

Everything that can be interpreted can also be misinterpreted. - Anon

First we explained how a Bill, such as the Pension Schemes Bill 2019-2021, becomes an Act of Parliament. Part II covered secondary legislation, which develops the broad sketches of an Act into detailed provisions that govern our society.

But the story does not end there. One couldn't memorise all the statutes on the books and know what was within the law, what was against the law, or even all you needed to know to run a pension scheme compliantly. Would that it were so simple!

Those statutes are missing some rules and regulations, including the most important one. There isn't an Act of Parliament or Statutory Instrument that says murder is illegal. It most certainly is, but the prohibition is set out in our system of '**common law**': the laws created by judges through the principle of binding precedent (more on that later).

Statutory Interpretation

Furthermore, to know the law, you must interpret its texts accurately. Words or phrases may:

- have more than one meaning (e.g. 'chip');
- cover multiple possibilities without specifying which it applies to, and which it doesn't;
- exclude words that the drafter thought were implied;
- have changed meaning over time (e.g. 'to divest' used to mean 'to undress').

When two interpretations come into conflict (perhaps your interpretation, and the Pensions Regulator's), you

have a dispute over a point of law. These may be settled by judges in a court.

For example, Mr Barber thought his pension scheme (the Guardian Royal Exchange Pension Fund) had breached sex discrimination legislation by refusing him an immediate (unreduced) pension at age 52. A female in the same situation in the same scheme would have been so entitled.

The critical interpretation was whether a 'pension' counted as 'pay', thus falling within the equal pay requirements. Famously, in May 1990, the European Court of Justice ruled that it did.

Judges may go beyond interpreting what a provision does say and read into it things they think Parliament meant it to say. There are legitimate reasons why a provision, as written, may not cover everything it should:

- Changes to society and particularly technology can, over time, mean something is omitted which a drafter in the present day would include.
- There may be an error in drafting, particularly if the legislation was amended several times in Parliament.
- Parliament simply cannot spell out a provision's application to every situation.

There was a famous drafting error in *The Pension Sharing (Pension Credit Benefit) Regulations 2000* (now revoked). These Regulations originally provided that part of a pension credit could be commuted where the pension credit member:

- was suffering from incapacity before normal benefit age, or
- had reached age 50.

The word 'or' here was subsequently corrected to read 'and'. This example also shows how changing just one word in an item of legislation can completely change its meaning.

How to Interpret Law

Judges do not have complete freedom to read in legislation what they want to read. There is a framework governing statutory interpretation, starting with three important rules.

1. The Literal Rule

The judge should first consider what the statute actually says, rather than what it should say i.e. even if they don't like the outcome.

2. The Golden Rule

That said, if the literal rule produces an absurd interpretation, then the court should look for another meaning of the words to avoid the absurd result.

3. The Mischief Rule

The third rule was first documented in [Heydon's Case](#), from 1584. It said that for the true interpretation of a statute, you must consider four things:

- i. What the common law was before the making of the Act.
- ii. What the mischief and defect was that the common law did not provide for already.
- iii. What remedy Parliament hath resolved and appointed to cure the disease of the Commonwealth.
- iv. The true reason of the remedy.

The office of the judges is then to make such construction as shall suppress the mischief and advance the remedy.

In other words, courts have discretion to consider what the provision was trying to do rather than what it does as written. This is known as a 'purposive approach' and can be controversial.

There are also three main rules around the linguistic interpretation of legislation.

1. *Ejusdem generis* ('of the same kind')

Where specific words are followed in a list by general words (e.g. defined benefits, defined contributions, or others), the general words (i.e. 'others') refer to the same sort of thing (i.e. pension benefit types).

2. *Noscitur a sociis* ('a word is known by the company it keeps')

Words and phrases must be looked at in context, considering the surrounding sections of the legislation.

3. *Expressio unius est exclusio alterius* ('the express mention of one thing excludes others')

For example, if a provision mentions active members, pensioner members, and dependants, it excludes deferred members.

Besides these six named rules, judges must also presume certain truths about a provision unless the provision states otherwise. For example, one such presumption is that the Crown is not bound by any statute. Another important one is that legislative provisions only apply from the date they come into effect. They are not retrospective unless they are expressly backdated.

Resources

There are clues provided with the legislation that aid its interpretation. The title of a piece of legislation tells a little about its intent. *The Occupational Pension Schemes (Preservation of Benefit) Regulations 1991* will not concern you too much if you administer a SIPP.

Near the front of a piece of legislation you might find that some terms have a definition. In the aforementioned regulations from 1991, sure enough, "scheme" literally means "occupational pension scheme".

Skip to the end of a statutory instrument and you will find an 'Explanatory Note' telling you what the drafter thinks each regulation is doing. Newer instruments are also supplemented by a more extensive 'Explanatory Memorandum'.

These do not have legal weight, and the regulation itself (as interpreted) will take precedence. Nonetheless, they can be a useful steer.

There is also the [Interpretation Act 1978](#), which sets certain rules on legislation interpretation e.g. where an Act includes a power to make subordinate legislation (e.g. Regulations), then expressions used in that subordinate legislation carry the same meaning as they do in the Act, unless the contrary intention appears.

Also, you might have seen that some legal provisions are gendered: "He shall do this..." "He shall not do that..." Females are not off the hook. The 1978 Act provides that words importing the masculine gender include the feminine, and vice-versa.

Precedent

Another critical aid to interpretation is earlier interpretations of the same legislation. This is why a judge's decision can be as newsworthy as a new Act of Parliament. It sets a precedent that is likely to stand henceforth.

In the courts of England and Wales, a decision of a court is binding on **lower** courts, and usually binding on those of equal level. A judge in a County Court cannot generally interpret a provision differently to an earlier interpretation from a judge in a High Court case. This is the doctrine of 'binding precedent' or *stare decisis* ('to stand by things decided'). This system is a key tenet of common law. (Northern Ireland is a separate common law jurisdiction. In Scots law precedents are not binding in the same way.)

The Supreme Court, the UK's highest, does not review every decision or precedent. It takes someone to appeal a decision for the case to climb the court hierarchy and test earlier precedents. Even a binding precedent in the Supreme Court or the House of Lords (the previous highest court) could be revisited at that level.

Any precedent could be overruled later by a higher court (or 'reversed', where it is the same case being considered). An overruling has retrospective effect, so even acting within the law, as interpreted in an earlier court judgment, could in theory be outside of the law. This is why judges are more reluctant to go against a precedent the older it is. In the Barber decision, the Court had to expressly restrict the application of its judgment to apply from the date of the ruling.

It is not always straightforward to determine if a judge's decision sets a binding precedent. Statements made *obiter dictum* ('a word said while travelling'), which means they were made in the course of

reaching a judgment, but were not critical in reaching it, are not binding. They are 'persuasive precedents' that may be referred to in later cases, but need not be.

A judge won't declare which of their conclusions were *obiter dictum* and which were *ratio decidendi* ('the rationale for the decision'), so it is for latter judges to determine whether they are bound by them. This gives them significant leeway to depart from earlier precedents.

This area is controversial as it arguably allows unelected judges to make law. The main counterargument is that literal interpretations can have undesirable, nonsensical outcomes. In any case, Parliament can always revise the law to remove a precedent the people do not want (if they can find the time).

Court Watch

The importance of precedents is why Aries monitors decisions in the courts. The Supreme Court case of [HMRC v Parry & Ors](#) (the so called 'Staveley case') was one such example from August last year, teaching us a lot about how inheritance tax may apply to pensions wealth.

Ombudsman determinations do not carry the force of precedence. They can also be appealed against (but only on points of law) and quashed by a court.

An important example of this was [Donna-Marie Hughes v Royal London Mutual Insurance Society Ltd.](#) The Ombudsman ruled that Ms Hughes did not have a statutory right to a transfer to a purported occupational pension scheme because obtaining 'transfer credits' in that arrangement required her to have earnings in relation to the receiving scheme employer. The High Court overruled that interpretation,

finding that she only needed to be an earner under the legislation. The Ombudsman had overreached, the court found, in adding words to the provisions to correct an apparent mistake.

Nonetheless, his decisions give us a good idea of what his office might determine in a future dispute, and usually a good steer as to what a court might decide. We've produced four Insights so far summarising interesting determinations. They are a guide to compliance but, as we have seen, offer no guarantee.

Brexit and the European Courts

European courts* have historically set important precedents for UK pensions. As recently as December 2019, a German national's dispute with a German Pension Authority, [Pensions-Sicherungs-Verein VVaG v Bauer](#), led to a decision in the European Court of Justice with major implications for our Pension Protection Fund.

**There are several courts, and their different roles are beyond the scope of this Insight.*

Their influence is diminished going forward, but not defunct. The latest from Parliament's [website says](#):

The Political Declaration agreed by the UK and the EU, only makes clear that insofar as the 'future relationship' contains concepts of EU law, disputes about those concepts will have to be referred to the CJEU [the Court of Justice of the European Union]. This must be in a process similar to that set up by Article 174 of the WA [Withdrawal Agreement], in which the CJEU can offer a binding interpretation of EU law.

We will have to wait and see whether a dispute about a concept of EU law will again impact the pensions landscape. As ever with Law, the devil will be in the detail.

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Aries Insight - February 2021

