

The nature of legislative intention and its implications for legislative drafting

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Introduction

It is one of the most ancient principles of the law of England and Wales that in applying legislation the courts and any other reader should aim to construe it “according to the intent of them that made it”¹. But while this trenchant aphorism is initially and superficially satisfying, like many an epigram the more one thinks about it the less it appears to mean.

Who are “those who made the legislation”? In the case of an Act of Parliament, it was notionally made by that shadowy concept “The Sovereign in Parliament”, being neither the Sovereign, nor the Houses of Parliament, but a notional agglomeration². To suggest that the Sovereign personally had any intention as to what was to be achieved by the legislation when giving Royal Assent to it would be patently absurd. Equally, to suggest that both Houses, or even either House, actually had a single intention in relation to the construction of the Act would be to defy obvious reality. And as soon as one arrives in the search at individuals who might be reasonably expected to have had actual and ascertainable intentions as to the construction of the legislation – such as the draftsman of the Bill, the departmental administrators or lawyers with responsibility for the content of the Bill, the Minister in charge of the Bill in either House, or individual Members of either House participating in consideration of the Bill – one has left the class of persons whose intentions can without constitutional impropriety be treated as the intentions of Parliament.

In the case of subordinate legislation, the fact that there will often be a single individual making the legislation in a formal sense³ might suggest that it will at least be sufficiently clear whose intent is to be considered (even if there were difficulties in establishing what the intent was). But as soon as one examines the reality of the process by which subordinate legislation is made it becomes clear that the position is no better than in the case of primary legislation and may be worse. In most cases, it is as absurd to attribute to the Minister making an instrument any actual intentions in relation to its meaning as it is to attribute intention to the Sovereign in granting Royal Assent to an Act. There are three or four thousand statutory instruments made each year nowadays, and a departmental Minister might expect to sign several each week: as a general rule

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¹ 4 Co. Inst. 330.

² One could argue at length about whether an Act passed under the Parliament Act 1911 (c. 13) is enacted by the Queen in Parliament or, as the special enactment formula might seem to indicate, by the Queen “in”, or together with, the House of Commons. But the argument would probably be inconclusive and futile.

³ That will not, of course, be true for Orders in Council, in connection with which the notion of the Sovereign in Council will raise the same difficulties as the notion of the Sovereign in Parliament. Orders of Council will be not much better, since the Council meeting that made the Order will have been attended by a number of Councillors, often selected more or less at random so far as the content of the instrument is concerned. Even in the case of rules, regulations and orders, it will often be the case that more than one Minister is jointly responsible for making the instrument.

they will be either too lengthy and complicated to permit of the Minister acquiring much understanding of the detail or too trivial to make it feasible to brief the Minister on the content in detail.

Even if it were possible to establish whose actual intentions at the time of enacting legislation were relevant, it would still of course be difficult or impossible to ascertain what their intentions were. In the case of an Act of Parliament the only contemporary records likely to be of assistance are those set out in Parliamentary records. But although the courts now permit themselves in certain cases and subject to significant constraints to look at material of that kind in construing legislation, the fact remains that, as Lord Oliver of Aylmerton said in *Pepper (Inspector of Taxes) v. Hart*⁴ (the case in which the House of Lords decided that Parliamentary material could be considered for the purposes of resolving ambiguity)—

... experience shows that language – and, particularly, language adopted or concurred in under the pressure of a tight parliamentary timetable – is not always a reliable vehicle for the complete or accurate translation of legislative intention.

The same is true of a Minister or group of Ministers making subordinate legislation.

Of course, one could ask the Ministers who proposed primary legislation to Parliament, or who themselves made subordinate legislation, what their intentions were (if their intentions were established as being determinative or even relevant): but the Ministers themselves would often have only a hazy idea of what their original intentions had been, while to allow them to substitute their present intentions in relation to the application of the legislation would be in effect to permit them an unrestricted, unaccountable and wholly informal power of continuous legislating.

Irrelevance of subjective intention of legislature

The practical difficulties adumbrated above are sufficient to show that it would be difficult or impossible in most cases to take the aim described in Coke's aphorism literally and discover the actual intention of the legislature. Even were it possible, however, it is clear that the process of discovering the actual subjective intention of the legislature – whoever they are – is not the same as the process of discovering the legislative intent as that process is traditionally approached by the courts.

The point was made recently by Lord Nicholls of Birkenhead in *R v. Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd*—⁵

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. These individuals will often have widely varying intentions. Their

⁴ [1993] 1 All ER 42 HL.

⁵ [2001] 2 AC 349, 395 HL.

understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning “cannot be what Parliament intended”, they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.

An older but equally helpful exposition of the same point is found in the judgment of Lord Watson in *Salomon v. A. Salomon & Co. Ltd*—⁶

“Intention of the Legislature” is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.

More epigrammatically, Lord Reid said in *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG*—⁷

We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.

So even in the case, for example, of an order made by a single Minister in a matter in which he took a personal interest and as to the meaning of which he could therefore reasonably be expected to have an actual intention, the courts would not concern themselves with discovering that actual intention for the purposes of construction. They would not summon the Minister to give evidence as to his or her intention, nor, subject to what is said below, would they admit evidence from the Minister to that effect.

The reasons for this are obvious. In *Spath Holme* Lord Nicholls referred in passing to two reasons why subjective intention is not the aim of the courts’ search in construing legislation.

- (1) First, there are generally a large number of persons whose subjective intentions would have to be considered if subjective intention were relevant at all.
- (2) Secondly, and relevant even in the case of legislation made by a single mind, the individual’s conception of the “true” meaning of the legislation that he or she makes may be, as Lord Nicholls puts it, woefully inadequate.

A third reason, not directly mentioned by Lord Nicholls, is that inviting a Minister who made legislation to assist in its construction by giving evidence as to his or her intention at the time would be perceived as giving the Minister two bites at the cherry, so to speak, even if the Minister could be trusted not to substitute his present aspirations for his original intention: the Minister has an opportunity to express his or her intention in the words used, and ought not to seek to repair any lack of clarity or felicity in the choice of words by making subsequent statements about the state of his or her mind at the time.⁸

⁶ [1897] AC 22, 38 HL.

⁷ [1975] AC 591, 613 HL.

⁸ Governments will, of course, seek to construe legislation after its enactment or making, by issuing guidance on how it is to be interpreted or applied. But while there is nothing inherently unlawful or improper in that, there is no reason why a government should expect particular deference to be paid to its observations or entreaties; and whether and to what extent they will be admissible in and considered by the courts is an open question – see *Evans*

What is objective intention?

All this makes it easy to understand why the courts have been careful not to equate legislative intention with the actual or subjective intention of any one or more persons involved in the making of legislation. But what is more difficult is to understand precisely what the search for legislative intention then becomes. What is the precise nature of the “objective concept” identified by Lord Nicholls, the “meaning of the words used” referred to by Lord Reid or the legitimately ascertained intention alluded to by Lord Watson?

The concept of a subjective intention of the legislature would, at least, be a clear concept, even if difficult or impossible to establish in individual cases. But having rejected that concept it must be replaced with something that has a sufficient degree of certainty and consistency to avoid the dangers inherent in the following powerful and troubling assertion made by the author of a paper on construction of legislation in the Canadian courts—⁹

A careful study of cases involving statutory construction makes it appear that “legislative intention” is little more than a meaningless mantra that is invoked by judges who wish to justify holdings that are reached by intuition or other ill-defined means. By chanting ‘legislative intention’, the judge calms his or her nerves and casts responsibility for a case’s outcome on the drafters of a statute. Statutory interpretation can be a frightening exercise, but judges seem to feel that all will be well if they discover and rely on the ‘legislative intention’. Unfortunately, no one seems to know what the phrase ‘legislative intention’ really means.

One attempt to spell out what “objective intention” means might be along the lines of “the intention that a reader could reasonably impute to the legislature by reference to the words used”. But the obvious problem with this approach is that what it is reasonable to impute to a legislature depends on who or what that legislature is and what its state of mind can reasonably be taken to have been: which takes one straight back to the impossibility or undesirability of identifying one or more particular individuals and construing the legislation by reference to the state of their minds at a particular time.

Another approach would be to define “objective intention” as being that intention which may reasonably be inferred having regard only to, as Lord Reid puts it, “the meaning of the words which Parliament used”, looking at the literal meaning unflavoured by any underlying policy or surrounding circumstance. The principal problem with this is that it simply does not describe the process that the courts undertake or a process that it would occur to anybody as being sensible to undertake. Whatever a judge’s position in relation to the academic debates the matter of literal or

v. Amicus Healthcare [2004] 3 All E.R. 1025 C.A. And note the following observations of Chief Master Hurst in *Sharratt v. London Central Bus Co Ltd* [2003] 1 All ER 353 on the admissibility of evidence from the Lord Chancellor’s officials – “Certainly in my judgment neither her letter nor any views which she may have expressed to Mr McCulloch can be regarded as ‘official statements’. Thus, although her letter throws some light on the way in which the Lord Chancellor’s Department might hope that conditional fees would develop, I do not take her views as persuasive authority on the meaning of the legislation.” Note also, in a similar but not precisely parallel vein, Lord Woolf CJ in *R (Gillan) v. Metropolitan Police Commissioner* [2004] EWCA Civ 1067 (para. 30)— “The interpretation of the [Terrorism Act 2000] is a matter of law for the courts. There is no question of this Court showing deference or respect to the views of the respondents because of the subject matter of the legislation. On the contrary, as the statutory power enables the appropriate senior police officer to authorise interference with the freedom of the citizen, backed by a criminal sanction to support compliance, the power has to be restrictively construed.”

⁹ R.N. Graham, *Good Intentions*, (2000) 12 S.C.L.R. (2d) 147 to 185.

purposive construction, nobody has ever doubted that the context and purpose of legislation is crucial to interpreting it. As Lord Blackburn put it in *Direct US Cable Co. v. Anglo-American Telegraph Co.*,¹⁰ long before the present general acceptance of purposivism—

The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject-matter with respect to which they are used and the object in view.¹¹

The objective reader rather than the objective legislator

The difficulty in establishing the intention of the legislature is, to some extent, softened by applying an objectivity more to the consideration of the reader than to the consideration of the legislature. When in *Spath Holme* Lord Nicholls referred to the “objective concept” of “the intention which the court reasonably imputes to Parliament in respect of the language used”, he was referring not to an imputation on objective grounds as to the actual intention of Parliament – which as noted above simply recreates the question of whom one means by Parliament in the context of actual intention – but to an imputation along the lines of the following assertion made by Lord Nicholls in a recent lecture: “the words of a statute are intended by Parliament to convey the meaning they would reasonably convey to a reader of the statute assisted where necessary by a suitable professional adviser”.¹²

In the commercial context Lord Nicholls put the point as follows in the same lecture—

In everyday life we seek to identify what a speaker or writer *actually* intended by the words he has used. As we all know, the law proceeds on a different footing: words are taken as intended to convey the meaning, that is, the idea, they would *reasonably* convey to the hearer or reader. The question posed by the law when interpreting a contract is thus: what would a reasonable person *in the position of the parties* understand was the meaning the words were intended to convey?

This, of course, creates its own difficulties: but they are of a much lesser order and more open to practical resolution in individual cases than the search for the subjective intention of the maker of legislation. The principal difficulty with this approach is to identify the typical profile of the reader of a particular legislative provision. A subsidiary difficulty is to determine in what circumstances it will be appropriate to assume that the typical reader will necessarily be assisted by professional advice, and, in cases where he will be assisted, to determine the degree of expertise and specialist knowledge that the typical adviser is likely to have.

¹⁰ (1877) 2 App. Cas. 394, 412 HL.

¹¹ Equally, and at the other extreme, however purposive the approach that a particular judge likes to take, it is accepted by all that he is constrained in his purposivism by the clear linguistic limits of the text. So, for example, in *Capper v. Baldwin* [1965] 2 QB 53, 61 per Lord Parker CJ – “[Counsel’s] argument comes down to this, that if he is wrong and you cannot exclude such a machine as this, it really is driving a coach and four through section 33 itself and what, he maintains, must have been the plain intention of Parliament, namely, an intention not to permit such a machine to be operated for private gain in a public-house. I agree that it is very odd, but the intention of Parliament must be deduced from the language used, and it may well be that Parliament expected the necessary limitation to be imposed by the permit which is a condition precedent to the operation of such a machine in such a place. But be that as it may, I am quite unable to construe the words in such a way as to exclude this machine.”

¹² *My Kingdom for a Horse: the Meaning of Words*, Chancery Bar Association Annual Lecture, 16th March 2005: text taken from the website of the Association.

Nor does the approach of looking for an objective reader entirely eliminate the difficulties of considering the nature of the legislature. As Lord Nicholls says, the question is what the reasonable reader would understand the speaker as having meant to convey. And the point is expressed similarly in the following passage of the opinion of *Lord Hoffmann in R (Wilkinson) v. Inland Revenue Commissioners*—¹³

It may have come as a surprise to the members of the Parliament which in 1988 enacted the statute construed in the *Ghaidan* case that the relationship to which they were referring could include homosexual relationships. In that sense the construction may have been contrary to the ‘intention of Parliament’. But that is not normally what one means by the intention of Parliament. One means the interpretation which the reasonable reader would give to the statute read against its background, including, now, an assumption that it was not intended to be incompatible with Convention rights.

While this is objective in one sense, the fact that one has to consider reasonableness re-introduces an element of subjectivity. And since what is reasonable for the reader to assume will or may require the reader to consider the nature and circumstances of the speaker, the determination of the reasonable reader’s impression has the potential to take us full-circle back to the impossibility of identifying who Parliament actually is. In reality, however, the return is not quite full-circle: the typical reader will have an imprecise but generally serviceable image of the nature of the legislature, and it will be sufficient to imagine what the reader would have expected that imaginary legislature to be intending to convey.

Equating objective intention with the “mischief”

The centuries-old mischief rule has traditionally, without expressly distinguishing between a subjective approach and an objective one, been phrased more by reference to the objective appearance of the law taken in its full context than to a search for a subjective intention on the part of its makers¹⁴. Clearly, the concepts of the mischief at which the legislation is aimed and the intention of the legislature are very closely related; and they have sometimes been equated. So, for example, in *Building Societies Commission v. Halifax Building Society*¹⁵ Chadwick J said—

Browne-Wilkinson V-C (as he then was), giving judgment in the *Abbey National* case, had described s 100 (8) as ‘obscure’. That provided some base from which to embark on an examination of the relevant parliamentary material. It was only after such an examination that I could tell whether the material clearly discloses the mischief aimed at or the legislative intention lying behind the obscure words. ...

It follows that I am satisfied that, when Browne-Wilkinson V-C in the *Abbey National* case—without access to the consultative paper or the Parliamentary material—identified the mischief at which s 100 (8) was aimed as being the need to prevent those who became members of the society only when the conversion was in the air from being able to take a quick advantage, he was substantially correct. I am also satisfied

¹³ [2005] UKHL 30, para. 18.

¹⁴ See, for example, as well as the original formulation of the rule in *Heydon’s Case* (1584) 3 Co. Rep. 7a, the following expression of the rule by Lindley MR in *Re Mayfair Property Co.* [1898] 2 Ch 28, 35 – “In order properly to interpret any statute it is as necessary now as it was when Lord Coke 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.”

¹⁵ [1995] 3 All ER 193 Ch.

that there is no clear statement of the legislative intention lying behind the words ‘in priority to other subscribers’ in s 100 (8).¹⁶

Evidence

It is not within the remit of this paper to assess the state of the law on the nature of the materials that the courts will and will not permit themselves to consider in determining the legislative intention. But three brief points may be worth making in the context of the present discussion.

First, there is nothing in the decision in *Pepper v. Hart*¹⁷ (permitting the courts to have regard to Hansard for the purpose of resolving ambiguity in statute) that necessarily implies that the search for legislative intention is a subjective one by reference to the minds of the members of the Houses of Parliament. The decision can certainly be understood, and is perhaps best understood, as mere acknowledgment that in the search for background evidence of the context of an Act for the purpose of construing its probable intentions statements by Parliamentarians at the time of the passage of the Bill for the Act may be a relatively fertile source of illumination (although practice shows that the fertility is only relative, and judged objectively in itself is consistently disappointing¹⁸).

Secondly, the courts will be alive to, and utterly resistant of, any attempt by the Government to adduce Hansard or any other material as a way of remedying defects in the drafting of statute, by impressing upon the courts that a particular construction was what the Government had subjectively intended to provide for and should therefore be given precedence over other possible constructions. See, for example, the following passage of the joint judgment of Thorpe and Sedley LJ in *Evans v. Amicus Healthcare*—¹⁹

Although no formal objection was taken before us to the admission of this evidence, [Counsel] was pressed from the bench about its admissibility. In the absence of any intractable ambiguity of the sort contemplated in *Pepper v. Hart*, it seemed at first sight an endeavour by the department of state responsible for drafting the legislation to introduce its own intentions as an aid to construction, something which is no more permissible in the construction of legislation than it is in the construction of contracts.

Thirdly, if it is accepted that Hansard is admitted not because of any intrinsic authority of Members of either House to direct or control how legislation is to be construed but merely in so far as it provides illumination of the political context against which the reasonable reader would consider it, two propositions follow—

¹⁶ Note also that, perhaps less helpfully, in the same case Chadwick J at least terminologically appeared to return to the subjective-search approach of determining legislative intention, when he said “My impression from the material which has been put before me is that those words reflect the preferred route proposed in the consultative paper published in December 1985—that conversion by transfer to a specially formed company should be effected through an issue by the successor of shares for cash in relation to which shareholding members would have exhaustive or priority rights to subscribe. I doubt whether the draftsman of sub-s (8) had the issue of free shares in mind.”

¹⁷ [1993] AC 593 HL.

¹⁸ See, for example, the following observation of Lord Hoffmann 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.” That was a case in which Counsel for opposite sides had each found something in Hansard to adduce in support of their construction.

¹⁹ [2004] 3 All E.R. 1025, 1039-1042 CA.

- (1) The extent to which the observations of Ministers or others in Hansard are relevant to establishing the context within which legislation will be read may depend in part upon how far the general political aspirations of or background to the legislation were known outside Parliament. In the case of a Bill of no general political importance, however revealing the speech of a Minister may be as to what was in the executive's minds when proposing the legislation, it may be of little or no value in determining what the reasonable reader would expect the legislation to have been intended to mean; the speech probably deals with recondite concepts and policy of which the primary expected audience would have been wholly unaware. Of course, in the case of a technical Bill, its primary audience may be a class of technical experts who will be expected to have been familiar with the policy objectives, in which case the Hansard references will have their usual weight. But not so in the case of a Bill which, while intended for a general audience (in the sense of not being of particular relevance to any particular class of reader) is intended to make a change in the law of a slight or technical nature of which the general public is unlikely to have any knowledge.
- (2) Other contemporary evidence that illuminates the background against which the primary audience would have been expected to consider the legislation will be no less pertinent than Hansard. As well as departmental guidance and other documents, that could include evidence or observations from the draftsman²⁰.

Stretching the fiction: section 3 of the Human Rights Act

While the notion of the legislative intention is a fiction, it is clearly a convenient and reasonable one, and its focus on the natural meaning of the words used means that the courts appear generally comfortable about discovering the legislative intention of a particular provision.

In certain contexts, however, the courts are required not to look for the legislative intention by reference simply to the natural meaning of the words used in the context of the legislation and its political background, but to have regard to that intention as qualified by some other specified consideration.

The first obvious example was section 2 (1) of the European Communities Act 1972²¹. A more recent and possibly even more powerful example is section 3 (1) of the Human Rights Act 1998²². As to that, Lord Nicholls of Birkenhead said in *Ghaidan v. Mendoza*—²³

[30] ... the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted

²⁰ See further discussion below.

²¹ 1972 c. 68.

²² 1998 c. 42 – “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

²³ [2004] UKHL 30.

the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

[31] On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve convention-compliance. If he chose a different form of words, section 3 would be impotent.

[32] From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a convention-compliant meaning does not of itself make a convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.

[33] Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision convention-compliant, and the choice may involve issues calling for legislative deliberation.

One could distil from this approach the suggestion that whereas one is normally required to inquire what meaning can reasonably and objectively be imputed to the words used, in applying section 3 one is required to think what words might have been chosen, consistently with the principal intentions of the legislation, had a particular issue of compliance with the European Convention on Human Rights been brought to the attention of the legislature. One can consider this as a form of search for the intention of the legislature only in so far as one takes section 3 of the 1998 Act as establishing a presumption that the legislature always intend to comply with the Convention, so that words used whose natural meaning inevitably conflicts with the Convention

must be regarded as an unintended slip which disturbs rather than reveals the “true” intention²⁴. While the courts appear reasonably comfortable in applying this presumption in this way, it certainly stretches the notion of the search for the legislative intention one step further away from anything that might be recognised as the actual intention of the legislature²⁵.

Implications for legislative drafting

It has always been axiomatic that legislation should be drafted with the ease and convenience of the reader in mind, and that what is convenient for the reader will depend upon the nature of the legislation. In the enduring and salutary words of Sir Alison Russell KC—²⁶

The draftsman should bear in mind that his Act is supposed to be read and understood by the plain man. In any case, he may be sure that if he finds he can express his meaning in simple words all is going well with his draft: while if he finds himself driven to complicated expressions composed of long words it is a sign that he is getting lost, and he should reconsider the form of the section.

So who are our readers? While in one sense Parliament is our primary client and the courts are our “ultimate” client, in another sense we should consider the citizen – the professional or lay individual who may have to consult our statute daily for years – not only as our principal client but also as, ideally, the ultimate client. A pellucid product may be able to avoid the attention of the courts forever. As the Renton Committee put it in their report—²⁷

On the other hand, the draftsman must never be forced to sacrifice certainty for simplicity, since the result may be to frustrate the legislative intention. An unfortunate subject may be driven to litigation because the meaning of an act was obscure which could, by the use of a few extra words, have been made plain. The courts may hold, or a Government department be driven to conclude, that the Act which was intended to mean one thing does not mean that thing, but something else. Where this occurs, the draftsman’s discomfort is considerable, and he will instinctively guard against its happening to him a second time.

Equally of course, what is convenient for the reader will depend upon his nature and purpose in consulting the legislation, which will in turn depend upon the nature of the legislation. As Sir Alison Russell continued—

Of course, in Acts of a technical kind, he may find it necessary to use technical expressions: but such Acts will usually only affect readers who are qualified to understand them.

The reflections above about the meaning of the objective intention of Parliament make careful consideration of who the “target audience” of the statute is likely to be not merely a matter of good practice for the ease of citizens, but actually an essential part of ensuring that the search for the legislative intention, whether by the courts or by the citizen, will produce the right result. To

²⁴ An argument that will not, of course, be relevant to pre-1988 enactments: but in relation to them one can say that the 1988 Act has by an exertion of its legislative intent modified the legislative intents of the pre-1988 legislatures.

²⁵ As Lord Nicholls put it in his lecture mentioned above, “Interpretation of a statute in accordance with section 3 is not interpretation in the ordinary sense of that expression.”

²⁶ *Legislative Drafting and Forms*, 4th ed., 1938, p. 13.

²⁷ *The Preparation of Legislation*, Report of a Committee Appointed by the Lord President of the Council, May 1975, Cmnd. 6053, para. 11.5.

the common sense requirement to have regard to the nature of the most likely readers of our legislation and to consult their convenience can be added the fact that we must take into account that in construing our legislation the courts will consider what impression we could reasonably have expected to make on the minds of those who were most likely to form our primary audience.

If the courts will have regard to what the reasonable reader will reasonably assume Parliament to have meant, the courts will have to consider what knowledge and interpretive skills that reasonable reader was likely to have. A statute drafted on the assumption of expert knowledge as to the meaning of a technical term will, therefore, produce the wrong result if the courts search for the objective legislative intention by reference to a lay reader with no technical knowledge.

Finally, it has already been suggested that evidence and observations from the draftsman could be of relevance in discovering the primary audience of legislation and their likely understanding of it. The suggestion that a letter from the draftsman could be adduced in aid of construction of legislation was made and rejected in *R. v. Hinks*²⁸. But that was a suggestion that the draftsman might exert an influence upon construction, to be rejected in much the same way and for much the same reasons as the suggestion of construction by reference to departmental guidance in *Evans*. It is conceivable, however, that evidence from the draftsman as to the nature of the primary audience for whom he was intending to write, or as to the known policy and legal constraints upon him at the time of writing, might be useful to a court in determining how the reasonable reader might construe the legislation. And while the presentational and political objections to admitting evidence of that kind might be unconquerable in some contexts, they might not be so in all.

Conclusion

The concept of the legislative intent is neither as straightforward as it might appear at first glance nor as elusive as one might fear on closer examination. As traditionally understood by the courts it is a concept that is capable of being discovered by reference to objective criteria. Its nature, and the nature of those criteria, require to be borne in mind by the draftsman in order to ensure that

²⁸ [2000] 3 W.L.R. 1590, 1596 H.L. See, in particular, the following passage of the speech of Lord Steyn — “While this anecdote is an interesting bit of legal history, it is not relevant to the question before the House. Given Counsel’s use of it, as well as aspects of Sir John Smith’s writing on the point in question, which have played such a large role in the present case, it is necessary to state quite firmly how the issue of interpretation should be approached.

“In *Black-Clawson International Ltd v. Papierwerke Waldhoff-Anschaffenburg AG* [[1975] A.C. 595, 613 HL] Lord Reid observed—

‘We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.’

“This does not rule out or diminish relevant contextual material. But it is the critical point of departure of statutory interpretation. It also sets logical limits to what may be called in aid of statutory interpretation. Thus the published *Eighth Report of the Criminal Law Revision Committee on Theft and Related Offences* [(1966) (Cmnd 2977)], and in particular paragraph 35, may arguably be relevant as part of the background against which Parliament enacted the Bill which became the 1968 Act. . . . Relevant publicly available contextual materials are readily admitted in aid of the construction of statutes. On the other hand, to delve into the intentions of individual members of the Committee, and their communications, would be to rely on material which cannot conceivably be relevant. If statutory interpretation is to be a rational and coherent process a line has to be drawn somewhere. And what Mr Fiennes [The Parliamentary Draftsman, later Sir John Fiennes K.C.B., Q.C., First Parliamentary Counsel] wrote to the Larceny Sub-Committee was demonstrably on the wrong side of the line.”

his draft will be given the meaning that he intends. In particular, the nature of the objective search for legislative intent requires the draftsman to determine the nature of his primary target audience and the facilities likely to be available to them in applying and construing the legislation.