be non-justiciable in the private law sphere, and which was in any event entirely reasonable.

JANET O'SULLIVAN

INTERPRETING CONTRACTS—THE PRICE OF PERSPECTIVE

WHEN a court seeks the meaning of a written contract, it meets a barrier on the outskirts of the document, a barrier imposed by the parol evidence rule. Traditionally, if a court wants to go beyond the barrier for a wider perspective of what the document might mean, it requires a permit on one or more of three grounds. The first is "technicality": that, although the words appear clear, they have a technical meaning that is not apparent without seeking extrinsic evidence. The second is "ambiguity": that the words are not clear and the ambiguity must be resolved from a wider perspective. The third is "absurdity": that a literal reading is not just unreasonable but unworkable or absurd and that that reading must be avoided by taking once again a wider perspective. The perspective is one which takes in the purpose and background (also called the matrix) of the document.

It was no more than the third ground that seems to have been in the mind of Lord Wilberforce in *Prenn* v. *Simmonds* [1971] 1 W.L.R. 1381, 1385 (H.L.), when he said this: if it can be shown that one interpretation completely frustrates the object of the contract, "to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found". However, some years later the thoughts of Lord Wilberforce, not for the first time, were "reinterpreted". In 1997 in *Investors Compensation Scheme Ltd.* v. *West Bromwich BS* [1998] 1 W.L.R. 896, 912 (H.L.) Lord Hoffmann surprised us, not for the last time, by referring to "the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce", with the result that almost all "the old intellectual baggage of 'legal' interpretation has been discarded". In particular (p. 913), the "meaning of words is a matter of dictionaries and grammars; the meaning of a 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 ... to conclude that the parties must, for whatever reason, have used the wrong words or syntax."

https://doi.org/10.1017/S0008197300260017 Published online by Cambridge University Press

The question now is to what extent the words of Lord Hoffmann will be given the literal effect which he, apparently, was ready to deny to the contractual wording of others. If his words are taken entirely literally, the traditional barrier on the outskirts of a written contract has been largely dismantled. Since *Investors*, however, the Hoffmann "school" of what Lord Lloyd (dissenting, p. 904) called "creative interpretation" has seen some enrolments but little creativity. Although in *Ham* v. *Somak* (4 February 1998) the Court of Appeal seemed to take little notice at all, it was more attentive more recently in *MDIS* v. *Swinbank* [1999] Lloyd's Rep. I.R. 516. In *MDIS* the operative clause of a liability policy required the insurer to "indemnify the Assured ... against any claim for which the Assured may become legally liable ... *alleging*: (a) Neglect Error or Omission ..." (emphasis added). The policy also excluded claims "resulting from", *inter alia*, fraud by employees. The insured settled a claim which alleged negligence but made no mention of fraud. The insured's action to recover the amount of the settlement from the insurer failed because there had been fraud.

Peter Gibson L.J., dissenting, put a literal interpretation on the policy, and concluded (p. 526) that, the possibility of fraud not having been alleged, the insurer should pay. The majority, however, read the words in the background, first, of legal precedent and, second, of the "danger" that a well informed third party claimant might be tempted to be "economical with the truth": to frame his "allegation" with a selective presentation of the facts so as to ensure that the insurer paid, even when a more complete account of the facts would reveal a defence. (See *Hayden* v. *Lo & Lo* [1997] 1 W.L.R. 198, 204 *per* Lord Lloyd (P.C.).)

The decision in *MDIS*, however, offers little more than formal support for the Hoffmann school. The background of legal precedent, mainly the judgment of Devlin J., as he then was, in *West Wake Price & Co.* v. *Ching* [1957] 1 W.L.R. 45, 53–54, was "well known amongst insurance lawyers and indeed brokers for many years" (p. 522 *per* Clarke L.J.) and easily available to the court; so was the tailoring of claims. That was also true of the background information in *Investors* itself and some other such recent cases; see, *e.g.*, *Kumar* v. *AGF* [1999] Lloyd's Rep. I.R. 147. Not so *Kingscroft* v. *Nissan (No. 2)* [1999] Lloyd's Rep. I.R. 603, however, in which the hearing lasted from 14 April to 28 May 1999. An appreciable time had to be spent looking at the background to reinsurance transactions although, the case being complex, it is difficult to know exactly how much.

The background quest is important and controversial. Sir Christopher Staughton wrote in this journal ([1999] C.L.J. 303,

https://doi.org/10.1017/S0008197300260017 Published online by Cambridge University Press

307), with reference to the Hoffmann "school", that it was "hard to imagine a ruling more calculated to perpetuate the vast cost of commercial litigation". In *National Bank of Sharjah* v. *Dellborg* (C.A. 9 July 1997) Saville L.J., as he then was, also objected on grounds of cost. He then raised a further objection, that

> the position of third parties (which would include assignees of contractual rights) does not seem to have been considered at all. They are unlikely in the nature of things to be aware of the surrounding circumstances. Where the words of the agreement have only one meaning, and that meaning is not self evidently nonsensical, is the third party justified in taking that to be the agreement that was made, or unable to rely on the words used without examining (which it is likely to be difficult or impossible for third parties to do) all the surrounding circumstances? If the former is the case, the law would have to treat the agreement as meaning one thing to the parties and another to third parties, hardly a satisfactory state of affairs. If the latter is the case, then unless third parties can discover all the surrounding circumstances and are satisfied that they make no difference, they cannot safely proceed to act on the basis of what the agreement actually says. This again would seem to be highly unsatisfactory.

To take the "teaching" of Lord Hoffmann at face value is to forget the lessons of the past. Indeed, it is not clear that that was what he intended. In *Investors* (p. 912), he did say that the background might include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man". However, he also required "that it should have been reasonably available to the parties". Presumably, what is "reasonably available" to large litigants may not be "reasonably available" to others. The outcome may also depend on the resources of the court, resources of knowledge and awareness about the value of what the background is likely to reveal and about how much time and money will have to be spent to get it. The judge was always more than just a technician. Now, it seems, he has become a director or research.

MALCOLM CLARKE

https://doi.org/10.1017/S0008197300260017 Published online by Cambridge University Press