

**TERRA FIRMA CHAMBERS COMMERCIAL LAW CONFERENCE**  
**INTERPRETATION OF COMMERCIAL CONTRACTS**

1. Historical background

The historical position regarding interpretation of written contracts was that once reduced to writing, any dispute arising from the contract required to be resolved within the four corners of the contract itself. It is expressed as follows in Gloag (2<sup>nd</sup> edition, 1929) touching on both parole evidence and extrinsic evidence generally:

“The general rule undoubtedly is that where parties have reduced the terms of their agreement into writing, the obligations they have undertaken must be ascertained from the terms of that writing without the aid of any extrinsic evidence. Parole evidence that their real intention was other than that so expressed is inadmissible, either when offered as explanatory of the writing, or with the object of proving that the obligations there undertaken were not those by which they intended to be bound.”

That statement of the law derives from the leading case at the time that Gloag was writing. In *Inglis v Buttery & Co*<sup>1</sup> the following rationale for the rule was stated by the Inner House with which the House of Lords subsequently agreed:

“Where parties agree to embody, and do actually embody, their contract in a formal written deed, then in determining what the contract really was and really meant, a Court must look at the formal deed and to that deed alone. This is only carrying out the will of the parties.”

The English influence on Scots Law has since meant that the Scottish courts seek to ascertain on an objective basis what the parties have said, rather than what they intended to say. The inquiry of the courts entails an investigation of the ordinary and natural meaning that the words used actually conveyed.

On that basis, the courts are only allowed to look at circumstances surrounding the conclusion of the contract where the words are capable of more than one interpretation or

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<sup>1</sup> 1877 5R 58

there are latent ambiguities, that is, the words or expressions deployed in the written commercial contract appear to be clear, but the surrounding circumstances point to an ambiguity in the words.<sup>2</sup>

## 2. Developments since then

The main statutory alteration to that common law position was brought about by the Contract (Scotland) Act 1997 which was introduced to remedy the “three bad rules of contract.” Section 1 of the Act provides as follows:

### **Extrinsic evidence of additional contract term etc.**

(1)Where a document appears (or two or more documents appear) to comprise all the express terms of a contract or unilateral voluntary obligation, it shall be presumed, unless the contrary is proved, that the document does (or the documents do) comprise all the express terms of the contract or unilateral voluntary obligation.

(2)Extrinsic oral or documentary evidence shall be admissible to prove, for the purposes of subsection (1) above, that the contract or unilateral voluntary obligation includes additional express terms (whether or not written terms).

(3)Notwithstanding the foregoing provisions of this section, where one of the terms in the document (or in the documents) is to the effect that the document does (or the documents do) comprise all the express terms of the contract or unilateral voluntary obligation, that term shall be conclusive in the matter.

(4)This section is without prejudice to any enactment which makes provision as respects the constitution, or formalities of execution, of a contract or unilateral voluntary obligation.

It can be seen that since 1997, it has been permissible by statute to look beyond the mere written terms of a contract in order to prove additional express terms, whether committed to writing or not. It is also possible to contract out of that possibility in terms of s 1(3) to include an “entire agreement clause” stating that the agreement constitutes the whole terms of a contract. Such a term is effective to prevent enquiry beyond the written document for any further contract terms.

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<sup>2</sup> *Wilson v Eagle Star Insurance* 1993 SLT 938; Cabrelli, Commercial Agreements in Scotland, Law and Practice.

Apart from that, the law on Scotland was shaped by a new approach expounded by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society*<sup>3</sup> (“ICS”). In that case the ICS was established to provide a compensation fund to certain persons who had suffered heavy losses due to the advice of independent financial advisors who had become insolvent. To qualify for the scheme, investors had to assign all rights in subrogation, subject to a reservation, It was the extent of that reservation and therefore the extent to which investors still retained a right of action despite being compensated by ICS that led to the action and the opportunity for the House of Lords to consider the rules relating to the construction of written contracts and their provisions.

In reviewing the relevant authorities, Lord Hoffman enunciated the following legal principles by which contractual documents are to be construed:

- (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation at the time of the contract.
- (2) The background or surrounding circumstances include absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man, so long as it was reasonably available to the parties.
- (3) The law *excludes* from the admissible background the previous negotiations of the parties and any declarations of subjective intent.
- (4) The meaning which a document would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter for dictionaries; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even to conclude that the parties must, for whatever reason, have used the wrong words or syntax.
- (5) The rule that words should be given their natural and ordinary meaning reflects the common sense proposition that it is not easily accepted that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nonetheless conclude from the background that something must have gone

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<sup>3</sup> [1998] 1 WLR 896.

wrong with the language, the law does not require the court to attribute to the parties an intention which they plainly could not have had.

Accordingly, this approach represented a fundamental shift in the approach to contractual interpretation. Ambiguity was no longer stated to be a pre-requisite of an investigation into the factual matrix in which a contract had been concluded. Such an investigation, according to Lord Hoffman, is an indispensable part of the process of understanding what a contract means in all cases. The background enables a judge to determine the intended meaning of the expressions actually used in the contract. Moreover, the actual words used do not necessarily govern the meaning to be given to the contract. The background can let the judge decide that the parties used the wrong words and he or she may read them in such a way as to give the parties' expressions the meaning they must have intended in the light of that background.

## 2.1. Pre-contractual negotiations

The above approach has been re-affirmed in the more recent supreme court case of *Chartbrook v Persimmon Homes*<sup>4</sup> and in the yet more recent case of *Rainy Sky SA v Kookmin Bank*.<sup>5</sup> In addition, one of the important limitations as stated by Lord Hoffman in *ICS* was also upheld unanimously by the Supreme Court in *Chartbrook*, namely that despite their potential relevance as background to the parties' agreement, pre-contractual negotiations are excluded from consideration by the court in interpreting contracts as a matter of law. In doing so, the Supreme Court upheld the decision in *Prenn v Simmonds*<sup>6</sup> and indeed a later part of the quote referred to above in *Inglis v Buttery & Co.* In *Prenn*,<sup>7</sup> Lord Wilberforce explained the rule as follows:

“The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience...It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties positions with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records the consensus. If the previous documents use different expressions, how does the construction of those

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<sup>4</sup> [2009] 1 AC 1101.

<sup>5</sup> [2011] UKSC 50, where it was also stated, per Lord Clarke that “if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and reject the other.”

<sup>6</sup> [1971] 1 WLR 1381 (HL).

<sup>7</sup> At pages 1384-5.

expressions, itself a doubtful process, help in the construction of the contractual words? If the same expressions are used, nothing is gained in looking back: indeed, something might be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to. It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial or business object, of the transaction, objectively ascertained, may be a surrounding fact.”

In *Chartbrook*, Lord Hoffman stated that evidence of prior negotiations should be excluded on “pragmatic grounds”. Nevertheless, he accepted that such evidence could be used for purposes other than interpretation, such as establishing that a fact relevant to the background was known to the parties. One might think, that this is a fine distinction which could easily blur what has otherwise been stated as a clear and absolute exclusion in the interpretation of contracts. If for example, a judge is asked to consider evidence of a superseded offer in the course of negotiations in order to demonstrate a fact, merely by way of background, and not as an aid to interpretation, it might be difficult to conceive that the fact of the previous offer can realistically be put out of his or her head for anything other than that limited purpose.

### 3. The Scottish approach

Scottish courts have traditionally confined themselves to what is known as a commercial or purposive approach to interpretation of commercial contracts – seeking to give effect to the actual words used in the light of the circumstances surrounding the parties at the time that they entered into their contract. It seems reasonably clear, however, that the Scottish Courts have accepted the Hoffman approach: In the *ICS* case, Scottish Law Lords, Hope and Clyde agreed with Lord Hoffman’s speech while in *Chartbrook*, Lords Hope and Roger also agreed with Lord Hoffman. That is not to say, that the approach is entirely without controversy, as on one view, it does appear to involve the possibility of re-working the text of a contract which is not permissible and perhaps, in relation to express terms, potentially blurs the distinction between interpretation and rectification of a contract in terms of ss 8 and 9 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985.

Be that as it may, the leading case in Scotland on how to interpret contracts is usually taken to be *Bank of Scotland v Dunedin Property Investment Company*<sup>8</sup> where the Hoffman approach was cited with approval. The approach of the Scottish Courts was stated to be to start with the words used but avoiding interpretations in conflict with business reality or producing absurd results. The facts of that case were that the Bank and Dunedin entered into a loan stock deed, in which a clause provided that Dunedin had a right, on giving six months' notice, to purchase the stock but "subject to Bank of Scotland being fully reimbursed for all costs, charges and expenses incurred by it in connection with the stock." The loan was for a duration of ten years, at a fixed rate of interest. In order to hedge itself against fluctuations in interest rates in the market, the Bank entered into a further swaps contract with another bank. Some years into the loan, Dunedin gave the Bank notice that they wished to purchase the debenture stock and so terminate the fixed term loan early. The Bank then sought payment of the breakage charge which it was obliged to pay the other bank for prematurely terminating the swaps agreement, on the basis that the payment was a cost incurred "in connection with" the stock in terms of the contract with Dunedin.

Reversing the Lord Ordinary, the First Division held that the phrase "in connection with" was not limited to such matters as drafting, registration or purely administrative charges, but also included the breakage charge which it was obliged to pay the third party bank. A crucial factor in the decision was the fact that Dunedin were aware at the time of the negotiation of the loan stock agreement that the Bank intended to undertake a swap arrangement to hedge the agreement. As noted, the Hoffman approach was affirmed by the Inner House: Indeed Lord Kirkwood stated that if the condition had been construed in isolation without reference to any of the surrounding circumstances established by the evidence, it would have been difficult to find the Bank entitled to recover the cost of breaking the swap agreement as a cost, charge or expense incurred by the Bank "in connection with the stock." Lord President Rodger, however approached the matter in a nuanced way albeit consistent with ICS. He found it:

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<sup>8</sup> 1998 SC 657.

“helpful to start where Lord Mustill began when interpreting the reinsurance contracts in *Charter Reinsurance Co Ltd v Fagan*<sup>9</sup> at p 384B-C: ‘I believe that most expressions do have a natural meaning, in the sense of their primary meaning in ordinary speech. Certainly, there are occasions where direct recourse to such a meaning is inappropriate. Thus, the word may come from a specialist vocabulary and have no significance in ordinary speech. Or it may have one meaning in common speech and another in a specialist vocabulary; and the context may show that the author of the document in which it appears intended it to be understood in the latter sense. Subject to this, however, the inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used.’ I begin therefore, not by enquiring into the state of knowledge of the parties to the contract, but by asking myself what is the ordinary meaning of the words ‘in connection with’ in Condition 3.”

Having reached a particular understanding of the words in issue on the basis that in their ordinary meaning the words “in connection with” while imposing a certain restriction on the costs which fell within the condition considered nonetheless that they brought in costs over a wider area. Then by reference to the commercial background, including the parties’ knowledge that the Bank would have to engage in a further hedging transaction as a direct consequence of the agreement with Dunedin, the Lord President confirmed that the phrase used would encompass the costs associated with early breakage of the swap arrangement.

The other Scottish case of significance, which in fact went all the way to the Supreme Court, is *Multi-Link Leisure Developments Ltd v North Lanarkshire Council*<sup>10</sup> where there was arguably a re-working of the terms of the contract to achieve a commercially sensible meaning.

The facts of the case are that Multi-Link entered into a 50 year lease over a 34ha site near Cumbernauld with North Lanarkshire Council as Landlords. At the time the lease was entered into, it was envisaged by the parties that Multi-Link would develop the land as a golf course. Entry was taken on 1 June 1999 and a pay and play course was duly developed within five years of that date as stipulated. The lease contained an option for Multi-Link to purchase the land during the currency of the lease on a basis set out within it. The relevant part of the option clause in the lease provided that the purchase price under the option should be “equal to the full market value of the subjects hereby let at the

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<sup>9</sup> [1997] AC 313.

<sup>10</sup> 2011 SC (HL) 53.

date of entry for the proposed purchase (as determined by the landlords) of agricultural land or open space suitable for development as a golf course.” If the option was exercised during the first year of let, the option price was agreed at £130,000.

As at the date of entry, neither party to the lease contemplated that the site might be used for residential development. However, the site was subsequently identified as being an area with potential for housing-led expansion in the 2008 North Lanarkshire Finalised Draft Local Plan. Multi-Link exercised their option to purchase on 8 October 2007 by serving a formal notice on the Council seeking entry one year later on 8 October 2008. During court proceedings, Multi-Link contended that the market value of the subjects was £500,000, relying in particular on the words “of agricultural land or open space suitable for development as a golf course.” The Council as landlords on the other hand relied upon the words “full market value” which they contended included an increase in value which may be attributable to the fact that it was likely that planning permission would be granted for housing development. The purchase price that they sought on that basis was £5.3m and they served a notice on Multi-Link seeking payment of that sum within 28 days in exchange for a marketable title, failing which they would rescind the option contract. Multi-Link refused to do so and on 25 February 2009, the Council served a formal notice of rescission on the option contract, thereby purporting to bring the option to purchase to an end. Multi-Link went to the Court of Session seeking declarator that the value of the subjects was only to be assessed by reference to the use of them as a golf course. The Council counterclaimed and sought declarator that the option clause had been validly rescinded, that it had been spent, and could not be exercised during the remainder of the lease.

Lord Glennie agreed with Multi-Link, finding that the wording of the clause was clear and that valuation should only be by reference to development as a golf course and granted the declarator sought by them. The Council reclaimed to the Inner House who overturned that ruling, finding that considerations that might be relevant to market value were not to be ignored unless there were express words to that effect and granted the declarators sought by the Council instead. Multi-Link appealed to the Supreme Court, who unanimously refused their appeal.

The issue in the case centred around the conflict between the first part of the clause (“full market value”) and the assumptions and disregards in second part of the clause

(“agricultural land or open space...for a golf course”). The Supreme Court held that it had to recognise the poor quality of the drafting and to try to give a sensible meaning to the clause as a whole which takes account of the factual background known to the parties at the time they entered into the lease. The commercial or business object of the provision had to be taken into account and Multi-Link’s construction, if upheld, would provide them with a substantial windfall at the expense of the Council. It held that if reasonable commercial parties directed their minds to the benefits which would accrue to the Multi-Link if the option was exercised, they would have agreed that the option price was the full market value of the land, taking into account *any* development potential. That is what the parties must have been taken to have agreed in this case. Lord Rodger pointed out that the clause contained no instructions to ignore any other factors which might be relevant to the value of the golf course. He held that the valuation sought by Multi-Link would be an unusual and artificial approach, given that there was no limit on the use to which the land could be put once the option had been exercised.

Lord Hope expressed the Court’s approach as follows:

“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.”

Nonetheless, Lord Hope later went on to consider that the clause dealing with “assumptions and disregards” looked as if it had been borrowed from another lease without regard to the context. Accordingly, while the words used were the normal starting point, with drafting as such poor quality in this case, it was legitimate to try and give a sensible meaning to the clause as a whole. Account should be taken of the factual background known to both parties at the time of contracting and the aim should be to achieve a result consistent with business common sense.

There have been numerous other authorities prior to *Multi-Link* which each add a particular facet to the interpretation of commercial contracts in Scotland. One of these was *Emcor Drake and Scull Ltd v Edinburgh Royal Joint Venture*<sup>11</sup> where Lord Drummond Young affirmed the rule that it is impermissible to have reference to contractual negotiations prior to conclusion of the contract for the reasons summarised above. He, in common with other Outer House judges took the opportunity to set out certain canons of construction for commercial contracts. Likewise Lord Clarke in *City Wall Properties (Scotland) Ltd v Pearl Assurance Plc*<sup>12</sup> took the opportunity to do so in that case where he also held that the provisions in question were not ambiguous and were ordinary words used in the ordinary way and had therefore to be given their ordinary meaning with nothing more by way of interpretation. With regard to the issue of the risk of the courts being tempted to effectively re-write contracts in order to give them commercial sense, Lord Clarke observed that it is not the function, far less the duty of the court to rescue a party or his advisors from what might be regarded as a bad bargain. That comment has implications for the more general nature of what was said by Lord Diplock in *The Antaios Compania Naviera v Salen Rederierna AB*,<sup>13</sup> where he stated the oft-quoted phrase that: “if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”

The sentiment of Lord Clarke regarding it not being legitimate for the courts to rescue parties from bad bargains by rewriting them in more favourable commercial terms in the name of interpretation was echoed in the case of *Forbo-Nairn v Murrayfield Properties Ltd*<sup>14</sup> the facts of which were as follows:

The dispute concerned the sale of four acres of land in Kirkcaldy. In addition to the sale of the subjects themselves, the missives also dealt with an area of land to be retained by the sellers to the North of the sale site and a further area of adjoining land which the purchasers might also have purchased at a later date. A clause was inserted to the effect that the purchasers, or any of their nominees or subsidiaries, were prohibited from developing the subjects or any part of the adjoining land for housing. To that end, the purchasers were required to draft and execute a deed of conditions inserting a burden over

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<sup>11</sup> 2005 SLT 1233.

<sup>12</sup> 2004 SC 214 at page 229.

<sup>13</sup> [1985] AC 191 at 201.

<sup>14</sup> [2009] CSIH 94.

the subjects and the adjoining land to give effect to that restriction in use. The sellers sought and obtained declarator from the Court that the obligation was a real burden which ran with the land. The purchasers argued that the obligation was only a personal one which affected them and their nominees or subsidiaries only and not successors in title, which argument was rejected by the Court. They reclaimed against that decision to the Inner House. Reference was made to *Emcor Drake and Scull v Edinburgh Royal Joint Venture* and its seven canons of construction in relation to commercial contracts and which formed the basis of the original Court decision. At appeal, the Inner House approved that decision but formed its own determination on a more straightforward basis. By reference to *Dunedin*, it held that if the meaning of the whole clause of a contract is plain by being given its ordinary meaning, then the matter finishes there without the need to consider the other canons of construction. They only come into play if there is an ambiguity or uncertainty or if there is a mistake in the contract which is readily identifiable. In this case, references to “restriction on use” as that expression is understood in conveyancing and planning terms does not focus on the parties to the bargain but, rather, it runs with the land and therefore includes successors in title.

If that were not the case, the purchasers could easily avoid the obligation by transferring title to a third party. That would not be a commercially sensible interpretation and cannot have been intended by the parties to the transaction. Such a restriction was of course a great disadvantage to the purchasers, but as the Court also recognised in *Emcor, City Wall Developments* and also *Credential Bath Street Ltd v Venture Investment Placement Ltd*,<sup>15</sup> it must be alive to the position of both parties to the contract and accept that a provision may be the result of compromise or that one party may simply have made a bad bargain. The Court must give effect to the parties’ bargain and cannot substitute a different one from that which the parties have made.

In *Luminar Lava Ignite v Mama Group*,<sup>16</sup> ICS, Chartbrook, City Wall and Dunedin amongst others were all considered.

The dispute concerned the sale of a music venue in Lothian Road, Edinburgh by Luminar who wished to continue operating a discotheque venue at nearby Tollcross after the sale. In the sales particulars, Luminar indicated that it did not wish to sell to a nightclub or pub

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<sup>15</sup> [2007] CSOH 123.

<sup>16</sup> 2010 SC 310.

operator. However when Mama Group plc (“Mama”) showed an interest in purchasing the property, the parties entered into a contract of sale which included a clause intended to restrict the extent to which Mama could use the Lothian Road premises as a discotheque venue (i.e. a venue for dancing to recorded music) in competition with that being operated by Luminar a short distance away. The germane part of the clause read as follows: “Mama and Purchaser jointly and severally undertake to Luminar not to use the [Lothian Road premises] for late night entertainment in *direct competition on a like for like basis with the discotheque business* of Luminar as carried out as at 1 March 2008.” Following sale, the Lothian road premises were operated as a live music venue but it was also subsequently advertised by the owners as being a nightclub/discotheque venue which Luminar considered to be in breach of the contractual restriction contained within the missives of sale. Accordingly, they obtained an interim interdict preventing the use of the Lothian Road premises as a discotheque venue while the Tollcross premises were so operated, that is, on a Wednesday, Friday and Saturday night between 10pm and 3pm. When the case came before a commercial judge for the hearing of evidence, he refused to allow evidence to be taken into account regarding the pre-contractual negotiations leading to the non-compete agreement. Thereafter, he recalled the interdict, finding on the basis of the remaining evidence led that the activities carried out at the two venues were not “like for like” and therefore there had been no breach of the agreement.

Luminar reclaimed to the Inner House where the terms of the clause were scrutinised. At first blush, it would appear to have been a case for the application of the principles set out in the *Chartbrook*, that is to say, that the exclusionary rule applies, preventing the leading of evidence concerned with pre-contractual negotiations, except where they clarify the surrounding circumstances to the final contract. Interestingly, however, in the leading judgment, Lord Hodge found himself struck by how little each party to the transaction seemed to have known about what the other party was doing or intended to do. He remarked that “the parties have led very little evidence about what was the common knowledge of each other’s general business, but that, on the Lord Ordinary’s findings in fact, does not amount to much.”

He went on to remark that the clause in question was highly ambiguous and that “the phrase which the parties used seemed to me to be a recipe for litigation.” The difficulty was that that both interpretations urged by each party were capable of being commercially sensible. On balance, Lord Hodge decided that the interpretation contended by Luminar

was closer to what would be understood by a reasonable businessman to be the commercial intention of the parties. Consequently, that could be seen as a very narrow judgment where not only were the terms of the contract ambiguous, but also any exploration into the background facts or factual matrix lent no assistance to the court in correctly interpreting the contract. Ultimately, it was the most commercially sensible interpretation which prevailed, albeit by a majority of 2:1.<sup>17</sup>

Taking all of these strands together, the Scottish Law Commission in its discussion paper on Interpretation of Contract Law<sup>18</sup> published in February of this year, seeks further to adumbrate certain principles of interpretation. These are as follows:

1. The words used by the parties must generally be given their ordinary meaning.
2. A contractual provision must be construed in the context of the contractual document or documents as a whole.
3. In construing a contract drafted by lawyers, the words may be expected to have been chosen with care and to be intended to convey the meaning which the words chosen would convey to a reasonable person.
4. The process of construction is objective, according to the standards of a reasonable third party aware of the commercial context.
5. Regard is to be had to the circumstances in which the contract came to be concluded to discover the facts to which the contract refers and its commercial purposes objectively considered, although this is limited to matters known or reasonably to be known by both parties.
6. Where more than one construction is possible, the commercially sensible construction is taken to be what the parties intended.
7. The court must not substitute a different bargain from that made by the parties.

#### 4. Conclusion

While there are some areas of uncertainty, it can probably be said that the Scottish courts have now developed the law on the interpretation of contracts to a position of reasonable

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<sup>17</sup> See *Mannai Investments v Eagle Star Insurance* [1997] AC 749.

<sup>18</sup> Discussion paper No. 147.

clarity on a number of points. Judges are clear that an objective approach is to be taken to the interpretative task in which, however, the parties' words and expressions can be considered in the context of the document in which they appear and in the light of the admissible and relevant surrounding circumstances. Pre-contractual negotiations and parties' conduct subsequent to the formation of their contract cannot be used as direct evidence of their intention, although they may be referred to for evidence of the surrounding circumstances known to both parties at the time of contracting. The restriction on use of pre-contractual negotiations is based on pragmatic rather than principled grounds, since the evidence is excluded even if it is relevant. The basis for excluding evidence of subsequent conduct appears to be based on the idea that admitting it would lead to the meaning of the contract varying over time.

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**TFC COMMERCIAL LAW CONFERENCE**

**INTERPRETATION OF COMMERCIAL CONTRACTS  
THE UP TO DATE POSITION**

**MAURICE O'CARROLL**

**14 NOVEMBER 2011**