Clear Ambiguity:
the interpretation of plain language in English legal judgments

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Abstract: It is inevitable in a complex discipline, that expression should sometimes appear obscure. In the legal field it is agreed that such obscurity should be reduced to a minimum. However, the avoidance of (unnecessary) obscurity will not eliminate problems of interpretation. It is shown that problems of ambiguity may arise even where the language is clear. A study of celebrated English cases shows that common words are more ambiguous than specialised terms. It is argued that, because “what is said” is not determined (merely) by the words, but also depends on the context of discourse, there can be no purely literal meaning. Where the contextual features are unavailable or inadmissible, the sense may appear indeterminate. A consideration of the classical rules of legal construction as applied in common law judgments shows that although ambiguity is an integral part of the law, it may be seen not as a defect, but as an essential tool of adjudication.

1. Introduction

As the law is a complex discipline; it is inevitable that legal discourse will occasionally appear obscure to those unfamiliar with the syntactic conventions and the specialist vocabulary. To such people, it often seems that obscurity is deliberately cultivated by the lawyers as a stylistic device. This is unfortunate as in principle the law is addressed to ordinary people who are presumed to be aware of their rights and obligations. One of the aims of the movement for Clarity in the Law is to reduce obscurity to a minimum, by avoiding unnecessary complexity and by using ordinary language wherever possible. Indeed, one of the senses of the word ‘clarity’, as used in this context, is associated with the use of plain language in place of technical terms. It will be argued in this chapter that it would be overly optimistic to assume that clear expression could have the effect of eliminating misunderstandings and controversies regarding the sense of legal texts and documents.

Problems of linguistic ambiguity should be clearly distinguished from those related to the understanding of complex and obscure expression. As far as professionals are concerned, obscurity is only rarely a barrier to understanding. It appears instead that the most difficult and subtle problems of legal construction relate to the understanding of commonly occurring, plain words. The reason is that sense depends on context. As common words occur more frequently, they can be expected to occur in more different discourse situations than technical terms; the risk of ambiguity is therefore greater.

Arguments and examples from English law will be presented in the following sections to show that language is inherently polysemic and that even clear expression may appear in the absence of contextual information as indeterminate. It will appear in conclusion that, as linguistic ambiguity cannot be eliminated, it must be considered as an integral part of the law. An examination of the classical rules of construction, as applied in common law judgments, shows that ambiguity has a valuable functions as a tool in legal adjudication. Before going on to discuss the problem of ambiguity in clear language, it is first necessary to distinguish this problem from that of obscurity or incoherence. It will then be useful to consider the legal approach to ambiguity, as

1 Charnock (2006b)
observed in common law judgments, and to examine the use and admissibility of external evidence within the legal tradition of supposedly literal interpretation.

2. Plain language and obscurity

Regarding the use of ordinary language in the law, the well-known French decree of 25 August 1539 (the Ordonnance Villers-Cotteret) appears touchingly naive. This Ordonnance was passed in the reign of King François 1 to impose the use of vernacular French in place of Latin in legal and administrative acts and instruments. It provided (Article 110) that statutes and judgments should henceforth be written clearly, so as to eliminate all ambiguity or uncertainty and to make “interpretation” unnecessary:

Et afin qu'il n'y ait cause de douter sur l'intelligence desdits arrêts, nous voulons et ordonnons qu'ils soient faits et écrits si clairement, qu'il n'y ait ni puisse avoir aucune ambiguïté ou incertitude ne lieu à demander interprétation. (Art. 110, Ordonnance Villers-Cotteret 1539)

In order to achieve the same aim, it further provided (Article 111), that judgments, sentences, contracts, wills and all legal procedures, should be written in French, rather than in Latin:

Et pour ce que telles chose sont souvent advenues sur l'intelligence des mots latins contenus esdits arrests, nous voulons d'oresnavant que tous arrests, ensemble toutes autres procédures, soient de nos cours souveraines et autres subalternes et inférieures, soient de registres, enquêtes, contrats, commissions, sentences, testaments, et autres quelconques, actes et exploits de justice, ou qui en dépendent, soient prononcés, enregistrés et délivrés aux parties en langage maternel françois et non autrement. (Art. 111, Ordonnance Villers-Cotteret 1539)

While this Ordonnance is naturally seen as marking a significant date in the history of the French language, it cannot be taken seriously as a contribution to semantic theory. Indeed, although the use of familiar terms may make recourse to dictionaries less frequent, such terms are less well defined and therefore more likely to give rise to debate and disagreement regarding the correct interpretation. Experience has shown that the use of French instead of Latin cannot not be expected to eliminate the problems of ambiguity and indeterminacy in the law.

2.1 Obscurity

Although laymen faced with complex legal terminology often find themselves at a loss, it is rare in practice for professionals to declare themselves unable to understand the documents they are called upon to interpret. However, careless or unconsidered drafting occasionally leads to impenetrable obscurity; it is then difficult, even for those familiar with the appropriate terminology, to discover the meaning of the particular texts. One notorious example is found in the Foreign Judgments (Reciprocal Information) Act 1933:

Subject to the provisions of this section, a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings. (Foreign Judgments (Reciprocal Information) Act 1933 II s8(1))

It is reassuring to note that Lord Reid himself admitted, when called upon to interpret this text in Black-Clawson v Papierwerke 1975, “I find the first few lines very obscure.”

Black-Clawson is chiefly remembered because of the decision to accept extraneous evidence in the form of the legislative committee report, in the forlorn hope of resolving what was presented as an ambiguity:
Where there is ambiguity in a statute the court may have regard to the report of a committee presented to Parliament containing proposals for legislation which resulted in the enactment of the statute, in order to determine the mischief which the statute was intended to remedy. \textit{(Black-Clawson v Papierwerke HL 1975, per curiam)}

This venture into new interpretative territory was no doubt facilitated by the fact that the controlling statute had originally been presented to Parliament in the form of a legislative committee report. The judgment constitutes authority for the admissibility of legislative committee reports where necessary in order resolve ambiguity. It must be admitted, however, that in this particular case, the text to be interpreted was not ambiguous in the sense that it can be understood in two or more different ways. It is better seen as obscure, as it has no readily perceptible meaning at all. The extraneous material was therefore of no real help, and even when the Committee Report was taken into account, the actual decision could have gone either way. The question of the distinction between ambiguity and obscurity was not addressed.

Another example of obscurantism and mystification may be mentioned here, regarding case references in academic publications. For practical purposes, it is usually enough to know that full text judgments for English cases since 1865 are conveniently available in various collections (\textit{All England Reports}, \textit{Law Reports} or the \textit{Weekly Law Reports} (for the appropriate year). Earlier cases (1220 to 1865) may be found in the \textit{English Reports} (ER) (Green: Edinburgh). Statutes are published by HMSO: London. Yet instead of using conventional bibliographical references, old-fashioned legal journals still persist in unnecessarily multiplying footnotes of singular opacity.

1.2 Incoherence

While language is said to be obscure when it has no discernable meaning, texts may be considered incoherent where different possible meanings suggest themselves, but are excluded because they lead to contradiction. A recent example is found in \textit{Investors Compensation Scheme v West Bromwich Building Society} 1998. In this case, the court had to interpret a clause in a compensation claim form, which provided that certain listed claims were not to be treated as “Third Party Claims”. These included:

\begin{quote}
Any claim (whether sounding in rescission for undue influence or otherwise) that you have or may have against the West Bromwich Building Society in which you claim an abatement of sums which you would otherwise have to repay to that Society in respect of sums borrowed by you from that Society in connection with the transaction and dealings giving rise to the claim (including interest on any such sums). (ICS claim form, s3b, 1997)
\end{quote}

This language must have appeared obscure to the investors, who could not be expected to be familiar with such concepts as “sounding in rescission” or even “abatement”. However, professionals familiar with the terminology are more likely to find the text incoherent, as the most plausible meaning appears to be excluded by the text itself. A cursory logical analysis reveals that the language appears to exempt all possible claims, which is unlikely to be what was meant. An alternative meaning was also excluded by the court for grammatical reasons. It was pointed out that the inclusion of the words ‘for undue influence’ after ‘rescission’ could only lead to confusion, as there are other grounds on which the investor might claim rescission (for example, misrepresentation).

The question to be decided in the House of Lords concerned the extent to which it was acceptable for the Court to rewrite the contract so as to make it conform to the presumed intention of the parties. Lord Lloyd, dissenting, considered that judicial discretion did not extend to such creative interpretation, and was unwilling to make the necessary modification. He pointed out that it would amount to “taking words from within the brackets, where they underline the width of ‘any claim’, and placing them outside, where they have the opposite effect”. Lord Hoffmann, however, for the majority, considered that, where the intention of the parties was apparent, it should be allowed to prevail in spite of incoherent wording. Even where the language had not been used in the ordinary way, the court should be at liberty to choose the most reasonable among the competing unnatural
meanings. Basing his interpretation on the Explanatory Note thoughtfully provided, he considered that the document, although badly drafted, was nevertheless clear. The court should therefore have the right to provide an acceptable interpretation, even though the parties appeared to have made some linguistic mistake:

[T]he meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (Investors Compensation Scheme v West Bromwich Building Society HL 1998, per Lord Hoffmann)

Lord Hoffmann’s claim is that, in spite of incoherent expression, the intended meaning is clear, as, even where the words themselves make no sense, background knowledge and awareness of the surrounding circumstances should be enough to ensure acceptable communication. The same judge made a similar point regarding contextual interpretation in Mannai Investment v Eagle Star 1997, in which he gave the example of malapropisms to show that even when expressed incoherently, the speaker’s intended meaning may still be clear:

No one, for example, has any difficulty in understanding Mrs. Malaprop. When she says “She is as obstinate as an allegory on the banks of the Nile”, we reject the conventional or literal meaning of allegory as making nonsense of the sentence and substitute “alligator” by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like “allegory”. If one applies that kind of interpretation to the notice in this case, there will also be no ambiguity. (Mannai Investment Co Ltd v Eagle Star Assurance HL, per Lord Hoffmann)

Linguistically, it would be preferable to say, not that there was no ambiguity, but that the contradiction between the literal and the contextual meaning was easily resolved.

In Mannai, Lord Hoffmann noted that it would never be possible to achieve absolute clarity or to avoid any possible ambiguity, but concluded that this was not in fact necessary (it was not what was “desiderated”). On the other hand, Lord Goff, dissenting, although willing to resolve “ambiguity” in such a way as to give the contractual document validity, nevertheless refused to accept that where a document was clear and specific, the court should be able to rewrite it in order to correct what he called “particular inaccuracies”.

According to Lord Hoffmann’s approach, if the intended meaning is clear in context, even where the text itself fails to communicate that meaning clearly, then the observed incoherence poses no problem in itself. Although such cases may take up a disproportionate amount of the court’s time, the difficulties which arise at this level are more likely to be the result of inappropriate and counter-productive attempts to follow the so-called “literal rule”.

3. Ambiguity and external evidence

In legal interpretation, judges are expected to decide the correct meaning of a particular text. To do so they must assume that there is a single, correct construction of the text waiting to be discovered. In the words of Lord Browne-Wilkinson in Pepper v Hart 1993, “Parliament never intends to enact an ambiguity”. The existence of a single, “true and correct” meaning thus appears to be presupposed. Unfortunately, this approach to interpretation may seem unduly optimistic, more a matter of wishful thinking than a statement of fact. As words are used in an indefinite variety of different ways in different contexts, the courts cannot hope to avoid debate concerning what may have been the intended meaning.

A reading of judicial statements on this subject shows that the term ‘ambiguity’ itself is not clearly defined, different judges using it to refer to different though related problems. It is apparent

2 The Explanatory Note was said to be “a model of clarity”.
from an examination of any legal linguistic corpus: that the adjective ‘ambiguous’ is strongly collocated with ‘obscure’. Perhaps because of this, the two concepts are often conflated. Lord Blom-Cooper appears to reserve the term to designate unclear wording:

There may be said to be a logical flaw in the reasoning that equates ambiguity with the choice between alternative conclusions that, by definition, are rival interpretations of clear wording. (R v London Borough of Wandsworth, ex parte Hawthorne HL 1994, per Lord Blom-Cooper)

This approach is confusing, as it implies that words are not to be considered ambiguous where the different possible meanings are clear. Linguists are more likely to consider that the true problem of ambiguity arises precisely when there is more than one plausible interpretation. This is the conventional dictionary definition.

In ordinary language it is natural to refer to the context to resolve any ambiguity. However, in the context of statute construction, judges prefer to ascertain the intention of the legislature from the words of the enactment itself. This is a consequence of the literal rule, as stated by Tindall CJ in the Sussex Peerage case 1844: “The words alone do, in such a case, best declare the intention of the lawgiver.” This rule is frequently confirmed, for example by Lord Reid in Black-Clawson: “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.”

The power of the literal rule derives partly from the fact that it allows the judges to present themselves as applying existing law, independently of their personal preferences. Yet the concentration on the text, independently of the context, may lead the courts to neglect the intention of the legislature. Indeed, the notion of “legislative intention” was presented by Lord Watson in Salomon v Salomon & Co 1897 as a “common but very slippery phrase”, leading to “speculative opinion” as to “what the Legislature probably would have meant if the particular question had been considered.” In order to avoid such speculation judges prefer to reduce the role of contextual elements to a minimum. Recourse to the context as an aid to interpretation in the law is therefore strictly limited.

Debate in English courts is often concerned with the admissibility of external evidence where available, and where it is considered necessary for disambiguation. This question frequently arises in cases dealing with the interpretation of contracts or wills, as well as in statute construction.

3.1 Contracts
A reading of well-known cases in contract law shows that ordinary language is more likely to create difficulties of interpretation than is the use of traditional legal terminology In Raffles v Wichelhaus 1864, for example, the court had to deal with a simple problem of ambiguity of reference. The defendant had refused delivery of goods shipped on the “Peerless” from Bombay because he had intended to refer to another ship of the same name, sailing two months later from the same port. According to the rules prevailing at the time, it was for the court to determine the intentions of the parties from an examination of the contract itself, the parties themselves not being expected to give evidence on the question. Here, failure to appreciate the “latent ambiguity” had led to misunderstanding. It was held that there was no consensus ad idem, and therefore no binding contract.

Unfortunately, the observation that there is disagreement between the parties is not always sufficient to evacuate the problem. The courts often have to decide which of the alternative interpretations is correct, and it is then necessary to consider the particular context in order to discover what was meant.

The extent to which the court is entitled to consider the surrounding circumstances in its interpretation of contractual terms was extensively discussed in Prenn v Simmonds 1971. In this case, the parties proposed conflicting interpretations of a contract which allowed an employee to purchase

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3 Full text judgments for English cases since 1997 are available in electronic form on <www.bailli.org>. 
stock at a given price, on condition that the company’s profits reached a certain level. The meaning of the word ‘company’ was clear, but it was not obvious which was the company referred to. The employer claimed that the profits related to the individual company, while in the view of the employee, they were to be understood as the consolidated profits of the holding company. The Court of Appeal held in favour of the employee, considering that pre-contract negotiations were admissible as an aid to interpretation, and noting the unfairness of the alternative view, in which the profits of the individual company would depend in practice on accounting procedures, in the control of the employer. However, in the House of Lords, Lord Wilberforce rejected this approach, pointing out that the apparent unfairness of the arrangement was not in itself decisive, and considering more generally that, while the object of the transaction may be admitted as part of the “surrounding circumstances”, evidence of pre-contract negotiations “ought not to be received”:

In my opinion, then, evidence of negotiations, or of the parties’ intentions, and a fortiori of Dr Simmonds’s intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the ‘genesis’ and objectively the ‘aim’ of the transaction. (Prenn v Simmonds HL 1971, per Lord Wilberforce)

Lord Wilberforce thus accepted that account should be taken of the context in which the contract was made, but gave a restricted definition of the notion of “surrounding circumstances”. He was nevertheless able to reach the same result as the Court of Appeal, through his analysis of the text itself, relative to what he took to be the object of the contract:

And if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found [...] To sum up, Mr Prenn’s construction does not fit in any way the aim of the agreement, or correspond with commercial good sense, nor is it, even linguistically, acceptable. The converse of each of these propositions applies to Dr Simmonds’s interpretation. I would accept it. (Prenn v Simmonds HL 1971, per Lord Wilberforce)

More recently, in the ICS v West Bromwich case, mentioned above, Lord Lloyd adopted a broadly similar approach, holding that the ambiguity could be resolved through an analysis of the text itself. In his opinion, the text should not be said to be ambiguous at all:

So with great respect to those taking a different view, I do not regard the present case as raising any question of ambiguity, or of choosing between two possible interpretations. The construction advocated by the investors, though it gives rise to the oddity which I have mentioned, is a permissible construction of the words used. The I.C.S.’s construction is not. (Investors Compensation Scheme v West Bromwich Building Society HL 1998, per Lord Lloyd)

3.2 Wills

Courts often have to take account of particular circumstances in dealing with problems of ambiguity in the interpretation of wills, for example in identifying the intended beneficiary. In NSPCC v SNSPCC 1915, a Scottish testator left part of his estate to the National Society for the Prevention of Cruelty to Children. The House of Lords relied on background facts (the testator was a Scotsman living in Scotland) in deciding that this Society was not in fact the one intended, and construed the will as referring to the equivalent Scottish society. It was held that there was no rigid rule according to which, once a person is accurately named in a will, no further inquiry is possible. The true rule was that “the accurate use of a name in a will creates a strong presumption against any rival who is not the possessor of the name” (per Earl Loreburn). The Scottish Society was therefore allowed to benefit.

However, external evidence of intention was not enough in Re Gale 1941, because of the direct contradiction between the literal meaning of the words used and what was clearly meant. Here, the testator attempted to leave property to his common-law wife “during her widowhood”. Farwell J refused to allow her to inherit, holding that a woman who had never been married could not be anyone’s widow.

The word ‘money’ is both common and well-known; however its interpretation in wills is
notoriously problematic. According to long-standing authority, the word is broad enough to include bank deposits as well as cash, but does not include investments and securities. However, numerous testators continue to use the word intending to refer to the whole of their personal estate. In *Perrin v Morgan* 1943, the Court of Appeal held that there was no “sufficient context” to justify giving a different meaning to the word. However, in the House of Lords, Viscount Simon held that the technical meaning should not automatically have priority. He seems to have adopted a contextualist approach, considering that: “the word ‘money’ has not got one natural or usual meaning. It has several meanings, each of which in appropriate circumstances may be regarded as natural.” He preferred to

[L]ook beyond the words of the will to the general nature of the testator’s estate, his relationship to the beneficiaries, the age and education of the testator and generally to all relevant circumstances affecting the construction of the will. (*Perrin v Morgan* HL 1943, per Viscount Simon)

Viscount Simon thus gave a more extended definition of the contextual features to be considered when determining the correct interpretation in the particular circumstances.

Lord Thankerton, concurring, suggested that, in cases of ambiguity, the ordinary meaning should be preferred to the established legal definition:

There does not appear to me to be any occasion for a separate rule in the matter. It is rather to treat the testator, in the case of ambiguity, as having used the word in the sense which the court adjudges to be the more ordinary use of the word in the English language at the time at which the testator used it. (*Perrin v Morgan* HL 1943, per Lord Thankerton)

The strict rule regarding the interpretation of the word ‘money’ was therefore rejected, and the discussion centred on whether it should be abrogated, or simply applied in a more reasonable way.  

3.3 Statute construction

Numerous cases are concerned with the problem of ambiguity in legislative texts. Again, as will be seen, difficulties are more likely to arise with common, everyday words than with erudite terminology.

The interpretation of general terms in particular situations has long been a source of difficulty in legal adjudication. The question was explicitly addressed as early as *Heydon’s case* 1584. At this time, Abbots and owners of church land were anxious to prevent or at least to delay the application of laws concerning the dissolution of the Monasteries, if necessary by exploiting loopholes in the legal texts. One of the technical devices available was to grant renewed leases on the land for the life-time of third parties. Statute 31 Hen 8 was passed in order to close this loophole. It included a number of technical terms which now appear obscure. It enacted that:

[I]f any abbot, &c. or other religious and ecclesiastical house or place, within one year next before the first day of this present Parliament, hath made, or hereafter shall make any lease or grant for life, or for term of years, of any manors, messuages, land &c. and in the which any estate or interest for life, year or years, at the time of the making of such grant or lease, then had his being or continuance, or hereafter shall have his being or continuance, and not determined at the making of such lease, &c. Or if the usual and old rents and farms accustomed to be yielded and reserved by the space of twenty years next before the first day of this present Parliament, is not, or be not, or hereafter shall not be thereupon reserved or yielded, &c. that all and even such lease, &c. shall be utterly void. (Statute 31 Hen 8)

The judgment in *Heydon* concerned the alternative device of granting a lease not for a “lifetime”, but for a period of 80 years. It makes use of a number of concepts which modern lawyers, unfamiliar with the history of probate law, may now find unclear, including “copyhold by copy for life” and the Statute *de Donis Conditionalibus*. However, these terms presented no difficulty for the judges at the

4 Lord Atkin was in favour of abrogation: “I anticipate with satisfaction that henceforth the group of ghosts of dissatisfied testators who, according to a late Chancery judge, wait on the other bank of the Styx, to receive the judicial personages who have misconstrued their wills, may be considerably diminished.”
time. On the contrary, the procedure seems to have been taken as elementary, as when the court mentions in passing that “the custom of the manor is to grant lands by copy in feuod simplici (as the usual pleading is) without question”. The true problem was that of the interpretation of everyday words, and in particular whether the meaning of the phrase “grant for life” was wide enough to include an 80-year lease, that is to say whether ‘80 years’ was synonymous with ‘a lifetime’. The true problem was that of the interpretation of everyday words, and in particular whether the meaning of the phrase “grant for life” was wide enough to include an 80-year lease, that is to say whether ‘80 years’ was synonymous with ‘a lifetime’.

The case is now chiefly remembered because it contains the earliest statement of the “mischief rule”, according to which judges were always to “make such construction as shall suppress the mischief, and advance the remedy”. The Chief Baron decided that the general term (‘grant for life’) was wide enough in this particular context to include an 80-year period. He did not base his decision on any actuarial information regarding life expectancy during the 16th century, but simply noted that such long leases were precisely what Parliament had wished to prevent:

In this case the common law was, that religious and ecclesiastical persons might have made leases for as many years as they pleased, the mischief was that when they perceived their houses would be dissolved, they made long and unreasonable leases: now the stat of 31 H. 8. doth provide the remedy. (Heydon’s case 1584, per the Chief Baron)

More recent cases show that ordinary language still presents more problems of interpretation than well-defined technical terms. In Pepper v Hart 1993, for example, there was no question of obscurity or incoherence, yet, in order to discover the correct meaning, the court found it necessary to go further than Black-Clawson 1975 and allow reference not just to legislative committee reports, but also, contrary to the long-standing “exclusionary rule”, to the records of Parliamentary debates, as published in Hansard.

The court had to decide whether tax liabilities relating to non-financial benefits supplied to employees should be assessed on the full economic cost or on the marginal cost to the employer. A schoolmaster at a private school benefited from a reduced rate for the education of his children. The price charged to the general public was high, but for the owner of the school, the marginal cost of one extra pupil was minimal. The controlling statute, the Finance Act 1975, was unclear on the point, referring only to “a proper proportion” of the cost. However, it appeared that reference to Parliamentary debates would allow the court to resolve the ambiguity. For Lord Browne-Wilkinson:

Where the words used by Parliament are obscure or ambiguous, the Parliamentary material may throw considerable light not only on the mischief which the Act was designed to remedy but also on the purpose of the legislation and its anticipated effect. (Pepper v Hart HL 1993, per Lord Browne-Wilkinson)

As in Heydon’s case, technical terms caused no difficulty. There was no question of obscure wording or unclear drafting. On the contrary, the problem of interpretation arose from the use of ordinary, everyday words, in this case, ‘a proper proportion’.

4. Ambiguity and open texture

It is apparent that words and phrases have many different senses depending on the context of use. The meaning of the most common words varies most widely, precisely because, by definition, they can be expected to occur more frequently, in more different contexts.

The point may be briefly illustrated with words related to athletics. The word ‘run’, for example, has different meanings in ‘to run a race’ and ‘to run a company’ or ‘to run a deficit’. Even when metaphorical uses are excluded, athletes insist than to run a hundred metres is not at all the same thing as running a mile. Similarly for the word ‘jump’, which has different senses in ‘jumping out of one’s skin’ or ‘jumping the queue’. Again, the high jump and the long jump involve very different physical activities. In the same way, ‘throw’ has very different meanings in ‘to throw a fit’, or ‘to throw a party’. Even regarding purely physical actions differ when involving a ball, a stone or a javelin. Examples may be multiplied ad infinitum.
If all meaning is relative to context, then in spite of the judges’ frequent claims to be following the literal rule, there can be no purely literal interpretation. English judges refer to this basic feature of language through the use of the word ‘colour’ as a grammatical term. In *AG v Prince Ernest-Augustus* HL 1957, Viscount Simonds stated that “Words, and particularly general words, cannot be read in isolation, their colour and content are derived from their context.” Similarly, in *Bourne v Norwich Crematorium* 1976, Stamp J pointed out that “English words derive colour from those which surround them.” In *Bromley LBC v GLC* 1983, Lord Scarman used the same term in pointing out that “[Economic] is a very useful word, chameleon-like, taking its colour from its surroundings.”

It is worth noting that, in the United States, Justice Cardozo spoke as early as 1918 of the “shades of meaning” which appear in context:

Surrounding circumstances may stamp upon a contract a popular or looser meaning than the strict legal meaning, certainly when to follow the latter would make the transaction futile. It is easier to give a new shade of meaning to a word than to give no meaning to a whole transaction. (*Utica City v Gunn* 1918, *per* Cardozo J)

Justice Cardozo’s claim here is that it is the observed vagueness of the language allows the judge the latitude necessary to come to a considered decision.

### 4.1 Open texture

The concept of open texture was introduced into the legal literature by Hart (1961), who pointed out that, while the meaning of words appears clear in typical contexts, their extension is less clear in more unusual situations. Thus, words may have what he called a “penumbra”, in contexts where their application is open to doubt. Hart’s recurrent example (1961: 126) is the word ‘vehicle’ in the invented rule ‘No vehicles in the park’. The problem is presented as follows:

There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable (“If anything is a vehicle a motor-car is one), but there will also be cases where it is not clear whether they apply or not. (Does ‘vehicle’ used here include bicycles, airplanes, roller-skates?)

This definition recalls prototype semantics (Rosch 1983), in which a distinction is made between prototypical and peripheral examples of basic categories. In this psycho-linguistic theory, a robin, for example, is considered as a more prototypical example of the category “bird” than, say, an ostrich or a penguin. In the same way, for many people, apples and oranges are more prototypically “fruit” than tomatoes.

Although originally developed as an approach to cognitive psychology, this analysis is relevant to the law, as is illustrated in the American case of *Nix v Heddon* 1893. The *Tariff Act* 1883 imposed a duty on “[v]egetables, in their natural state, or in salt or brine, not specially enumerated or provided for in this act, ten per centum ad valorem”. When the authorities attempted to charge the 10% duty on tomatoes, it was pointed out, reasonably enough, that a tomato was not a vegetable but a fruit. However, Justice Gray refused to accept the technical definition, holding that “in the common language of the people, whether sellers or consumers of provisions, all these are vegetables”. In his judgment, the “ordinary” meaning should prevail.

Although Hart recognised the inherent polysemy of natural language, he still considered (contrary to the theories of the American realists) that laws are normally determinate enough to constrain legal decision-making. He accepted the necessity of judicial discretion, but argued that it was strictly limited. In proposing his compromise solution, he admitted (1961: 136) that in “hard cases”, where words are used in a penumbral sense; there may be no definitive “right answers”; however, in his opinion, this could not justify rule-scepticism in situations where words preserve their basic meaning.

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5 The term ‘penumbra’ may have been taken from Russell (1923), who used it in a somewhat different sense in his early article on vagueness".
This approach appears optimistic. It is immediately apparent that not all non-prototypical meanings can be considered as existing in a “penumbra”. In *Garner v Burr* 1951, for example, Lord Goddard decided that a poultry shed could and should be considered as a ‘vehicle’ for the purpose of the *Road Traffic Act* 1930. This wide interpretation goes beyond any conceivable “periphery”. Such extreme examples correspond better to the original definition of open texture proposed by Hart’s Oxford colleague Waismann (1951), according to which the true problem of open texture derives from the fact that it is not possible to give a complete definition even of technical terms.

Waismann (1951) points out that all concepts are associated with an indefinite number of semantic features, some of which have not yet been noticed and perhaps never will be noticed by anyone. Descriptions are therefore inevitably incomplete, and an indefinite number of features must remain implicit as part of the “hidden background”. On this more radical view, a doubt will always remain, even regarding prototypical usage.

3.2 Technical terms

If Waismann’s definition of open texture is accepted, then the meaning of all words without exception must be taken to depend radically on the context of use. This is particularly clear in the legal field, as judges are often seen to redefine not just common, everyday words, but also technical concepts, in order to take account of new circumstances.

The definition of consideration in the law of contract is an obvious example. This term normally includes acts or forbearances, in exchange for the supply of goods or the payment of money; but the concept appears to be almost indefinitely extensible, having been taken to include, for example, worthless used chocolate-wrappers (in *Chappell Co v Nestlé Co* 1959) and the promise to ensure that a child was happy (*Ward v Byam* 1956). Students of English law will remember that in *Shadwell v Shadwell* 1860, even getting married was accepted as sufficient consideration, allowing a nephew to enforce a promise of financial help from his uncle for an indefinite period.

The application of other technical terms appears equally indeterminate. The meaning of the term ‘entry’ in s9(1) of the *Theft Act* 1968 has been extensively discussed. As defined in the meanings clause of that statute, a person is guilty of burglary if he “enters any building or part of a building as a trespasser and with intent to commit an offence.”

In *R v Collins* 1972, it was necessary to decide whether a house painter, sitting wearing nothing but his socks on the window sill of an upstairs bedroom, where a girl was sleeping, could be said to have ‘entered’ her room as a trespasser. Noticing the figure in the dark, the girl had invited him in, apparently assuming that her boy-friend had come to pay her a visit. The painter inevitably took advantage of the situation and was later charged with burglary. The judge ruled that:

Unless the jury were entirely satisfied that the defendant made an effective and substantial entry into the bedroom without the complainant doing or saying anything to cause him to believe that she was consenting to his entering it, he ought not to be convicted of the offence charged. (*R v Collins* CA 1972, per Edmond Davies LJ)

It was held that the “small part” of the accused that might have entered before the young woman woke up was not “substantial” enough to qualify.

In *Spartan Steel* 1972, Lord Denning claimed to be unsure of the meaning of the basic technical terms relating to damages in tort:

The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: ‘There was no duty’. In others I say: ‘The damage was too remote’. So much so that I think the time has come to discard those tests which have proved so elusive. (*Spartan Steel v Martin (Contractors)* CA 1972, per Denning LJ)

In *Beswick v Beswick* 1966, with the support of the same Lord Denning, Danckwerts LJ proposed a particularly creative interpretation of a ‘thing in action’. This concept was defined in s56(1) of the *Law of Property Act* 1925, as including “right of entry, covenant or agreement over or respecting
land or other property”. It was argued that, as ‘property’ was included in the definition, and contractual rights were a form of property, the Law of Property Act could be taken as abrogating the rule of privity of contract.6

The notion of ‘course of business’ is also regularly redefined, as in Stevenson & another v Rogers 1998:

I acknowledge the argument that, because of the varied approach of the courts in differing areas of the law to the question of what is or is not done in the course of a trade or business, an ambiguity or real doubt arises as to whether or not the words of s14(2) should be taken at face value or whether they should be interpreted to connote at least some degree of regularity and so as to exclude sporadic sales which are no more than incidental to the seller’s business. In the light of that argument, this seems to me a case where it is appropriate and proper under the rule in Pepper v Hart to refer to Hansard. (Stevenson & anor v Rogers CA 1998, per Potter LJ)

3.3 Indeterminate rules
Where the application of terms in novel situations cannot be decided in advance, the rules expressed will also appear indeterminate. Wittgenstein (1953, §85) imagines a pupil asked to continue a mathematical series by adding 2 to each number. The pupil successfully continues the series up to 1,000, following the teacher’s example, but then writes: “1000, 1004, 1008, 1012 ...”. Only then does it become apparent that the pupil has understood the rule “wrongly”. As the problem is presented in Kripke’s (1982: 9) exegesis of the Wittgensteinian rule-following argument,7 the pupil (or sceptic) claims that he is following the rule he has always followed, and that he is now simply going on in the same way. As, by hypothesis, the application of the rule in the novel situation cannot be justified by appeal to previous usage, there can be no objective fact of the matter regarding the originally intended application. Thus, such anomalies can never be excluded in new contexts. On the individual level, the content of rules therefore appears indeterminate. The inevitable conclusion is that, contrary to the view of Hart (1961), rules can constrain neither behaviour nor legal adjudication. As the example given is both clear and simple, the philosophical problem cannot be said to be one of complexity.8

No doubt most practicing lawyers will reject this worrying philosophical conclusion, yet no fully satisfying alternative solution has yet emerged from the abundant literature on the subject. It is often supposed (e.g. Schauer 1991: 66) that the problem could be avoided simply by stating a new, more detailed rule for the interpretation of the “indeterminate” rule. However, as the new rule must also be interpreted, this putative solution merely displaces the problem. Nor can it be assumed that the indeterminacy could be avoided through clearer expression. Indeed, the opposite may be true. In the course of his argument, Bix (1993: 217) puts forward the astonishing claim that Wittgenstein’s rule-following thesis may apply only to simple, clear rules: “There are ample reasons to believe that we cannot simply apply directly Wittgenstein’s ideas meant for easy cases, to hard cases.” He fails to see that Wittgenstein’s consistent strategy is to take the simplest cases as the strongest possible argument for the point he is making. If even the rule “add two”, is indeterminate, then a fortiori the argument must be valid for rules which are less clearly understood.

Wittgenstein (1953, §202) points out that “every action according to a rule is an interpretation”. However, Marmor (1992: 151) distinguishes between intuitive understanding and (conscious) interpretation, defined as the substitution of one expression for another. He claims (1992: 153) that: “It does not make sense to say that one has understood a rule yet does not know which actions would be in accord with it”. This allows him to deny (1992: 22) that rules are necessarily interpreted, suggesting that in “easy cases” they may be directly understood. The danger here is that

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6 Unsurprisingly, this reasoning was rejected by the Lords the following year. Parliament finally granted third party rights by statute more than 30 years later, in the Contracts (Rights of Third Parties) Act 1999.
7 Kripke’s presentation involves a distinction between the arithmetic function “plus” and a more complex but related function “quus”.
8 Kripke’s argument is often misunderstood as a sceptical attempt to deny that any rules can constrain conduct; his purpose is rather to demonstrate the unsuspected complexity of a concept which practising lawyers usually prefer to take for granted.
where a text is simply expressed so that it can be intuitively understood, without conscious
interpretation, it may be understood differently by different people in different contexts.

Marmor’s objection depends on an artificial distinction between understanding and
interpretation which to a linguist must appear unsustainable. Clearly, even the simplest rules stand
permanently in need of contextual interpretation. On the motor-way, for example, perpendicular
arrows pointing vertically downwards are understood as traffic directions, yet they must be
interpreted as meaning not downwards, but straight ahead towards the named city. Only in other,
more unusual contexts, including perhaps speleology, may downwards arrows be interpreted literally
as indicating the way down. Again, the problem cannot be avoided by giving more precise rules of
interpretation, as these will also be susceptible of re-interpretation.

Kripke’s own (1982) solution to the Wittgensteinian paradox depends on the notion of
consensus within the appropriate community. According to this solution, rules are not objectively
fixed, independently of context, any more than words are attached to a fixed, literal meaning. This
model corresponds well to contextualist definitions of meaning, which depend on the current state of
knowledge and the occasion of use.

4. Contextualism and “what is said”

If the meaning of words depends on the occasion of use, it must follow that all interpretation must be
contextual, even in those “easy” cases where only one interpretation appears plausible. Even Hart
was forced to admit (1961: 126) that the plain cases, “where the general terms seem to need no
interpretation”, are simply the most familiar ones, constantly recurring in similar contexts. The fact
that a particular context is familiar does not imply that it has no role to play, or even that its
familiarity can be assumed or intuitively known in advance.

If interpretation is necessarily contextual, then, in spite of the stated assumptions of numerous
judges, there can be no purely literal meaning. The semantics of “what is said”, as well as the
intentional, speaker’s meaning, depends fundamentally on the context. The point may be made very
simply. An utterance like “It is warm in here” cannot be said to have an acontextual, literal meaning,
not just because of the deictic expression ‘here’, but also because the word ‘warm’ refers to very
different things in, say, a railway compartment or a supermarket chill cabinet. Its semantics must be
taken to depend on a general, background context. However, the meaning of “what is said” may still
be distinguished from the pragmatic, intentional meaning, which depends on a more specific
situation of discourse. Depending on the particular context, the utterance may be pragmatically
understood in an indefinite number of different ways, conveying, for example, a request to open the
window, or an instruction to withdraw perishable goods from sale. The distinction between the
general background context and the more particular situation of utterance is a matter of ongoing
debate. 9

The theoretical impossibility of literal meaning may explain why judges often claim, in a
phrase that appears to a linguist to be a contradiction in terms, to be determining the “literal meaning
in context”, that is, in the context of the whole of the statute. The judicial notion of literal meaning
may correspond in practice to the contextualist concept of “what is said”.

In a series of recent cases, Lord Hoffmann appears willing to go beyond the general
background features and to take account of those pragmatic elements of discourse which might give
a clearer indication of the intended meaning on a particular occasion. His approach in ICS v West
Bromwich 1998, was based on the individual speaker’s meaning, even where this differed from the
general, semantic consensus within the wider linguistic community:

Humpty Dumpty’s point was that “a nice knock-down argument” was what he meant by using the word “glory.” He very

9 Recanati (2004) gives an extended account of the ongoing debate opposing the linguistic “contextualists” and the
proponents of the “literalist” theory.
fairly acknowledged that Alice, as a reasonable young woman, could not have realised this until he told her, but once he had told her, or if, without being expressly told, she could have inferred it from the background, she would have had no difficulty in understanding what he meant. (*ICS v West Bromwich* 1998, *per* Lord Hoffmann)

According to this approach to interpretation, the judge is entitled to consider all the circumstances in order to determine both “what was said” and “what was meant”.

4.1 Contextualism and indeterminacy

As statutes are by definition of general application, they cannot easily be associated with specific contexts; appeal to the surrounding circumstances in order to discover the intended meaning is therefore often futile. Where the necessary contextual details are unavailable, the law may appear not just ambiguous but indeterminate. In such cases, dictionary definitions are usually of no help. When called upon to adjudicate between conflicting interpretations, the judges are therefore frequently obliged to exercise their discretion in deciding, rather than in discovering, the correct meaning. Numerous examples can be given in which the meaning appears unclear.

In *Alexander v Railway Executive* 1951, a claim for compensation was made by a stage magician against a left-luggage office which had allowed the conjuror’s assistant to take possession of his property, not realising that the two had separated after a disagreement. The assistant subsequently disposed of the property for his own purposes. The defendants refused to pay compensation, claiming to be protected by an exclusion clause limiting liability in the event of the property being “misdelivered”. Although ordinary speakers were unlikely to have considered the distinction which arose in the particular context, Devlin J considered, *obiter*, that the word did not apply in the given circumstances:

I am disposed to think that while in certain contexts the word ‘misdelivery’ may bear the wider meaning, in its more natural and popular meaning it is restricted to a wrong delivery involving some sort of mistake or inadvertence. (*Alexander v Railway Executive* 1951, *per* Devlin J)

Accordingly, the company was not protected by the limitation clause. Although Devlin J presented the problem in terms of ambiguity, following the interpretations favoured by the parties, he cannot be thought to have simply selected one of a number of pre-existing possible meanings. Such an approach to semantic analysis would be unacceptably prescriptivist, as it would lead to the assumption that words may be attributed meanings of which the speakers in the linguistic community are unaware. In spite of references to natural or popular usage, it seems therefore that Devlin J was in fact deciding rather than discovering the meaning, following his personal, linguistic intuition.

Similarly, in *R v Bournewood NHS Trust* 1999, a hospital was prosecuted for the “detention” of a mentally handicapped patient [L], who had spent over 30 years in the institution without attempting to leave and who was judged to be incapable of understanding that he would not be allowed to do so. At trial, Owen J decided that the patient could not be said to have been “detained”. He was overruled in the Court of Appeal by Woolf MR who found the hospital guilty of unlawful imprisonment. The case was of national significance as his judgment would potentially apply to all the mental institutions in the country.

Again, the *Theft Act* 1968 provides in s1(1) that “a person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it”. This wording was taken from the old *Larceny Act* 1916, the words “without the consent of the owner” being unfortunately omitted after the verb ‘appropriates’. The question arose in *Lawrence v Metropolitan Police Commissioner* 1972 as to whether this omission was deliberate, or, alternatively, whether the word ‘appropriates’ was to be understood as implying the absence of permission, in which case the missing words may have been omitted as redundant.

In *Lawrence*, a taxi-driver had taken £6 from the wallet of a non English-speaking Italian tourist, after being invited by gestures to take sufficient payment. The case went to court when it was

10 The original judgment was later reinstated in the House of Lords.
discovered that the correct fare should have been about 10s 6d. The taxi-driver’s defence was that he had been invited to take the money.

Viscount Dilhorne, in the House of Lords, applied the literal rule, holding that the omission of the words ‘without the consent of the owner’ must be assumed to be deliberate, and that the taxi-driver was therefore guilty of theft, notwithstanding the victim’s consent. He did not, however, go on to give an authoritative definition of ‘appropriates’. Continuing doubt as to the meaning of this word led to an ongoing series of cases, for example R v Morris 1984, in which the defendant switched price-labels in a supermarket and paid the lower price as requested at the checkout; and later DPP v Gomez 1993, in which a shop assistant persuaded his manager to accept a cheque from an accomplice in exchange for goods, knowing that the cheque was stolen. Gomez’ (unsuccessful) defence was that the manager had expressly authorised the transaction, and that there was therefore no ‘appropriation’.

On the semantic level, there is clearly no fact of the matter regarding the meaning of such words as ‘appropriates’ or ‘detain’. Where there is no authority on the question, the judge is obliged in the end to rely on his personal, linguistic intuition, occasionally reinforced by references to dictionary definitions (Charnock 2005).

Basic grammatical terms are also likely to raise problems of legal interpretation. The statutory ‘may’ for example, in its deontic sense, is sometimes interpreted as ‘must’ (Charnock 2006a). Similar problems occur on the epistemic level. In Broom v Batchelor 1856, for example, the expression ‘may be’ appeared unclear in the context of a contractual clause reading:

Also I hereby agree to guarantee the payment of any balance that may be due from the said B. and accepted by E. This guarantee to include all bills of exchange now running as well as the balance of account at this day.

At the time the contract was made, future dealings were contemplated. The court had to decide whether the guarantee was limited to past transactions or whether it also had legal validity in relation to those contemplated in the future. It was held that the expression ‘may be’ did apply to the future dealings. Pollock CB went to the extent of consulting a rudimentary linguistic corpus in order to confirm that this was the natural and ordinary meaning:

‘May be’ is in my judgment, clearly future. I have been unable to find direct authority in any dictionary, but in Cruden’s Concordance of the Bible, from 60 to 80 references are given, and the expression ‘may be’ is found in various parts of the Bible, nine out of ten of which have manifestly a reference to the future. The Concordance of Shakespeare gives no references in respect of the words ‘may’ and ‘be’. But as far as I can bring my knowledge of the English language to bear on the subject ‘may be’ is much oftener used with reference to the future than the past or the present. (Broom v Batchelor 1856, per Pollock CB)

Bramwell B, dissenting, held on the contrary that the modal verb applied “prima facie” (or “by default”) to the present, that this meaning was intelligible, and that there were no extrinsic circumstances allowing the court to attribute a different meaning to the words. Similar problems occur in the United States regarding the determination of the natural and ordinary meanings of common words. In a recent series of cases, the members of the Supreme Court disagreed over the correct interpretation of the apparently simple words ‘use’ and ‘carry’ in the context of a statute providing for severe minimum sentences where a firearm is used or carried

11 In the leading case on this question, Julius v Oxford (Bishop) 1880, the judges agreed that the word ‘may’ could not be said to be ambiguous. Rather, its semantic “potential” could include not just rights and powers, but also obligations and legal duties.
12 ‘May be’ is the present tense, and prima facie, means ‘now may be’. It is occasionally used in the future tense, no doubt, as, for instance, ‘may be due today’, or ‘may be due to-morrow’. I apprehend you may use it to indicate future applications; but in that case it must be understood as applied in the present tense. A thing ‘may be black’, or it may be ‘fit to eat’ or it may be ‘fit to cook’. If you use the words ‘may be’ without indicating the time, to my mind the expression refers to the present, or, more correctly, not to a question with reference to the future. (Broom v Batchelor 1856 per Bramwell B, dissenting).
during the commission of “any felony” (18 U.S.C. § 924(c)(1)). In *Smith v US* 1993 the question to be decided was whether a machine-gun could be said to have been ‘used’ in a drugs-related crime when the accused offered to exchange it for four ounces of cocaine (even though in the end the projected exchange did not in fact take place). It was held by a majority that the firearm was indeed “used” for barter, even though there was no question of its being used “for shooting”).

In a later case, *Muscarello v US* 1998, the accused had a gun with him, in the boot of his car. The question was whether this amounted to ‘carrying’. Justice Breyer studied the etymology of the word, noting that, as used in the Bible, it is not limited to carrying on the person, but can also be used to refer to carrying in wagons or on donkeys. Like Pollock CB in England almost a century and a half earlier, he found it useful to analyse a linguistic corpus (in this case a corpus of computerized newspaper databases) in order to confirm his intuition. Justice Ginsberg, however, was not convinced by the majority’s finding that carrying guns in a car “showed up as the meaning perhaps more than one third of the time”. As well as enquiring pointedly about the other two thirds of the occurrences, she suggested that other meanings, for example “to be infectious” (when “carrying” germs), must also have been frequently observed.

In view of such disagreements, semantic indeterminacy appears as a pervasive problem, involving not just ordinary words and phrases, but also grammatical constructions and technical terms. To this extent, the law itself may be considered indeterminate.

5. Clarity and drafting failures

Because simplicity of expression often leads to interpretative difficulties, attempts to achieve clarity through the use of plain language are often counter-productive. There are numerous cases where the judges have found themselves unable to give effect to the clearly expressed intention of the legislature. English lawyers will remember for example the difficulties involved in interpreting the everyday expression ‘another person’ in the *Trade Descriptions Act* 1968.

Section 20(1) of this Act lists as potential defendants, the “director, manager, secretary or other similar member of the body corporate”, but allowed in s24(1), that “it shall [...] be a defence for the person charged to prove (a) that the commission of the offence was due to the act of another person [...]”. In *Tesco v Nattrass* 1972, the manager of a supermarket store had offered Radiant washing powder for sale at a price less than the price in fact charged. The company’s (successful) defence was that the manager of the store was “another person”. It was held that, as he was not a member of the body corporate, he therefore did not represent the “directing mind and will” of the company.

A similar problem is observed in *Warwickshire CC v Johnson* 1993, concerning the interpretation of the equally natural phrase ‘any business of his’. The manager of a Dixon’s store offered to beat any TV, Hifi or Video price by £20, but then refused to sell, contrary to the *Consumer Protection Act* 1987 s20(1), which provides that “[...] a person shall be guilty of an offence if, in the course of any business of his, he gives (by any means whatever) to any consumers an indication which is misleading as to price [...]”. The manager was clearly acting in the course of business when giving the misleading price indication, but claimed that the business was not his own. It is a matter of conjecture whether the words ‘of his’ were originally added to make the text seem more accessible to the general public. Unfortunately, in themselves, these words have no precise meaning.

Lord Roskill, obliged to decide the literal meaning of the statute, held that the only possible construction was “a business of which the defendant is either the owner or in which he has a controlling interest”. He criticised the drafting, which made the person actually responsible for the offence immune from prosecution. A consultation of Hansard (under the conditions decided in

Pepper) revealed that the wording had been criticized in Parliament, an amendment to delete the words ‘of his’ having been proposed and then withdrawn, following assurances from the Minister that the matter would be reconsidered. However, the text could only be applied as it stood.

Legislative drafting was also criticized in *R v Bentham* 2005. In this case, the appellant broke into the house of his former employer, who was asleep in the bedroom. He demanded money and jewellery, threatening to shoot his victim if he did not comply. To give weight to this threat he kept his hand inside his zipped-up jacket, forcing the material out so as to give the impression that he had a gun. Among the charges he faced was “possessing an imitation firearm during the course of a robbery”, contrary to section 17(2) of the *Firearms and Imitation Firearms (Criminal Use) Act 1968*. This Act provides that:

If a person, at the time of his committing or being arrested for an offence specified in Schedule 1 to this Act, has in his possession a firearm or imitative firearm, he shall be guilty of an offence under this subsection unless he shows that he had it in his possession for a lawful object. (*Firearms and Imitation Firearms (Criminal Use) Act 1968* 17(2))

On appeal, he claimed that his fingers could not be considered to be either a firearm or an imitation firearm.

In the definitions clause, s57(4), the Act defines “imitation firearm” to mean: “any thing which has the appearance of being a firearm [...] whether or not it is capable of discharging any shot, bullet or other missile”. It was admitted that the defendant’s fingers inside his jacket did indeed have the appearance of a firearm, even though they could not be used to shoot bullets; however, the appeal was allowed on this point because the judges decided that the phrase ‘in his possession’ was unacceptable in this context. Lord Bingham’s argument was based on the fact that a person’s hands or fingers could not be considered as property:

If they were regarded as property [...] the court could, theoretically, make an order depriving the offender of his rights to them and they could be taken into the possession of the police. (*R v Bentham* CA 2005, per Bingham LJ)

In spite of the defendant’s “highly reprehensible conduct”, Lord Bingham refused to allow metaphorical interpretation, as “metaphor is a literary device which draftsmen of criminal statutes do not employ”. Furthermore, purposive construction could not be relied on to create an offence which Parliament had not created.14

Regarding the drafting of this section of the Act, the judge suggested that it would have been preferable to create an offence of falsely pretending to have a firearm. It would then have been unnecessary to speak of imitation firearms at all (as one does not pretend to have an imitation firearm). In this judgment, Lord Bingham therefore appears to be recommending greater clarity in the language of the law. Unfortunately, this encouraging impression is somewhat dissipated by the fact that there is no attempt to clarify the judgments themselves. Indeed, contrary to the expressed preference of François 1er in 1539, Lord Rodger chose to begin his concurring judgment in Latin, thus: “My Lords, Dominus membrorum suorum nemo videtur”.

6. Conclusion: declarations of ambiguity

Where the literal meaning is ambiguous or obscure, it is acceptable, under the conditions discussed above, to refer to surrounding circumstances, legislative committee reports or Parliamentary debates in order to resolve the ambiguity. Various rules of interpretation have been developed which apply where there is genuine doubt as to the “true and correct” interpretation. These include the old “Mischief rule”, first stated in *Heydon’s case* 1584. Other rules include general presumptions against

14 In the course of his judgment, Lord Bingham mentioned that the text of the statute had already been criticised the previous year in Spencer (2004).

15 o-one is to be regarded as the owner of his own limbs” (*Ulpian D 9.2.13.pr, Ulpianus ad ed.*)
injustice, or change in the law, or the more specific rules of *expressio unius* or *ejusdem generis*. In criminal cases, according to the rule of “lenity”, doubts should be resolved in favour of the accused.\(^{16}\) The “Golden Rule” allows courts to avoid inconsistent, absurd, or (quaintly) inconvenient results, by interpreting words, not with their “ordinary signification”, but by “putting on them some other signification, which, though less proper, is one which the court thinks the words will bear” (*per* Lord Blackburn in *River Wear Commissioners v Anderson* 1877). Unfortunately, rules of this kind can only be applied where an alternative signification is available, that is where the text is ambiguous. Where there is no ambiguity, the court is obliged to apply the law as it stands.

This principle is generally accepted as a consequence of the literal rule. In the *Sussex Peerage Case* (1844) Tindall CJ stated that “[i]f the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.” The principle is confirmed by Lord Reid in *Black-Clawson* 1975:

> In the comparatively few cases where the words of a statutory provision are only capable of having one meaning, that is an end of the matter and no further enquiry is permissible. (*Black-Clawson v Papierwerke* 1975, *per* Lord Reid)

Thus, where the judges are unable to find the necessary ambiguity in the legal text to be interpreted, they have no right to exercise their discretion. This is the sense of the Latin phrase, *Clara non sunt interpretanda, interpretio cessat in claris*. The results are occasionally absurd.\(^{17}\)

The result in *Whiteley v Chappell* 1868-9, for example, was inevitable in view of the words used, though it may seem unfortunate in the light of the facts of the case. The defendant was accused of “personification”, defined in the relevant statute as “taking the place of someone entitled to vote at an election”. Although he had indeed voted in place of someone else, he was nevertheless found not guilty because it so happened that the man impersonated had died just prior to the election, and should not therefore have been “entitled to vote”. Another celebrated example is *AG v Prince of Hanover* 1957, in which British nationality was granted to a member of a foreign Royal family. The court attempted to find an alternative interpretation of the controlling statute,\(^ {18}\) but was unable to do so.

Lord Reid nevertheless maintained, again in *Black-Clawson*, that the cases where the words of a statutory provision are only capable of having one meaning were “comparatively few”. In the same case, Lord Oliver admitted that: “Ingenuity can sometimes suggest ambiguity or obscurity where none exists.”

More recently, in *Kirin-Amgen v Hoechst* 2004, Lord Hoffmann referred to the disadvantages of an interpretative technique that required words to be given a fixed meaning, regardless of context or background, unless they were “ambiguous”. He considered that the literal rule can never have been strictly applied, pointing out that injustice was often avoided only because judges were “generally astute to find the necessary ‘ambiguity’ which enabled them to interpret the document in its proper context”. He thus appears to consider ambiguity, not as an obstacle to understanding, but rather as an invaluable tool to be used in adjudication.

Examples of such “astuteness” may be found in the application of the old *contra proferentem* rule in the interpretation of clauses limiting or excluding contractual liability. According to this rule, such clauses were to interpreted against the party introducing them, usually a commercial company dealing with a consumer. Judges were willing to “discover” unsuspected ambiguities in order to get round what they considered to be unfair conditions, as for example in *Hollier v Rambler Motors* 1972. In this case a car was damaged by a fire caused by an employee’s negligence. The company was found liable in spite of an exclusion clause providing that “[t]he company is not responsible for damage caused by fire to customers’ cars on the premises”. The justification proposed by the court

\(^{16}\) In *Pepper*, Lord Mackay, dissenting, considered that doubt should be resolved in favour of the tax-payer.

\(^{17}\) I am reliably informed that, in the military context, when a soldier obeys an order in the letter but not the spirit, that is called “dumb isulence”.

\(^{18}\) 4 Anne, c4, the *Princess Sophia Naturalization Act* 1705.
was that the clause referred only to fire in general, and not to fires started through negligence.

Since the Unfair Contract Terms Act 1977, it has no longer been necessary to indulge in such “gymnastic contortions” (per Denning LJ in *Mitchell v Finney Lock Seeds* 1983). However, it is relevant to note that the principle is maintained in the European *Unfair Terms in Consumer Contracts Regulations* 1994, which provides, significantly, in Reg. 6, that unless such clauses are written in “plain, intelligible language […] the interpretation most favourable to the consumer shall prevail”.

The same “astuteness” may also be observed in the field of statute construction, where judges are often led to “declare” an ambiguity, even when convinced that none in fact exists. In *Gomez* 1993, for example, Lord Lowry, dissenting, was able to show, through a consideration of the relevant legislative committee report, that the word ‘appropriates’, as it appears in the *Theft Act* 1968, was intended by Parliament to imply the absence of consent. To justify his reference to this extrinsic material, he was obliged to treat the word as ambiguous, even though he considered that the wording was in fact clear:

So clear is this conclusion to my mind that, notwithstanding anything which has been said in other cases, I would be very slow to concede that the word “appropriates” in section 1(1) is in its context ambiguous. [...] Therefore, my Lords, I am willing for the purpose of argument to treat the word “appropriates” as ambiguous in its context and, on that basis […] I turn, for such guidance as it may afford, to the Eighth Report of the Criminal Law Revision Committee on Theft and Related Offences. (*DPP v Gomez* HL 1993, per Lord Lowry, dissenting)

The majority nevertheless preferred to follow authority, with the result that, under English law, it is possible to be found guilty of theft for having (dishonestly) accepted a gift.

In *MacCarthy’s Ltd. v Smith* 1981, the absence of ambiguity in the “simple” present tense prevented the Court of Appeal from arriving at an acceptable interpretation of the *Equal Pay Act* 1970. Wendy Smith was engaged as manager of a stockroom at a salary of £50 a week. She discovered that a man had been doing the same job for £60 a week. The *Equal Pay Act* guarantees equal pay for a woman employee:

(a) where the woman is employed on like work with a man in the same employment or (b) where the woman is employed in work rated as equivalent with that of a man in the same employment. (*Equal Pay Act* 1970, s2)

Mrs Smith claimed that the Act applied in her case, even though her male predecessor had left four months before her appointment. However, the use of the present tense in the statute implied that under English law she was only protected where she and her comparator were working contemporaneously. The majority in the Court of Appeal felt that the English statute was clear and unambiguous on this point, and that it was therefore not permissible to take account of extrinsic material in the form of European legislation. Instead, the question had to be referred to the European Court itself.19

The European Court confirmed in due course that, under the European treaty, the woman was entitled to equal pay, even where her male comparator had already left. In accepting this authoritative decision, Cumming-Bruce LJ presented the problem counter-factually: “If I had been of the view that there was an ambiguity in the English statute, I would have taken the view that it was appropriate to look at art. 119 in order to assist in resolving the ambiguity.” This negative example demonstrates once again the importance of ambiguity in English legal adjudication.

It is generally accepted that legal language acquainting members of the general public with their rights and obligations should be expressed so that the basic ideas are clear. However, even if perfect clarity was a feasible objective, the resulting legal texts may lead to difficulty and to injustice where the supposedly clear rules have to be applied in unforeseen contexts and in previously

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19 The European law could not be directly applied as the text was unclear on the point at issue. This was the first case to be sent to the ECJ by the English Court of Appeal for an opinion on the construction and application of an Article in the EEC Treaty.
unenvisaged circumstances. Even where plain language is used, cases will inevitably arise in which the correct interpretation is open to doubt. Contrary to what is generally supposed, such problems of interpretation are more likely to arise with ordinary, everyday language, using common words, than with well-defined technical terms. From that point of view, the most complex interpretative difficulties may be a consequence of plain language and clear expression.

Those who assume that the function of the judge is to apply pre-existing law, and who wish to reduce judicial discretion to a minimum, may see any lack of precision in statements of the law as a problem to be avoided where possible, if necessary through the use of obscure language. However, because all natural language is inherently polysemic and open-textured, ambiguity is theoretically unavoidable. It must therefore be accepted as an integral part of the law.

To the extent that it allows alternative constructions of normative texts, ambiguity appears to function as a valuable tool in legal interpretation. As has been seen, where an ambiguity is declared, judges are able to come to a considered decision, taking into account the particular circumstances of the case, yet without being accused of case-by-case adjudication. In that sense, given that its absence is likely to lead to injustice, linguistic ambiguity appears to function as a prerequisite to the exercise of legal judgment.

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