instrument must conform must be objectively determined in the same way as any other contract", and that "the question is what an objective observer would have thought the intentions of the parties to be". As the concurring judgments illustrate, this is a departure from traditional equitable principle which concentrates on the parties' actual intentions. It is difficult to see why an earlier objective accord should trump a later, formal agreement unless the written instrument fails to reflect the parties' actual intentions. Moreover, Lord Hoffmann's approach surprisingly allows a court to find a common mistake because a reasonable person would consider that one party was mistaken, even if the party was not actually mistaken at all (cf. *Chartbrook Ltd. v Persimmon Homes Ltd.* [2007] EWHC 409 (Ch); [2007] 1 All E.R. (Comm) 1083, at [138]–[164], per Briggs J.).

The approach in *Simic* reflects the traditional approach to rectification; both French C.J. and Kiefel J. were clear that the views of Lord Hoffmann in *Chartbrook* involve a departure from that approach. Both Justices said that Australia should not follow this aspect of *Chartbrook* without full argument in a case where the issue was relevant to the outcome. This is sensible, and it is suggested that Lord Hoffmann's approach should not be endorsed in any event. Indeed, even in England Lord Hoffmann's approach has given rise to much controversy, and a number of judges have been moved to express strong views in extra-judicial speeches and articles (for a sample, see Davies, "Rectification versus Interpretation", fn. 6). It is to be hoped that this issue will be considered fully by an appellate court in this jurisdiction as well. In *Chartbrook*, Lord Hoffmann's views on rectification were *obiter*, and in *Daventry District Council v Daventry & District Housing Ltd.* [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333, Lord Hoffmann's approach regarding rectification was not contested. This is problematic. As French C.J. rightly observed (at [18]), "[a]t a conceptual level, construction and rectification of a contract are different processes".

Paul S. Davies

Address for Correspondence: Faculty of Laws, University College London, London, WC1H 9BT, UK. Email: paul.s.davies@ucl.ac.uk

THE "UNITARY EXERCISE" OF CONTRACTUAL INTERPRETATION

LORD Hoffmann's famous "restatement" of the principles of contractual interpretation in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912–13, was heralded as a "quiet revolution" (McLauchlan (2000) 19 N.Z.U.L.R. 147, at 148) in that it appeared to overthrow the legalistic approach of the past. That approach, often associated with the "plain meaning rule" (*Bank of New Zealand v Simpson* [1990] A.C. 182 (PC), 189) involved giving effect to the expressed

https://doi.org/10.1017/S0008197317000745 Published online by Cambridge University Press

meaning of the text, which (limited exceptions aside) could not be contradicted by the relevant background (or matrix of fact). By contrast, the approach in *ICS* mandated the Court to search for the apparently intended meaning by consulting the relevant and admissible background in all cases. The *ICS* approach rapidly became dominant, and indeed orthodox, across multiple jurisdictions. However, in a series of judgments commencing with *Re Sigma Finance Corporation* [2009] UKSC 2; [2010] 1 All E.R. 571, the Supreme Court of the United Kingdom has gradually moved away from the approach in *ICS* (albeit without expressly overruling it) and emphasised the importance of giving effect to the natural and ordinary meaning of the words used, in combination with other factors (see especially *Marley v Rawlings* [2014] UKSC 2; [2014] 2 W.L.R. 213, at [18]–[19]; *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619, at [14]–[23]). This return to a more traditional approach to interpretation vindicates sustained criticism of the validity of the *ICS* approach in principle and practice (see e.g. Staughton [1999] C.L.J. 303; Berg (2006) 122 L.Q.R. 354; Buxton [2010] C.L.J. 253).

This shift in approach has, nevertheless, left some uncertainty in its wake. One residual issue is the legitimate scope for business or commercial "common sense" in interpretation (which has enjoyed a role since at least *Prenn v Simmonds* [1971] 1 W.L.R. 1381, 1385). Although Lord Neuberger in *Arnold* firmly reined in the role of "common sense" in interpretation (at [19]–[20]), Lord Clarke in *Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50; [2011] 1 W.L.R. 1900 had stated at [21] that "[I]f 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".

In *Wood v Capita Insurance Services* [2017] UKSC 24, the Supreme Court had the opportunity to reconcile the apparently inconsistent treatment of common sense in these cases, and also to clarify the general method by which interpretation should be carried out. In brief, Capita had purchased the entire issued share capital of Sureterm Direct Ltd., an insurance broking business, from Mr. Wood and other shareholders. After the acquisition, Sureterm reviewed its past business in response to concerns raised by employees as to mis-selling of insurance at higher prices than quoted. Sureterm duly reported its findings to the Financial Services Authority, which recommended redress. The parties then agreed on a scheme to compensate potentially affected customers, under which Sureterm paid £1.35 million in compensation.

Capita then sued the sellers for total losses of £2.4 million suffered as a result, relying on an indemnity in the sale and purchase agreement, which read:

> The Sellers undertake to pay to the Buyer an amount … to indemnify the Buyer … against all actions, proceedings, losses, claims, damages, costs,

https://doi.org/10.1017/S0008197317000745 Published online by Cambridge University Press

> charges, expenses and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by [the Company] following and arising out of claims or complaints registered with the FSA, the Financial Services Ombudsman or any other Authority against [the Company], the Sellers or any Relevant Person and which relate to the period prior to the Completion Date pertaining to any mis-selling or suspected mis-selling of any insurance or insurance related product of service.

The sellers' case was that the relevant loss fell outside the indemnity, since the requirement to compensate was not the result of a claim by customers, or a complaint by customers to the FSA. This was rejected at first instance [2014] EWHC 3240 (Comm) on the basis that it did not make "business common sense" for the indemnity to exclude situations where there had been no claim or complaint by a customer. The Court of Appeal [2015] EWCA Civ 839 reversed this, finding that liability could not arise in the absence of an actual claim or complaint by a customer.

Giving the judgment of the Supreme Court dismissing Capita's appeal, Lord Hodge refrained from reformulating the principles set out in *Rainy Sky* and *Arnold*, but was concerned to address a submission that *Arnold* had altered the approach summarised in *Rainy Sky*. His Lordship explained that, in reality, these cases were "saying the same thing" (at [14]). This was because all the judgments in *Arnold* had confirmed the approach in *Rainy Sky* at [21], according to which interpretation is a "unitary exercise". This means that where there are rival interpretations, the court must strike a "balance" between the competing indications given by the relevant language, the factual background, and commercial or business common sense (at [11]–[12]), and having regard to the nature of the agreement and the quality of its drafting (at [13]). Competing textual and contextual indications are but "tools to ascertain the objective meaning" (at [13]).

Such a unitary approach, involving pragmatic balancing, does not sit comfortably with the caution which Lord Neuberger P.S.C. (with whom Lord Sumption and Lord Hughes agreed) sounded in *Arnold* at [17] "the reliance placed in some cases on commercial common sense and surrounding circumstances … should not be invoked to undervalue the importance of the provision which is to be construed" and "[objective] meaning is most obviously to be gleaned from the language of the provision". These dicta (not referred to by Lord Hodge) strongly suggest that, save in unusual cases, the actual language is the primary (if not presumptive) source of meaning, and enjoys superior status to commercial common sense and surrounding circumstances (compare A Burrows (ed.), *A Restatement of the English Law of Contract* (Oxford 2016), §14).

In deciding the meaning of the indemnity, Lord Hodge (at [26]–[28], [39]–[41]) first considered its place in the context of the agreement, which contained extensive and detailed warranties, including that Sureterm had no reason to believe that any action would be taken against

https://doi.org/10.1017/S0008197317000745 Published online by Cambridge University Press

it in relation to any of its current or past activities for non-compliance or infringement of applicable financial services laws (Part 14.1(c)). Capita had not notified a warranty claim within the required period, and the Court would not improve the bargain of Capita by adopting the interpretation for which it contended. Secondly, His Lordship also dissected the indemnity into constituent parts, to illustrate that Capita's interpretation (to the effect that it was only "fines, compensation or remedial action or payments imposed on or required to be made by the Company" which had to "follow and arise out of claims or complaints registered with the FSA") was both remarkable and unlikely (at [29]–[38]).

It is perhaps surprising that the point of interpretation in this case reached the appellate courts. While the indemnity was somewhat convoluted and could have been drafted more clearly as Lord Hodge noted (at [24]) that, in the context of the clause, the phrase "following and arising out of claims or complaints registered with the FSA" clearly qualified all the preceding items, and logically meant there had to be a claim or complaint registered with the FSA by a third party. The actual language and syntax therefore dictated the answer; this was not a case of more than one meaning being reasonably available. In fact, the penultimate paragraph of the judgment (at [42]) confirms the reason for the outcome: "In this case, the circumstances which trigger that indemnity are to be found principally in a careful examination of the language which the parties have used."

This suggests that this was not a case which called for a balancing of competing indications. It is strongly arguable that any balancing of contextual considerations should only come into play where the court has scrutinised the two or more meanings advanced by the parties, and is satisfied that these are reasonably available meanings on the language used. Unless a robust approach of this kind is taken, the integrity of the written agreement and the conventional meaning of its words risks being undermined as a primary source of understanding (see *Charter Reinsurance v Fagan* [1997] A.C. 313, 384, per Lord Mustill; *Earl of Lonsdale v Attorney-General* [1982] 1 W.L.R. 887, 901–02; and Grabiner (2012) 128 L.Q.R. 41), and there is too much scope for one party, by invoking contextual considerations, to devise a possible meaning which masquerades as a "rival interpretation" demanding to be taken seriously.

ROHAN HAVELOCK

Address for Correspondence: Faculty of Law, University of Auckland, Private Bag 92019, Auckland Mail Centre, Auckland, New Zealand. Email: r.havelock@auckland.ac.nz

https://doi.org/10.1017/S0008197317000745 Published online by Cambridge University Press