

ARTICLES

INTERPRETATION OF WRITTEN CONTRACTS IN ENGLAND

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This article examines the leading principles governing interpretation of written contracts under English law. This is a comprehensive and incisive analysis of the current law and of the relevant doctrines, including the equitable principles of rectification, as well as the powers of appeal courts or of the High Court when hearing an appeal from an arbitral award. The topic of interpretation of written contracts is fast-moving. It is of fundamental importance because this is the most significant commercial focus for dispute and because of the number of cross-border transactions to which English law is expressly applied by businesses.

Key words: contract; interpretation; English law; appeal courts.

1. Introduction¹

On this fundamental topic the English approach is in vivid contrast with that adopted within other jurisdictions.² In English law the search is for the objective meaning of the language appearing in the parties' written contract. The English courts do not allow the parties to give evidence of their personal and subjective understanding of those words. Nor is it normally permissible for a party to produce evidence of the pre-contractual dealings – the negotiations – in order to elucidate the

¹ *Textbooks*: Neil Andrews, *Contract Law* 14.01–14.32 (Cambridge University Press 2011) (for the same author's examination of civil processes see 1 Andrews on *Civil Processes* ch. 15 (Intersentia 2013)); on appeals from arbitral awards on points of English law, 2 Andrews on *Civil Processes* (Intersentia 2013)); Kim Lewison, *Interpretation of Contracts* (5th ed., Sweet & Maxwell – Thomson Reuters 2011; and first supplement due Dec. 2013); Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (2nd ed., Oxford University Press 2011) [hereinafter McMeel, *The Construction of Contracts*] (see also Gerard McMeel, *The Interplay of Contractual Construction and Civil Justice: Procedures for Accelerated Justice*, 2011 European Business L. Rev. 437–449 [hereinafter McMeel, *The Interplay of Contractual Construction*]); Catherine Mitchell, *Interpretation of Contracts* (Routledge-Cavendish 2007); (from an Australian perspective) John W. Carter, *The Construction of Commercial Contracts* (Hart 2013). *Other discussion*: Lord Bingham, *A New Thing Under the Sun: The Interpretation of Contract and the ICS Decision*, 12 Edinburgh L. Rev. 374 (2008); Richard Buxton, *'Construction' and Rectification after Chartbrook*, 2010 CLJ 253; Andrew Burrows, *Construction and Rectification*, in *Contract Terms* 88 ff. (Andrew Burrows & Edwin Peel, eds.) (Oxford University Press 2007); John Cartwright, *Interpretation of English Law in Light of the Common Frame of Reference*, in *Content and Meaning of National Law in the Context of Transnational Law* (Henk Snijders & Stefan Vogenauer, eds.) (Sellier 2009); Lord Grabiner, *The Iterative Process of Contractual Interpretation*, 128 LQR 41 (2012); Lord Hoffmann, *The Intolerable Wrestle with Words and Meanings*, 1997 South Africa L. J. 656; Ewan McKendrick, *The Interpretation of Contracts: Lord Hoffmann's Re-Statement*, in *Commercial Law and Commercial Practice* (Sarah Worthington, ed.) (Hart 2003); David McLauchlan, *Contract Interpretation: What is it About?*, 31 Sydney L. Rev. 5 (2009); Lord Nicholls, *My Kingdom for a Horse: the Meaning of Words*, 121 LQR 577 (2005); Lord Phillips, *The Interpretation of Contracts and Statutes*, 68 Arbitration 17 (2002); Spigelmann CJ, *From Text to Contract: Contemporary Contractual Interpretation*, 81 ALJ 322 (2007); Christopher Staughton, *How Do The Courts Interpret Commercial Contracts?*, 1999 CLJ 303; for comparative literature, see *infra* n. 2.

² For comparative observations on interpretation of contracts see Michael J. Bonell, *The UNIDROIT Principles and CISG – Sources of Inspiration for English Courts?*, 11 Uniform L. Rev. 305 (2006); *The UNIDROIT Principles in Practice: Case Law and Bibliography on the UNIDROIT Principles of International Commercial Contracts* 144 (Michael J. Bonell, ed.) (2nd ed., Transnational Publishers 2006); Eric Clive, *Interpretation*, in *European Contract Law: Scots and South African Perspectives* 183 (Hector MacQueen & Reinhard Zimmermann, eds.) (Edinburgh University Press 2006); Edward A. Farnsworth, *Comparative Contract Law*, in *The Oxford Handbook of Comparative Law* 920 ff. (Mathias Reimann & Reinhard Zimmermann, eds.) (Oxford University Press 2006); Catherine Valke, *On Comparing French and English Contract Law: Insights from Social Contract Theory*, 2009 J. Comp. L. 69–95 (cited as 'illuminating' by Lord Hoffmann in the *Chartbrook* case ([2009] UKHL 38; [2009] 1 AC 1001, at [39])); *idem.*, *Contractual Interpretation: at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric*, in *Exploring Contract Law* 77–114 (Jason W. Neyers, Richard Brunaugh, Stephen G. A. Pitel, eds.) (Hart 2009); Stefan Vogenauer, *Interpretation of Contracts: Concluding Comparative Observations*, in *Contract Terms* ch. 7 (Andrew Burrows & Edwin Peel, eds.) (Oxford University Press 2007); *Commentary on the UNIDROIT Principles of International Commercial Contracts* 311 (Stefan Vogenauer & Jan Kleinheisterkamp, eds.) (Oxford University Press 2009); Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* ch. 30 (Tony Weir, trans.) (3rd ed., Oxford University Press 1998) (although their discussion of English law is now out-of-date, because of the developments explained in, especially, sect. 2 of this article).

finally agreed terms. To this last proposition there is a large exception when a party seeks the equitable remedy of rectification. That remedy is considered in sect. 3 of this paper. In essence, rectification is an equitable remedy enabling the court to *insert new words to reflect the true consensus, as objectively ascertained, and which stood immediately preceding formation*:³ thus rectification enables the court to declare that the written terms must be altered if it is shown that, in their final formulation of the contract's written terms, the parties have failed to reproduce accurately their prior and uninterrupted consensus; that consensus will be determined objectively; and it must have an outwardly discernible subsistence.

Finally, the civilian lawyer will find it remarkable that in this entire area the legislature has not intervened. All the rules governing interpretation of contracts, as well as the equitable doctrine of rectification, are the creature of judicial decision-making resulting mostly from appellate review of first instance judicial decisions or of arbitral awards in which English contract law has been applied.⁴ This judicial monopoly of this important field of contract law has worked well. For the courts retain the power to refine, sometimes to develop quite boldly, the governing principles of interpretation. In fact this is regarded as not only the most important topic in English contract law, from a practical perspective, but the most dynamic modern doctrine.

2. Interpretation

Appellate Revision: Construction of Written Contracts is a Question of Law and Not One of Fact: If English law governs the relevant agreement, interpretation of (wholly) 'written contracts' (including electronic documents)⁵ is a question of law,⁶ whereas interpretation of contracts not wholly contained in writing (whether oral, or part written and part oral) is a 'matter of fact.' Appeal courts have power to review first instance errors of law, but in general defer to findings of fact.⁷

³ See Andrews, *Contract Law*, *supra* n. 1, at 14.33–14.51; Chitty on Contracts 5-110 ff. (31st ed., Sweet & Maxwell 2012); David Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010); McMeel, *The Construction of Contracts*, *supra* n. 1, ch. 17; Snell's *Principles of Equity* ch. 16 (32nd ed., Sweet & Maxwell 2010); Edwin Peel, *Treitel on the Law of Contract* 8-059 (13th ed., Sweet & Maxwell 2011); Marcus Smith, *Rectification of Contracts for Common Mistake*, 123 LQR 116 (2007); David McLauchlan, *The 'Drastic' Remedy of Rectification for Unilateral Mistake*, 124 LQR 608 (2008); Burrows, *supra* n. 1, at 77.

⁴ In the case of arbitration references where the 'seat' is within England and Wales, the High Court in London must first give permission for an appeal on a point of English law to proceed to the High Court: Arbitration Act, 1996, sect. 69(2) and sect. 69(3) (England and Wales).

⁵ See Chitty on Contracts, *supra* n. 3, at 12-048.

⁶ See *id.* at 12-046.

⁷ See 1 Andrews on Civil Processes, *supra* n. 1, ¶¶ 15.12 and 15.72 ff.

Objectivity: The 'objective principle of agreement' precludes reference to a party's undisclosed and personal understanding of the written terms' meaning and effect.⁸ Lord Hoffmann, in the *Investors Compensation Scheme* case (1998), said: 'Interpretation [of written contracts] is the ascertainment of 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.'⁹

Context: The courts will adopt a contextual approach to interpretation rather than a narrow 'dictionary meaning' approach: see Lord Hoffmann's seminal statement in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1998)¹⁰ (which he traced to decisions in the 1970s).¹¹ The courts permit the parties to refer to the contractual setting, expressed variously as the transaction's 'commercial purpose,' 'genesis,' 'background,' 'context,' its location in the relevant 'market,'¹² or its 'landscape.'¹³ It must be emphasized, however, that 'background' *does not extend to pre-contractual negotiations* (on that, see below; however, in the case of applications for rectification, there is an exception to the bar on evidence of pre-contractual negotiations: see further below).

Need for Procedural Discipline: Lord Hoffmann in the *BCCI* case (2001) said that courts and arbitrators should curb attempts by parties to adduce excessive quantities of background information.¹⁴ Subject to that, in *Procter and Gamble Co. v. Svenska Cellulosa Aktiebolaget SCA* (2012)¹⁵ the Common Law tool of pre-trial disclosure of documents¹⁶ was noted by Rix LJ as an important accompaniment to construction of documents.

⁸ *Reardon Smith Line Limited v. Hansen Tangen*, [1976] 1 WLR 989, 996, HL, *per* Lord Wilberforce.

⁹ [1998] 1 WLR 896, 912–913, HL.

¹⁰ [1998] 1 WLR 896, 912–913, HL; McKendrick, *supra* n. 1, at 139–162.

¹¹ See *Prenn v. Simonds*, [1971] 1 WLR 1381, 1384–1386, HL; *Reardon Smith Line Limited v. Hansen Tangen*, [1976] 1 WLR 989, HL; in the *Prenn* case, at 1384, Lord Wilberforce traced the 'anti-literal' approach to mid-nineteenth century case law.

¹² The leading comment is by Lord Wilberforce in *Reardon Smith Line Limited v. Hansen Tangen*, [1976] 1 WLR 989, 995–996, HL; see Staughton, *supra* n. 1, at 303 (on the problem of the 'factual matrix').

¹³ *Charter Reinsurance Co. Ltd. v. Fagan*, [1997] AC 313, 384, HL, *per* Lord Mustill: 'The words must be set in the landscape of the instrument as a whole.'

¹⁴ [2001] 1 AC 251, at [39], HL.

¹⁵ [2012] EWCA Civ 1413, at [38]: 'In English law we have eschewed asking what the parties have actually intended, thinking that the question of contractual intention is to be derived objectively from their agreement, and that when it comes to a dispute the question of actual intention is likely to be submerged in wishful thinking. In the civil law, matters are looked at differently, with the court free, as I understand matters, to look at everything for the purpose of deriving the actual, as distinct from the imputed, intention of the parties. Even so, for different reasons, English law is much more willing than the civil law, again as I understand matters, to accommodate disclosure of documents and cross-examination, even though they add to the cost of litigation. In matters of contractual interpretation there is an irony in this combination of approaches. Nevertheless, willingly applying as I do the current understanding of contractual interpretation in English law, which has become increasingly open to the influences of considerations of factual matrix and purposive construction, I am unable to create an agreement which the parties might, or might not, have arrived at, had they thought of and discussed the problem which has overtaken them.'

¹⁶ The leading rules are codified at CPR, pt. 31: for comment on these procedural rules see 1 Andrews on Civil Processes, *supra* n. 1, ch. 11.

Accessibility of Background Material: The relevant ‘background’ must have been accessible to the present parties: in the *Sigma* case (2009) Lord Collins emphasised this last point.¹⁷ It should not be buried in the archaeological remains of an original transaction formed between different persons or entities – as where a standard document was created by parties X and Y, long ago, but the current dispute concerns A and B, who are strangers to the original document, but have adopted it, along with many hundreds or even thousands of other contracting parties in the relevant ‘market’.

Pre-Contractual Negotiations Bar: Interpretation: The English rule – not followed in most other jurisdictions around the world – is that, when seeking to interpret written contracts (as distinct from oral or partly written contracts), a party cannot adduce, without his opponent’s permission, evidence of the parties’ *prior negotiations*. The five-fold rationale for this bar is (rationales collected by Briggs J,¹⁸ at first instance in *Chartbrook Ltd. v. Persimmon Homes Ltd.* (2007), drawing upon Lord Nicholls’ famous lecture, ‘My Kingdom for a Horse’ lecture):¹⁹ (i) avoidance of ‘uncertainty and unpredictability’; (ii) the fact that interested third parties cannot be guaranteed access to such negotiation history, (iii) such dealings are notoriously shifting and so such evidence would be unhelpful, (iv) one-sided impressions might contaminate the inquiry so that the objective approach to interpretation would be undermined, and (v) ‘sophisticated and knowledgeable negotiators would be tempted to lay a paper trail of self-serving documents.’²⁰

Pre-Formation Negotiations Relevant to Rectification Claims: Such evidence is to be adduced for the purpose of rectification, an independent equitable remedy (see *infra*). And so claims for rectification are often brought in conjunction with a pleading based on ordinary ‘interpretation.’²¹

Post-Formation Conduct: A written contract should not be construed by reference to the parties’ conduct subsequent to the contract’s formation.²² However, there

¹⁷ But in the *Sigma* case ([2009] UKSC 2; [2010] 1 All ER 571; [2010] BCC 40, at [35]–[37]) Lord Collins (with the support of Lords Mance and Hope) disapproved too broad a search for background information when, as in the *Sigma* case itself, the parties to the relevant transaction might not have been present at its birth, and had instead become second-hand or remoter recipients of others’ contractual text which had been in circulation in the relevant financial market.

¹⁸ [2007] EWHC 409 (Ch), at [23].

¹⁹ Nicholls, *supra* n. 1, at 577; in his note on the House of Lords’ decision in the *Chartbrook* case, David McLaughlan (see *Commonsense Principles of Interpretation and Rectification*, 126 LQR 8, 9–11 (2010)) rejects these various suggested justifications.

²⁰ *Chartbrook v. Persimmons*, [2008] EWCA Civ 183; [2008] 2 All ER (Comm) 387, at [111], *per* Collins LJ; this argument is described as unconvincing by David McLaughlan (see *Commonsense Principles of Interpretation and Rectification*, *supra* n. 19, at 11).

²¹ On this two-pronged approach see McMeel, *The Interplay of Contractual Construction*, *supra* n. 1, at 437–449; Buxton, *supra* n. 1, at 253; Burrows, *supra* n. 1, at 88 ff.

²² See *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.*, [1970] AC 583, 603, HL, *per* Lord Reid.

are two exceptions: (1) if it can be shown that the parties had specifically *agreed to vary or discharge the agreement*,²³ or (2) if the doctrine of estoppel by convention can be established, that is, proof that, *subsequent to formation, the parties had implicitly agreed on how the written terms should be interpreted or modified*.²⁴

Commercial Common-Sense: The courts should construe written instruments, including contracts, in a 'commercial' way, with sensitivity to business 'common-sense'.²⁵ There are many statements supporting this.

(1) Lord Diplock said in *Antaios Cia Naviera SA v. Salen Rederierna AB* (1985):²⁶ '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.'

(2) Lord Steyn said in *Mannai Investment Co. v. Eagle Star Life Assurance* (1997):²⁷ 'Words are ... interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.'

(3) Lord Hope endorsed this approach in the Supreme Court in *Multi-Link Leisure v. North Lanarkshire* (2010),²⁸ noting that this was consistent with Lord Hoffmann's principles in *Investors' Compensation Scheme Ltd. v. West Bromwich Building Society* (1998).²⁹

(4) The Supreme Court has confirmed this approach in the *Rainy Sky* case (2011),³⁰ where Lord Clarke said:

[20] It is not in my judgment necessary to conclude that, unless the most natural meaning of the words produces a result so extreme as to suggest that it was unintended, the court must give effect to that meaning ... [21] ... If there are two possible constructions, the court is entitled to prefer the

²³ See Chitty on Contracts, *supra* n. 3, at 12-111.

²⁴ To establish such an estoppel, an implicit agreement must be manifested in their pattern of behaviour and interaction: *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.*, [1982] QB 84, 120, CA, *per* Lord Denning MR: 'So here we have ... evidence of subsequent conduct to come to our aid. It is available-not so as to construe the contract-but to see how they themselves acted on it. Under the guise of estoppel [by convention] we can prevent either party from going back on the interpretation they themselves gave to it.'

²⁵ *Antaios Cia Naviera SA v. Salen Rederierna AB*, [1985] AC 191, 201, HL, *per* Lord Diplock.

²⁶ [1985] AC 191, 201, HL.

²⁷ [1997] AC 749, HL (a majority decision concerning a rent notice); Paul V. Baker, *Reconstructing the Rules of Construction*, 114 LQR 55-62 (1998).

²⁸ [2010] UKSC 47; [2011] 1 All ER 175, at [21].

²⁹ [1998] 1 WLR 896, 913, HL.

³⁰ *Rainy Sky SA v. Kookmin Bank*, [2011] UKSC 50; [2011] 1 WLR 2900.

construction which is consistent with business common sense and to reject the other ... [40] Since the language of [the relevant contractual stipulation] is capable of two meanings it is appropriate for the court to have regard to considerations of commercial common sense in resolving the question what a reasonable person would have understood the parties to have meant.

(5) And the Court of Appeal in *Procter and Gamble Co. v. Svenska Cellulosa Aktiebolaget SCA* (2012) emphasised that the *Rainy Sky* case is not a warrant for re-writing a contract to achieve a 'fairer result' (even assuming that this can be perceived). In the *Procter and Gamble* case Moore-Bick LJ said that where there is no ambiguity, the court should give effect to the contract's clear meaning.³¹

*Interpretation by Re-construction of the Text:*³² The House of Lords in *Chartbrook Ltd. v. Persimmon Homes Ltd.* (2009)³³ held that a judge can 'construe' a contract by wholly recasting a relevant phrase or portion of a written contract when (i) it is obvious that the drafting has gone awry and (ii) it is also obvious, as a matter of objective interpretation, what was the parties' true meaning. Thus both ordinary interpretation principles and the doctrine of rectification can have the effect of revising a document. The safer course is for a party who is seeking a favourable judicial decision on a disputed written contract to plead both 'construction' (in the 'reconstructive' style just explained) and 'rectification' (summarised below).³⁴ There

³¹ [2012] EWCA Civ 1413, at [22], *per* Moore-Bick LJ: '[T]he starting point must be the words the parties have used to express their intention and in the case of a carefully drafted agreement of the present kind the court must take care not to fall into the trap of re-writing the contract in order to produce what it considers to be a more reasonable meaning. In my view the Agreement, considered as a whole, is not reasonably capable of being given two possible meanings.' Rix LJ added at [38]: '[W]illingly applying as I do the current understanding of contractual interpretation in English law, which has become increasingly open to the influences of considerations of factual matrix and purposive construction, I am unable to create an agreement which the parties might, or might not, have arrived at, had they thought of and discussed the problem which has overtaken them.' *On the facts of the Procter & Gamble* case, the court held that the parties had agreed that the price for expensive plant would be in Euros, but the payment of such sums would be in pounds. The parties had not agreed a fixed rate of conversion of Euros to pounds. After formation, the Euro/pound exchange rate moved disadvantageously for the buyer. But the buyer could not show, whether by a process of interpretation, implication of terms, or rectification, that there was a consensus that Euros were to be converted to pounds at the rate (favourable to the buyer) prevailing at the date of the contract, as distinct from the subsequent dates of delivery. One of the commercial documents exchanged by the parties bore an annotation giving a rate of exchange applicable at that date. But this was not intended to impose a fixed exchange rate. It merely recorded a process of calculation made on the spot at that juncture of the parties' dealings. In the absence of a fixed currency provision, the adverse currency movement was to be borne by the buyer, and it was not the court's task to save that party from this economic result.

³² *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 WLR 896, 912–913, HL (propositions (iv) and (v)).

³³ [2009] UKHL 38; [2009] 1 AC 1101; noted David McLauchlan (see *Commonsense Principles of Interpretation and Rectification*, *supra* n. 19, at 8–14).

³⁴ On this two-pronged approach see McMeel, *The Interplay of Contractual Construction*, *supra* n. 1, at 437–449; Buxton, *supra* n. 1, at 253; Burrows, *supra* n. 1, at 88 ff.

are many examples of the courts invoking this style of interpretation: *Holding & Barnes PLC v. Hill House Hammond Ltd. (No. 1)* (2001);³⁵ *Littman v. Aspen Oil (Broking) Ltd.* (2005);³⁶ *KPMG LLP v. Network Rail Infrastructure Ltd.* (2007);³⁷ *Springwell Navigation Corporation v. JP Morgan Chase* (2010);³⁸ *Pink Floyd Music Ltd. v. EMI Records Ltd.* (2011).³⁹

*Situations where Re-Construction is **Not Available**:* Such a reconstruction will not be possible if:

(1) The only real complaint is that both parties have misunderstood the extent of the subject-matter: *Bashir v. Ali* (2011);⁴⁰ or

(2) where a clause is flawed but does not contain an inner solution: the Court of Appeal in *ING Bank NV v. Ros Roca SA* (2011)⁴¹ held that it was not possible, on the facts, to apply the technique of ‘reconstructive’ interpretation to re-write a clause concerning an investment bank’s ‘additional fee.’ Similarly, the task of reconstructing the text was declared impossible in *Fairstate Ltd. v. General Enterprise & Management Ltd.* (2010),⁴² where the judge said:⁴³ ‘the defects in the agreement recorded in the

³⁵ [2001] EWCA Civ 1334; [2002] L & TR 103.

³⁶ [2005] EWCA Civ 1579.

³⁷ [2007] EWCA Civ 363; [2007] Bus LR 1336.

³⁸ [2010] EWCA Civ 1221; [2010] 2 CLC 705, at [132]–[140].

³⁹ [2010] EWCA Civ 1429; [2011] 1 WLR 770 (Lord Neuberger MR and Laws LJ held that an agreement for exploitation of the ‘records’ of Pink Floyd could be construed as embracing digital recordings by the same band. To decide otherwise would run counter to the obvious commercial purpose of the transaction. However, Carnwath LJ dissented, finding there was no such obvious mistake).

⁴⁰ [2011] EWCA Civ 707; [2011] 2 P & CR 12, at [39], *per* Etherton LJ: ‘[T]his is not a case . . . in which the wording used by the parties, on one construction, leads to arbitrary and irrational results.’

⁴¹ [2011] EWCA Civ 353; [2012] 1 WLR 472 (but the court was able to achieve a favourable outcome for the bank by employing the doctrine of estoppel by convention to take account of post-formation dealings: see [111]–[112], *per* Rix LJ, notably this passage at [111]: ‘[E]stoppel is a flexible doctrine which can take account of . . . the honest and responsible interaction of business parties to a contract. Where there is room for disagreement as to the meaning or effect of a contract but the parties have clearly chosen (or purported to choose) their own understanding of it and have dealt with one another on the basis of that understanding, whether that mutuality is found in a common assumption, or in acquiescence, or in one party’s reliance on another’s representation, the doctrine of estoppel allows the court in a proper case to give effect to the parties’ objectively ascertainable and mutual dealings with one another.’

⁴² [2010] EWHC 3072 (QB); [2011] 2 All ER (Comm) 497; 133 Con LR 112 (Richard Salter QC, Deputy).

⁴³ *Id.* at [94]: ‘the defects in the agreement recorded in the Guarantee Form are so fundamental and extensive that they cannot sufficiently be cured, either by purposive construction, or by rectification, or by any combination of those approaches.’ Guarantees require clarity, *id.* at [93]: ‘it is particularly important that the Court should require clarity as to all (and not just some of) the material terms of the transaction in cases, such as the present, where it is asked to use its powers of purposive construction or of rectification to correct errors in the wording of a document which is relied upon to satisfy the requirements of the Statute of Frauds 1677 s 4. To do otherwise risks undermining the protection that the statute was intended to confer.’ As for the creditor’s claim that the purported guarantor was estopped (estoppel by representation by tendering the document) from denying the validity of the document, the

Guarantee Form are so fundamental and extensive that they cannot sufficiently be cured, either by purposive construction, or by rectification, or by any combination of those approaches.' (And rectification failed because there had been no clear prior consensus concerning the effect and scope of the guarantee.)

Court not to Overstrain its Powers of Interpretation: The courts must not illegitimately rewrite the contract if its meaning is clear and does not lead to commercial absurdity. Lord Mustill in *Charter Reinsurance Co. Ltd. v. Fagan* (1997) warned that it is illegitimate for courts or arbitrators to 'force upon the words a meaning which they cannot fairly bear', since this would be 'to substitute for the bargain actually made one which the court believes could better have been made.'⁴⁴ Similarly, Rix LJ said in *ING Bank NV v. Ros Roca SA* (2011):⁴⁵ 'Judges should not see in *Chartbrook Ltd. v. Persimmon Homes Ltd.* ([2009] AC 1101) an open sesame for reconstructing the parties' contract, but an opportunity to remedy by construction a clear error of language which could not have been intended.'

3. Rectification⁴⁶

The Two Grounds: There are two separate grounds for rectifying written contracts: (1) common intention rectification based on a mismatch between the earlier outwardly manifested version of the transaction and the parties' finally agreed written terms; or (2) unilateral mistake, where party B has reprehensibly failed to point out to party A that the written terms of their imminent transaction will not accord with A's mistaken understanding concerning the contents of that written agreement. These two heads will now be taken in turn.

Common Intention Rectification: A contract can be rectified to bring a written contract into conformity with the parties' pre-contractual and shared understanding of its terms, provided (i) there is some outward manifestation of that understanding;⁴⁷ and (ii) the 'understanding' is ascertained and construed by resort to the objective method. It is not enough that both parties had mistakenly thought that they were dealing with subject-matter 'X' and so used that label throughout their dealings.

judge said, *id.* at [97]: 'it is hard to see why any signatory to a defective agreement of guarantee would not similarly be estopped. In that respect, the position here seems to me to be very similar to that considered by the House of Lords in *Actionstrength Limited (t/a Vital Resources) v. International Glass Engineering In. Gl. En. Spa* ([2003] UKHL 17; [2003] 2 AC 541), where the plea of estoppel was unanimously rejected.'

⁴⁴ [1997] AC 313, 388, HL.

⁴⁵ [2011] EWCA Civ 353; [2012] 1 WLR 472, at [110].

⁴⁶ See Hodge, *supra* n. 3; Snell's Principles of Equity, *supra* n. 3, ch. 16; see also Andrews, Contract Law, *supra* n. 1, at 14.33–14.51; Chitty on Contracts, *supra* n. 3, at 5–110 ff.; Peel, *supra* n. 3, at 8–059 ff.; Smith, *supra* n. 3, at 116, especially 130 to end; McLauchlan, *The 'Drastic' Remedy of Rectification for Unilateral Mistake*, *supra* n. 3, at 608, especially 608–610, 639–640; Burrows, *supra* n. 1, at 77, especially 90 to end.

⁴⁷ *Joscelyne v. Nissen*, [1970] 2 QB 86, CA.

If the written contract then records the subject-matter as 'X', there is no scope for rectification because there is no mismatch between their outward prior consensus and the eventual written terms.⁴⁸ The court has no 'roving commission to do whatever it regards as fair in relation to a claim for rectification.'⁴⁹

Need for an Unbroken Continuing Intention: If the earlier stage of the negotiations involves the parties agreeing a set of terms 'A, B, and C', but the final version is a set of terms 'X, Y, and Z', it might be clear that the parties have substituted for elements 'A, B and C' new elements 'X, Y and Z'. If that is the case, there should be no scope for rectifying the contract to restore the terms 'A, B, and C'. The simple reason for rectification being denied is that the parties have freely substituted new terms and agreed on those terms. It follows that rectification will be appropriate only if there has been a *continuing and unbroken intention to enter into a contract based on terms 'A, B, and C'*. On the facts just mentioned no such unbroken consensus exists and thus the final terms should stand: 'X, Y, and Z'. The need for the common intention to subsist in unaltered form arose in dramatic form in the *Daventry* case (2011),⁵⁰ a majority decision of the Court of Appeal (Toulson LJ and Lord Neuberger MR; Etherton LJ dissenting; and overturning Vos J). The surprising majority decision appears to conflict with the elementary process of negotiation just mentioned.⁵¹ It will be disappointing if this troublesome decision survives. It cannot be right that English law should allow rectification to occur when, during the negotiations, there has been a clear break in the pattern of the relevant contractual language, and one party's preferred version has

⁴⁸ *Rose (Frederick E) (London) Ltd. v. Wm H Pim Junr & Co. Ltd.*, [1953] 2 QB 450, CA.

⁴⁹ *Holaw (470) Ltd. v. Stockton Estates Ltd.*, (2000) 81 P & CR 404, at [41], *per* Neuberger J.

⁵⁰ *Daventry District Council v. Daventry & District Housing Ltd.*, [2011] EWCA Civ 1153, at [210], *per* Lord Neuberger: 'it was being made clear by DDH. . . that they were including a term whose effect was that DDC would pay the pension deficit, and, indeed, that this was consistent with clause 14.10.2, which had been included in the draft contract almost from the beginning.' Noted Paul S. Davies, *Interpreting Commercial Contract: A Case of Ambiguity?*, 2012 LMCLQ 26.

⁵¹ In the *Daventry* case the District Council [hereinafter DCC] successfully obtained rectification despite the fact that the opponent, a housing association [hereinafter DDH], had clearly introduced into the second phase of the negotiations a competing clause which unequivocally contradicted DDC's preferred version, and to which DDC, on legal advice, objectively appeared to assent by entering into the final written contract on DDH's preferred terms. Surprisingly, a majority of the Court of Appeal (Toulson LJ and Lord Neuberger MR) reversed Vos J. In the majority's opinion, the original version of the document, as found by Vos J, allocated the financial burden for the pension shortfall to DDH. During these early stages of the negotiation, DDH's main negotiator perceived that this wording might not be water-tight in favour of DDC, but he had not intervened to ensure that the parties focused specifically on this textual uncertainty. Toulson LJ, at [178], and Lord Neuberger MR, at [213] to [225], (the latter 'not without hesitation', at [227]) held that the subsequent change, notably insertion of clause 14.10.3, initiated by DDH (this clause unequivocally placed the financial burden upon DDC), had not been clearly enough signalled to DDC. Therefore, objectively, in the majority's opinion, this change had not overtaken the preceding version. The majority reached this conclusion even though this final wording clearly contradicted the earlier version and even though this final version was available to be read by DDC's officials and their lawyers. But, with respect, Toulson LJ's and Lord Neuberger MR's decision is unconvincing.

manifestly prevailed (applying ordinary principles governing sequential negotiations). If the other party has failed to raise objection to this clearly contradictory new clause or new set of terms, and there is no finding of unconscionable dealing at this stage, the contract should proceed on these finally settled terms.

Unilateral Mistake Rectification: The general rule is that the court will not grant rectification simply to reflect one party's mistaken understanding.⁵² However, the exception to this arises if party B is aware that party A is mistaken concerning the contents or meaning of the written terms. Where that exception applies, rectification is available, therefore. For this purpose, B will be 'aware' of the other's error in any of three situations: (1) if he had actual knowledge; or (2) was wilfully blind to an obvious fact; or (3) he wilfully or recklessly failed, contrary to the notion of reasonableness and honesty, to inquire whether there had in fact been a mistake.⁵³ Although it has been said that the law does not require proof of 'sharp practice',⁵⁴ it seems clear that all three situations necessarily import a lack of good faith, or want of probity, on B's part.⁵⁵ Equity takes the view that, in situations (1) to (3), if B stays silent, B cannot take advantage of A's mistake: and that the contract can be rectified in A's favour.⁵⁶ This is justified on the basis of B's unconscionable, bad faith, or reprehensible acquiescence in A's error. This is a strong equitable intervention because the mistaken party achieves 'total victory': a contract is recast to reflect his unilateral understanding, even though there was no shared understanding supporting this version of the contract.⁵⁷

⁵² *Riverlate Properties v. Paul*, [1975] Ch 133, CA.

⁵³ *Commission for New Towns v. Cooper (GB) Ltd.*, [1995] Ch 259, 281 D, 292 F, CA; *George Wimpey UK Ltd. v. VI Construction Ltd.*, [2005] EWCA Civ 77; [2005] 2 P & CR DG5, at [79]; *Traditional Structures Ltd. v. HW Construction Ltd.*, [2010] EWHC 1530 (TCC).

⁵⁴ *Thomas Bates Ltd. v. Wyndham's (Lingerie) Ltd.*, [1981] 1 WLR 505, 515 H, CA, *per* Buckley LJ: 'Undoubtedly I think in any such case the conduct of the defendant must be such as to make it inequitable that he should be allowed to object to the rectification of the document. If this necessarily implies some measure of "sharp practice," so be it; but for my part I think that the doctrine is one which depends more upon the equity of the position.'

⁵⁵ *George Wimpey UK Ltd. v. VI Construction Ltd.*, [2005] EWCA Civ 77; [2005] 2 P & CR DG5, at [79].

⁵⁶ *A Roberts & Co. Ltd. v. Leicestershire CC*, [1961] Ch 555, 570, Pennycuik J (noted Robert E. Megarry, 77 LQR 313–316 (1961)); *Etablissements Georges et Paul Levy v. Adderley Navigation Co Panama SA ('The Olympic Pride')*, [1980] 2 Lloyd's Rep. 67, Mustill J; *Thomas Bates Ltd. v. Wyndham's (Lingerie) Ltd.*, [1981] 1 WLR 505, CA; *Agip SpA v. Navigazione Alta Italia SpA ('The Nai Genova and the Nai Superba')*, [1984] 1 Lloyd's Rep. 353, 365, CA; *Commission for New Towns v. Cooper (GB) Ltd.*, [1995] Ch 259, CA (noted David Mossop, *Rectification for Unilateral Mistake*, 10 JCL 259–263 (1996)); *George Wimpey UK Ltd. v. VI Components Ltd.*, [2005] EWCA Civ 77; [2005] 2 P & CR DG5; *Traditional Structures Ltd. v. HW Construction Ltd.*, [2010] EWHC 1530 (TCC), at [25]–[31]; McLauchlan, *The 'Drastic' Remedy of Rectification for Unilateral Mistake*, *supra* n. 3, at 608–640 (who thinks this category of rectification has been misunderstood; although a first instance judge is not at liberty to reconsider this category of rectification because he is bound by Court of Appeal authority: *Traditional Structures Ltd. v. HW Construction Ltd.*, [2010] EWHC 1530 (TCC), at [32] and [33]; on this point, see Andrews, *supra* n. 1, at 14.47).

⁵⁷ *Rowallan Group Ltd. v. Edgehill Portfolio No. 1 Ltd.*, [2007] EWHC 32 (Ch); [2007] NPC 9, at [14], *per* Lightman J: 'the remedy of rectification for unilateral mistake is a drastic remedy, for it has the result

Residual Status of Rectification: Rectification need not be invoked if the court can, as a matter of simple 'construction' (as explained in section II of this article), revise the relevant document. The latter is possible if (a) it is clear that the present wording makes no commercial sense, and (b) it is apparent how the document should be reconstructed.⁵⁸ But rectification is a doctrine of last resort in this respect. This doctrine applies only if other techniques, such as common law interpretation, or even the implication⁵⁹ of terms at common law,⁶⁰ do not yield a solution.⁶¹

'Explosion' of Rectification Litigation: Although, as just mentioned, rectification is a doctrine of last resort, there has been an 'explosion' of claims for rectification. This is attributable to these three factors: first, to the increasing complexity of commercial and other written contracts; secondly, to the tendency for successive drafts to be composed using the 'cut and paste' style of word-processing; the increasing length, multi-jurisdictional, and multi-partite nature of modern agreements; and, finally, to the richness of accessible electronic records of negotiations.⁶²

Rectification and Evidence: The party seeking rectification must satisfy a high standard of proof, especially where both parties have been professionally advised.⁶³ Rectification admits much greater light into the process of illuminating the dark corners of the written text than the process of common law interpretation. When considering a claim for rectification, the court can admit extrinsic evidence, that is, evidence of discussion or documentary material outside the text of the written agreement. Thus rectification is an exception to the 'parol evidence rule' (this is

of imposing on the defendant . . . a contract that he did not, and did not intend, to make.' Hodge, *supra* n. 3, at 4-90 to 4-93.

⁵⁸ *Holding & Barnes PLC v. Hill House Hammond Ltd. (No. 1)*, [2001] EWCA Civ. 1334; [2002] L & TR 103; *Littman v. Aspen Oil (Broking) Ltd.*, [2005] EWCA Civ 1579; *Nittan (UK) Ltd. v. Solent Steel Fabrication Ltd.*, [1981] 1 Lloyd's Rep 633, CA.

⁵⁹ On implied terms generally, see Andrews, *supra* n. 1, ch. 13.

⁶⁰ *Holaw (470) Ltd. v. Stockton Estates Ltd.*, (2000) 81 P & CR 404, at [41], *per* Neuberger J, at [44] (if a point is so obvious that it goes without saying, the judge said that the appropriate doctrine is implied terms, rather than equitable rectification).

⁶¹ Snell's Principles of Equity, *supra* n. 3, at 16-002: 'Rectification will not be decreed if the desired result can conveniently be achieved by other means: by reliance upon common law rights, or by agreement between the parties.' Snell's Principles of Equity, at 16-009, also notes that the 'touchstone' for implied terms, including in the context of written contracts, remains a demanding matter of 'necessity'; as noted by Sir Anthony Clarke MR in *Mediterranean Salvage & Towage Ltd. v. Seamar Trading & Commerce Inc. ('The Reborn')* ([2009] EWCA Civ 53; [2009] 2 Lloyd's Rep 639, at [18]); on this case and its attractively sceptical reception of Lord Hoffmann's discussion in *Attorney-General for Belize v. Belize Telecom Ltd.* ([2009] UKPC 10; [2009] 2 All ER 1127, at [16]–[27], especially [21]), see Andrews, *supra* n. 1, at 13.15; see also McMeel, *The Construction of Contracts*, *supra* n. 1, chs. 10 and 11.

⁶² See Lord Neuberger MR, *Foreword* to Hodge, *supra* n. 3, at (vii).

⁶³ See *James Hay Pension Trustees Ltd. v. Hird*, [2005] EWHC 1093 (Ch), at [81]; *Surgicraft Ltd. v. Paradigm Biodevices Inc.*, [2010] EWHC 1291 (Ch), at [69], *per* Christopher Pycroft QC (Deputy High Court Judge); *Traditional Structures Ltd. v. HW Construction Ltd.*, [2010] EWHC 1530 (TCC), at [34].

the special English rule governing written contracts – that evidence outside the written contract cannot be used by a party to vary, supplement, or contradict that document's contents).⁶⁴ And so the parole evidence rule does not restrict the process of discerning the parties' pre-contractual intentions and negotiations for the purpose of rectification.

Nor does an 'entire agreement' clause bar external evidence if that evidence is adduced during an application for rectification of a written contract. An 'entire agreement' clause is a stipulation in the main contract stating that the parties agree to exclude from their agreement any prior and external assurances or warranties or promises. It has been suggested at first instance that it would be inappropriate for the 'entire agreement' clause to exclude such evidence in this context because the function of such a clause is to bar resort to oral undertakings or satellite written assurances independently of the main written contract (prior or collateral promises). By contrast, rectification is invoked to show that the main contract does not record accurately the parties' true consensus.⁶⁵

4. Appeals on points of interpretation or rectification⁶⁶

If English law is applicable to the relevant transaction, interpretation of (wholly) 'written contracts' (including electronic documents)⁶⁷ is a question of law.⁶⁸ This means that (if permission to appeal is obtained – and permission is a requirement for an appeal in an English civil case)⁶⁹ an appellate court will have the opportunity to reconsider the lower court's view of the contract's effect⁷⁰ (or the point *might* be subject to appeal to the English High Court, namely the Commercial Court, from an arbitration tribunal, if the High Court gives permission).⁷¹

⁶⁴ Generally on this rule, see Andrews, *supra* n. 1, at 14.26 ff.

⁶⁵ See *Surgicraft Ltd. v. Paradigm Biodevices Inc.*, [2010] EWHC 1291 (Ch), at [73], per Christopher Pycroft QC (Deputy High Court Judge); Snell's Principles of Equity, *supra* n. 3, at 16-008; Chitty on Contracts, *supra* n. 3, at 5-112.

⁶⁶ On the system of appeal in English court proceedings, see 1 Andrews on Civil Processes, *supra* n. 1, ch. 15; on appeals from arbitral awards on points of English law, see 2 Andrews on Civil Processes, *supra* n. 1, ¶¶ 18.67 ff.

⁶⁷ Chitty on Contracts, *supra* n. 3, at 12-048.

⁶⁸ *Id.* 12-046.

⁶⁹ CPR, pts. 52.3(1), 52.4(2).

⁷⁰ See, e.g., *AXA Reinsurance (UK) v. Field*, [1996] 1 WLR 1026, HL.

⁷¹ Arbitration Act, 1996, sect. 69 (England); scope for granting leave to appeal from an arbitrator's decision is constrained: *id.* sect. 69(3).

By contrast, appellate courts are generally reluctant to re-open findings of fact made by first instance courts (although the precise scope of appeals against matters of fact has become a complex field of procedure):

[T]he approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere.⁷²

The 'advantage' is the lower court's monopoly (under modern practice) upon hearing live testimony.

High Court or appeal court decisions on interpretation of written contracts supply valuable precedent decisions on standard words or phrases in commercial documents. Those decisions will be binding on all lower courts, and on arbitrators applying English law.

As for the equitable remedy of rectification (*see supra* sect. 3), a leading textbook notes:⁷³

although the applicable principles underpinning rectification are a question of law, whether or not a particular instrument should be rectified is a question of fact; [whereas] the correct construction of a particular written contract is a question of law. Thus appeals concerning interpretation are much more common than appeals on the issue of rectification.

5. Concluding remarks

Modern English courts, and arbitrators applying English law, are no longer tied to the literal wording of the written contract, but can consider the parties' common intention against the background of the transaction. In the face of more than one possible meaning, it is legitimate for the courts to prefer a meaning which better reflects the commercial realities of the relevant contract or contractual clause.

English courts, and arbitrators applying English substantive principles, possess a liberal power to interpret a written contract so as to make new sense of it, provided it is objectively clear that it has been defectively written and provided also that its true meaning is obvious. This last condition must remain strict. The court should not engage in guess-work or creative re-drafting which is unsupported by the

⁷² *Assicurazioni Generali SpA v. Arab Insurance Group*, [2002] EWCA Civ 1642; [2003] 1 WLR 577, CA, at [15], *per* Clarke LJ.

⁷³ Snell's Principles of Equity, *supra* n. 3, at 16.11.

clear implication: 'this is what we truly intended and had agreed, although the final document has not intelligibly or accurately reflected this.'

English contract law does not allow reference to pre-contractual negotiations when interpreting written contract. To this last proposition there is a large exception when a party seeks the equitable remedy of rectification.

Appeal courts can review a first instance court's decision (or an arbitral tribunal's award where English substantive law has been applied)⁷⁴ on a point of interpretation if the relevant contract is wholly contained in writing. This is because interpretation of such a document is classified as an issue of law, as distinct from one of fact (findings of fact, if they turn on the trial court's appreciation of oral evidence, tend not to be disturbed on appeal). However, civil appeals, even concerning points of law, are not automatically available. An appellant must first apply to the first instance court or the relevant appellate court to give permission for an appeal to take place. If such permission is given, the appellate court can pronounce authoritatively on the point of interpretation.⁷⁵ The appeal court's statement of the relevant methodology for eliciting meaning will then be binding on the lower courts and upon arbitral tribunals applying English law. The meaning of the relevant written terms, at least in that immediate context, will also be binding. In this way English courts have constructed a rich stock of precedent decisions concerning standard phrases in commercial use. These decisions help to promote predictability.⁷⁶

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⁷⁴ In the case of arbitration references where the 'seat' is within England and Wales, the High Court in London must first give permission for an appeal on a point of English law to proceed to the High Court: Arbitration Act, 1996, sects. 69(2) and 69(3) (England and Wales).

⁷⁵ On the system of 'permission' for appeals in English court proceedings, see 1 Andrews on Civil Processes, *supra* n. 1, at ¶¶ 15.25 ff.

⁷⁶ McMeel (see *The Interplay of Contractual Construction and Civil Justice*, *supra* n. 1, at 438, n. 6) collects judicial statements in favour of commercial certainty, especially Lord Bingham in the *Homburg Houtimport BV v. Agrosin Private Ltd. ('The Starsin')* ([2003] UKHL 12; [2004] 1 AC 715, at [13]) and Lord Steyn in *Jindal Iron and Steel Co. Ltd. and others v. Islamic Solidarity Shipping Co. Jordan Inc. ('The Jordan II')* ([2004] UKHL 49; [2005] 1 WLR 1363, 1370).

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