of the causation of the individual victim's mesothelioma? One basis might be that, though the defendant had been careless in creating such a dangerous environment, this victim had only spent a trivial amount of time in it. Another basis is developing scientific knowledge: it is now accepted that where a wrongful exposure occurred wholly within the five years before manifestation of the mesothelioma it can be ignored for the purposes of causation: *Sienkiewicz v Greif (UK) Ltd.* [2011] UKSC 10, [2011] 2 A.C. 229, at [19v] and [175]. But neither of these conclusions relies on a rigorous comparison of all the other exposures to which the victim was subjected.

Two dangers were averted by the court's rejection of the University's argument. First, such a requirement might have placed an insuperable evidentiary burden on claimants because they are unable to provide relative estimates of all exposures suffered by the victim. Secondly, the requirement might be thought to re-introduce the flawed reasoning on which the appellants in *Sienkiewicz v Greif UK Ltd.* [2011] UKSC 10, [2011] 2 A.C. 229 unsuccessfully relied, namely that the relatively much greater exposure from other sources provided, in itself, a valid basis for dismissing the legal relevance of exposure due to the defendant's tort. This is not the case because the aetiology of mesothelioma is unknown and, therefore, might involve a mechanism to which a very small number of fibres from the tortious source contributed even if the victim had been exposed to a vastly greater volume of fibre from other sources.

JANE STAPLETON

ABSURDITY AND AMBIGUITY – MAKING SENSE OF CONTRACTUAL CONSTRUCTION

IN his classic restatement of the principles of contractual construction in *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 W.L.R. 896, Lord Hoffmann reaffirmed the vital distinction between the permissible judicial role of construing a contract and the forbidden role (outside a rectification action) of rewriting the contract. Nonetheless he discussed what the court should do when it is forced to "conclude from the background that something must have gone wrong with the language", and, by way of an answer, approved a dictum of Lord Diplock from *The Antaios* [1985] A.C. 191 that, "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". Unfortunately, whilst all judges accept that there is a crucial line between making the parties' words "yield to business common sense" and

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rewriting them, they do not concur on where that line is located in particular cases. As ever, this reflects the tension between the desire for commercial certainty versus individual justice, as well as varying degrees of confidence amongst judges about their ability to understand the commercial context and recognise when a provision makes no commercial sense. The upshot is uncertainty for commercial parties and their advisers, and far too many construction disputes reaching the appellate courts, of which *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900 is the latest example.

Each claimant made an identical shipbuilding contract ("the Contract") with a shipbuilder, who was a customer of the defendant bank. The claimants had to pay in advance for the ships by instalments, which left them exposed financially, so the Contract obliged the shipbuilder to provide an "Advance Payment Bond" (the "Bond"), to be issued by the bank, to guarantee refunds of the pre-delivery instalments. The list of events in the Contract that allowed the claimant to get such a refund included the insolvency of the shipbuilder, but the drafting of the Bond did not reflect that of the Contract; in particular, the shipbuilder's insolvency was arguably not included in the Bond as triggering a guaranteed refund. The shipbuilder went bust before finishing the ships and declined to repay any instalments; each claimant sought refunds of the instalments from the bank under its Bond, but the bank refused to pay. The claimants sued, arguing that the Bond should be interpreted so as to match the Contract and include insolvency events. The bank retorted that the words of the Bond were clear and did not cover insolvency.

The problem with the Bond's wording was the inter-relation of two provisions:

> "*Para 2* Pursuant to the terms of the Contract, you are entitled, upon your rejection of the Vessel in accordance with the terms of the Contract, your termination, cancellation or rescission of the Contract or upon a Total Loss of the Vessel, to repayment of the pre-delivery instalments of the Contract Price paid by you prior to such termination or a Total Loss of the Vessel (as the case may be) …."
> "*Para 3* In consideration of your agreement to make the pre-delivery instalments under the Contract … we hereby, as primary obligor, irrevocably and unconditionally undertake to pay to you … *all such sums* due to you under the Contract … [emphasis added]"

Argument centred on the meaning of "all such sums" in paragraph 3. The bank contended that the phrase referred back to the pre-delivery instalments listed in paragraph 2 (which omitted the insolvency of the shipbuilder), whereas the claimants argued that it referred to the first half of paragraph 3 i.e. to all pre-delivery instalments due (and

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potentially refundable) under the Contract, including on the shipbuilder's insolvency. The claimants' interpretation was commercially more plausible, but as a matter of drafting rendered paragraph 2 redundant. Simon J. in the Commercial Court nonetheless agreed with the claimants (treating paragraph 2 as a mere "preamble"), but the Court of Appeal by a majority allowed the bank's appeal. Patten L.J. said: "This is not a case in which the construction contended for would produce an absurd or irrational result … and merely to say that no credible commercial reason has been advanced for the limited scope of the Bond does, in my view, put us in real danger of substituting our own judgment of the commerciality of the transaction for that of those who were actually party to it."

The Supreme Court, however, unanimously allowed the claimants' appeal and took the view that Patten L.J.'s approach was too restrictive and wrong in law. As Lord Clarke said, "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." Instead, wherever the wording used by the parties has more than one possible meaning, as here, "the court is entitled to prefer the construction which is consistent with business common sense and to reject the other". Although this is a more interventionist approach than Patten L.J. adopted, it is still not as radical as Lord Hoffmann envisaged in *West Bromwich*, since the Supreme Court stressed that where the parties have used unambiguous language, the court must apply it, even if the result is commercially implausible. This approach would, for example, prohibit the interpretation/rewriting of the words "the sum actually paid" to mean "the sum due but not actually paid" (adopted by the House of Lords in *Charter Reinsurance Co. Ltd. v Fagan* [1997] A.C. 313).

It is of course hard to disagree with Lord Clarke that the bank's construction had the "surprising and uncommercial result that the [claimants] would not be able to call on the Bonds on the happening of the event, namely insolvency of the [shipbuilder], which would be most likely to require the first class security". But it is also striking that (unlike many recent construction cases) there was absolutely no evidence of contextual background of how the Bond came to be drafted as it was. All we know (from the first instance judgment) is that the terms of the Bond were agreed subsequent to the conclusion of the Contract. The court was operating in a vacuum, an unfamiliar environment for judges, and this is why Lord Hoffmann's principle in *West Bromwich* envisages a common sense interpretation when the court concludes *from the background* that something must have gone wrong with the language.

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Finally, it is interesting that the claimants did not also seek rectification of the Bond. Sir Richard Buxton, writing extra-judicially in this journal [2010] C.L.J. 253, argued convincingly that rectification (not construction) should always be used "when it is necessary to correct errors in the formal expression of the contractual consensus." This would be more honest, since the contract is effectively being rewritten, and has the advantage of allowing evidence of the parties' pre-contractual negotiations and earlier drafts to be considered. Lord Clarke supported his conclusion with the words, "I have no doubt that if … the Bank had been able to think of a credible reason for excluding repayments in the event of the Builder's insolvency, such a reason would have been at the forefront of the Bank's case." A cynic might respond that, similarly, if the pre-contractual negotiations suggested that insolvency was excluded in error, one might have expected the claimants to want to admit them and seek rectification.

JANET O'SULLIVAN

NO LEAPFROGGING OF CONTRACT IN UNJUST ENRICHMENT

MACDONALD entered into a contract with Oakwood Residential Limited ("Oakwood") to carry out building work on land owned by Mr. and Mrs. Costello ("the Costellos"). The Costellos also owned Oakwood and were the directors of that company. MacDonald was not paid for his work so sued Oakwood for breach of contract, and the Costellos in unjust enrichment. Both claims succeeded in the Bournemouth County Court; Recorder Abbott held that the Costellos and Oakwood were jointly and severally liable to pay the money due to MacDonald. The Costellos successfully appealed: *Costello v MacDonald* [2011] EWCA Civ 930, [2011] 3 W.L.R. 1341. No claim in unjust enrichment could succeed on such facts.

Although the Costellos were enriched by the work done by MacDonald, and in a general sense it might be considered unjust that the Costellos not pay for their benefit, the Court of Appeal was absolutely right to overturn the decision of the lower court. Etherton L.J., giving the only reasoned speech, held that allowing a claim in unjust enrichment would undermine the contracts in place and "the way in which the parties chose to allocate the risks involved in the transaction" (at [21]). This is a fundamental point: unjust enrichment should not be allowed to undermine the primacy of contract. The parties allocated the risks involved in the transaction through voluntary agreements. Unjust enrichment should not interfere to distribute those risks differently, and allow MacDonald to "leapfrog" its contract with Oakwood. Moreover, Etherton L.J. thought that there was a

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