

## **All Trains Stop at Crewe:**

### **The Rise and Rise of Contextual Drafting**

Daniel Greenberg\*

#### **A. Introduction**

A railway porter stands on the platform at Nantwich station shouting “all trains stop at Crewe”. Taken literally, his assertion is incorrect. But those who hear him appear to have no difficulty in understanding his intended meaning; indeed, they seem to find his concise proposition helpful because of its simplicity, the ease with which it is assimilated, and the fact that its brevity permits him to repeat it with sufficient frequency for each new wave of travellers to hear it in full. He could stand there repeating “All those trains that leave from this side of the platform stop, subject to unforeseen weather or other circumstances and with the exclusion of those trains that are bound only for the siding yard, at Crewe, but only in the sense that they interrupt their journey at Crewe for sufficient time to enable passengers to board and leave, following which, unless they have suffered a technical fault, they depart from Crewe and continue their journey.” The literal accuracy of his remarks would be greatly enhanced, but not their efficacy: and he would soon be consigned to a home for obsessive lunatics with pedantic neurosis.

One such home, the Office of the Parliamentary Counsel in London, has seen such change over the past few decades that it is no longer certain that the literalist porter would find it a congenial environment; or at any rate he would be obliged to choose his company much more selectively than may once have been the case. In the United Kingdom the primeval swamps of commercial legal drafting still abound with tangled sentences of 300 words and more, twisting and turning in an obsessive struggle towards that impossible goal, a perfect and exhaustive literal accuracy; and in the murk of these last remaining habitats revel moribund creatures such as ‘hereinbefore’ and ‘aforementioned’. But in the fields of legislative drafting the swamps have been drained, the grosser archaisms largely driven out

---

\* Of Lincoln’s Inn, Barrister; Parliamentary Counsel. This article is based on observations made by the author in the course of a lecture on statutory construction to the legal advisers to the Lord Chancellor on 10 October 2005. The author is greatly indebted to Saira Salimi of the Office of the Parliamentary Counsel for her comments on a troublesomely lengthy series of drafts

and the United Kingdom firmly established on an accelerating trend towards what a Minister recently described and applauded as “demotic English”.<sup>1</sup>

The relative prolixity and complexity of legislative drafting has habitually been justified by reference to the literalist behaviour of the courts of the United Kingdom in construing statutes.<sup>2</sup> Every legislative drafter has been taught over the years<sup>3</sup> to have in mind that the courts will begin by assuming that the words of the statute are to be given their fullest and plainest literal meaning, and that it is therefore necessary to draft in such a way as to ensure that the literal meaning and the legislative intention<sup>4</sup> are one and the same. It is sometimes assumed, therefore, that the modern trend towards brevity and simplicity in legislative drafting must be the result of a victory won against the forces of literalism. This article denies that; identifies a trend towards the use of colloquial language in legislation which is independent of the judiciary but which is assisted and supported by an expansion of the range of tools which the judges permit themselves to use for statutory construction; and suggests that there remains room for improvement.

## B. Literalism Versus Purposivism – the Phoney War

It is frequently asserted that an ancient war between the forces of darkness and literalism and the forces of light and purposivism has finally been won by the purposivists.<sup>5</sup> But it is apparent from close examination of the practice of the courts of the United Kingdom over the years in construing legislation that there never was a real war in these terms at all.

Put simply, in the judicial history of the United Kingdom the literalists were never literal and the purposivists were never purposive.

Theoretical advocates of literalism have always been forced, almost before they have finished asserting the force of literalism, to concede a great many exceptions

<sup>1</sup> “On the point raised by the noble Lord, Lord Berkeley, [“I have one comment on the phrase ‘the Secretary of State thinks’ ... I suggest that ‘think’ is a slightly odd word. Perhaps ‘consider’ would have been a better word.”] we are happy to engage Parliamentary Counsel who use ordinary English – what I would call demotic English – in the drafting of the Bill. I believe that ‘think’ says what it means and is the right word to use, rather than ‘is of the opinion’ or some more pompous phrase” (Lord McIntosh of Haringey speaking for the Government on an amendment to the Railways and Transport Safety Bill 2002-03 H.L. Deb. 10<sup>th</sup> July 2003 c. 432).

<sup>2</sup> See, for example, Chapters X and XI of the 1975 Report *The Preparation of Legislation* by the Renton Committee (Cmnd. 6053)

<sup>3</sup> See, for example, Sir Alison Russell KC, *Legislative Drafting and Forms* 12 (1938).

<sup>4</sup> Itself a concept of considerable difficulty to understand. See D. Greenberg, *The Meaning of Legislative Intention and its Implications for Legislative Drafting*, 27 (1) *Statute Law Review* (2006).

<sup>5</sup> See, for example, “The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in *River Wear Commissioners v. Adamson* (1876-77) LR 2 App Cas 743 affirming (1875-76) LR 1 QBD 546. In any event, nowadays the shift towards purposive interpretation is not in doubt.” – R (*Quintavalle*) v. *Secretary of State for Health* [2003] UKHL 13 per Lord Steyn.

and qualifications. That is true whether one is talking of academic writing<sup>6</sup> or of actual judicial pronouncement. And the most important qualification acknowledged by the judges, which owes as much to common sense as to jurisprudential dogma, is that however literal one wishes to be, if the natural construction of the words does not answer the question being asked, one is forced to look outside the strict letter of the legislation for its intention. In doing so one must rationally begin by considering the context of the words (and will frequently need to go no further).

The point is illustrated vividly by the following passage of the judgment of Lord Wilberforce in *Fothergill v. Monarch Airlines*<sup>7</sup> —

I start by considering the purpose of article 26, and I do not think that in doing so I am infringing any ‘golden rule.’ Consideration of the purpose of an enactment is always a legitimate part of the process of interpretation, and if it is usual – and indeed correct – to look first for a clear meaning of the words used, it is certain, in the present case, both on a first look at the relevant text, and from the judgments in the courts below, that no ‘golden rule’ meaning can be ascribed.

At the other end of the spectrum, those judges of the United Kingdom who espouse purposivism are immediately forced to concede its limitations. The most significant is that which is founded on the doctrine of the Sovereignty of Parliament and which requires clear and unambiguous words to be given their clear and unambiguous meaning, even in cases where one suspects that the legislature might have provided differently had a particular question or issue been exposed at the time. In this respect the following pronouncement of Jervis CJ in *Abley v. Dale*<sup>8</sup> remains good law —

If the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning.

This and other constraints imposed by the common law mean that the most purposive of judges in the United Kingdom is and always will be unable to be purposive in the teleological sense in which judicial purposivism is understood in continental and European contexts.

It is of course true that certain judges sometimes purport to be departing from literalism in pursuit of the legislative purpose, and that certain other judges sometimes declare themselves prevented by literalism from realising the legislative purpose. But on one analysis in neither case are they actually doing what they purport to be doing.

Take, for instance, the following dictum of Lord Simon of Glaisdale in *Stock v. Frank Jones (Tipton) Ltd*<sup>9</sup> —

<sup>6</sup> See, for example, Maxwell on The Interpretation of Statutes, Chapter 2 *et seq.* (1969).

<sup>7</sup> [1981] A.C. 251, 271 H.L.

<sup>8</sup> (1850) 20 LJCP 33, 35.

<sup>9</sup> [1978] 1 WLR 231 HL.

a court would only be justified in departing from the plain words of the statute were it satisfied that: (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly.

The fourth objective listed by Lord Simon shows that the departure mentioned in his opening words is not really a departure at all, rather a recognition of the fact that if one were to seek to construe the words used in a vacuum one would, unsurprisingly, arrive at a manifestly undesirable result, but that as soon as one reads the statute in its proper context one is able to avoid the undesirable result and perceive a single obviously desirable one.

### C. Contextual Analysis: the Common Ground

Among the most ancient and important principles of statutory construction in the United Kingdom, standing alongside the “golden rule”<sup>10</sup> adverted to by Lord Wilberforce in *Fothergill*, are the rules laid down by the Barons of the Exchequer in *Heydon’s case*<sup>11</sup> which require consideration of the “mischief and defect for which the common law did not provide”, the “true reason of the remedy” appointed to address it and “to make such construction as shall suppress the mischief and advance the remedy ... according to the true intent of the makers of the Act.”

With a background of this ancient principle, it may appear surprising that anyone could have perceived the British history of statutory construction as the gradual ousting of an ancient tradition of literalism. But the perception becomes comprehensible when one realises that, properly understood, the mischief rule is neither defiance of the cardinal rule of literal construction nor acceptance of anything approaching teleological purposivism. Rather, it is acceptance that as a matter of common sense the ground shared both by exponents of literalism and by exponents of purposivism must necessarily be occupied by the doctrine of the relevance of context. The concepts of mischief and intent in the mischief rule are not concepts of subjective motive, but objective concepts ascertainable from the context of the legislation.

It is notable in this regard that in one of the most important recent cases on statutory construction in the United Kingdom, *Regina v. Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd*<sup>12</sup> the concepts of mischief, legislative intent and context are inextricably linked both linguistically and conceptually in the judgments. Most striking, perhaps, is the following passage of the judgment of the Court of Appeal<sup>13</sup> —

<sup>10</sup> The golden or cardinal rule of construction according to plain meaning.

<sup>11</sup> (1584) 3 Co. Rep. 7a. See 1 Bl. Com. Ed. Hargrave, p. 87, note 38.

<sup>12</sup> [2001] 2 AC 349 HL.

<sup>13</sup> Para. 32.

So far as statutory construction is concerned the court adopts a purposive approach to statutory construction founded upon the mischief designed to be remedied and the object of the Act. Accordingly the surrounding circumstances admissible to ascertain such mischief and object are taken into account immediately, before starting to construe the words used, to make an informed determination whether these words are ambiguous in this context whatever their literal meaning. If so, then the court proceeds to construe the words in order to give effect to the intention of the legislature whether actual, so far as it is known, or if not, presumed according to the appropriate principles of construction.

In similar vein, Lord Nicholls of Birkenhead said in the House of Lords —

The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event, whether the purpose is stated expressly or has to be inferred, the exercise is one of statutory interpretation. Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.

#### **D. The Real War: Methods of Establishing Context**

The hypothesis that there never was any real war between literalism and purposivism in the attitude of the judiciary of the United Kingdom has to be able to account for a number of battles which have certainly been fought, and which have certainly been regarded, including by some of the antagonists, as being skirmishes in the course of that war. In what war were those battles actually fought, if not in the war against literalism?

One of the most significant and recent battles about legislative construction was the case of *Pepper v. Hart*<sup>14</sup> where a seven-judge House of Lords was expressly convened, unusually following a determination of a five-judge House, for the purpose of deciding whether or not to relax the previous rule preventing the courts from considering speeches in Hansard<sup>15</sup> in construing legislation. It is beyond doubt that some of those fighting in this particular battle thought that it was about the degree of purposivism permitted in statutory interpretation.<sup>16</sup> But if literalism was never a real enemy for the reasons given above, and Lord Griffiths and others were in fact tilting at windmills, by describing and then rejecting a strict literalism of a kind that has never in fact been practiced by the courts, what was the battle about and what has changed over the years?

The simple answer is that what has changed, and in the course of change has frequently been a matter of sharp controversy, is the set of rules about what

<sup>14</sup> [1993] AC 593 HL.

<sup>15</sup> The official record of proceedings in Parliament.

<sup>16</sup> So, for example, Lord Griffiths – “The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.”

evidence the courts will and will not admit for the purpose of forming a picture of the legislative context of the provision to be construed. In this respect, the position clearly has changed over time, and a general trend towards greater willingness to look at whatever material might be helpful has been punctuated by significant battles over particular issues along the way.

As Lord Nicholls said in *Spath Holme* (in the context of the disagreement between different members of the Appellate Committee of the House of Lords as to whether or not recourse could be had to Hansard in that case in accordance with the principles of *Pepper v. Hart*) the decision in *Pepper v. Hart* did not establish any kind of special rule allowing statements of the legislature to exert an influence on construction of their enactments after the event. Rather, it merely abrogated a self-denying ordinance that the courts had operated for many years preventing them from looking at Hansard, for constitutional reasons relating to the independence and supremacy of Parliament. Having abrogated that ordinance, however, the courts were not conferring any kind of special authoritative status upon Hansard: they merely permitted themselves to admit it as one more kind of evidence of the context of the legislative provisions.<sup>17</sup> As Lord Nicholls said —

If, however, the statements are clear, and were made by a minister or other promoter of the Bill, they qualify as an external aid. In such a case the statements are a factor the court will take into account in construing legislation which is ambiguous or obscure or productive of absurdity. They are then as much part of the background to the legislation as, say, Government white papers. They are part of the legislative background, but they are no more than this. This cannot be emphasised too strongly. Government statements, however they are made and however explicit they may be, cannot control the meaning of an Act of Parliament. As with other extraneous material, it is for the court, when determining what was the intention of Parliament in using the words in question, to decide how much importance, or weight, if any, should be attached to a Government statement.

So the decision in *Pepper v. Hart* was of great significance, not because it changed the nature of the exercise of legislative construction but because it marked an important symbolic step<sup>18</sup> in the determination of the courts to throw off self-imposed evidential shackles artificially preventing them from doing their job of construing legislation in its proper context.<sup>19</sup>

<sup>17</sup> For further discussion of the status of different kinds of ministerial and other statement for the purpose of the rule in *Pepper v. Hart*, see Craies on Legislation, Chapter 28 (2004) and the First Supplement (2005).

<sup>18</sup> As it has turned out, however, the step has been much more symbolic than actual, and it has been found time and again that ambiguity in the legislation is matched by ambiguity in the ministerial utterances that accompany it. As Lord Hoffmann said in *R (Quintavalle) v. Human Fertilisation Authority*, [2005] UKHL 28, para. 34: “As is almost invariably the case when such statements are tendered under the rule in *Pepper v. Hart*, I found neither of any assistance.” In that case Counsel for opposite sides had each found something in Hansard to adduce in support of their own construction.

<sup>19</sup> Note also that *Pepper v. Hart* does have the potential to impart to ministerial statements a power that they did not previously have, not in the direction of influencing construction by the courts but in the direction of constraining the Government from using or construing legislation in a manner contrary to ministerial pronouncements during the passage of a Bill, a process somewhat akin to an estoppel. See, *Wilson v. Secretary of State for Trade and Industry*, *Wilson v. First County Trust Ltd*

## E. The Battle of Explanatory Notes

After *Pepper v. Hart* the next major engagement in the war over what material may and may not be used to establish context arose as the result of a new creation, Explanatory Notes to Acts of Parliament.

While statutory instruments have for decades been published with an attached statement, written by the Government department responsible for the instrument and briefly describing its content and purpose, the same was not achieved for Acts until after the Second Report of the House of Commons Select Committee on Modernisation in 1997.<sup>20</sup> As soon as these notes became an established part of the legislative scenery it was inevitable that there would be pressure for their use in statutory construction. The main difference between this and the principle at stake in *Pepper v. Hart* is that the latter concerned statements made to Parliament in the course of and for the purpose of its consideration of draft legislation – and can therefore reasonably be taken as evidence of the matters actuating Parliament in legislating<sup>21</sup> – while explanatory notes contain statements made by the Government unilaterally and after Royal Assent and which could be designed not so much to reveal the legislative intention as to gloss it, by encouraging construction in accordance with what the Government would have liked the intention to be or in accordance with what the Government now wish the intention had been.<sup>22</sup>

The first reaction of the House of Lords to the suggestion of using Explanatory Notes as an aid to construction was cautiously encouraging, but by no means unreservedly so. In *R (Westminster City Council) v. National Asylum Support Service*<sup>23</sup> Lord Steyn said<sup>24</sup> —

The question is whether in aid of the interpretation of a statute the court may take into account the explanatory notes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen. ...

In so far as the explanatory notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what

---

(No. 2), [2003] 3 WLR 568 HL and the discussion of *Wilson in McDonnell (FC) v. Congregation of Christian Brothers Trustees (Formerly Irish Christian Brothers)*, [2003] 3 WLR 1627, 1641-42 HL.

<sup>20</sup> Session 1997-98, 3 December 1997.

<sup>21</sup> As a result of which there is no reason to confine the rule to ministerial statements, and statements made, for example, by an Opposition or back-bench proponent of an amendment or private Member's Bill ought to be of the same evidential value as a ministerial statement in relation to a Government amendment or Bill.

<sup>22</sup> An objection clearly stated long before the emergence of Explanatory Notes, but in anticipation of them or something like them emerging, by the 1975 Report *The Preparation of Legislation* by the Renton Committee (Cmnd. 6053), para. 19.24.

<sup>23</sup> [2002] UKHL 38.

<sup>24</sup> Paras. 5 & 6.

logical value they have. Used for this purpose explanatory notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, government Green or White Papers, and the like. After all, the connection of explanatory notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: ...

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.

## F. Other Recent Campaigns

The last part of the passage from *R (Westminster City Council)* cited above contains a very clear warning to the Government to remember that the debate about the use of extraneous material is a debate about what contemporary materials are and are not useful in establishing the context within which legislation was enacted; it is not a debate about whether the courts can use material, contemporary or otherwise, produced by the Government for the purpose of demonstrating what the purpose of the legislation was, is or should have been.

The boundaries in relation to material to which the courts might be invited to have regard in construing legislation nevertheless continued to be tested. In particular, while explanatory notes are a more or less contemporary<sup>25</sup> record of the background to the act and its effect, the Government have sometimes invited the courts to have regard to guidance which is issued by the Government well after the enactment of legislation and which is expressly designed to influence its construction.<sup>26</sup>

In general, the courts have appeared to be increasingly relaxed about the use of a wide range of material produced by the executive, particularly where the material is produced at the time when the legislation to which it relates is presented or made. In *Wilson v. First County Trust*<sup>27</sup>, for example, the House of Lords was prepared to extend the *Pepper v. Hart* principles so as to allow the use of Parliamentary material where no ambiguity required to be resolved but where the court was required to exercise its new role under the Human Rights Act 1998<sup>28</sup> of evaluating legislation for compatibility with the European Convention on human Rights. Lord Nicholls of Birkenhead said<sup>29</sup> —

<sup>25</sup> There are generally three sets of notes produced. The first accompanies introduction of the Bill into its first House. The second is revised to reflect the Bill as it stands when passing into the second House. The third is produced for publication shortly after Royal Assent and reflects the text enacted.

<sup>26</sup> See, for example, *South Buckinghamshire District Council v. Porter*, [2003] 3 All ER 1, 11 per Lord Bingham of Cornhill.

<sup>27</sup> [2003] UKHL 40.

<sup>28</sup> 1998 c. 42.

<sup>29</sup> Paras. 63 & 64.



When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the ‘proportionality’ of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the ‘mischief’) at which the legislation is aimed. This may throw light on the rationale underlying the legislation.

This additional background material may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would ... merely be placing itself in a better position to understand the legislation.

In other words, why deprive oneself of useful material unless the constitutional or other objections to its use are clear? And yet the trend has not been entirely in one direction. The question of the nature of departmental material to which the courts may properly have regard for purposes of construction arose at the instigation of the Court of Appeal in *Evans v. Amicus Healthcare*<sup>30</sup> and was extensively, but inconclusively, discussed in the joint judgment of Thorpe and Sedley LJ. That judgment includes a certain amount of analysis of the opinions in *Wilson*, and discusses possible differences between Parliamentary and extra-Parliamentary material and between contemporary and non-contemporary material; it concludes<sup>31</sup> —

Since no formal objection has been taken, we are not called upon to rule on the admissibility of [the Department’s] evidence. We do no more than record our concerns about it and express the hope that attention will be given to them in future proceedings on the construction of a statute to which the promoting department is a party. It does not appear that admissibility was in issue in the case noted in the previous paragraph. It may demonstrate no more than that, once the proportionality or discriminatory effect of legislation becomes an issue under the Human Rights Act 1998, it may help the court to know the factual background against which the compatibility of the legislation with the Convention falls to be gauged. This would be unexceptionable, not as an aid to construction but as a means of testing compatibility. What remains to be decided if the occasion arises is the admissibility of evidence of departmental policy as an aid to the construction of a statute. The issue is a potentially important one which touches upon the separation of powers.

After that indecisive skirmish, another check to the momentum of the trend towards greater freedom to consult papers of various kinds in construing legislation was

<sup>30</sup> [2004] EWCA Civ. 727.

<sup>31</sup> Para. 56.

delivered by the Court of Appeal in *Lancashire County Council v. Taylor*.<sup>32</sup> In particular, the court warned against the temptation for the Government to abuse its greater facility of producing Parliamentary and similar materials as an aid to construction. The court said —

58. It seems to us ... [that] care must be taken not simply to produce anything from the files which helps to show why the impugned legislation took the form it did, but to approach the matter rather more rigorously. The first question is whether the policy justification for the distinction which is in issue is apparent from the legislation, whether read by itself or with its antecedents and the cases decided on the provisions. Only if the policy is not apparent from these materials should it become necessary to look wider. In that event, great care needs to be exercised to avoid the adduction of passages from parliamentary debates which, by being open to more than one construction, invite the court to transgress Article IX of the Bill of Rights. What has to be kept in mind throughout is that, as with the process of statutory construction, the inquiry is into Parliament's intention, and that in relation to both the primary source is the text which Parliament has adopted.

59. For these reasons, had we found it necessary to go beyond the text and the legislative and judicial history of the 1986 Act itself, we would have admitted little if any of the parliamentary material set out over several pages by Stanley Burnton J. We would not have admitted the contributions of members to the debates; nor would we have admitted ministerial statements which say no more than can be readily seen from the legislation itself. ...

60. Departments of State need also to bear in mind that they have an advantage in this field. They have access to materials to which other parties have no access or which it would be difficult and expensive for them to search out. But axiomatically an exercise of this kind, if it is to be carried out at all, must disclose the unwelcome along with the helpful. If, for example, there had been internal documents acknowledging an inconsistency in the protection to be given to tenant farmers and advancing no good reason for it, they would have been added to the exhibits. The fact that there were evidently no such documents in the present case does not dilute the cautionary reminder that if research of this kind is to be placed before the court, it cannot be selective in what it tends to show.

Perhaps the most significant check so far to the trend towards reliance on explanatory material of various kinds came from the Divisional Court in *R (Haw) v. Secretary of State for the Home Department*.<sup>33</sup> The facts were these. Mr Haw has been demonstrating in Parliament Square, in the company of a large number of placards, since 2001. It was well known that the size and continuity of his demonstration, together with the obtrusiveness of some of his tactics, made him something of a thorn in the side of both Government and non-Government Parliamentarians. Eventually the Government introduced provisions about central London demonstrations in the Serious Organised Crime and Police Act 2005<sup>34</sup> which require demonstrations to obtain police permission. It was well understood that Mr Haw was a principal reason for the introduction of this provision: and yet the Government failed to make it expressly retrospective, with the result that

<sup>32</sup> [2005] EWCA Civ. 284.

<sup>33</sup> [2005] EWHC 2061 (Admin).

<sup>34</sup> 2005 c. 15; s. 132.

on a normally strict construction of what amounts to a penal provision Mr Haw would be permitted to continue his demonstration without police permission. The Government made a purportedly retrospective commencement order,<sup>35</sup> which was challenged by way of judicial review and struck down by the Divisional Court. In argument before the court Counsel for the Crown was most urgent that the court should adopt what was described as a “modern, liberal, purposive construction.”<sup>36</sup> She argued strongly that various published materials made it clear that the principal target of the provision was Mr Haw, and that the courts were bound to give effect to the legislative intention in allowing that target to be hit. The court refused to do so, however, on the grounds that whatever the Government’s intention may have been in relation to Mr Haw they had simply not produced legislation capable of achieving that intention. As Smith LJ said<sup>37</sup> —

In my judgment, even if this were not a penal statute, there is no room for a modern, liberal, purposive construction.<sup>38</sup> The words of section 312 are clear and they give effect to a perfectly sensible purpose, even though demonstrations which began before 1 August are not caught.

No case could better illustrate either the inherent limitations on purposivism in the United Kingdom courts<sup>39</sup>, or the fact that the increasing trend towards openness in regard to evidence as to context may not be relied on so as to substitute the Government’s clear policy intentions for the clear meaning of the legislation that they have caused to be enacted for the purposes of achieving it. Construction of legislation in its proper context is one thing: allowing a recorded intention of the legislature to override the natural meaning of the words used is quite another.

## G. Implications For Legislative Drafting

When *Pepper v. Hart* was decided, a number of those who were both responsible for drafting legislation and possessed of an unhappily cynical turn of mind predicted that some of their clients might see this more as an opportunity than a challenge: namely, as an opportunity to be content with imprecise drafting supported by a relatively precise ministerial statement of intent. The temptation is obvious and, to some extent, excusable: it is often the case that the constraints

<sup>35</sup> S.I. 2005/1521, art. 4(2).

<sup>36</sup> Judgment of Smith LJ, para. 42.

<sup>37</sup> Para. 58.

<sup>38</sup> Although even this is something that the courts will be prepared to do if instructed expressly by Parliament. Hence section 3 of the Human Rights Act 1998 (c. 42), which in effect requires the courts to construe all statutes – even those passed before 1998 – in the context of the United Kingdom’s obligations under the European Convention on Human Rights; this requirement has been construed by the courts as requiring them to give weight to the context of the Convention Rights even at the expense of a certain degree of violence to clear words used – *see*, in particular, *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30.

Note that the Court of Appeal reversed the Divisional Court in *Haw* ([2006] EWCA Civ. 532, but expressly “on the basis of the statutory language construed in its context” (para. 25).

<sup>39</sup> In accordance with the dictum of Jervis CJ in *Abley v. Dale*, cited above, note 8.

within which legislative language requires to be constructed prevent a degree of clarity that can in practice be achieved relatively easily in kinds of prose not subject to those constraints, such as ministerial statements or explanatory notes. Those forms of prose can, in particular, use techniques such as repetition for emphasis, examples and alternative formulations of a single idea; all techniques which are in general unacceptably dangerous in legislation itself.<sup>40</sup>

Nor were these cynical predictions entirely unjustified. It is not unheard of for a Department, driven to the edge of despair by the apparent impossibility of getting the legislative draft into absolutely accurate form, to express a hope, fainter or stronger depending on the circumstances, that a point might be left at large in the legislation but ‘Pepper v. Hart-ed’ during its passage through Parliament.

But for the most part it is understood that those hopes, while understandable, are doomed to failure. The courts have ensured this in part by the increasingly cautious approach they have taken to the application of *Pepper v. Hart* and by the various cautionary utterances cited above against too much reliance on extraneous material for the purposes of construction. But Departments have also largely constrained their own reliance on ministerial statements, explanatory notes and other material extraneous to the legislative text, partly as a matter of principle and partly because of the obvious concern that there is no guarantee that the courts will apply the material for the construction of an ambiguous or vague provision in the way desired by the Department. To achieve 95% of the Department’s policy with 100% certainty will often be a much better bet for the Department than a 75% chance of achieving 100% of its policy.

That does not mean, however, that the new freedoms of the courts in construing legislation are without impact on legislative drafting. The trend of legislative drafting has been towards simplicity and clarity for some years,<sup>41</sup> but the drafter is constrained by the extent to which he or she can assume that the courts will not hold the simplicity or clarity against him or her. In this respect, the trend towards an increasingly open, admitted and undisputed reliance upon context, and the greater freedom that the courts allow themselves in determining it, allows the drafter greater freedom in avoiding prolixity and complexity. The more the drafter can say, to himself or herself or to his or her clients, “the possibility of construction X can safely be disregarded, despite its being within the literal meaning of the

<sup>40</sup> See Appendix 2 to the Second Report of the House of Commons Select Committee on Modernisation, Session 1997-98, 3 December 1997, *Memorandum submitted by First Parliamentary Counsel*, para. 6 — “A consequence of this unique function is that a Bill cannot set about communicating with the reader in the same way that other forms of writing do. It cannot use the same range of tools. In particular, it cannot repeat important points simply to emphasise their importance or safely explain itself by restating a proposition in different words. To do so would risk creating doubts and ambiguities that would fuel litigation. As a result, legislation speaks in a monotone and its language is compressed. It is less easy for readers to get their bearings and to assimilate quickly what they are being told than it would be if conventional methods of helping the reader were freely available to the drafter.”

<sup>41</sup> As well as Renton, cited above, see the findings in paragraph 206 of the 1992 Report of the Hansard Commission on The Legislative Process (Hansard Society for Parliamentary Government).

words, because it would be perverse in the context of this legislation as amply demonstrated by various kinds of evidence<sup>42</sup>, the more he or she can simplify and shorten the legislation.

Nor is this a very recent development, although it has perhaps accelerated in recent years. At a general level, the influence of this trend has been felt over a period of about fifty years; hence this telling passage in the *Renton Report*<sup>43</sup> —

In the 1940s and 1950s ... there was still a general belief that the language, or rather the style, must be formalised, on mere grounds of decorum; and that the precision needed to attain immediate certainty overrode every other consideration. In both respects the belief has since weakened. Language is increasingly informal. As to certainty, the need for it remains amply recognised (as it must be); but certainty is obtainable at two different levels. One is where the draftsman deliberately words his clause so that at no point can it possibly be challenged for ambiguity, even by a reader (or legal practitioner) so perverse, or having such a professional interest in finding a way around the law, that he is resolved to find an ambiguity which to any ordinary reader is invisible. At this level of certainty, language becomes by gradations more and more convoluted, and the legislative proposition obscured. At the other level, sufficient certainty is obtained for a fair-minded and reasonable reader to be in no doubt what is intended, it being assumed that no one would take entirely perverse points against the draft, or that such points would be brushed aside by the court. Most of us are satisfied that there has been a substantial and desirable retreat from the first level, with resultant simplification and abbreviation of language.

From the Government drafter's point of view, the most significant phrase in that passage is "or that such points would be brushed aside by the court." It is rarely if ever safe to assume that there will be no reader so obtuse or mischievous as to wish to argue the unarguable.<sup>44</sup> But provided the drafter can give the relevant Minister a positive assurance that the intention of the legislation is sufficiently plain to ensure that the courts will give effect to it, he or she will be able to counsel disregarding a literally possible, but substantively perverse, construction. And having unequivocal published evidence of the context within which legislation was produced, and knowing that the courts will be prepared to adduce that evidence

<sup>42</sup> Although the major battles have been fought over categories of published evidence, it is clearly the case that the relaxation of recent years has resulted in judges feeling increasingly free to have regard to their own common sense and political and social knowledge in construing legislation, which again makes it possible for the drafter simply to ignore the possibility of certain kinds of possible but perverse interpretations.

<sup>43</sup> 1975 Report *The Preparation of Legislation* by the Renton Committee (Cmnd. 6053), para. 11.4.

<sup>44</sup> "Mr Justice Stephen said, speaking from his own experience: I think that my late friend, Mr. Mill, made a mistake upon the subject, probably because he was not accustomed to use language with that degree of precision which is essential to every one who has ever had, as I have had on many occasions, to draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it." Lord Thring, *Practical Legislation* (1902), at 9 quoting Stephen J in *In re Castioni*, (1891) 1 Q.B. 149, 167.

for the purposes of construction, may be an important part of the decision that the legislative intention is sufficiently clear to permit of the legislation being enacted in a simplified or abbreviated form.

None of this, of course, alters that fact that the aim of the drafter is always to achieve the highest degree of literal accuracy that is both reasonably necessary in the context and also consistent with the production of provisions that are sufficiently clear to the likely primary audience to ensure that the state of the law will be reasonably certain. The reluctance of the United Kingdom's judiciary to assume the role of law-maker is, among the vast majority of judges, as strong as it ever was, and the drafter should not assume that if he or she deliberately leaves areas of doubt or uncertainty the courts will rush in to fill those areas by reference to evidence as to the underlying legislative intention.<sup>45</sup> Nor would drafters in general feel comfortable with a position in which they were urged to be content with imprecision for the sake of brevity and simplicity, since they would then be left with the impossible task of determining what degree of imprecision could safely be assumed in each case to be sufficient to lead the courts to the intended answer. Wherever the intended policy is susceptible of being stated in complete and accurate terms, the drafter will always and should always wish to achieve complete accuracy. But while accuracy remains the principal aim of the legislative drafter, the courts' willingness to consider context as determinative of meaning is one of the factors which encourages the drafter to draft with a conciseness redolent more of the porter on Nantwich railway station than of the conveyancing draftsman of former years. While it is more than a little questionable whether the latter's prolixity was ever necessary for the avoidance of any real kind of doubt, or whether it arose more from a desire to increase and entrench the mystique and distance of his art, it is beyond question that there is neither need nor excuse for drafting of such a style today.

And yet one still routinely finds that legislation includes redundancies that would be eliminated if the drafter were to consider the obvious effect of context on construction.

One of the most common is the inclusion of 'such'. In the proposition "The Tribunal shall not make an order under this rule without giving the parties and the relevant Minister an opportunity to show cause why such an order should not be made", for example, the word 'such' adds nothing of value. By no conceivable stretch of the imagination could a reader think that "why an order should not

<sup>45</sup> There have, however, been some recent instances of the courts being prepared to go to surprising lengths to mend errors in the drafting of legislation. Two particularly extreme examples are the decisions of the House of Lords in *Inco Europe Ltd v. First Choice Distribution (A Firm)*, [2000] 1 WLR 586 HL and of the Court of Appeal in *Confederation of Passenger Transport UK v. The Humber Bridge Board (Secretary of State for Transport, Local Government and the Regions, interested party)*, [2003] EWCA Civ. 842. Both decisions contain considerable analysis of the difference between judicial law-making and rectification of obvious errors of drafting. In the context of this article the most telling are the words of Sir Rupert Cross cited by Lord Nicholls of Birkenhead in *Inco* and relied upon by Clarke LJ in *Humber Bridge* – "In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."

be made” referred to anything other than an order of the kind that by being mentioned at the beginning of the proposition expressly sets the context for the end. The additional word adds unnecessary complexity, of a kind that matters perhaps little in the context of a relatively simple and short provision,<sup>46</sup> but which would be much better avoided throughout the pages of legislation: its inclusion in places where it does little harm will encourage drafters to include it, or even make them frightened not to include it, in places where it does more harm. Similar considerations arise in relation to the habitual inclusion of the word ‘so’ in places where it adds nothing: for example, in the phrase “not being (in either case) securities listed on a recognised stock exchange nor issued on terms which are reasonably comparable with the terms of issue of securities so listed”, the final “securities so listed” would read more comfortably as “listed securities” without any loss of certainty of meaning given the immediate context.

Inherent undesirability apart, there is always the danger that once the drafter becomes accustomed to permit the redundant ‘such’ or ‘so’ for the removal of doubt that does not really arise, he or she will come to rely upon it for the removal of a doubt that actually arises, and in those contexts it is rarely sufficient. A real doubt generally needs resolution by express words.

Another frequent example of redundant usage is provided by phrases along the lines of “(subject to the following provisions of this section).” As originally inserted, they were intended to guard against the literal inaccuracy of having a general proposition that is partially falsified by an excepting proposition that follows it. But given that the first proposition will be construed in the context of the provision as a whole, the parenthetical words are unnecessary. Being unnecessary, they are an unwelcome distraction for the reader who is trying to grasp the nature of the general proposition before proceeding to the exceptions. The only place for parenthetical observations of this kind within a modern style of contextual drafting is, therefore, where the generality of the opening proposition is likely significantly to mislead the reader if he is not made aware at the outset that exceptions are provided for later. An example would be the case where for good structural reasons the exceptions are not found immediately after the general proposition (although even there it may be preferable to have a separate proposition, merely adverting to the existence elsewhere of exceptions, immediately after the general proposition, rather than a parenthetical observation disrupting the flow of the general proposition itself).

It will be seen from these examples that the individual saving of words eliminated by rigorous reliance on context is often very small. But it is no less valuable overall for that. A small addition can distract the reader just as much as a large one, and once he has mentally ‘stubbed his toe’ on a redundancy it may be difficult to recapture the thread of meaning of the provision being read.

<sup>46</sup> Although it can become particularly confusing where it is close to a legitimate and necessary use of the word – as in, for example, “If an officer of Revenue and Customs has reason to believe that the employer has failed to give such a notice, the officer may by notice require the employer to provide such information as the officer may reasonably require for the purposes of this section about ...”: the first such is redundant, the second is significant and the cumulative result is distracting and confusing for the reader.

That aside, even omitting a ‘such’ here and a “(subject to the provisions of this section)” there can have a significant cumulative influence on the total length of the annual statute book and on the number and size of the annual volumes of statutory instruments.

And there is the additional danger that every extra word has the potential to change the law in some undesirable way. Because the starting point of construction is the meaning of each word, the courts may be invited to give even probable redundancies some specific separate meaning, which will necessarily be wrong since no meaning at all was intended by their inclusion. The addition of an unnecessary ‘such’ is particularly susceptible to this problem.

## **H. Conclusion**

The courts of the United Kingdom have always been willing to give due weight to context in construing legislation, and drafters have over the years allowed themselves to rely increasingly on this willingness in producing relatively simple and short legislation. This trend, which there will probably always be room to develop further, is supported and assisted by the greater willingness of the courts to use material extraneous to the text in construing legislation, subject to limits that are still being established. In so far as those materials provide a source of evidence by reference to which the legislative context can be established, their admission in evidence enables the drafter to rely more heavily upon the legislative context for the purpose of avoiding prolixity and complexity. While there is much evidence that drafters have taken advantage of that and other developments to permit themselves a more vernacular style, there is still room for improvement, in particular by way of ruthlessly eliminating words and phrases that are redundant in their context.