meaning which they simply cannot have as a matter of ordinary linguistic analysis, because the notional reasonable person would be satisfied that something had gone wrong in the drafting."

He added that:

"One is normally looking for an outcome which is 'arbitrary' or 'irrational', before a mistake argument will run."

If the court is persuaded that something has gone with the language:

"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."[99]

8. PRINCIPLES TO BE READ AS A WHOLE

1.08 The five principles must be read as a whole.

Although the five principles deal with different aspects of the techniques of interpretation, they must be read as a whole. In *HSBC Bank Plc v Liberty Mutual Insurances*[100] Patten J. said:

"It seems to me important to read this passage as a whole and to avoid giving to anyone of Lord Hoffmann's stated principles a meaning and importance unqualified by the other rules he has set out. During argument in this case [counsel] placed particular emphasis upon the statement in principle (4) that the meaning which a document would convey to a reasonable man is not the same thing as the meaning of its words. It is I think clear from the whole of principle (4) and principle (5) which follows it that this is merely one of the possibilities that attends any particular use of language and in a document drawn up or vetted by lawyers the starting point must be to assume that the words used were intended to bear their ordinary meaning. One does not, as Lord Hoffmann observed, readily or easily conclude that a mistake has been made. It is only when from the document itself, the surrounding circumstances, or the consequences of adopting a particular construction that it becomes apparent that something must have gone wrong that the court is entitled to abandon the dictionary and the grammar book and in effect to reconstruct or re-write the document."

[99] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] A.C. 1101. However, in *Chipsaway International Ltd v Kerr* [2009] EWCA Civ 320 the CA held that where it is clear that something has gone wrong with the language, such that the clause must be rewritten, the rewriting that is required is that which involves the minimum changes necessary to achieve a sensible meaning and which gives effect to the commercial purpose of the clause.

[100] [2001] All E.R. (D) 61, affirmed on appeal [2002] EWCA Civ 691.

CHAPTER 2

THE PURPOSE OF INTERPRETATION

A perfect Judge will read each Work of Wit
With the same Spirit that its Author writ

Alexander Pope:
An Essay on Criticism

1. THE PROCESS OF INTERPRETATION

The interpretation of a written contract involves the ascertainment of the words used by the parties and the determination, subject to any rule of law, of the legal effect of those words. 2.01

This book is concerned with the interpretation of written contracts. In the last resort, when parties have differing views about what their contract means, or what its effect on their legal rights and obligations is, their difference must be settled by the court.[1] In *Wasa International Insurance Co Ltd v Lexington Insurance Co*[2] Sedley L.J. said:

"It is the rule of law and the principle of finality which forms part of it which make the meaning and effect of a contract whatever a court of competent jurisdiction holds them to be."

The settlement of differences is to a large extent governed by the proper interpretation (or construction) of the contract.[3] In arriving at its conclusion the

[1] Or by arbitration. Some contracts, however, are framed in such a way that makes the content of the parties' obligations dependent on what a third party thinks they are. See **para.13.03** below.

[2] [2008] Bus. L.R. 1029. The decision of the Court of Appeal was reversed, sub nom *Lexington Insurance Co v AGF Insurance Ltd* [2010] 1 A.C. 180 but without affecting this point.

[3] A distinction is sometimes drawn between "construction" and "interpretation". Thus in *Life Insurance Co of Australia v Phillips* (1925) 36 C.L.R. 60, Isaacs J. said at 78: "But the term 'ambiguity' is itself not inflexible. It may arise from doubt as to the construction in their totality of the ordinary and in themselves well-understood English words the parties have employed. That is true construction. Or it may arise from the diversity of subjects to which those words may in the circumstances be applied. That is rather interpretation of terms. Or again it may arise from obscurity as to the full expression in ordinary language of some abbreviated term or arbitrary form that has been adopted. That again is interpretation of terms."

It is doubtful whether this distinction serves any useful purpose, particularly since in practice "construction" and "interpretation" are used interchangeably. In *Cream Holdings Ltd v Davenport* [2009] B.C.C. 183 Sedley L.J. said: "Many law students are initially puzzled by the expression 'construction of contracts'. They think it must mean the process of assembling the elements of a contract; it takes them some time to realise that it means interpreting them. The realisation,

court applies relatively well established principles of interpretation. The purpose of this book is to gather together those principles. However, at the outset the scope of the inquiry must be ascertained. In *Chatenay v The Brazilian Submarine Telegraph Co Ltd,*[4] Lindley L.J. said:

> "The expression 'construction', as applied to a document, at all events as used by English lawyers, includes two things: first the meaning of the words; and secondly their legal effect, or the effect which is to be given to them."

As a working definition, however, this is incomplete. Firstly, the determination of the legal effect of a contract may involve the application of external rules of law (for example the intervention of a statute, or some rule of public policy) which has nothing to do with the intention of the parties as expressed in their contract. Secondly, the determination of the legal effect to be given to the contract may turn in part on words which the parties have not actually used, but which are properly to be implied. After some controversy, it is now established that the process of implying terms is part of the interpretation of contracts.[5] It has also been suggested that determining the scope of a claim for damages for breach of contract is also a question of interpretation of the contract in question, rather than the application of an external rule of foreseeability.[6]

It is also difficult, in any practical sense, to draw a realistic boundary between examining documents (and sometimes conduct) in order to determine whether a contract has been formed at all, and examining the same material in order to ascertain what the terms of a concluded agreement are.

Finally it must be said that the boundary between the interpretation of a document, the emergence of a canon or principle of interpretation and its eventual ossification into a rule of law is a difficult one to discern. Over time a particular interpretation may develop into a principle, as a judicial consensus grows.[7] The boundary may have been crossed at times, but there is no general intention to deal with matters of substantive rules of law.

2. ASCERTAINMENT OF MEANING TO A REASONABLE READER

2.02 Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge

moreover, may not come rapidly because the law reports which they study are often as consistent with the first as with the second meaning of 'construction', because the courts, although mandated only to make sense of what the parties have agreed to, repeatedly find themselves repairing or rebuilding contracts which simply do not cater for the problem which has arisen." It is partly for this reason that the author prefers to speak of the interpretation of contracts.

[4] [1891] 1 Q.B. 79 at 85.

[5] See **Ch.6** below.

[6] *Transfield Shipping Inc v Mercator Shipping Inc* [2009] A.C. 61. For comment see (2009) 125 L.Q.R. 408 (Adam Kramer).

[7] *The Mercini Lady* [2010] EWCA Civ 1145.

which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

The modern starting point is Lord Hoffmann's statement that[8]:

> "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."

As he explained in *Kirin Amgen Inc v Hoechst Marion Roussel Ltd*[9]:

> "Construction, whether of a patent or any other document, is of course not directly concerned with what the author meant to say. There is no window into the mind of the patentee or the author of any other document. Construction is objective in the sense that it is concerned with what a reasonable person to whom the utterance was addressed would have understood the author to be using the words to mean. Notice, however, that it is not, as is sometimes said, 'the meaning of the words the author used', but rather what the notional addressee would have understood the author to mean by using those words. The meaning of words is a matter of convention, governed by rules, which can be found in dictionaries and grammars. What the author would have been understood to mean by using those words is not simply a matter of rules. It is highly sensitive to the context of and background to the particular utterance. It depends not only upon the words the author has chosen but also upon the identity of the audience he is taken to have been addressing and the knowledge and assumptions which one attributes to that audience."

In *Attorney General of v Belize Telecom Ltd*[10] Lord Hoffmann reiterated that the meaning of a contract is not necessarily the same as the intention of the parties. He said:

> "The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed."

Similarly, Lord Steyn said in *Equitable Life Assurance Society v Hyman*[11]:

[8] In *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 W.L.R. 896. This is now the starting point for any discussion of interpretation. See **para.1.02** above.

[9] [2005] R.P.C. 169.

[10] [2009] 1 W.L.R. 1988; *Anthracite Rated Investments (Jersey) Ltd v Lehman Brothers Finance SA* [2011] EWHC 1822 (Ch).

[11] [2000] 3 All E.R. 961 at 969.

> "The purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear."[12]

The more traditional formulation of the goal of interpretation was that it was designed to ascertain the intention of the contracting parties. Thus in *Pioneer Shipping Ltd v BTP Tioxide Ltd*,[13] Lord Diplock said:

> "The object sought to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to express them."

The framing of the goal by reference to the intention of the parties was liable to give rise to the common but erroneous thought that the task of the court was to ascertain the real intention of the actual parties to the contract. As will be seen this was never the approach taken by English law. Despite references to the intention of the parties, the English approach to the interpretation of contracts has always been an objective one. This is one of the principal features of the English approach that distinguishes it from many European jurisdictions.[14] Lord Hoffmann explained in *Chartbrook Ltd v Persimmon Homes Ltd*[15]:

> "Both the *Unidroit Principles of International Commercial Contracts* (1994 and 2004 revision) and the *Principles of European Contract Law* (1999) provide that in ascertaining the 'common intention of the parties', regard shall be had to prior negotiations: articles 4.3 and 5.102 respectively. The same is true of the United Nations Convention on Contracts for the International Sale of Goods (1980). But these instruments reflect the French philosophy of contractual interpretation, which is altogether different from that of English law. As Professor Catherine Valcke explains in an illuminating article ('On Comparing French and English Contract Law: Insights from Social Contract Theory') (16 January 2009), French law regards the intentions of the parties as a pure question of subjective fact, their v*olonté psychologique*, uninfluenced by any rules of law. It follows that any evidence of what they said or did, whether to each other or to third parties, may be relevant to establishing what their intentions actually were. There is in French law a sharp distinction between the ascertainment of their intentions and the application of legal rules which may, in the interests of fairness to other parties or otherwise, limit the extent to which those intentions are given effect. English law, on the other hand, mixes up the ascertainment of intention with the rules of law by depersonalising the contracting parties and asking, not what their intentions actually were, but what a reasonable outside observer would have taken them to be."

[12] See also *Commerzbank AG v Jones* [2003] EWCA Civ 1663 ("The aim of construction is to determine from the documents, read, of course, in their factual setting, what the parties agreed. It is not the function of the court to substitute for the agreement of the parties what it thinks would have been the sensible commercial agreement for the parties to have made." Per Mummery L.J.).
[13] [1982] A.C. 724.
[14] Comparative surveys may be found in Kötz & Flessner, *European Contract Law*, Ch.7, and Vogenauer, *Interpretation of Contracts: Concluding Comparative Observations* in Burrow & Peel: *Contract Terms*.
[15] [2009] A.C. 1101.

Lord Hoffmann's reformulation by reference to the reasonable outsider, rather than by reference to the parties themselves, emphasises the objective nature of the task. Indeed, the phrase "the intention of the parties" does not appear at all in the five principles he laid down. This is a reflection of the philosophical basis of interpretation in English law; namely that it is an objective exercise.

This is not a new approach. Even in the more traditional formulations of the purpose of interpretation judges have been careful to stress that when they speak of the intention of the parties, they are ascertaining their presumed intention objectively.

Thus in *Reardon-Smith Line Ltd v Hansen-Tangen*,[16] Lord Wilberforce said:

> "When one speaks of the intention of the parties to the contract one speaks objectively—the parties cannot themselves give direct evidence of what their intention was—and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties."

A similar point was made by Lord Reid in *McCutcheon v David MacBrayne Ltd*,[17] approving the following quotation from *Gloag on Contracts*[18]:

> "The judicial task is not to discover the actual intentions of each party it is to decide what each was reasonably entitled to conclude from the attitude of the other."

In *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*[19] Mason J. said:

> ". . . when the issue is which of two or more possible meanings is to be given to a contractual provision we look not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the contract."

Sir John Donaldson M.R. gave a rather more cynical explanation of the unimportance of the actual intentions of the parties in *Summit Investment Inc v British Steel Corp*[20]:

[16] [1976] 1 W.L.R. 989.
[17] [1964] 1 W.L.R. 125.
[18] (2nd edn, 1985), p.7.
[19] (1982) 149 C.L.R. 337
[20] [1987] 1 Lloyd's Rep. 230 at 233.

"their actual intentions are happily irrelevant, since, were it otherwise, many, and perhaps most, disputes upon points of construction would be resolved by holding that the parties were not *ad idem*."

Nevertheless, this is an important point for it emphasises the objectivity of the court's task of interpretation. In many cases the contract is one which will be relied upon by third parties (for example a bill of lading or a conveyance) and it is important for such persons to have a reasonable degree of certainty as to the meaning of the contract. Both these reasons were confirmed by the Ontario Court of Appeal in *Dumbrell v The Regional Group of Companies Inc.*[21] Doherty J.A. said:

"In my view, when interpreting written contracts, at least in the context of commercial relationships, it is not helpful to frame the analysis in terms of the subjective intention of the parties at the time the contract was drawn. This is so for at least two reasons. First, emphasis on subjective intention denudes the contractual arrangement of the certainty that reducing an arrangement to writing was intended to achieve. This is particularly important where, as is often the case, strangers to the contract must rely on its terms. They have no way of discerning the actual intention of the parties, but must rely on the intent expressed in the written words. Second, many contractual disputes involve issues on which there is no common subjective intention between the parties. Quite simply, the answer to what the parties intended at the time they entered into the contract will often be that they never gave it a moment's thought until it became a problem."

More modern descriptions of the process of interpretation also stress the objectivity of the exercise. In *Deutsche Genossenschaftsbank v Burnhope*[22] Lord Steyn[23] said:

"It is true the objective of the construction of a contract is to give effect to the intention of the parties. But our law of construction is based on an objective theory. The methodology is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by reference to expressed rather than actual intention. The question therefore resolves itself in a search for the meaning of language in its contractual setting. That does not mean that the purpose of a contractual provision is not important. The commercial or business object of a provision, *objectively ascertained,* may be highly relevant: . . . But the court must not try to divine the purpose of the contract by speculating about the real intention of the parties. It may only be inferred from the language used by the parties, judged against the objective contextual background. It is therefore wrong to speculate about the actual intention of the parties in this case, as Staughton L.J. apparently did in the first sentence in the passage quoted and as counsel for the insurers undoubtedly did throughout his argument."

[21] (2007) 279 D.L.R. (4th) 201.
[22] [1995] 4 All E.R. 717.
[23] A dissenting speech.

In *Cream Holdings Ltd v Davenport*[24] Mummery L.J. said:

"The language chosen to express the parties' intentions, the intended purpose of the provision and its overall context are all relevant to construction. The object of the exercise is to end up, if possible, with a reasonable result within the ambit of the parties' probable intentions."

Similarly in *Bekker NO v Total South Africa (Pty) Ltd*[25] Kriegler J. said:

"The interpretation of a written document is not an exercise in the arcane. It is a logical process in which the interpreter seeks to ascertain the intention of the draftsman as embodied in the instrument. The mutual intention of the parties to a bilateral contract is, of course, an abstraction. The primary method to find out what that abstraction was is to ask: what did the parties say? This does not mean picking away at words like a guinea fowl down a row of maize seed. One looks at the words used with common sense and perspective."

However, the logical aspects of the process of construction must not be exaggerated. As Robert Walker L.J. explained in *John v Price Waterhouse*[26]:

"The process of construction often (and certainly in this case) involves the assessment of disparate (and therefore incommensurable) factors to reach what is ultimately an intuitive (but not irrational) conclusion. If a judge makes a point-by-point evaluation of the opposing arguments addressed to him he is performing his duty to give reasons for his decision. But point-by-point analysis of that sort cannot fully reflect the nature of the judicial process of construing a complex and difficult commercial agreement."

3. INTERPRETATION IS OBJECTIVE

The interpretation of a contract is an objective exercise.[27] **2.03**

The words of Lord Steyn in *Deutsche Genossenschaftsbank v Burnhope*[28] have already been cited.[29] Lord Steyn has repeatedly stressed the objective nature of

[24] [2009] B.C.C. 183.
[25] [1990] 3 S.A. 159.
[26] [2002] EWCA Civ 899 para.94. See also *Morrells of Oxford Ltd v Oxford United Football Club* [2001] Ch. 459.
[27] The equivalent paragraph in a previous edition was cited with approval by Young C.J. in Eq in *Greenwood v Kingston Properties Pty Ltd* [2007] NSWSC 1108.
[28] [1995] 4 All E.R. 717. See also *Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep. 19 at 38 per Hobhouse L.J. ("The purpose [of interpretation] is to enable the Court to attribute the appropriate *objective* meaning to the words used by the parties in the document").
[29] See **para.2.02** above.

interpretation. In *Sirius International Insurance Co v FAI General Insurance Ltd*[30] his Lordship said:

> "The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene."

The stress on the objectivity of the English approach is not new. In *IRC v Raphael,*[31] Lord Wright spoke to similar effect. He said:

> "The words actually used must no doubt be construed with reference to the facts known to the parties and in contemplation of which the parties must be deemed to have used them; such facts may be proved by extrinsic evidence or appear in recitals; again the meaning of the words used must be ascertained by considering the whole context of the document and so as to harmonize as far as possible all the parts; particular words may appear to have been used in a technical or trade sense, or in a special meaning adopted by the parties as shown by the whole document. Terms may be implied by custom and on similar grounds. But allowing for these and other rules of the same kind, the principle of the common law has been to adopt an objective standard of construction and to exclude general evidence of the intention of the parties; the reason for this has been that otherwise all certainty would be taken from the words in which the parties have recorded their agreement or their dispositions of property. If in some cases hardship or injustice may be effected by this rule of law, such hardship or injustice can generally be obviated by the power in equity to reform the contract, in proper cases and on proper evidence that there has been a real intention and a real mistake in expressing that intention; these matters may be established, as they generally are, by extrinsic evidence. The Court will thus reform or rewrite the clauses to give effect to the real intention. But that is not construction, but rectification."

In *Kirin Amgen Inc v Hoechst Marion Roussel Ltd*[32] Lord Hoffmann also emphasised that construction is an objective exercise:

> "Construction is objective in the sense that it is concerned with what a reasonable person to whom the utterance was addressed would have understood the author to be using the words to mean."

As he explained in *Chartbrook Ltd v Persimmon Homes Ltd*[33]:

[30] [2004] 1 W.L.R. 3251; *Weston v Dayman* [2006] B.P.I.R 1549.
[31] [1935] A.C. 96.
[32] [2005] R.P.C. 169.
[33] [2009] A.C. 1101.

> "English law . . . mixes up the ascertainment of intention with the rules of law by depersonalising the contracting parties and asking, not what their intentions actually were, but what a reasonable outside observer would have taken them to be."

Accordingly, the subjective intention of one party to a contract, even if communicated to the other party before the contract is made, will not usually be a relevant consideration.[34]

It is for this reason that evidence of the parties' subjective intention is inadmissible. Given the objective nature of the exercise, it is, quite simply, irrelevant. In *Young v Brooks*[35] Rimer L.J. said:

> "One thing, however, which is clear is this. Although the task of the court is to ascertain the intentions of the parties as expressed in the language in which they have chosen to frame the grant, the one area of evidence that is wholly inadmissible for that purpose is the direct evidence of what the parties, or either of them, actually intended by it. That is not part of the admissible background evidence and such evidence is admissible only in a claim for rectification, which the present claim was not."

The objective approach is also applied in Australia and New Zealand. Thus in *Pacific Carriers Ltd v BNP Paribas*[36] The High Court of Australia said:

> "What is important is not Ms Dhiri's subjective intention, or even what she might have conveyed, or attempted to convey, to NEAT about her understanding of what she was doing. The letters of indemnity were, and were intended by NEAT and BNP to be, furnished to Pacific. Pacific did not know what was going on in Ms Dhiri's mind, or what she might have communicated to NEAT as to her understanding or intention. The case provides a good example of the reason why the meaning of commercial documents is determined objectively: it was only the documents that spoke to Pacific."

Similarly in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*[37] their Honours said:

> "This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the

[34] *Windwood v Bifa Waste Services Ltd* [2011] EWCA Civ 108.
[35] [2008] 3 E.G.L.R. 27.
[36] (2004) 218 C.L.R. 451.
[37] (2004) 219 C.L.R. 165. See also *Equuscorp Pty Ltd v Glengallen Investments Pty Ltd* (2004) 218 C.L.R. 471 (HCA). For criticism of the stress on objectivity see D.W. McLauchlan, "Objectivity in Contract" [2005] UQLJ 28.

CHAPTER 4

LAW AND PRECEDENT

. . . the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances . . .

Alfred Lord Tennyson:
Aylmer's Field

1. LAW AND FACT

The proper construction of a written contract is a question of law. However, the ascertainment of the meaning of a particular word is a question of fact.[1] 4.01

The division between what is a question of law and what is a question of fact is extremely difficult to draw.[2] However, it has been said on many occasions that the proper interpretation of a contract is a question of law. Thus it is for the judge to interpret the contract, even when he is assisted by a jury,[3] and the jury is bound to accept the judge's direction upon the construction of the contract. Indeed, it is largely because trials were heard by juries that the construction of a contract is classified as a question of law at all. As Lord Diplock pointed out in *Pioneer Shipping Ltd v B. T.P. Tioxide Ltd*:

> ". . . 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

[1] This paragraph was referred to with approval in *Canada (Attorney General) v Rostrust Investments Inc* [2007] CanLII 1878.

[2] The problem notably arose in connection with the law of mistake: see *Midland Great Western Railway of Ireland v Johnson* (1858) 6 H.L.Cas. 798; *Cooper v Phibbs* (1867) L.R. 2 H.L. 149; *Solle v Butcher* [1950] 1 K.B. 671. The distinction between law and fact in that context is nowadays of little, if any, importance.

[3] e.g. to determine whether a trade custom has been proved, or whether a word bears a secondary trade meaning. In *Turner v Sawdon & Co* [1901] 2 K.B. 653, the trial judge left a question of construction to the jury. The Court of Appeal held that he was wrong to do so, as there was no question proper to be left to the jury. See also *Grenfell v E Meyrowitz Ltd* [1936] 2 All E.R. 1313.

written contract between private parties as being 'a question of law' for the purposes of judicial review . . ."

In *Carmichael v National Power Plc*[4] Lord Hoffmann, while agreeing with Lord Diplock's account of the original reason for the classification, added a further historical gloss:

"[T]he rule was adopted in trials by jury for purely pragmatic reasons. In mediaeval times juries were illiterate and most of the documents which came before a jury were deeds drafted by lawyers. In the eighteenth and nineteenth centuries the rule was maintained because it was essential to the development of English commercial law. There could have been no precedent and no certainty in the construction of standard commercial documents if questions of construction had been left in each case to a jury which gave no reasons for its decision."

In *Khan v Khan*[5] Arden L.J. said that there can be no difference in principle between the rules which apply to the interpretation of contractual documents and those which apply to oral contracts.[6]

However, in *Thorner v Majors*,[7] in the context of a discussion of proprietary estoppel rather than contract, Lord Neuberger of Abbotsbury said:

"(a) the interpretation of a purely written contract is a matter of law, and depends on a relatively objective contextual assessment, which almost always excludes evidence of the parties' subjective understanding of what they were agreeing, but (b) the interpretation of an oral contract is a matter of fact (I suggest inference from primary fact), rather than one of law, on which the parties' subjective understanding of what they were agreeing is admissible."

Apart from the historical origins of the rule (trial by jury) Lord Neuberger suggested that the dichotomy was underpinned by practical reasons. He said:

"If the contract is solely in writing, the parties rarely give evidence as to the terms of the contract, so it is cost-effective and practical to exclude evidence of their understanding as to its effect. On the other hand, if the contract was made orally, the parties will inevitably be giving evidence as to what was said and done at the relevant discussions or meetings, and it could be rather artificial to exclude evidence as to their contemporary understanding. Secondly, and perhaps more importantly, memory is often unreliable and self-serving, so it is

[4] [1999] W.L.R. 2024.
[5] [2008] Bus. L.R. D73 *Khan v Khan* was followed in *Kahn v Dunlop Haywards (DHL) Ltd* [2007] EWHC 2659 (QB). This corresponds with the view expressed in a previous edition of this book. That edition referred to *Torbett v Faulkner* [1952] 2 T.L.R. 659, in which Romer L.J. said that the ascertainment of the effect of an oral contract was "entirely a question of fact and no question of construction arises". Cf. *Yorkshire Insurance Co Ltd v Campbell* [1917] A.C. 218 at 221, per Lord Sumner. In the author's view this approach conflates the identification of contract terms and their interpretation.
[6] See also *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234.
[7] [2009] 1 W.L.R. 776.

better to exclude evidence of actual understanding when there is no doubt as to the terms of the contract, as when it is in writing. However, it is very often positively helpful to have such evidence to assist in the interpretation of an oral contract, as the parties will rarely, if ever, be able to recollect all the details and circumstances of the relevant conversations."

The practical considerations to which he referred do not appear to differentiate between identifying the terms of an oral contract (upon which oral evidence is admissible) and interpreting those terms once they have been identified. In the penultimate sentence of the cited passage Lord Neuberger refers to a written contract where "there is no doubt as to the terms". This can only mean that there is no doubt about what terms were agreed, rather than no doubt about what they mean. The final sentence, however, refers to admitting evidence of subjective intention, not for the purpose of identifying the terms of the contract (what terms were agreed?) but for the purpose of interpreting it (what do the agreed terms mean?). It is submitted that this would be a major departure from the objective nature of contractual interpretation, and indeed seems at variance with the actual decision in the case itself, which was that a representation or assurance should be objectively interpreted, albeit in the context of the particular relationship between the representor and the representee.

Since the proper construction of a written contract is a question of law, the court is not bound by concessions about its meaning made by counsel in the course of argument. In *Bahamas International Trust Co Ltd v Threadgold*[8] Lord Diplock said:

"In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the concession is made; *a fortiori* in the court to which an appeal from the judgment of the court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous."

For the same reason, the court is not restricted to an interpretation which has been advanced by counsel. Since the question of construction is one of law, it is at large.[9]

[8] [1974] 1 W.L.R. 1514, HL, applied in *Biggin Hill Airport Ltd v Bromley L.B.C.* [2001] EWCA Civ 1089, CA.
[9] *Charter Reinsurance Co Ltd v Fagan* [1997] A.C. 313, CA (reversed by HL on different grounds).

However, in *HLB Kidsons v Lloyd's Underwriters*[10] Rix L.J. said that "a judge should be very sure of his ground" before rejecting a concession about a one-off document, affecting only the parties to the contract, where the party making the concession was as experienced in reading and evaluating such documents as anyone.

Although the ascertainment of the meaning of a written contract is a question of law, many steps in the process of ascertaining that meaning are classified as questions of fact.[11] In *Brutus v Cozens*,[12] an appeal concerned the meaning of the word "insulting" as applied to the phrase "insulting behaviour" in the Public Order Act 1936. Lord Reid said:

> "It is not clear to me what precisely is the point of law which we have to decide. The question in the case stated for the opinion of the court is 'Whether, on the above statement of facts, we came to a correct decision in point of law.' This seems to assume that the meaning of the word 'insulting' in s.5 is a matter of law. And the Divisional Court appear to have proceeded on that footing. In my judgment that is not right. The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine when that unusual sense is. But here there is in my opinion no question of the word 'insulting' being used in any unusual sense."

This distinction applies to written contracts in the same way.[13]

Nor is this approach confined to "ordinary" words. The ascertainment of a technical term is equally a question of fact. So in *Hill v Evans*,[14] Lord Westbury L.C. said:

> "It is true, as a proposition of law, that the construction of a specification (like the construction of all other written instruments) belongs to the Court; but the specification of an invention contains generally, if not always, some technical terms, some phrases of art, some description of processes which require the light to be derived from what are called the surrounding circumstances. It is therefore an admitted rule of law, that the explanation of the words or technical terms of art, the phrases used in commerce and the proof and results of the processes which are described (and in a chemical patent the ascertainment of chemical equivalents) that all these are matters of fact upon which evidence

[10] [2009] 1 Lloyd's Rep. 8 at [84].
[11] In *Torbett v Faulkner* [1952] 2 T.L.R. 659, Romer L.J. said that the ascertainment of the effect of an oral contract was "entirely a question of fact and no question of construction arises". Cf. *Yorkshire Insurance Co Ltd v Campbell* [1917] A.C. 218 at 221, per Lord Sumner. These views seem to conflate two stages in the overall question of interpretation.
[12] [1973] A.C. 854.
[13] *Commonwealth Smelting Ltd v Guardian Royal Exchange Assurance Ltd* [1986] 1 Lloyd's Rep. 121; *Belgravia Navigation Co SA v Cannor Shipping Inc., The Times*, April 18, 1988; *Norwich Union Life Insurance Society v P. & O. Property Holdings Ltd* [1993] 1 E.G.L.R. 164, CA; *Fitzroy House Epworth Street (No.1) Ltd v The Financial Times Ltd* [2006] 2 All E.R. 776.
[14] (1862) 4 De G.P. & J. 288 (a case of interpretation of patents).

> may be given, contradictory testimony may be adduced, and upon which it is the province and the right of a jury to decide."

The process of construction or interpretation, therefore, consists of at least two elements, one element of which is factual, and the other legal. The two stage process was summarised by Lindley L.J. in *Chatenay v Brazilian Submarine Telegraph Co Ltd*[15] as follows:

> "The expression 'construction,' as applied to a document, at all events as used by English lawyers, includes two things: first the meaning of the words; and secondly their legal effect, or the effect to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words used is a question of law."

Thus in a criminal trial it is the function of the judge to rule on the interpretation of a contract, rather than the function of the jury to decide what it means as a question of fact.[16] However, in a libel action although the question whether words are *capable* of bearing a defamatory meaning is a question of law of the judge, whether they *do* bear such a meaning is a question of fact for the jury.[17]

Most questions of fact cannot be determined by the court without evidence to prove them. Sometimes, however, the court may take judicial notice of facts, in which case they may be regarded as proved without the necessity of evidence. Even in such a case, however, it seems unlikely that a party could be prevented from leading evidence on such a fact. In the case of the determination of the meaning of an ordinary English word, evidence of meaning is positively inadmissible. Thus in *Lovell and Christmas Ltd v Wall*,[18] Fletcher Moulton L.J. said:

> "I think that it is arguable that evidence may be taken as to the meaning of the word 'provision merchants'. I say that it is arguable because it must not be thought that the court cannot take judicial cognisance of the fact that the words have different meanings in different contexts. For instance I doubt very much whether the court ought to take evidence as to the meaning of the word 'chair'. That word in connection with domestic furniture has one meaning. But 'chair' in connection with a railway has another. I very much doubt whether a court would consider itself perfectly entitled to take cognisance of the fact that 'chair' used in connection with a railway, means a mode of fastening a rail to a sleeper."

It is, therefore, a curiosity that the ascertainment of the meaning of an ordinary English word is a question of fact which cannot be proved by any admissible evidence.[19]

[15] [1892] 1 Q.B. 79. See also *Neilson v Harford* (1841) 8 M. & W. 806 at 823, per Parke B.
[16] *R. v Spens* [1991] 1 W.L.R. 624, CA.
[17] *Slim v Daily Telegraph* [1968] 2 Q.B. 157.
[18] (1911) 104 L.T. 85. See also *Marquess Camden v IRC* [1913] 1 K.B. 641. In 1977 the word "supermarket" was sufficiently out of the ordinary for evidence to be admissible to explain it: *Calabar (Woolwich) Ltd v Tesco Stores Ltd* [1978] 1 E.G.L.R. 113.
[19] The logic of the rule has been questioned in Australia: *Pepsi Seven-Up Bottlers Perth Pty Ltd v Commissioner of Taxation* (1995) 62 FCR 289; *Dyson v Pharmacy Board* (2000) 50 N.S.W.L.R. 523.

2. FACT

4.02 The ascertainment of the terms of a contract which is partly written and partly oral or which is wholly oral is a question of fact.[20]

Whether the parties intended their contract to be wholly written is a question of fact. If they did not, then the ascertainment of the full terms of the contract is also a question of fact.[21]

In *Moore v Garwood*[22] Pollock CB directed the jury that:

> ". . . the nature of the contract into which the parties had entered was rather a question of fact than of law, because it did not consist of one distinct contract between the parties, but of a series of acts and things done, from which the jury were to determine what was the real intention and meaning of the parties when they entered into the mutual relation in which they stood . . ."

His direction was upheld on appeal. Similarly in *Maggs v Marsh*[23] Smith L.J. said:

> "Determining the terms of an oral contract is a question of fact. Establishing the facts will usually, as here, depend upon the recollections of the parties and other witnesses. The accuracy of those recollections may be tested and elucidated by things said and done by the parties or witnesses after the agreement has been concluded."

However, in *Keeley v Fosroc International Ltd*,[24] Auld L.J. pointed out that:

> "[W]here document A, acknowledged to have contractual effect, expressly incorporates by reference document B, and there are no other candidates for contractual contribution to the agreement, the construction of a particular provision in document B does not become a fact-finding exercise on the strength of extraneous evidence as to the true intention of the parties, any more than it would have done if the provision had originally appeared in document A. It simply becomes a matter of construction of the two documents read together."

In *Torbett v Faulkner*,[25] Romer L.J. said that the ascertainment of the effect of an oral contract was "entirely a question of fact and no question of construction arises." It is thought, however, that this bald statement goes too far. While the ascertainment of the terms of an oral contract is a question of fact, the determination of the legal effect of those terms is a question of law. In that sense

[20] This proposition was approved in *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 A.L.R. 382.
[21] *Carmichael v National Power Plc* [1999] 1 W.L.R. 2024.
[22] (1849) 4 Exch 681.
[23] [2006] B.L.R. 395.
[24] [2006] I.R.L.R 961.
[25] [1952] 2 T.L.R. 659.

the construction of a contract is always a question of law. As Arden L.J. put it in *Khan v Khan*[26]:

> "[T]here can be no difference in principle between the rules which apply to the interpretation of contractual documents and those which apply to oral contracts."

3. CATEGORISATION AND CONSTRUCTION

4.03 The legal effect of a written contract may involve a two stage process: first to ascertain what rights and obligations the contract creates; and second to determine what kind of contract has been made.

Many substantive legal rules apply only to contracts of a particular kind. In *A1 Lofts Ltd v HMRC*[27] Lewison J. said:

> "The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description."

The latter process is conveniently referred to as categorisation.[28] During the 1970s and 1980s, for example, the courts were frequently required to determine whether a contract created a licence or a tenancy. Whether the occupier of residential property acquired security of tenure depended on the answer to that question. As Lord Templeman put it in *Street v Mountford*[29]:

> "Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

[26] [2008] Bus. L.R. D73. See also *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234.
[27] [2010] S.T.C. 214. See also *IIG Capital LLc v Van Der Merwe* [2008] 2 Lloyd's Rep. 187 per Waller L.J. ("It was common ground before us that it ultimately depends on the true construction of the agreement whether a particular label is the right one to apply to any instrument".)
[28] *Progress Property Co Ltd v Moorgarth Group Ltd* [2011] 2 All E.R. 432.
[29] [1985] A.C. 809. See also *Progress Property Co Ltd v Moorgarth Group Ltd* [2011] 2 All E.R. 432.

Likewise in *McEntire v Crossley*[30] Lord Herschell L.C. said:

> "Coming then to the examination of the agreement, I quite concede that the agreement must be regarded as a whole—its substance must be looked at. The parties cannot, by the insertion of any mere words, defeat the effect of the transaction as appearing from the whole of the agreement into which they have entered. If the words in one part of it point in one direction and the words in another part in another direction, you must look at the agreement as a whole and see what its substantial effect is. But there is no such thing, as seems to have been argued here, as looking at the substance, apart from looking at the language which the parties have used. It is only by a study of the whole of the language that the substance can be ascertained."

In *Agnew v Commissioner of Inland Revenue*[31] the Privy Council considered whether an agreement created a fixed charge or a floating charge. Lord Millett explained:

> "In deciding whether a charge is a fixed charge or a floating charge, the court is engaged in a two-stage process. At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it. A similar process is involved in construing a document to see whether it creates a licence or tenancy."

Equally the classification of a contract may bring with it particular non-statutory legal rights and obligations. In *Socimer International Bank Ltd v Standard Bank London Ltd*[32] Lloyd L.J. said:

> "If parties enter into a transaction which is a mortgage, then the law imposes certain obligations on the mortgagee, and confers certain rights on the mortgagor, which go back to the intervention of equity in the early development of mortgages. Although a mortgage is a contractual transaction, the imposition of such duties has nothing to do with the implication of terms in a contract under the general law of contracts . . . Whether these duties are imposed on a given party depends only on whether, on the true analysis of the transaction, it is or is not a mortgage."

[30] [1895] A.C. 457. See also *Welsh Development Agency v Export Finance Co Ltd* [1992] B.C.L.C. 148.
[31] [2001] 2 A.C. 710.
[32] [2008] 1 Lloyd's Rep. 558.

Similarly, because of the different legal consequences that may attach to a guarantee on the one hand and an indemnity on the other, it may be important to classify the document as one or the other.[33]

In each case there is a public interest which overrides unrestrained freedom of contract, namely to ensure that the substantive law is properly applied. Lord Walker explained this in *Re Spectrum Plus Ltd*[34]:

> "it is the court's duty to characterise the document according to the true legal effect of its terms . . . In each case there is a public interest which overrides unrestrained freedom of contract. On the lease/licence issue, the public interest is the protection of vulnerable people seeking living accommodation. On the fixed/floating issue, it is ensuring that preferential creditors obtain the measure of protection which Parliament intended them to have."

In considering how to classify a contract, "the task is to decide the nature of the instrument by looking at it as a whole without any preconceptions as to what it is".[35]

In the case of a composite transaction, the court will assess the substance of the transaction taken as a whole.[36]

The question of false labels is considered further in **para.9.07** below.

4. PRINCIPLES OF INTERPRETATION ARE NOT RULES OF LAW

A principle of interpretation is a guideline rather than a rule of law; and accordingly will only be applied in the absence of a contrary intention expressed in the contract. 4.04

The court often construes contracts with the assistance of principles of interpretation (often called canons of construction). Over time a particular interpretation may develop into a principle, as a judicial consensus grows.[37] In *Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd*,[38] Kerr L.J. pointed out that:

> "Rules of construction are not rules of law; they are merely guidelines to the presumed intention of the parties in the light of events which have occurred."

[33] *Associated British Ports v Ferryways NV* [2009] 1 Lloyd's Rep. 595.
[34] [2005] 2 A.C. 680.
[35] *Gold Coast Ltd v Caja de Ahorros del Mediterraneo* [2002] 1 Lloyd's Rep. 617.
[36] *Brighton & Hove City Council v Audus* [2009] EWHC 340 (Ch).
[37] *The Mercini Lady* [2010] EWCA Civ 1145.
[38] [1983] Q.B. 284. See also *Sabah Flour and Feedmills v Comfez Ltd* [1988] 2 Lloyd's Rep. 647.

unduly interfered with. It was held that the reservation was unintelligible, and accordingly the lease took effect as if the reservation had not been included in it.

Mundy v Duke of Rutland[249]

2. A franchise agreement contained a clause providing for renewal of the agreement with "uplifted minimum performance requirements", but did not specify what they were and did not provide for machinery to determine them. It was held that there was no binding agreement for renewal and that the original franchise agreement expired according to its terms.

Grow with US Ltd v Green Thumb (UK) Ltd[250]

[249] (1882) 23 Ch.D. 81.
[250] [2006] EWCA Civ 1201.

CHAPTER 9

MISTAKES AND INCONSISTENCIES

Our use of words is generally inaccurate and seldom completely correct, but our meaning is recognised none the less

St Augustine:
Confessions XI section 20

1. CORRECTION OF MISTAKES BY CONSTRUCTION

As part of the process of construction the court has power to correct obvious mistakes in the written expression of the intention of the parties. Once corrected, the contract is interpreted in its corrected form. 9.01

In *Wilson v Wilson*,[1] Lord St. Leonards said:

> "Now it is a great mistake if it be supposed that even a Court of Law cannot correct a mistake, or error on the face of an instrument; there is no magic in words. If you find a clear mistake and it admits of no other construction, a Court of Law, as well as a Court of Equity, without impugning any doctrine about correcting those things which can only be shown by parol evidence to be mistakes-without, I say, going into those cases at all, both Courts of Law and of Equity may correct an obvious mistake on the face of an instrument without the slightest difficulty."

The reference to "courts of law" in distinction to "courts of equity" shows that his Lordship was considering the correction of errors as matters of construction rather than by way of the equitable remedy of rectification.[2]

In *East v Pantiles (Plant Hire) Ltd*[3] Brightman L.J. said that a mistake in a written instrument could be corrected as a matter of construction:

> "Two conditions must be satisfied: first there must be a clear mistake on the face of the instrument; secondly it must be clear what correction ought to be

[1] (1854) 5 H.L.Cas. 40 at 66.
[2] In *Homburg Houtimport BV v Agrosin Ltd (The Starsin)* [2004] 1 A.C. 715 Lord Millett made a similar point by reference to the ability of courts of equity to correct errors in wills, at a time when there was no power to rectify a will.
[3] [1982] 2 E.G.L.R. 111, applied in *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] 1 Lloyd's Rep. 599; *Clydesdale Bank Plc v Weston Property Company Ltd* [2011] EWHC 1251 (Ch).

made in order to cure the mistake.[4] If those conditions are satisfied, then the correction is made as a matter of construction. If they are not satisfied then either the claimant must pursue an action for rectification or he must leave it to a court of construction to reach what answer it can on the basis that the uncorrected wording represents the manner in which the parties decided to express their intention."

In *G & S Brough Ltd v Salvage Wharf Ltd*[5] Jackson L.J. expressed the principle as follows:

"Where a written agreement as drafted is a nonsense and it is clear what the parties were trying to say the court will, as a matter of construction, give effect to the obvious intention of the parties."

Before concluding that correction is required the court should first attempt to interpret the contract as it stands.[6] In *Multi-Link Leisure Developments Ltd v North Lanarkshire Council*[7] Lord Hope said:

"The court's task is to ascertain the intention of the parties by examining the words they used and giving them their ordinary meaning in their contractual context. It must start with what it is given by the parties themselves when it is conducting this exercise. Effect is to be given to every word, so far as possible, in the order in which they appear in the clause in question. Words should not be added which are not there, and words which are there should not be changed, taken out or moved from the place in the clause where they have been put by the parties. It may be necessary to do some of these things at a later stage to make sense of the language. But this should not be done until it has become clear that the language the parties actually used creates an ambiguity which cannot be solved otherwise."

Both Lord St Leonards and Brightman L.J. spoke of an error "on the face of the instrument". However, in order to decide whether there is such a mistake, the court may take into account such evidence of background facts as is admissible in order to interpret the contract.[8] In *Chartbrook Ltd v Persimmon Homes Ltd*[9] Lord Hoffmann approved the judgment of Carnwath L.J. in *KPMG LLP v Network Rail Infrastructure Ltd*,[10] and in particular that:

[4] It is sufficient if the gist of the correction is clear: *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363.
[5] [2009] EWCA Civ 21.
[6] If the contract, as interpreted, is not absurd, it is unlikely that the court will interfere with its wording: *Bashir v Ali* [2011] EWCA Civ 707.
[7] [2011] 1 All E.R. 175 (a Scottish appeal). There is no difference between the law of Scotland and the law of England and Wales in this respect: *Credential Bath Street Ltd v Venture Investment Placement Ltd* [2007] CSOH 208.
[8] *Holding & Barnes Plc v Hill House Hammond Ltd* [2002] L. & T.R. 7, CA. This passage in the previous edition of this book was approved by the CA in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363.
[9] [2009] 1 A.C. 1101.
[10] [2007] Bus. L.R. 1336.

"in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration."

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. In my opinion, both of these requirements are satisfied."[11]

In *Homburg Houtimport BV v Agrosin Ltd (The Starsin)*[12] Lord Bingham of Cornhill said:

"I take it to be clear in principle that the court should not interpolate words into a written instrument, of whatever nature, unless it is clear both that words have been omitted and what those omitted words were."

Lord Steyn said:

"As Lord Bingham has pointed out . . . some words have been left out of clause 5. The deletion was plainly a mistake. In these circumstances the court should, in order to give effect to the reasonable expectations of the parties, fill the gap by inserting what had been omitted. What falls to be construed is the clause so reconstructed."

Lord Millett said:

"The clause does not make grammatical sense as it stands, and it is obvious that words have been omitted. The court must, therefore, supply the omission by implying at least the minimum necessary for the clause to make grammatical sense. This is what all the judges below did. But the authorities show that in a proper case the court will go further. Where it can see, not only that words have been omitted, but what those words are, then it is its duty to supply them. It is not necessary that the court should be certain precisely what words have been omitted; it is sufficient that it knows their gist.[13] The process is one of construction, not rectification; this is evident from the fact that the Court of Chancery not infrequently supplied omissions in wills at a time when it had no jurisdiction to rectify them."

In that case the words of a clause in a bill of lading had been modelled on a form in common use, but some of the words in that form had been omitted.[14] The House of Lords held that the words in the precedent should be interpolated into the bill of

[11] Applied in *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429; *State Street Bank and Trust Co v Sompo Japan Insurance Inc* [2010] EWHC 1461 (Ch).
[12] [2004] 1 A.C. 715.
[13] Applied in *Clydesdale Bank Plc v Weston Property Company Ltd* [2011] EWHC 1251 (Ch).
[14] The copying error in that case is technically known as homeoteleuton. The reader, like the author, may need to consult a dictionary.

lading. Thus the extrinsic evidence of the precedent was critical to the process of identifying the omitted words. However, it does not matter in principle that a draft agreement was tailor-made, rather than "off-the-peg", as in *The Starsin*. What matters is the help it can give in practice, as a matter of common sense rather than law, as to the nature of the mistake and how it should be corrected. Second, it does not matter that details have been changed in other parts of the draft. Third, it is sufficient that the court is satisfied about the gist of the correction that should be made.[15] In *KPMG LLP v Network Rail Infrastructure Ltd*[16] Carnwath L.J. said

> "Once the court has identified an obvious omission, and has found in admissible background materials an obvious precedent for filling it, it should not be fatal that there may be more than one possible version of the replacement, or more than one explanation of the change."

In *The Prudential Assurance Co Ltd v Ayres*[17] the Court of Appeal was satisfied that "something had gone wrong with the language" of a deed of guarantee and interpreted it in a way that did violence to its language but reflected what the parties must have intended.

However, where there is no doubt about the natural meaning of the contract and that meaning does not produce an arbitrary or irrational result, the fact that the contract seems unduly favourable to one party is not enough.[18] As Lord Neuberger of Abbotsbury M.R. put it in *Pink Floyd Music Ltd v EMI Records Ltd*[19]:

> "One is normally looking for an outcome which is 'arbitrary' or 'irrational', before a mistake argument will run."

Where the parties' mistake was not a mistake in expression, but a falsification of the expected timetable for a transaction, there was no error capable of correction by construction. Nothing had gone wrong with "the language"; what had gone wrong was a failure to anticipate the consequences of the language. The contract would have worked perfectly well if it had gone ahead in accordance with the originally expected timetable.[20]

The distinction between the correction of errors by construction and the equitable remedy of rectification[21] was pointed out in *North Circular Properties Ltd v Internal Systems Organisation Ltd*.[22] The deputy judge said:

[15] *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus. L.R. 1336; *Company Developments (Finance) Ltd v Coffee Club Restaurants Ltd* [2011] EWCA Civ 766.
[16] [2007] Bus. L.R. 1336.
[17] [2008] 1 E.G.L.R. 5.
[18] *Bishops Wholesale Newsagency Ltd v Surridge Dawson Ltd* [2010] 2 B.C.L.C. 546; *Bashir v Ali* [2011] EWCA Civ 707; *LB Re Financing No 3 Ltd v Excalibur Funding No.1 Plc* [2011] EWHC 2111 (Ch).
[19] [2010] EWCA Civ 1429.
[20] *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353.
[21] Described by Lord Hoffmann as a safety valve in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 A.C. 1101.
[22] Ch.D. unreported, October 26, 1984. Donald Rattee QC (sitting as a deputy judge). Sir Richard Buxton has made a powerful case for the conclusion that the difference between rectification and

> "Of course the court will not lightly, as part of the construction process, tamper with the actual words used, particularly in a commercial document such as a lease. On the other hand the law is not such an ass as to compel the court to hold the parties to the actual words used when it is, as in my judgment it is in this case, clear from the document itself, without looking at extrinsic evidence, that such words were used only by virtue of a draftsman's blunder. Such a process of correction of obvious drafting errors in the process of construction is of course distinct from the equitable doctrine of rectification. The former can only be adopted where the fact that a mistake has been made and the nature of the mistake can be ascertained with certainty from a consideration of the relevant instrument in the context of objective circumstances surrounding its execution. Rectification, on the other hand, will be appropriate in many other cases where the existence and nature of a mistake are apparent only from extrinsic evidence of the actual intention of the parties."

In *WW Gear Construction Ltd v McGee Group Ltd*[23] Akenhead J. said:

> "Whilst the court does not readily accept that contractual parties have made a mistake in their written contracts, once it is clear that something has gone wrong with the language, the court will seek as a matter of construction and interpretation to determine what the parties really meant; in doing so, as with all contractual construction exercises, the court can as necessary have regard to the background to and context of the contract in question. If it is simply not possible to determine what was mutually intended from the wording, the background and the context, it may well be the case that the court has to say that the parties have produced a meaningless term or contract as the case may be. The construction exercise however is to be distinguished from the circumstances which give rise to a claim for rectification."

One difference between the correction of errors by interpretation and the equitable remedy of rectification is that in the latter case (but not in the former) the court may have regard and give appropriate weight to the parties' pre-contractual negotiations.[24] Nevertheless the principles of interpretation to correct a mistake and the equitable remedy of rectification are closely related.[25]

The assertion by the court of a power to correct errors is a reflection of the canon of construction by which the court seeks to save a document rather than allow the intention of the parties to miscarry. This appears from the speech of Lord Brougham L.C. in *Langston v Langston*.[26] So also in *The Tropwind*,[27] Lord Denning M.R. said:

construction has reduced almost to vanishing point in the light of the decision of the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 A.C. 1101: see [2010] C.L.J. 253.
[23] [2010] EWHC 1460 (TCC) (correction of wrong cross-reference in the contract).
[24] *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429.
[25] *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44.
[26] (1834) 2 Cl. & Fin. 194 (a will case).
[27] [1982] 1 Lloyd's Rep. 232.

> "We have on a few occasions rejected a sentence as meaningless. . . . But this is only when it is impossible to make sense of it. Rather than find it meaningless, we should strive to find out what was really intended-by amending the punctuation, or by supplying words and so forth."

Although it is common to speak of the court supplying or striking out words this may not be strictly accurate. In *Re Sassoon*,[28] Romer L.J. said:

> "Now our attention was drawn during the argument to several cases, and many others are to be found in the books, where the court has departed, and in some cases departed widely, from the literal meaning of words contained in wills and settlements. Such cases are sometimes referred to as cases in which the court has 'supplied' or 'struck out' words. This is, perhaps, a convenient way of referring to them, but it is in strictness an entirely inaccurate way. Except in actions for rectification the court has no power whatsoever of adding to or subtracting from the words of a written instrument. A testator or a settlor may, however, in the instrument itself indicate sufficiently plainly that he is using certain words or phrases in other than their literal and ordinary meaning. In such cases he is said to have provided his own dictionary, and the court will construe such words and phrases in the light of that dictionary."

While this is undoubtedly true of many if not most cases, there are nevertheless cases in which the court has supplied whole phrases. It would be difficult to categorise such cases as cases where the court was doing no more than interpreting words in the instrument by reference to an idiosyncratic dictionary. Equally there are cases in which the court has construed a contract by striking out words where it is satisfied that they were included by clerical error.[29]

In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*,[30] Lord Hoffmann gave a different explanation. He said:

> "It is a matter of constant experience that people can convey their meaning unambiguously although they have used the wrong words. We start with an assumption that people will use words and grammar in a conventional way but quite often it becomes obvious that, for one reason or another, they are not doing so and we adjust our interpretation of what they are saying accordingly. We do so in order to make sense of their utterance: so that the different parts of the sentence fit together in a coherent way and also to enable the sentence to fit the background of facts which plays an indispensible part of the way we interpret what anyone is saying."

It is, he said, important to:

> "distinguish between the meaning of words and the question of what would be understood as the meaning of a person who uses words. The meaning of words,

[28] [1933] Ch. 858.
[29] *Holding & Barnes Plc v Hill House Hammond Ltd* [2002] L. & T.R. 7, CA.
[30] [1997] A.C. 749, HL.

> as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning, but also, in the way I have explained, to understand a speaker's meaning, often without ambiguity, when he has used the wrong words."

This principle enables the court to take background facts into account in deciding whether a mistake has been made and, if so, what it is.[31] The application of this principle, although it has been called "common law rectification", is simply part of the overall process of interpreting a contract.[32]

2. THE NATURE OF THE MISTAKE

The mistake to be corrected must be a mistake in expression. It may be a mistake in spelling or grammar; a mistake in the naming of persons referred to; the omission of words or the inclusion of words; or the use of the wrong words. 9.02

Many of the early cases involving the correction of errors by construction arose out of the misuse of Latin in which legal documents were frequently written. "It is a rule of law, *mala grammatica non vitiat chartam*, neither false Latin nor false English will make a deed void when the intent of the parties doth plainly appear. It is therefore held that two negatives do not make an affirmative when the apparent intent is contrary. And it is another rule of law *falsa orthographia non vitiat concessionem*."[33]

However, the power of the court to correct errors goes beyond the mere correction of spelling or grammar. In *Chipsaway International Ltd v Kerr*[34] the Court of Appeal held that where it is clear that something has gone wrong with the language, such that the clause must be rewritten, the rewriting that is required is that which involves the minimum changes necessary to achieve a sensible meaning and which gives effect to the commercial purpose of the clause. In the author's opinion, this is too restrictive a description of the court's power. In *Chartbrook Ltd v Persimmon Homes Ltd*[35] Lord Hoffmann said 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

[31] *Holding & Barnes Plc v Hill House Hammond Ltd* [2002] L. & T.R. 7, CA; *Homburg Hountimport BV v Agrosin Ltd* [2004] 1 A.C. 715.
[32] *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363.
[33] *Sheppard's Touchstone* (8th edn, 1826) p.87. Examples of such cases are collected in *Norton on Deeds* (2nd edn, 1928) pp.103–104.
[34] [2009] EWCA Civ 320.
[35] [2009] 1 A.C. 1101.

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."[36]

Thus in *LB Re Financing No.3 Ltd v Excalibur Funding No 1 Plc*[37] Briggs J. said:

"Where something has gone wrong with the language, it is not in my judgment necessarily an objection to dealing with it in a way that avoids commercial absurdity that provisions have, apparently, to be rewritten, blue pencilled, or amplified so as to work rationally in particular circumstances."

Upon this principle the court may correct a mistaken reference to a party or a misnomer.[38]

Thus in *Wilson v Wilson*,[39] a deed of separation between John Wilson and Mary Wilson contained a provision which apparently obliged the trustees of Mary Wilson to indemnify John Wilson against "the present debts and liabilities of the said John". The House of Lords held that the deed should be construed as if "Mary" had been substituted for "John" in that clause.

Similarly, in *Nittan (U.K.) Ltd v Solent Steel Fabrications Ltd*,[40] a company traded under the name of "Sargrove Automation". The contract named one of the parties as "Sargrove Electronic Controls Ltd", which was a real, but dormant company. The Court of Appeal read the name stated in the contract as the trading name of the company, holding that it was a case of mere misnomer.

The court may supply words erroneously omitted, particularly where the omitted words are part of a common form of wording. Thus in *Re Daniel's Settlement Trusts*,[41] a post-nuptial settlement declared trusts for every child or children of the marriage who being a son shall attain the age of 21 years in equal shares, and if there should be only one such child the whole to be in trust for such child, his or her executors. Assisted by the reference to "her", the Court of Appeal held that the trusts applied to daughters who had attained the age of 21.

Similarly, in *Re Hargraves' Trusts*,[42] a deed of trust declared trusts for such of the settlor's grandchildren "as being male shall have attained the age of 21 years or being female shall have married under that age". Farwell J. held that daughters who attained the age of 21 without having married were entitled to benefit from the trusts. He said:

[36] Applied in *Scottish Widows Fund and Life Assurance Society v BGC International* [2011] EWHC 729 (Ch).
[37] [2011] EWHC 2111 (Ch).
[38] See **para.10.08** below.
[39] (1854) 5 H.L.Cas. 40.
[40] [1981] 1 Lloyd's Rep. 633.
[41] (1875) 1 Ch.D. 375.
[42] [1937] 2 All E.R. 545.

"When one reads this settlement as a whole, it is absolutely impossible, in my judgment, to come to any conclusion other than that there has been left out of what is a perfectly well recognised and settled form the words 'shall have attained that age'. These words have no doubt been left out by some person who had to copy the form. . . . When the meaning is plainly written, throughout the document, from beginning to end, and I find a mistake made in copying a common form, which may operate to defeat the object for which the settlement was made, I am justified in construing the settlement in the way it was intended to be read."

The court may also supply the name of a grantor where the identity of the grantor appears from other parts of the deed. In *Lord Say and Seal's Case*,[43] Lord Say and Seal was intended to be the grantor. But the granting part of the deed did not say who was the grantor. The court supplied the name.

The power of correction also extends to substituting antonyms. In *Bache v Proctor*,[44] Buller J. referred to a case in the Common Pleas in which a bond was conditioned to be void if the obligor did not pay. The word "not" was rejected. In *Slough Estates Ltd v Slough Borough Council (No.2)*[45] an applicant for planning permission had submitted a plan showing the land on which he wished to develop coloured in various colours. The planning permission granted permission to develop the land shown uncoloured on the plan. The Court of Appeal, reversing the trial judge, read the word "uncoloured" as meaning "coloured". However, it has been doubted whether as a matter of construction the court can construe a grant directly contrary to its express terms.[46] But it seems likely that the court will continue to assert such a power.

So, for example, in *Fitzgerald v Masters*,[47] cl.8 of a contract for the sale of land provided:

"The usual conditions of sale . . . shall so far as they are inconsistent herewith be deemed to be embodied herein."

The High Court of Australia construed "inconsistent" as "consistent".

Dixon C.J. and Fullagar J. said in their joint judgment:

"There is a superficial difficulty in Cl. 8 because it purports to incorporate a set of conditions so far as they are inconsistent with what has been specifically agreed upon. No real difficulty, however, is created. Words may generally be supplied omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency. Here it would be indeed absurd to suppose that the parties having expressed their agreement on a number

[43] (1711) 10 Mod.Rep. 40.
[44] (1780) Doug.K.B. 382.
[45] [1969] 2 Ch. 30.
[46] See *Mill v Hill* (1852) 3 H.L.Cas. 828 at 851.
[47] (1956) 95 C.L.R. 420.

CHAPTER 16

CONDITIONS AND CONDITIONAL OBLIGATIONS

"Unimportant, of course, I mean" the King hastily said and went on to himself in an undertone "important-unimportant-unimportant important" as if he were trying which word sounded best

Lewis Carroll:
Alice in Wonderland

1. THE MEANING OF "CONDITION"

In English law the word "condition" may mean (i) a requirement which must be satisfied before any contract comes into existence; (ii) a requirement which must be satisfied before a party can be liable to perform his obligations under a contract; (iii) a term of the contract; (iv) an important term of the contract, breach of which will amount to a repudiation of the contract; (v) a requirement which if satisfied will automatically bring the contract to an end; or (vi) a requirement which if satisfied will entitle one party to bring the contract to an end.[1] 16.01

The word "condition" both historically and today is used in a wide variety of senses.[2] Some of those senses were explained by the Court of Appeal in *Wickman Machine Tool Sales Ltd v Schuler (L) Att.-Gen.*[3] In that case Lord Denning M.R. identified three meanings of the word "condition". The first was its "proper meaning"; that is:

> "a prerequisite to the *very existence* of the agreement."

The second was the "common meaning;" that is a term, provision or stipulation. He said:

> "When an agreement is made for the sale of land, it is always subject to 'conditions of sale'. The Law Society's 'Conditions of Sale' are in everyday use. When a building contract is made, it is usually subject to the R.I.B.A. conditions. Whenever a quotation is given or invoice sent, the printed form

[1] Cited with approval in *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep. 209 at 220, per Lord Steyn.
[2] In "The Contractual Concept of Condition" (1953) 69 L.Q.R. 485, S.J. Stoljar identifies no less than 12 meanings of the word.
[3] [1972] 1 W.L.R. 840.

invariably says it is subject to the 'conditions' on the back. In all these cases the word 'conditions' simply means *terms* of the contract."

The third is its meaning "as a term of art".

> "A 'condition' in this sense is a stipulation in a contract which carries with it this consequence: if the promisor breaks a 'condition' in any respect, however slight, it gives the other party a right to be quit of his future obligations and to sue for damages unless he, by his conduct, waives the condition, in which case he is bound to perform his future obligations, but can sue for the damages he has suffered. A 'condition' in this sense is used in contrast to a 'warranty'. If a promisor breaks a warranty in any respect, however serious, the other party is not quit of his future obligations. He has to perform them. His only remedy is to sue for damages."

In the House of Lords[4] Lords Reid and Simon of Glaisdale both indicated that where the word "condition" is used in a legal document, there is a presumption that it is used in its sense as a term of art.

In his dissenting judgment in the Court of Appeal, Stephenson L.J. said:

> "To my mind the natural and ordinary meaning of making something a condition of an agreement is that it is made something on which the agreement depends. If the condition is not performed the agreement goes. If the condition is one to be fulfilled before the agreement comes into force, it is what lawyers have called a condition precedent (or a contingent or causal condition), that is a condition of the agreement's coming into force, and if it is not performed there is no agreement. If the condition is to be performed after the agreement has come into force, it is what lawyers have called a condition subsequent, or a condition inherent (or a promissory condition), that is a condition of the agreement's continuing; and if it is not performed the agreement comes to an end. In a sense all conditions are conditions precedent, some to an agreement beginning, others to its continuing. One thing is a condition of another when its existence is essential to that other thing, when the existence of each depends on the existence of the other, and that is so whether one of the two things is to be done once (the simplest case) or is to be repeated or continued or is an agreement to do one or more things."

This two-fold classification has the great attraction of simplicity, but unfortunately, it does not adequately reflect the wide (and often inconsistent) variety of judicial usage of the word "condition". Thus in *Wood Preservation Ltd v Prior*[5] Goff J. identified the following four different types of conditional arrangements:

(1) where the arrangement between the parties, which would otherwise be a contract, is subject to a condition precedent to the making of an agreement at all;

[4] [1974] A.C. 235.
[5] [1969] 1 W.L.R. 1077.

(2) where there is a contract under which one party assumes a unilateral obligation in a certain event, and there is no obligation on the other party to bring about that certain event;

(3) where there is a bilateral contract subject to a condition precedent with an immediate obligation on one of the parties to perform the condition or to use his best endeavours to perform it;

(4) where there is an immediate contract but on the basis that one of the parties will obtain some particular information or assurance or perform some particular term which goes to the root of the contract.

And in *Bashir v Commissioner of Crown Lands*,[6] the Privy Council held that a stipulation in a contract could be both a condition and a covenant.[7] Similarly, in *Burford UK Properties Ltd and others v Forte Hotels (UK) Ltd*[8] Auld L.J. said that:

> "there is no particular magic in the use in the lease of the word 'covenant' as against that of 'condition', 'provision', 'agreement' or 'proviso', and that a proviso, whether in the body of a lease or in a schedule to it, may, depending on its form and the context, have the same force and effect as a covenant."

In *Total Gas Marketing Ltd v Arco British Ltd*[9] Lord Steyn said that conditions could be divided into promissory conditions and contingent conditions. A promissory condition is one which is within the power of the promisor to bring about, whereas a contingent condition is one which is not within his power to bring about, although he may undertake obligations to try to do so.[10] Contingent conditions can themselves be divided into conditions precedent and conditions subsequent. A condition precedent is a condition that must be fulfilled to bring about the creation of a contract or the enforceablity of an obligation; and a condition subsequent is a condition which, if fulfilled, extinguishes a contract or obligation to which it is subsequent.

2. CONDITIONS PRECEDENT

A condition precedent is a condition which must be fulfilled before any binding contract is concluded at all. The expression is also used to describe a condition which does not prevent the existence of a binding contract, but which suspends performance of it or an obligation under it until fulfilment of the condition; or to describe a contractual obligation that must be performed by one party before another contractual obligation of the counter-party arises. 16.02

[6] [1960] A.C. 44.
[7] See also *Hyundai Merchant Marine Co Ltd v Karander Maritime Co Inc* [1996] C.L.C. 749.
[8] [2003] EWCA Civ 1800.
[9] [1998] 2 Lloyd's Rep. 209 at 220.
[10] *Michaels v Harley House (Marylebone) Ltd* [2000] Ch. 104 at 116.

A condition precedent[11] is the "proper" meaning of condition, referred to in the last paragraph. In *Bremer Handelsgesellschaft Schaft v Vanden Avenne Izegem*,[12] Lord Wilberforce said:

> "Whether this clause is a condition precedent or a contractual term of some other character must depend on (i) the form of the clause itself, (ii) the relation of the clause to the contract as a whole, (iii) general considerations of law."

In *Trans Trust SPRL v Danubian Trading Co Ltd*,[13] a contract for the sale of goods provided that payment was to be by cash against shipping documents from a confirmed credit. The question arose what was the nature of the buyer's obligation to procure the provision of a confirmed credit. Denning L.J. said:

> "Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a credit' is rather like a stipulation 'subject to contract'. If no credit is provided there is no contract between the parties. In other cases the contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit."

In the result it was held that the obligation to open a credit was not a condition precedent, but an essential obligation of the contract, breach of which entitled the seller to refuse to deliver and to sue for damages.

The formulation by Denning L.J. divides conditions precedent into two groups; one where non-fulfilment of the condition prevents the existence of any binding agreement, and the other where non-fulfilment of the condition has the same effect as a breach of contract which goes to the root of the contract. However, there is an intermediate position. A condition may be such as not to prevent a binding contract from coming into existence, but to suspend immediate performance of the obligations it creates until fulfilment of the condition. Thus in *Bank of Nova Scotia v Hellenic Mutual Ltd (The Good Luck)*[14] Lord Goff of Chieveley described the "classical sense" in English law of a condition precedent as being a provision:

> "under which the coming into existence of (for example) an obligation, or the duty or further duty to perform an obligation, is dependent upon the fulfilment of the specified condition."

[11] Sometimes called a "suspensive condition": see *Bentworth Finance Ltd v Lubert* [1968] 1 Q.B. 680.
[12] [1978] 2 Lloyd's Rep. 109; *WW Gear Construction Ltd v McGee Group Ltd* [2010] EWHC 1460 (TCC).
[13] [1952] 2 Q.B. 297.
[14] [1992] 1 A.C. 233.

In *Aspen Insurance UK Ltd v Pectel Ltd*[15] Teare J. said:

> "It is well established that a general clause in an insurance policy purporting to make compliance with obligations in the policy a condition precedent to the underwriters being liable in respect of a claim can indeed have that effect . . . The effect of such a general clause is that which the clause would have if it had been set out at the commencement of each particular clause which imposes an obligation upon the assured. This is the 'modern drafting technique' . . . Whilst the words 'condition precedent' are often used in such clauses, other words can have the same effect so long as the clause is apt to make that effect the clear intention of the parties . . . What has to be found is a 'conditional link' between the assured's obligation to give notice and the underwriters' obligation to pay the claim . . .".

In *Marten v Whale*[16] A agreed to sell to B a plot of land "subject to purchaser's solicitors' approval of title and restrictions", and at the same time and in consideration of the sale of the land B agreed to sell A a motor car. B allowed A to have the car on loan, and A sold it to C. Subsequently B's solicitors refused to approve the title. The question was whether A had "agreed to buy" the car, for if he had he was empowered to pass a good title to C. The Court of Appeal held that the arrangement amounted to a conditional contract and consequently title passed to C. Similarly, in *Smallman v Smallman*,[17] parties reached an agreement for a settlement of a divorce. The agreement was "subject to the approval of the court". Lord Denning M.R. said:

> "In my opinion, if the parties have reached an agreement on all essential matters, then the clause 'subject to the approval of the court' does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves it, it is binding on the parties. If the court does not approve, it is not binding. But, pending the application to the court, it remains a binding agreement which neither party can disavow."[18]

The expression "condition precedent" is also used to describe a contingency which must be fulfilled in order to bring a particular contractual obligation into operation. That contingency may be the performance by one party of a contractual obligation of his own, or may be some other event (such as the giving of a notice). In *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd*[19] Coulson J. said:

> "It is trite law that, if one party's obligation to do something under a contract is contingent upon the happening of a particular event, the circumstances of that

[15] [2009] Lloyd's Rep. IR 440.
[16] [1917] 2 K.B. 480.
[17] [1972] Fam. 25.
[18] Whether this is correct as a matter of matrimonial law is beyond the scope of this book: see *Xydhias v Xydhias* [1999] 2 All E.R. 386; *Soulsbury v Soulsbury* [2008] Fam. 1.
[19] [2008] EWHC 2379 (TCC), para.298.

event must be identified unambiguously in the contract. It must be clear beyond doubt how and in what circumstances the relevant obligation has been triggered."

An option (or unilateral contract) is sometimes described as an "if" contract, because it only comes into operation as a bilateral contract "if" the option is exercised. Where a provision in a bilateral contract is an "if" provision, fulfilment of the contingency introduced by the word "if" is likely to be a condition precedent.[20] Likewise, where a contractual clause contains the phrase "provided always that":

"This type of wording is often the strongest sign that the parties intend there to be a condition precedent. What follows such a proviso is usually a qualification and explanation of what is required to enable the preceding requirements or entitlements to materialise."[21]

In *Burford UK Properties Ltd v Forte Hotels (UK) Ltd*[22] Arden L.J. said:

"One of the normal meanings of the words 'provided that' is 'on condition that' or 'on the assumption or footing that'."

In *Astrazeneca UK Ltd v Albemarle International Corporation*[23] Flaux J. said:

"Whilst it is clear that, for performance of a provision in a contract to be a condition precedent to the performance of another provision, it is not necessary for the relevant provision to use the express words 'condition precedent' or something similar, nonetheless the court has to consider whether on the proper construction of the contract that is the effect of the provisions."

He added that:

". . . in the absence of an express term, performance of one obligation will only be a condition precedent to another obligation where either the first obligation must for practical reasons clearly be performed before the second obligation can arise or the second obligation is the direct quid pro quo of the first, in the sense that only performance of the first earns entitlement to the second."[24]

Normally a condition precedent must be precisely fulfilled. However, a condition precedent need not be fulfilled where it would be futile, useless and unnecessary to do so.[25] This will rarely be the case where compliance with the condition is

[20] *Merton London Borough v Stanley Hugh Leach Ltd* (1985) 32 B.L.R. 51; *WW Gear Construction Ltd v McGee Group Ltd* [2010] EWHC 1460 (TCC).
[21] *WW Gear Construction Ltd v McGee Group Ltd* [2010] EWHC 1460 (TCC), per Akenhead J.
[22] [2003] EWCA Civ 1800.
[23] [2011] EWHC 1574 (Comm).
[24] See also *DRC Distribution Ltd v Ulva Ltd* [2007] EWHC 1716 (QB).
[25] *Barrett Bros (Taxis) Ltd v Davies* [1966] 1 W.L.R. 1334; *The Mozart* [1985] 1 Lloyd's Rep. 239; *Mansel Oil Ltd v Troon Storage Tankers SA* [2008] 2 Lloyd's Rep. 384 (affirmed on appeal: [2009] EWCA Civ 425).

necessary in order to bring into effect a contractual obligation in a particular manner.[26] In *Glencore Grain Ltd v Goldbeam Shipping Inc*[27] Moore-Bick J. said:

"If the parties have stipulated that a notice must be given in order to bring some other provision of the contract into operation, I doubt whether it could ever be dispensed with on the grounds that to give such a notice would be futile."

It has been said that a condition precedent "enables a party to know where it stands contemporaneously", and consequently cannot be retrospectively satisfied.[28] However, where a condition precedent merely suspends performance of other obligations, then it appears that it can be satisfied at a date later than the time for fulfilment of the condition. In that sense the satisfaction of the condition is retrospective, because the obligation whose performance is suspended then comes into operation.[29] In other cases a similar result has been reached by interpreting the condition precedent as not being tied to a particular date.[30]

It should perhaps be mentioned that in older cases[31] the expression "condition precedent" is more generally used in the sense of a term of the contract, breach of which entitled the other party to the contract to treat it as at an end. This usage was bound up with the old rules of pleading which required the plaintiff to aver performance or willingness or ability to perform all stipulations on his part in the precise words in which they were expressed in the contract. This rule treated all promises by each party to a contract as "conditions precedent" to all promises of the other; with the result that any departure from the promised manner of performance, however slight that departure may have been, discharged the other party from the obligation to continue to perform any of his own promises.[32] In modern law, however, the expression "condition precedent" (as opposed simply to "condition") should be restricted to cases where non-fulfilment of the condition prevents the formation of a binding agreement, or suspends the operation of the contract or particular obligations under it.

Illustrations

1. A finance company claimed arrears of instalments under a hire purchase agreement relating to a car. The buyer of the car proved that the company's agents had agreed that the hire would not become payable until the company had provided a log-book for the car. Lord Denning M.R. said:

[26] *Glencore Grain Ltd v Flacker Shipping Ltd (The Happy Day)* [2002] 2 Lloyd's Rep. 487.
[27] [2002] 2 Lloyd's Rep. 400.
[28] *Sempra Oil Trading Sarl v Kronos Worldwide Ltd* [2004] 1 Lloyd's Rep. 260.
[29] *Lomas v JFB Firth Rixson Inc* [2010] EWHC 3372 (Ch) following dictum of Austin J. in *Enron Australia v TXU Electricity* [2003] NSWSC 1169.
[30] *McGahon v Crest Nicholson Regeneration Ltd* [2011] 1 P. & C.R. 225.
[31] i.e. cases decided before the changes in pleading made by the Common Law Procedure Act 1852.
[32] See *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26; *United Scientific Holdings Ltd v Burnley Borough Council* [1978] A.C. 904, per Diplock L.J. and Lord Diplock respectively.

"The provision of the log-book was a condition on which the very existence of the contract depended. It was, in technical language, a suspensive condition. Until the log-book was provided there was no contract at all."

Bentworth Finance Ltd v Lubert[33]

2. A written agreement provided for the sale to the defendant of a share in an invention of the plaintiff. The defendant was allowed to give evidence to the effect that the agreement was not to become binding until the invention had been approved by an engineer. He had not approved it. It was held that no agreement came into existence.

Pym v Campbell[34]

3. A compromise agreement between a company and its former chief executive provided that "Subject to and conditional upon the terms set out below" the company would pay a lump sum. One of the terms was a warranty by the chief executive "as a strict condition of this agreement" that there were no circumstances of which he was aware that would amount to a repudiatory breach of his contract of employment. It was held that the truth of the warranty was a condition precedent to the company's liability to pay.

Collidge v Freeport Plc[35]

3. SUBJECT TO CONTRACT

16.03 Save in exceptional circumstances, an arrangement made subject to contract means that execution or exchange of a formal written contract is a condition precedent to any legal liability.

Informal agreements for the sale of land are commonly made "subject to contract". The making of such agreements is not confined to land transactions.[36] In the case of negotiations for the grant of a lease there is a presumption that any informal agreement is "subject to lease".[37]

Where such an expression is used, it is generally interpreted to mean that the parties do not intend to be bound unless and until a formal written contract is executed or exchanged between them. So in *Rossdale v Denny*[38] Russell J. said:

". . . after considering all the authorities which have been brought to my attention it would appear that in every case with two exceptions, where the words

[33] [1968] 1 Q.B. 680.
[34] (1856) 1 E. & B. 370.
[35] [2008] I.R.L.R. 697.
[36] *Confetti Records v Warner Music (UK) Ltd* [2003] E.M.L.R. 35.
[37] *Leveson v Parfum Marcel Rochas (England) Ltd* (1966) 200 E.G. 407.
[38] [1921] 1 Ch. 57.

'subject to' appear, the documents in those cases have been held to amount only to a conditional offer or a conditional acceptance, as the case may be, but not such as to constitute a binding contract apart from the execution of a formal document."

Of the two exceptions, one[39] was decided upon special facts and the other[40] has been frequently doubted, not least by the Court of Appeal affirming the decision of Russell J.

The phrase "subject to contract" has the same effect in the case of a proposed grant of a lease.[41] So in *Derby & Co Ltd v ITC Pension Trust Ltd*,[42] Oliver J. said:

"Where negotiations are carried out 'subject to contract' that means, and I think this is clear from the authorities, that they are conditional on the final engrossment, execution and exchange of the formal lease, where the case is one of negotiations for the grant of a lease or tenancy."

However, the mere fact that the parties contemplate the preparation of a formal contract will not necessarily prevent a binding agreement from coming into effect before the formal contract is executed. In *Rossiter v Miller*[43] Lord Blackburn said:

"I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up."

So also in *Von Hatzfeld-Wildenburg v Alexander*,[44] Parker J. said:

"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through."

In *Branca v Cobarro*,[45] the parties entered into an agreement which contained a clause stating:

"This is a provisional agreement until a fully legalised agreement, drawn up by a solicitor and embodying all the conditions herewith stated is signed."

[39] *Filby v Hounsell* [1896] 2 Ch. 737.
[40] *North v Percival* [1898] 2 Ch. 128.
[41] *Longman v Viscount Chelsea* (1989) 58 P. & C.R.189, CA; *Akiens v Salomon* (1992) 65 P. & C.R. 363, CA.
[42] [1977] 2 All E.R. 890; *Longman v Chelsea (Viscount)* (1989) 58 P. & C.R. 189, CA.
[43] (1878) 3 App.Cas. 1124.
[44] [1912] 1 Ch. 284.
[45] [1947] K.B. 854.