**“Contract Interpretation in the Common and Civil Law”**

**Sir Bernard Rix**

***Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 (HL):**

Lord Hoffmann at 912/913:

“The principles may be summarised as follows:

1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
2. The background was famously referred to by Lord Wilberforce [in *Prenn v. Simmonds* [1971 1 WLR 1381 at 1384-1386 (HL)] as the “matrix of fact”, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
3. The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion to explore them.
4. The meaning which a document (or any other utterance) would convey to a reasonable man is not same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749.
5. The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201:

“If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.””

***Arnold v Britton* [2015] UKSC 36; [2015] 2 WLR 1593**

Lord Neuberger, PSC at [15] – [22]

1. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101 , para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *[Prenn [1971] 1 WLR 1381](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=77&crumb-action=replace&docguid=I28865D10E42811DA8FC2A0F0355337E9)* , 1384-1386; [*Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=77&crumb-action=replace&docguid=I84CAA9F0E42811DA8FC2A0F0355337E9) , 995-997 per Lord Wilberforce; [*Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=77&crumb-action=replace&docguid=I6EBDF050E42711DA8FC2A0F0355337E9) , para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in [*Rainy Sky [2011] 1 WLR 2900*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=77&crumb-action=replace&docguid=IB0E26860056111E1982AB05400E684EA), paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC.
2. For present purposes, I think it is important to emphasise seven factors.
3. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook [2009] AC 1101 , paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.
4. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another ***\*1600*** way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.
5. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *[Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=77&crumb-action=replace&docguid=ID62E7FC0E42711DA8FC2A0F0355337E9)* , 251 and Lord Diplock in *[Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=77&crumb-action=replace&docguid=I5E83BBC0E42711DA8FC2A0F0355337E9)* , 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.
6. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.
7. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.
8. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is [*Aberdeen City Council v Stewart Milne Group Ltd 2012 SCLR 114*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=77&crumb-action=replace&docguid=IDCA28210213011E1BB47F41A9D30735A) , where the court concluded that “any … approach” other than that which was adopted “would defeat the parties' clear objectives”, but the conclusion was based on what the parties “had in mind when they entered into” the contract: see paras 21 and 22.

*Bank of Credit and Commerce International SA v. Ali* [2001] UKHL 8, [2002] 1 AC 251

*Fiona Trust and Holding Corp v. Privalov* [2007] UKHL 40, [2008] 1 Lloyd’s Rep 254

*Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101

*Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763

*ING Bank NV v. Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472

*Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900

*The Spirit of Independence* [1999] 1 Lloyd’s Rep 43

*Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB)

Compare *Dallah Real Estate v. Pakistan* in France, *Cour d’ Appel, Paris, February 17, 2011*, and see an article by Jacob Grierson and Dr Mireille Taok “*Dallah*: Conflicting Judgments from the UK Supreme Court and the Paris Cour d’Appel” in (2011) 28 J Int Arb 4 at 407.

Anson’s Law of Contracts, 30th ed, 2016, at pages 178-184

Chitty on Contracts, 32nd ed, 2015, at paras 13-041 to 13-097

Article: *The iterative process of contractual interpretation* by Lord Grabiner, at LQR 2012 128 (Jan) at 41-62

Article: *The Intractable Problem of The Interpretation of Legal Texts* by Lord Steyn, at (2003) 25 Sydney L Rev. 5

Article: *The Intolerable Wrestle with Words and Meanings* by Lord Hoffmann, at 114 S Africa L J 656 (1997)

Article: *Contractual Interpretation: a Comparative Perspective* by James Spigelman, at [http://ssrn.com/abstract=1809331](http://ssrn.com/abstract%3D1809331)

And see generally: *The Interpretation of Contracts* by Sir Kim Lewison, 5th ed, 2011, Sweet & Maxwell

*Code Napoleon,* Article 1156:

“In agreements it is necessary to search into the mutual intention of the contracting parties, rather than to stop at the literal sense of the terms.”

It should be noted that on 11 February 2016, the French Ordinance No 2016-131 amended sections of the French Civil Code (1804) that govern the law of contracts. The amendments came into force as of 1 October 2016. Article 1156 of the Code Napoleon was kept almost verbatim, but a new paragraph is added. The new provision as amended by the French Ordinance, Article 1188, reads:

1. A contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms.
2. Where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it.

Article 8(3) of the UN Convention on Contracts for the International Sale of Goods 1980 (‘CISG’) provides:

In determin In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 4.3 of the Unidroit Principles states:

In applyin In applying Articles 4.1 [titled “Intention of the parties] and 4.2 [titled “Interpretation of statements and other conduct”], regard shall be had to all the circumstances, including

1. preliminary negotiations between the parties;

…

1. the conduct of the parties subsequent to the conclusion of the contract;

Along similar lines, Article 5:102 of the Principles of European Contract Law (1999), which provide a set of general rules of contract law in European legal systems, states:

In interpreting the contract, regard shall be had, in particular, to:

1. the circumstances in which it was concluded, including the preliminary negotiations;

…

1. the conduct of the parties, even subsequent to the conclusion of the contract;