into account, then the plaintiff can have no complaint. The difficult question is, what is to happen in the few cases where this is not so, where the professional's duty was fairly and squarely to benefit the plaintiff, and yet failed to do so? The majority in *White* v. *Jones* [1995] 2 A.C. 207 allows the plaintiff to sue, yet with a strongly-argued dissent by Lord Mustill protesting that if the professional's primary duty is not owed to the plaintiff, the plaintiff cannot take advantage of it. In *Phelps,* the Mustill approach is in the ascendant.

STEVE HEDLEY

CONTRACT CONSTRUCTION AND RISK ALLOCATION

WHEN a judge needs to construe a contract, to what extent can he or she have regard to factors which are external to the agreement rather than adopt a literal interpretation? This was the crucial question for the Court of Appeal to answer in *Bromarin A.B. and others* v. *I.M.D. Investments Ltd.* [1999] S.T.C. 301.

The facts of the case were complex. The plaintiffs owned companies which had allowable capital lossses. These losses could be carried forward and set off against chargeable gains for the purposes of assessing tax liability, but it was not possible for the companies to use them because they had no capital gains. Consequently, the plaintiffs agreed to sell their shares in the companies to the defendant, which wished to make use of the losses by transferring assets pregnant with gains to the companies, which would then sell them and set the existing losses off against the gains. The consideration for the purchase of the companies took two forms. First, the defendant agreed to pay £10,000 to each plaintiff. Secondly, the defendant agreed to pay to the plaintiffs, after five years, a sum equivalent to half of the tax which had been saved. If the defendant had not used all of the capital losses after five years, there was a long-stop provision whereby it was required to pay a sum equivalent to half the amount of tax which it would have saved had all of the losses been used. The defendant was never able to use any of the capital losses because of a severe decline in its capital gains and, crucially, because three years after the agreement was made, the law was changed by the Finance Act 1993 so that it was prevented from using the losses because they had been incurred before the shares in the companies had been purchased. The dispute between the parties concerned whether the long-stop provision applied where the reason why the defendant was unable to make use of the losses was that the

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law had changed. Park J. held that the defendant was not liable to the plaintiffs for two reasons, both of which were rejected by the Court of Appeal.

The first reason related to the construction of the contracts. Park J. had concluded that, since the parties had not contemplated that the law might change (although this was inconsistent with the facts), it was not appropriate to adopt a literal interpretation of the agreements. Instead, he considered the "factual matrix" which existed at the time the agreements were made, and concluded that the long-stop provision was not intended to apply if the defendant was prevented by law from using the capital losses. This argument was easily refuted by the Court of Appeal. As Chadwick L.J. recognised, it is not possible to conclude that a contract does not apply on the occurrence of a particular event simply because that event had not been contemplated by the parties. Rather, it is necessary to ascertain what the parties would have intended had the event been contemplated. He went on to assert that, in identifying this intention, it is necessary to have regard to the whole of the agreement, including the words used and the surrounding events, and ask what a reasonable person would have intended by the use of the words made in those circumstances.

This commonsense approach to contractual construction is consistent with the important judgment of Lord Hoffmann in *Investors Compensation Scheme Ltd.* v. *West Bromwich Building Society* [1998] 1 W.L.R. 896, 912–913, which identifies the general principles for the construction of contractual documents. But one aspect of Lord Hoffmann's judgment was clarified by the Court of Appeal in a crucial respect. Lord Hoffmann had stated that, when considering the meaning of a document, it was legitimate to consider the background against which the contract had been made, especially its commercial purpose. Although the Court of Appeal acknowledged that the commercial purpose was an important consideration when construing a document, it emphasised that there was no need to have regard to any evidence which was extrinsic to the contract to determine this purpose if it was apparent from the terms of the contract itself. In *Bromarin* itself, the terms of the agreement and its commercial purpose were clear so there was no need for the court to consider any external facts. Consequently, the court concluded that, according to its literal interpretation, the contract allocated the risk of a change in the law to the defendant, which was therefore liable to pay the plaintiffs.

Park J. also justified his conclusion that the defendant was not liable to pay the plaintiffs on the alternative ground that the change in the law brought about by the Finance Act served to frustrate the

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agreement. This conclusion was summarily rejected by the Court of Appeal, again correctly. The operation of the doctrine of frustration also depends on the construction of the contract, since it will only apply where there has been a change of circumstances of such significance that the performance of an obligation would be different from that for which the parties had contracted: *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696, 729 (Lord Radcliffe). The relevant obligation in this case was that of the defendant to pay for the shares which it had purchased. Although the defendant's *reason* for making the contract had been frustrated, since it could no longer use the capital losses, it did not follow that the contract itself had been frustrated because the *purpose* of the transaction, namely the purchase of shares, was unaffected. The conclusion that the contract had not been frustrated is also consistent with the allocation of risk, since the defendant bore the risk that the law might change to prevent it from using the capital losses.

Both conclusions of the Court of Appeal are correct. The terms of the agreement were consistent with the conclusion that the defendant bore the risk of a change in the law and it was not for the courts to re-allocate that risk to the plaintiffs. But there is another dimension to this case concerning the potential application of the law of restitution. The defendant had paid £10,000 to each of the plaintiffs as initial consideration for the purchase of the shares. Although the defendant had not sought restitution of this money, could it have done so following the enactment of the Finance Act 1993? It could not have established that there had been a total failure or absence of consideration, but could it have recovered the money by virtue of a mistake, namely a mistake of law? Following the decision of the House of Lords in *Kleinwort Benson Ltd.* v. *Lincoln C.C.* [1998] 3 W.L.R. 1095, such an argument might have succeeded. Since the change in law effected by the Finance Act 1993 was retrospective it followed that, when the defendant paid the plaintiffs, it could be considered to be acting under a mistake, since it thought that the payment would enable it to use the companies' capital losses and, but for this mistake, it would not have paid the money. Consequently, the plaintiffs were unjustly enriched at the defendant's expense. But this would mean that, although the defendant would still have been liable to pay the plaintiff's under the agreements, it could recover any money which had already been paid. To avoid this absurd result, it is vital to insist that, where money has been paid pursuant to a contract, restitutionary remedies are only available where the contract ceases to operate. This was the case in *Kleinwort Benson* because the contract was null and void, but the contract continued to be effective in *Bromarin* and so restitutionary relief

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would have been unavailable. It is not for the law of restitution to subvert the contractual allocation of risk.

GRAHAM VIRGO

WHEN IS A SALE MADE "IN THE COURSE OF A BUSINESS"?

IN the days (not so long ago) when there were typewriters in solicitors' offices, there was much speculation whether the sale by a solicitor of a typewriter which was no longer required would be caught by the provisions in section 14 of the Sale of Goods Act that impose conditions as to quality and fitness upon a "business" seller. There was no real room for doubt so far as the original Act of 1893 was concerned, where the relevant subsections referred to goods "of a description which it is in the course of the seller's business to supply" (s. 14(1)) and to "a seller who deals in goods of that description" (s. 14(2)). Plainly, our solicitor was not within either subsection. But when section 14 was revised (and subsection (1) confusingly renumbered so that it became subsection (3)), these formulae were discarded and replaced by the wording: "Where the seller sells goods in the course of a business"—which is plainly wider. This reform was introduced by the Supply of Goods (Implied Terms) Act 1973 and later consolidated into the Sale of Goods Act 1979 that is currently in force. Remarkably, the scope of the new provision has not been the subject of any judicial consideration for over two decades; but the Court of Appeal has now given a firm ruling in *Stevenson* v. *Rogers* [1999] 1 All E.R. 613, with the consequence that any redundant typewriters disposed of by solicitors in the future will be deemed sold "in the course of a business".

Rogers, the defendant, was a fisherman who in 1988 sold his only boat, the *Jelle,* to the plaintiff, Stevenson, for £600,000 and replaced it with the *Marilyn Jane.* The court was asked to rule, as a preliminary issue, whether the sale of the *Jelle* was made in the course of Rogers' business as a fisherman, so rendering him potentially liable under a claim that the vessel was not of merchantable quality. ("Merchantable quality" has, of course, now given way to "satisfactory quality", following the amendments made to the Act in 1994.)

Potter L.J., who gave the leading judgment, took full advantage of the new dispensation established by the House of Lords in *Pepper* v. *Hart* [1993] A.C. 593 to explore not only statements made during the passage of the 1973 legislation through Parliament, but also the reports of the (Moloney) Committee on Consumer Protection (1962) and of the Law Commissions on Exemption Clauses in Contracts

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