INTERTEXTUALITY AND LEGAL JUDGMENTS

by Alex Steel*

Intertextuality is a tool of literary analysis that was developed to enable the analysis of literature in a more wholistic way. This is done by emphasising the interconnected nature of literature through the references imbedded in the work to other works; references both intentional and unintentional. In so doing intertextuality attempts to locate meaning in the reader's understanding rather than in the author's intention. Such techniques have long been a part of the legal interpretation of statutes and previous court decisions, using techniques of stare decisis and statutory construction. This paper attempts to highlight such similarities by outlining the basic tenets of intertextuality and the applying them to the wording of a decision of the NSW Supreme Court.

Aspects of Legal Judgments

In recent years there has been much discussion in literary criticism of the "death of the author" as a privileged definer of meaning for literary texts and of the intertextuality that underpins all literary writing. These concepts have been developed largely in relation to literary rather than technical or scientific writing. Legal judgments, particularly those relating to statutory interpretation are an interesting species of works which strive for technical precision but remain strongly literary. As works on this cusp they are therefore an interesting subject to apply to the concepts of intertextuality.

* Lecturer, School of Business Law and Taxation, University of New South Wales. This paper was originally prepared for a non-legal audience as part of a cultural studies subject in a Master of Arts degree. One impetus in writing the paper was to highlight the similarities between what is seen as a highly intellectual analysis of literature in cultural studies and yet is largely accepted in legal practice as the standard and practical way of reading court judgments.

Indeed legal judgments are overtly intertextual in that the legal system is based very strongly on the concept of precedent. Generally stated this is that, in theory, if any court has previously made a decision on the same issue that is before the present court, the previous decision must be followed. Thus all judgments are laced with the intertexts of previous judgments. Of course, the application and use of these intertexts are not as straightforward as this initial outline might suggest.

In particular, the legal concepts of *ratio decidendi* and *obiter dicta* are important complicating factors. In any legal judgment the judge's discussion of the law can be divided into these two categories. *Ratio decidendi* refers to those pronouncements of the judge and the elements of the judge's legal reasoning that were the necessary basis for the final decision.[1] *Obiter dicta* constitutes all other aspects of the judge's reasoning that are not strictly required for the decision but constitute comments "by the way". The theory is that the *ratio* of a judgment creates a binding authority for lower courts in the same legal system dealing with a case containing facts or principles similar to the previous judgment, but that any judicial pronouncements that are merely *obiter* can be disregarded.[2] It should be obvious that the ability to correctly determine which aspects of the judgment (which in its form reads like a literary work) constitute the *ratio* and which the *dicta* can be highly contentious and uncertain.[3]

In addition, deciding if a previous case had facts sufficiently similar to the present case can also involve a large degree of opinion. This is because a case can be a precedent if the underlying principle involved in the facts are similar, though the particular facts are very different. For example, allowing a dead snail to fall into a bottle of ginger beer during its manufacture[4] has been held to be a precedent for thousands of diverse cases including slippery floors on shopping centres[5] and incorrectly witnessing a will[6] because in all cases the underlying principle is a relationship between the parties that the law considers to be sufficiently close to require a degree of care between the parties.

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1 See eg *Pretoria City Council v. Levison* 1949 (3) SA 405 at 417 and the discussion in Cross and Harris, *Precedent in English Law*, 4th ed, Clarendon Press, Oxford, 1991 at 72-95.

2 See, for example, *Deakin v. Webb* (1904) 1 CLR 585 at 605.

3 For a discussion of the arbitrariness of these concepts see J Stone, *Precedent and Law*, Sydney, Butterworths, 1985.

4 *Donoghue v. Stevenson* [1932] AC 562.

5 For example, see *Australian Safeway Stores Pty Ltd v. Zaluzna* (1987) 162 CLR 479.

6 See *Hill (t/as R F Hill & Associates) v. Van Erp* (1997) 188 CLR 159.

This article examines a short judgment of Clarke JA of the NSW Court of Appeal in the case *Googoorewon Pty Ltd v Amatek Pty Ltd*.[7] This case involves a further additional element of intertext, that of statutory construction. Due to the supremacy of Parliament over the courts the court must apply the words of any Acts of Parliament as they are expressed. Thus a court is not permitted to amend the words of the Act, even if the court considers the actual impact of the Act was unintended.[8] They do however have the power of interpretation - a right and duty to expand the meaning of the words used by Parliament[9] and in interpreting Acts of Parliament they are guided by certain self-imposed rules of construction[10] and by previous precedent cases providing precedents on the meaning of the same or similar words and phrases.

The Death of the Author

The first issue of interest in the judge's approach to the question is the issue of authorship. Is the Parliament's intended meaning paramount, or does law also subscribe to the notion of the death of the author? Is the text of the Act "the hand, cut off from any voice, borne by a pure gesture of inscription (and not of expression), trac[ing] a field without origin"[11] or does law attempt to "give a text an Author [and] impose a limit on that text, to furnish it with a final signified, to close the writing"?[12] Certainly the courts would claim to do so. The court's traditional understanding of their role is encapsulated in the words of Higgins J:

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7 (1991) 25 NSWLR 330. Kirby P agreed with Clarke JA and Mahoney JA delivered a judgment to generally similar effect. The Court of Appeal's judgment was unamimously overturned by the High Court in *Amatek Ltd v. Googoorewon Pty Ltd* (1993) 176 CLR 471.

8 For example, see *Higgins v. O'Dea* [1962] WAR 140.

9 This power of interpretation grants a large degree of flexibility to the courts and has given rise to the purposive approach to interpretation, discussed below. Very rarely the courts have also considered that this power of interpretation can be used to give a word a meaning which is completely different to it's normal meaning, thereby overcoming the traditional prohibition on amending Acts; see eg *Grey v. Pearson* (1857) 6 HLC 61.

10 These are set out in detail in books such as D Pearce & R Geddes, *Statutory Interpretation in Australia*, 4th ed., Butterworths, Sydney, 1996.

11 R Barthes, "From Work to Text" in S Heath (ed.), *Image-Music-Text*, Fontana, Glasgow, 1977 at 146.

12 n11 at 147.

> The fundamental rule of statutory interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole.[13]

However, what they really do is to privilege the reader over the author. They effectively close off meaning by giving the text an Interpreter. The courts will take into account the context and construction of the text and at times the stated intention of the Parliament, but the courts always assert their sole right to interpret the meaning of the text.

Compare the following quotes, the first from Barthes, the second from the leading Australian textbook on statutory interpretation.

> A text is made up of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is one place where this multiplicity is focussed and that place is the reader, not, as was hitherto said, the author.[14]
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> ...
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> The legislature may declare that the meaning given to the Act by the courts is wrong; it may even proceed to set aside the interpretation with retrospective effect, but it is the courts which are empowered to pronounce on the meaning of legislation and the legislation is bound to await such a ruling and then either to accept it or pass legislation to negate it.[15]

Consequently, if the Parliament has made known its intended operation of the Act but, in the court's opinion, the words used in the Act have a different effect, the court's interpretation prevails.[16]

The Author-Function

Although, as Higgins J makes clear, the courts claim to base their interpretation of statutes on the Parliament's intention, this intention is largely fictional. Parliament is a body made of a very large number of people

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13 *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161.

14 n11 at 148.

15 n10 at 4.

16 For example, see *IR Commrs v. Hinchy* [1960] AC 748 at 767.

all with differing views. The persons who draft the law, debate it and pass it may all have different understandings of its meaning. Further the Parliament rarely gives considered examination to all words and phrases of the Act and most situations in the courts where particular words and phrases arise for decision would have been unthought of by the members of Parliament at the time of passing the law. Yet it is imperative that the courts appear to be using the sovereignty they have as readers in a way that promotes the intention of the author. This is because law attempts to create certainty and limit multiplicity of meaning. As Foucault has said:

> The author allows a limitation of the cancerous and dangerous proliferation of significations within a world where one is thrifty not only with one's resources and riches, but also with one's discourses and their significations. The author is the principle of thrift in the proliferation of meaning...the author is not an indefinite source of significations which fill the work; the author does not precede the works, he is a certain functional principle by which, in our culture, one limits, excludes, and chooses; ...[17]

The courts therefore attempt to endow legislation with what Foucault calls the *author-function* in order to allow them to insist on a single meaning for the Act. But as Foucault says, this author is a function rather than a true historical figure. Even with a literary text produced by a single "author" it impossible to make a straight equation between the author and the message of the text. Even in this case there is a plurality of self. How more impossible must it be to determine a unitary self in legislation? In fact, the author-function operates in the gap between the author and the plural selves of the text, and in a way to limit the availability of those textual selves.[18]

What is actually occurring is the construction of an author with certain characteristics as a projection of what the courts want the Act to mean:

> ... a projection, in more or less psychologizing terms, of the operations that we force texts to undergo, the connections that we make, the traits that we establish as pertinent, the continuities that we recognise, or the exclusions that we practice.[19]

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17 M Foucault, "What is an Author?" in J Harari (ed.), *Textual Strategies*, Cornell University Press, Ithica, 1979 at 159.

18 n17 at 152.

19 n17 at 150.

Paratexts

Given the courts traditional insistence on finding Parliament's intention only within the words of the text itself, government's have attempted to force the courts to take note of what the Executive arm of the government intends by legislation. In so doing, governments have created for Acts what Genette has called surrounding *paratexts. Paratexts* are a fringe to the text which are:

> always the bearer of authorial commentary, either more or less legitimated by the author, [and which] constitutes, between the text and what lies outside it, a zone not just of transition, but of *transaction:* the privileged site of a pragmatics and of a strategy, of an action on the public in the service, well or badly understood and accomplished, of a better reception of the text and a more pertinent reading - more pertinent, naturally, in the eyes of the author and his allies.[20]

The *paratext* is defined by Genette to be of two types. *Peritexts* are those paratexts that have a positioned relationship to the text itself, such as the title or preface, or even a position within the text, such as chapter headings or footnotes. *Epitexts* those paratexts that are situated outside the text, such as media interviews with the author, commentaries on the text or personal recommendations from friends that the reader has encountered, which, although not in a positioned relationship to the text, nevertheless influence the reader's approach to the text. *Paratexts* can be created by the author for varying reasons, but for the purposes of Acts of Parliament the most pertinent purpose is that of authorial intention. That is, an attempt to alert the reader to the meaning of the text that the author intended the text to have.

Further in order to give these *paratexts* strong pragmatic status the Parliaments have passed Acts Interpretation Acts (themselves *paratexts*) which mandate the court's consideration of a list of *paratexts*.[21] In relation to *epitexts* these include pre-existing *paratexts* such as Government commissioned committees, investigations and reports and relevant international treaties the Parliament has entered into and contemporary *paratexts* such as the

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[20] G Genette, "Introduction to the Paratext" 22 (1992) *New Literary History* 261 at 261-62.

[21] See, for example, *Acts Interpretation Act* 1901 (Cth) s15AB.

[22] Cross & Harris, n1 at 97ff.

Minister's Second Reading Speech to the House and Explanatory Memoranda tabled in association with the Bill. There is also a species of highly significant subsequent *paratexts* which the court will be bound by; these are any court decisions on the Act which consitute precedents (though the pragmatic status of these decisions are determined by both the position of the previous court in the overall court hierarchy and the factual and legal issues dealt with in the previous case, relative to the current case).[22]

Within the text itself are a number of *peritexts* that influence the courts. Courts will be influenced by the long heading of Acts (a formal title which outlines the aim of the Act), any sections stating the intention of Parliament in passing the law, and any definitions within the Act.[23] Finally there are also important factual *paratexts* that influence the courts such as the fact that the text in question was passed by NSW Parliament (and therefore is a law that the courts must interpret) and the whole genre of statutory interpretation the court will operate within as it interprets the Act's meaning.

It is worth remembering however that all of these *paratexts* influence rather than determine the court's interpretation. As Genette says:

> No matter what aesthetic or ideological pretensions ("fine title", preface-manifesto)...the author puts into it, a paratextual element is always subordinate to "its" text ...[24]

Possible Intertexts

So far we have seen that the concept of the death of the author operates within the interpretation of statute law to privilege the role of the reader (the courts) over the intentions of the author (Parliament) but that the author attempts to maintain some influence through the production of *paratexts*. However it has also been seen that it is convenient for the courts to continue to insist that the author's intentions are paramount in order to legitimate the courts closing of meaning and imposition of a unitary interpretation of Acts of Parliament.

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23 Pearce & Geddes, n10 at 115ff.

24 Genette, n20 at 269.

In undertaking this fictionalised method the courts operate within a large number of intertexts that permeate the words of the Act and the court's understanding of them. The need of the courts to impose a unitary meaning is precisely because the Act is a text. To quote Barthes, the text of an Act is an irreducible plurality of meanings. It is a tissue made up of the "stereographic plurality of its weave of signifiers".[25] In terms of Kristeva's analysis of Bakhtin, what the courts are attempting to do is to assert the monologic pole of the text at the expense of the dialogic. The dialogic or intertextual nature of the text with its intersections of different meanings has been argued by Bakhtin and Kristeva to involve a sense of carnival - the challenge of laughter to imposed hierarchical linguistic codes.[26] Arguably nowhere is this more clear than in the judgment of courts on the meaning of legislation. Even the divergent understandings of the parties to a court case are testament to the widely different weaves of meaning in any text, and this is not to include the meanings and understandings of those disenfranchised by court proceedings, particularly when those meanings are hostile to the meaning ascribed to the text by the courts.

Kristeva's argument is that the intertextuality of texts means that there are no meanings that are given, all meanings are produced.[27] Thus it is important to have an understanding of the possible meanings that these intertexts can produce in order to fully appreciate the nature of the meanings that the courts determine for an Act. Some of these intertexts come intentionally from the author, others are unintentionally buried in the text. Still others are brought to the text by the reader.

There are intertexts of the historical development of a separation between the courts and Parliament, as a result of which the courts felt they could no longer ascertain Parliament's intention other than through the bare words of the Act, and that concomitantly forced Parliament to draft legislation in a very detailed and formulaic way in order to ensure that the courts enforced legislation in a way that the drafters had intended.[28] Thus there is a highly complex and convoluted style of expression in the legislative

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[25] Barthes, n11 at 159.

[26] J Still & M Worton, "Introduction" in J Still & M Worton (eds), *Intertextuality: Theories and Practices*, Manchester University Press, Manchester, 1990 at 16-17.

[27] n26 at 16.

[28] For example, see T Plucknett, *A Concise History of the Common Law*, 4th ed, Butterworths, London, 1948 at 313-323.

texts and much of the phraseology is based on statutory drafting intertexts that are unknown to the non-lawyer.[29]

Then there are the intertexts of previous legislation on the topic in the area that influence the approach the drafter took in constructing the Act. There are intertexts of legislative powers and procedures and the administration of laws. All of these intertexts are to a large extent absorbed by the drafter and are intentionally used to weave the text.

There are also a large number of intertexts that the drafter may be unaware of that might add to the stereophony of the text. For example the words that the drafter uses may have been previously used in other legislation and the courts may have given that use of the word a different meaning to the one intended by the drafter. If so, the intertext of precedent might mean that the courts will decide to use the previously defined meaning and not the one the drafter intends. Or legislation created at a later date might conflict to some extent with the intended meaning of the text. If so another intertext will require that the earlier text be restricted by the later.

All of these intertexts are however part of what Genette might call the architextuality of legal discourse Genette defines *architexts* as the set of categories such as genres or themes that help to define any individual text.[30] Thus the meaning of legal texts can be limited by seeing them as situated within a genre defined by acceptance of standard and authorised methods of interpretation. Intertextualities brought out of the text by the non-lawyer reader are not so likely to conform to such a genre. In the case of the judges this element is unlikely to be as great, given their acceptance of the architext and their years of training in reading legal texts in this architextural tradition. However, also important but largely unacknowledged are the judge's own assumptions on the role of government and the courts, their preferred models of society and their personal opinions of the actors in the courtroom drama. To the extent these personal intertexts diverge from the intertexts used by the drafters an element of carnival is introduced. Others readers may have very strong elements of carnival in their interpretation. Thus a homeless person, a land owner, a lawyer, a politician, an anarchist, and a refugee

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29 For example, there is an intertext based on the phrase, *generalia specialibus non derogant* which states that if, in interpreting legislation, there is a conflict between general and specific provisions, the specific provisions prevail. See Pearce & Geddes, n10 at 85ff.

30 Genette, n20.

from a totalitarian state will all emphasise different intertexts in the texts and produce different degrees of carnival. While a judge's degree of carnival might be lessened by their training it is unlikely to have been removed entirely.

Obligatory Reader-Response

So are these myriad of intertexts without limit or constraint or is there some boundary on the meaning of texts? When the courts search for a meaning in legislation is it a total fiction or do they apply certain elements of the texts which constrain certain meanings? This question has been considered in detail by Michael Riffaterre and by Laurent Jenny. Riffaterre argues that it is impossible to read a text in a literary way (ie as a text rather than just a collection of words) without a presupposition of intertexts. He then argues that the text contains certain pointers to intertexts that the readers' presuppositions react with. The reader becomes aware of these references to intertexts, gaps in the text or, as he puts it, *ungrammaticalities.* Intertextual connection take place when the reader's attention is triggered by the clues mentioned above, by intratextual anomalies - obscure wordings, phrasings that the context alone will not suffice to explain - in short, ungrammaticalities within the idioletic norm (though not necessarily ungrammaticalities vis-a-vis the sociolect) which are traces left by the absent intertext, signs of an incompleteness to be completed elsewhere. These, in turn, are enough to set in train an intertextual reading, even if the intertext is not yet known or has been lost with the tradition it reflected.[31] While the reader may never fully understand the significance of these intertexts the reader is obliged to acknowledge their presence. Following Durida, he argues that context in which words are used in a text often enforce an ambiguity of meaning onto the reader which he refers to as *syllepis.* For example, texts often contain words which have both a literal and figurative meaning. The way in which the text ties both meanings together in an undecidable way is, Riffaterre argues, a pointer to an intertext which may resolve the ambiguity.[32]

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[31] M Riffaterre, "Syllepsis" [1980] *Critical Inquiry* 625 at 627.

[32] n31 at 629.

Riffaterre draws a distinction between these *sylleptic* intertexts and mere thematic ideas. He argues that something is only an intertext if an extra piece of information is needed before meaning can be made of the text. By contrast texts that follow themes are within themselves grammatical and self sufficent, all the theme does is add greater depth to the meaning. This extra meaning is aelatory; it is not necessary to understand the text's meaning .[33]

It should be pointed out that the fundamental problem with Riffaterre's analysis is that it assumes a normative form of reading.[34] Essentially his argument makes sense if it is assumed that the reader wishes to approach the author's understanding of the text, with possibly an enhancement of that understanding. In such cases the *ungrammaticalities* are gaps and prompts to the reader to search for intertexts. But if the reader is approaching the text in a subversive or unothodox way these gaps may be celebrated in themselves or even be unnoticed. Thus in the case discussed below the intertexts of private ownership and the need to define boundaries of privately owned land may not be prompted to the mind of a reader who approaches the text believing it to be a coded message about troop movements or who believes it is a line of nonsense verse.[35]

By contrast Laurent Jenny sees the overall thematic devices as predominantly intertexts.[36] As long as the theme or genre has ceased to develop and has a set pattern then it can be seen as a weak intertext with the more specific *syllepsis* form as strong intertexts. Jenny is a necessary corrective to Riffaterre's concentration on linguistic minutiae as providing intertexts, focusing instead on the overall intertexts that create the genres in which a text is understood. As Frow puts it, the starting point of analysis is not the linguistic textual ordering but "an assessment of the strategic value (the fruitfulness, the pleasure, the didactic or political interest) of a particular

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33 M Riffaterre, "Compulsory Reader Response" in J Still & M Worton (eds), *Intertextuality: Theories and Practices*, Manchester University Press, Manchester, 1990 at 61.

34 J Frow, *Marxism and Literary History*, Basil Blackwell, Oxford, 1986 at 154.

35 Riffaterre would presumably counter that the correct intertexts are not ideological in nature. Ideology comes from deciding to accept or reject the intertext and that the way in which the text is approached is itself an intertext.

36 L Jenny, "The Strategy of Form", in T Todoror (ed) (trans R Carter), F*rench Literacy Theory Today*, Cambridge, 1982 at 42.

construction of relevant relations".[37] Thus Jenny argues that the overall genres that texts operate in, refer to or subvert can be seen as intertexts or *architexts.*

Googoorewon Pty Ltd v Amatek Pty Ltd

In this case the issue for decision concerned the meaning of one word in the *Encroachment of Buildings Act* 1922 (NSW). The word was "encroachment". Googoorewon and Amatek were owners of adjacent blocks of land near Bowral. When the blocks had been bought both parties had misunderstood where the boundary of their properties lay and as a result Googoorewon had built a commercial nursery on part of Amatek's land. In fact, most of the buildings were constructed entirely on Amatek's land. The law is that any building on land is seen as part of the land itself. Therefore the nursery was actually owned by Amatek even though built by Googoorewon. The *Encroachment of Buildings Act* was designed to alleviate these sort of problems by giving the court the power to order the owner of the land to sell that portion of the land to the encroaching builder at a fair price. The issue in this case was whether the word encroachment required a portion of the building to be on the builder's own land and to "encroach" onto the neighbour's property or whether "encroachment" also included buildings built wholly on the neighbouring land. As a text in its own right this judgment contains a myriad of intertexts, quotations and allusions. However, this paper will only focus on the evidence it contains of how Clarke JA, as a reader, approached the meaning of the text in the Act.

The text which Clarke JA is examining is section 3(1) of the Act. It provides:

> Either an adjacent owner or an encroaching owner may apply to the court for relief under this Act in respect of any encroachment.

The judge begins his analysis by applying the intertextual approach known in legal analysis as "literal interpretation". This is very similar in effect to Riffaterre's "*ungrammaticalities*" approach. The judge looks at the word encroachment and tries to determine its meaning and significance. Firstly, the importance of the word to the section and the Act suggests to

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[37] Frow, n34 at 157.

the judge that the word should have been further defined by the author. Consequently he looks for the author's *peritext* of definition and finds in section 2 a definition of encroachment. This is:

> "Encroachment" means encroachment by a building, and includes encroachment by overhang of any part as well as encroachment by intrusion of any part in or upon the soil.

But he finds that this intertextual lead is negated by the definition as it does not refer to a building built wholly on other land and in fact specifically points the judge to other intertexts by stating that encroachment "*includes* encroachment by overhang":

> It should be noted at the outset that the definition of "encroachment" in s2 of the Act throws little light on the problem. The definition is in these terms:
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> "Encroachment' means encroachment by a building, and includes encroachment by overhang of any part as well as encroachment by intrusion of any part in or upon the soil."
>
> The purpose of the inclusive part of the definition is clearly to include "overhangs" within "encroachment" but neither that part of the definition nor the reference to "part" of a building provides any guidance, in my opinion, on the present problem."[38]

Another legal interpretation intertext applied to this phrase means the author has specifically meant to not restrict other meanings of the word. The author is in fact explicitly stating that readers must search for other intertexts to find the meaning of the word.

Having been unable to use this standard *peritextual* approach the judge then turns back to the word itself and searches for an intertextual meaning that will resolve the ungrammaticality. The first intertextual source he turns to are dictionary meanings suggested to him by the parties. These dictionaries are essentially compendiums of possible intertextual meanings. The judge examines these sources to see if any appear to him to be true intertexts in this situation. What he finds is that there is a suggestion in these meanings that encroaching buildings must be built across a boundary.

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[38] Googoorewon Pty Ltd v Amatek Pty Ltd (1991) *25 NSWLR 330* at 338

Thus:

> The respondent sought to support his Honour's construction of the Act in three ways. First, he submitted that the word "encroach" is usually used to denote an intrusion across a boundary onto the lands of another. For instance, the *Shorter Oxford English Dictionary* defines encroach, relevantly, in these terms: "To trench or intrude usurpingly (esp by insidious or gradual advances) on the territory or rights of another; to make gradual inroads on; to intrude beyond natural or conventional limits:" see also *Macquarie Dictionary* (at 592).
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> Furthermore, in Skeats, *Concise Etymological Dictionary of the English Language* the following appears: "Encroach - to hook away, catch in a hook", and specific reference is made to the French verb "accrocher" which means "to hook or catch", as in "to hook a fish". The notion being conveyed, according to the respondent's argument, being a reaching out from one's own land to that of another.[39]

But the judge realises that he is examining a text and as such it contains a multiplicity of meanings. He is therefore not satisfied to apply the first possible meaning he finds. His next step is return to the text and to try to place it within the context of the larger text from which it was drawn, namely the Act as a whole. This is another standard intertextual strategy of courts and one that drafters of legislation are aware of.[40] What is fascinating from an intertextual point of view is the way that the judge is negotiating his way between competing understandings of the text urged by each party.

Amatek's lawyers argue that the only possible intertexts are those relating to overhanging buildings because the overall context of the Act impels this meaning and particularly because the grammatical meaning of other passages make any other intertext impossible. Implicit in this whole argument is the underlying intertext that the text conforms to the norms of its genre and does not take a poetical approach to meaning within it.

> Thirdly, particular provisions in the Act were consistent only with the construction adopted by his Honour. In this respect Mr Downes QC, senior counsel for the respondent, pointed to a number of sections but it is necessary to look at two only for they provide his strongest support.

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[39] n38.

[40] The rule is that of *noscitur a sociis* (the meaning of a word is to be determined by its context)

They are the definition of "subject land" which "rneans that part of the land over which an encroachment extends" (s2), and s3(2)(b) which reads:

On the application the court may make such orders as it may deem just with respect to -

(b) the conveyance transfer or lease of the subject land to the encroaching owner, or the grant to him of any estate or interest therein or any easement right or privilege in relation thereto."

It was submitted that the definition of "subject land" is consistent only with the "encroachment" having the more limited meaning. Even greater emphasis was placed, however, on s3(2)(b) of the Act for, as counsel pointed out, little purpose would be served in the transfer of the "subject land" if, as in the present case, that land was wholly outside the encroaching owner's land and was not contiguous to the boundary between the two allotments.

This is, I recognise, a powerful argument for it could hardly be supposed that the legislature would empower a court to order the transfer of a block of land to a person who could not gain access to it.[41]

Finally, Amatek's lawyers urge on the judge the important intertexts of precedent cases. They refer to two cases *Bolton v. Clutterbuck and LDJ Holland Investments Pty Ltd v. Howard.* While both of these cases refer to other Acts, they do deal with the encroachment issue. The interesting point here is the way in which Clarke JA deals with these cases. Applying the *ratio decidendi/obiter dicta* intertexts mentioned at the beginning of the paper he decides (in a difficult passage) that these cases are not intertexts for s3(1) by deciding that the *ratio* in both cases did not deal with the application of s3(1) which he is faced with.

The first was Bolton v. Clutterbuck [1955] SASR 253. In that case the owner of land upon which two adjoining two-storey buildings were erected subdivided the land in such a manner that one lot had the whole of the northern building and a portion of the southern building, 6 feet wide, on it. That lot was then sold to a purchaser and some years later the other lot was also sold. All parties were aware, at all relevant times, that portion of the southern building overlapped on to C's land.

[41] n38 at 338-39.

> The purchaser of the southern lot brought an application for relief under the *Encroachments Act* 1944 (SA). Ross J rejected the application holding that no encroachment had been established. *Although the judge appears to have placed some emphasis on the lack of evidence of any error, mistake or negligence, the better view would seem to be that his Honour regarded the element of intrusion as essential to encroachment and found that element missing in that case.*
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> The other decision was that of Holland J in L D J Investments Pty Ltd v. Howard (1981) 3 BPR 9614. Here the owner of a lot in a strata plan sought an order under the Act in respect of a wall which was wholly within his neighbour's lot. The claim had no substance because the wall had not been constructed by the applicant and he had no possible claim to it. The reason he brought the application was that he had previously understood that portion of the lot on one side of the wall belonged to him. That was a mistaken belief and he in fact had no title to that area of land. His claim for relief under the Act, which was wholly misconceived, was brought as a defensive measure in an endeavour to resist the other party's claim to possession of the land. *The decision was clearly correct and does not afford any assistance to the respondent.* So much Mr Downes conceded but he relies on the following statement in the judgment (at 9616): "...The word "building" is defined to include a wall but even then the concept is of one owner's wall crossing his boundary into another's land. See Bolton..."[42]

Having applied a Riffaterrian analysis to the *syllepsis* in the word encroachment Clarke JA remains unsatisfied he has discovered the correct intertextual reference. He therefore turns to the approach emphasised by Jenny of trying to interpret the word through the lens of the text's overall genre or theme. To do this he relies on the author's *paratexts.* The judge examines the *peritext* of the Act's long heading and the overall context of the section. This is enough for him to decide that the intertext by which he should interpret encroachment is one of an authorial intention to give the court a wide discretion. He backs up this conclusion by reference to the *epitexts* of the Second Reading Speech and the *Interpretation Act 1987.*

> Notwithstanding the force of these submissions I am of opinion that broader considerations should determine the answer to the question.

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[42] n38 at 339. Author's emphasis.

> The Act was, clearly enough, passed to deal with the troublesome situations which arose when persons mistook the location of the boundaries of their land and erected buildings on the land of others. The legislative means adopted for dealing with the situation was to furnish this Court with a wide discretionary power to grant relief whenever an encroachment had occurred. That relief includes the power to order the payment of compensation, the transfer or grant of other interests in land and the removal of the encroachment.[43]
>
> Although the Court's attention is specifically directed to a number of matters which are set out in s3(3) of the Act it may take other matters into consideration.
>
> That this was the purpose of the Act is, I think, beyond doubt. It emerges clearly enough from the various provisions of the Act and is implicit in the long heading which reads "An Act to make provision for the adjustment of boundaries where buildings encroach on adjoining land; to facilitate the determination of boundaries; and for purposes connected therewith." For these reasons there is no occasion to look beyond the Act itself in order to ascertain its purpose. If it were necessary to go beyond the Act a reading of the Second Reading Speech would emphatically confirm the purpose as being to remedy the mischief which originally resulted from inaccurate surveying techniques. It is a fundamental rule of statutory interpretation that a construction which promotes the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object: *Interpretation Act 1987*, s33.[44]

The judge also refers to another *architextual* approach to interpretation. This is that if the text falls within the genre of a "remedial" statute it should be construed broadly, an approach which he also bases on precedent intertexts.

> The statute is remedial in character and accordingly should be so construed so as to give the most complete remedy which is consistent "with the actual language employed" and to which its words "are fairly open": *Khoury v. Government Insurance Office of New South Wales*, (1984)

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[43] n38 at 339.

[44] n38 at 339-40.

> 58 ALJR 502 at 508; 54 ALR 639 at 649-650; *Kebby v. Waldron* (1943) 43 SR (NSW) 342; 60 WN (NSW) 218; Butler v. Fife Coal Co, Ltd [1912] AC 149 at 178-179 and *Accident Insurance Mutual Ltd v. Sullivan* (1987) 7 NSWLR 65 at 68.[45]

But he is concerned that this comparatively dramatic use of thematic approaches and generalised *paratexts* might highlight his assertion of the reader's right to interpret the text. Hastening to dispel this idea Clarke constructs an *author-function* by referring to the intertext of *Kingston v. Keprose Pty Ltd.* He quotes another judge's comments:

> But as McHugh JA, as he then was, said in *Kingston v. Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423:
>
> > But first and last the function of the court remains one of construction and not legislation....
> >
> > Purposive construction often requires a sophisticated analysis to determine the legislative purpose and a discriminating judgment as to where the boundary of construction ends and legislation begins. But it is the technique best calculated to give effect to the legislative intention and to deal with the detailed and diverse factual patterns which the legislature cannot always foresee but must have intended to deal with if the purpose of the legislation was to be achieved.[46]

No matter how "sophisticated" the approach taken might be it remains only a means of giving effect to the "legislative intention" in situations that "the legislature cannot always foresee but must have intended to deal with".

The judge then refers to another case which he claims supports his interpretation, *Earl of Lisburne v. Davies.* This reference highlights that despite the judge's claim that he has found the unitary meaning of the text and that all he is doing is giving effect to Parliament's interpretation there remains a very strong control by the reader over a possible multiplicity of meaning. The two previous cases urged as precedents by Amatek's lawyers were recent Australian cases dealing with buildings. Yet using the concepts of *ratio* and *obiter* Clarke JA decided that they were not intertexts. On the other hand *Earl of Lisburne*, an 1866 English case about the rights of landlords and tenants, was considered by the judge to be an intertext.

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[45] n38 at 340.

[46] n38 at 340.

> Although I would accept that the word "encroach" is more readily understood to have the meaning which the appellant ascribes to it the decision in the *Earl of Lisburne v. Davies* (1866) LR 1 CP 259, exemplifies its capacity to bear the wider meaning urged by the appellant. Although the meaning of the word was not in question in that case the enclosure by a tenant of a section of waste land which was not contiguous to the land occupied by him was universally described as an "encroachment". That meaning of the word where used in the Act is, in my opinion, wholly consistent with the object of the Act.[47]
>
> ...
>
> In my opinion the construction for which the appellant contends is fairly open on the words of the Act and, given that Mr Plowman's mistaken belief as to the distance of the boundary led to his construction of the buildings on the wrong allotment, should be adopted in preference to one which serves considerably to narrow the work which the Act is capable of performing.[48]

The High Court

But Clarke JA's attempted closure of meaning does not survive a review by an even more privileged group of readers, the High Court. Despite agreement with this approach by his fellow judges of appeal, the High Court unanimously overturns Clarke JA's reading on appeal. On almost all aspects of Clarke's judgment, the High Court takes the other view. The court considers that the intertext of precedent cases on landlord and tenants, does not relate to the syllepsis created by the word encroachment:

> As a matter of ordinary language, "encroachment" is a term appropriate to describe either the action of a person who intrudes upon land or rights to which he has no title or the intrusion by some inanimate thing on an area broader than the area properly or previously occupied by it. The term is used in the former sense in a line of cases in which *Kingsmill v. Millard* ((8) (1855) 11 Ex 313 (156 ER 849)) is the leading authority. The basic principle on which these cases proceed is that, as

47 n38 at 340.

48 n38 at 340

> between a landlord and a tenant who has encroached during his term on land not held under the tenancy, the area encroached upon is presumed to be part of the holding to be rendered up at the end of the term...These cases are founded on a kind of estoppel as between the landlord and the tenant which precludes the tenant from denying the landlord's title not only to the land demised but also to land of which the tenant got possession "by virtue of being tenant of the demised premises, and (which) he occupied ... as part of these premises"... That being the nature of the principle, it is not surprising that the principle extends to land which, though adjacent to the holding, is not strictly contiguous with it ((12) *Earl of Lisburne v. Davies* (1866) LR 1 CP 259.).
>
> In construing the Act and defining its purpose, the Court of Appeal assumed that there is some analogy between encroachments to which the principle of these cases applies and encroachments for the purposes of the Act. ...Clarke JA, with whose judgment Kirby P agreed, held that "encroachment" in the Act was a term wide enough to include a case where the land encroached upon was not contiguous with the land of the person encroaching. ...
>
> There is, however, no valid analogy between an "encroachment" as that term is understood for the purpose of regulating the relationship of landlord and tenant and an "encroachment" as defined by an Act which authorizes the expropriation of a person's land by his neighbour.[49]

Thus they dismiss Clarke JA's attempt to close the meaning using the intertext of *Earl of Lisburne v Davies*. They also reject Clarke JA's use of *architextual paratexts*:

> The purpose of the Act is to be ascertained from its language. So far as one may define the purpose of the Act from its long title, that purpose does not extend to the conferring of a general power to change the boundaries between contiguous parcels of land. It is an Act "to make provision for the adjustment of boundaries *where buildings encroach on adjoining land*; to facilitate *the determination of boundaries*; and for purposes connected therewith". The twin purposes of the Act are to facilitate the determination of existing boundaries (provided for by s9) and to permit the adjustment of boundaries when, but only when,

[49] *Amatek Ltd v. Googoorewon Pty Ltd* (1993) 176 CLR 471 at 475-7.

buildings encroach on adjoining land (provided for by s3). The language of the Act shows clearly that the encroachment to which it relates is not an encroachment by a person but an encroachment by a building: the definition of "encroachment" in s2 explicitly says so. The term is defined by extension to include "encroachment by overhang *of any part*" or "by intrusion of *any part* in or upon the soil". By the definition of "subject land", the land of the "adjacent owner" which the court may order to be conveyed, transferred or leased to the encroaching owner pursuant to s3(2)(b) is only "that part of the (adjacent owner's) land *over which* an encroachment extends". The subject land is thus identified as the land vertically under the encroachment. And in s9, which authorizes an application to the court by either of the owners of contiguous parcels of land to determine the true boundary between their parcels, the jurisdiction is limited to cases where a question arises "whether *an existing building encroaches or a proposed building will encroach* beyond the boundary".

The encroachment by a building of which the Act is speaking is a horizontal encroachment *"beyond the boundary"* between the land of the encroaching owner and the land of the adjoining owner. The definition of "encroaching owner" makes it clear that the encroaching building *extends beyond the boundary* of the encroaching owner's land. And in s5, which provides for the creation of a charge on the land of the encroaching owner, that land is described as "the parcel of land *contiguous to the boundary beyond which the encroachment extends*, or such part thereof as the court may specify ...". Thus an "encroachment" under the Act is an encroachment by a building that traverses the "boundary" between the contiguous parcels of land.

The respondent's argument that persons, not buildings, encroach cannot withstand the clear terms of the legislation. Section 3 of the Act is remedial, but it applies only when a building encroaches from the land of the encroaching owner across the boundary on to the contiguous land of the adjacent owner. This is the view of the Act that has hitherto been taken ((14) See *LDJ Investments Pty Ltd v. Howard* (1981) 3 BPR 9614, at p 9616; Butterworth's Conveyancing Service New South Wales, par.11440; see also *Bolton v. Clutterbuck* (1955) SASR 253, at p 264.).[50]

[50] n49 at 477-8.

In so doing the High Court asserts the intertextual nature of *LDJ Investments Pty. Ltd. v. Howard Bolton v. Clutterbuck* which Clarke JA had dismissed as being irrelevant. The final outcome of the case therefore emphasises that despite the attempt to close off meaning, the harder the courts attempt to do so, the more meaning multiplies. It is only the externally imposed normativity of the status in the legal system given to the High Court that privileges its meaning over others.

Conclusion

In conclusion, Clarke JA's judgment is an interesting commentary on the limits of Riffaterre's *syllepsis* approach to intertextuality. Even in the most normative of environments the *ungrammaticality* of a text does not always provide a closure of meaning for an expert in intertextuality. Clarke JA finds that the most satisfactory solution is to use the *syllepsis* approach to narrow the range of meanings but then to choose a meaning based on an *author-function* construction and reliance on accordance with the text's *architextuality*.

Law is also possibly the most extreme opposite to the romantic ideal of the author. In the legal environment the role assumed by the literary critic in literary circles is mandated and enforced by the courts. For law, the critic (ie. the court) is not just an expert, it is the definer of meaning. However in its attempts to so define meaning, it instead creates further texts, intertexts and amplification of the stereophonic quality of meaning. In the course of attempting to define the meaning of one word Clarke JA creates pages of text, all with their own complexity of possible meaning. Yet paradoxically, it is in this seemingly bewildering cacophony of meaning that we find meaning and certainty in our legal system.