

Contract Interpretation: What it says on the tin

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1. Vows

Lord Justice Moore-Bick, Ladies and Gentleman.

I hate marking. I hate it so much that, unlike many of my colleagues, I cannot joke about it. Every script that I mark places a weight upon me that I find hard to bear.

When presented each summer with a pile of exams to mark, I have a number of tricks to try and induce myself to perform the task. So, I resolve that I will only be allowed a cup of tea, a small piece of chocolate, and a look at the newspaper once I have managed to mark five papers. I can only break for lunch once I have finished one fifth of the total. And so on.

I weaken every time. My future self chafes at the restrictions I have imposed. Boredom and despair at my ability to teach anyone anything set in. I find myself doing less awful tasks, such as de-scaling the kettle, or re-grouting the bathroom. The marking is always done in the end, but not without more pain than is necessary. Summer marking that coincides with major international football tournaments is especially problematic.

This is a very bad way to behave. Being resolute is an important virtue. A better version of myself would be able to stick to the resolutions that I make, save where there subsequently appear other better reasons not to do so. We teach our children the importance of setting goals for themselves and persevering. Stickability is important.

To make a vow, it is sufficient to form a resolution in one's mind. Communication to another is unnecessary. Its meaning is similarly determined by the intention of the person at the time of making it. Whether a reasonable person would think I was making such a vow, which judging by my subsequent behaviour they may not, is neither here nor there. The vow is a product of my willing it into being.

Making a vow is not, however, the same thing as promising or contracting. What I am going to try to persuade you of tonight is that when we interpret a contract, or indeed any other words that are the source of rights, such as in a deed, will or statute, we should cease to talk of our searching for the intentions of the parties creating it. This has implications for our rules of construction.

2. Objectivity

Under the malign influence of the will theory of contracting, many writers see promises as created by the will of the promisor, or in the context of a contract the combination of wills of the promisor and promisee together. If this were correct the existence and content of a promise ought, other things being equal, to be determined by the intentions of the parties, just

as it is with a vow. Although this subjective theory of promises clearly does not fit with the positive law as it is, it has persisted from the nineteenth century until the present day.¹ It is not just legal theorists who think in this way. Sir Christopher Staughton, writing extra-judicially, has stated that: “Rule One is that the task of the judge when interpreting a written contract is to find the intention of the parties.”² Many hundreds of examples of judicial statements of this kind could be produced. Is it true? And, perhaps more importantly, ought it to be true?

As we all know, both in determining whether there is a contract and in settling its content the law adopts an objective approach, what is actually intended not being determinative of the contract’s existence or meaning. How can this be squared with the proposition that we are concerned with discovering the intentions of the parties?

Two tactics are commonly employed to explain the law’s divergence from the theory. Neither is persuasive. First that the law uses an objective standard for evidentiary reasons: it promotes certainty and prevents fraud.³ Certainty alone is never very persuasive as a justification for a rule departing from what justice would otherwise require. A rule stipulating for the slaughter of all first born children may be very certain, but that isn’t much to its credit.

Second that because the promisee will have relied upon the promise, or that there is at least a risk that she will have done so, this provides a good reason for departure from what was

¹ Eg C von Savigny, *System des Heutigen Romischen Rechts* (1840); C Fried, *Contract as Promise* (1981), 12-13, 60-63, TM Scanlon, *Promises and Contracts*, in *the Theory of Contract Law: New Essays*, (2001, P Benson ed.) 86, 104.

² C Staughton, ‘How Do the Courts Interpret Commercial Contracts’ (1999) 58 CLJ 303, 304.

³ C Fried, *Contract as Promise* (1981), 62-63; E Peel, *Treitel’s The Law of Contract* (13thed., 2012) [1-002].

actually intended.⁴ Why apply such a rule in contexts where not only can it be shown that no reliance has taken place, but that no such reliance ever could take place? The terms of a will in a sealed box are interpreted objectively, just as much as the terms of a contract.

However unlike a vow, we cannot make a promise on our own in a darkened room. However much I try, I cannot simply will a promise into existence. Even if two parties intend precisely the same promise from one to another to exist, that alone is not a promise. Promises and contracts are actions in the world. They are acts of communication; indeed, they are the archetypal example of speech acts. Both the existence and the content of a promise are determined objectively because the existence and content of communicated words are determined objectively.⁵

Lord Nicholls, writing extra-judicially, has claimed that in “everyday life we seek to identify what a speaker or writer *actually* intended by the words he has used ...[but] the law proceeds on a different footing.”⁶ This claim about everyday life is incorrect. The law’s approach to interpretation is, in this respect, identical to our approach to the meaning of words outside the law. If I say “I offer to buy your black cat for £100” those words do not mean “I offer to sell my white dog for £30,” even if that is the meaning I had intended to convey. Meaning is not determined by the speaker’s intentions.

⁴ C Fried, *Contract as Promise* (1981), 62-63; P Atiyah *An Introduction to the Law of Contract* (5th ed., 1995), 82.

⁵ See T Endicott, “Objectivity, Subjectivity and Incomplete Agreements” in J Horder (ed) *Oxford Essays in Jurisprudence* (2000, 4th series).

⁶ Lord Nicholls, ‘My kingdom for a horse: the meaning of words’ 2005 LQR 577, 579.

However, for an act to impose obligations upon me it must be my doing; I must be *responsible* for it. If a fraudster impersonates me and forges my signature on a contractual document, I am not bound even if the promisee believes that the promise was mine, and any reasonable person in his shoes would have believed the same. It is not the case however that I am responsible only for the consequences of my actions that I intend. If I negligently knock over a Ming vase, I am responsible for its destruction, and in law must pay for it, regardless of the fact that that result was not what I intended. The same is true of words. The promise must be mine, in the sense that I am responsible for it, but it is a mistake to think that I am only responsible for those things I intend.

The narrow doctrine of *non est factum* is a nice illustration of the point in a contractual context. If a celebrity is asked to sign his autograph and it is later discovered that the document is in fact a contract for the sale of his home, he may plead that the document is not his. If however someone is careless in signing a document, such as someone who signs a document containing blanks that are later filled in otherwise than in accordance with his instructions, he may be bound.⁷

That words have objective meanings, and that that meaning is not determined by our intentions, is reflected in the law in many contexts outside of contract law. If, for example, I publish an article stating that Moore-Bick LJ is an axe murderer, I commit the tort of libel. I will not be able to resist the claim by proving that what I had intended to say he is a fine golf player. Just so long as I am responsible for the publication, I commit the tort.

⁷ *Gallie v Lee* [1971] AC 1004.

This objective approach to meaning is followed in the context of wills, trust deeds, and court orders. The law is not departing from our approach in everyday life, but applying it.

Now, some of you may be becoming slightly impatient with the claims made so far. If it is accepted that the meaning of words and consequently promises is not determined by the intention of the person speaking, isn't it determined by what a reasonable person would conclude they intended? That we are neither searching for what was actually intended nor what a reasonable person would think they intended is shown by the law's exclusion from consideration in interpreting an agreement of the parties' subsequent conduct.⁸ If our concern were to determine what the parties themselves subjectively intended their agreement to mean, how they operated it subsequent to their agreement would be extremely strong probative evidence of this fact, and its exclusion would make no sense. If however we are interested in discovering what the words they have used mean, what they subjectively thought they meant is usually neither here nor there (unless perhaps they are in a specialist market and their subjective understandings provides evidence of what the words mean in the context in which they are used.) This exclusionary rule also shows us that the justification for the objective approach is not based upon either the actual or potential reliance of the promise, as meaning is not determined by the subsequent reliance of the parties' on a particular understanding. Subsequent events, whatever they may be, cannot determine the meaning of the words at the time spoken.

An example.

⁸ *Schuler v Wickman machine Tools Sales Ltd* [1974] AC 325, HL.

D Bank takes a fixed charge over all receivables due to *C Ltd*. It is a term of the agreement creating the charge that all payments are to be made into a blocked account with the bank. From the start the account is never operated as a blocked account, *C Ltd* freely withdrawing all monies paid in for its own use in the ordinary course of business.

Is the charge a fixed or floating charge? We know from *Spectrum v Digital Plus*⁹ that the meaning of the agreement is determined at time of contracting. Subsequent conduct may be relevant to the questions of whether the agreement has been varied, or an obligation waived, or even whether the document representing the deal is in fact a sham, but it is not relevant to its construction. Further, that the subsequent conduct may be admitted for these other purposes shows that our approach to construction cannot be based upon either the need for commercial certainty or a desire to restrict admissible material in order to expedite court hearings.

It may be objected that there are occasions when the courts look to the parties' subjective states of mind in finding the existence of a contract.¹⁰ If one party subjectively makes a mistake *as to the terms of the deal*, and the counterparty *knows* of that mistake, there is often said to be no binding agreement.¹¹ A famous example is the so-called 'snapping up' case of *Hartog v Collin Shields*.¹² The defendant offered to sell Argentine Hare skins at a price quoted 'per pound.' This was a mistake. It was intended to offer them 'per piece' and there were about three hare skins to the pound. As the plaintiff knew that the defendant was making a mistake he could not enforce the contract at the low price stated in the offer.

⁹ [2005] 2 AC 680)

¹⁰ Eg DW McLauchlan , "The 'drastic' remedy of unilateral mistake' (2008) 124 LQR 608, 611.

¹¹ *Smith v Hughes* (1870-71) L.R.6 Q.B. 597 has come to stand for this proposition. Of course it will be a rare case where the promisee knows this when a reasonable person would not know of the mistake, but it is perfectly possible and if the promisee is honest he will admit it.

¹² [1939] 3 All ER 566.

This rule is usually said to show that the question of agreement is not a wholly objective one, but that it also contains subjective elements.¹³ However that this is not so may be shown by considering what the position would have been if the market had moved dramatically, so that the deal had become a good one for the seller. Could the buyer have insisted that there was no agreement? The answer is surely no. There was objectively a bargain, but one that only the seller could enforce. Why could the buyer not rely upon the agreement? Because the seller's subjective consent to the bargain was vitiated. This is a case where there is a contract, but where one party's subjective mistake when known by the other allows escape from the deal by one party.

What I have said so far is, I would suggest, entirely consistent with at least the statements of principle set out in *Investors Compensation Scheme Ltd v West Bromwich Building Society*¹⁴ by Lord Hoffmann. So his first principle is said to be:

- (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."

Notice that we are looking to ascertain the meaning which would be conveyed, not the meaning that was intended to be conveyed.

¹³ E Peel, *Treitel's The Law of Contract* (13th ed., 2012) [1-002].

¹⁴ [1998] 1 WLR 896, 912-913.

An example is the decision in *The Starsin*.¹⁵ A Bill of Lading was signed on its face by a port agent “As Agent for [the Charterer] of the vessel”. On reverse of the Bill, clause stating

33 IDENTITY OF CARRIER The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness.

The House of Lords refused to give effect to this demise clause, preferring the meaning that would be placed on the face of the Bill by a reasonable person to whom the document was addressed. We may note in passing that it is meaningless in a case such as *The Starsin* to ask what was it that the promisor intended, or what would the promisor have been reasonably expected to intend, as the issue was: who is the promisor?

This does not mean that what the promise means is to be determined by a rigid literalism, anymore than this is true of the use of words generally.¹⁶ “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 listener.”¹⁷ When John Prescott, the UK Deputy Prime Minister, told the House of Commons that it was government policy to “reduce – and probably eliminate – the homeless”¹⁸, the background circumstances give the words a meaning different from their literal one. This is nothing to do with what Prescott

¹⁵ [2004] 1 AC 715.

¹⁶ In England by far the most important statement of how promises are to be interpreted is contained in the speech of Lords Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912-913.

¹⁷ Lord Hoffmann.

¹⁸ Hansard, House of Commons, 6th Series vol 423, col, 1268.

himself subjectively intended. Even if he had actually intended that the homeless be slaughtered, that is not the meaning his words conveyed.

This is reflected in Lord Hoffmann's second principle

- (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 to be 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."

So, in principle, nothing is excluded that could be relevant, but we are admitting background evidence to show what meaning is conveyed, not what the parties themselves intended. Just as evidence of Prescott's personal loathing of the homeless would be irrelevant to the meaning of his words, in admitting background evidence we are not doing so in a hunt for intention.

- (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. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them."

The continuation of this (much criticised) rule was recognised, albeit in obiter dicta, by the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd*¹⁹

Some second order justifications can be given for this rule. It does promote certainty.

Assignees may not know or be able to know the content of these negotiations. It may reduce the cost of advice, litigation etc. in trawling negotiations; but as this evidence is relevant and admissible for other purposes the force of this argument is limited.

However the primary reason for the exclusion is that it is almost always irrelevant. If our task were to discover what was intended or what a reasonable person would understand the parties to have intended, then just as with their subsequent conduct, their prior negotiations would often be of great probative value. In trying to ascertain the meaning of words, it is much more rarely so.

There is no doubt however, that this rule can give rise to counter-intuitive results. For example

D, a shipbuilder, negotiates to repair *P*'s ship. *D* proposes as a term

“The plating of the hull to be repaired, *but if any new plating is required the same to be paid for extra.*”

¹⁹ [2009] AC 1101.

P objects to the italicised words, saying contract must cover all work to make the vessel A1 at Lloyd's. *D* agrees to the deletion of the italicised words. Did the contract cover the cost of the additional plating, or did this have to be paid for as an extra?

It was held that the prior negotiations were inadmissible in answering this question---*A&J Inglis v John Buttery & Co*²⁰---but clearly this was context directly relevant to the meaning of the words employed.

We can use evidence of prior negotiations for purposes of rectification and estoppel by convention so as to have the document/agreement amended. A cynic might argue that admissibility for these purposes undermines whatever force there is in the inadmissibility rule for purposes of interpretation. The truth may be that admission for purposes of interpretation misleads more than it assists. Because it may strongly indicate what the parties themselves intended, the malign temptation is to give effect to this, rather than to the meaning of the words used. As background evidence of meaning, prior negotiations will rarely be strong evidence. Whether the danger that a judge may misuse this information is sufficiently hazardous that we must prevent her from using it at all, is a question concerning the competence of the judiciary that I dare not try and answer.

- (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

²⁰ (1878) 3 App Cas 552, HL.

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.”

This wide approach means there is much less need for the doctrine of rectification today. But it could not lead to the inclusion of an entire clause omitted in error (eg a time-bar clause) or the exclusion of an entire clause that should not be there,

- (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. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B.* 19851 A.C. 191, 201:

". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

Is this a purposive approach? A difficult example

C is entitled to a refund under a shipbuilding contract if the contract was terminated, or there was an ‘insolvency event’. Such an event occurred, and they claimed under a guarantee given by D bank in support of the refund obligation. The guarantee referred to ‘all sums due under the [shipbuilding] contract’ but only referred to a refund on ‘termination’. No commercial reason for the guarantee to be limited in this way is discernible. The majority of the CA hold the bank liable under the guarantee, overturned by SC. – *Kookmin Bank v Rainy Sky SA*²¹

For me, this is a plain example of the court rightly giving effect to what the parties have done, rather than to what they had intended to be done.

(i) 3. Vitiating Factors

An agreement may be set aside for a number of reasons related to defects in the subjective intentions of one or both parties. Where there has been a misrepresentation, duress, or undue influence the party whose consent was as a result defective has the power to avoid the contract. If one subscribes to the view that promises take place in, or are at least dependent upon, our subjective intention to subject ourselves to obligations, then the true position in all of these cases would be that there is no promise at all. Any putative contract ought as a result to be void.

This does not align with the positive law. A party subject to duress, or acting under undue influence, or to whom a misrepresentation has been made by the counter party has the power

²¹ [2011] UKSC 50.

to avoid the contract. It is not the case that no promise has been made: there has been regardless of any defects in the promisor's subjective consent. The reason why the contract can be set aside is quite separate from what a promise is.

It may be objected that there are occasions when a contract is rendered void, and not just voidable, as a result of a vitiating error, such as mistake. One common example (a mistake as to the terms of a deal, known to the other side) is discussed above. Another is the case of common fundamental mistake.

A agrees to buy *B*'s horse *Dobbin*, currently in his stables in East Oxford. Unbeknownst to either party, at the time of the agreement the stables had burnt to the ground and *Dobbin* had been destroyed.

Under section 6 of the Sale of Goods Act 1979, a contract for the sale of specific goods where they have perished at the time of contracting without the knowledge of the seller is void.

However if we change the story, the oddity of concluding that no agreement was entered into because of the mistake becomes apparent. If the contract stipulated that title to *Dobbin* was to pass the following week upon delivery, and the fire had taken place after the contract but before delivery, the contract would have been frustrated. We could not, however, say that no contract had ever been entered into; clearly there had.

The better view is that there is an agreement in both cases, but that promises, like words generally, are not absolute. They run out. To take a rather over-discussed example, if parents ask a babysitter to teach their young child a game whilst they are at the cinema, the word 'game' cannot in context be interpreted to include knife throwing or playing 'chicken' on a busy road. In the abstract the word game can include these things, but not in these circumstances. Again this has nothing to do with what the parties themselves subjectively intended---it matters not a jot whether the parents thought about these possibilities.

In the law the limits of what has been promised is inevitably a matter of interpretation, but words have limits. Promises do not cover all unforeseeable eventualities, such as the non-existence of the subject-matter. Promises to buy and sell in such a situation are no less real, but they do not bind. It does not matter that the parties never considered this situation, nor does it matter that they never considered this situation's possibility.

That the contract in the common mistake case is not absolutely void may be shown by reflecting upon the fate of terms other than the promises to buy and sell. If the contract for the sale of *Dobbin* contains a jurisdiction or arbitration clause these are binding, which they should not be if the contract were indeed void. Rather all that is no longer binding are the parties' primary obligations to buy and sell, and this is because the promises do not cover the situation where the subject matter of the agreement does not exist. This is so regardless of whether its destruction takes place ten minutes before or ten minutes after the agreement is concluded.

4. Parol Evidence

The parol evidence rule is not dead, or even ill, but merely misunderstood.²² The misunderstanding probably comes from its name, which is wholly misleading. First, the evidence excluded which falls outside of a document which is intended to include the parties entire agreement is not limited to parol (ie oral) evidence but also applies to all other evidence, which may be in writing, outside of the document.²³ Therefore it is better to speak of evidence *extrinsic* to the written agreement being excluded.

Second, properly understood it is not, or at least is no longer, a rule of evidence but a rule of construction. The rule as traditionally formulated states that evidence cannot be admitted (or even if admitted cannot be used) to add to, vary or contradict a written instrument.²⁴ The rule forms part of the law of merger, which is of more general application outside of the law of contract (eg court orders). Once it has been shown that the parties have agreed to be bound to the terms of a contract wholly embodied in a written instrument, each is bound by its terms although one or other may not know what they are,²⁵ and even though the content of prior negotiation may be inconsistent with the terms contained in the document. The refusal to admit such extrinsic evidence as relevant, arises from the fact that it is wholly pointless to admit it. Once the court has concluded that the document was *agreed* to contain all the terms of the contract proving terms that had earlier been agreed to is neither here nor there. The rule that such extrinsic evidence is irrelevant follows as a matter of logic from what the parties

²² Contrast G McMeel ‘Interpretation and mistake in contract law: ‘The fox knows many things...’ [2006] LMCLQ 49, at 66-69.

²³ eg *Mercantile Bank of Sydney v Taylor* [1893] AC 317.

²⁴ *Bank of Australia v Palmer* [1897] AC 540, at 545, per Lord Morris; *Jacobs v Batavia & General Plantation Trust* [1924] 1 Ch 287, at 295 per PO Lawrence J; affd [1924] 2 Ch 329.

²⁵ *Parker v South Eastern Rly Co* (1877) 2 CPD 416, at 421.

have agreed to be bound by. Such an agreement is determined by the ordinary rules of objective interpretation. If, as a matter of fact, the parties had at an earlier point in their negotiations reached an agreement on different terms from that embodied in the subsequent written contract, this earlier agreement is replaced, consideration provided by each side's promise to be bound solely by the terms in the written agreement. Giving effect to different terms from those contained in the written agreement would be contrary to the agreement the parties have reached. Properly understood, therefore, the 'parol evidence' rule is not, as it is sometimes portrayed, a rigid rule based upon a now unfashionable love of certainty which will lead to the frustration of the parties' actual intentions. Rather the effect of the rule is to enforce, not frustrate, the intentions of the parties as objectively manifested.

Although it has been claimed that there are a large number of exceptions to the rule, and that these exceptions have swallowed it up,²⁶ the better view is that the logic of the rule is irresistible and that the so-called exceptions are nothing of the sort.²⁷ For example, as a matter of logic, the rule only applies to the contents of the contract, and not to its validity. Only if it has been genuinely agreed that the document is agreed to embody the parties' entire agreement does it logically follow that extrinsic evidence of other terms is irrelevant. This limitation is not, therefore, an exception to the rule.

Further, the most important anterior question to the rule's application is whether, as a matter of construction, the written instrument is intended to contain all of the terms agreed to. So, in *Allen v Pink*²⁸ a buyer received a memorandum from the seller 'Bought of G Pink a horse for the sum of £7 2s 6d.' As the document was meant as a memorandum evidencing the agreement which had been entered into, and not as containing the entire terms of the

²⁶ G McMeel, above n 26, at 66-67.

²⁷ Law Commission, *Law of Contract – The Parol Evidence Rule* (Law Com 154, 1986), para [2.31].

²⁸ (1838) 4 M & W 140.

agreement, evidence of an oral warranty that the horse would go quietly to harness was admitted. Again, this is obviously not an exception.

Similarly the rule against extrinsic evidence needs to be kept distinct from the question as to whether the parties can rely upon extrinsic evidence as an aid to interpretation of a contract. The extent to which the document is to be treated as conclusive of its terms is a question of degree. If all that has been agreed is that no terms other than those embodied in the written document have been agreed to, leading extrinsic evidence to interpret such a document is not inconsistent with the agreement. Indeed such contextual evidence may be indispensable. In recent times the courts have become much less restrictive in admitting such evidence.²⁹ In principle, there is no tension between this development and the parol evidence rule.

The parol evidence rule is not dictated by public policy, or the needs of commercial certainty, or in order to make the court's task easier by restricting the relevant material. Rather, it arises because of the agreement itself. It is a form of implied entire agreement clause. Consequently, there is no need to 'liberalise' the parol evidence rule.

Now it can be said that the so-called parol evidence rule is not a separate rule of law at all, but merely a specific application of general principles. The rule does indeed follow as a matter of course from the general rule as to the objective test for agreement. This does not show that the parol evidence rule is dead, but merely that it is a species of a wider genus. Precisely the same objection to the separate doctrines of frustration and mistake in all its forms can be made. They too follow from the application of the logic of the general rules of

²⁹ *ICS Ltd v West Bromwich Building Society* [1998] 1 WLR 896 liberalises the use of such evidence. See ch 00 (McMeel).

formation and construction.³⁰ However, this does not render otiose, irrelevant or wrong the cases which have worked through the application of general principles in these specific contexts. Similarly, the cases on the parol evidence rule cannot simply be forgotten as they are the common law's working through of general principles where an agreement has been reduced to writing.

Where a contract is reduced to writing there is a 'presumption' that the parties intended it to include all of the terms of the contract.³¹ This 'presumption' is merely a presumption of fact, and reflects the court's readiness to draw inferences as a result of common background practice. This is to be contrasted with a true presumption of law, for example the presumption that a person's death can be presumed from his absence for seven years. The 'presumption' that when a contract is reduced to writing it is intended to include all its terms is inevitably rebuttable. However, it does reflect the social fact that laymen, in particular commercial parties, attach great significance to the reduction of a contract into writing, so that the 'presumption' will in practice be difficult to rebut.

Today it is very common for parties to include a clause in written contracts stating that the document represents their 'entire agreement.' Such express clauses will also deprive pre-contractual statements of the contractual force they might otherwise have.³² The extent of such a clause's operation is, inevitably, a matter of construction. In many cases, the entire agreement clause adds nothing to the conclusion that the court would have reached without its inclusion. Such a clause removes any doubts that the parties by reducing their agreement to a single written document intended it, and nothing else, to represent their agreement. The time may come where the failure, in some contexts, of commercial parties to include such a

³⁰ CJ Slade 'The Myth of Mistake in the English Law of Contract' (1954) 70 LQR 385.

³¹ *Gillespie Bros & Co v Cheney, Eggar & Co* [1896] 1 QB 59, at 62.

³² *Inntrepreneur Pub Co (GL v East Crown Ltd* (2000) 2 Lloyd's Rep 611, at 614, *per* Lightman J.

clause provides sufficient evidence that the written agreement they have entered into is not intended to embody their entire agreement. This is not, yet, the world in which we live.

5. Rectification

It is one of the curiosities of the law that although many people claim that the parol evidence rule is no more, nobody would make the same claim about the doctrine of rectification. Yet if we had no parol evidence rule we would have no need for the doctrine of rectification. Rectification operates by way of partial rescission. If all that it did was amend the document itself it would be of no legal significance. Instead, the agreement that the document alone represents the parties' agreement is rescinded. What we are left with is the bargain that there would have been if it had not been agreed that the document alone contained their entire agreement. Much confusion is created by thinking that the doctrine of rectification exists in order to give effect to the parties' intentions. Again, this is simply the error of thinking that contracts should represent what the parties' intended.

Lord Nicholls extrajudicially suggested that the parol evidence rule could be easily circumvented by pleading rectification, thereby bringing before the court evidence of what the parties' subjectively intended. This would be correct if the parol evidence rule were a rule of evidence, as this would undermine its entire purpose. But, as we have seen, it is not. Rectification seeks to partially avoid what has been objectively agreed. The evidence relevant to the question of whether one or more of the parties was making a mistake is simply not the same as the evidence relevant to the meaning of the words used. No rule is being circumvented here.

I shall not seek to set out all the circumstances where rectification is possible, but rather to set out what its consequences are. In each case, we are not concerned to give effect to the parties' intentions but to their agreement.

Some examples.

A and B agree for the sale of feveroles. Their agreement, when reduced to writing, states that there is an agreement for the sale of ordinary horsebeans. Both mistakenly believe that feveroles and ordinary horsebeans are the same. B now seeks to rectify the contract so that feveroles replaces ordinary horsebeans.

The parties have made a common mistake as to whether the document contains the terms of their agreement. Rectification there should be awarded. Although the written contract was consistent with their actual intentions (for ordinary horsebeans), this is of no relevance.

A and B agree for the sale of ordinary horsebeans. Their agreement, when reduced to writing, states that there is an agreement for the sale of ordinary horsebeans. Both mistakenly believe that feveroles and ordinary horsebeans are the same. B now seeks to rectify the contract so that feveroles replaces ordinary horsebeans.

Again, here the finalised written document accords with the parties' agreement, irrespective of the document. That this did not accord with their actual intentions is irrelevant, and no rectification will

be awarded.³³ No agreement for the sale of feveroles was ever entered into, and rectification cannot alter this fact.

A and B agree for the sale of feveroles. Their agreement when reduced to writing states that there is an agreement for the sale of ordinary horsebeans. A mistakenly believes that ordinary horsebeans and feveroles are the same. B knows that feveroles are top quality horsebeans. A seeks rectification so that feveroles replaces ordinary horsebeans.

Again, there should be rectification, and it does not matter that there is no common intention that what is sold is feveroles. The mistake that A makes, if known to B, entitles A to rescind the agreement that the document represents the agreement, leaving the agreement that there would have been if they had not reduced it to writing.

6. Legislative Intent

If the propositions concerning the meaning of words used by individuals in voluntarily creating duties rights, powers, liabilities and immunities is correct, then a fortiori the same should apply to legislative enactments. Courts frequently speak of the process of interpreting a statute as one of searching for the legislature's intent.³⁴ This is however a mistake. This is not because it is meaningless to speak of a legal construct such as a legislature or a corporation having an intention. Although it is the case that only natural persons can form an intention, we may perfectly rationally attribute those intentions to a non-natural entity. So, just as the act of Geoff Hurst in kicking a ball in a net may be attributed as a goal to a team, England, that itself can only 'act' through human agents, we can speak of companies,

³³ *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* [1953] 2 QB 450; *IBM United Kingdom Pensions Trust Ltd v IBM United Kingdom Holdings Ltd* [2012] EWHC 2766

³⁴ Eg *Pepper v Hart* 643 per Lord Browne-Wilkinson.

legislatures, or even entire nations having intentions through the attribution of the intentions of the human agents who make up the corporate body. This process of attribution may be more complex where we have a group, some of whom may have different intentions from others, but the law can solve problems such as these with a rule. It is not the artificiality or the difficulty of the exercise that is the problem in searching for legislative intent. Rather it is its irrelevance.

So, even if we could ask all 650 MPs and 774 members of the House of Lords for their view on the correct interpretation of a statutory provision, and all were in agreement, this on its own would be of no more probative value than asking several hundred random members of the public what they thought the words meant. It may show what a reasonable person may think, but the words mean what the words mean, not what members of the legislature intend.

The position is no different in cases where the legislative provision is ambiguous or obscure than it is where it is clear and precise. What is intended by anyone is not determinative of meaning, and consequently of what has been done. Legislation is enacted. The word *Act* of Parliament reflects that its existence and content is determined by what has been done, not by what anyone intended to be done.

In this light, we may see that the rule against the admission of statements made in Parliament during the passing of a Bill was not a rule of evidence at all. The problem is not that the material may not have been reported accurately, nor that it may be ambiguous, nor that the costs of searching outweighed the potential costs, nor that the Bill of Rights precluded courts from questioning parliamentary debates, nor that it undermines legal certainty, nor that it undermines the separation of powers, nor does it depend on rejection of the very idea of Parliamentary intent. Rather, admitting

clear and unambiguous evidence of Parliamentary intent would rarely tell the court anything it needed to know. It is not a rule of evidence at all but rather a rule of construction

However, just as with the interpretation of a contract, the context in which legislation is passed is relevant to its meaning. This enables us to both justify the rule in *Pepper v Hart* and to understand its limited importance. If it were the case that our purpose is to ascertain the collective intention of the legislature, admitting statements by ministers in charge of promulgating Bills appears to be a poor method of ascertaining this. Ministers may be the mouthpiece of government, but they are not the mouthpiece of the legislature. However, just as with any other material that provides the background to an Act, a white paper, or Law Commission report, or its preamble, statements made in the passing of legislation may be evidence of its context. A clear and appropriate case was the decision of the House of Lords in *Harding v Wealands*. This concerned the true construction of the Private international Law (Miscellaneous Provisions) Act 1995. This Act repealed the conflict of law ‘double actionability’ rule in the law of torts, and provided that the law to govern claims in torts was the *lex loci actus*. Issues of procedure were to be governed by the *lex fori*. Did matters of ‘procedure’ include the appropriate remedy, in particular the quantification of damages? During the Report stage in the House of Lords an amendment to the then Bill had been tabled to provide that damages were to be awarded in accordance with the *lex fori*. The Minister promoting the Bill, the Lord Chancellor, responded that issues of quantification of damage were considered to be procedural, so that the amendment was unnecessary. The amendment was therefore dropped. This may be contrasted with the approach in *A&J Inglis v John Buttery & Co* above. That pre-contractual negotiations are excluded as part of the background context in interpreting a contract, is inconsistent with the admissibility in interpreting a statute. Whichever approach is right, the law’s approach is inconsistent.

7. Conclusion

That the law as it is understood in England is not inevitable is perhaps most easily illustrated by the principles of interpretation set out in the proposed Common European Sales Law.

Article 58

General rules on interpretation of contracts

1. A contract is to be interpreted according to the common intention of the parties ~~even~~ if even if this differs from the normal meaning of the expressions used in it.
2. Where one party intended an expression used in the contract to have a ~~particular~~ particular meaning, and at the time of the conclusion of the contract the other party was aware, ~~or, or~~ could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the first party.
3. Unless otherwise provided in paragraphs 1 and 2, the contract is to be interpreted according to the meaning which a reasonable person would give to it.

This provision clearly adopts an approach to interpretation that fits more closely with the Civilian tradition than with that of the common law, but that is no objection to it. All of us could point to favourite examples of the common law that make no sense. Rather, the objection is that this rule is inconsistent with how to correctly interpret words in general and promises in particular. Any approach that starts with the proposition that this is to be ascertained by looking at the intentions of the parties is simply wrong. Indeed, in the vast majority of contractual disputes, the parties did not foresee the problem that has arisen, let alone have a common intention as to how it should be resolved. Why then has this rule, which is in conflict with everyday life, found favour? The only answer that can be given is an appeal to history. In the first half of the nineteenth century the 'will theory' of contract pioneered by Frederick Carl von Savigny, that promises are a product of will, and contracts the product of a

meeting of minds, held sway. This theory, whilst having some influence in England, has always had a more significant hold on the law in continental Europe. If a contract were indeed a product of our combined wills, then like a vow its content would be similarly determined by what was intended.

Today, there are no serious subscribers to the will theory. We are bound by those agreements for which we are responsible, not just those we intend. It is not narrow partisanship to suppose that the common law rule is superior to that which is proposed to replace it.