

# CONTRACTUAL INTERPRETATION: DO JUDGES SOMETIMES SAY ONE THING AND DO ANOTHER?

SIR GEOFFREY VOS\*

## ABSTRACT

*This article questions whether the factual situation that arose in ICS v West Bromwich Building Society would be decided the same way today. The developments in the law of contractual interpretation are tracked through Chartbrook v Persimmon Homes and Lord Hoffmann's retirement. It is suggested that there has been a sea change in Rainy Sky, Arnold v Britton, and Wood v Capita, even though those cases suggest that they are about continuity. The change of approach is compared with the developments taking place at the same time in the law of implied terms and in the use of mutual mistake rectification found in Daventry DC v Daventry & District Housing. The conclusion is that it may be better to interpret a written agreement in accordance with what the parties obviously agreed judged from the other terms of the contract and the admissible factual matrix, rather than rectifying a contract for mutual mistake to say exactly the opposite of what one of those parties would or could ever agree. The difference of approach between common law and equity judges is explored.*

## I. INTRODUCTION

It is perhaps obvious that many people say one thing and do another, and they do not say exactly what they mean. This may be what Lord Hoffmann was speaking about when he said in *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* that:<sup>1</sup>

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.

\* Chancellor of the High Court of England and Wales. This article is based on a lecture delivered to the Hong Kong judiciary on 16 October 2017, and as a Hotung Fellowship lecture at the University of Canterbury on 18 October 2017.

1 *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 [*Mannai*].

It is perhaps less obvious that judges are sometimes in the same boat. But, as it seems to me, recent trends in the law of contractual interpretation demonstrate that judges at the highest level have not always said exactly what they mean, hoping perhaps that others would not notice.

What I hope to show in this article is that there has been a distinct sea change in the law since the House of Lords decided *Investors Compensation Scheme Ltd v West Bromwich Building Society* in June 1997 (*ICS*),<sup>2</sup> now just over 20 years. That is not, in itself, surprising. But what is a little more surprising may be what has been said about the change. In short, what seems to me to have been a palpable change in the law has been repeatedly denied or at least played down. As Lord Hodge put it in *Wood v Capita Insurance Services Ltd* (*Wood v Capita*) on 29 March 2017:<sup>3</sup> “[t]he recent history of the common law of contractual interpretation is one of continuity rather than change”. That was a view to which Lords Neuberger, Mance, Clarke and Sumption subscribed.

This is important, because one of the clarion calls of this same group of judges is and has been that the greatest benefit of the common law in general, and of our contract and commercial law in particular, is its dependable certainty and predictability. My conclusion is to wonder whether *ICS* would itself be decided the same way if it came to the UK Supreme Court today. Is that evidence of certainty or continuity, or rather uncertainty and imperceptible change? I feel this change particularly strongly as I argued the successful appellants’ case in *ICS*, having had my case rather ridiculed by the Court of Appeal.

It is also useful in this connection to look at the direction of travel in regard to the associated subjects of implied terms and mutual mistake rectification, which have also been through some choppy judicial waters in the last few years. What emerges from this analysis is that there is often a significant difference of intellectual approach to these matters between judges who originate from a commercial background and those that emanate from a Chancery background (as we understand those terms in London). In making this distinction, I cannot help but make a reference to the fact that we have now brought both the Chancery Division and the Commercial Court (and the Technology and Construction Court) under the umbrella of the Business and Property Courts of England and Wales headquartered in the Rolls Building, so there may, I hope, be a real prospect for future convergence of approaches. We can, therefore, start with *ICS* itself.

2 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] [*ICS*].

3 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 [2017] 2 WLR 1095 [*Wood v Capita*].

## II. ICS

The problem arose in *ICS* from what Lord Lloyd described as “slovenly drafting”. Investors had to sign a claim form or an assignment in order to receive compensation. Section 3(b) of the form provided for the claims that would *not* pass to ICS as follows:

Any claim (whether sounding in rescission for undue influence or otherwise) that you have or may have against the West Bromwich Building Society in which you claim an abatement of sums which you would otherwise have to repay to that society ...

I argued, as counsel for ICS, that the only thing that did not pass to ICS was any claim in rescission. Andrew Leggatt LJ in the Court of Appeal had said that this was not an available meaning of the words, since what I wanted to do was make the words read: “[a]ny claim sounding in rescission (whether for undue influence or otherwise)”, when they actually read “[a]ny claim (whether sounding in rescission for undue influence or otherwise)”.

Lord Hoffmann began by saying that the fundamental change which had overtaken this branch of the law as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* had not been sufficiently appreciated.<sup>4</sup> He said that the result had been to “assimilate the way in which such documents [by which he meant commercial documents] are interpreted by judges to the common-sense principles by which any serious utterance would be interpreted in ordinary life” (save that pre-contractual negotiations were to be ignored). I shall return briefly to the fact that this is one important area where the law in New Zealand differs from English law.

Lord Hoffmann then upheld the first instance judge’s reasoning by applying the five most well-known of well-known principles that he had stated. The wider or more natural construction of “any claim” and “abatement” led to a “ridiculous commercial result which the parties to the claim forms were quite unlikely to have intended” so that it was clear that “the drafting of ... section 3(b) was mistaken”.

This was an application particularly of the first, fourth and fifth principles that he summarised. First, that 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. Fourthly, that 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

<sup>4</sup> *Prenn v Simmonds* [1971] 1 WLR 1381, at 1384–1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989.

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.<sup>5</sup>

Lord Hoffmann's fifth principle, explaining the fourth, was that 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 *Antaios Compania Naviera SA v Salen Rederierna AB* (the *Antaios*) that:<sup>6</sup>

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

The words in s 3(b) were avowedly construed as meaning something they did not say, not because what they did say was not a possible meaning, and not because the result was absurd, but because it made no commercial sense. Leggatt LJ was held to have been simply wrong to have decided the case on the basis that the construction I advocated was not an available meaning of the words used (about which, of course, he had been right).

### III. CHARTBROOK

*ICS* held sway for a short generation and was even consolidated in *Chartbrook Ltd v Persimmon Homes Ltd* (*Chartbrook*)<sup>7</sup>. *Chartbrook* was also a rectification case, but for present purposes, it is sufficient to recall that Lord Hoffmann said:<sup>8</sup>

What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.

5 See *Mannai*, above n 1.

6 *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201 [the *Antaios*].

7 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 [2009] 1 AC 1101 [*Chartbrook*].

8 At [25].

## IV. THEN LORD HOFFMANN RETIRED

When Lord Hoffmann retired from the Supreme Court on 21 April 2009, things began to change. Within 18 months, Lord Clarke had given his seminal judgment in *Rainy Sky SA v Kookmin Bank (Rainy Sky)* on 2 November 2011,<sup>9</sup> swiftly followed by *Arnold v Britton (Arnold v Britton)*,<sup>10</sup> and then by *Marks and Spencer plc v BNP Paribas (Marks and Spencer)* on 2 December 2015.<sup>11</sup> There have been many other cases along the way, but these are probably the landmarks before *Wood v Capita*.<sup>12</sup>

## V. FROM RAINY SKY TO ARNOLD V BRITTON

The change came in the way that Lord Clarke expressed himself in *Rainy Sky* as follows:<sup>13</sup>

*The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has 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, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.*

This introduces a two-step approach – first, identifying what constructions of the actual words are possible, then secondly identifying which of the identified possible constructions is most consistent with business common sense.

This formulation seems somewhat to bypass Lord Hoffmann's decision in *ICS* which adopted a construction that was not a possible construction, and his decision in *Mannai*, where it was not possible, anyway, as a matter of the words used, to construe the termination notice as taking effect on 13 January, when it said it took effect on 12 January. In neither case was the result that was achieved by the drafting absurd, just uncommercial.

9 *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 [*Rainy Sky*].

10 *Arnold v Britton* [2015] UKSC 36 [*Arnold v Britton*].

11 *Marks and Spencer plc v BNP Paribas* [2015] UKSC 72 [*Marks and Spencer*].

12 *Wood v Capita*, above n 3.

13 *Rainy Sky*, above n 9, at [21] (emphasis added).

In *Marley v Rawlings*,<sup>14</sup> which you will recall was the case in which the Supreme Court famously held that a husband and wife who had signed each other's wills had executed valid testamentary instruments, Lord Neuberger described the second sentence of Lord Hoffmann's fifth proposition in *ICS* as "controversial", and went on to give support to the views of Sir Richard Buxton in his article entitled "Construction and Rectification after *Chartbrook*",<sup>15</sup> where he had said that Lord Hoffmann's approach to interpretation in *ICS* and *Chartbrook* was inconsistent with previously established principles.<sup>16</sup> Sir Richard had, as Lewison LJ had written, made out a powerful case for the conclusion that, if Lord Hoffmann were right, the difference between construction and rectification had been reduced almost to vanishing point.

In *Arnold v Britton*,<sup>17</sup> the departure prefaced in *Rainy Sky* is taken forward. Lord Neuberger's first proposition was that:

... reliance placed in some cases on commercial common sense and surrounding circumstances (... *Chartbrook* [16–26]) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision.

You will note that the words "save perhaps in a very unusual case" must be a nod to *ICS*. But, as later cases show, it would be surprising if *ICS* were to be decided in the same way today. Moreover, the reference to *Chartbrook* includes the controversial paragraph 25, which Lord Neuberger had already doubted in *Marley*.

In his second proposition, Lord Neuberger accepted that:

... the worse [the] drafting, the more ready the court can properly be to depart from their natural meaning", but that did not "justify the court embarking on an exercise of searching for, let alone [correcting] [the word used is constructing], drafting infelicities in order to facilitate a departure from the natural meaning.

This is directly in conflict with what Lord Hoffmann said in his fifth proposition:<sup>18</sup>

... if one would nevertheless conclude from the background that something must have gone wrong with the language,

14 *Marley v Rawlings* [2014] UKSC 2.

15 Sir Richard Buxton "Construction and Rectification after *Chartbrook*" [2010] CLJ 253.

16 *Chartbrook*, above n 7, at [25].

17 *Arnold v Britton*, above n 10.

18 *ICS*, above n 2.

the law does not require judges to attribute to the parties an intention which they plainly could not have had.

Lord Neuberger's third point was that Lord Diplock in the *Antaios* had to be read bearing in mind that commercial common sense is not to be invoked retrospectively.<sup>19</sup> That again differs from Lord Hoffmann's fifth proposition.

Lord Neuberger's fourth proposition, to the effect that a judge should avoid re-writing contracts in an attempt to assist an unwise party or to penalise an astute party, is again somewhat at odds with Lord Hoffmann's approach.

Lord Neuberger's sixth proposition included a further nod to *ICS*, but within a very limited compass. It acknowledged that "in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract". In such a case, "if it is clear what the parties would have intended, the court will give effect to that intention", as in *Aberdeen City Council v Stewart Milne Group Ltd*,<sup>20</sup> where the court concluded that "any ... approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract.

In *Wood v Capita*,<sup>21</sup> as I have said, the Supreme Court endorsed *Rainy Sky* and *Arnold v Britton*, but did so in such a way as to make clear that there is no room in the current law for the fourth and fifth principles stated in *ICS*. Those principles are not even mentioned by Lord Hodge in his passage on contractual interpretation.<sup>22</sup> That would be unremarkable, since the case concerned a badly drafted but ambiguous indemnity clause that certainly had more than one possible meaning. But it is rendered remarkable by the fact that Lord Hodge seeks to explain the principles that he contends represent continuity rather than change.<sup>23</sup> His exposition has been very recently referred to again by Lord Neuberger in *Actavis UK v Eli Lilly*,<sup>24</sup> where he said, in relation to construing documents, that the applicable principles as stated by Lord Hodge in *Wood v Capita* were "tolerably clear".

## VI. OTHER COMMON LAW JURISDICTIONS

It is worth noting at this stage the position in some other common law jurisdictions. In New Zealand, it has recently been decided that ambiguity does not have to be established before contextual and business common sense construction is permissible, even though the position was historically the

19 The *Antaios*, above n 6, at 201.

20 *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56 at [17] and [22].

21 *Wood v Capita*, above n 3.

22 At [8]–[15].

23 At [15].

24 *Actavis UK v Eli Lilly* [2017] UKSC 48 at [58].

reverse.<sup>25</sup> The approach of Tipping J in *Vector Gas*, which allowed reference to pre-contractual negotiations, has now gained currency in New Zealand, but certainly not in the UK.

In Australia, the classic decision was *Codelfa Construction Pty Ltd v State Rail Authority of NSW (Codelfa)*,<sup>26</sup> where the surrounding circumstances were only said to be admissible if the contractual language was “ambiguous or susceptible of more than one meaning” (whatever that latter formulation may add). It is not clear to me that the Australian position has changed since *Codelfa*, even though the later High Court decisions have not mentioned the need for ambiguity.

Finally, in Hong Kong, Lord Hoffmann’s approach in *ICS* seems thus far to hold sway. Chief Justice Geoffrey Ma gave a resounding endorsement of the contextual approach to construction in *Fully Profit (Asia) Ltd v Secretary for Justice*,<sup>27</sup> approving both *ICS* and Lord Hoffmann’s judgment in the Court of Final Appeal in *Jumbo King Ltd v Faithful Properties Ltd*.<sup>28</sup>

#### VII. *BELISE AND MARKS AND SPENCER* – SIMILAR EVOLUTION IN THE LAW OF IMPLIED TERMS

At the same time as these changes have been progressing, a similar evolution has been going on in relation to implied terms. In 2009, at the end of Lord Hoffmann’s judicial career, he delivered the Privy Council opinion in *Attorney General of Belise v Belise Telecom Ltd (“Belise”)*.<sup>29</sup> By 2015, Lord Neuberger had unequivocally reversed that development in the law in *Marks and Spencer*.<sup>30</sup>

In *Belise*, Lord Hoffmann equated the process of construction and the implication of terms. In *Marks and Spencer*, Lord Neuberger said that Lord Hoffmann’s views on the implication of terms expressed in *Belise* “should henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms”. And so the law on implied terms reverted to the previous tough approach. The courts will not make a contract for the parties and, if something is omitted from a contract that the parties have made, it will take the rigorous application of the necessity test for the courts to imply a term. Moreover, the process of implication cannot normally begin until the process of contractual interpretation is complete. They are not one and the same process.

25 See paragraph 61 of the majority judgment in the New Zealand Supreme Court in *Firm PI 1 Limited v Zurich Australian Insurance* [2014] NZSC 147, where *Rainy Sky* was expressly footnoted as advancing a different position and *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5 [*Vector Gas*] at [4], [23], [64] and 151.

26 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.

27 *Fully Profit (Asia) Ltd v Secretary for Justice* (2013) 16 HKCFAR.

28 *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR.

29 *Attorney General of Belise v Belise Telecom Ltd* [2009] 1 WLR 1988 [*Belise*].

30 *Marks and Spencer*, above n 11.



It is worth noting that the more conservative approach to implied terms, which does indeed achieve consistency in the law, was also taken by the Singapore Court of Appeal in two landmark cases that respectfully differed from Lord Hoffmann's approach in *Belise*. In *Foo Jong Peng v Phua Kiah Mai*,<sup>31</sup> the Singapore Court of Appeal refused to follow the reasoning in *Belise* at least in so far as "it suggest[ed] that the traditional 'business efficacy' and 'officious bystander' tests [were] not central to the implication of terms". That approach was adopted again in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*.<sup>32</sup>

The New Zealand approach to *Belise* seems to regard it as having retained the necessity test,<sup>33</sup> though I note a recent High Court case where Downs J seems to have accepted that *Belise* had been superseded by *Marks and Spencer*.<sup>34</sup>

### VIII. CHARTBROOK AND DAVENTRY

Before seeking to draw the threads of these changes in the law together, it is worth digressing to look at the most recent approaches to the law of mutual mistake rectification. The law on that subject was, apparently definitively stated by Lord Hoffmann in *Chartbrook*, and repeated by Etherton LJ (who dissented as to the decision, but with whom Neuberger MR agreed as to the law) in *Daventry District Council v Daventry and District Housing Ltd (Daventry)* as follows:<sup>35</sup>

Lord Hoffmann's clarification was that the required "common continuing intention" is not a mere subjective belief but rather what an objective observer would have thought the intention to be: [see *Chartbrook* at 60]. In other words, the requirements of "an outward expression of accord" and "common continuing intention" are not separate conditions, but two sides of the same coin, since an uncommunicated inward intention is irrelevant. I suggest that Gibson LJ's statement of the requirements for rectification for mutual mistake [in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560] can be re-phrased as:

- (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
- (2) which existed at the time of execution of the instrument sought to be rectified;

31 *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267 at [34]–[36].

32 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43.

33 See *Satterthwaite v Gough Holdings Ltd* [2015] NZCA 130.

34 See *The Rintoul Group Limited v Far North District Council* [2017] NZHC 1132.

35 *Daventry District Council v Daventry and District Housing Ltd* [2011] EWCA Civ 1153 [*Daventry*] at 80.

(3) such common continuing intention is to be established objectively, that is to say by reference to what an objective observer would have thought the intentions of the parties to be; and

(4) by mistake, the instrument did not reflect that common intention.

The majority in *Daventry*, composed of Neuberger and Toulson LJJ, without expressly changing the law, nevertheless held on the facts, as I had found them as the first instance judge, that a contract should be rectified when it is accepted that the defendant would never have entered into the contract had it known that the terms were those to which the claimant asked that they be rectified.<sup>36</sup> That is, for sure, an unusual kind of *common* mistake. As Lord Neuberger MR said in that case:<sup>37</sup>

It may appear counter-intuitive to describe the parties as having signed the contract under a common mistake, as the board of [the defendant] intended to agree what it provides; accordingly any claim for rectification by [the claimant] might appear to the uninitiated to be more appropriately based on unilateral mistake. However, as has been explained in all three judgments on this appeal, Lord Hoffmann's speech in *Chartbrook* [[2009] AC 1101] establishes that the issue as to whether there was a common mistake must be judged objectively.

And at paragraph 226:

... there is much to be said for the view that many rectification claims which might previously have been regarded as based on unilateral mistake may now be better treated as being based on common mistake.

Although the Court of Appeal in *Daventry* purported to approve Lord Hoffmann's formulation in *Chartbrook*, they hardly made the law as certain as many of us had thought it before.

## IX. WHAT IS TO BE DRAWN FROM THESE DEVELOPMENTS?

Let me first say something entirely positive. The new formulations in *Arnold v Britton* and *Wood v Capita* put greater weight, in the case of ambiguity, on the quality and formality of the drafting, which in my view is an appropriate approach. Greater weight undoubtedly has to be given to the most natural

<sup>36</sup> At [219].

<sup>37</sup> At [25].

meaning of the words used in a formal and carefully drafted document, than might be the case where the drafting is sloppy or careless. Regard must also be had, as recent cases emphasise, to the commercial reality that ambiguity often stems from the fact that the parties have not actually reached complete agreement and each hopes to be able to advance its construction of the ambiguity if a dispute later arises.

In my view, however, it is not an exaggeration to say that we have witnessed some sea changes. It is now as clear as can be that contractual interpretation is limited to choosing between two available meanings of the words used and that there is not, save anyway in a most exceptional case or a case of obvious absurdity, any scope for adjusting the language to reflect what the objective observer would think the parties must actually have meant in the light either of the other terms of the written contract or the available factual matrix. As Lord Hodge reiterated in *Wood v Capita*:<sup>38</sup>

... where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense.

Professor David McLaughlan's article entitled "The lingering confusion and uncertainty in the law of contractual interpretation" hits a number of nails on the head,<sup>39</sup> but it was written before *Arnold v Britton* and *Wood v Capita*. His latest view expressed in a case note on *Wood v Capita* in the latest edition of the Law Quarterly Review argues that neither that case nor *Arnold v Britton* did actually roll back on Lord Hoffmann's *ICS* principles.<sup>40</sup>

So what of the criticism that the last two principles in *ICS* mean that it is hard to know where interpretation ends and rectification begins? That would be a valid criticism if the law on rectification were as clear as it was before *Daventry*, but the same judges who have put the brakes on in relation to the developments in the law of construction noted in *ICS*, have thrown the application of the law of mutual mistake rectification into doubt. As Etherton LJ made very clear in *Daventry*:<sup>41</sup>

That [the appellant's argument] muddles the distinction between rectification for mutual mistake (on the ground of an objective common continuing intention) and unilateral mistake (on the ground that the Defendant was aware or ought to have been aware that the Claimant entered the formal contract under a mistake) and wrongly conflates elements of both (the Defendant's culpability being

38 *Wood v Capita*, above n 3, at [225] (emphasis added).

39 David McLaughlan "The lingering confusion and uncertainty in the law of contractual interpretation" (2015) LMCLQ 406.

40 David McLaughlan "Continuity, not change, in contract interpretation?" (2017) 133 LQR 546.

41 *Daventry*, above n 35, at [91].

irrelevant for rectification for mutual mistake, but essential for rectification for unilateral mistake).

Lord Neuberger said in an extra-curial lecture in Singapore in 2016:<sup>42</sup>

When it comes to the sort of issue raised in *Arnold*, I believe that a common law judge has to harden his or her heart, and to bear in mind that, while a decision on an issue of principle in a particular case will undoubtedly affect the parties in that case, it is very likely to affect many more people who are in a different and unknowable position. I come back to the fundamental importance of the law being certain, or, perhaps a better word, predictable. A common law judge has the privilege of making and developing the law as well as interpreting and applying it, and with that privilege comes the responsibility of not being wrongly swayed by sympathy for the plight in which an imprudent or unlucky litigant finds himself. If the judge is so swayed, the danger is that the resulting decision will muddy the clear water of certainty which is such an important ingredient in the rule of law. As Professor Glanville Williams once said, “[w]hat is certain is that cases in which the moral indignation of the judge is aroused frequently make bad law”. But, as Lord Denning at his best demonstrated, that should not prevent a judge from moving on the law in an appropriate way when the right case arises.

I wonder whether black-letter law does not need to be applied consistently across the piece if the certainty of the common law is to be preserved.

It is, therefore, one thing to adopt a hard black-letter approach to contractual construction and to harden one’s heart to the injustice that that conservatism may cause, but quite another to adopt a more flexible view of the law of mutual mistake rectification, which had been well-settled for many years, and exists merely to correct errors in reducing agreements to writing in documents, not errors in the agreements themselves. My view is that it is better to interpret a written agreement in accordance with what the parties must obviously have agreed as judged from the other terms of the contract and the admissible factual matrix, rather than rectifying a contract for mutual mistake to say exactly the opposite of what one of those parties would or could ever agree.

42 Lord Neuberger, President of the Supreme Court of the United Kingdom “Express and Implied Terms in Contracts” (Speech at the School of Law, Singapore Management University, 19 August 2016) at [18].

## X. IS THERE A DIFFERENCE BETWEEN THE APPROACHES OF JUDGES FROM DIFFERENT DISCIPLINES?

In England and Wales, perhaps uniquely, we have judges that are trained in practice in starkly contrasting disciplines. We have equity judges brought up on a diet of equity and trusts, and we have ‘commercial’ judges brought up on a diet of commercial and financial contracts, whose familiarity with equitable remedies is rather less. They generally come together only when they sit in the same Court of Appeal. Of course, all these judges have to interpret written contracts – probably all-day long.

The cases I have mentioned highlight this difference of approach. The common law and commercial judges have always taken a harder line on the construction of written contracts, holding commercial men to their bargains. But yet, they are sometimes softer when it comes to equitable remedies than those more familiar with them.

For my part, I think Lord Hoffmann, an equity lawyer, squared the circle in *Mannai* and *ICS*. The rule he explained in his fourth and fifth principles were not a licence to the unscrupulous. They provided a mechanism for establishing what the objective meaning of a contract actually was. People do in ordinary life and in commercial life use the wrong words to convey their meaning. As I started by saying, they may call someone by the wrong name, without meaning to refer to someone else. If the background available to both the parties makes that error clear, one can and should go beyond choosing between the possible meanings of an ambiguous words, but can conclude that the parties have used the wrong words, just as happened in each of *Mannai* and *ICS*. Lord Diplock was a formidable lawyer. I would not easily conclude that he was wrong in the *Antaios* to assert that a commercial contract whose proper construction “flouts business common-sense” should be “made to yield to business common-sense”.

## XI. CONCLUSION

The debate is certainly not over, but we have just perhaps concluded one swing of the pendulum. It will be interesting to see how matters develop as the composition of the UK Supreme Court changes, and a different balance of judges comes to consider these problems.