

A RAINY SKY IN SCOTLAND:

Recent Cases on Contractual Interpretation

by

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1. Has so-called “business common sense” had its day when it comes to the interpretation of contracts? Despite the oft-quoted words of Lord Neuberger in ARNOLD V BRITTON [2015] AC 1619, it seems not.
2. The starting point for those practitioners dealing with a case involving contractual interpretation has most frequently been the five principles set out by Lord Hoffmann in ICS V WEST BROMWICH BS [1998] 1 WLR 896. I have set these out in full in the annex to this talk.
3. Perhaps the most influential point made by Lord Hoffmann in that case was his invocation of “business common sense” and his repetition of, and emphasis on, the words of Lord Diplock in ANTAIOS COMPANIA NAVIERA S.A. V. SALEN REDERIerna A.B. [1985] A.C. 191 (at 201) when he said:

“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.”

4. That case involved the interpretation of a clause in a standard claim form entered into between a consumer and the Investors Compensation Scheme Ltd, a company set up to compensate members of the public who had been mis-sold mortgage insurance. The House of Lords felt able to read the words in the contract, which were:

“Any claim (whether sounding in rescission for undue influence or otherwise)”

As in fact meaning:

“Any claim sounding in rescission (whether for undue influence or otherwise)”

They agreed with the Judge who had said that to read the clause literally

“led to a “ridiculous commercial result which the parties to the claim forms were quite unlikely to have intended”

5. Following the ICS case the appellate courts of England attempted on various occasions to summarize the relevant principles in various different ways. In retrospect, the most significant of these is the speech of Lord Clark in RAINY SKY V KOOKMIN [2011] 1 WLR 2900. Again I have set out in full the relevant passages from his speech in the annex to this talk.

6. In that case, the Supreme Court had to interpret the provisions of a commercial advance payment bond given by a bank to the customers of a shipbuilder and in particular the phrase “all such sums” in one particularly clause. The question was whether that phrase referred to one or other of two alternative formulations. Lord Clarke favoured the formulation of principle by Sir Simon Tuckey in the Court of Appeal where he said:

“If the language of the bond leads clearly to a conclusion that one or other of the constructions contended for is the correct one, the court must give effect to it, however surprising or unreasonable the result might be. But if there are two possible constructions, the court is entitled to reject the one which is unreasonable and, in a commercial context, the one which flouts business common sense.”

He disapproved the formulation of Patten LJ which was as follows:

“Unless the most natural meaning of the words produces a result which is so extreme as to suggest that it was unintended, the court has no alternative but to give effect to its terms”

Lord Clarke stated:

“where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense. For these reasons, I prefer the approach of the judge and Sir Simon Tuckey to that of Patten LJ, which is to my mind significantly different on this point”

7. Perhaps the apogee of the application of business common sense came on the case of CHARTBROOK V PERSIMMON [2009] 1 AC 1101 which was Lord Hoffmann’s last case before retirement. The House of Lords had to interpret the terms of an overage provision in a contract for the sale of some land to a housebuilder. The relevant words related to the calculation of a sum (called “ARP”) which might become due to the vendor once the land had been sold to the housebuilder and the flats sold on. The words of the agreement were as follows:

“23.4% of the price achieved for each residential unit in excess of the minimum guaranteed residential unit value less the costs and incentives.”

The judge at first instance and the majority in the Court of Appeal had interpreted this phrase in what Lord Hoffmann accepted was “in accordance with conventional syntax”, that is that:

ARP = 23.4% of (the price achieved in excess of the minimum guaranteed residential value less the costs and incentives).

However the House of Lords held that this produced “commercial nonsense” (see Lord Walker at paragraph 89). The correct interpretation was as follows:

ARP = any excess over the minimum guaranteed residential value represented by the figure which is (23.4% of the price achieved less costs and incentives).

8. In the course of his speech Lord Hoffmann said this:

“I do not think that it is necessary to undertake the exercise of comparing this language with that of the definition in order to see how much use of red ink is involved. When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did. The fact that the court might have to express that meaning in language quite different from that used by the parties...is no reason for not giving effect to what they appear to have meant.

He added later:

“there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied.”

9. Some have complained that this goes too far and allows the court, under the guise of interpreting a contract, effectively to re-write it so that it mirrors judicial views of fairness. As Sir Kim Lewison puts it in his book (The Interpretation of Contracts (6th edition) at paragraph 2.08):

“neither the advocates who argue points of construction nor the judges who determine them are commercial men. In deciding without evidence what the commercial purpose of a contract is, there is a danger that the real intention of the parties will be frustrated. This may manifest itself in the application of a preconceived idea of what contracts of that description generally seek to

achieve, and a resulting tendency to force the words of the particular contract to fit that preconception.”

10. Then came the, by now, well-known case of ARNOLD V BRITTON. As we know that case involved the interpretation of a service charge provision in some leases of holiday chalet plots in a caravan park in South Wales. The relevant provision was as follows:

“To pay to the lessors without any deduction in addition to the said rent a proportionate part of the expenses and outgoings incurred by the lessors in the repair maintenance renewal and the provision of services hereafter set out the yearly sum of £90 and VAT (if any) for the first three years of the term hereby granted increasing thereafter by ten pounds per hundred for every subsequent three year period or part thereof.”

The effect of this clause literally applied was that the initial service charge of £90 per annum would be increased on a compound basis by 10% every 3 years. The actual effect of this was that, by 2015, the service charge was £2,500 and by the term date in the leases, in 2072, the sum payable annually would be £550,000. None of these sums of course bore any relation to the sums actually expended by the landlord in the upkeep of the caravan park.

11. The Supreme Court recognized that the literal meaning of the clause produced “unattractive, indeed alarming” results, “unattractive consequences” and a “highly unsatisfactory outcome”. The tenants submitted that the service charge clause requires the lessee to pay a fair proportion of the lessor's costs of providing the services, subject to a maximum, which is £90 in the first year of the term, and increases every year by 10% on a compound basis. In other words, they argued that, in effect, the words “up to” should be read into the clause set out in para 7 above, between the words “the provision of services hereafter set out” and “the yearly sum of £90”.

12. The Supreme Court rejected the tenant's arguments. They ran counter to what Lord Neuberger called "the natural meaning" of the words used and involved inserting words which weren't there.
13. In the course of his speech (the relevant passages of which are set out in the annex) Lord Neuberger famously reminded us all of the importance of paying close attention to the words actually used by the parties to the contract.
14. He made seven points four of which are particularly relevant:
 - a. The first point was that commercial common sense should not be invoked to undervalue the importance of the language of the provision which is to be construed. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract.
 - b. His second point was that the court should not embark on an exercise of looking for or constructing ambiguity or drafting infelicities in order to allow it to apply commercial common sense and depart from the natural meaning of the words used.
 - c. His third point was that commercial common sense could not 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.
 - d. His fourth point was that 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.
15. Now reading that case, you might well have thought (as did I) that, whilst it indicated no sea-change in the basic principles of contractual interpretation, at the very least it

signaled a return to literalism: an approach much more closely focused on the words actually used. One might well have thought that courts were being told to be much less free and easy with Lord Hoffmann's "red ink". One might also have thought that the "mood music" had changed since Lord Hoffmann's retirement.

16. But apparently not. The Scots have said no.

17. You might well not have noticed the Scottish case of HOE INTERNATIONAL V ANDERSEN [2017] CSIH 9. This was a case in the Second Division, Inner House (the Scottish equivalent to the Court of Appeal) it involved the correct interpretation of some notice provisions in an indemnity agreement deriving from a commercial share sale.

18. In the course of his lengthy judgment, Lord Drummond Young criticized the first instance judge for asserting that "in each case the court must approach matters using the principles of contractual interpretation summarized by Lord Neuberger in *Arnold v Britton*, [2015] AC 1619 , at paragraphs 14-23". The appeal court said:

"For reasons discussed below, we consider that this is too simplistic an approach to the question of general contractual interpretation."

The court went on to say:

*"The Lord Ordinary treated as definitive the principles of contractual interpretation that are said to be summarized by Lord Neuberger in *Arnold v Britton*, [2015] AC 1619 , at paragraphs 14-23. In our opinion that is an oversimplification of what was held in that case."*

The court concluded:

"..the comments of Lord Neuberger at paragraphs 16-23 deal with a specialized situation rather than an ordinary or typical case of contractual interpretation. It appears to us that those comments, in their emphasis and balance, are directed towards the relatively extreme case where it is argued that rewriting is

required, and not with the ordinary case of contractual construction of a clause containing a degree of ambiguity. For the proper approach to ordinary cases of contractual interpretation, we are of opinion that regard should be had to the factors listed at paragraph 15, to the opinion of Lord Hodge, and to the earlier analysis by Lord Clarke in Rainy Sky”.

19. Now one might have been tempted to think either that this was a rather bold ruling by some Scottish judges which would turn out, in the fullness of time, to have been erroneous or that, whilst the dear old Scots could go their own way, the English courts would still be bound to follow the lead apparently given by Lord Neuberger.

20. Well apparently, not.

21. The final case I wish to examine is the very recent Supreme Court case of WOOD V CAPITA INSURANCE SERVICES [2017] UKSC 24. This was an English case and Lord Neuberger was on the panel hearing it. It involved the interpretation of an indemnity clause in an agreement for the sale and purchase of the entire issued share capital of a company. The only speech was given by Lord Hodge (a Scot). All four English SCJ's agreed.

22. Most importantly for present purposes, Lord Hodge had this to say (at paragraphs 8 and 9):

“In his written case counsel for Capita argued that the Court of Appeal had fallen into error because it had been influenced by a submission by Mr Wood's counsel that the decision of this court in Arnold v Britton [2015] AC 1619 had “rowed back” from the guidance on contractual interpretation which this court gave in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 . This, he submitted, had caused the Court of Appeal to place too much emphasis on the words of the SPA and to give insufficient weight to the factual matrix...But it

may assist if I explain briefly why I do not accept the proposition that the Arnold case involved a recalibration of the approach summarised in the Rainy Sky case.”

23. I have set out in full in the annex the relevant passages in Lord Hodge’s speech. He emphasized that contractual interpretation was a “unitary exercise” involving an “iterative process”. He concluded:

“On the approach to contractual interpretation, the Rainy Sky and Arnold case were saying the same thing.”

24. I am not sure that I would fully agree with that statement. One could indeed be forgiven for wondering what is now the significance (if any) of Lord Neuberger’s seven points set out in his speech in Arnold. Perhaps only time will tell. However, given that Lord Hodge praised as “one of the attractions of English law as a legal system of choice in commercial matters” what he called “its stability and continuity, particularly in contractual interpretation”, I venture to suggest that one ought not to be putting away too much of Lord Hoffmann’s “red ink” just yet.

ANNEX

Lord Hoffmann in ICS:

*But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381 , 1384–1386 and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989 , is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of “legal” interpretation has been discarded. 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 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 on which to explore them.

*(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the 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 even (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] A.C. 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 S.A. v. Salen Rederierna A.B.* [1985] A.C. 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.”

Lord Clarke in Rainy Sky:

14 For the most part, the correct approach to construction of the bonds, as in the case of any contract, was not in dispute. The principles have been discussed in many cases, notably of course, as Lord Neuberger of Abbotsbury MR said in *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429 , para 17, by Lord Hoffmann in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 , passim, in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 , 912 F -913 G and in *Chartbrook Ltd v Persimmon Homes Ltd* (Chartbrook Ltd Part 20 defendants) [2009] AC 1101 , paras 21–26. I agree with Lord Neuberger (also at para 17) that those cases show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the *Investors Compensation Scheme case* [1998] 1 WLR 896 , 912 H , the relevant reasonable person is one who has 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.

15 The issue between the parties in this appeal is the role to be played by considerations of business common sense in determining what the parties meant...

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 The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has 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, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other...

30... where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense. For these reasons I prefer the approach of the judge and Sir Simon Tuckey to that of Patten LJ, which is to my mind significantly different on this point.

Lord Neuberger in Arnold v Britton:

15 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 *1628 subjective evidence of any party's intentions. In this connection, see *Prenn [1971] 1 WLR 1381* , 1384-1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989* , 995-997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251* , para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky [2011] 1 WLR 2900* , paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC.

16 For present purposes, I think it is important to emphasise seven factors.

17 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.

18 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 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.

19 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* , 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191* , 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.

20 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 *1629 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.

21 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.

22 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 SC (UKSC) 240 , 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.

23 Seventhly, reference was made in argument to service charge clauses being construed “restrictively”. I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in *McHale v Earl Cadogan* [2010] HLR 412 , para 17. What he was saying, quite correctly, was that the court should not “bring within the general words of a service charge clause anything which does not clearly belong there”. However, that does not help resolve the sort of issue of interpretation raised in this case.

Lord Hodge in *Wood v Capita*:

10 The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 , 1383H–1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 , 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 , 912–913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extra-judicial writing, “A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision” (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11 Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky case* [2011] 1 WLR 2900 , para 21f. In the *Arnold case* [2015] AC 1619 all of the judgments confirmed the approach in the *Rainy Sky case*:

Lord Neuberger of Abbotsbury PSC, paras 13–14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299*, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12 This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 *1100 citing *In re Sigma Finance Corpn [2010] 1 All ER 571*, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn [2010] 1 All ER 571*, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.

14 On the approach to contractual interpretation, the *Rainy Sky* and *Arnold* case were saying the same thing.

15 The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation.