IN FOCUS

YOU SAY POTATO ... THE DIFFERENT RULES FOR WORKING OUT THE MEANING OF WORDS IN SCHEME DOCUMENTATION AND LEGISLATION

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Introduction

Pensions lawyers spend much of their time reading two types of documents: schemes' governing documentation, and legislation. In each case, the task is to ascertain the meaning of the instrument. It would be understandable to think, therefore, that the two exercises were effectively the same, with the same principles applying each time.

Understandable, but perhaps wrong. In fact, the respective law on construing these two types of documents in the pensions context has arguably markedly diverged. For scheme documentation, the wording is king, whereas for legislation it is the context and purpose of the overall legislative scheme. That possible divergence was vividly illustrated by two appeals heard last year, coincidentally on the same day: the *BBC* appeal[1] and the *Virgin Media* appeal.[2]

[1] *BBC v BBC Pension Trust Limited & Another* [2024] EWCA Civ 767, [2024] ICR 1399.
[2] *Virgin Media Ltd v NTL Pension Trustees II Ltd & Ors* [2024] EWCA Civ 843, [2024] Pens LR 326.

This article explores the nature of the divergence, and what it is that may justify it. The point may at first glance appear academic, as the respective approaches are now established at appellate level, but in fact they can illuminate the respective nature of the two exercises, and suggest that the divergence is smaller than may at first appear.

The divergence: *BBC* and *Virgin Media*

It is more than just the coincidence of the dates of their hearings that makes *BBC* and *Virgin Media* a good illustration of the divergence. The two cases each concerned the construction of a short phrase, and the issue in each was whether that phrase extended to future service rights, providing in retrospect the perfect environment to study the differing approaches.

In *BBC*, the relevant phrase was *"interests of [active] Members"*, as used in the proviso to an amendment power precluding amendments that substantially prejudiced such interests. The issue was whether that extended to future service rights. The Court of Appeal held that it did. For our purposes, three parts of its reasoning to that conclusion are of particular interest.

First, Lewison LJ approached the question as one of textual analysis.

Thus at para [66], having paid tribute to the skill with which what he described as the intricate arguments advanced by Counsel, he said *"the starting point (and usually the end point) is, in my view, the natural meaning of the phrase seen in its context."* It appears clear that by *"context"* in this paragraph he meant *"textual context"* rather than any wider factual context such as one might have regard to in construing for example a commercial contract. To the extent that factual context was mentioned at all in the judgment, its relevance was positively dismissed (see for example para [20]).

Then having identified this as the starting point and the usual end point, Lewison LJ concluded at para [72] that the issue in the case could be answered by a *"straightforward reading of*

the phrase in its context." So having started by considering the natural meaning of the phrase in its context, Lewison LJ saw no need to consider anything else. That was a complete answer to the case.

Secondly, Lewison LJ was sceptical of the invocation, in the circumstances of that case, of Millett J's famous statement in *Re Courage Group's Pension Schemes*[3] that it *"is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigencies of commercial life."* At para [15], he rejected any suggesting that this was *"an autonomous, let alone an overriding, principle of interpretation of pension schemes"*, stressing consistently with the approach he went on to take that the power *"should be interpreted precisely in accordance with its terms, neither more nor less."*

Thirdly, Lewison LJ was at para [20] sceptical of the utility of looking at previous iterations of scheme documentation, and at para [74] held that, in the case before him, the predecessor rule shed no light on the exercise of construction in which he was engaged.

The facts and significance of *Virgin Media* will be well known to the readers of this article. The relevant phrase to be construed was *"accrued rights"* in the definition of *"section 9(2B) rights"* relevant to s.37 of the Pension Schemes Act 1993 and Regulation 42(2) of the Occupational Pension Schemes (Contracting-out) Regulations 1996 (**"the 1996 Regs"**), and the issue again was whether that phrase extended to future service rights.

Had Nugee LJ adopted the same approach to the language used as Lewison LJ, there can surely be little doubt what the answer would have been. As Nugee LJ accepted at para [99], if one asks at any particular date what a member's accrued rights are, *"the obvious answer"* is past service rights, not future service rights. If this was a provision in scheme documentation, it is difficult to see what further debate there could have been.

[3] [1987] 1 WLR 495 at 505.

But Nugee LJ adopted a very different approach to the interpretative exercise before him. We have seen that Lewison LJ identified the words as the starting point. In the context of statutory construction, Nugee LJ expressly rejected this as the proper starting point, saying as follows at para [68]:

> *"So although [Counsel for the employer] began his submission by identifying the natural meaning of the words used in the definition of section 9(2B) rights, I consider, in accordance with the guidance from the Supreme Court, that we should first orientate ourselves by reference to the legislative purpose and scheme before considering the meaning of the words to be construed."*

And in case it is thought that *"legislative purpose and scheme"* means the same as Lewison LJ's reference to *"context"*, and in contrast to Lewison LJ's scepticism of the use of predecessor rules, it is important to note that Nugee LJ immediately went on to make clear how broad a concept this is:

> *"…this not only means construing the words in the context of the statute as a whole, but reading the statute as a whole "in the historical context of the situation which led to its enactment.""*

Thus the relevant enquiry not only starts at a different place, but is much more wide-ranging.

Nugee LJ therefore considered in depth the history and underlying purpose of the legislative scheme, in a (respectfully) magisterial survey starting from its inception in 1978, through to the amendments he was concerned with in 1997. Having at para [101] reminded himself that the starting point is to ask what the purpose of s.37 is, it is at a high level of abstraction then possible to identify two stages in his reasoning.

The first, at paras [101]–[109], is to conclude, by reference to the legislative purpose and history, that Regulation 42 should be interpreted if possible in a way consistent with its previous iteration, as embracing future service rights. This is about as far away from the approach of Lewison LJ in *BBC* as one can imagine: rather than taking the text on its own merits, Nugee LJ starts outside the text to identify the 'objective' in construing it.

The second, at paras [110] – [114], was only at that stage to consider the text, and to consider whether it could be construed to extend to future service rights. But even that textual analysis was heavily imbued with purposive considerations: Nugee LJ centred his textual analysis not by taking the words in the textual context of the 1996 Regs, but by reference to the shortcomings of the previous iteration of the regulation, and construed the words of the iteration before him by identifying how they were intending to address those shortcomings.

Can this divergence be justified?

So these two cases show that the process of ascertaining intention from words involves quite different methods when those words are in scheme documentation, compared to when they are in legislation. Is that approach justifiable?

In my view, the answer is yes. There are three differences between scheme documentation and legislation which together can explain why a more restricted approach is appropriate for the former, and a more expansive for the latter.

Before turning to those differences, a helpful starting point as to what might justify the difference in treatment is to take the five factors identified by the Supreme Court in *Barnardo's v Buckinghamshire*[4] as justifying according primacy to textual analysis of scheme documentation, and ask whether or not those factors apply to legislation.

The first is that a pension scheme is a formal legal document prepared by skilled and specialist drafters. That, surely, is true of legislation as well.

The second that it is not the product of commercial negotiations between parties who are happy to leave loose ends to be sorted out in future. Again, the same is clearly true of legislation.

[44] [2018] UKSC 55, [2019] Pens LR 4 at paras [14]–[15].

The third is that a pension scheme is an instrument designed to operate in the long term. But again, so is legislation, or at least much of it.

The fourth is that a pension scheme confers important rights on third parties, the members, including members who may join the scheme many years after it was initiated. But equally, those affected by legislation dealing with pension schemes are in no sense 'party' to it.

The fifth is that members of a pension scheme may not have easy access to expert legal advice or be able readily to ascertain the circumstances which existed when the scheme was established.

This last point is where it begins to get interesting. One might suppose that a similar point can be made in the context of legislation: surely, one might say, members of the public should be able to ascertain the law by reading what Parliament has enacted, without engaging in the kind of research necessary to produce the analysis in *Virgin Media*?

But the point in fact made in the authorities on construing legislation is subtly different. In *R v Secretary of State for the Environment, Transport, and the Regions, ex parte Spath Holme Ltd*,[5] a case cited by Nugee LJ in *Virgin Media* at [63], Lord Nicholls said as follows:[6]

> *"Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."*

The crucial words in this passage for our purposes are *"with the assistance of their advisers."* In the context of technical pensions legislation, the reality is that no lay person will seek to understand it themselves without expert advice: the only people in fact having regard to it will be employers and trustees, and they will have the wherewithal to take expert advice.

[5] [2001] 2 AC 349.
[6] Ibid, at 397.

That brings us to the first difference. Whereas, as *Barnardo's* shows, the principles applicable to construction proceed on the basis that scheme documentation may have to be comprehensible to a lay member without expert advice or access to relevant facts, the principles applicable to the construction of legislation recognise that people may require the assistance of advisers. Where the subject matter of the legislation is deeply technical, it is more reasonable to suppose that it was drafted to be construed with the assistance of advisers, and hence to adopt a more sophisticated approach to its construction, than might otherwise be the case.

The first half of the fifth factor identified in *Barnardo's* that underlies this first difference – that members may not have access to legal advice - is one which for my part I must confess not to find a particularly compelling argument for a textual approach to pension schemes. Pension schemes are themselves highly technical documents, and it is difficult to imagine that any drafter sets themselves the superhuman task of drafting a document which will be intelligible to a lay person without expert advice. Other documents, such as scheme booklets, are prepared to help members. But whatever my views, the fact that members may not have access to legal advice is clearly established by authority at the highest level as a relevant consideration, and can justify a different approach to construction of legislation.

The second difference is related, and arises out of the second half of the fifth factor identified in *Barnardo's*, namely the availability of background information. The drafter of a pension scheme document can reasonably be supposed to be cognisant of the risk, given the long-term life of the scheme, that by the time it comes to be construed the factual matrix out of which it arose may no longer be fully or partially available to those construing it, even if they have expert advice. Relevant documents may have been lost, recollections unavailable or have faded. It is not inconceivable that even previous formal scheme documents may over time be misplaced. A wise drafter in those circumstances would want to ensure that the meaning of the document was clear from its own four corners, and did not depend on the happenstance of what factual information was still available at the time it came to be construed.

The drafter of legislation would no doubt share the same objective, but it is less urgent. The background information that might realistically inform the construction of legislation – the previous iterations of the legislation, Law Commission Reports, White Papers and so forth – are all public documents. The prospect that they might not be available at the future time when it becomes necessary to construe the legislation is slight.

The third difference – and to my mind the most compelling – is that it is much easier to identify a purpose for a legislative provision that is informative on the question of construction, and the identification of which does not itself depend on the resolution of the question of construction. Legislation is by its nature purposive. A legislative scheme is brought into existence for a reason: to address some mischief, or to achieve a desirable outcome. This overall purpose of the legislation is generally apparent, either from the legislation itself or from the public material accompanying its production. The particular purpose that individual provisions play within that overall scheme can be discerned either from the same material, or from some relatively simple reasoning.

Virgin Media is a very good example of that. The purpose of the contracting-out regime as a whole is clear – to permit employers to make alternative provision to SERPS for their employees and benefit from reduced national insurance contributions accordingly – and the role within that of s.37 and Reg 42 is also clear – to prevent amendments being made which allow the employer to benefit from reduced national insurance contributions without providing the quid pro quo of adequate alternative benefits to SERPS. That assertion does not depend on the outcome of the question of construction. When the legislation is viewed as a whole, the contrary is not seriously arguable: those are the only realistic explanations for why those provisions were on the statute book. That being the whole point of the legislation, it would be bizarre if it was not at the heart of the Court's analysis.

Pension schemes however are not purposive in the same way: beyond 'providing pensions', which gives you little clue to anything other than the most obvious questions of construction, it is

not generally possible to discern an overriding purpose to a particular scheme. There is no mischief it exists to prevent or outcome it intends to achieve. That being the case, it is not possible generally to identify a 'purpose' for individual provisions which is not either obvious, or contestable, in that it depends on the question of construction itself.

Take in that regard *BBC*. Clearly, the purpose of the fetter was to protect members' interests against adverse amendments. But that statement of purpose is useless in seeking to construe what the word "interests" means. That purpose is served regardless of whether it does or does not extend to future service rights. And there is no basis for re-defining the purpose of the fetter in a way that illuminates that question: that can only be done once the word "interests" has been construed.

Thus when it comes to construing the provisions of a scheme, any appeal to purpose is much more likely to be either impotent – because the purpose is too general to inform the question of construction – or redundant – because the establishment of the purpose depends on the prior question of construction.

None of this of course is absolute. There may be cases where the identification of the purpose of a provision can inform its construction in a meaningful way. But the principles are not absolute: the Supreme Court in para [15] of *Barnardo's* recognised that a textual analysis is not a matter of pure literalism *"but includes a purposive construction when that is appropriate."* The point is that in the context of scheme documentation, a purposive construction is much less likely to be informative, and hence appropriate, than it is in the context of legislation.

Conclusion

Viewed in this light, the divergence perhaps ceases to look quite as severe as it did. The apparently markedly different approaches adopted in *BBC* and *Virgin Media* to ascertaining the meaning of the words in the documents being construed can be viewed not as judgments of

principle as to the tools available for each task, but as recognition that how the various tools are deployed is heavily dependent on context.

It follows from that that there may be cases of statutory construction where appeals to purpose add nothing – because the purpose of the provision is not sufficiently clear before the question of construction is resolved – and cases of pension scheme construction where appeals to purpose may make all the difference. *BBC* and *Virgin Media* help us as practitioners understand the respective emphases which a purposive analysis and a textual analysis will likely have in the different contexts of scheme documentation and legislation, but they do not absolve us of the duty in each context to consider both.

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