DENTONS

Statutory interpretation – can EU law concepts really be retained post-Brexit?

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1. In the coming years, the government is likely to want to bring forward primary legislation in areas where it previously relied (at least in part) on the EU to legislate. Continuity is generally thought to be good for regulated communities and bringing a degree of certainty to otherwise new and untested concepts undoubtedly makes a lot of practical sense. So, it is likely that, in at least some respects, the government will wish to maintain the law in the same way. However, UK primary legislation and EU legislation (supported by the interpretative powers of the CJEU) are very different beasts and some change in terminology, structure and drafting approach is likely, even where the intention is that the legal effect should remain the same. When faced with a Bill which looks very different from what businesses and lawyers are used to seeing, ministers and civil servants may seek to offer reassurance through public policy statements about continuity.

2. In such circumstances, it is superficially attractive to take comfort from such assurances – it makes sense that the people predominantly responsible for writing a Bill (and the policy upon which it is based) will be good guides as to the interpretation of the Act. However, reliance on such statements should be approached with caution. Although governments draft and bring forward most legislation, it is Parliament (and not government) which creates legislation and, whilst the latter can have significant influence over the former, there are risks with over-reliance on statements of policy intention rather than looking in detail at the terms of the legislation.

3. Put another way, how likely (or even legitimate) is it that the courts will rely on assurances from the Executive in determining the scope of Acts produced by the Legislature? And, if they do, can such statements justify the courts importing EU law concepts and jurisprudence into post-Brexit UK legislation in the name of continuity? This article looks at some of the difficulties with such reliance through the lens of the Procurement Act 2023.

Summary

4. Lawyers seeking to interpret UK legislation which succeeds EU legislation should be cautious about relying too heavily on statements of policy by government to the effect that "nothing is changing", in particular in relation to primary legislation. Whilst that may turn out to be true in the majority of circumstances, some changes are likely in the course of this shift and the courts are not likely to start from the basis that such policy statements can be relied upon in all circumstances. Such expressions have a well-established (and limited) home in the process of statutory interpretation and there is little indication that this is shifting.

The courts' approach to statutory interpretation

5. The courts will look to interpret the will of Parliament as expressed through the language of the statute. That places significant weight on the words used in the statute, but the context of those words is also important. The judgment of Lord Nicholls in *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* is often drawn on to describe the approach taken:

> *"Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House."*[1]

6. More recently, in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department*, Lord Hodge (with whom the rest of the Supreme Court agreed), drew extensively on the judgment of Lord Nicholls, relying on his description of statutory interpretation as:

> *"an exercise which requires the court to identify the meaning borne by the words in question in the particular context."*[2]

7. His further analysis made it clear that, in his view, such context was to be drawn from an analysis of the language used by Parliament, saying that:

> *"They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained."*[3]

8. And whilst he accepted that some assistance could be drawn from certain other materials, whether or not there is ambiguity or uncertainty in the language, he was firmly of the view that "external aids to interpretation therefore must play a secondary role"[4] and that they could not "displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."[5]

9. That principle of the primacy of text has historically found favour, even when the literal interpretation of the drafting gives rise to difficulties. In *R v J*, Lord Bingham said:

> *"It is the duty of the court to give full and fair effect to the meaning of a statute … If a statutory provision is clear and unambiguous, the court may not decline to give effect to it on the ground that its rationale is anachronistic, or discredited, or unconvincing. The … deficiencies of the Act cannot absolve the court from its duty to give effect to clear and unambiguous provisions."*[6]

1. [2001] 2 A.C. 349, paragraph 396.
2. [2022] UKSC 3, paragraphs 29-30.
3. *Ibid.*
4. [2022] UKSC 3, paragraph 30.
5. *Ibid.*
6. [2004] UKHL 42, paragraph 15.

10. So, the courts are prepared to look to certain other materials as relevant context to understand an Act of Parliament and there seems to be judicial agreement as to the primacy to be given to the text over other materials. However, the amount of influence to be afforded to such extraneous materials could yet be the subject of judicial debate. In the *Project for the Registration of Children as British Citizens* case, Lady Arden agreed with Lord Hodge, but took the opportunity to adopt a slightly different tone in relation to extraneous material. She felt that:

> *"There are occasions when pre-legislative material may, depending on the circumstances, go further than simply provide the background or context for the statutory provision in question. It may influence its meaning ... While external material is likely to contribute to the court's knowledge of the context of and background to the statute to be interpreted and its appreciation of its purpose, matters do not always stop there. In some but not all cases, its use may go further ... where perusal of the external material reveals that the language of the statute – perhaps initially thought to be clear on its face so as not to need any further inquiry – is in fact ambiguous. Here the external material has a use which goes beyond the provision of background and context."*[7]

11. This begs the question: what is suitable extraneous material and do different types attract different interest?

Parliamentary statements and Explanatory Notes

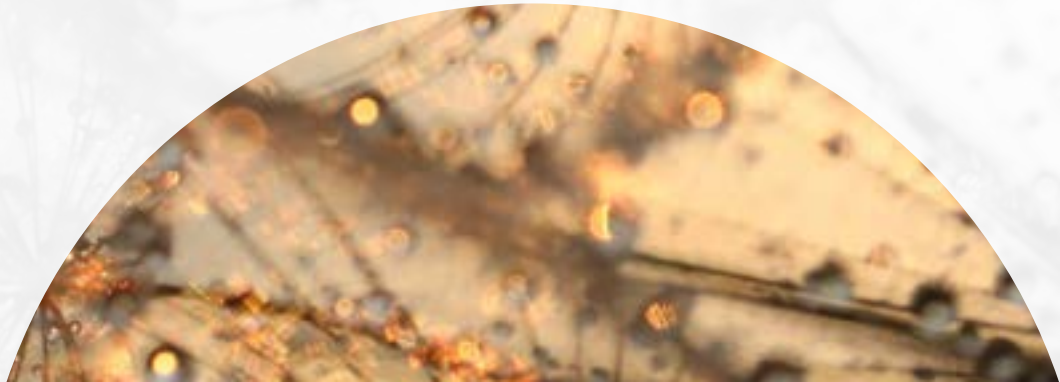
12. In the famous judgment of Lord Browne-Wilkinson in Pepper v Hart, the House of Lords (in its judicial capacity) agreed that, when determining the meaning of a provision, regard could be had to specific statements made by ministers in the course of Parliamentary debates during the passage of the Bill:

> *"Clear and unambiguous statements made by Ministers in Parliament are as much the background to the enactment of legislation as white papers and Parliamentary reports."*[8]

13. Lord Stephens, in *R (Coughlan) v Minister for the Cabinet Office*,[9] reminded us that there are three conditions to be met before drawing on such material, being (i) that the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity; (ii) that the material must be or include one or more statements by a minister or other promoter of the Bill; and (iii) the statement must be clear and unequivocal on the point of interpretation which the court is considering. Although Lord Stephens cited Lord Hodge with approval, there does seem to be a slight tension between the three tests and Lord Hodge's view that *"the context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty"*.[10] It is sufficient for the purposes of this analysis though to be clear that statements by a government minister in Parliament in the course of promoting the Bill are relevant extraneous material.

14. Reliance on the Explanatory Notes of a Bill is also an uncontroversial source of extraneous material. Lord Hodge felt that *"Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions"*[11] and Lady Arden agreed, setting out a brief and useful summary of their origin.[12]

7. [2022] UKSC 3, paragraphs 64-65.
8. [1993] A.C. 593, paragraph 635.
9. [2022] UKSC 11, paragraph 14.
10. [2022] UKSC 3, paragraph 30.
11. Ibid.
12. [2022] UKSC 3, paragraph 60.



White papers and Law Commission reports

15. There is also some scope for looking beyond Parliamentary proceedings. Since at least the late 19th century, the courts have considered it permissible to look to a range of extraneous documents in order to understand the broader social and political background which gave rise to the legislation and the mischief it was seeking to remedy. Ten years before *Pepper v Hart*, Lord Diplock expressed the view that an awareness of the political context could be relevant. He said, of a dispute over the politically controversial question of whether public passenger services should be paid for by the state or by service users, that:

> *"Into the merits of that controversy your Lordships, in your judicial capacity, must scrupulously refrain from entering; but recognition that it existed is, in my view, of considerable relevance to a proper understanding of the language of the Act."*[13]

16. It is similarly well established that, where an Act is preceded by a report by a public body that has investigated and proposed recommendations, the report may be used as evidence of the facts and surrounding circumstances so as to determine the mischief that it was designed to remedy. So, government white papers and Law Commission reports which give rise to pieces of legislation are ripe for exploration by the courts in their search for meaning.

Policy statements

17. However, the courts have been much more reticent to draw on simple statements of policy or intention which do not originate from the Legislature. To quote Lord Hobhouse:

> *"Once one departs from the text of the statute construed as a whole and looks for expressions of intention to be found elsewhere, one is not looking for the intention of the legislature but that of some other source with no constitutional power to make law."*[14]

18. In addition to the explicit warning in the passage cited in paragraph 5 above, that statutory interpretation is not about the subjective intention of the minister, the drafters or of individual members or even of a majority of either House, Lord Nicholls in *Spath Holme* added this:

> *"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. The weight will depend on all the circumstances."*[15]

19. Arden LJ (as she then was) similarly voiced concern about looking too hard for assistance in other sorts of documents in *P&O Steam Navigation Company v HMRC:*

> *"In my judgment, one must be somewhat cautious before accepting any assertion of purpose of an Act of Parliament not set out in any provision of the Act itself made by a party propounding a particular statutory interpretation. Of course I make exceptions for assertion of purpose deducible by implication from the legislative scheme or clearly stated in some material which is admissible as an aid to interpretation."*[16]

20. Neither Lord Nicholls nor Arden LJ completely closed the door on the interpretative value of policy statements though and what scope there is to rely on them was explored by Green J in *Solar Century Holdings Ltd v Secretary of State for Energy & Climate Change*. In this case, he was prepared to go as far as acknowledging that it might be permissible to look at expressions of policy intent. However, he was clear that the circumstances justifying such analysis would be exceptional. He set out a useful expression of the application of the principles when considering policy statements made by government prior to legislation:

13. *Bromley London Borough Council v Greater London Council* [1982] 2 WLR 62, paragraph 106.
14. *Wilson v First County Trust (No 2)* [2003] UKHL 40, paragraph139.
15. [2001] 2 A.C. 349, paragraph 399.
16. [2016] EWCA Civ 468, paragraph 60.

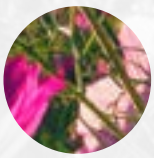
"First, the pre-existing statements relied upon must be exceptionally clear and precise and amount to something which can be understood as an 'assurance'. Second, there can be no quick and easy assumption that Parliament necessarily intended to respect this assurance if in fact it uses language which is inconsistent with the assurance … Third, the court must therefore be satisfied that the prior assurance does in fact and law accurately reflect Parliament's will. Fourth, in Westminster City Council Lord Steyn was concerned only with Explanatory Notes as a guide to interpretation, nothing else. However, it seems to me that the underlying principle can be applied both to (a) any form of pre-legislative material which in law is admissible; and (b) to the process of identifying the purpose of Parliament in an enactment. Fifth, there is a tension in this area with normal Pepper v Hart principles which militate against the admissibility of pre-legislative material as guides to interpretation and in the relevant cases the courts have sought to square the Pepper v Hart circle with some finely tuned analysis. All of this suggests that the circumstances in which a pre-legislative assurance will be treated as reflecting Parliament's when this is not apparent from the enactment (and even more so when it is inconsistent) may be exceptional."[17]

21. Green J, drawing on the judgment of Lord Steyn in *R (Westminster City Council) v National Asylum Support Service,*[18] also usefully opined that *"statements made in White Papers and consultation documents … carry materially less weight than Explanatory Notes or a direct statement by a sponsoring Minister."*[19] Therefore, in the hierarchy of matters to which the courts will have regard, ministerial or governmental statements of policy intent (outside Parliament) carry only limited weight.

Predecessor legislation and historical context

22. One interpretative device of relevance in these circumstances may be that to some extent the courts are entitled to consider the impacts of historical context and predecessor legislation. In *R (N) v Lewisham London Borough Council,* Lord Hodge said that *"where Parliament re-enacts a statutory provision which has been the subject of authoritative judicial interpretation, the courts will readily infer that Parliament intended the re-enacted provision to bear the meaning that the case law had already established."*[20] On the face of it, that might open the door to the courts accepting an encouragement to look back to CJEU case law to ensure consistency in interpretation. However, as the particular circumstances under consideration here are where the drafting materially differs from its EU predecessor (but policy statements suggest that no change is intended), this device is unlikely to come into play.

23. The courts have also been prepared to look more widely at legislative history than just looking at Parliament's preservation of judicially defined terms. In *R (Kaitey) v Secretary of State for the Home Department*, the Court of Appeal was content that *"the legislative history of a statutory provision is relevant and can be taken into account in its interpretation."*[21] In that case, the court was content that the clear intention of Parliament had been to overturn a particular judicial decision and this was relevant background to interpreting the provisions in question. So, if the courts are prepared to rely on the context where they considered the intention of the Act was to move away from a particular interpretation, it seems reasonable to argue that they could do so where the expressed intention is to stick with a particular interpretation.



17. [2014] EWHC 3677 (Admin), paragraph 66. This case went on to the Court of Appeal, but nothing there contradicted Green J's analysis here.
18. [2002] UKHL 38, paragraph 5.
19. [2014] EWHC 3677 (Admin), paragraph 67.
20. [2015] AC 1259, paragraph 53.
21. [2021] EWCA Civ 1875, paragraph 68.

24. In *R (Quintavalle) v Secretary of State for Health*, Lord Bingham identified as relevant the "context" of the statute as a whole and, more especially, the "*... historical context of the situation which led to its enactment*". He articulated the principle in a way which focused upon the task of discerning what the purpose of the statute was:

> *"The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation ... Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."*[22]

25. This would seem to open the door to the possibility that the courts might look back into the historic context of post-Exit Bills and from there link back to EU legal concepts. However, it is questionable whether the mere fact that a Bill seeks to replace EU legislation is a sufficiently clear link that, in and of itself, this successor legislation should be taken to mean the same as its predecessor. Much will depend upon the particular circumstances and how ambiguous the provisions under consideration in any given situation are, along with how clear the relevant context in suggesting continuity. However, as a starting point it would seem quite a stretch to suggest that significant reliance can and should be placed on the interpretation of predecessor legislation.

Counterfactuals

26. 26. Lastly, it is legitimate for the courts to consider why the statutory constructions are the way they are and whether Parliament would have legislated in a different way if it had intended something that was not consistent with the literal interpretation. The extent to which the courts may feel able to nuance the interpretation of a statute through an interpretative approach will therefore likely be tied to some extent to the question of how easy or obvious alternative drafting constructions might have been.

A case study: the Procurement Act 2023

27. One area where this is a live issue is procurement law. In December 2020, the government produced a green paper on the reform of procurement law post-Brexit, with a response to consultation in December 2021. It introduced the Procurement Bill into Parliament in May 2022 and when it comes into force it will remove (in England and Wales, and Northern Ireland, and for some matters in Scotland) the existing EU-derived procurement regime. The relevant Regulations adopted the "copy out" style of drafting that has been common for implementing EU Directives for some years and, as such, they contain a number of complex provisions which can only really be understood through the lens of the extensive case law of the CJEU.

28. The green paper and the government response both set out clear areas where they envisage the procurement regime under the Bill differing from that under the current EU-derived Regulations, principally in relation to procedures and not scope of coverage. In a limited number of areas, public statements have been made about the intention to maintain current concepts and coverage, though these are not all easy to find.

22. [2003] UKHL 13, paragraph 8.

29. The government response to its green paper: Transforming Public Procurement set out that:

> *"Contracting authorities will find the structure of the new procurement legislation familiar and recognise similarities in its application, scope and definitions. The new provisions on principles, procedures, purchasing tools, conditions of participation, contract award, legal challenges and remedies will be set out in much simpler and clearer language than the EU terminology used in our current regulations."*[23]

30. When the Bill was produced, it moved significantly away from the terminology used in the Directives (and existing Regulations) and sought to reframe key concepts upon which the regime was based. One area of particular interest is the concept of what constitutes a "contracting authority". The Directives and the current sets of Regulations use the concept "body governed by public law", which has benefitted from considerable and occasionally very subtle clarification by the CJEU. What appears in the Bill is a detailed statutory definition which covers more than a page and a half of text. It is noteworthy that in the course of Bill Committee in the House of Lords, in respect of the definition of "contracting authority", Lord True (then the responsible minister) said:

> *"... the definition of contracting authority in the Bill is intended to capture the same bodies as in the existing Public Contracts Regulations. We are not seeking to change the scope of bodies covered in any way, though some adjustments have been necessary to replace references to European concepts such as bodies governed by public law with the more relevant UK analogous concept of bodies undertaking public functions. Ensuring consistency is necessary not only for practical continuity purposes but in respect of the United Kingdom's international market access commitments in free trade agreements, which use the existing definition as the basis of the UK's coverage offer."*[24]

31. However, beyond these statements the government has not offered detailed guidance on what it is seeking to change and what it is not. Through various outreach and briefing events, civil servants responsible for the Bill sought to reassure industry that it did not represent a wholesale change to the scope and coverage of procurement law, but such statements are not easily found in the published literature.

32. So where does that leave lawyers seeking to interpret the concepts in the Procurement Act 2023?

33. Applying the process identified above, the courts would be looking to establish the meaning of the words used in the Act, where appropriate having regard to the wider context. Using the example of the definition of "contracting authority", it seems likely that even with very clear statutory wording the courts would feel entitled to look to the government response to the green paper and to the words of Lord True during Bill Committee as part of the relevant context. What is less clear is whether they would feel that the views propounded there were sufficiently weighty as to influence them in deciding the meaning of the statutory term. Much would likely turn on the exact question and how far the natural meaning of the language would need to be stretched by the context.

34. It seems less likely, though, that the courts will feel swayed by other extraneous policy observations, statements and guidance. It is questionable that any of those meet the tests described by Green J in *Solar Century Holdings*. Whilst there is further scope for judicial widening of the tests, on current authority it seems highly questionable that statements of policy intent by the government, however much they reflect policy intention in the drafting, are capable of materially influencing a literal interpretation of the words in the Act.

23. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038516/Transforming_Public_Procurement-_Government_response_to_consultation.v3_.pdf, paragraph 71.
24. HL Deb 4 July 2022, volume 823, column 227GC.

35. Attempting to draw meaning into the Act through applying the principles on predecessor legislation is also unlikely to bear much fruit. The language in the Act does not reflect that of the EU Directives or the EU-derived procurement legislation currently on the statute book – and evidently deliberately so. There is no textual linkage from the Directive regime to its successor, so the argument that Parliament should be taken to be aware of the meaning of the terms it is using becomes difficult to apply. It is probably only by relying on the policy assertions of the government (or possibly the limited statements of the minister in Parliament) that it is possible to assert that the predecessor legislation doctrine should apply and for the reasons set out above that is unlikely to be permissible.

36. One argument (not considered above) that might be applied to justify drawing on some historic EU concepts in the Act is that, where a piece of legislation is intended to meet international obligations, the courts are entitled to assume that Parliament intended the legislation to meet those obligations and, as such, may look to the obligation for support in interpreting the text. In the passage quoted above, Lord True made specific reference to the Bill meeting the UK's international commitments and Part 7 is dedicated to the implementation of international obligations, so there is likely a sufficient link. The UK's Schedules to the WTO's Agreement on Government Procurement are tied very closely to those of the EU and even retain some of the language, including that of "bodies governed by public law".[25] We might speculate that this is one reason why the minister made express reference to this concept and not to others in the passage cited above. Speculation aside, in those instances where the UK's international commitments are tied to what is clearly an historic EU concept, it seems likely that the courts could be persuaded to consider the meaning of that term in shaping the concept of "contracting authority" in the Act. It is questionable though whether this will in practice extend to other concepts, which are not similarly obviously linked to the EU's procurement regime by the UK's international commitments. The GPA does not, for example, expand upon the meaning of a "contract" when seeking to require that procurement procedures apply to "contracts". It is therefore questionable that this linkage to the GPA allows for any broader read across to EU law.

Conclusion

37. There seem limited prospects that pure statements of policy by the government (including through its civil servants) as to the scope and meaning of provisions of an Act which replaces EU law are likely to have much sway in the courts' interpretation of those terms. Whilst there are well-established mechanisms for ensuring that weight can be attached to such statements, it is unlikely that statements, policy or guidance will suffice.

38. In practical terms, this means that policymakers in government may wish to give careful consideration to the extent to which they seek to rely on nuancing statutory concepts through policy elaboration or guidance. This increases the burden on those drafting legislation to be clear on the face of it that all suitable nuances and subtleties are accounted for in the draft, which may become particularly challenging in areas, like procurement law, where lots of subtle interpretative nuances have evolved through the case law of the CJEU.

39. Lawyers and procurement leads seeking to interpret the Act and its implementing legislation should therefore be wary of starting from the basis that well-known (to procurement practitioners at least) procurement concepts remain in force. In the vast majority of cases, the drafting will have the effect of preserving existing concepts, but for those few exceptional cases where that is not the case, the assurances from policy leads (however expert they may be) that nothing is changing could end up ringing hollow before the courts.

25. See for example paragraph 2.a of Annex 2 to the UK's Schedules to the WTO's Agreement on Government Procurement.