MRS MALAPROP AND MANGLED SYNTAX: NEW DEVELOPMENTS OR JUST BUSINESS AS USUAL?

John Weale*

"Many people, including politicians, celebrities and Mrs Malaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean."

Convention requires, I believe, that the layman invited to address such a splendid gathering as this should grovel a bit and make suitably fatuous remarks about poachers presuming to lecture game-keepers on how to breed pheasants. But, as we seem to be a little short on time, I propose to forego this ritual self-abasement, and will merely remark that a better analogy might be an ambulance driver speaking to pathologists. Broadly speaking, we are in the same line of business: it is simply that most of the contractual specimens which you will see will either be dead or very sickly by the time they reach you.

It may, therefore, come as a mild shock when I tell you that the area of contract law which most troubles commercial men is how to interpret their written agreements. The common question is: but what does this document actually mean?

Your natural reaction may be that this is a trite and arid topic, more suited to textbooks and the class-room; and, until a few years ago, you would be right. But in the last five years or so, the House of Lords has whipped up quite a lively discussion in this area. In such a context, "*lively*" is, of course, a relative term: the debate has all the spectator appeal of a fly-fishing contest - a perception which is reinforced by the polite tendency of the protagonists to pretend that they are really doing nothing more than restating the existing law. But, despite this disingenuous diffidence, the issues really are quite vital, and should occasionally keep you awake at night, let alone just after lunch.

Legal interpretation is, of course, something which the courts of common law have always jealously guarded. This is usually explained as a hangover from the days when civil suits had to be decided by illiterate jurors;[1] but the real reason, I would submit, is to be found in the four fictional premises of contractual construction. I wasn't at all sure that "*fiction*" was quite the right term to use here; but my dictionary defines it as: "*a supposition of law that a thing is true, which is either certainly not true, or at least is as probably false as true.*" If that is correct, then "*fiction*" is precisely the word I was looking for.

The first of these fictions is, of course, the premise of mutual intent. This implies that the parties did actually have such an intention, which, as experience has shown, is often not the case at all. This can occur for all sorts of reasons, most frequently perhaps because both parties overlooked the problem which has arisen in the course of performance. Or perhaps – and this happens a lot - one of them has foreseen the problem very clearly, but decides to remain silent in case it blows the deal away. "*Let's not go there - we'll deal with that if and when it arises,*" is a

---

* *Vice President, Risk Management, Fednav Limited, Montreal.*
President, Association of Maritime Arbitrators of Canada

remark which is heard all too often on the broker's cell-phone.

The second and third premises are rather less logical: one is the assumption that there exists only one true and correct meaning for the bargain which the parties have struck; and the other is the assumption that this one true meaning may actually be something which neither of the parties intended.

Oddest of all, however, is the fourth fiction, which relates to the concept of objective interpretation. This rests on the sensible premise that the wording of the contract has simply to be construed in its context, from the objective point of view of reasonable persons standing in the shoes of the contracting parties. So far, so good; but the inherent illogicality appears when you look around the court-room, and discover that the only person who is actually dressing up as the reasonable man is the ranking pathologist – I mean, of course, the judge himself.[2]

Some judges will readily admit the inherent absurdity of this assumption. Lord Bramwell expressed it in his usual robust terms:[3]

> *"Here is a contract made by a fishmonger and a carrier of fish who know their business, and whether it is just or reasonable is to be settled by me who am neither fishmonger nor carrier, nor with any knowledge of their business."*

But all too often, I am afraid, it happens that the judge will solemnly rely on his "*instinctive appreciation of commercial likelihood*"[4] (or some other, equally improbable abstraction), when everyone else in the room knows perfectly well that he has to rely on his wife to balance his cheque book.

But I must get to my main point. The case which really set the purposive cat among the literalist pigeons came to the House of Lords in 1997. Its unwieldy title was *Investors Compensation Scheme v. West Bromwich Building Society*.[5] I will, for convenience, just refer to it as "*ICS*". I do not intend to quote from *ICS* at length: the relevant passage is included in the dark blue folder, which you can pick up afterwards if you wish to.[6]

The defining speech was given by Lord Hoffmann. His message was quite simple. The meaning of a document or any other utterance is not necessarily the same as the meaning of its words. The meaning of the document is what the parties using those words in that context would reasonably be understood to mean. The context or background allows us not only to choose between alternative possible meanings, but even to conclude that the parties have used the wrong words or syntax. From this, it follows that you cannot properly construe any written document, unless you know its context and background. With the sole exception of the preceding negotiations, absolutely anything is admissible which could affect the way in which the language of the document might be understood by a reasonable man. (Here, I must echo Anna Russell and assure you that I am not making any of this up: Lord Hoffmann did actually say "*absolutely anything*".[7])

According to this view, the time-honoured "Golden Rule", that words should be given their "natural and ordinary meaning", simply reflects the common-sense proposition that we do not readily accept that people make linguistic mistakes in formal documents. But if it is clear from the background that something has gone wrong with the language, the law does not require the court to attribute to the parties an intention which they plainly could not have had.

The *ICS* case concerned the interpretation of a legally drafted form of release. A few weeks earlier, Lord Hoffmann had applied his skills as a linguistic philosopher to a parallel problem in respect of a formal notice given under a lease. His remarks in that case present a lively and animated picture of his general approach: [8]

> "*No one ... has any difficulty in understanding Mrs. Malaprop. When she says 'She is as obstinate as an allegory on the banks of the Nile', we reject the conventional or literal meaning of allegory as making nonsense of the sentence and substitute 'alligator' by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like 'allegory'.*
>
> *Mrs. Malaprop's problem was an imperfect understanding of the conventional meanings of English words. But the reason for the mistake does not really matter. We use the same process of adjustment when people have made mistakes about names or descriptions or days or times because they have forgotten or become mixed up. If one meets an acquaintance and he says 'And how is Mary?' it may be obvious that he is referring to one's wife, even if she is in fact called Jane. One may even, to avoid embarrassment, answer 'Very well, thank you' without drawing attention to his mistake. The message has been unambiguously received and understood.*"

Lord Hoffmann's easy and persuasive style, coupled with his coy description of his heterodoxy as "*some general remarks about the principles by which contractual documents are nowadays construed*", may have led some judicial commentators to conclude that, after all, there is nothing very revolutionary in his approach.[9] From a semantic point of view, his views make good sense; and he may be the first senior judge to recognise the relevance and importance of the work done by the linguistic philosophers at Oxford fifty years ago. But as a general rule for interpreting legal documents, *ICS* has undoubtedly turned things upside down and effected what Lord Mustill has correctly described as "*a sea change in the way contracts are to be interpreted*".[10]

For all sorts of reasons, including those which I mentioned earlier, legal construction is a highly contrived and artificial exercise; and there is really no logical reason why its rules should track those of everyday speech, any more than the rules of hockey should follow the Geneva Convention. But rules there are; and once the rule-making body decides to alter them, the rest of us must do what we can to assimilate the changes.

Before *ICS*, the traditional and "correct" approach was the one very neatly summarised by Mr Justice Saville (as he then was) in a 1988 case: I have quoted the relevant paragraph in the blue folder (together with some other specimens which may be relevant to your autopsy).[11]

Essentially, what he had to say was this: the whole exercise is simply to establish the objective intent of the parties from the words which they have chosen to use. If those words are clear and will allow only one sensible and acceptable meaning, then that is that. If, however, the wording is ambiguous, or will allow more than one sensible meaning then, and only then, do you turn to consider the aim and genesis of the agreement, and select from among the competing interpretations the one which makes most sense in the overall context of the contract when set among the circumstances which surrounded its making.

In other words, in a written agreement, you must first concentrate exclusively on the wording, and you may only venture into the background if the words are ambiguous. The written agreement lives in one room, and the surrounding circumstances live in an adjoining room; and you only cross from the first room to the second if the first contains an ambiguity. If the words are clear and will carry only one relevant meaning, then that is where you must stop: the background is forbidden territory. It is this simple orthodoxy which Lord Hoffmann and his learned brethren have now overturned.

Not everyone has been convinced. In *ICS* itself, Lord Lloyd – himself quite open to the idea of purposive construction[12] – voiced a strong dissent:

> *"As Leggatt L.J. said in the Court of Appeal, such a construction is simply not an available meaning of the words used; and it is, after all, from the words used that one must ascertain what the parties meant. Purposive interpretation of a contract is a useful tool where the purpose can be identified with reasonable certainty. But creative interpretation is another thing altogether. The one must not be allowed to shade into the other."*

Soon afterwards, Lord Justice Saville expressed his own misgivings.[13] One could hardly quarrel, he said, with the proposition that the purpose was to work out what the parties really intended as opposed to analysing their words in a vacuum. But if that intention was clear from those words, there must be two serious objections to admitting the background and factual matrix to alter that meaning.

The first objection was clearly one of cost: the requirement to dig into the background to see whether it might change the meaning of the written words must add greatly to the length and complexity of the proceedings.[14]

The second objection was that this new doctrine must create serious problems for third parties such as endorsees or assignees: for how can a third party rely on the meaning of his document if that meaning may be governed by external events and situations of which he has no knowledge? But equally, how can it be satisfactory to have the same document carrying different meanings, quite possibly at the same time, depending on who relies on it?

This difficulty with the rights and obligations of such third parties is, of course, nothing new.[15] Nor is this the only area where interpretative problems can and often do arise: to take a topical example, the war clause of a time charter entered into last August might quite properly be construed to mean something entirely different in a back-to-back sub-charter entered into a week after the bombing began in Afghanistan.[16] The difficulties which such situations raise are certainly not semantic problems; and it would be unfair to lay these at Lord Hoffmann's door.

But *ICS* has clearly modified the traditional approach to contractual interpretation, and in doing so has effectively blurred the distinction between the construction of the written words within their documentary context, and the matrix of fact and circumstance which surrounded the genesis and creation of the contract itself.

Let me give you a simple example of what I mean. Suppose that an owner and a charterer are negotiating a voyage charter through an exchange of faxes. This is being done on an "accept/except" basis, and the open issues are progressively reduced until there is very little left to be agreed apart from the rate of freight. At this stage, the owner sends a message saying that he repeats his last offer, with the freight rate to be $6.00 per ton. The charterer, who knows that the market is really closer to $16, loses no time in returning his clean acceptance; and at that point the contract is made.

This would be hard luck on the owner. Perhaps he might hope to persuade an arbitration tribunal to correct his mistake (although this is clearly not a case for rectification in the legal sense); but it would undoubtedly be an up-hill task. Now, armed with the authority of *ICS*, the owner can say: "*But a reasonable man standing in the shoes of the parties would understand immediately that something has gone wrong with the wording of the contract, because he would know that the market is not $6, but somewhere in the mid-teens, and would naturally recognise my typographical mistake for what it is. Any fool, let alone your reasonable and well-informed bystander, would have to know that I had mangled my numerical syntax.*" Of course, he could have said that before: the issue is whether the tribunal could properly listen to him and then search out some convenient device to free him from his inequitable trap.

Now, before you reject this example as too absurd for serious consideration, let me explain briefly what was the issue in *ICS*.

There was a scheme for compensating investors which was set up under a section of the Financial Services Act. The issue in the case concerned a single clause in the form of release to be signed by the investors when making their claim for compensation. An exclusion was carved out from the general surrender of the investors' claims in return for the compensation, where the offending words read:

> "*Any claim (whether sounding in rescission for undue influence or otherwise) that you have or may have against West Bromwich Building Society ...*"

The judge at first instance accepted that the construction offered by the investors and the building society was the more natural meaning of the words, so that the exclusion covered all possible claims, and not just claims for rescission; but he then went on to reject this interpretation, on the grounds that it produced a ridiculous result which was contrary to "*the demonstrable purpose of the parties in entering into the claim forms.*"

The Court of Appeal agreed about the natural meaning of the words, but declined to go any further: in giving the leading judgment, Lord Justice Leggatt said: "*There is simply no warrant for limiting the rights retained to claims for or consequent upon rescission.*"

With the exception of Lord Lloyd, the House concluded that the Court of Appeal had got it wrong: in effect, they said, the words "*in rescission*" did not belong inside the brackets, but outside. The text should not be read as: "*Any claim (whether sounding in rescission for undue influence or otherwise ...*", but as: "*Any claim in rescission (whether sounding for undue influence or otherwise ...*" In other words, they decided to rewrite the contract.

Part of the surrounding matrix was an Explanatory Note addressed in non-legal language to the investor himself, but which formed no part of the formal document itself. This stated: "*You also agree that ICS should be able to use any rights which you now have against anyone else in relation to the claim. ... You give up all those rights and transfer them to ICS.*" This Note, which was praised by Lord Hoffmann as "*a model of clarity*", obviously influenced the purposive interpretation which was finally upheld.

ICS should not be viewed in isolation: there are a number of earlier decisions in the Court of

Appeal as well as the House of Lords which show a tendency to move in the same direction, notably those which arose in the stream of litigation concerning the Lloyd's names and their reinsurers.[17] But none of these, I think, ever actually crossed the threshold between our first room and our second except by going through the single door to which ambiguity is the only key.

In *ICS*, however, Lord Hoffmann elected not to use the door at all: he simply knocked down the adjoining wall, and turned the two rooms into one. And that, surprising though it may seem, is the current state of the law on this point in England.

What has this to do with the Federal Court of Canada? Our common law has long since, you will say, thrown off the fetters of the English system: why, we even admit expert evidence in collision cases where the judge is sitting with assessors – and what could be more daring and grown-up than that?

The problem is that these issues of interpretation are already surfacing in arbitration; and with the introduction of Section 46 of the new Marine Liability Act, they are likely to arise much more frequently, not least because the usual claimant will be the third man: as endorsee of the contract of carriage, he will find that he has unwittingly picked up an arbitration agreement which is expressly subject to an alien jurisdiction.

So my question is this: how are our Canadian arbitrators to deal with arguments based on Lord Hoffmann's new approach to constructive home improvement?[18]

---

1 *" ... in English jurisprudence, as a legacy of the system of trial by juries who might not all be literate, the construction of a written agreement, even between private parties, became classified as a question of law. ... A lawyer nurtured in a jurisdiction which did not owe its origin to the common law of England would not regard it as a question of law at all. ... Nevertheless, despite the disappearance of juries, literate or illiterate, in civil cases in England, it is far too late to change the technical classification of the ascertainment of the meaning of a written contract between private parties as being "a question of law" for the purposes of judicial review."*

(*Pioneer Shipping Ltd v. B.T.P.Tioxide Ltd.* (*The* ***"NEMA"***) [1981] 2 Lloyd's Rep. 239, per Lord Diplock)

2 Cf: *"And so the argument between lawyers starts with the unexpressed major premise that any particular combination of words has one meaning, which is not necessarily the same as that intended by him who published them or understood by any of those who read them, but is capable of ascertainment as being the "right" meaning by the adjudicator to whom the law confides the responsibility of determining it."*

(*Slim v. Daily Telegraph Ltd.* [1968] 2 Q.B. 157, per Diplock LJ)

3 *Manchester Sheffield & Leicestershire Railway Co. v Brown* [1883] L.R. 8 A.C. 703

Cf: *"I also accept, equally unreservedly, that arguments based upon apparent commercial absurdity need to be regarded with caution not least because, whilst Judges of commercial experience are in a position to make some evaluation of the benefits and burdens of liberties and limitations contained in a charter-party, they are unlikely to be able to evaluate the countervailing burden or benefit of a particular rate of hire or length of charter, which depends upon current market conditions, and because the alleged absurdity of a particular provision has to be judged in the context of the whole package."*

(*The* ***"WORLD SYMPHONY"*** *&* ***"WORLD RENOWN"***) [1992] 2 Lloyd's Rep. 117, per Lord Donaldson MR)

4 *Sinochem International Oil (London) v. Mobil Sales & Supply Corp.* [2000] 1 Lloyd's Rep. 339, per Mance LJ

[5] [1998] 1 W.L.R. 912. The relevant passage is the following:

"In the Court of Appeal, Leggatt LJ said ... that the judge's interpretation was 'not an available meaning of the words'. 'Any claim (whether sounding in recission for undue influence or otherwise)' could not mean 'Any claim sounding in recission (whether for undue influence or otherwise)' and that was that. He was unimpressed by the alleged commercial nonsense of the alternative construction.

My Lords, I will say at once that I prefer the approach of the learned judge [sc. at first instance]. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v. Simmonds [1971] 1 W.L.R. 1381, 1384-1386 and Reardon Smith Line Ltd. v Yngvar Hansen-Tangen [1976] 1 W.L.R.989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all of the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) 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. ...

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the 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 (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 W.L.R. 945.)

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. ...

If one applies these principles, it seems to me that the judge must be right. ... The only remark of his which I would respectfully question is when he said that he was "doing violence" to the natural meaning of the words. This is an over-energetic way to describe the process of interpretation. Many people, including politicians, celebrities and Mrs Malaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean. If anyone is doing violence to natural meanings, it is they rather than their listeners."

[6] The full text can conveniently be found on the House of Lords web-site:

http://www.publications.parliament.uk/pa/ld/ldhome.htm

7 In a subsequent case, Lord Hoffmann did offer a qualified amplification, but this hardly alters the basic proposition:

"The background is however very important. I should in passing say that when in [ICS] I said that the admissible background included 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man', I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: 'we do not easily accept that people have made linguistic mistakes, particularly in formal documents'. I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage."

(*Bank of Credit & Commerce International SA ... v. Munwar Ali* [2001] UKHL 8)

8 *Mannai Investment Co. Ltd. v. Eagle Star Assurance* [1997] 2 W.L.R. 945

9 *"But, for my part, I am not persuaded that Lord Hoffmann intended, in the passage in the Investor's Compensation Scheme case which is so often relied upon, to propound any novel principle. To my mind, he was doing no more than emphasising that words are to be construed in the context of the agreement which the parties are making, having regard to the other provisions in the agreement, and the commercial purpose for which the agreement was made."*

(*Bromarin AB & ANR v. IMD Investments Limited* [1999] EWCA Civ 678, per Chadwick LJ)

"For my part, I do not read either of the speeches of Lord Hoffmann as departing from the approach of Lord Wilberforce ... Lord Hoffmann was simply overruling old and outdated cases by reference to an approach on construction which has been followed in the Commercial Court for many years."

(*NLA Group Ltd. v. Bowers* [1999] 1 Lloyd's Rep. 109, per Timothy Walker J)

"The crucial part of the letter of undertaking is of course to be construed in the context of the letter as a whole, which is in turn to be considered in its factual matrix and having regard to the surrounding circumstances. These well known principles have recently been illuminated by Lord Hoffmann in Investors Compensation Scheme Ltd. v. West Bromwich Building Society ..."

(*The* ***"RIO ASSU"*** *(No.2)* [1999] 1 Lloyd's Rep. 115, per Clarke J)

10 As reported in "***On Board***" No.7, October 2001 (publication of Shipping Group of Richards Butler)

11 *"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 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...."*

(*Vitol B.V. v. Compagnie Européene des Petroles* [1988] 1 Lloyd's Rep. 576)

Cf: *"The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of* *the parties to the instrument is utterly inadmissible."*

(*Shore v. Wilson* [1842] 9 Cl. & Fin. 355, per Tindall LCJ)

"... one hears much use made of the word "intention," but courts of law when on the work of interpretation are not engaged upon the task or study of what parties intended to do, but of what the language which they employed showed that they did; in other words, they are not constructing a contract on the lines of what may be thought to have been what the parties intended, but they are construing the words and expressions used by the parties themselves. What do these mean? That when ascertained is the meaning to be given effect to, the meaning of the contract by which the parties are bound. The suggestion of an intention of the parties different from the meaning conveyed by the words employed is no part of interpretation, but is mere confusion."

(*Great Western Railway v. Bristol Corporation* [1918] 87 L.J.Ch.414, per Lord Shaw)

[12] E.g.: *"If ever a case were designed to separate the purposive sheep from the literalist goats, this is it ... For the reasons I have given, I would in this case count myself among the purposive sheep."*

(*Summit Investment Inc. v. British Steel Corporation (The* ***"SOUNION"****)* [1987] 1 Lloyd's Rep. 230)

[13] *"It is difficult to quarrel with the general proposition that when interpreting an agreement the court is trying to work out what the parties intended to agree, rather than analysing words in a vacuum. Thus where the words the parties have used are ambiguous or, read literally, are meaningless or nonsensical, the surrounding circumstances must be considered in order to select the appropriate meaning or to give the words meaning or sense. However, where the words used have an unambiguous and sensible meaning as a matter of ordinary language, I see serious objections in an approach which would permit the surrounding circumstances to alter that meaning."*

(*National Bank of Sharjah v. Dellborg & others* [1997] EWCA Civ 2070)

[14] Cf: *"All, or almost all, judges are now concerned about the huge cost of litigation. I have to say that such a wide definition of surrounding circumstances, background or matrix seems likely to increase the cost, to no very obvious advantage."*

(*Scottish Power PLC v. Britoil (Exploration) Limited & others* [1997] EWCA Civ 2752, per Staughton LJ)

[15] Cf: *" ... the common law has its eye fixed as closely on the third man as on the original parties; and the final document is the only thing that can speak to the third man."* (Lord Devlin: ***"Morals and the Law of Contract"***; reprinted in ***"The Enforcement of Morals"*** [1965])

Cf: *"The words in the Exxonvoy bill of lading upon which this appeal turns are the same irrespective of whether it is issued in respect of a complete or a part of the cargo, received on board at the first or any subsequent loading port for carriage to and discharge at the last or any previous discharging port. There must be ascribed to the words a meaning that would make good commercial sense if the Exxonvoy bill of lading were issued in any of these situations, and not some meaning that imposed upon a transferee to whom the bill of lading for goods afloat was negotiated, a financial liability of unknown extent that no business man in his senses would be willing to incur."*

(*The* ***"MIRAMAR"*** [1984] 2 Lloyd's Rep. 129, per Lord Diplock)

[16] Cf: *"In my judgment, [Counsel] is right on behalf of the charterers to emphasize the circumstances prevailing when the charter-party was entered into. Telex messages exchanged immediately before it was signed showed that the owners were well aware of what they called the charterers' 'intended trade pattern'. ... For the purpose of construing 'dangerous' in [the war clause] the common intention that the vessel should trade to UAE ports is relevant to the reasonableness of refusal by the owners to proceed there. ... Although at the time when the charter-party was made the whole of the Gulf, including UAE waters, constituted a war risk zone, the owners were, by the combination of [these clauses] accepting that in the circumstances prevailing at the date of the charter-party the risks of proceeding to UAE ports and loading there were not such as they would consider 'dangerous', so as to render the discretion under [the war clause] exercisable."*

(*The* ***"PRODUCT STAR"*** *(No.2)* [1993] 1 Lloyd's Rep. 397, per Leggatt LJ) among the circumstances which surrounded its making.

In other words, in a written agreement, you must first concentrate exclusively on the wording, and you may only venture into the background if the words are ambiguous. The written agreement lives in one room, and the surrounding circumstances live in an adjoining room; and you only cross from the first room to the second if the first contains an ambiguity. If the words are clear and will carry only one relevant meaning, then that is where you must stop: the background is forbidden territory. It is this simple orthodoxy which Lord Hoffmann and his learned brethren have now overturned.

Not everyone has been convinced. In *ICS* itself, Lord Lloyd – himself quite open to the idea of purposive construction[12] – voiced a strong dissent:

> *"As Leggatt L.J. said in the Court of Appeal, such a construction is simply not an available meaning of the words used; and it is, after all, from the words used that one must ascertain what the parties meant. Purposive interpretation of a contract is a useful tool where the purpose can be identified with reasonable certainty. But creative interpretation is another thing altogether. The one must not be allowed to shade into the other."*

Soon afterwards, Lord Justice Saville expressed his own misgivings.[13] One could hardly quarrel, he said, with the proposition that the purpose was to work out what the parties really intended as opposed to analysing their words in a vacuum. But if that intention was clear from those words, there must be two serious objections to admitting the background and factual matrix to alter that meaning.

The first objection was clearly one of cost: the requirement to dig into the background to see whether it might change the meaning of the written words must add greatly to the length and complexity of the proceedings.[14]

The second objection was that this new doctrine must create serious problems for third parties such as endorsees or assignees: for how can a third party rely on the meaning of his document if that meaning may be governed by external events and situations of which he has no knowledge? But equally, how can it be satisfactory to have the same document carrying different meanings, quite possibly at the same time, depending on who relies on it?

This difficulty with the rights and obligations of such third parties is, of course, nothing new.[15] Nor is this the only area where interpretative problems can and often do arise: to take a topical example, the war clause of a time charter entered into last August might quite properly be construed to mean something entirely different in a back-to-back sub-charter entered into a week after the bombing began in Afghanistan.[16] The difficulties which such situations raise are certainly not semantic problems; and it would be unfair to lay these at Lord Hoffmann's door.

But *ICS* has clearly modified the traditional approach to contractual interpretation, and in doing so has effectively blurred the distinction between the construction of the written words within their documentary context, and the matrix of fact and circumstance which surrounded the genesis and creation of the contract itself.

Let me give you a simple example of what I mean. Suppose that an owner and a charterer are negotiating a voyage charter through an exchange of faxes. This is being done on an "accept/except" basis, and the open issues are progressively reduced until there is very little left to be agreed apart from the rate of freight. At this stage, the owner sends a message saying that he repeats his last offer, with the freight rate to be $6.00 per ton. The charterer, who knows that the market is really closer to $16, loses no time in returning his clean acceptance; and at that point the contract is made.

This would be hard luck on the owner. Perhaps he might hope to persuade an arbitration tribunal to correct his mistake (although this is clearly not a case for rectification in the legal sense); but it would undoubtedly be an up-hill task. Now, armed with the authority of *ICS*, the owner can say: "*But a reasonable man standing in the shoes of the parties would understand immediately that something has gone wrong with the wording of the contract, because he would know that the market is not $6, but somewhere in the mid-teens, and would naturally recognise my typographical mistake for what it is. Any fool, let alone your reasonable and well-informed bystander, would have to know that I had mangled my numerical syntax.*" Of course, he could have said that before: the issue is whether the tribunal could properly listen to him and then search out some convenient device to free him from his inequitable trap.

Now, before you reject this example as too absurd for serious consideration, let me explain briefly what was the issue in *ICS*.

There was a scheme for compensating investors which was set up under a section of the Financial Services Act. The issue in the case concerned a single clause in the form of release to be signed by the investors when making their claim for compensation. An exclusion was carved out from the general surrender of the investors' claims in return for the compensation, where the offending words read:

> "*Any claim (whether sounding in rescission for undue influence or otherwise) that you have or may have against West Bromwich Building Society ...*"

The judge at first instance accepted that the construction offered by the investors and the building society was the more natural meaning of the words, so that the exclusion covered all possible claims, and not just claims for rescission; but he then went on to reject this interpretation, on the grounds that it produced a ridiculous result which was contrary to "*the demonstrable purpose of the parties in entering into the claim forms.*"

The Court of Appeal agreed about the natural meaning of the words, but declined to go any further: in giving the leading judgment, Lord Justice Leggatt said: "*There is simply no warrant for limiting the rights retained to claims for or consequent upon rescission.*"

With the exception of Lord Lloyd, the House concluded that the Court of Appeal had got it wrong: in effect, they said, the words "*in rescission*" did not belong inside the brackets, but outside. The text should not be read as: "*Any claim (whether sounding in rescission for undue influence or otherwise ...*", but as: "*Any claim in rescission (whether sounding for undue influence or otherwise ...*" In other words, they decided to rewrite the contract.

Part of the surrounding matrix was an Explanatory Note addressed in non-legal language to the investor himself, but which formed no part of the formal document itself. This stated: "*You also agree that ICS should be able to use any rights which you now have against anyone else in relation to the claim. ... You give up all those rights and transfer them to ICS.*" This Note, which was praised by Lord Hoffmann as "*a model of clarity*", obviously influenced the purposive interpretation which was finally upheld.

ICS should not be viewed in isolation: there are a number of earlier decisions in the Court of

Appeal as well as the House of Lords which show a tendency to move in the same direction, notably those which arose in the stream of litigation concerning the Lloyd's names and their reinsurers.[17] But none of these, I think, ever actually crossed the threshold between our first room and our second except by going through the single door to which ambiguity is the only key.

In *ICS*, however, Lord Hoffmann elected not to use the door at all: he simply knocked down the adjoining wall, and turned the two rooms into one. And that, surprising though it may seem, is the current state of the law on this point in England.

What has this to do with the Federal Court of Canada? Our common law has long since, you will say, thrown off the fetters of the English system: why, we even admit expert evidence in collision cases where the judge is sitting with assessors – and what could be more daring and grown-up than that?

The problem is that these issues of interpretation are already surfacing in arbitration; and with the introduction of Section 46 of the new Marine Liability Act, they are likely to arise much more frequently, not least because the usual claimant will be the third man: as endorsee of the contract of carriage, he will find that he has unwittingly picked up an arbitration agreement which is expressly subject to an alien jurisdiction.

So my question is this: how are our Canadian arbitrators to deal with arguments based on Lord Hoffmann's new approach to constructive home improvement?[18]

---

1 " ... *in English jurisprudence, as a legacy of the system of trial by juries who might not all be literate, the construction of a written agreement, even between private parties, became classified as a question of law. ... A lawyer nurtured in a jurisdiction which did not owe its origin to the common law of England would not regard it as a question of law at all. ... Nevertheless, despite the disappearance of juries, literate or illiterate, in civil cases in England, it is far too late to change the technical classification of the ascertainment of the meaning of a written contract between private parties as being "a question of law" for the purposes of judicial review.*"

(*Pioneer Shipping Ltd v. B.T.P.Tioxide Ltd.* (*The* "***NEMA***") [1981] 2 Lloyd's Rep. 239, per Lord Diplock)

2 Cf: "*And so the argument between lawyers starts with the unexpressed major premise that any particular combination of words has one meaning, which is not necessarily the same as that intended by him who published them or understood by any of those who read them, but is capable of ascertainment as being the "right" meaning by the adjudicator to whom the law confides the responsibility of determining it.*"

(*Slim v. Daily Telegraph Ltd.* [1968] 2 Q.B. 157, per Diplock LJ)

3 *Manchester Sheffield & Leicestershire Railway Co. v Brown* [1883] L.R. 8 A.C. 703

Cf: "*I also accept, equally unreservedly, that arguments based upon apparent commercial absurdity need to be regarded with caution not least because, whilst Judges of commercial experience are in a position to make some evaluation of the benefits and burdens of liberties and limitations contained in a charter-party, they are unlikely to be able to evaluate the countervailing burden or benefit of a particular rate of hire or length of charter, which depends upon current market conditions, and because the alleged absurdity of a particular provision has to be judged in the context of the whole package.*"

(*The* "***WORLD SYMPHONY***" & "***WORLD RENOWN***") [1992] 2 Lloyd's Rep. 117, per Lord Donaldson MR)

4 *Sinochem International Oil (London) v. Mobil Sales & Supply Corp.* [2000] 1 Lloyd's Rep. 339, per Mance LJ

5 [1998] 1 W.L.R. 912. The relevant passage is the following:

"In the Court of Appeal, Leggatt LJ said ... that the judge's interpretation was 'not an available meaning of the words'. 'Any claim (whether sounding in recission for undue influence or otherwise)' could not mean 'Any claim sounding in recission (whether for undue influence or otherwise)' and that was that. He was unimpressed by the alleged commercial nonsense of the alternative construction.

My Lords, I will say at once that I prefer the approach of the learned judge [sc. at first instance]. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v. Simmonds [1971] 1 W.L.R. 1381, 1384-1386 and Reardon Smith Line Ltd. v Yngvar Hansen-Tangen [1976] 1 W.L.R.989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all of the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) 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. ...

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the 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 (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 W.L.R. 945.)

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. ...

If one applies these principles, it seems to me that the judge must be right. ... The only remark of his which I would respectfully question is when he said that he was "doing violence" to the natural meaning of the words. This is an over-energetic way to describe the process of interpretation. Many people, including politicians, celebrities and Mrs Malaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean. If anyone is doing violence to natural meanings, it is they rather than their listeners."

6 The full text can conveniently be found on the House of Lords web-site:

http://www.publications.parliament.uk/pa/ld/ldhome.htm

7 In a subsequent case, Lord Hoffmann did offer a qualified amplification, but this hardly alters the basic proposition:

"The background is however very important. I should in passing say that when in [ICS] I said that the admissible background included 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man', I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: 'we do not easily accept that people have made linguistic mistakes, particularly in formal documents'. I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage."

(*Bank of Credit & Commerce International SA ... v. Munwar Ali* [2001] UKHL 8)

8 *Mannai Investment Co. Ltd. v. Eagle Star Assurance* [1997] 2 W.L.R. 945

9 *"But, for my part, I am not persuaded that Lord Hoffmann intended, in the passage in the Investor's Compensation Scheme case which is so often relied upon, to propound any novel principle. To my mind, he was doing no more than emphasising that words are to be construed in the context of the agreement which the parties are making, having regard to the other provisions in the agreement, and the commercial purpose for which the agreement was made."*

(*Bromarin AB & ANR v. IMD Investments Limited* [1999] EWCA Civ 678, per Chadwick LJ)

"For my part, I do not read either of the speeches of Lord Hoffmann as departing from the approach of Lord Wilberforce ... Lord Hoffmann was simply overruling old and outdated cases by reference to an approach on construction which has been followed in the Commercial Court for many years."

(*NLA Group Ltd. v. Bowers* [1999] 1 Lloyd's Rep. 109, per Timothy Walker J)

"The crucial part of the letter of undertaking is of course to be construed in the context of the letter as a whole, which is in turn to be considered in its factual matrix and having regard to the surrounding circumstances. These well known principles have recently been illuminated by Lord Hoffmann in Investors Compensation Scheme Ltd. v. West Bromwich Building Society ..."

(*The "**RIO ASSU**" (No.2)* [1999] 1 Lloyd's Rep. 115, per Clarke J)

10 As reported in "***On Board***" No.7, October 2001 (publication of Shipping Group of Richards Butler)

11 *"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 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...."*

(*Vitol B.V. v. Compagnie Européene des Petroles* [1988] 1 Lloyd's Rep. 576)

Cf: *"The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of* the parties to the instrument is utterly inadmissible."

(*Shore v. Wilson* [1842] 9 Cl. & Fin. 355, per Tindall LCJ)

"... *one hears much use made of the word "intention," but courts of law when on the work of interpretation are not engaged upon the task or study of what parties intended to do, but of what the language which they employed showed that they did; in other words, they are not constructing a contract on the lines of what may be thought to have been what the parties intended, but they are construing the words and expressions used by the parties themselves. What do these mean? That when ascertained is the meaning to be given effect to, the meaning of the contract by which the parties are bound. The suggestion of an intention of the parties different from the meaning conveyed by the words employed is no part of interpretation, but is mere confusion.*"

(*Great Western Railway v. Bristol Corporation* [1918] 87 L.J.Ch.414, per Lord Shaw)

12 E.g.: "*If ever a case were designed to separate the purposive sheep from the literalist goats, this is it ... For the reasons I have given, I would in this case count myself among the purposive sheep.*"

(*Summit Investment Inc. v. British Steel Corporation (The "**SOUNION**")* [1987] 1 Lloyd's Rep. 230)

13 "*It is difficult to quarrel with the general proposition that when interpreting an agreement the court is trying to work out what the parties intended to agree, rather than analysing words in a vacuum. Thus where the words the parties have used are ambiguous or, read literally, are meaningless or nonsensical, the surrounding circumstances must be considered in order to select the appropriate meaning or to give the words meaning or sense. However, where the words used have an unambiguous and sensible meaning as a matter of ordinary language, I see serious objections in an approach which would permit the surrounding circumstances to alter that meaning.*"

(*National Bank of Sharjah v. Dellborg & others* [1997] EWCA Civ 2070)

14 Cf: "*All, or almost all, judges are now concerned about the huge cost of litigation. I have to say that such a wide definition of surrounding circumstances, background or matrix seems likely to increase the cost, to no very obvious advantage.*"

(*Scottish Power PLC v. Britoil (Exploration) Limited & others* [1997] EWCA Civ 2752, per Staughton LJ)

15 Cf: " ... *the common law has its eye fixed as closely on the third man as on the original parties; and the final document is the only thing that can speak to the third man.*" (Lord Devlin: "***Morals and the Law of Contract***"; reprinted in "***The Enforcement of Morals***" [1965])

Cf: "*The words in the Exxonvoy bill of lading upon which this appeal turns are the same irrespective of whether it is issued in respect of a complete or a part of the cargo, received on board at the first or any subsequent loading port for carriage to and discharge at the last or any previous discharging port. There must be ascribed to the words a meaning that would make good commercial sense if the Exxonvoy bill of lading were issued in any of these situations, and not some meaning that imposed upon a transferee to whom the bill of lading for goods afloat was negotiated, a financial liability of unknown extent that no business man in his senses would be willing to incur.*"

(*The "**MIRAMAR**"* [1984] 2 Lloyd's Rep. 129, per Lord Diplock)

16 Cf: "*In my judgment, [Counsel] is right on behalf of the charterers to emphasize the circumstances prevailing when the charter-party was entered into. Telex messages exchanged immediately before it was signed showed that the owners were well aware of what they called the charterers' 'intended trade pattern'. ... For the purpose of construing 'dangerous' in [the war clause] the common intention that the vessel should trade to UAE ports is relevant to the reasonableness of refusal by the owners to proceed there. ... Although at the time when the charter-party was made the whole of the Gulf, including UAE waters, constituted a war risk zone, the owners were, by the combination of [these clauses] accepting that in the circumstances prevailing at the date of the charter-party the risks of proceeding to UAE ports and loading there were not such as they would consider 'dangerous', so as to render the discretion under [the war clause] exercisable.*"

(*The "**PRODUCT STAR**" (No.2)* [1993] 1 Lloyd's Rep. 397, per Leggatt LJ)

[17] E.g.: *"I readily accept [Counsel's] submission that the starting point of the process of interpretation must be the language of the contract. But [Counsel] went further and said that, if the meaning of the words is clear, as he submitted it is, the purpose of the contractual provisions cannot be allowed to influence the Court's interpretation. That involves approaching the process of interpretation in the fashion of a black-letter man. The argument assumes that interpretation is a purely linguistic or semantic process until an ambiguity is revealed. That is wrong. Dictionaries never solve concrete problems of construction. The meaning of words cannot be ascertained divorced from their context. And part of the contextual scene is the purpose of the provision."*

(*Arbuthnott v. Fagan, Deeny v. Gooda Walker Ltd.* [1996] L.R.L.R. 135, per Steyn LJ)

"Courts will never construe words in a vacuum. To a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief. To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view pedantic, sterile and productive of error. But that is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he means. To my mind construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive: the instrument must speak for itself, but it must do so in situ *and not be transported to the laboratory for microscopic analysis."*

(*Arbuthnott v. Fagan, Deeny v. Gooda Walker Ltd.* [1996] L.R.L.R. 135, per Bingham MR)

"I think that in some cases the notion of words having a natural meaning is not a very helpful one. Because the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus a statement that words have a particular natural meaning may mean no more than that in many contexts they will have that meaning. In other contexts their meaning will be different but no less natural.

Take, for example, the word 'pay'. In many contexts, it will mean that money has changed hands, usually in discharge of some liability. In other contexts, it will mean only that a liability was incurred, without necessarily having been discharged. A wife comes home with a new dress and her husband says 'What did you pay for it?' She would not be understanding his question in its natural meaning if she answered 'Nothing, because the shop gave me 30 days credit'. It is perfectly clear from the context that the husband wanted to know the amount of the liability which she incurred, whether or not that liability has been discharged."

(*Charter Reinsurance Co. Ltd. v. Fagan* [1996] 2 Lloyd's Rep. 113, per Lord Hoffmann)

[18] *"Certainty of rights and duties, and predictability of dispute resolution, is the first imperative of a system of commercial law. It is of fundamental importance, not so as to ease the task of Judges, but because it enables businessmen and their advisers in the drafting and negotiating stage to consider properly the risks attendant upon an adventure, and to make suitable arrangements by way of contractual stipulations and the procuring of insurance cover. Moreover, certainty and predictability is also of vital importance when a dispute arises, so that in so far as it is possible, the way in which it will probably be resolved will not usually be a complete mystery to businessmen and their advisers."*

(*The* ***"ULJANOVSK"*** [1990] 1 Lloyd's Rep. 430, per Steyn J)