Black Swans or Ugly Duckings?
Some Contract Contradictions

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"The law is a fashion industry"[1]

Nowadays, it is fashionable to start any discussion of contractual interpretation under English and related legal systems with the five principles famously enunciated by Lord Hoffmann twelve years ago.[2] And this paper is no exception. But, rather than explore the semantics of meaning, or the admissibility, absent ambiguity, of the factual matrix, it will focus on his third proposition, and the issue which he deliberately left vague and uncertain.

What Lord Hoffmann said was this:

> *"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."*

These "reasons of practical policy" are taken to refer to the well-known speech of Lord Wilberforce in *Prenn v Simmonds*, where he said: [3]

> *"The reason for not admitting evidence of [the prior exchanges between the parties' solicitors] ... is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, although converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the written word? If the same expressions are used, nothing is gained by looking back; indeed, something may*

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[1] J. J. Spigelman: "*From Text to Context: Contemporary Contractual Interpretation*" (Address to the Risky Business Conference, Sydney, NSW, 21 March 2007)

[2] *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28. (All decisions cited by their unique case number can be accessed through the web-site of the British and Irish Legal Information Institute: www.bailii.org)

[3] (1971) 3 All E.R. 237, at p.239. *Cf*: "*[I]n a world of give and take, men often have to be satisfied with less than they want.*"

be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to. ...[E]vidence of negotiations, or of the parties' intentions, and a fortiori *of [one party's] intention, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' or 'aim' of the transaction."*

Recently, there has been a fairly sustained effort to push back the boundaries so as to justify the admission, as an aid to construction, of pre-contractual negotiations, and also post-contractual conduct. Today, I am concerned only with what happens before the contract is made; and so I will not speak about what may arise afterwards – except to point out that the analysis is usually based on a simplified text-book model which is far removed from our maritime world, where charter parties are often negotiated by one set of people, in a language not their own, and then executed by an entirely separate department, often with limited communication between the two.

Perhaps the most seductive case for admitting the negotiations was presented by Lord Nicholls in a paper which he gave to the Chancery Bar Association in 2005.[4] English law, he argued, was not static, but had, as the saying goes, "*graduated from a stiff and superstitious formalism to a flexible rationalism*;" and the time was now ripe to address this archaic and illogical "no go" area. After all, reduced to its simplest terms, if the reasonable person in the position of the parties would know what had passed between them before the contract was made, why not the judge?

This was not to say that exclusion should not remain as the general rule; but where the negotiations would shed light on the meaning which the parties intended to convey by the words of the contract, the judge, no less than the parties, should logically be permitted to consider that evidence and decide what weight it should bear. Otherwise, he could only conjecture, but would never know. Pre-contract negotiations should be admissible where they would have influenced the notional reasonable person in the position of the parties in his understanding of the meaning which they intended their words to convey.

In this context, Lord Nicholls argued that Lord Wilberforce's propositions should not be read as laying down a rigid principle without exceptions – nor had they been so regarded by the courts.[5] Judges, preferring truth to fiction, had been ready to adopt the sensible approach, as witness the judgments of the Court of Appeal in *The PACIFIC COLOCOTRONIS* [6] and of the Commercial Court in *The KAREN OLTMANN*.[7] "*These cases*," he said, "*are noted briefly in the textbooks. But for a reason not altogether clear, the full significance of these cases seems not to have been widely appreciated. They have not received the attention they deserve.*" I will try to remedy that in a moment.

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[4] "*My Kingdom for a Horse: the Meaning of Words*" (printed at (2005) 121 LQR 577)

[5] In *BCCI v Ali* [2001] UKHL 8 [31], Lord Nicholls himself had remarked that the reasons of practical policy for the exclusionary rule, referred to by Lord Hoffmann in *Investors Compensation Scheme*, had been increasingly debated, and he desired to keep the point open for consideration on a future occasion.

[6] *Shell Tankers (UK) Ltd. v Astro Comino Armadora SA* [1980] 1 Lloyd's Rep. 366 (Comm.Ct.); [1981] 2 Lloyd's Rep. 40 (CA).

[7] *Partenreederei MS Karen Oltmann v Scarsdale Shipping Co.* ([1976] 2 Lloyd's Rep. 708)

In his discussion, Lord Nicholls identified five potential objections to his thesis. First, that opening up the negotiations would lead to uncertainty and unpredictability. Second, that adopting a more liberal approach would be to the detriment of third parties who might acquire an interest in the contract. Third, Lord Wilberforce's point that the negotiations are simply, by their nature, entirely unhelpful. Fourth, that admission of direct evidence of subjective intent would subvert the objective approach to construction. And fifth, that expanding the court's area of investigation would increase the costs, and add to the delays, of litigation. To these five has recently been added a sixth: that, without the exclusionary rule, sophisticated negotiators will be tempted to lay a self-serving trail of documents.[8]

Prior to Lord Hoffmann's speech in *Investors Compensation Scheme*, access to the factual matrix was permitted only in the case of ambiguity. In the words of a typical judgment:

> *"The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them - and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole."*[9]

But in 1997, all that changed. In the words of Lord Steyn:

> *"The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen. In ... his important judgment in Investors Compensation Scheme ..., Lord Hoffmann made crystal clear that an ambiguity*

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[8] *Chartbrook v Persimmon Homes* [2008] EWCA Civ 183, per Lawrence Collins LJ at [111] (to be discussed *infra*)

[9] *Vitol B.V. v Compagnie Européene des Petroles* [1988] 1 Lloyd's Rep. 574 (per Saville J 576). *Cf*: *"The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail."* (*Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 1 NZLR 391, per Lord Hope [8] (Lord Hoffmann concurring)

need not be established before the surrounding circumstances may be taken into account."[10]

With this demolition of the party wall between text and context, where previously you could only cross over through the door marked "Ambiguity," several of the objections suggested by Lord Nicholls may now seem rather insubstantial. For better or worse, the arguments about complexity, cost and delay have now lost much of their force. So too with the objection about the rights of third party assignees or endorsees. And as for the argument about the objective approach, those who argue for opening up the negotiations are always careful to insist that the issue is really one of the weight of the evidence, and that the court will (or should) always ignore any subjective input.

So where does that leave us? It seems to me that, in the end, the issue is more a matter of policy than of logic. English commercial law is a very important export commodity. The fact that it diverges from most international norms, including the Vienna Convention, the Unidroit Principles, the civil law régimes and the Restatement of Contracts, may be no disadvantage when viewed in that way:

> "*[A] blurring of the edges compromises the prime purpose of commercial law, which is to provide businessmen with a reliable framework within which to conclude their transactions. Lawyers are interested in disputes. Businessmen are interested in transactions. Certainty is at a premium in this field. As Lord Campbell said: 'Plain rules without qualification or exception are most desirable in commercial transactions.*'"[11]

If the rules are the same for everyone, it is difficult to argue that they are unfair: that is like complaining about the rules of hockey or chess.

But that is not the point of this paper. Earlier, I mentioned the two cases cited by Lord Nicholls; and one of these, *The KAREN OLTMANN*, always pops up in any case or commentary which approaches this "No go" area of pre-contractual negotiations. Sometimes it is only a cameo appearance: one is often left with the feeling that, the more they can distinguish it, the happier are the judges to give it the time of day. So what did these two judgments decide? And why should Lord Nicholls have complained that they have been neglected unjustly?

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[10] *Westminster City Council v National Asylum Support Service* ([2002] UKHL 38 [5])

Cf: "*As in ordinary life, words in a legal text cannot be understood except in relation to the circumstances in which they are used. It is sometimes assumed by judges that the existence of an ambiguity is a precondition to admitting evidence of the context in a legal text. That is wrong. Language can never be understood divorced from its context.*" (J. Steyn: "*Pepper v Hart; A Re-examination*" (2001) 21 OJLS 59, at 60)

[11] M. Mustill: "*Decision-making in Maritime Law*"(LMCLQ [1995] Part 3, 314, at 323).

THE PACIFIC COLOCOTRONIS

The PACIFIC COLOCOTRONIS was the later of the two. It involved a lightening contract. The eponymous tanker started to leak crude oil off the Dutch coast while on its way to Wilhelmshaven. Shell Tankers was able to position a suitable vessel, the *DRUPA*, with an experienced crew, and agreed to provide lightening services.

The *PACIFIC COLOCOTRONIS* was carrying a cargo of about 72,000 tonnes. The *DRUPA* took off all but 7,000 tonnes and then, at high water, departed for Wilhelmshaven. The *PACIFIC COLOCOTRONIS* subsequently proceeded to Amsterdam, where it discharged the rest of its cargo without further incident.

The dispute, which came before the Commercial Court in May 1979, concerned this balance of the cargo: was Shell obliged to send the *DRUPA* back for it or not? The relevant clause of the contract stated: "*Upon such discharge of cargo the lightening ship shall either return to the vicinity of the tanker to render further lightening assistance ... or if no further assistance is required shall be returned to the orders of the owners of the lightening ship ...*"

At issue was the meaning of the word "*required.*" Did it mean: "*if no further assistance is needed*"? Or was it: "*if no further assistance is requested by the Master*"?

At first instance, Sheen J had no difficulty with this. "*I have no doubt that the word 'required' is used in the sense of 'needed', 'necessary' or 'requisite.' When construed in this way the contract fits naturally into the commercial setting in which it was made. ... The first thing to be observed about this contract is that it is a 'lightening contract' and not a 'discharging contract.*"'[12] The tanker owners had not sought to show that it was necessary to discharge more cargo for reasons of safety or to prevent further pollution; and so it could not be said that the ship required further lightening assistance.

The appeal was heard in March 1981. The leading judgment was given by Eveleigh LJ, who concluded that "*required*" did actually mean "*required by the Master*"; but, by reason of the effective incorporation of the preamble into the contract, such requirement must be restricted to taking off such cargo as might be necessary to eliminate the risk of pollution. Thus, he reached the same conclusion as the Commercial Court, but by a different linguistic route: for him, "*required*" meant "*properly required by the Master.*"

In reaching this conclusion, the Court of Appeal relied heavily on the recitals, which were effectively incorporated by Clause 1: "*In order to render assistance as aforesaid...*" But what did "*assistance*" mean? The sense was quite clear: it was, as the judge had found, to remove oil cargo so as to prevent further pollution. The terms of the contract were, in effect, defined by the nature of the assistance requested.

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[12] *Ibid.*, at 369. *Cf.* also at 368: "*That commercial purpose is clear beyond doubt. It was to lighten PACIFIC COLOCOTRONIS by taking off part of her cargo and thus eliminate the risk of her causing oil pollution.*"

So far, so good. But then Eveleigh LJ went on: "*But if I am wrong in that approach, I nonetheless take the view that the negotiations, and what occurred during them, are 'permissible' factors to take into account in order to construe the words of this contract.*" And Dunn LJ concurred: "*I agree that the Court is entitled to look at the negotiations for the purpose of identifying the meaning of the word 'assistance' in the preamble.*"

In this context, Eveleigh LJ stated: "*Details of how that agreement was arrived at are set out in the judgment of Mr. Justice Sheen... and there is no need to repeat them for the purpose of this judgment; except to say that in the course of negotiations between the parties, the plaintiffs were informed by those acting on behalf of the defendants that the master of the vessel had said that it needed to be lightened to the extent of about 30,000 tons of cargo to prevent further oil pollution.*"

Taken at face value, this reads strangely, because Sheen J had not referred to the negotiations at all. In a model judgment, he had been careful to start out by recording the factual matrix: as he put it, "*I have described in outline the background and the context in which the contract was made and I have sought to show the commercial purpose of that contract.*" And it is that section of his judgment which records the anticipated requirement to lighten 20 – 30,000 tons. The narrative mentions this twice, on both occasions prior to Shell's first indication that it might be able to reschedule its fleet so as to provide the *DRUPA* as a lightening vessel.

Thus, the scope of the operation was already well aired and known to both sides even before the negotiations commenced, and therefore formed part of the surrounding matrix of fact. And, apart from Eveleigh LJ's passing references to the need to remove about 30,000 tons, neither judgment has anything to say about the content of the negotiations.[13] The Court of Appeal was certainly not looking for a common understanding of the meaning of "assistance" as such: its search was for the objective purpose of the transaction.[14]

The PACIFIC COLOCOTRONIS, then, really has nothing to say about the admissibility of the negotiations as such. Rather, as it seems to me, it stands for the principle robustly enunciated by Lord Rodger in a recent Scottish case:

"*[T]he rule which excludes evidence of prior communings as an aid to interpretation of a concluded contract is well-established and salutary. The rationale of the rule shows, however, that it has no application when the evidence of the parties' discussions is being considered, not*

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[13] Dunn LJ justified his conclusion by reference to the preamble, and Waller LJ, who said he agreed with both of the preceding judgments, also referred only to the preamble and the surrounding facts. In his third paragraph, Eveleigh LJ had said: "*Details of how that agreement was arrived at are set out in the judgment of Mr Justice Sheen, and there is no need to repeat them for the purpose of this judgment; except to say that in the course of negotiations between the parties, the plaintiffs were informed by those acting on behalf of the defendants that the master of the vessel had said that it needed to be lightened to the extent of about 30,000 tons of cargo to prevent further oil pollution.*" (*ibid.*, 42)

[14] "*When a formal contract is drawn up and signed, care must be taken to distinguish between admissible background evidence relating to the nature and object of the contractual venture and inadmissible evidence of the terms for which each party was contending in the course of negotiations.*" (*The TYCHY No.2* [2001] 2 Lloyd's Rep 403, per Lord Phillips MR [29]).

in order to provide a gloss on the terms of the contract, but rather to establish the parties' knowledge of the circumstances with reference to which they used the words in the contract."[15]

THE KAREN OLTMANN

Probably for this reason, *The PACIFIC COLOCOTRONIS* is not referred to very often. *The KAREN OLTMANN*, on the other hand, makes fairly regular appearances in support of what has come to be called the "private dictionary" principle.

That dispute arose under a two-year time charter which permitted the charterer to redeliver the vessel "*after 12 months trading subject giving 3 months' notice*." Nineteen months after delivery, the charterer had purported to give its three months redelivery notice.

The charterer argued that the expression "*after 12 months trading*" meant "*at any time after the vessel had traded for 12 months.*" The owner, not unreasonably, argued that it had to mean "*on the expiry of 12 months trading*" – in other words, redelivery could occur after one year, or after two years, but not at 22 months.

Kerr J's first impression was that owner must be right. If the charterer's construction had been intended, one would have expected to see the words "*at any time;*" and, while a charter for two years, or one at the charterer's option, had a familiar ring to it, a charter for minimum one year with an option for any period up to two seemed unfamiliar. But that was not enough. "*Others may equally firmly form the opposite impression, and it has often been said that there is no magic about the construction of ordinary words in charter-parties in comparison with any other type of contract.*"[16]

Having dismissed the owner's argument, based on ambiguity, that he was entitled to disinter the negotiations in an attempt to resolve the difficulty,[17] the judge turned to its alternative argument

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[15] *Bank of Scotland v Dunedin Property Investment Co. Ltd.* [1998] SC 657 (per Lord Rodger at 7). In *Seagate Shipping Ltd. v Glencore International A.G* ([2008] EWHC 1904 (Comm)), this was accepted by both sides as being a sound principle of English law (cited with approval in *Bernhard Schulte Shipmanagement v BP Shipping* [2009] EWHC 111 (Comm) [22].

Cf: "*Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible.*" (*Codelfa Construction v State Rail Authority of NSW* (1982) 149 CLR 337, per Mason CJ at 352)

For a rather different characterisation of the case, *cf*: "*It is clear from Lord Hoffmann's speech that in general pre-contractual negotiations cannot be admitted as evidence when questions of interpretation of an agreement arise. There are exceptions to this course. Thus for example the court can admit evidence as to pre-contractual communications made orally where the subsequent written agreement refers to those oral discussions: see The PACIFIC COLOCOTRONIS ...*" (*Square Mile Partnership v Fitzmaurice McCall*) [2006] EWCA Civ 1690, per Arden LJ at [59]

[16] *Ibid.*, 711

[17] "*[O]n the authority of Prenn v Simonds, I am bound to reject this submission, particularly in light of what was said about that case by the House of Lords in Wickman v Schuler and by the Court of Appeal in Arrale v Costain. The latter cases also show that the situation in the present case is not truly one of ambiguity in the legal sense, either patent or latent, but merely one of difficulty of construction.*" (*ibid.*, at 711)

of estoppel: in the course of the pre-contractual exchanges, it was said, the charterer had effectively represented that "*after 12 months trading*" involved a 2 year charter, with the charterer's option to keep the vessel for 12 months only; and it was in reliance on this that the owners had executed the charter party.

Kerr J took the view that this argument entitled him to look at the pre-contractual exchanges, albeit with a clear acknowledgement that, if they did not support the owner's position, he must put them out of his mind. Somewhat illogically, he then came to the conclusion that, while the negotiations did not support the plea of estoppel, they did demonstrate that the words "*after 12 months trading*" had been used in an agreed sense. "*It was clear that both parties throughout used the word 'after' in the sense of 'on the expiry of' and not 'at any time after the expiry of'.*"

This exercise, he said, was a long way from any attempt to adduce extrinsic evidence to construe the contract. He went on:

> "*[T]he principle can be stated as follows. If a contract contains words which in their context are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the Court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the words as the result of their common intention. Such cases would not support a claim for rectification of the contract, because the choice of words in the contract would not result from any mistake. The words used in the contract would* ex hypothesi *reflect the meaning which both parties intended.*"

Not unfairly, this Trojan horse has attracted mixed reviews and has given rise "*to much discussion and some misunderstanding.*"[18]

In 1988, Sir Johan Steyn (as he then was), writing extra-judicially, was alert to its far-ranging implications. Having identified the possibility of an unequivocal representation during negotiations giving rise to estoppel, he went on:

> "*But that must be a fairly rare case. A judgment given in the Commercial Court appeared to form the basis of another potentially more virile exception to the general rule. In KAREN OLTMANN the court used pre-contractual telex exchanges as an aid to the interpretation of an ambiguous word on the basis that the exchanges revealed that the parties had negotiated on an agreed basis. It was said that the parties had given to the word the same dictionary meaning. And this conclusion was reached despite the fact that the judge held that there was no basis for rectifying the contract, or for finding that an estoppel operated. It is an exception which could easily swallow up the rule. That has, however, not happened so far and this decision can perhaps be regarded either as justified on*

[18] Per Lawrence Collins LJ (*Chartbrook. v Persimmon Homes* ([2008] EWCA Civ 183 [118])

the orthodox basis of an estoppel or as depending on its own rather special facts."[19]

More recently, Lord Bingham has said (also extra-judicially):

> "*It seems clear to me that if in the course of negotiating a contract the parties use a certain expression as having a certain* agreed *meaning, and if the meaning of that expression when used in the final contract falls to be interpreted, evidence should be admissible of the meaning that the parties gave the expression in their private dictionary. It was so held in The KAREN OLTMANN, and this rule (never to my knowledge questioned) seems wholly consistent with the rule which admits evidence of trade and technical expressions.*"[20]

JUDICIAL CONSIDERATION OF *THE KAREN OLTMANN*

The KAREN OLTMANN had in fact come under fairly vigorous attack not long before Lord Bingham's speech. In his judgment in *Chartbrook v Persimmon Homes*,[21] Briggs J carried out an extensive review of the "private dictionary" authorities. Concluding that the *KAREN OLTMANN* principle could not apply to the case before him, the ambiguous expression being a defined term,[22] he nevertheless expressed doubts as to whether this principle was really a rule of construction at all. "*If free to do so,*" he said, "*I would re-analyse the KAREN OLTMANN 'private dictionary' line of cases as concerned with rectification, rather than construction.*"[23]

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[19] "*Written Contracts: To What Extent May Evidence Control Language?*" [1988] CLP 23, at 29. More recently, the case has been described as "*a vitally important landmark in the landscape of those who advocate the extension of the range of material available in an exercise of interpretation and who decry the utility of rectification.*" (K. Lewison: "*If It ain't broke don't fix it: Rectification and the Boundaries of Interpretation*": Jonathan Brock Memorial Lecture, presented to the London Common Law & Commercial Bar Association, 21 May 2008.). There, the author argues that "*rather than allow the law of interpretation to reach the point at which it swallows up the law of rectification, we ought rather to look at rectification to see whether it needs alteration.*"

[20] "*A New Thing Under The Sun? The Interpretation of Contract and the ICS Decision*" (Paper delivered in Edinburgh on 4 March 2008, printed at EdinLR (2008) Vol 12, 374).

[21] [2007] EWHC 409 (Ch). The case involved a dispute about a pricing formula expressed in defined terms.

[22] "*The whole purpose of the attribution of a detailed meaning to a word or phrase is to replace what readers might otherwise have thought to be the natural meaning of that word or phrase with its contractually defined meaning. The word or phrase is stripped of its natural meaning, and the same result could have been achieved if an algebraic letter or expression were used as the label with the same detailed definition.*" (*ibid.*, [61]). In *Harper v Interchange Group* ([2007] EWHC 1834 (Comm) 88]), Aikens J agreed with the latter point. But this may be overstated: what if the parties have used the phrase in its natural meaning, but have made it a defined term simply to label it for the sake of drafting economy? (An example might be those contracts of affreightment drafted by corporate counsel where "*Vessel*" is persistently defined as "*vessel or vessels as the context may require*," and the question soon arises whether the singular or plural is applicable.)

[23] A few months later, he was again faced with an argument based on the private dictionary. He then said: "*In [Chartbrook], I had occasion to review the authorities relating to this supposed principle ... I concluded... that it was open to serious doubt whether the supposed private dictionary principle was really a principle of construction at all, rather than an aspect of the law of rectification.*" (*euNetworks Fiber v Abovenet Communications* [2007] EWHC 3099 (Ch) [189])

When *Chartbrook v Persimmon* came before the Court of Appeal, opinion was divided on the construction issue. The first judgment was given by Lawrence Collins LJ. The case, he said, was "*on the borderland between construction of a written agreement, the admissibility of prior negotiations as an aid to construction, and the equitable remedy of rectification, based on common or unilateral mistake.*" The appeal based on rectification should be rejected: there was nothing to suggest that the judge had misapplied the evidence before him. As for the distinction between defined terms and those which were not, he was unimpressed: a defined term was a contractual term like any other; and the fact of the definition was no more than one of several factors to be taken into account.

With regard to the "private dictionary" point, Kerr J's reasoning had, he said,

> "*... referred to the negotiation on 'an agreed basis that the words bore only one of two possible meanings' and used the expression 'their own dictionary meaning.' But it is plain from the facts that there had been no actual agreement on the meaning of the word 'after'. What happened was that the parties were negotiating on a common understanding of what the point in contention between them was, namely the period within which the notice had to be given so as to expire at the end of a period which the owners wanted to be of maximum duration and minimum flexibility where the charterers wanted the precise opposite. There was no agreement on the word 'after' except in this sense: because they were negotiating on a common understanding of what each was endeavouring to achieve they were using the word in the same sense.*"

He went on:

> "*On analysis, in my judgment, The KAREN OLTMANN does not lay down any special 'private dictionary' exception. All that Kerr J was saying was that the negotiations could be looked at to see whether the parties had negotiated on an agreed basis that the words bore only one of two possible meanings. I doubt whether this differs in any material respect from admitting evidence of prior negotiations in construing a contract.*"

But, in any event, *Chartbrook* was not a case for the "private dictionary" or "agreed basis" exceptions, simply because the negotiations did not establish a sufficiently clear evidential basis.

Rimer and Tuckey LLJ agreed that the appeal against the judge's rejection of rectification should be dismissed. But as to the construction issue, they did not accept the suggestion that it was legitimate to consider the negotiations in this particular case; and, if the "private dictionary" exception did exist, there was no scope for it here. Short of rectification, the forces of commercial good sense were, quite simply, not up to the major interpretative task of rewriting the words as written.[24]

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[24] The final appeal of *Chartbrook v Persimmon* was heard by the House of Lords on 31 March 2009. As at the date of writing, no decision has been handed down.

Shortly before this, the Court of Appeal had to consider the "private dictionary" proposition in a rather different case, *Proforce Recruit v The Rugby Group*.[25] There, an ambiguous term, "*preferred supplier status*," was not defined, and the contract contained a conclusive evidence clause. The court's discussion of the issues, which referred to *The PACIFIC COLOCOTRONIS* as well as *The KAREN OLTMANN*, has been characterised by a respected commentator as "*somewhat inconclusive.*"[26]

Mummery LJ thought that:

> "*[E]vidence of facts about which the parties were negotiating is admissible to explain what meaning was intended and evidence of what the parties said in negotiations is admissible to show that the parties negotiated on an agreed basis that the words used bore a particular meaning.*"

Arden LJ added:

> "*In this case, the parties have used a very unusual combination of words ... These words are undefined and they are not introduced or accompanied by any words of explanation. In those circumstances it is in my judgment reasonably arguable that on their true interpretation those words bear the meaning that the parties in common gave them in their communications leading up to the signing of the agreement. In admitting evidence as to those communications, the court would be hearing that evidence not with a view to taking the parties' subjective intent into account for the purposes of interpretation (a purpose precluded by the principles laid down by Lord Hoffmann ...) but for the purpose of identifying the meaning that the parties in effect incorporated into their agreement in circumstances where the court was satisfied that on their true interpretation the terms of the agreement were to have this effect.*"[27]

As Lewison points out,[28] this is very close to an estoppel by convention, and, as such, not at all inconsistent with the principles famously enunciated by Lord Wilberforce. And that is really the nub of the matter. Should the negotiations ever be admitted as a matter of construction, or only in

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[25] [2006] EWCA Civ 69

[26] K. Lewison: "*The Interpretation of Contracts*" (4th edn., 2007) §3.08. For another view, *vid*: "*In my judgement, whilst Mummery and Arden LJJ recognised the possibility that the boundaries of the exclusionary principle might be redrawn in the future, the Court of Appeal did not change the law on the admissibility of pre-contract negotiations as an aid to the construction of a written contract which was intended to contain all of the agreed terms. If it is contended on proper grounds that the parties negotiated on an agreed basis or that there is an estoppel by convention, or that the contract should be rectified, evidence of pre-contract negotiations is admissible, but not otherwise.*" (*Great Hill Equity Partners v Novator One* [2007] EWHC 1210 (Comm), per Field J [59])

[27] At this stage, *Proforce* was only a strike-out case.

[28] *Op. cit.*, §3.08. In *Air New Zealand v Nippon Credit Bank Ltd.*, Gault J remarked that Kerr J's approach had about it "*the ring of estoppel by convention applied to contract construction.*" ([1997] NZLR 218, at p. 223). In his lecture cited at fn.19 *sup.*, Lewison identifies two errors in Kerr J's statement of principle: (i) its premise that rectification is not available where the words have been deliberately chosen or have been given their own dictionary meaning; and (ii) its assertion that the words deliberately chosen reflected the meaning which the parties intended.

the context of rectification or estoppel? For, as Lord Steyn noted in his 1988 paper, if the "private dictionary" principle has legs, it has the potential, sooner or later, to run away altogether with Lord Hoffmann's exclusionary third rule.[29]

When *Proforce v Rugby Group* eventually came to a full trial, Cresswell J was sceptical about the private dictionary:

> *"The present case serves to illustrate some of the difficulties with this ... exception to the rule that the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. It is in my opinion important that it should be recognised that this is an exception which will seldom arise in the interpretation of commercial contracts. ... The exception under consideration should not be allowed to become a means, regularly adopted by litigants, of attempting to circumvent the fundamental principle that generally the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent."* [30]

At this point, we should recall that, as presented in *The KAREN OLTMANN*, the private dictionary rule has two necessary conditions for its application: (i) negotiation on an agreed meaning, and (ii) ambiguity. But that was before *Investors Compensation Scheme*. Now that the court can, even should, have access to the factual matrix absent ambiguity, we have to ask: does this similarly liberate the private dictionary rule? Because, if it does, Lord Steyn's apprehension will be fully justified, and the negotiations effectively laid bare whenever a colourable case can be made that the parties were using a disputed term in only one of two competing senses. The metamorphosis of the ugly duckling will be complete, and it will have grown into the proverbial black swan, effectively proving the judicial falsifiability of the exclusion rule.

So far, I think it is fair to say that the implications of this question have not sunk in – although it is possible that the House of Lords will address it in *Chartbrook v Persimmon*, if only because there is otherwise no obvious reason why they would have agreed to hear that particular case.[31]

My own view is that the private dictionary is a perverse and sterile oddity, and one which is not to be taken seriously in the context of contractual construction. Whether or not English law should be more closely aligned with the rest of the judicial world, it is fairly clear, I think, that

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[29] For the logical implications of the construction approach, *cf*: "*[T]he supposed principle in The KAREN OLTMANN should be seen as an example of a much wider principle, namely that evidence of prior negotiations should be admissible whenever such evidence proves to be both reliable and helpful in the resolution of the issue which is before the court.*" (E. McKendrick: "*Interpretation of Contracts and the Admissibility of Pre-contractual Negotiations*": (2005) 17 SAcLJ 248, at.271)

[30] [2007] EWHC 1621 (QB)

[31] This was to be one of the last cases to be heard by Lord Hoffmann prior to his retirement. In another recent case (before the Privy Council), he appears to have grasped the opportunity to restate at some length the principles for implication of terms: *Attorney General of Belize v Belize Telecom* [2009] UKPC 11 at [16]ff.; and so it may be that, here too, authoritative guidance will be provided.

The KAREN OLTMANN is a most unreliable signpost.[32] As the Irishman said, when asked the best way to Dublin: "*If I was you, I wouldn't start from here.*"

AGREED DELETIONS

So far as the private dictionary goes, that is about as far as one can take it until we have the decision of the House of Lords in *Chartbrook*. But there is another potential exception to the general exclusionary rule, parallel but distinct. This involves agreed deletions from negotiating drafts. Here, I should perhaps make it clear that I am not thinking of literal deletions on the face of the final contractual document, all too familiar to anyone who deals with charter parties or other standard contract forms. Because these appear on the face of the formal agreement itself, there may well be sound reasons of policy and logic for taking them into account when trying to divine the parties' objective intentions from the instrument which they have signed.[33] There is also the situation where a clause from a printed form has been incorporated, with deletions, in a one-off contract.[34]

These are interesting topics; but I am after something else, which is, whether the negotiations are admissible where one party alleges that the construction advanced by the other was discussed and rejected in the course of negotiating the terms of the final instrument. If the private dictionary exception is allowed – that is, evidence that the parties negotiated on the basis of an agreed understanding – it is hard to see why a parallel exception should not permit the admission of evidence as to what one of the parties had expressly rejected.

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[32] The commercial reader may wonder whether the judgment was written in some haste. At the foot of the first column on page 711, "*charterers*" must be a mistake for "*owners*". Having concluded that "*the situation in the present case is not truly one of ambiguity ... but merely one of difficulty of construction*," it then proceeds to a decision "*on the basis that the word 'after' in clause 26 is capable of bearing two meanings as a matter of construction....*" After stating that the negotiations are to be put out of mind if they fail to support the plea of estoppel, it then admits them under the "private dictionary rule." And there is something stylistically awkward about the last two paragraphs on page 712, the first beginning: "*I therefore turn to consider the pleaded telex exchanges...,*" and the second: "*Turning to the telex exchanges between the brokers ...*"

[33] "*When the parties use a printed form and delete parts of it one can, in my opinion pay regard to what has been deleted as part of the surrounding circumstances in the light of which one must construe what they have chosen to leave in.*" (*Mottram Consultants v Sunley* [1975] 2 Lloyd's Rep. 197, per Lord Cross at p.209) (Emphasis added)

But even here, it is easy to stray from the right path: "*But it seems to me quite another thing to say that the deletion itself has contractual significance; or that by deleting a provision in a contract the parties must be deemed to have agreed the converse. The parties may have had all sorts of reasons for deleting the provisions; they may have thought it unnecessary; they may have thought it inconsistent with some other provision of the contract; it may even have been deleted by mistake.*" (*The GOLDEN LEADER* [1980] 2 Lloyd's Rep. 573, per Lloyd J at p.575).

[34] "*One-off contracts are often composed of ready-made clauses taken from one or more sources, together with* ad hoc *clauses drafted afresh for the purpose of the particular contract. I can see no difference in principle between looking at a deletion in a printed form of contract, and looking at a deletion in a printed form of clause included in a one-off contract.*" (*Team Services v Kier Management & Design* (1993) 63 B.L.R. 76, per Lloyd LJ)

In the simplistic text-book model, this may resonate quite plausibly. One party wants to insert a clause to limit the consequences of its actionable breach, but the other disagrees. After negotiation, the first party agrees to drop the point. And the final document is silent on the matter.

But even in such a crude example, the difficulties are obvious. Was the deletion accepted because the party proposing it had conceded the substance of the point? Or was he just mistaken as to the legal effect of the deleted and/or remaining words?

A few years ago, the Court of Appeal had to deal with a restrictive covenant relating to the purchase of land by a school, which wished to develop it.[35] The covenant banned "*any building which shall be greater in height than the buildings now existing.*" As it turned out, the school's plan provided that the new building would be higher than the existing roofline, but lower than its chimney pots.

The case actually concerned a claim brought by the school against its solicitor, he having advised in fairly robust terms that the height restriction included the height of the chimney pots of the existing building; and the issue was whether his advice fell below the standard of a reasonably competent solicitor. Thus, the court did not have to decide what the covenant meant, only whether there was real scope for disagreement about what it meant.

One of the arguments made by the solicitor was that, during the negotiations, the sellers' request for a restriction equivalent to the existing roofline had been expressly rejected, and the parties had agreed instead to state the restriction in terms of its height. Unfortunately, the Court of Appeal did not have to explore this aspect because it found that there was in any case real scope for dispute about the meaning of the words actually used; but the case does illustrate the dilemma commonly created by agreed deletions.

The issue was discussed in a recent Chancery case where, after listing all of the well-known authorities on deletions, the judge went on:[36]

> "*What is striking, for present purposes, is that in none of these cases is there any discussion of the general principle in Prenn v Simmonds. This of itself suggests that the cases listed above are not concerned with comparing a draft agreement with an executed agreement to see what has been deleted or omitted but are instead concerned ... with executed agreements where the executed agreement itself reveals that the document had earlier existed in a different form and the document was amended, usually by deleting words, to its final form....*
>
> *In order to succeed in the present case, [Counsel] has to go further than any of the cases referred to above ... In order for him to develop his point he has to have admitted into evidence the draft agreements which were considered by the parties*

[35] *Queen Elizabeth's School Blackburn v Banks Wilson* ([2001] EWCA Civ 1360).

[36] *Berkeley Community Villages v Pullen* ([2007] EWHC 1330 (Ch))

and then to invite the court to compare the terms of the draft agreements with the executed agreement. However, in my judgment this is the very thing which as a matter of principle Prenn v Simmonds says cannot be done."[37]

Although the point may not have been discussed in the literature, there is, I think, a good argument that the private dictionary exception to the general rule is, at the very least, called into question by the fact that no similar exception appears to have been carved out to cover deletions from antecedent drafts. Perhaps, after all, that particular ugly duckling is destined to turn into a regular swan, white like all the rest.

One final thought. Earlier, I cited a recent talk by Lord Bingham where he equated the private dictionary with the well established rule admitting evidence of trade and technical expressions. I do not see how this can be right. The court admits evidence as to the meaning of expressions used in the trade in just the same way as it looks up foreign words in the dictionary: these are communal terms, however small or eccentric the community which uses them. Given the existence of that community, there is an objective meaning which can be imputed to the expression.

Negotiations, on the other hand, are private, adversarial and undisciplined – in that sense, the antithesis of communal. They are characterised by the cunning and self-serving attempts of each side to better its position, usually at the expense of the other, coupled with a disconcerting readiness, too often overlooked, to avoid dealing with awkward issues which may not arise in performance.

Which, by the way, is why, in my view, the general exclusionary rule propounded in *Prenn v Simmonds* should be kept safe from emasculation by such meretricious exceptions as the so-called private dictionary.

June 15, 2009

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[37] *Ibid.*, at [51] f

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