When Homer nods: how courts respond to mistakes in legislation

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THE STATUTE LAW SOCIETY: THE RENTON LECTURE

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1. I want to open with a thank you to the Statute Law Society for this invitation to speak at the Lord Renton Lecture.[1] It is fitting that we honour Lord Renton, an individual whose landmark report on legislative drafting almost 50 years ago led to major reforms in simplifying and clarifying British law. The titles of the different sections which made up the Renton Report are themselves exemplars of how to draft clearly and concisely. They also give some clue to the problems that drafters were encountering then. One section was headed "The problem of expressing complicated concepts in simple language" and another section was headed "The conflicting needs of different audiences". Those and several other headings would I guess still strike a chord with today's drafters.

2. I also want to start - not with a disclaimer as such - but with a confess and avoid. I have the greatest respect for those who draft our laws – whether that is the team of Parliamentary Counsel now led by Jessica DeMounteney drafting primary legislation, or the departmental lawyers who draft the statutory instruments. When I was a legal advisor in His Majesty's Treasury, I worked on the bill that became the Financial Services and Markets Act 2000. I was continually amazed at how the boffins further up the road in Whitehall managed to spin gold in the form of elegant and precise draft clauses from the abundance of straw that we sent them in the form of hundreds of pages of instructions. I was later appointed co-leader with Sir Jonathan Jones (as he now is) of the departmental team in the Treasury drafting the regulations and orders to bring the 2000 Act into effect. I know just how difficult it is to strike that balance between on the one hand trying to deal with every possible future permutation of facts that might arise, but on the other hand not overloading the statute book with micro-detail which renders it impenetrable for the ordinary reader.

3. Thankfully, most modern legislation is clear and effective, and does not lead to the kind of misunderstandings which result in litigation. If there is litigation, then it suggests one of two things. First, it may be that a set of facts has arisen which does not seem to have been contemplated by the drafter. That can happen even after the extensive public consultation exercises that precede the introduction of a Bill into Parliament. Consultation is designed to reduce mistakes by flushing out unusual situations out there in the real world which may be affected by the proposed wording in a way which is not intended. I remember when the Treasury consulted on whether investment custody services should become a regulated financial service under the old Financial Services Act, we had a

[1] I am very grateful to my judicial assistant Joseph Kelen for his help in preparing this lecture.

response from a society of Druids who pointed out a glitch in the draft wording we proposed that would unintentionally have put them in great difficulties. That prompted a tweak in the definition of custody services for this purpose.

4. But despite everyone's best endeavours, there is sometimes an ambiguity in the wording of the legislation that no one has spotted. Or it may be more than an ambiguity – it may be more or less clear that it is a mistake. For instance, I would like to express my sympathies to the Belgian lawyer who, as reported in The Brussels Times in June 2021, was analysing a regulation dealing with the price of medical goods online, and came across incorporated in the text of the regulation, a 6-step recipe for white asparagus gratin.[2]

5. Where there seems to be a mistake not so obviously made by hungry civil servants, how should the judges as interpreters of the law respond when called upon to apply the provision? Recent judicial descriptions of the proper way to interpret statutes stress the need to adopt a purposive approach. The current go-to authority on the principles of statutory construction most often quoted in recent submissions filed with the Supreme Court is the judgment of Lord Hodge in *R (oao O) v Secretary of State of the Home Department*.[3] Paragraphs 29 to 31 of that judgment emphasise that the words used in the statute are the primary source by which the meaning is ascertained. That is because the words are what Parliament has chosen to enact as an expression of the purpose of the legislation.

6. But there have been warnings in the past that this purposive approach must not go too far. Judges of course have always varied in their readiness to be creative. *Magor and St Mellons Rural District Council v Newport*[4] back in 1950 concerned a spat arising from the redrawing of the boundary between two district councils. As a result, one wealthy district council had to pay compensation to a poorer district council for the loss of an area of potential tax revenue, that area now being part of the wealthier council. Unfortunately, at the same time as the boundary was redrawn, the poorer district council was abolished and absorbed with another district into an entirely new district council. Did that deprive the residents of the abolished poor area of the entitlement to the compensation from their wealthy neighbours? The majority of the Court of Appeal held that the only right to compensation that the new district council could have inherited from its predecessor was the right that the old district council had. But that right was limited to compensation due for the scintilla of time that the old district council existed before being abolished – i.e. a right to nil compensation.

[2] The Brussels Times, "Asparagus gratin recipe accidentally included in Belgian legal text", 5 June 2021 also reported by the BBC News, "Asparagus recipe appears in Belgian law database", 1 June 2021.
[3] *R (oao O) v Secretary of State for the Home Department* [2022] UKSC 3.
[4] *Magor and St Mellons Rural District Council v Newport Corporation* [1950] 2 All E.R. 1226.

7. Lord Justice Denning, dissenting, described the statutory provisions in issue as "drafted, as legal documents often are, more with a view to accuracy than to intelligibility". He said that it was obvious that the intention behind the merger of the two poor districts could not have been to remove the right to compensation. He thought that the new amalgamated district should inherit that full entitlement to compensation from its wealthy neighbour going forward. He said:[5]

> "I have no patience with an ultra-legalistic interpretation which would deprive [the appellants] of their rights altogether… We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."

8. It was the majority decision that there was no such right which was ultimately upheld by the House of Lords. The Lord Chancellor Lord Simonds gave a short but rather finger-wagging judgment. He said that given that so many cases before the courts depend on the construction of modern statutes, it would not be right for the House to pass unnoticed the propositions that Denning LJ had laid down. What seems particularly to have upset Lord Simonds was Denning LJ's reference to filling in the gaps and the idea that what the legislature has not written, the court must write. Lord Simonds described this as "a naked usurpation of the legislative function under the thin disguise of interpretation.".[6] It was even less justifiable when it was merely guesswork to decide how Parliament would have filled the gap if it had discovered it. If a gap is revealed, Lord Simonds said, the remedy lies in an amending Act.

9. The law has of course moved on a great deal from the 1950s. Let me first discuss some circumstances where the courts are able legitimately to fill in the gaps which have been left by a very specific kind of mistake in the drafting.

10. The first is in the context of EU law. In the case of *Marleasing* in 1990,[7] the Court of Justice in Luxembourg held that it was part of a Member State's obligations arising from the enactment of an EU directive to take all appropriate measures to achieve the result envisaged by the directive. This included an obligation on the courts to interpret domestic law "as far as possible" in the light of the wording and purpose of the directive. In *Marleasing* itself, the mistake, if you can call it that, was that Spain had failed to implement the directive within the deadline set. The directive had set out an exhaustive list of the grounds on which a public company could be declared a nullity. The existing Spanish law provided for an additional ground and so was not consistent with the

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[5] *Magor and St Mellons Rural District Council* at p 1236.

[6] *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189, 191.

[7] Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135.

directive. *Marleasing* made clear that the Spanish courts were required to correct this mistake by striking through that additional ground and disapplying it rather than waiting for Spain to amend its law.

11. The Court in *Marleasing* left some wiggle room by saying that the obligation on the domestic courts was to construe their law as compliant "as far as possible". That phrase was interpreted by the English Court of Appeal in *Vidal-Hall v Google*.[8] That case in 2016 was an early skirmish in the challenge by a number of Apple computer users who objected to Google collecting information about their use of an Apple browser and then using that information to sell advertising services. The case turned on the proper interpretation of the Data Protection Act 1998. That Act was intended to implement the EU's Data Protection Directive.[9] But there was a mistake because the relevant provision of the Act required a potential claimant to have suffered some pecuniary loss in order to bring a claim. If someone had suffered pecuniary loss, then they could also add in a claim for compensation for distress. But a claimant could not base a claim purely on suffering distress. That was not a limitation imposed by the EU Directive which would have allowed a claim to be based on distress without pecuniary loss. The Court of Appeal recognised that interpreted literally section 13(2) of the DPA had not effectively transposed article 23 of the Directive into domestic law. Was this a mistake in the drafting of the domestic implementing legislation and if so, could it be remedied by a *Marleasing* construction?

12. The CA reiterated the test to be applied. The relevant question in each case is whether the change brought about by the interpretation alters a fundamental feature of the legislation or is inconsistent with its essential principles or goes against its grain. If the proposed alteration of the provision changes a fundamental element of it, that is not permissible. The problem for the Court of Appeal in *Vidal-Hall* was that it was clear from the wording of the Act, that Parliament had *deliberately* chosen to limit the right to compensation in the way that it did. That ruled out, they held, a *Marleasing* construction.

13. But that was not the end of the story because the circumstances in *Vidal-Hall* amounted not only to a failure to implement the directive properly but also a breach of the claimant's rights to an effective remedy under article 47 of the EU Charter of Fundamental Rights. In the human rights sphere covered by the Charter there were the additional principles laid down by the Court of Appeal in *Benkharbouche*,[10] that the court not only could but was obliged to disapply the conflicting domestic provision. So in *Vidal-Hall* the arguments which defeated a possible *Marleasing* interpretation, namely that it overrode a carefully calibrated Parliamentary choice, were no match for the might

[8] *Vidal-Hall and others v Google Inc* [2016] QB 1003 (CA).

[9] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 23.11.1995. Now superseded by the General Data Protection Regulation.

[10] *Benkharbouche and Janah v Embassy of Sudan* [2016] QB 347 (CA).

of *Benkharbouche* because it was very clear what the answer ought to be – there were no policy choices to be made.

14. This debate about interpretative techniques to correct failures to implement EU instruments appears still to be relevant post Brexit. Section 6(3) of the European Union (Withdrawal) Act 2018 requires courts to interpret assimilated EU law in accordance with any assimilated case law and any retained general principles of EU law.[11] And where assimilated EU law is modified by subsequent domestic enactments, section 6(6) provides that those same principles continue to apply in respect of a now-modified assimilated EU law norm "if doing so is consistent with the intention of the modifications".[12] So even in the post-Brexit legal landscape, where of course the EU Charter no longer applies, the interpretative tether to EU law persists, anchoring UK law to its European origins where Parliament has intended such continuity.

15. In the *Vidal-Hall v Google* case, the Court noted the similarity between the *Marleasing* test and the test for reading down legislation under section 3(1) of the Human Rights Act 1998 to make it compatible with Convention rights. That test is also subject to the proviso that the court can read down legislation only "so far as it is possible to do so".[13]

16. Let me give an example from my own workload of where I read a statute down to ensure compliance with a Convention right. *Henry Hand Will Trust*[14] concerned a claim by two adopted children of a descendant of one Henry Hand. Henry Hand had died in June 1947 leaving a will in which his property was to pass down to his "children" and thereafter to their "children". At the time he made his will, the word "children" used in that context did not include adopted children. That was because under the adoption law then in place, the Adoption of Children Act 1926, adopted children were still treated for legal purposes as the children of their biological parents and not as children of their adoptive parent. Later Adoption Acts change this so that adopted children are treated only as the children of their adoptive parents. But buried away in the transitional provisions of the later Acts has always been a saving clause which said that the new law did not apply to dispositions of property in a will if the will was made before that new regime came into force.

17. It was clear and common ground in the case therefore that under domestic law, the claimants could not inherit that part of their adoptive father's estate that originally came from old Henry Hand's will.

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[11] European Union (Withdrawal) Act 2018, s6(6).

[12] European Union (Withdrawal) Act 2018 s6(3).

[13] *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [45]-[56] (Lord Steyn). For a more recent case on "reading down" see *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12 where the Supreme Court made a declaration of incompatibility having declined to read down the offending provision.

[14] *In the matter of the Henry Frederick Hand Will Trust* [2017] EWHC 533 (Ch).

18. However, I held that the application of this domestic transitional provision would be incompatible with the claimants' right under Article 8 of the Human Rights Convention. There is a great deal of Strasbourg case law that states that adopted children must be treated in the same way as the biological children of a testator. To apply the law as it stood would be discriminatory and contrary to Article 14 in conjunction with Article 8. In *Pla*[15] in 2004 the Court in Strasbourg said the Convention is a dynamic text and entails positive obligations for States. It is a living instrument. A court's decision about how to interpret a will could not be made exclusively in the light of the social conditions existing when the will was made or at the time of the testatrix's death. In the period since the will was written there had, the Strasbourg Court said, been profound social, economic and legal changes and the courts of the Contracting States must not ignore these new realities.

19. In light of that incompatibility, I had to decide whether I could read down the transitional provisions in the Adoption Act 1976 which disapplied it to a pre-1976 Will so that the adopted children could inherit. I decided that I could. The thrust or grain of the Adoption Act 1976 was to treat children as the children of their adoptive parents. It was not going against the grain of that to remove the last legacy of the different regime in 1926.

20. The *Marleasing* principle to correct EU law mistakes and the reading down of domestic legislation to correct ECHR mistakes are fairly familiar territory. Let me touch on some less well known circumstances in which the courts are invited to get creative by some gap filling and striking through what Parliament has served up.

21. The post-Brexit landscape has also given us the intriguing section 29 of the European Union (Future Relationship) Act 2020. That relates to the UK's obligations under the Trade and Cooperation Agreement – the Agreement concluded between the UK and the EU on 30 December 2020 to govern the relationship between us going forward post Brexit. Section 29 of the Future Relationship Act provides that existing domestic law has effect post-Brexit "with such modifications as are required for the purposes of implementing" the Agreement in our domestic law and for the purpose of complying with the UK's international obligations. Does that impose on the court a general obligation to rewrite domestic legislation as it sees fit, if it concludes that the domestic law doesn't quite do the job that needs to be done to comply with the TCA? That obligation covers a much wider range of domestic law than just the human rights context covered by *Benkharbouche*. Some academic commentators have noted[16] that section 29 seems to go much further than *Marleasing*. There is no "so far as it can" or "so far as possible" limitation in the wording of the section. There is no statement that such modifications must not go against the grain of the domestic legislation being considered. Does this go further even than the *Benkharbouche* principles? Those have always been tempered even

[15] *Pla and Puncernau v Andorra* (Appn no 69498/01) judgment of 13 July 2004.

[16] See e.g Professor Simon Whittaker *Retaining European Law in the United Kingdom* (2021) 137 LQR 477.

in the human rights field by the Supreme Court's ruling in *R (Chester)*[17] where the Court declined to disapply the UK domestic legislation which banned prisoners from voting in elections because it was impossible for the Court to devise an alternative scheme of voting eligibility. That was a matter for Parliament. In *Lipton v BA Cityflyer*[18] the Supreme Court in July this year discussed the potential of section 29 but left the precise power conferred on courts to bring domestic legislation into line with the TCA to be debated afresh in due course.

22. In another area, tax law, we now have the general anti-abuse rule ("GAAR"). This was originally included in Part 5 of the Finance Act 2013, following the Graham Aaronson report, designed to deter abusive tax avoidance schemes.[19] The purpose of the rules is to counteract tax avoidance arrangements which, although within the letter of the law, are not what was intended by Parliament. Where the GAAR applies, HMRC can make a just and reasonable tax adjustment to counteract the abusive tax advantage that the taxpayer is seeking to obtain. To quote the government guidance "Taxation is not to be treated as a game where taxpayers can indulge in inventive schemes in order to eliminate or reduce their tax liability."[20] The GAAR provisions set up a complicated system of definitions of what is a tax advantage and what is abusive and a procedural jungle of notices and advisory bodies. Ultimately it says in section 211 that in proceedings before a court or tribunal, that court has to look at all the guidance and also at evidence of established practice at the time that the impugned arrangements were made. Presumably then we have to apply the law as if it says what HMRC want it to say in order to prevent abuse rather than apply what it actually says.

23. According to a report published by the Tax Adviser magazine in 2022,[21] there were 19 published opinions of the GAAR Advisory Panel between 2013 and 2022. So although this is not a high volume operation, each of those opinions can lead to HMRC issuing many hundreds of notices to individual tax payers who have tried to use that particular tax avoidance scheme.

24. Let me now turn to mistakes in their purest form – where it appears that something really has gone wrong with the drafting. Lord Simonds' reprimand to Lord Denning all those years ago in the *Magor* case seems to have put a damper on judicial gap filling for some time after. Lord Russell in an appeal in 1977 referred disparagingly to a submission made to him that there was a lacuna in the Companies Act 1948. He said that he did not find that word satisfactory. "It has the colour", he said "of an accidental omission or a

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[17] *R (Chester) v Secretary of State for Justice* [2014] AC 271, para 74.

[18] *Lipton v Cityflyer* [2024] UKSC 24, see para 80.

[19] Finance Act 2013, s207 later amended by the Finance Act 2016, s156-158 and the Finance Act 2021, Schedule 32. There are similar but separate regimes in Scotland and Wales in relation to devolved taxes.

[20] UK Government, "GAAR guidance with effect from 16 July 2021: Parts A, B and C", B2.2.

[21] Tax Adviser Magazine 21 June 2022: "*A review of cases that have gone to the GAAR panel: what can we learn?*" by Helen McGhee.

legislative slip" – "the picture" he went on "conjuring up the presence of a permanent banana skin".[22]

25. But eventually mistakes have come to be recognised and with that has come the recognition that we must do something about them – the days in which we can say confidently, like Lord Simonds, that Parliament will correct the mistake may be gone. Parliament has been a bit busy with other things.

26. The leading case is *Inco Europe*,[23] decided in 2000. The House of Lords there was puzzling over a provision in the Supreme Court Act 1981 which provided that no appeal lies to the Court of Appeal from a decision under Part 1 of the Arbitration Act 1996 except as provided for in Part 1 of the Arbitration Act. The problem was that Part 1 of the Arbitration Act did not actually provide for any appeals to the Court of Appeal. So the exception which intended to maintain in existence a right of appeal was in fact an empty set and the section seemed therefore to abolish pre-existing rights of appeal. The House of Lords recognised that this must be a mistake. There was no suggestion that the new provision was intended to abolish existing rights of appeal. That would, their Lordships said, have been a radical change in the law. What it must mean was that there was the usual general right of appeal except in so far as that general right was restricted by something in Part 1 of the Arbitration Act. Lord Nicolls said that he was in no doubt that on this occasion the drafter had slipped up. He said "Several features make it plain beyond a peradventure that on this occasion Homer, in the person of the draftsman … nodded" and that something had gone awry in the drafting.

27. Lord Nicholls said that the courts do have a role in correcting obvious drafting errors. In suitable cases, in discharging its interpretative function, the court will add words or omit words or substitute words. However, the power was strictly confined "to plain cases of drafting mistakes". He then set out the test that has been applied in later cases. In order to correct a mistake, the court must be abundantly sure of three things. First, the intended purpose of the statute or provision in question. Secondly, that by inadvertence the drafter and Parliament failed to give effect to that purpose in the provision in question; and thirdly the court must be sure of the substance of the provision Parliament would have made had the error in the Bill been noticed, although the court need not necessarily be sure of the precise words Parliament would have used.

28. The *Inco Europe* test was applied by the Court of Appeal in *Pollen Estates v HMRC*.[24] There the legislation granted a relief from stamp duty land tax for a charity which bought land. The problem was that the legislation granted the relief when the "purchaser" of the land was a charity. But what if the land was bought jointly by a charity and a non-charity?

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[22] Lord Russell in *Herbert Berry Associates v Inland Revenue Commissions* [1977] 1 WLR 1437, 1449.

[23] *Inco Europe Ltd. v First Choice Distribution (a firm)* [2000] 1 W.L.R. 586.

[24] *Pollen Estates v HMRC* [2013] 1 WLR 3785.

It appeared to rule out the grant of any relief when land was brought by a group of people only one of which was a charity.

29. The Court of Appeal recognised that simply reading the word "purchaser" to include "purchasers" or "one of the purchasers" did not work. One had to add in the words "to the extent that the purchaser is a charity". That would have the consequence that a land transaction was partially exempt to the extent of the charity's interest. The Court held that that was the correct interpretation. In particular Lewison LJ noted that although judges are not parliamentary draftsmen, it was sufficient that the court could be confident of the gist or substance of the alteration, rather than its precise language. That makes sense to me.

30. Is there a particular danger zone in drafting legislation when mistakes tend to creep in? In my experience, the most frequent culprit is when a statute borrows a term from an entirely different statute, opting to cross-reference an existing definition rather than crafting one bespoke to the specific context at hand. It might look to the busy drafter like a convenient shortcut, especially if there is no particular need for the term to mean different things in different contexts. In reality, such an approach can create results which stretch beyond what the drafters of the law must have intended. Unless, of course, they had a hidden agenda to keep lawyers fully occupied for decades to come. Sometimes the incorporation of the borrowed definition is prefaced with the useful words stating that the borrowed definition applies "unless the context otherwise requires". That can give the court the latitude needed to say that the context does otherwise require and tweak the definition to make it a better fit in the new context.

31. But sometimes the drafter does not include those helpful words and that is when the trouble can start. Let me give you two different examples from my judicial workload which illustrate two different responses.

32. In *Moulsdale v HMRC*, the issue we were confronted with was whether a taxpayer's sale of property to a purchaser was a "supply" exempt from VAT or whether the seller should have added VAT to the sale price of the land.[25] The relevant provisions borrowed certain definitions of key phrases from some VAT Regulations where they were used for a completely different aspect of VAT computation. But applying that provision in the new context, the effect of the provisions as drafted appeared to be that if Mr Moulsdale intended or expected to add VAT to the price he was charging for the land, then VAT was not chargeable on the sale so he did not need to add VAT. But if Mr Moulsdale did not intend or expect that the purchaser would pay VAT on the price, then the transaction was liable to VAT and so he ought to have added VAT to the purchase price. To borrow from Dickens, the situation felt like a 'tale of two clauses'—each pulling us in a different direction. As I said in one of the opening paragraphs of my judgment, "Drafting tax legislation is a difficult and complex task so it is not surprising that sometimes the

[25] *Moulsdale t/a Moulsdale Properties v HMRC (Scotland)* [2023] UKSC 12.

legislation does not quite work. It is common ground that this appeal arises because of one such occasion."

33. In order to solve this circularity problem, which both parties had recognised, we just had to take a leap and say that the words had to be interpreted to make sense of the statute, even if that resulted in a not-so-identical definition to the one provided in the referenced VAT Regulations 1995. In such circumstances, it was clear that the statute intended that the sale should be caught.

34. In contrast, when I was sitting in the Upper Tax Tribunal in *HMRC v McQuillan*, we found we could not arrive at the result which might have been thought to be fair, because of the need not to bend the meaning of a borrowed definition.[26] This concerned a claim for entrepreneurs tax relief under the Taxation of Capital Gains Act. The McQuillans were a couple living in Belfast who had opened a sandwich shop business which they then decided to franchise. They started off with a little off-the-shelf company called "Streat" with a share capital of £100 which they mostly owned. The business was a great success and ten years later they sold their shares in the company for a substantial sum of money. Now the apparent capital gain on the value of those shares was very considerable but they said that this is just the kind of situation to which entrepreneurs relief is directed – where a person starts with nothing and then works very hard over many years and sells the company for a large sum. Part of the definition of when entrepreneurs relief applies requires that the company sold must be the "personal company" of the entrepreneur. And the term "personal company" is defined as meaning that the entrepreneur must have held at least 5% of the ordinary share capital of the company during the year prior to the sale. It then says that "ordinary share capital" for that purpose has the same meaning as in the Income Tax Act 2007 section 989.

35. The problem for the McQuillans was that at some point during the growth of their company, a loan made to them by Mrs McQuillan's brother and sister in law had been converted into shares in the company, albeit shares that did not carry the right to any dividend or votes. But if you included those shares in the total ordinary share capital of the company, then the McQuillans' shares were much less than 5% of the total. So the company was not their personal company and they were not entitled to the relief.

36. The first-tier tribunal has solved the problem by tweaking the definition of ordinary share capital in section 989 as it applied in the new context. We in the Upper Tribunal were urged to give the term "ordinary share capital" a purposive construction bearing in mind the purpose of entrepreneur's relief. But we could not do that because that would mean that the words of the borrowed definition in section 989 meant something different when they were imported into the entrepreneur's relief context. That is not usually possible.[27]

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[26] *HMRC v McQuillan* [2017] UKUT 344 (TCC).

[27] *Williams v Central Bank of Nigeria* [2014] AC 1189 *per* Lord Sumption at [27] and Lord Neuberger at [50].

But if we decided to give a purposive interpretation that would then change the meaning of the term "ordinary share capital" in all the many contexts in which that definition in section 989 applies across the tax code and beyond. That could lead to who knows what odd and unexpected problems for other areas of the tax code or wider company law.

37. If borrowing definitions is one cause of mistakes creeping in, the use of the ambiguous word "includes" is another. Where a term is defined in a statutory provision, there is often a statement that the term "includes" a list of things. Sometimes one or more of the things in the list is not something that you would normally think of as falling within the natural meaning of the term defined. Does the fact that the term "includes" everything on that list mean that each of those things necessarily, by itself, now falls within the meaning of the term? This question arose in *Winfield v Secretary of State for Communities and Local Government*.[28] That appeal concerned the statutory definition of the word "advertisement" for the purposes of a provision in some planning regulations controlling the display of advertisements. The regulations conferred deemed planning consent on an "advertisement" if it had been displayed on a site continually for ten years.[29] For that purpose, the word "advertisement" was defined by reference to the meaning given to it in a different Act, section 336(1) of the Town and Country Planning Act 1990. That definition is very broad and expressly says that an advertisement "includes" any hoarding or similar structure used or designed for the display of advertisements.[30]

38. So, the claimants in the *Winfield* case had installed wooden posts and a wooden structure on the land. The wooden posts had certainly been there for ten years and sometimes the claimant had displayed placards and notices on the posts but not continuously for the whole ten year period. The claimant argued that because the term "advertisement" includes the wooden posts then as long as the posts had an unbroken presence on the land for more than ten years, there was deemed planning consent for the continued presence of the posts. Even during the periods when nothing was attached to them, the posts were themselves expressly included in the definition of "advertisement" and so continued to be "advertisements" for that purpose.

39. The Court of Appeal disagreed. They recognised that a purposive construction of the provision pointed in favour of a very broad meaning for the word "advertisement". But did that necessarily mean that a bare unadorned wooden post remained an "advertisement" even when it was not displaying anything? It did not. Instead, the Court of Appeal found that the unadorned structure is no longer "in the nature of, and employed wholly or partly for the purposes of, advertisement". In other words, if there is something there that you would ordinarily describe as an advertisement then the wooden posts as well as the placard or sign are included in it and also get planning permission. But that does not mean that wooden posts count as advertisements by themselves. The Court of

[28] *Winfield v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1415.
[29] Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (SI 2007/783) Class 13.
[30] Town and Country Planning Act 1990, section 336(1).

Appeal recognised that this interpretation was at or near the limits of the permissible. But it served the purpose of the legislation and had the additional virtue of chiming with common sense.

40. Another recent example of problems caused by the word "includes" is the case of *PACCAR*. That was an appeal about whether third-party litigation funding agreements had been rendered unenforceable by the restrictions on conditional fee agreements.[31] The claimants in some complex and expensive proceedings had an arrangement with a third-party funder, under which the funder would pay all the legal and expert fees as the case progressed and would take a share of the damages if the case was ultimately successful.

41. The Supreme Court was asked whether such an agreement was unenforceable by virtue of section 58AA of the Legal Services Act 1990. That turned on whether the funding arrangement fell within the definition of a "damages-based agreement" in that section. And whether it was a "damages based agreement" in turn depended on whether the funders were providing the claimants with "claims management services". So what are "claims management services" for this purpose? Unfortunately for the claimants, section 58AA borrowed a definition of "claims management services" from an entirely different piece of legislation. That defined the term so that it was a kind of service that might at some point be designated as a financial service to be regulated by the Financial Conduct Authority. That borrowed definition of "claims management services" set out a list of four activities that were "included, in particular," in the term "claims management services". One of those things "included" in the term claims management services was the provision of financial assistance.

42. Now no one would think normally that simply providing funding for litigation amounted to providing the litigant with claims management services. But the funders were undoubtedly providing financial assistance to the litigants. And there it was, the statute said that claims management services include in particular providing financial assistance. So it looked as if the fact that the funders provided financial assistance, meant that they provided claims management services, that meant that their agreement fell within the definition of a damages based agreement and was potentially unenforceable under section 58AA. The majority of the Court held that the borrowed definition was a broad definition and that scope had to be the same in the new context as it was in the original place. Despite the different legislative context, the majority held that the meaning of the definition had not changed.

43. This you will note was an example of both danger zones coming one on top of the other, the borrowing of a definition from a completely different context without any useful "unless the context otherwise requires" get out and the use of the ambiguous word "includes". The importation of the definition was particularly risky in this case because

[31] *R (oao PACCAR) v CAT* [2023] UKSC 28.

giving a broad interpretation to the term "claims management services" in the statute where it was originally enacted did not have any legal repercussions. All that the term did where it was originally defined was to define a broad pool of services from which the Secretary of State could at some point pick out those that he or she decided ought to be regulated financial services. Including financial assistance in the term had no legal effect at all. But once imported into a new context the broad definition had a potentially very serious impact indeed, rendering potentially unenforceable a large number of funding agreements, including, as we now know, the funding agreement underpinning the claim brought by Sir Alan Bates and the other sub-postmasters against the Post Office.

44. So why does all this matter? What has prompted me to choose this topic for this annual lecture? Well, like almost everything these days, the answer unfurls in familiar red, white and blue colours: Brexit. The legislative overhaul required following the UK's withdrawal from the EU has resulted in an avalanche of primary and secondary legislation. Over 40 years of accumulated EU law has now been now transposed, often hastily, into domestic law with various tweaks and revisions. I attended a lecture by Lord Judge in 2017.[32] Even then he was sending up distress signals about the lack of real scrutiny of the thousands of statutory instruments produced each year. He commented that the arrangements for scrutinising legislation were about to be tested by Brexit which would involve many thousands of provisions interacting and bearing on each other.

45. What is lurking out there? Because of the time lag between fact patterns arising and cases coming to court at all and certainly arriving at the Supreme Court, we have not yet had to grapple with the full weight of Brexit legislation. But we know that so far, the government has reformed or revoked over 2,000 statutory instruments, with over 6,700 in total likely to be affected.[33] But who knows what now lies on our rather bloated statute book despite the very best efforts of Parliamentary Counsel and departmental lawyers. Are there three statutory instruments amending the same primary legislative provisions in inconsistent ways or borrowing a definition from another piece of legislation which has actually been repealed?

46. What will become clear over the next few years is whether the court's current approach to dealing with mistakes is up to the task. Or will we be called upon to channel our inner Lord Denning. He said in the *Magor* case I referred to earlier: "We all have to do the best we can to make sense of these provisions". That is certainly true if we as judges are to fulfil our time honoured role of interpreting and applying the law in a clear and intelligible way.

47. But will we need to expand on what is "the best we can do"? We shall see.

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[32] Annual Bingham Lecture given by the Rt Hon Lord Judge, 3 May 2017: *A Judge's View on the Rule of Law*.
[33] Department for Business & Trade, "Retained EU law Parliamentary Report June 2023 – December 2023". 22 January 2024. UK Government, "Retained EU Law / Assimilated Law – Public Dashboard".