Interpreting Taxing Statutes # 104 – Purposes for use of external aids

External aids to construction may be used for a variety of different purposes. For example, they may be used to ascertain the wider context in which language in a statute is used, to explain the legal, social or political state of affairs that the legislation is designed to remedy or change (the mischief), to provide evidence as to the intended meaning of the words used or simply for the persuasive value of reasoning contained in them. [Ben 24.3]

SYNOPSIS

Legal, social and political context

In order to understand a statute fully the words must be construed in light of the legal, social and political context at the time at which it was passed. The courts are entitled to take judicial notice of much information relating to the context in which it was enacted. External aids may be used to shed light on that context. As Lord Steyn said in R (Westminster City Council) v National Asylum Support Service [(2002) UKHL 38] when considering the use that may be made of explanatory notes:

‘The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. If follows that the context must always be identified and considered before the process of construction or during it.’

Ascertaining the mischief

A slightly different use of context and external materials is to ascertain the legal, social or political state of affairs that the legislation is designed to remedy or change. This is traditionally

expressed in terms of the mischief that the legislature intended to remedy by passing a statute The mischief rule involves the use of an aspect of context to indicate the legislative intent. As Lindley MR said in Mayfair Property Co, Re, Bartlett v Mayfair Property Co: [(1898)] 2 Ch 28]

'In order to properly interpret any statute it is as necessary now as it was when Lord Cock reported Heydon's Case to consider how the law stood when the statute to be construed was passed what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief.'

For example, where an Act is preceded by a report by a public body that has investigated a potential problem and proposed recommendation, 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. The admission of material for this purpose is unobjectionable and has generally been allowed although the courts were not traditionally prepared to admit parliamentary material even for this limited purpose. More recently this seems to have given way to a general acceptance that parliamentary materials may be looked at for the purposes of ascertaining the mischief that a provision is intended to remedy, outside the strict rules laid down by Pepper v Hart for admission of reports of legislative debates.

Evidence of legislative intent/meaning

Another use of external materials is to discover the meaning of an Act (that is, its legislative intent) on the basis of material that was, or may be assumed to have been, in the contemplation of the legislature during the passage of the Bill. For example, commentary on an earlier draft Bill, or reports of legislative

debates, provide evidence from which it may be possible to draw inferences as to the intended meaning of the resulting Act.

It is sometimes said that the use of external materials as evidence of legislative intent is constitutionally objectionable on the basis that it is confusing the intention of the legislature with that of the government or others.

It is, of course, important to distinguish between the notional intention of the legislature and the subjective intention of ministers and others involved in the legislative process; what matters is the notional intention of the legislature. However, this should not of itself prevent the courts from consulting reports of legislative debates and other material available to the legislature. Debates and material available to the legislature may provide evidence from which inferences can reasonably be drawn as to the meaning of the Act without running into the constitutional difficulties referred to above. So, for example, if a minister clearly states the effect of a provision and there is nothing to contradict that statement it may be reasonable to assume that the legislature passed the Bill on the basis that the provision would have the stated effect.

The correct analytical approach is described by Green J in Solar Century Holdings Ltd v Secretary of State for Energy & Climate Change: [(20014) EWHC 3677 (Admin)]

‘Parliament is sovereign and its views are constitutionally discrete from those of the Executive. The gap can in some cases, however, be bridged… where there is a very clear pre-legislative statement which turns out to be inconsistent with the subsequent enactment the latter may be construed to mean the same as the former where this can properly be said to reflect the will of Parliament. In such a case the view of the Executive is not taking

precedence over that of Parliament; it is simply that the earlier statement is said on analysis to be accurate reflection of Parliament's will. At base this approach by the court seeks to override infelicitous statutory language which the court concludes is not a proper reflection of Parliament's actual will and it is aided in this endeavour by reference to admissible pre-legislative material. I would make five observations about this approach. 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 per-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.'

Persuasive opinion

Finally, external materials are sometimes relied on for opinions they contain as to the intended meaning or effect of a provision. A wide variety of materials may be used for this purpose although the focus tends to be on materials that post-date

enactment. Nothing that happens after an Act is passed can affect the legislative intention at the time it was enacted. But information generated subsequently may nonetheless be of use in construing the Act. For example, reliance may be placed on guidance, reports by official committees examining an area of law or commentaries on an act. This kind of external aid is at best persuasive and the weight to be given to it should depend solely on the quality of the argument for a particular interpretation.