4

INTERNAL CONTEXT: THE WHOLE CONTRACT APPROACH

The first and least-controversial source of assistance for the purpose of construing particular contractual words is the remainder of the instrument or the 'internal context'. It is always permissible to have reference to other provisions within the 'four corners' of the document. As Lord Steyn has observed: 'In a legal text a word forms part of a sentence and subject to syntax sentences are unlimited in their variety of arrangement of words. Moreover, the sentence is embedded in a text which by virtue of its character and the general effect of its provisions adds colour to the words and sentences.'[1] More musically, the great American jurist Learned Hand J observed: **4.01**

[1] Lord Steyn, '*Pepper v Hart*; A Re-examination' (2001) 21 OJLS 59, 60. Compare, speaking both extra-judicially and judicially, Oliver Wendell Holmes, 'The Theory of Legal Interpretation' (1897) 12 Harv LR 417 and Justice Holmes in *Towne v Eisner* 245 US 418, 425 (1918): 'A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.'

> The meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.[2]

4.02 This chapter is concerned with internal context and Chapter 5 with external context. As Brennan J opined in *Codelfa Construction Prop Ltd v State Rail Authority of New South Wales*:[3]

> The meaning of a written contract may be illuminated by evidence of facts to which the writing refers, for the symbols of language convey meaning according to the circumstances in which they are used . . . Both the internal and extrinsic context in which a word or phrase is used may throw light upon the meaning with which the parties must be taken to have used it . . . [4]

4.03 The former is less controversial. The remainder of the terms of a document are always relevant in construing a particular word, phrase, or clause. More traditionally, this may have been described as considering 'intrinsic evidence'.[5] However one should not expect complete consistency and harmony in an instrument, particularly if it is not professionally drafted or if it is a standard form which has been amended over the years. The same word or phrase may have different meaning and effect in different parts of the contract. Some of the constituent parts of contracts are also considered.

The Whole Contract or Holistic Approach

Every word counts

4.04 Both the traditional and modern approaches emphasize the importance of construing a document as a whole. Over-concentration on a particular word, phrase, or clause may do violence to the overall sense and intent of an instrument. Nevertheless every word and phrase counts, and each must be given effect to. This dilemma was forcefully put by Leach V-C in 1824:

> In the construction of all instruments it is the duty of the Court not to confine itself to the force of a particular expression, but to collect the intention from the whole instrument taken together. But a Court is not authorized to deviate from the force of a particular expression, unless it finds, in other parts of the instrument, expressions which manifest that the author of the instrument could not have the intention which

[2] *Helvering v Gregory* 69 F 2d 809, 810–11 (1934). A happy phrase which has appealed to at least two other judges from other jurisdictions: A Barak, *Purposive Interpretation in Law* (2005); and Hon J J Spigelman AC, 'From text to context: Contemporary contractual interpretation' (2007) 81 ALJ 322, 325.

[3] (1982) 149 CLR 337.

[4] Ibid, 337, 401.

[5] R Norton, *A Treatise on Deeds* (2nd edn, edited by R Morrison and H Goolden) (1981 reprint) ('Norton') 83.

> the literal force of a particular expression would impute to him. However capricious may be the intention which is clearly and unequivocally expressed, every Court is bound by it, unless it is plainly contradicted by other parts of the instrument.[6]

A recent clear demonstration of the holistic approach is the speech of Lord Mustill in *Charter Reinsurance Co Ltd v Fagan*.[7] **4.05**

Oliver Wendell Holmes and internal context

Oliver Wendell Holmes, the great American judge and jurist, described the rationale for the *holistic* approach to contracts: **4.06**

> It is true that in theory any document purporting to be serious and to have some legal effect has one meaning and no other, because the known object is to achieve some definite result. It is not true that in practice (and I know no reason why theory should disagree with the facts) a given *word* or even a given *collocation of words* has one meaning and no other. A word generally has several meanings, even in a dictionary. You have to consider the *sentence* in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given in the word-book. But in this first step, at least, you are not troubling yourself about the idiosyncrasies of the writer, you are considering simply the general usages of speech. So when you let whatever galvanic current may come from the *rest of the instrument* run through the particular sentence, you are still doing the same thing.[8]

The limits of the whole contract approach

Many contracts do not constitute neatly integrated frameworks for cooperative behaviour. Few commercial documents can withstand the scrutiny of experienced solicitors, learned counsel, the High Court, or appellate courts without some inconsistency or ambiguity being identified. In *L Schuler AG v Wickman Machine Tool Sales Ltd*[9] Lord Reid was scathing of the exclusive distributorship agreement under scrutiny: **4.07**

> on any view the interrelation and consequences of the various provisions of the agreement are so ill-thought out that I am not disposed to discard the natural meaning of the words . . . merely because to give them their natural meaning implies that the draftsman has forgotten something which a better draftsman would have remembered.[10]

[6] *Hume v Rundell* (1824) 2 S & S 174, 177, 57 ER 311. Similarly *Re Strand Music Hall Co Ltd ex p European and American Finance Co Ltd* (1865) 35 Beav 153, 159, 55 ER 853 (Sir John Romilly MR).

[7] [1997] AC 313. See 1.132.

[8] Oliver Wendell Holmes, 'The Theory of Legal Interpretation' (1899) 12 Harv LR 417–20 (emphasis added).

[9] [1974] AC 235, HL.

[10] Ibid, 235, 249.

4.08 In *E E Caledonia Ltd v Orbit Valve Co Europe* Hobhouse J wryly observed of the scheme of contractual terms in that case:

> They would appear to form part of a single scheme and, prima facie, should be construed having regard to that scheme. However, it is difficult to identify the scheme; potential conflicts or inconsistencies exist between the provisions of each part. On any view the scheme is not clear. I have not therefore felt able to derive assistance from an approach of construing each part in relation to the others.[11]

4.09 Nevertheless there are no special rules for allegedly badly drafted contracts[12] so ordinary principles must be applied, supplemented by a number of techniques for dealing with inconsistencies.

Arguments from redundancy and the presumption against surplusage

4.10 Arguments which attempt to give effect to each and every word come up against the factor that many contracts, and in particular standard forms, contain a great deal of verbiage which may be superfluous in most cases. Devlin J in *Chandris v Isbrandtsen-Moller Co Inc*,[13] discussing the restrictive tendency of the *ejusdem generis* rule, stated:

> Moreover, the main argument of construction which justifies the application of the rule does not apply in commercial documents. It is that if the general words have an unrestricted meaning the enumerated items are surplusage. The presumption against surplusage is of little value in ascertaining the intention of the parties to commercial documents, as many great commercial judges have recognized. In *Burrell & Sons v F Green & Co*,[14] Bailhache J said that he was unimpressed by the argument of redundancy 'because charterparties often contain many redundant words' . . . Scott LJ in *Beaumont-Thomas v Blue Star Line Ltd*,[15] referred to the same habit, but less kindly, as 'the common and pernicious practice of cramming a contract with particular illustrations of some general stipulation, which in a legal sense are wholly unnecessary, and just because they are unnecessary often afford a pretext for limiting general words in a way that was never intended'.[16]

[11] [1994] 1 WLR 221, 225; affd [1994] 1 WLR 1515, CA; echoed by Rix J in *Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals & Polymers Ltd* [1998] 2 Lloyd's Rep 139; affd [1999] 1 Lloyd's Rep 387, CA.

[12] *Mitsui Construction Co Ltd v Attorney-General of Hong Kong* (1986) 33 Build LR 1, 14, PC (Lord Bridge). See also *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, HL, where Viscount Simonds complained: 'Lord Bramwell, in a phrase which the learned editors of *Scrutton on Charterparties*, 16th ed, at p 186, have done well to preserve, described a certain class of case as "cases where no principle of law is involved, but only the meaning of careless and slovenly documents." This is such a case. No doubt there are rules or canons of construction applicable to careless and slovenly, as to other, documents. I have tried to apply them, resolute, on the one hand, to construe commercial agreements broadly and not to be astute to find defects in them or reject them as meaningless and, on the other, not to make a contract for the parties which they have not thought fit to make for themselves' (at 157–8).

[13] [1951] 1 KB 240, KBD and CA.

[14] [1914] 1 KB 293, 303.

[15] (1939) 55 TLR 850, 852, CA.

[16] [1951] 1 KB 240, 245–6.

4.11 In *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* Lord Hoffmann described an argument that the parties are presumed not to say anything unnecessarily as a species of argument from redundancy. His Lordship continued:

> I think, my Lords, that the argument from redundancy is seldom an entirely secure one. The fact is that even in legal documents (or, some might say, especially in legal documents) people often use superfluous words. Sometimes the draftsmanship is clumsy; more often the cause is a lawyer's desire to be certain that every conceivable point has been covered. One has only to read the covenants in a traditional lease to realise that draftsmen lack inhibition about using too many words.[17]

In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Design & Construction Pte Ltd*[18] V K Rajah JA, delivering the judgment of the Singapore Court of Appeal, thought that the presumption against redundant words, or surplusage, might be a partial explanation of the reasoning of the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,[19] in the sense that some meaning had to be given to the parenthetical phrase referring to undue influence.[20]

Inconsistency

4.12 It is clear that, despite the best efforts of the author or authors of a legal document, the terms may not be internally consistent.[21] Where this occurs the court must do its best to make overall sense of the provisions. Where the document is contradictory the court will attempt to discern the overall intentions of the parties from the remainder of the instrument in the first instance. So in *Walker v Giles* in 1848 Wilde CJ considered the object of the deed from its recitals and declared:

> as the different parts of the deed are inconsistent with each other, the question is, to which part effect ought to be given. There is no doubt, that, applying the approved rules of construction to this instrument, effect ought to be given to that part which is calculated to carry into effect the real intention, and that part: which would defeat it should be rejected.[22]

The reference to 'real' intention can be treated with circumspection, because the court took its evidence for the parties' intentions from the remainder of the deed. The case is reconcilable with the now clearly articulated objective principle of construction.

[17] [1999] AC 266, 274, HL (NI).

[18] [2008] SGCA 27, [2008] 3 SLR (R) 1029, Sing CA (Chan Sek Keong CJ, Andrew Phang Boon Leong JA, and V K Rajah JA).

[19] [1998] 1 WLR 896, 912. See 1.138.

[20] [2008] SGCA 27, [2008] 3 SLR (R) 1029, para [65].

[21] Determining whether or not there is an internal inconsistency may be no straightforward matter as demonstrated by the decision of the Court of Appeal in *Taylor v Rive Droite Music Ltd* [2005] EWCA Civ 1300 where Chadwick LJ and Neuberger LJ reached opposite conclusions on this threshold question. Latham LJ sided with Neuberger LJ.

[22] (1848) 6 CB 662, 702, 136 ER 1407; see also *Lloyd v Lloyd* (1837) 2 My & Cr 192, 202, 40 ER 613 (Lord Cottenham LC).

4.13 More recently, in such cases, as Steyn J stated in *Pagnan SpA v Tradax Ocean Transportation SA*[23] the approach of the court is 'to reconcile seemingly inconsistent provisions if that result can conscientiously and fairly be achieved'.[24] However, ultimately it may be necessary to prefer one clause to another.

4.14 The courts can be reluctant to do this, as was pointed out by Lord Goff of Chieveley in *Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd*:[25] 'to reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified in circumstances where the two clauses are in truth inconsistent.'[26] Lord Goff suggested that such intervention would be a rare occurrence:

> In point of fact, this is likely to occur only where there has been some defect of draftmanship . . . But where the document has been drafted as a coherent whole, repugnancy is extremely unlikely to occur. The contract has, after all, to be read as a whole; and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction.[27]

The patchwork quilt of the standard form

4.15 In the context of standard form contracts the courts are sensitive to the ongoing process of revision and amendment, and its impact on internal consistency. As long ago as 1779, Lord Mansfield in *Hotham v East India Company* observed:

> This charter-party is an old instrument informal, and by the introduction of different clauses at different times, inaccurate and sometimes contradictory. Like all mercantile contracts, it ought to have a liberal interpretation.[28]

Similarly in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* Lord Hoffmann commented: 'In the case of a contract which has been periodically renegotiated, amended and added to over many years, it is unreasonable to expect that there will be no redundancies or loose ends.'[29]

[23] [1987] 1 All ER 81, QBD; affd [1987] 3 All ER 565, CA. See also *Chiswell Shipping Ltd v National Iranian Tanker Co, The World Symphony and World Renown* [1992] 2 Lloyd's Rep 115, CA.
[24] [1987] 1 All ER 81, 89.
[25] [1989] 2 HKLR 639, PC.
[26] Ibid, 639, 645.
[27] Ibid, 639, 645.
[28] (1779) 1 Dougl 272, 277, 99 ER 178.
[29] [1999] AC 266, 274, HL (NI). See also, in the context of pension scheme deeds which evolve over many years and decades, the 'patchwork quilt' effect, whereby it is increasingly unlikely that the same word or phrase will have the same meaning in different provisions, and the inconsistencies may emerge: *International Power plc v Healy (formerly National Power v Feldon)* [2001] UKHL 20, [2001] PLR 121.

Reading two clauses together

4.16 *Fuller's Theatre and Vaudeville Co Ltd v Rofe*[30] concerned the home of the original Sydney Opera House. The Privy Council, in an advice delivered by Lord Atkinson, construed the landlord's covenants and the tenant's covenants together, so as to qualify the tenant's obligation. Lord Atkinson stated:

> It is well established, . . . that if one finds in a lease a covenant by the lessee not to assign or sublet the demised premises without the consent, in writing, of the lessor first had and obtained, and also a covenant by the lessor that he will not unreasonably withhold his consent to a subletting or such like, the two covenants must be construed together, with the result that the covenant of the lessee will be held to be qualified by that of the lessor.[31]

Same phrase; different meaning

4.17 The same word or phrase may not have a consistent meaning within a particular document.

4.18 In *Watson v Haggitt*[32] the Privy Council, in construing a partnership deed for a law practice, rejected any 'supposed rule of construction that the same meaning ought to be given to an expression in every part of the document in which it appears'.[33] The partnership deed provided by clause 3 for the payment of a salary to each and then the division of 'nett profits' between them. By clause 21 in the event of the death of a partner the survivor was required to pay to the representatives of the deceased one-third of 'nett annual profits' for the succeeding five years. It was held by the Privy Council, affirming the Court of Appeal of New Zealand, that in the former clause the calculation took place after deduction of salaries, but that it took place before deduction of the salary of the survivor in the latter clause.

Ignoring or deleting an inconsistent clause

4.19 The traditional rule was that where two clauses were repugnant the former prevailed and the latter was rejected.[34] It was said to be a mere rule of thumb and to be used only as a last resort.

The traditional rule restated?

4.20 However, as recently as 1922 the rule was restated in the Privy Council in a case involving a building contract. In *Forbes v Git*[35] Lord Wrenbury, delivering the advice of the Privy Council, stated:

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[30] [1923] AC 435, PC.
[31] Ibid, 435, 439–40.
[32] [1928] AC 127, PC.
[33] Ibid, 127, 130–1 (Lord Warrington, delivering the advice of the committee).
[34] Norton, 89; citing Shepherd's Touchstone, 88.
[35] [1922] 1 AC 256, PC.

> The principle of law to be applied may be stated in few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed prevails over the later. Thus if A covenants to pay 100*l*. and the deed subsequently provides that he shall not be liable under his covenant, that later provision is to be rejected as repugnant and void, for it altogether destroys the covenant. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole. Thus if A covenants to pay 100*l*. and the deed subsequently provides that he shall be liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute covenant to pay is controlled by the words qualifying the obligation in manner described.[36]

4.21 However, this was mere *obiter dicta* so far as the traditional blunt instrument of the 'first clause prevailing' rule is concerned, as the Judicial Committee held that there was no repugnancy in that case. It is submitted that the 'first clause prevails' no longer represents good English law.[37]

The modern approach

4.22 The modern principle is that the court will treat as repugnant a clause which is inconsistent with the main purpose of the contract, or with the intentions of the parties objectively ascertained from the whole of the contract in its relevant contextual setting.

For example, in *Home Insurance Company of New York v Victoria-Montreal Fire Insurance Company*[38] the Privy Council was faced with a reinsurance policy, effectively copied out from the underlying fire insurance policy, which was, in the words of Lord Macnaghten, delivering the Advice, 'so awkwardly patched and so carelessly put together'. Many of its provisions were unnecessary in a reinsurance policy, inconsistent with the reinsurance slip, and on occasion in direct conflict. In those circumstances the Privy Council robustly rejected as inapplicable a limitation clause limiting claims to within one year of the fire. Whilst such a clause was appropriate for fire policies it was repugnant in reinsurance where the reinsured had to await the direct loss being ascertained between parties over whom it had no control and in proceedings in which it could not intervene.

4.23 A leading case is the decision of the House of Lords in *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd*[39] where in construing a charterparty the court ignored a provision that the contractual terms did not apply to charterparties.[40]

[36] [1922] 1 AC 256, 259.
[37] Compare G Dworkin, *Odgers' Construction of Deeds and Statutes* (5th edn, 1967), 72 ('totally unscientific').
[38] [1907] AC 59, PC.
[39] [1959] AC 133, HL, 162 (Lord Morton),178 (Lord Keith), 186 (Lord Somervell).
[40] See further 8.16.

Here the saving principle of *ut res magis valeat quam pereat* was deployed to give effect to the contract by correcting inappropriate expressions or by ignoring meaningless provisions.

Bills of Exchange Act: words and figures

Where there is discrepancy between words and figures in a negotiable instrument the words prevail: section 9(2) of the Bills of Exchange Act 1882. **4.24**

The Constituent Parts of a Contract

In a well-drafted contract the scheme is likely to follow a time-honoured form. The initial 'premises' will set forth the parties and contain any recitals. The recitals set out the general background, including reference to any prior deeds or contracts. This initial section may also set out the consideration.[41] Often in modern instruments, an elaborate definitions or interpretation clause is the first provision. There then follow the operative provisions of the contract. Detailed provisions to supplement the operative clauses are often found in schedules at the end of the instrument. **4.25**

Recitals

The recitals sit at the head of a deed or contract usually just after the parties are identified. Recitals are often identified as such, or prefaced by 'WHEREAS'. The purpose of recitals is, in the words of Sir William Blackstone, to set out 'such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded'.[42] That envisages by way of background a mixture of prior transactions and conveyances and factual circumstances, including how the parties are circumstanced immediately prior to the obligations they are undertaking in the body of the deed or contract. It is hornbook law that it is inappropriate to include any obligation or other operative provision in the recitals.[43] The recitals have some role to play in the construction of the operative provisions of the deed or contract. They are an obvious source of readily accessible 'background' or 'factual matrix'. A very early authority is *Moore v Magrath*, where Lord Mansfield stated: 'The deed begins with the preamble usual in all settlements; that is, by reciting what it is the grantor intends to do; and that, like the preamble to an Act of **4.26**

[41] W Blackstone, *Commentaries on the Laws of England* (1st edn, 1765–1769) (Univ of Chicago reprint edn, 1979) ('Bl Comm') II 298.

[42] Bl Comm, II 298.

[43] See K Lewison, *The Interpretation of Contracts* (4th edn, 2008), para 10.15 for examples (all from the nineteenth century) of occasions when the courts have construed recitals as imposing obligations on parties. It follows that such provisions, on their proper construction, are no longer recitals.

Parliament, is the key to what comes afterwards.'[44] However 'a recital in an instrument can only assist in the construction of the substantive terms thereof, it cannot override or control the operation of the substantive terms, where such terms are clear and unambiguous'.[45]

4.27 Nineteenth-century authority limits the role of recitals in construction. In *Walsh v Trevanion*[46] Patteson J stated:

> [W]hen the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed. On the other hand, when those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the true intention of the parties, and to fix the true meaning of those words.[47]

4.28 *Re Moon Ex P Dawes*[48] describes three contexts and whether the recitals may be relevant to construction in each. Lord Esher MR stated:

> Now there are three rules to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part will prevail. If both the recitals and operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.[49]

It is obvious that to this extent recitals are subservient to operative clauses.[50]

Section 58 of the Law of Property Act 1925

4.29 Section 58 of the Law of Property Act 1925 provides that where an instrument is expressed to be supplemental to a previous instrument the new instrument shall be given effect to as if it contained a full recital of its predecessor.

Recital as estoppel

4.30 For the potential operation of recitals in the context of estoppel by deed see Chapter 18.[51]

[44] (1774) 1 Cowp 9, 12, 98 ER 939. For discussion see H Beale (ed), *Chitty on Contracts* (26th edn, 2004 and supplements), para 12–066; G Andrews QC and R Millett QC, *Law of Guarantees* (4th edn, 2005), paras 4–008 and 4–009 (guarantees and indemnities).

[45] *The Management Corporation Strata Title Plan No 1933 v Liang Huat Aluminium Ltd* [2001] BLR 351, para [7], Singapore CA (L P Thean JA and Lai Kew Chai JA).

[46] (1850) 15 QB 733, 117 ER 636, QB.

[47] Ibid, 733, 751.

[48] (1886) 17 QBD 275, CA.

[49] Ibid, 275, 286.

[50] For consideration of the relevance of recitals, both incorporated and discarded drafts, see *Yoshimoto v Canterbury Golf International Ltd* [2000] NZCA 350, [2001] 1 NZLR 523; revsd [2002] UKPC 99.

[51] At 18.28.

Definitions

4.31 Definitions clauses or interpretation clauses are often significant features of modern contracts. In some instruments, such as traditional life assurance policies, the definitions clause often dwarfs the other operative provisions. Such clauses are often of assistance, but even defined terms must yield to wider context or contrary intention. Lord Steyn has stated extra-judicially: 'Even an agreed definition is of limited use: it takes no account of contextual requirements.'[52]

4.32 The use of an interpretation clause in a standard form of mortgage to render joint mortgagors jointly and severally liable for their individual as well as joint debts provoked a difference of opinion in the House of Lords in *AIB Group (UK) Ltd v Martin*.[53] The majority gave full effect to the interpretation clause so as to enlarge the operative provision to embrace surety obligations. Lord Millett in a near-dissent suggested that a more restrictive approach was available:

> The fact that the question concerns the application of an interpretation clause is also significant. The purpose of such a clause is twofold. It shortens the drafting and avoids unnecessary repetition; and it enables the form to be used in a variety of different situations. It is not the purpose of such a clause to enlarge the parties' rights and obligations beyond those provided by the operative provisions by imposing, for example, a secondary liability in addition to a primary liability as principal debtor. The application of such a clause is not merely a question of construction. If it is capable of being applied to the operative provisions in more than one way, it should be applied in a way which serves its purpose rather than in a way which extends the parties' obligations beyond those contemplated by the operative provisions. Of course, an interpretation clause may have this effect; but if so it should do so plainly and unambiguously.[54]

4.33 Lord Millett preferred a distributive construction, but this was rejected by the other members of the House of Lords.[55] The other Law Lords gave full effect to the interpretation clause, including the extension of secondary liability. The majority view treated the contract holistically, and gave equal effect to all the clauses. Lord Millett's near-dissent, which treated definitions clauses as second-class clauses, to be construed strictly against the party relying on it, should be treated with caution.

In *Chartbrook Ltd v Persimmon Homes Ltd*[56] Lord Hoffmann gave the following guidance on contractual definitions, drawing an explicit analogy with definitions in statutes:

> [T]he contract does not use algebraic symbols. It uses labels. The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition. In such

[52] Lord Steyn, '*Pepper v Hart*; A Re-examination' (2001) 21 OJLS 59, 60.
[53] [2001] UKHL 63, [2002] 1 WLR 94.
[54] [2001] UKHL 63, [2002] 1 WLR 94, para [8].
[55] See 8.35.
[56] [2009] UKHL 38, [2009] 1 AC 1101.

cases the language of the defined expression may help to elucidate ambiguities in the definition or other parts of the agreement. [57]

In that case the trial judge had given insufficient weight to the contractual definitions which made it clear that a minimum sum was intended.

Deleted words

4.34 For discussion of deleted words see Chapter 5.

[57] [2009] UKHL 38, [2009] 1 AC 1101, para [17]; citing *Birmingham City Council v Walker* [2007] UKHL 22, [2007] 2 AC 262, 268 (statutory definitions). See also Lord Walker at para [94]: 'There is a good deal of authority, if authority is needed, to give weight to the natural meaning of words in a definition. In relation to statutory definitions there are the observations of my noble and learned friend, Lord Hoffmann, in *Macdonald v Dextra Accessories Ltd* [2005] 4 All ER 107, para 18 and *Birmingham City Council v Walker* [2007] 2 AC 262, para 11 and Lord Scott of Foscote in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, paras 82–83. I would apply the same principle to a definition in a commercial contract.'