

# Double trouble: the distinction between the grammarian's and the lawyer's conceptions of 'joint liability'

Ben Staveley

## The grammatical concept of distributivity explained

Grammarians draw a distinction between distributive and non-distributive interpretations of certain utterances<sup>1</sup>.

The concept of distributivity relates to how an expression referring to a number of items is to be interpreted. By *number* here is meant more than one: in other words, however expressed, the expression has a plural meaning. The essence of a distributive interpretation is that the items in the class are viewed separately rather than together. The non-distributive interpretation is that the items are viewed together.

In what follows, the focus is on the expression in question representing the subject of the sentence. This is because the objective of the article is to examine the relationship between grammatical and contractual concepts of liability, and the classic formula used by drafters to impose contractual liability is to cast the person obliged as the grammatical subject, as in "*The Seller shall transfer the shares to the Buyer.*"

The items comprising the plural subject can be expressed either as a plural noun or as two nouns in coordination separated by "*and*". Either form of expression is consistent with a distributive interpretation or a non-distributive one. With "*The Brontë sisters wrote compellingly, but arguably Dickens and Tolstoy wrote greater novels*" we understand that both the plural "*the Brontë sisters*" and the coordination "*Dickens and Tolstoy*" are to be interpreted distributively: the quality of writing "*compellingly*" is ascribed to each of the sisters, viewed *separately*, and the quality of writing "*greater novels*" is also ascribed to Dickens and Tolstoy *separately*. A non-distributive interpretation would be mistaken: it would mean that they collaborated, or at least that the speaker asserted that they did.

However, with "*The Marx Brothers were funny, but Laurel and Hardy were funnier still*", we naturally interpret the expressions "*The Marx Brothers*" (plural) and "*Laurel and Hardy*" (a coordination) collectively, understanding that the speaker is unlikely to be thinking of each of the Marx Brothers, or probably Laurel and Hardy either, one by one. In grammatical terms, the expression "*were funny*" in the first half of the sentence is a predicate that is applied to the Marx Brothers viewed, as it were, as a single unit. Similarly we understand the predicate "*were funnier still*" as applying to Laurel and Hardy as a double act, not to each as a separate performer.

---

<sup>1</sup> "*Utterance*" is intended to be understood as a neutral term embracing both spoken and written forms.

It follows that, whether a speaker uses a plural noun or a coordination separated by “*and*” as the subject of a sentence, there is an open grammatical question whether the subject is to be understood distributively or non-distributively. The non-distributive interpretation is sometimes referred to grammatically as a “joint” interpretation<sup>2</sup>, but here is referred to as a “collective” interpretation to avoid confusion with the contractual concept of joint and several liability discussed below.

Most of the time, in ordinary speech, the context of the utterance allows us to understand which interpretation the speaker means us to adopt. In the examples above, a cursory knowledge of the history of literature or film allows us to choose between the rival grammatical readings (unless we suspect the speaker of making a historically controversial point). But the context may not always be so helpful. And if an ambiguity as between a distributive and a collective interpretation features in a contract, the divergence of interests between the parties may induce them to argue for rival interpretations.

Practising lawyers need to understand both the potential for such an ambiguity to arise, and how to draft so as to prevent it arising. And they also need to understand (so as to advise the parties to the contract) how the grammatical question of distributive versus collective interpretation interrelates with the contractual question of several versus joint liability. The two can easily be confused.

### **A closer look at distributivity in some non-contractual contexts**

#### *(a) Single task with solo performance*

Assume that Andrew and Bob are two local taxi drivers, each operating his own business. Nonetheless they cooperate informally in practice to help each other on occasions where one is busy and the other isn't. Knowing this, I may ring just Andrew to arrange a lift to the station next Monday morning, trusting that if it turns out that he can't do it because one of his regular customers turns out to need his services on Monday morning, he will arrange for Bob to pick me up instead.

Though these arrangements may well give rise to a contract, they may be the subject of a non-contractual utterance. If I were asked by my wife “*How are you planning to get to the station on Monday morning?*” I would probably reply “*Andrew or Bob will drive me there*”, using “*or*” in the coordination rather than “*and*”.

There is no risk of grammatical confusion here. My wife will readily understand that I mean that it could be Andrew and it could be Bob, though unless she knows about the cooperation arrangements between them, she might be puzzled as to why I am being so vague.

#### *(b) Repeated tasks with solo performance*

---

<sup>2</sup> See for example *The Cambridge Grammar of English Literature* (edited by Rodney Huddleston and Geoffrey K. Pullum), chapter 15 pp1282-4.

If I need the task to be repeated, I might make a similar arrangement with Andrew for multiple journeys, again to be undertaken by either Andrew or Bob. I might report this arrangement by saying to a listener “*Andrew or Bob will be driving me to the station every Monday morning between now and Christmas.*”

But it is just as plausible that I would use “*and*” rather than “*or*” and say “*Andrew and Bob will be driving me to the station every Monday morning between now and Christmas.*”

When I use the latter formulation, I am plainly not intending my listener to interpret “*A and B*” collectively. A collective interpretation involves the predicate applying to the plural subject looked at together. So it is consistent only with both Andrew *and* Bob turning up every Monday morning, which neither they nor I expect: I want only one of them to turn up, having sorted out between themselves on each occasion which of them it will be.

But if the interpretation I intend is not truly a collective interpretation, neither can it readily be seen as a distributive interpretation. A distributive interpretation would involve the meaning “*A will drive me to the station every Monday morning ...and Bob will drive me to the station every Monday morning as well*”, which is not what I am trying to convey. On any Monday, I need to take only one trip.

What seems to have happened here is that the “*and*” does not fulfil its usual purpose of signifying a collective meaning. It is closer in meaning to the “*or*” with which I would describe the single trip, as in (a).

In an informal way, if I were to answer a question that focuses more on what *arrangements* I have made for the task than the actual *performance*, I might naturally say “*A and B have agreed to take me to the station every Monday morning...*”, because I am referring to the feature that they have both accepted responsibility. Indeed I might, if a natural worrier, want to sign a contract with them both. This will become significant later.

(c) *Tasks required to be performed together/states*

The Andrew and Bob examples described above are different from a case where there is a single task, but it is understood that both people mentioned have to perform it together. If I report excitedly that “*The Proclaimers will be singing at my daughter’s wedding*”, or I pretend to know them and say “*Charlie and Craig<sup>3</sup> will be singing at my daughter’s wedding*”, I clearly envisage them both appearing at the wedding (and singing at the same time as each other). I am intending the subject of my utterance to be understood collectively. My guests can expect a real Proclaimers set rather than the two separate performances that a distributive interpretation would suggest (“*Charlie will be singing at*

---

<sup>3</sup> The reference is to the brothers Reid who together are The Proclaimers of “*Sunshine on Leith*” fame.

*my daughter's wedding and Craig will be singing at my daughter's wedding, but they will not necessarily be performing together*").

Whatever my intentions on how it should be interpreted, however, my sentence "*Charlie and Craig will be singing at my daughter's wedding*" is grammatically ambiguous<sup>4</sup>. It is consistent with either a collective or distributive interpretation, even if it is likely to be understood in a collective sense by anyone who knew which Charlie and Craig I was referring to. In the same way "*Charlie and Craig are brothers*" – which describes an ongoing *state* rather than a discrete *performance* – is grammatically ambiguous. It could be understood collectively (they are each other's brothers) and would generally be so understood if it is understood that I am talking of that Charlie and Craig in particular. But it is at a grammatical level capable of meaning that they are unrelated, but each has a brother or sister (in other words, that they are brothers of different people). That is a distributive reading: if it is true, "*Charlie is a brother*" and "*Craig is a brother*" are both also true, but without the special meaning (that they are *each other's* brother) applying as it does in the collective interpretation.

(d) *A single task composed of separate elements*

If I say "*Chloe and Dave will move all the contents of my existing office in Manchester to my new office in Leeds*" (Chloe being an IT expert and Dave being a removal man), I might well have arranged for C to come on Monday and D on Wednesday. I trust only C to disconnect and move my computer. They will not need to cooperate or even meet each other. Nonetheless the grammatical interpretation I intend is a collective one rather than a distributive one. It is C and D together to which the predicate "*will move all the contents of my existing office*" applies. It is true neither that C "*will move all the contents of my existing office*" nor that D will do so.

This is something of a special case. It is grammatically ambiguous and my listener may leap to the conclusion that I intend what could be termed a fully collective interpretation (not consistent with C and D coming on separate days) if my office furniture is difficult for one person to lift. If I want to make the meaning clear, I would be better to recast what I say, separately identifying the areas of responsibility: "*Chloe and Dave will respectively move my IT hardware, and all the rest of the contents of my existing office in Manchester, to my new office in Leeds.*"

In this formulation, the word "*respectively*" controls the meaning of the utterance and (although a grammarian would say that it remains a collective interpretation of "*Chloe and Dave*",<sup>5</sup> it achieves

---

<sup>4</sup> It is feasible to argue that "*The Proclaimers will be singing at my daughter's wedding*" is also technically capable as being interpreted distributively, but I would be fairly accused of misleading my listener if I knew that though both members of the group had agreed to appear, they had insisted on performing separately from each other for some reason.

<sup>5</sup> Because the sentence's grammatical predicate, which embraces the whole moving task, is not true of either C or D individually.

something of a similar effect to a distributive interpretation by allocating the components of the predicate between the two protagonists.

*(e) Uncertainty as to whether task single or multiple*

What I say may not make it clear whether I contemplate a single task or a repeated series of tasks. For example, if I say “*Emma and Flo will mow the school playing fields during the summer holidays*”, I may intend to signify either that there will be a single mowing, or by contrast that mowing will be carried out several times during the holidays, maybe once a week. And whichever I am contemplating as the answer to that question, my utterance embodies a different axis of uncertainty: when the mowing happens, do I think that both Emma and Flo will do it, or only one of them?

There are thus four possible interpretations of what I say: the playing fields

- (a) will be mown only once, by either E or F (but I do not know which one)
- (b) will be mown only once, by both of them together
- (c) will be mown more than once, but on each occasion, only E or F will do it on her own
- (d) will be mown more than once, but on each occasion, both E and F will be doing the mowing<sup>6</sup>

If I intend either (b) or (d), I want my listener to adopt a collective interpretation: I might, if I were aware of the potential for misunderstanding, say explicitly *Both Emma and Flo will mow...* or *Emma and Flo will together mow...*

However, if I intend interpretation (c), I intend my utterance to be understood distributively: I envisage that the predicate “*will mow the school playing fields during the summer holidays*” to be true of Emma and to be true of Flo, looked at separately. And interpretation (a) is another pseudo-distributive meaning: as with Andrew and Bob giving me a single lift to the station next Monday, I do not envisage that the predicate will be true of them both. It will only be true of one, though I do not know which. I am more likely to say “*Emma or Flo will mow...*”, unless I am more focussed on the arrangements I have made with them (they both promised me that one of them would do it) than the task itself.

*(f) Positive and negative values*

---

<sup>6</sup> It is also possible, if a bit unlikely, that I contemplate multiple mowing episodes which might be solo efforts or might be done by Emma and Flo together: perhaps the usual routine would involve both of them, but they may agree on a particular occasion that one of them can take the day off. This is mentioned here only to emphasise the range of possible meanings lurking behind what might be thought the simplest of utterances.

A collective interpretation of (in particular) an arithmetic or financial expression is also consistent with one or more of the subjects lacking entirely the quality ascribed to the plural subject in the rest of the sentence. A statement that “*The European subsidiaries were profitable last year*” (if distributively interpreted) is consistent only with each subsidiary, separately viewed, having turned a profit. But a collective interpretation could be consistent with (say) the Dutch, French and Italian subsidiaries all making a loss, provided the German subsidiary made a large enough profit to outweigh the aggregate of those losses.

### **Ambiguities often resolved pragmatically, through context**

What I mean, and what the listener will understand, will often be understood on pragmatic grounds. For example, in the Emma and Flo case, the listener will be guided to an interpretation based on how important I am likely to regard the appearance of the grounds throughout the holiday, the number and size of mowers in the school shed and so on.

The context, indeed often the other content of the sentence in question, may go so far as to *force* either a collective or a distributive interpretation. If I say “*George and Harriet will bring my tandem home from Worcester tomorrow*”, the collective interpretation (they will ride it home together) is just about compulsory: a distributive interpretation would involve George somehow struggling part of the way with it on his own, and the rest of the journey, just as laboriously, being undertaken by Harriet. And if I say “*George and Harriet will buy my Landseer painting of Stirling Castle for £8,000*” the collective meaning (they are buying it together) is equally compelling: the listener will understand that I only have one such painting, whereas a distributive meaning would demand that I had two.

By contrast, “*George and Harriet will carry a rucksack on their walking trip*” is naturally interpreted distributively: because a rucksack is designed to be carried by a single person, the predicate *will carry a rucksack on their walking trip* would raise an incongruous image if it were seen as applying both to both G and to H, viewed together.

But the point that these examples illustrate is that it is context alone, including clues from the rest of the sentence, that drives the listener to the “correct” interpretation. The *grammatical* structure at the heart of each utterance (“*George and Harriet will...*”) is the same in all cases.

### **Scalable tasks**

It might be thought that the distinction between single and multiple tasks is of slender practical importance. For example, the difference in outcomes between the playing fields being mown once and their being mown more than once during the school holidays does not seem a great one, given that the school will be closed the whole time. But the difference in outcomes between a distributive and a collective interpretation comes into sharper focus when the outcome is *scalable*, in other words varies with the number of times the task is performed. If I say “*George and Harriet will bake me a cake on Saturday*”, there is a clear difference in outcomes: a distributive interpretation of the utterance leads to me getting two cakes, but a collective interpretation only one.

And this difference is most obviously different if the predicate relates to payment. “*Ian and Jenny will pay me £1,500 a month to advertise on my website*” could mean that I earn £3,000 monthly if the reading is distributive (they each want to advertise separately) but only £1,500 if the interpretation is a collective one (they want to advertise jointly, perhaps because they co-own a single business).

The difference is enhanced, in a linear variation, if the number of the plural subject is greater: “*Ian, Jenny, Keith and Lisa will pay me £1,500 a month to advertise on my website*” could give me £6,000 a month if distributive, as opposed to the baseline figure of £1,500 that flows from a collective interpretation.

### **The differences between contractual and non-contractual utterances**

If I make an ambiguous utterance in ordinary conversation, what I mean by it can readily be elicited by the person I am speaking to asking me to explain more clearly what I mean. Any temporary misunderstanding can be ironed out as part of the give and take of conversation.

Contractual utterances that are ambiguous may be less easy to sort out, for various reasons:

- (i) a contractual utterance is permanent, not part of the flow of conversation that can be questioned and elucidated by a process of questioning;
- (ii) a contract is not unilateral: it binds two parties<sup>7</sup>, or perhaps more than two; and
- (iii) the long-standing rule is that (except in an action seeking rectification) evidence of the parties’ negotiations, or of their respective subjective intentions in entering into the contract, is inadmissible. Instead, a court must conduct an objective enquiry into what a reasonable person would take the parties to have meant by using the contractual language they did.<sup>8</sup>

---

<sup>7</sup> Leaving aside so-called ‘unilateral contracts’ of the type famously exemplified in *Carlill v Carbolic Smoke Ball Co* [1893] QB 256.

<sup>8</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1)* [1998] 1 All E.R. 98; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38

To this can be added another salient factor: a contract will very often deal in obligations to pay sums of money which, if predicated of a plural subject, are scalable in the same way that a non-contractual utterance like “*Ian, Jenny, Keith and Lisa will pay me £1,500 a month to advertise on my website*” is scalable. And the promises contained in a contract are intended to be legally binding, enforceable by the parties.

It follows that the ambiguities described in the earlier paragraphs, potentially confusing as they are when uttered in a non-contractual context, have a greater capacity for causing difficulties when they are given contractual force. In addition, there are a number of other aspects of contractual language which need to be understood at the same time if the drafter of a contract is to avoid the type of ambiguity that potentially triggers a dispute.

### **Typical contract language: a joint promise does not necessarily connote a joint performance**

The discussion above relates to ordinary utterances. But the language in the examples is very close to contract language (“*Andrew and Bob will be driving me*” etc). Accordingly, though the context considered so far is that of a report of what I understand, or hope, or predict, will happen, the language of a contract involving a formal commitment by someone that it *will* happen starts in a very similar place.

Drafting styles differ, but a contract may often impose an obligation by opening with a preamble (“*It is agreed as follows*” or similar language), and then recording, in separate operative clauses, the obligations of the various parties (“*A shall do X*”, or “*B will do Y*”, or, in the type of case we are considering, “*A and B shall do X*” or “*A and B will do Y*”). The contractual language is very close to a non-contractual utterance, though “*shall*” (unusual in speech) is often selected ahead of “*will*” so as to emphasise the formality of the commitment of the parties to their contractual obligations.

It may be easiest to illustrate how the legal context affects grammatical ambiguity by reconsidering at some of the earlier examples.

It was noted above that if I am referring to a single trip with a single driver, who might be Andrew or Bob, I might most normally say in a non-contractual context “*A or B will drive me<sup>9</sup> to the station next Monday morning*” using “*or*” rather than “*and*”. But if I want to draw up a contract that binds both A and B to agree that one of them will turn up to perform the contractual task, I might well want to have them both sign a contract which states “*A and B shall drive me to the station next Monday morning.*”

---

<sup>9</sup> More usually perhaps my name would appear in a written contract rather than “*me*”. But it is feasible for a contract to be framed more informally, often through my writing the other parties a letter which they both sign. The examples here all assume that this is the form the contracts take.

Why is it natural in this contractual context to use “*A and B*” when, in describing the position in ordinary speech, I would say “*A or B*” will drive me? The reason is that the contract is not conceived of as a description of the activity of driving itself, but records that both A and B are committing to me that one of them will turn up to carry out the journey. The nature of the arrangement is that if they agree between themselves that A will do the trip, but A oversleeps and does not turn up, I feel entitled, under the contract, to ring B up and remonstrate with him. I am entitled in other words to contractual performance from both A and B, and can look to either of them to perform. Whichever of them actually drives me, they have both *promised*.

This leads to the conclusion that there is something different about the construction of ordinary utterances and contractual ones, a point illustrated still more clearly by the case where the contract relates to repeated journeys. We have said that “*A and B will drive me to the station every Monday morning until Christmas*” is, as an ordinary non-contractual utterance, not to be interpreted jointly. It is not the case that the predicate “*will drive me to the station every Monday morning until Christmas*” relates to both of them viewed as a single unit, which is what a grammatical joint interpretation (what has been referred to above as a collective interpretation) entails.

But in a contract to which both A and B are party, the sentence “*A and B shall drive me to the station every Monday morning until Christmas*” is naturally interpreted as a joint commitment, because it relates to the agreement with me, not to their actual driving. In other words it is regarded as equivalent to “*A and B agree that they will drive me to the station every Monday morning between now and Christmas*”, or, more explicitly and accurately, “*A and B agree that one of them will drive me to the station every Monday morning between now and Christmas*.”

This accurately captures the arrangement: the promise is joint, but the performance is individual.

In contractual terms, the quality of the promise itself is the same as it would be in the perhaps more normal case where the joint promise relates to a joint performance, as in “*Charlie and Craig agree to perform together at my daughter’s wedding*” or “*George and Harriet will buy my Landseer painting of Stirling Castle for £8,000*.”

A lawyer describes the legal effect of a joint promise as joint liability, with some knock-on procedural consequences (if I want to enforce a joint promise by A and B to do X, I must take action against them both). But the important thing to recognise at this stage is that (a) whether the promise is a joint one, and (b) whether the expected performance is joint, are two separate questions.

### **The reverse case: individual contractual responsibility for joint performance**

So a joint contractual promise can bind the parties promising jointly to an individual performance. And it is equally possible for an individual party to a contract to accept individual responsibility for a joint performance.

This is at the heart of the contractual concept of joint and several liability. If Charlie and Craig agree that they will perform together at my daughter's wedding, and the contract makes clear that they accept joint and several liability for the performance, the several aspect of this promise is tantamount to a grammatically distributive interpretation of the first<sup>10</sup> "*Charlie and Craig*" in "*Charlie and Craig agree that Charlie and Craig will perform together at my daughter's wedding*". In other words Charlie promises me that "*Charlie and Craig will perform together...*", and Craig *also* agrees with me that "*Charlie and Craig will perform together...*"

Note here that lawyers refer to liability as being joint or joint and several. In other words, "several liability" in this context *presupposes* that the liability is joint: the only question is whether, *as well as* being joint, it is *also* several.

The concept of several liability on its own, therefore, is not a legal term of art. But it is feasible to imagine a case where an identical promise is made by more than one person relating to joint performance by them all, but there is no joint liability. I could for example enter into two separate contracts, one with Charlie and one with Craig, under each of which the relevant brother agrees that they will appear "*together*" at my daughter's wedding. There is then not on the face of it a joint promise at all, just two separate individual promises of a joint performance. Again this illustrates that there is a difference between the status of the contractual commitment (which focusses on agreement or responsibility) and the status of the description of what is to be performed.

In the case of two contracts, as also in the case where there is a single contract with joint and several liability, I can if I choose seek to take action against Charlie alone, or Craig alone, to compensate me for any shortfall in performance. Indeed, if Charlie turned up and was full of remorse for his brother's absence, Craig having insouciantly ignored his promise, I could choose to seek compensation from the innocent Charlie alone, despite Craig's sole responsibility for the lack of performance. If the liability is joint and several, I have the additional option of taking action against them both.

### **Liability for contractual performance must therefore be distinguished from the performance that has been contracted for**

In this type of contractual case, there are therefore two separate questions. First, what is the nature of the performance that has been promised? And secondly, how (and against whom) can that promise (or

---

<sup>10</sup> But not, of course, the second: "*together*" entails that the second "*Charlie and Craig*" is interpreted collectively.

compensation for its non-performance) be enforced? The nature of the liability (separate liability for separate promises, joint liability, or joint and several liability) relates to the second question only.

This means that lurking behind the question of liability may lie an underlying grammatical question of a distributive versus collective interpretation of performance.

Sometimes, this does not always cause any real ambiguity: in “*George and Harriet will buy my Landseer painting of Stirling Castle for £8,000*” there is, at a realistic level, no distributive versus joint question in interpreting what performance I am entitled to: I only have one such painting, so a distributive interpretation (“*George will buy [the painting] for £8,000*” and separately “*Harriet will buy [it] for £8,000*”) is not credible. The only question is whether George’s and Harriet’s liability for the performance is joint, or joint and several. I can never realistically argue that I should get more than £8,000.

But with an action that could be carried out more than once, the question is moot, and potentially controversial if the outcome is, as with payments, scalable. With “*Ian and Jenny will pay me £1,500 a month to advertise on my website*” the liability of Ian and Jenny is on its face joint: it might be joint and several if the contract says so expressly or impliedly.

But whether the liability is joint only, or joint and several, what is it that they have agreed to do? The distributivity versus collective question arises grammatically not only at the level of *responsibility*, but also at the level of *performance*: are they agreeing to pay me £1,500 (on a grammatically joint interpretation of “*Ian and Jenny*”) or £3,000 (on a distributive reading)?

### **Contract drafters often miss these subtleties**

It is perhaps not surprising that lawyers, trained to think about questions of liability more readily than grammatical questions, may overlook the latter. But sometimes they miss both questions, as seen in *Rhinegold Publishing Ltd v Apex Business Development Ltd*<sup>11</sup>. Two companies Rhinegold and Tannhauser owed the more prosaically named Apex an amount of over £50,000 between them, under the terms of two separate debts. Under a settlement agreement designed to stave off winding up, they agreed to compromise the debts. The agreement provided that, after an initial instalment, “*the Companies*” (as Rhinegold and Tannhauser were referred to) “*...shall make Apex twelve payments of £3,500 on or before the last working day of each month...*”

A number of the payments were made, enough to repay all Rhinegold’s debts to Apex; but not enough to pay off the debts owed by Tannhauser. In an action to recover the unpaid amounts, Apex claimed (successfully) that the liability created by the agreement was joint and several. In other words,

---

<sup>11</sup> [2012] EWHC 587 (Ch).

Rhinegold was responsible for paying the agreed instalments in repayment of Tannhauser's debts, not just its own.

In his judgment, Warren J focussed entirely on the question of joint and several liability, without addressing the question whether the obligation for the Companies to pay £3,500 a month was as a grammatical matter to be interpreted distributively (*each* of them had to pay £3,500) or collectively (they had to pay only £3,500 a month *between them*). It is easy to see that as a grammatical matter, either interpretation is possible.<sup>12</sup>

But the feebleness of the drafting is obvious: not only did the drafter fail to make clear whether the liability to meet the obligation was joint and several, he or she also failed to answer the logically prior question of what the obligation was in the first place. Whilst this did not matter in the *Rhinegold* case itself, it is easy to see that it could be, as in the "*Ian and Jenny will pay me £1,500 a month for permission to advertise on my website*" example.

In *AIB Group (UK) Plc v Martin and another*<sup>13</sup>, the House of Lords came close to the analysis suggested in this article. Two business partners, M and G, had entered into a mortgage with AIB on the basis of the bank's standard form to secure a variety borrowings. Some borrowings were by M and G jointly; some were by M alone; and some were by G alone. M and G – their names appearing in coordination separated by "*and*" – were identified as "*the mortgagor*". When the security fell to be enforced, G argued that he was not responsible for borrowings made by M alone.

The question of whether responsibility for the repayment covenants contained in the mortgage was several, or joint and several, was on its face decisively resolved by language providing as follows:

*"If the expression 'the mortgagor' includes more than one person it shall be construed as referring to all and/or any one of those persons and the obligations of such persons hereunder shall be joint and several."*

So responsibility or liability to discharge the "*mortgagor's*" covenants was expressly joint and several. But as Lord Scott of Foscote, giving the leading judgment, recognised, the enquiry did not end there: "*but the critical issue is not whether [G] and [M], as well as jointly covenanting to pay, have severally covenanted to pay. The critical issue is what have they covenanted to pay?*"<sup>14</sup>

Lord Scott recognises that there are two separate questions: that what has been agreed to be done is a logically separate question from who has taken responsibility for it. That there are two questions is slightly obscured by the feature that the answer to the second question turned on the same drafting as

---

<sup>12</sup> Though in fact, having regard to the amount of the debts that were being compromised, the numbers pointed strongly towards the collective interpretation; which is presumably why Warren J did not explicitly deal with the point

<sup>13</sup> [2001] UKHL 63

<sup>14</sup> Loc. cit. at paragraph 40: the emphasis is Lord Scott's.

the answer to the first. The obligation was to discharge the borrowings and other indebtedness of “*the mortgagor*”, and that meant both or either of them, albeit rather clumsily expressed (“*all and/or any one of those persons*”).

Lord Millett gave what was in substance a dissenting judgment.<sup>15</sup> He would have held that the joint liability of M and G related only to their joint borrowings, with G, therefore, not liable for the borrowings of M alone. He expressed it as a distributive construction. And so in a sense it was, but it went rather further than that. On analysis, Lord Millett was really applying a distributive meaning to the concept of joint and several liability *in itself*: separating out the respective strands of responsibility into three (M’s alone, G’s alone and M and G’s together) and allocating them to different components of the contractual task to be performed (to repay M’s indebtedness, to repay G’s indebtedness and to repay M’s and G’s joint indebtedness).<sup>16</sup> But as the rest of their Lordships recognised, it was very difficult to see how that squared with the joint and several liability expressly provided for in the clause defining how “*mortgagor*” should be understood<sup>17</sup>.

If nothing else, the case serves to illustrate how important it is for lawyers to understand, and to reflect in their drafting, the difference between the concepts of identifying the task to be performed and allocating responsibility for it. It is all too easy for drafters to fail to make this clear.<sup>18</sup>

### **Grammatical distributivity and joint liability: unlikely bedfellows**

One of the examples above “*Ian and Jenny will pay me £1,500 a month for permission to advertise on my website*” illustrates another trap. It is one thing for parties who have each agreed to make a payment to acknowledge in the drafting that the payments referred to are due from each of them rather than representing an aggregate sum.

In the example, assume that the bargain is truly that Ian and Jenny (who run different businesses, but know each other and have teamed up to negotiate terms with me) each separately considers that the monthly advertising is worth paying £1,500 a head for. That means that they should be happy to see drafting that states “*Ian and Jenny will pay me £1,500 a month each for permission to advertise on my*

---

<sup>15</sup> Though avoiding actual dissent: he acceded, however reluctantly, to the majority view as expressed by Lord Scott.

<sup>16</sup> A process captured by the Latin phrase *reddendo singula singulis*. This phrase is colourfully exemplified by the relevant entry in Jowett’s dictionary which cites the clause “*If anyone shall draw or load a gun or sword*”. “*Draw*” is interpreted as relating only to “*sword*” and “*load*” to “*gun*”, on the grounds that (as the editors helpfully explain) “*it is impossible to load a sword or draw a gun*”. (The latter part of this is linguistically debatable.)

<sup>17</sup> The word respectively would have helped: see the discussion of Chris and Debbie above.

<sup>18</sup> In Lord Rodger of Earlsferry’s judgment, he says (at paragraph 50): “*I do not question the intellectual respectability of the proposed way of reaching that [viz. Lord Millett’s] preferred] result; I simply do not believe that the result reflects the intention of the parties to this particular agreement*”. In other words, he acknowledges the potential for ambiguity even in language expressly directed at achieving joint and several liability.

website.” “Each” forces a distributive construction grammatically, which entails that “*Ian will pay me £1,500 a month*” and also that “*Jenny will pay me £1,500 a month*”. So it is clear that I am entitled to £3,000 in total.

But it is quite another thing for Ian and Jenny to accept – either expressly or impliedly – contractual joint, or joint and several, liability for this promise to pay me a total of £3,000. If this were the case, it would have the consequence that (for example) Jenny will be responsible to me for the full £3,000 if Ian fails to pay his £1,500, which may well not be the intention. The more likely position is that Ian has agreed to pay me £1,500 and Jenny has agreed to pay me £1,500, but without either expecting to be responsible for the other’s non-payment.

Though the combination of a joint (or joint and several) obligation to make separate payments would be surprising, it is feasible contractually. Joint, or joint and several, liability can arise either because the contract expressly provides so, as in

*“(a) Ian and Jenny will pay me £1,500 a month each for permission to advertise on my website; and*

*(b) they are jointly and severally liable for discharging the obligations imposed by paragraph (a)”*

But joint liability can arise through language that does not refer in express terms to joint liability, but nonetheless suggests it, as in “*Ian and Jenny both agree that each shall pay me £1,500 for permission to advertise on my website.*” On that drafting, the contrast between “*each*” (for the payments) and “*both*” (for the agreement) signifies, at least arguably and perhaps convincingly, that the intention was to create joint liability.

Assuming that the intention is not to create joint liability, the drafter would be better to make it clear that the promise of each is separate and independent from the other. Ideally, Ian and Jenny might prefer to enter into separate contracts with me.<sup>19</sup>

### **Other drafting solutions, and concluding remarks**

We have seen that two separate types of ambiguity – respectively relating to responsibility and performance – can affect the contract. Fortunately, both types of ambiguity can easily be resolved by careful drafting. Language such as that underlined in the examples below can make the position clear:

---

<sup>19</sup> Although I might resist this, perhaps on the grounds that my usual rate for allowing any advertiser on my website is £2,000 per month, but I have conceded a sort of volume discount to Ian and Jenny. That might leave me exposed if Ian cancelled his contract but Jenny wanted to continue with hers. But I could perhaps ask for a clause that allowed me, if either I or J pulled out of his or her contract, to terminate the other contract, or adjust the price.

*“Andrew and Bob both agree that one or other of them will drive me to the station every Monday morning between now and Christmas.”*

Here *both*, because it refers explicitly to the promise, plainly imposes joint liability: if the intention is that the liability is not merely joint but joint and several, that should be explicitly stated. It is clear from “*one or other of them*” that on each Monday, only a single driver is required.

In “*Chloe and Dave will respectively move my IT hardware, and all the rest of the contents of my existing Manchester office, to my new office in Leeds*”, the word “*respectively*” imposes a distributive meaning, allotting to each of them their appointed task. So at the level of performance, I can resist Dave insisting that he is contractually required to interfere with my IT. But it is not clear from this formulation whether they are jointly liable (still less jointly and severally). Joint liability seems unlikely, given the separate allocation of tasks. If the intention was that they should be jointly and severally liable, that would have to be stated. And if the more likely interpretation (that the liability was individual) was intended, the following would be better:

*“(a) Debbie will move my IT hardware from my existing Manchester office to my new office in Leeds.*

*(b) Chris will move the rest of the contents of my existing Manchester office to my new office in Leeds.*

*(c) The promises contained in (a) and (b) do not represent a joint promise, but separate and independent promises on the part of Debbie and Chris respectively.*”

The ambiguities in the Emma and Flo examples can be straightforwardly resolved, for example with “*Emma and Flo will both come to the school at least once a week during the summer holidays to mow the school playing fields*”. Here “*both*” and “*at least once a week*” resolve the uncertainties about whether there is a single episode of mowing, and whether the mowing is a solo effort.

Note that the grammatical problem can easily raise its head at another level. Assume that I say “*Emma and Flo will both come to the school at least once a week during the summer holidays to mow the school playing fields, and every time they do I’ll pay them £50.*” On this drafting, the distributive versus collective uncertainty still arises at the level of the indirect object of the second half of the sentence, represented by the pronoun “*them*”. Do I mean that I’ll pay them £50 in total or £50 each? The single sum of £50 is the collective interpretation, and is probably the way that the listener would naturally understand it. But a distributive interpretation meaning “*£50 each*” is certainly possible, and indeed would be the more likely interpretation of a different sentence “*I tend to give my three grandchildren £50 at Christmas*” (am I really likely to give them £16.66 each or show favouritism by giving them unequal amounts?) So if I want to be clear, I need to say “*£50 to share between them*” or

“£50 *each*”; and if the intention is that E and F’s contractual liability is to be joint or joint and several, I would be better to say this (“*both*” in the sentence as drafted seems to relate to performance rather than the promise).

As so often with questions of contract drafting, therefore, it seems that the difficulty is less in finding ways to eliminate ambiguities than in identifying that the drafting could possibly be seen as being ambiguous in the first place.

**November 2023**