

A Question of Taste: The Supreme Court and the Interpretation of Contracts*

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Lord Sumption

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Judges are fond of speculating about the motives and practices of businessmen in drafting contracts. It is a luxurious occupation. The rules of admissibility protect them from the uncomfortable experience of being confronted by actual facts. So, I propose to open my remarks this evening with a case study.

On 6 February 1663, Samuel Pepys recorded in his diary a meeting of the Tangier Committee. This committee was responsible for the administration of the port of Tangier in Morocco, one of England's earliest and most short-lived colonies. The business of the day was the drafting of a contract for the construction of a half-mile long mole at the entrance to the port, one of the largest and most difficult civil engineering projects which the English government had undertaken for many decades. Ranged on one side of the table were the contractors, a naval officer, Sir John Lawson, and a courtier, Sir Hugh Cholmley. They were men of only passable honesty, by the standards of the time. Lawson had at least been to Tangier, but he knew nothing about civil engineering. Cholmley claimed to be an expert on civil engineering on the strength of having built a jetty on his estate in Yorkshire, but he knew nothing about the port of Tangier. On the other side sat a group of senior officials of the Navy Board, none of whom knew anything about the construction of port facilities and most of whom knew nothing about Tangier either. Only one of them, the Vice-Admiral of England, had been there, and he had been bribed by the contractors. The parties set to drafting. A document was produced which in Pepys's opinion was completely incomprehensible, and after much discussion he gave it up as a waste of time and left. "None of us that were there understood [it]," he wrote, "but yet they agreed of things as Mr Cholmly and Sir J Lawson demanded, who are the undertakers; and so I left them to go on and agree, for I understood it not."

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Now, a modern contract lawyer, looking at this contract, would of course regard all of that as inadmissible. He would start by examining the factual matrix, namely the information available to both sides and presumed to be known to them: the characteristics of the port of Tangier, the available techniques of construction, the properties of concrete and stone, and so forth. He would apply the ordinary presumption in building contracts that the contractors had informed themselves of the nature of the site and exigencies of performance. He would have assumed that the parties must have had in mind whatever disaster subsequently befell, and would impute to them some intention about what would happen in that event. He would diligently examine the language of the instrument as the parties should have understood it, comparing clause with clause to make a bargain which conformed to his own idea of commercial common sense. If necessary, he would manipulate the language to achieve a reasonable outcome. In other words, he would treat the parties as hypothetical abstractions rather than men of flesh and blood. He would put himself in their position, but with the benefit of a fair mind, the knowledge of a corps of expert geographers and engineers and no bribes, all characteristics which the actual participants lacked. The moral of this story is that although subjective opinion is no guide to the common intention of the parties, objective construction may not be much better. Six years later after the contract was let, when the mole was still only half built, the Navy Board was lost patience, the contractors were sacked and the contract cancelled. And serves them right, says the contract lawyer. The incomplete works were shortly afterwards washed away by a storm.

The construction of contracts can never be entirely free of artifice. One is, after all, concerned to discover an objective meaning which will not necessarily correspond with the assumptions or the hopes or fears of either party. Such is the nature of bargaining. The main artifice, as I hope my little fable has illustrated, is that the parties understood what they were signing up to as completely as a judge armed with a mass of objectively relevant and carefully analysed background information and the advantages of hindsight. One would think that the language that the parties have agreed provided the one sure foundation for a hypothetical reconstruction of their intentions. However, rather more than thirty years ago, the House of Lords embarked upon an ambitious attempt to free the construction of contracts from the shackles of language and replace them with some broader notion of intention. These attempts have for the most part been associated with the towering figure of Lord Hoffmann. More recently, however, the Supreme Court has begun to withdraw from the more advanced positions seized during the Hoffmann offensive, to what I see as a more defensible position. It is with these shifts of judicial approach that I am concerned tonight.

The House of Lords' flight from language depended on two closely related concepts. One was the "surrounding circumstances". The other was "commercial common sense".

The idea that the surrounding circumstances may be relevant to the meaning of language was not an invention of Lord Wilberforce. It is much older. But the most authoritative modern statements are due to him. In two notable judgments, *Prenn v Simmonds* [1971] 1 WLR 1381 and *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989, Lord Wilberforce pointed out that when reading a contract the court must put itself in the position in which the parties stood at the time it was made, with all the knowledge that they had at the time about the origin and purpose of the transaction and the circumstances in which it would fall to be performed. But Lord Wilberforce's statement of this principle was deliberately restrained. He was not proposing to use the surrounding circumstances as an alternative way of discovering the parties' intentions. They were simply facts which assisted in interpreting the words. They helped one to know which out a range of plausible meanings the parties must as reasonable men have had in mind.

However, a step change occurred with the decision of the House of Lords in *The Antaios* in 1984: *Antaios Compania Naviera v Salen Rederierna AB* [1985] AC 191. The dispute arose out of a three-year time-charter which conferred a right of termination on the shipowner for non-payment of hire "or on any breach of this charterparty." One of the issues was whether this meant any breach, however minor, in which case it bore very harshly on the charterer; or only breaches sufficiently serious to deprive the shipowner of substantially the whole benefit of the contract, in which case it added nothing to the common law concept of repudiation. Having failed to persuade the arbitrators that it meant any breach at all, the owners applied for leave to appeal against the award. They were refused leave in the High Court, and again in the Court of Appeal and the House of Lords, mainly on the ground that their appeal had no merit. The problem about the case lies not with the result, which seems fair enough, but with the extravagant language in which it was justified by Lord Diplock. He famously declared (p 201) that "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense." On the face of it, Lord Diplock was commending the use of commercial common sense not as a means of understanding the language of the contract, but as a means of overriding it. As a canon of construction, this seems both unnecessary and wrong. Yet it is one of the few parts of

the law reports which most commercial judges can quote from memory. It is cited to them in virtually every case where Counsel contends for a result which is inconsistent with what his clients appear to have agreed.

Commenting on the decision two decades later in *Sirius International Insurance Co v FAI General Insurance* [2004] 1 WLR 3251, Lord Steyn observed that it was part of a “shift from literal methods of interpretation to a more commercial approach” (p 201). As an example of the literalism which we had now put behind us, Lord Steyn cited from Paley’s *Moral and Political Philosophy* the story of the tyrant Temures. Temures was the general who promised the garrison of Sebastia that if they surrendered no blood would be shed. When they surrendered, he had them buried alive. This delightful little anecdote was actually cited by Paley as an example of using the literal as opposed to the colloquial meaning of words. To most people, “shedding blood” simply meant killing. As a description of the approach to construction adopted by the English courts before *The Antaios*, the story is a travesty. The common law has never, since the modern law of contract was developed in the nineteenth century, adopted literalism as a canon of construction. It has always recognised that language is imprecise, that context may modify its meaning, and that words may be used in a special sense. In England, Baron Parke observed as early as 1848 in *Ford v Beech* (1848) 11 QB 852, 866 that “greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.” The older cases are full of warnings against the dangers posed by a wooden adherence to the disembodied meaning of words.

The real distinction, as it seems to me, is not between a literal and a commercial interpretation. It is between an approach to contractual construction which elucidates the meaning of the words, and an approach which modifies or contradicts the words in pursuit of what appears to a judge to be a reasonable result.

For some years, Lord Diplock’s pronouncement was not taken at face value. Although frequently cited, it was regarded as an uncharacteristic expletive. But at the end of the last century, the mood changed. It was a period when traditional views about the interpretation of all written instruments were under challenge, not just contracts but patents, deeds and statutes. As far as contracts were concerned, an early sign of the direction of travel was the decision of the House of Lords in *Charter Reinsurance Co. v Fagan* [1997] AC 313. This was a dispute about a programme of whole account excess of loss reinsurance. The reinsurer’s liability kicked in once

the reinsured's losses exceeded an ultimate net loss of a given amount. The definition of an ultimate net loss depended on what the reinsured had "actually paid" in settlement of claims. The reinsured went into liquidation and consequently he actually paid very little. But the Court of Appeal and the House of Lords held that the words "actually paid" did not mean that the reinsured had to have... well..., actually paid it. It was enough that the reinsured was liable to pay it although he had not done so and in view of his insolvency probably never would. We have truly reached the ultimate point which the flexibility of language can attain, when we find that in a court of law it means precisely the opposite of what it says.

As it happens, although I was the unsuccessful counsel in that case, I think that the decision was right. It was right essentially for the reasons given by Lord Mustill. He based his analysis on the technical meaning given to the concept of payment in the world of insurance and in the case-law extending back for more than a century. Lord Hoffmann, however, proposed a more radical solution. His line was that language is such a flexible instrument that words commonly have no "ordinary and natural meaning". They have a variety of meanings depending on the context. He illustrated the point with a homely example. A wife comes home with a new dress and the husband asks how much she paid for it.

"She would not be understanding his question in its natural meaning," said Lord Hoffmann if she answered: 'Nothing, because the shop gave me 30 days' credit.' It is perfectly clear from the context that the husband wanted to know the amount of the liability which she incurred, whether or not that liability has been discharged."

What is true, he concludes, of ordinary speech is also true of reinsurance. This argument is the direct opposite of Lord Mustill's. Where Lord Mustill had emphasised the technical meaning of insurance terminology, Lord Hoffmann based his view on the inherent adaptability of all language. Lord Mustill used a special dictionary where Lord Hoffmann threw the dictionary away. The problem about his homely example of the wife's new dress is of course that the context that he is imagining is not one where we cannot reasonably expect language to be used exactly. In this respect it is quite unlike the context with which we are concerned this evening, with two parties making a binding contract at arms' length. Moreover, exchanges between husband and wife are not generally subject to rule of objective construction. Either of them can ask the one question which the court is not allowed to ask, namely "What do you mean?".

Lord Mustill expressed his reservations about this approach in his own judgment, in terms which appear to me to have considerable force.

“I believe”, he said (p 384), “that most expressions do have a natural meaning, in the sense of their primary meaning in ordinary speech. Certainly, there are occasions where direct recourse to such a meaning is inappropriate. Thus, the word may come from a specialist vocabulary and have no significance in ordinary speech. Or it may have one meaning in common speech and another in a specialist vocabulary; and the content may show that the author of the document in which it appears intended it to be understood in the latter sense. Subject to this, however, the inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used.”

Nonetheless, it took only a year for Lord Hoffmann’s approach to prevail. The moment came in 1998 in one of the most influential modern decisions on the construction of contracts, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, in which Lord Hoffmann delivered the leading speech. It has more than once been suggested that this famous judgment was only a restatement of principles which were already familiar and uncontroversial. It is true that what is radical about it is perhaps more its tone than its substance. Instinct and mood play an important role in judicial analysis, and *ICS* changed the mood among judges dealing with commercial contracts in ways which are altogether more fundamental. I am not going to suggest to you that Lord Hoffmann has been misunderstood. I think that that is exactly what he intended to do.

In his speech, he began by observing that “all the old baggage of ‘legal’ interpretation” had been discarded. Having thus laid to one side the considered analyses of generations of careful contract lawyers, Lord Hoffmann formulated five principles which he suggested had replaced them. The first three principles are mainly concerned to broaden the range of facts which could serve as relevant surrounding circumstances, so as to include “absolutely anything” which would have affected the way in which the contract would have been understood by a reasonable man apart from pre-contractual negotiations and information unavailable to the parties. But the most striking of his five principles were the fourth and fifth. The fourth principle was founded on a distinction between language and meaning. Language, he suggested, was a mere matter of dictionaries and grammar. Meaning was something different, namely what the document would convey to a reasonable person against the relevant background. The background, he said,

“may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.”

In other words, the background may not only enable one to choose between possible meanings of the words, but to select impossible ones instead. The fifth principle builds upon that proposition. It was that the traditional adoption of the “natural and ordinary meaning” of the language is no more than a rebuttable presumption that people mean what they say in formal documents. If the background suggests that something has gone wrong with the words, the law may attribute a different intention to them. In support of this, he cited Lord Diplock’s famous observation in *The Antaios*.

What did Lord Hoffmann mean by suggesting that something might have gone wrong with the words? He clearly did not have in mind a case where the text got garbled in the word processor or the verb had been accidentally omitted. Looking through his seductive prose, what he actually appears to have meant is that the background may be used to show that the parties cannot as reasonable people have meant what they said, so that the court is entitled to substitute something else. Lord Hoffmann does not spell out how we are to discover what else they meant if it was not what they said. But the only plausible answer to that question is that the parties are taken to have intended whatever reasonable people would have intended even if it is not a possible meaning of the words.

The subsequent case-law demonstrates very clearly where this leads. It commonly involves treating the background circumstances as an alternative guide to the parties’ intentions instead of a means of interpreting their language.

Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 was an appeal to the House of Lords which turned on the interpretation of a contract between a landowner and a developer. The relevant clauses determined the amount to be paid to the landowner on the successful completion and sale of the plots. The landowner claimed to be entitled to about five times what the developer thought was due. The developer’s case was based on the express terms of the agreement, in particular the definition clauses in which the parties on the face of it described what they meant by the terms used. But the House of Lords held that something had gone

wrong with the language. It is true that it was not garbled. The sentences used intelligible words, including subjects, verbs and objects. There was no apparent error of drafting. But Lord Hoffmann reconstructed the commercial logic of the transaction on the assumption that it was highly unlikely that land values would fall. From this, he concluded that on the developer's construction the result was more favourable to him than the parties can have intended. The result may well have been just, but I have some difficulty in recognising it a process of construction. Moreover, if the case had been decided two decades earlier, when property values were indeed falling fast, it may be that Lord Hoffmann's view about the parties expectations would have been different.

A further stage was reached with the decision in *Rainy Sky v Kookmin Bank* in 2011: [2011] 1 WLR 2100. The dispute in this case was about the scope of a bank guarantee given in connection with a shipbuilding contract. The guarantee covered the repayment of certain advance instalments of the price in the event that the ship was not delivered. But there was a dispute about which kinds of advance instalments were covered. The Bank contended that not all of the advances were covered. The language on the face of it supported their view. The Court of Appeal accepted this. Their reason was that although there was no obvious commercial reason why the buyers should have been prepared to accept less than a full guarantee of the advance instalments, this result was neither absurd nor irrational and on the face of the contract that is what they had agreed. Lord Justice Patten, delivering the leading judgment for the majority in the Court of Appeal, observed that on any other view they were "in real danger of substituting our own judgment of the commerciality of the transaction for that of those who were actually party to it" (para 51). The Supreme Court reversed them on the ground that it was not necessary to show that the apparent meaning of the contract was absurd or irrational. It was enough that there was no plausible reason why the guarantee should have been for less than the full amount of the advances. Lord Clarke, in his leading judgment, emphasised that the object was to understand rather than override the language. But his reasoning points the other way. Because, in the absence of an explanation, the court thought it objectively more reasonable that there should be full guarantee than a partial one, it followed that the words which pointed to a partial one did not really represent the parties' intentions.

I suspect that some, perhaps most of these cases might have been decided the same way on more traditional principles of construction. But there are, I would suggest, a number of problems about the approach to construction which they adopted.

The first and main point to make is that the language of the parties' agreement, read as a whole, is the only direct evidence of their intentions which is admissible. I would certainly not advocate literalism as an approach to construction. But it is a fallacy to say that language is meaningful only in relation to some particular background. Most language and all properly drafted language has an autonomous meaning. I find the belittling of dictionaries and grammars as tools of interpretation to be rather extraordinary. Language is a mode of communication. Its efficacy depends on the acceptance of a number of conventions that enable people to understand each other. Dictionaries and grammars are simply reference books which record these conventions. If we abandon them as the basic tools of construction, we are no longer discovering how the parties understood each other. We are simply leaving judges to reconstruct an ideal contract which the parties might have been wiser to make, but never actually did.

It is I think time to reassert the primacy of language in the interpretation of contracts. It is true that language is a flexible instrument. But let us not overstate its flexibility. Language, properly used, should speak for itself and it usually does. The more precise the words used and the more elaborate the drafting, the less likely it is that the surrounding circumstances will add anything useful. I do not therefore accept that the flexibility of language is a proper basis for treating the surrounding circumstances as an independent source from which to discover the parties' objective intentions. The surrounding circumstances may well enable us to discover what the objective was, but not how far it has been achieved. In a negotiation, the parties' objectives are likely to be different. In the *Rainy Sky*, for example, it was in the interest of the purchaser to get as much as it could out of the guarantor bank. The surrounding circumstances cannot tell us how far he succeeded in that endeavour, as against a bank whose interest was to concede as little as possible. Only the language can tell us that. The draftsman, whether he is an amateur or a professional cannot alter the surrounding circumstances and may regard them as a great deal less important than the court does. He has no way to tell the court what he really wants other than the deployment of words. The parties are the masters of their own agreement, and anything which marginalises the role of words in the process of construction is a direct assault on their autonomy.

That brings me to the second major problem about the use of the surrounding circumstances to modify the effect of language. This is the difficulty of applying it fairly in a legal system like ours which rigorously excludes the use of precontractual negotiations as evidence of intention. In

Investors Compensation Scheme Lord Hoffmann described the exclusion of precontractual negotiations as being based on “reasons of practical policy” (p 913). But the reason is actually more fundamental than that. The exclusionary rule follows from the objective character of all contractual construction. The course of the negotiations cannot tell us what the contract objectively meant. It can tell us only what one or other or both of the parties subjectively thought or assumed or hoped that it meant. But if we cannot resort to the parties, thoughts, assumptions or hopes, how are we to answer the question posed by Lord Clarke in *The Rainy Sky*. The main reason which he gave for adopting the purchaser’s construction of the guarantee was that no plausible commercial explanation had been given why the guarantee should cover less than the whole amount of the prepayments. It is not normally the function of a contract to explain why it is in the terms that it is. Lord Clarke’s question can be answered only by reference to the views of the parties. Yet that is the one source of information which is barred. An apparently harsh or unreasonable term may have been agreed by way of compromise or in exchange for concessions in other areas or because the deal was concluded at 3 a.m. and one of the parties was more interested in going to bed than in the finer points of drafting. It seems extraordinarily unfair to the guarantor bank that it should have been prevented by law from answering the question which turned out to be decisive of the issue of construction, namely Why did you agree this? Once the courts resort to sources other than the language in order to identify the object of the transaction, it is difficult to justify the current law about extrinsic evidence. Yet that rule is fundamental to the principle of objective construction and has been reaffirmed in almost every case where the *Investors Compensation Scheme* approach has been applied.

My third difficulty with the *Investors Compensation Scheme* approach is that judges are not necessarily well-placed to determine what commercial common sense requires. Judges start from the answer and work backwards. They come to the question of construction after the dispute has arisen, when the parties are at loggerheads. They understandably focus on what has gone wrong, and look to the contract to put it right. Their instincts about what the parties must have intended is therefore likely to be quite different from that of the parties at the time that the contract was originally agreed, when they did not have the eventual catastrophe in mind. Moreover, judges’ notions of common sense tend to be moulded by their idea of fairness. But fairness has nothing to do with commercial contracts. The parties enter into them in a spirit of competitive co-operation, with a view to serving their own interest. Commercial parties can be most unfair and entirely unreasonable, if they can get away with it. The problem about measuring their intentions by a yardstick of commercial common sense is that in practise it transforms the judge from an

interpreter into a kind of *amiable compositeur*. It becomes a means of saving one party from what has turned out to be a bad bargain. The question is no longer what the parties agreed. It is: what would they have agreed if they were the objective, just and fair-minded people that in practice they are not.

Every practitioner will have his own illustrations drawn from his own experience. For my part I will mention just one example which frequently struck me when I was in practice. Long-term contracts commonly include clauses giving one party an option to terminate in certain events, for example if a given standard of performance is not achieved, or not achieved by a given date. In my experience, commercial parties attach importance to such clauses. They may want to deter non-performance. They frequently want a let-out if the situation changes in a way that may adversely affect them. But commercial judges in England are traditionally hostile to peremptory termination clauses. The problem about them is that they are rarely invoked for the reasons for which they were originally included. A party with a right to terminate will only do it if it suits his broader commercial interest. Time-chartered ships are never withdrawn for non-payment of hire if the market has gone down since it was agreed. They are only withdrawn if there is a chance to recharter them at a higher rate, perhaps to the same charterer. To a judge looking for the fair result after the termination right has been exercised (or purportedly exercised) this seems unfair. It smacks of bad faith. So they tend to construe the clauses more narrowly than the parties envisaged when they agreed it. This is just one illustration of the broader truth that judicial and commercial attitudes overlap but do not coincide.

Finally, the broader approach to construction favoured by Lord Hoffmann is difficult to reconcile with the law relating to implied terms and rectification. It is hard to see any need for either of these doctrines if the parties can have an intention attributed to them which is not reflected in the language of the agreement.

In *Attorney-General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, Lord Hoffmann, delivering the advice of the Privy Council, came close to abolishing the implication of terms as a distinct legal concept, at any rate in cases where the implication was said to arise from the particular facts rather than from any general principle of law. It was all, he said, a question of construction. But this, with respect, cannot possibly be right. The point about an implied term is that the parties have not expressed it. Implication fills a gap in the written instrument. It is not possible to identify by a process of construction something which *ex hypothesi* is not in the agreement at all.

Of course, the express terms must be construed in order to discover whether there really is a gap, and any term which is implied in order to fill the gap must be consistent with the express terms. But the minimum condition for the recognition of an implied term remains necessity. The problem about the process of construction described by Lord Hoffmann in *Investors Compensation Scheme* is that it is in reality a process of implication but without reference to the concept of necessity. When combined with his analysis in *Belize*, it is tantamount to allowing terms to be implied on the ground that they are commercially reasonable and must therefore have been intended. This solution has had its advocates. It was, famously, favoured by Lord Denning. But it was decisively rejected by the House of Lords in *Liverpool City Council v Irwin* [1977] AC 239. It may be, as the Supreme Court has recently suggested, that Lord Hoffmann has been misunderstood, but I doubt it. Lord Hoffmann was not a judge who decided things by accident. At any rate, it seems clear from the unanimous decision of the Supreme Court in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co* [2016] AC 742, that the traditional distinction between construction and implication still exists. Where this leaves the bolder propositions in *Investors Compensation Scheme* and *Rainy Sky* remains to be seen.

Very similar problems arise in relation to the law of rectification. A contract may be rectified if the terms fail correctly to express the parties' true agreement. Where it is obvious that a word has been omitted and what the word is, the courts have long recognised that it may be reinserted as a matter of construction in order to avoid incoherence or absurdity. One does not need in that kind of case to go to the length of applying for rectification. But this is an exacting test. By comparison, the issue cannot arise at all if Lord Hoffmann was right in *Investors Compensation Scheme*. His view was that where something has gone wrong with the words the correct response is to divine what the parties meant from the surrounding circumstances or the underlying commercial objective. This is not just a point of form or a question of labels. The law about rectification is based on the proposition that the parties must be taken to have meant what they said, a proposition which is reduced by Lord Hoffmann to the status of a rebuttable presumption. For that reason, the legal criteria for rectifying a contract are extremely exacting. Once those criteria are satisfied, evidence that would not be admissible for the purpose of construing the instrument becomes admissible for the purpose of rectifying it. That will include evidence of pre-contractual negotiations. This is a radically different process, which is largely circumvented by the approach which Lord Hoffmann has taken to questions of construction and implication.

These considerations provide some at least of the reasons why the Supreme Court has recently sounded the retreat. In *Arnold v Britton* [2015] AC 1619 the Supreme Court had to consider a contract for the sale of leasehold property on a newly developed estate. The contract provided for the payment of service charges. These were to be calculated by reference to an escalation clause which might just about have made sense in the economic conditions of the 1970s, when it was agreed, but produced a grotesque result once those conditions changed. Lord Neuberger, delivering the leading judgment, set out a number of principles which reasserted some traditional orthodoxies from earlier case-law. These included the primacy of language in the interpretation of contracts. He also pointed out the danger of retrospectively applying a notion of commercial common sense influenced by what had gone wrong after the contract was made. In *Krys v KBC Partners* [2015] UKPC 46, a majority of the Privy Council declined to depart from the natural meaning of the language simply because the result might be regarded as one-sided or unfair, and suggested that in the face of sufficiently clear language even an absurd result might have to be accepted.

But if the Supreme Court has sounded the retreat, it has, I must admit, sounded it in rather muffled tones. It has not actually admitted that earlier decisions went too far. Neither of these cases overruled or even criticised the decisions in *Investors Compensation Scheme* or *Rainy Sky*. Moreover, both were majority decisions reached in the face of powerful dissents, by Lord Carnwath in the first case and Lord Mance in the second. They felt that the majority view attached too much weight to the language of the contract and not enough to unreasonableness of the result.

It is not entirely clear how the Supreme Court will ultimately resolve these differences. But some indication of the new direction of travel can be seen from the recent judgment of a unanimous court in *Wood v Capita Insurance Services* [2017] UKSC 24. This case was about a contract for the sale of an insurance company. The contract contained a provision entitling the buyer of the business to be indemnified against compensation payable to customers for certain mis-selling claims by the old management. The words made an apparently arbitrary distinction cases where customers complained and cases where the company was forced to compensate them by regulators. In the High Court, the judge held that although the indemnity appeared to extend only to cases where the customer had complained, it must have been intended to apply in either case. The Court of Appeal disagreed and gave effect to the words of the clause. The Supreme Court upheld the Court of Appeal. The reality was that the buyers had an interest in getting the

broadest possible indemnity, and the sellers had an equal and opposite interest in conceding the narrowest possible one. As Lord Hodge, delivering the leading judgment, observed,

“Business common sense is useful to ascertain the purpose of a provision and how it might operate in practice. But in the tug o’ war of commercial negotiation, business common sense can rarely assist the court in ascertaining on which side of the line the centre line marking on the tug o’ war rope lay, when the negotiations ended.”

He therefore examined the language of the contract, which favoured the sellers. It was a harsh result, but there were reasons apparent from other provisions of the contract why the parties could rationally have intended it.

Just as *ICS* changed the judicial mood about language and tended to encourage the view that it was basically unimportant, so the more recent cases may in due course be seen to have changed it back again, at least to some degree. Experience has suggested that the loose approach to the construction of commercial documents which reached its highest point in *Rainy Sky* may have done a disservice to commercial parties by depriving them of the only effective means of making their intentions known.

The late Lord Diplock was a man who liked to be right, even by the self-confident standard of Her Majesty’s Judges. He once wrote a speech in an appeal on a question of contractual construction, in which he said that although he thought that his colleagues were wrong, he proposed to agree with them. This, he said, was because the House of Lords was the final court of appeal. From this it followed that a contract must mean whatever at least three law lords said it meant. As a canon of construction, this seems less than helpful. I hope that in future we can do better for you than that.*

* *Nothman v London Borough of Barnet* [1979] 1 All ER 142