in which a power will or will not be used*, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court.³⁶

Lord Steyn said that this reflected the actual decision in *Pepper v Hart*, adding:

“What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.”³⁷

In 2001 Lord Hope of Craighead had said-

“For the reasons which I explained in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 WLR 15, 48C-E, I consider that the effect of the exception to the rule that resort to Hansard is inadmissible for the purpose of construing an Act which was recognised in *Pepper v Hart* [1993] AC 593 is that, strictly speaking, this exercise is available for the purpose only of preventing the executive from placing a different meaning on words used in legislation from that which they attributed to those words when promoting the legislation in Parliament. In expressing that view I wish to acknowledge the debt which I owe to my noble and learned friend Lord Steyn’s

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valuable discussion of this point in ‘*Pepper v Hart: A re-examination*’ (2001) 21 Oxford Journal of Legal Studies 59”.³⁸

Commenting on this passage Ian McLeod says:

“This way of looking at the matter, which has led Bennion to coin the term *executive estoppel* (see *Pepper v Hart and Executive Estoppel* (2006) 170 JPN 167), provides a useful insight. However, if this approach is followed through, it would be at least arguable that one consequence would be to make *Pepper v Hart* relevant to the interpretation of any given statute only while the government which was responsible for the enactment of that statute is still in office.”³⁹

The better view may be that a government binds its successors in this respect. That is one of many aspects that need settling in relation to executive estoppel.

In a later case Lord Hope of Craighead said-

“As I understand [*Pepper v Hart*], it recognised a limited exception to the general rule that resort to Hansard was inadmissible. Its purpose is to prevent the Executive seeking to place a meaning on words used in legislation which is different from that which Ministers attributed to those words when promoting the legislation in Parliament (see *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195 at 226-227, [2001] 2 AC 349 at 407-408). Mr Sumption recognised that the exception thus stated has commanded broad acceptance where it has operated as a kind of quasi-estoppel against the Executive.”⁴⁰

³⁶ Para [6] (emphasis added).

³⁷ Ibid.

³⁸ *R v A* [2001] UKHL 25, [2001] 3 All ER 1, at [81].

³⁹ Ian McLeod, *Legal Method*, 6th edition (Palgrave, forthcoming). I am grateful to Mr McLeod for facilitating this reference and sharing his thoughts on the topic with me.

⁴⁰ *Wilson v First County Trust Ltd*, [2003] UKHL 40, [2003] 4 All ER 97, at [113.]

Roderick Munday has observed that this does not amount to a fully worked-out theory, but adds that it is one whereby the executive “effectively estops itself from employing a provision in the Act in a specified manner in the future” and says where it does so “the executive will not be entitled to renege on that undertaking”.⁴¹

What we have here is the emergence of a doctrine, which might conveniently be referred to as executive estoppel, whereby the executive is in law prevented from going back on an assurance as to its future conduct in relation to the relevant legislation, given by it as part of the enacting process. This is a matter not of the interpretation of the resulting Act but of its future administration.

Where the executive has committed itself in this way the courts will not assist it to enforce the Act in an alternative manner which runs counter to what has been notified to the public. This applies even though the alternative manner conforms to the legal meaning of the enactment. Furthermore it seems to apply even where, as in *Pepper v Hart*, the notified manner is *not* in accordance with the legal meaning. This somewhat startling result means that the court

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will enforce an incorrect legal meaning just because that is what the executive promised that it would apply.

This doctrine of executive estoppel obviously allows reference to Hansard to be made by the court in order to establish that the commitment in question was given by a representative of the executive. The courts need to distinguish carefully between the giving of such an assurance and the existence of ambiguity or obscurity in the wording of the enactment. The wise words of Lord Steyn in the citation above need always to be remembered: “The object is to see what is the intention expressed by the words enacted”. If the intention is to confer a power of judgment or discretion on the executive, and the executive gave an assurance about the way in which it intended to exercise that power, it will not be allowed to renege on that assurance in legal proceedings.

So far as I am aware, until recently no one has thought of estoppel in this connection. No one that is except James Goudie QC. Speaking at an Oxford seminar held soon after *Pepper v Hart* was decided, he presciently said in response to a comment of mine:

“How about a form of estoppel? There’s a European precedent – a member state can’t take advantage of wrongly failing to implement a directive. It sticks in the throat if a Minister gives an assurance when he promotes legislation and then later tries to run a case contrary to that assurance. You wouldn’t have the *Pepper v Hart* sledgehammer. It would only apply where a Government department was a party to the litigation and you would only refer to Hansard in such cases. Whereas if I were litigating against Richard [Richard Gordon QC] on a point of statutory interpretation neither of us could refer to a Ministerial statement. We would be on level playing field. Estoppel wouldn’t go to meaning, but to the pursuit of a claim contrary to an assurance.”⁴²

Legitimate expectation

Although I have ventured to label the doctrine under discussion by the convenient name of executive estoppel, I should note that use of the term estoppel in this public law connection may now be thought old-fashioned in view of remarks by Lord Hoffmann in *Reprotech*.⁴³ He drew attention⁴⁴ to a 1981 dictum of Lord Scarman that estoppels bind individuals on the

⁴¹ Roderick Munday, “Explanatory Notes and Statutory Interpretation”, 170 JP 124 (4 March 2006), at 125.

⁴² Note of Plenary Session (chaired by Richard Gordon QC) of Seminar on *Pepper v Hart* held at Balliol College Oxford on 15 and 16 April 1994, p. 16.

⁴³ *R v East Sussex County Council, ex p Reprotech (Pebsham) Ltd* [2002] UKHL 8, [2002] 4 All ER 58.

⁴⁴ See para. 33.

ground that it would be unconscionable for them to deny what they have represented or agreed, but these concepts of private law should not be extended into “the public law of planning control, which binds everyone”. Lord Hoffmann said:

“There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power . . . But

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it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote.”⁴⁵

Lord Hoffmann added:

It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.⁴⁶

Others may disagree, feeling that the idea of the executive being *stopped* by the courts from profiting out of its misleading of Parliament has a superior claim to that of the weaker concept of mere disappointed expectation. Why should public law not gracefully and overtly admit its use of a valuable private law concept admittedly borrowed?

Conclusion

The conclusion to be drawn from the above is it is submitted as follows. *Pepper v Hart* should for the future be accepted as relating to executive estoppel rather than statutory interpretation. In the latter context the constitutional arguments frequently deployed against relying on the executive’s intention as trumping the intention arising from the legislative words may now be regarded as conclusive.

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[2007] *Public Law*, Spring 1

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

References:

None

⁴⁵ See para. 34.

⁴⁶ See para. 35.