

Common Sense Principles of Contract Interpretation (and how we've been using them all along)

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Abstract—This article proposes to take seriously Lord Hoffmann's influential restatement of the rules of contractual interpretation. Consequently, it seeks to investigate the 'common sense principles by which any serious utterance would be interpreted in ordinary life', with the aid of theoretical insights from psycholinguistics, pragmatics and the philosophy of language. Such an investigation provides a principled explanation for some of the key features of our legal rules of interpretation, such as the objective principle and the importance of the factual matrix and the parties' reasonable expectations. It is shown that the intended meaning of a contractual document goes far beyond the ordinary linguistic meaning of the document, and even far beyond the information that crossed the drafter's mind. The common sense principles are then used to explain some key cases on the interpretation of contracts.

1. *Introduction*

The 1997 decision in *Investors Compensation Scheme v West Bromwich Building Society* included a restatement by the House of Lords of the principles of contract interpretation, Lord Hoffmann (speaking for the majority of the House of Lords) stating that a 'fundamental change' had overtaken the principles for interpreting contractual documents.¹ Those principles, he said, have now been assimilated into 'the common sense principles by which any serious utterance would be interpreted in ordinary life'.²

In this article I propose to take Lord Hoffmann seriously, examining how we interpret ordinary serious utterances in order to discover exactly what these common sense principles are, and how they can be applied to the interpretation of contractual documents. Part of this investigation shadows work that has

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¹ [1998] 1 WLR 896, hereafter referred to as *ICS*.

² *Ibid* at 912. Despite some criticism, Lord Hoffmann's approach has been affirmed by the House of Lords in *BCCI v Ali* [2001] 2 WLR 735.

already been done by psychologists, philosophers and linguists,³ work with which Lord Hoffmann was almost certainly familiar.⁴ As well as outlining in brief the basic common sense principles of interpretation, they will be used to explain a few key contractual interpretation cases.⁵ Indeed, we will see that, thanks to our judges—a group of amateur but experienced psychologists, philosophers and linguists—the common sense principles are already well reflected by our existing law.

2. *The Meaning of Communications and Other Actions*

Interpretation is the discovery of the meaning of something, but what is meaning? A natural phenomenon can have a meaning—sometimes called a ‘natural meaning’—and can be interpreted by gleaning an understanding of the phenomenon (its causes and operation) so as to draw conclusions from its existence, for example ‘spots mean measles’ and ‘smoke means fire’.⁶ Phenomena brought about by rational beings (this rationality being an important assumption on the interpreter’s part) may have been initiated deliberately (another assumption on the interpreter’s part).⁷ In such cases, the purpose that the rational agent intended to achieve is a part of the natural meaning, and interpretation is then a matter of guessing what the actor believed about the world and hence to what end the phenomenon was intended to be a means.⁸

When the actor’s apparent purpose is communication, then (it appears) the actor designed and performed the actions being interpreted for the particular purpose of their being interpreted. The meaning that is gleaned from communicated phenomena, which we will call utterances, is termed the ‘nonnatural

³ Useful works that introduce the relevant psycholinguistics include J. Aitchison, *Words in the Mind*, (2nd edn, 1994), H.H. Clark and E.V. Clark, *Psychology and Language: An Introduction to Psycholinguistics* (1977); and H.H. Clark (ed.), *Arenas of Language Use* (1993). Starting-points for investigating the relevant linguistic philosophy might be ch 3 in B. Hale and C. Wright (eds), *A Companion to the Philosophy of Language* (1999) and P. Grice, *Studies in the Way of Words* (1989), as well as J. Searle’s books. A good introduction to the relevant pragmatics is provided by D. Blakemore, *Understanding Utterances: An Introduction to Pragmatics* (1992) and by A. Akmajian, R.A. Demers, A.K. Farmer and R.M. Harnish, *Linguistics* (2001) at ch 9.

⁴ Lord Hoffmann commenced tenure as a don at University College, Oxford, in 1960, about the time of the highpoint of Oxonian linguistic philosophy. The Oxford philosopher John Austin, whom Lord Hoffmann recently cited in his opinion in *Amoco (UK) Exploration Company v Teesside Gas Transportation Ltd* [2001] UKHL 18; [2001] 1 All ER (Comm) 865, died that year. See further M. Chambers ‘Philosopher-Judge: Lord Hoffmann’s Impact on the Law’ (1997) 18 *Commercial Lawyer* 24.

⁵ The nitty-gritty of the legal rules and cases on contractual interpretation can be found in Kim Lewison’s invaluable (although no longer up-to-date) work *The Interpretation of Contracts* (2nd edn, 1997), hereafter referred to as Lewison. See also M. Furmston (ed.), *The Law of Contract* (1999) at ch 3: Contents; and A.G. Guest, in H.G. Beale (ed.), *Chitty on Contracts* (28th edn, 1999) at ch 12: Express Terms, and the two supplements to the 28th edition, hereafter referred to as *Chitty*.

⁶ The concepts of ‘natural’ and ‘nonnatural’ meaning were identified by the post-Platonic ancient Greeks. See more recently P. Grice, ‘Meaning’ (1957) in *Studies in the Way of Words* (1989).

⁷ Donald Davidson calls this presumption of rationality the ‘Principle of Charity’: an interpreter must assume logical consistency in the thought of the speaker (the Principle of Coherence) and that the speaker has the same beliefs about the world, to which the speaker is responding, that the interpreter would have in his situation. ‘Three Varieties of Knowledge’ in A.P. Griffiths, *A. J. Ayer Memorial Essays* (1991).

⁸ See T.A. van Dijk, *Text and Context* (1977) at 182–3.

meaning'—the meaning discovered by recognition of the fact that the communicator intended it to be discovered.⁹ In such cases the interpreter ceases to be a detached observer and becomes involved in a more interactional process of interpretation.

Interpretation in cases of communication is no less a pragmatic process involving presumptions and hypotheses, since without telepathy the interpretation remains a project of guesswork built upon the assumption that the utterance is a rational means to an end. However what is special about nonnatural meaning is that the communicator meets the interpreter half-way. Essentially, the two parties cooperate in the joint venture of trying to get the interpreter to recognize what the communicator is trying to communicate. Providing the communicator and the interpreter can share the same method of interpretation, the interpreter can merely apply the method of interpretation and be confident of gleaned the meaning that the communicator intended her to glean.¹⁰ A shared method allows a single jointly salient meaning to be identified from any utterance.

A code is one type of interpretative method, and languages are ready-made and widely known codes that can be used to interpret utterances. By applying a linguistic code to oral signs (phonemes) and written signs (letters, accent marks and punctuation marks) the interpreter can discover a single salient meaning,¹¹ although even communication through codes is a pragmatic process.¹² As will become clear, despite their reliability, linguistic codes are inadequate for the communication of sufficiently precise meanings by way of sufficiently short utterances, being insufficiently precise and efficient at encoding meaning. In fact we need to, and do, use a pragmatic process to augment the linguistic code.¹³ The process of pragmatic inference harnesses the information provided by the context of the utterance in order to make communication more economical. Communicated meaning is thus 'an amalgam of linguistically decoded material and pragmatically inferred material'.¹⁴ Convention is what makes the whole process work, by fixing which language and which method of pragmatic inference will be used, and thus ensuring that the same interpretative method is used by both the communicator and the interpreter.¹⁵

⁹ Utterances may also have natural meanings in that they may indicate things that the communicator did *not* intend to communicate, for example that he is anxious or poorly educated, or that his vocal cords work.

¹⁰ Henceforth, the exemplary communicator shall be referred to as 'he', and the exemplary communicatee (interpreter) referred to as 'she', in order to aid the reader in distinguishing between the two communicators.

¹¹ A language operates by applying phonological and graphological rules to discover words and punctuation marks from sounds and written marks. It then ascribes meaning to these words and punctuation marks by way of two types of rules. Semantic rules govern the meaning of words on their own, and grammatical rules govern the meaning of a particular order of words (syntax) or particular endings of words (morphology).

¹² Since without pragmatic presumptions that the communicator is rational (the presumption of rationality), that he intends to communicate, and that he has correctly used the linguistic code to design the utterance (the presumption of optimal design), the interpreter cannot conclude that the phenomenon that appears to be an encoding of an intended message is in fact that.

¹³ Thus, in recent years the 'message model' of communication (using a simple code to convey ideas) has been rejected in favour of the 'inferential model'. See Akmajian *et al.*, above n 3 at ch 9.

¹⁴ R. Carston, 'Explicature and Semantics' in S. Davis and B. Gillon (eds), *Semantics: A Reader* (Oxford: OUP, forthcoming).

¹⁵ D.K. Lewis, *Convention* (1969).

3. *The Objective Principle of Interpretation*

Before the ordinary principles of everyday interpretation are discussed further, it is important to make the point that (without telepathy) the best that the interpreter can hope for is to discover the *apparently* intended meaning of the communicator. As a matter of practical compromise, each communicating party must rely upon the other's successful fulfilment of his or her role in the communication (be it the design of the utterance or the utterance's interpretation).¹⁶ Thus an interpreter must presume that the communicator has optimally designed the utterance to be interpreted (since otherwise she cannot infer that the meaning gleaned from the utterance was intended),¹⁷ and a communicator must presume that the interpreter will correctly apply the shared method of interpretation. The apparently intended meaning is thus the meeting point for successful communication, but in our society this practical inter-reliance (which is characteristic of all joint ventures) attracts responsibility. Where parties have voluntarily embarked upon a venture, they are held responsible for the consequences of culpable failure to carry out their role.¹⁸ The consequences for communication are that a communicator is responsible for the consequences of his failure to correctly (reasonably) design the utterance so as to appear to mean what he intends to mean—that responsibility manifests itself as his being responsible as if he had intended the apparently intended meaning.¹⁹ Also an interpreter is responsible for the consequences of her failure to correctly (reasonably) interpret the utterance so as to discover the apparently intended meaning.²⁰ Overall then, the important question seems to be whether both the causing and the discovery of the failure in communication were solely within the power of one party.²¹

¹⁶ Lord Hoffmann 'The Intolerable Wrestle with Words and Meanings' (1997) 56 *S African Lj* 656 at 660–1.

¹⁷ H.H. Clark, R. Schreuder and S. Buttrick, 'Common Ground and the Understanding of Demonstrative Reference' in H.H. Clark, *Arenas of Language Use* (1993). They define the presumption of optimal design thus: 'The speaker designs his utterance in such a way that he has good reason to believe that the addressees can readily and uniquely compute what he meant on the basis of the utterance along with the rest of their common ground' at 81. Clark later renames this presumption 'the premises of sufficiency and solvability', *Using Language* (1996) at 68–9.

¹⁸ This requirement of voluntariness in embarking upon the venture is important. Goddard usefully distinguishes between intentionally making an utterance, which is a pre-requisite of responsibility for an utterance's apparent meaning, and intending the apparently intended meaning of the utterance, which is not a pre-requisite for responsibility for that apparently intended meaning. D. Goddard 'The myth of subjectivity' (1987) 7 *Legal Studies* 263. See also T.A.O. Endicott, 'Objectivity, Subjectivity and Incomplete Agreements' in J. Horder (ed.), *Oxford Essays in Jurisprudence* (Fourth Series, 2000) at 162.

¹⁹ This is reflected in the contract law rule usually exemplified by *Centrovincial Estates plc. v Merchant Investors Assurance Co Ltd* [1983] Com LR 158 (although note that, as a pre-trial declaration, the actual decision is of very limited force). If the interpreter should have recognized the mis-design of the utterance then the otherwise apparent meaning is no longer reasonably apparent and the communicator cannot be held to it: *Mammai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, discussed below in section 8. Where the interpreter is responsible for the mis-design of the communication then, again, she should have known about the mis-design and cannot hold the communicator to the otherwise apparently intended meaning: *Scriven Bros and Co v Hindley and Co* [1913] 3 KB 56. See further Endicott, above n 18.

²⁰ One example of this is the situation in which the interpreter should have recognized that the utterance was mis-designed (discussed above n 19) and should also have recognized what the utterance was intended to mean, as in *Mammai Investments Co Ltd v Eagle Star Life Assurance Co Ltd*, discussed below in section 8. In that case the interpreter is held responsible as if she had correctly understood the communication, and so if the interpreter accepts an offer that she misunderstood then she will be taken to have accepted the apparently intended offer.

²¹ Cf. The rules governing the communication of acceptance of an offer to contract as set forth in *The Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327 and related cases.

Collectively these principles are called ‘the objective principle’, and they are present both in the common sense principles of interpretation and, consequently, in legal rules of contract interpretation.²²

It should be noted at this point that this article is concerned with the question of what the law treats a communication as meaning. The posterior questions of what the law does with the apparently intended meaning are questions for elsewhere, and are not related to or governed by the common sense principles of everyday interpretation.²³

4. *Beyond the Text: the ‘Matrix of Fact’*

As mentioned earlier, our shared method of interpretation that makes communication possible is a sophisticated process of pragmatic inference. This process allows a more extensive meaning than the linguistic meaning to be gleaned from an utterance, and, given that the communicator designs the utterance accordingly, allows a meaning more extensive than the linguistic meaning to be communicated.²⁴ But how can this work? Since an utterance is only a set of words, what more can be extracted from the utterance than the linguistic meaning?

The answer is provided by Lord Justice Steyn (as he then was): ‘[d]ictionaries never solve concrete problems of construction. The meaning of words cannot be ascertained divorced from their context’.²⁵ If the interpreter only processes the text, she can get little more than the linguistic meaning of the text out of the interpretative process. However, by harnessing, and then processing, more information than merely the text, more meaning can be extracted at the other end of the interpretative process. The other information is the ‘context’ (meaning ‘with the text’). Contextual information about the communicator and the world allows the interpreter to deduce the communicator’s purposes, and the communicator’s beliefs about the world and the way it normally works. As we shall see, such information is important in supplementing or replacing the text’s linguistic meaning.

Of course, the communicator does not have control over context and so does not design the context directly; however, he designs the text given the context

²² Indeed, the objective principle also governs interpretation of utterances in other areas of law—see Lord Steyn’s comments in the tort sphere in *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL) at 835. For an interesting discussion of the objective principle of contract interpretation, see J.M. Perillo ‘The Origins of the Objective Theory of Contract Formation and Interpretation’ (2000) 69 *Fordham L Rev* 427.

²³ The principal posterior issue is that of what civil liabilities are imposed upon communicators of promises, relied-upon false statements, defamatory statements, statements containing confidential material etc. Another important issue concerns the rule of contract law by which obligations in contract law (and hence the meaning of agreements) are fixed at the time of contracting. This is necessary to ensure the usefulness of contracts for planning, since without it the apparently intended meaning of a promise would change as new evidence (such as subsequent feedback from the communicator as to what he meant) arose, and an apparently intended meaning would only last until the communicator disabuses the interpreter of the view that he intended that meaning. This rule is, however, not a part of the common sense principles of everyday communication.

²⁴ For further discussion of pragmatic inference see D. Sperber and D. Wilson, *Relevance* (2nd edn, 1995), and H.H. Clark, ‘Inferring What is Meant’ in W.J.M. Levelt and G.N. Flores d’Arcais (eds), *Studies in the Perception of Language* (1978). An introduction is provided by Akmajian *et al.*, above n 3 at ch 9.

²⁵ *Arbutnot v Fagan* (1993, July 30, CA unreported). See Lewison at ¶4.11.

within which it will be understood.²⁶ Thus the text allows the communicator to incorporate the context or, alternatively, to exclude parts of the context or to change them (by disabusing the interpreter of assumptions as to the communicator's beliefs or purpose).

In contract law, it is now well-established that the context is important in interpreting documents, such context being most often referred to by the label 'matrix of facts'.²⁷ The context has also been referred to as the 'surrounding circumstances', 'relevant circumstances', 'factual background', and by the elegant statement that the court must 'place itself in thought in the same position as the parties to the contract were placed, in fact, when they made it'.²⁸ Lord Hoffmann in the *ICS* case described the relevant contextual information as:

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

and described Lord Wilberforce's phrase 'matrix of fact' as:

if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next [the parole evidence rule], it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.²⁹

This definition of the factual matrix (absolutely anything . . .) is rightly without any fixed boundary;³⁰ the context, alongside the text itself, is part of the relevant source-material that is the utterance, and so anything in the context that was used by the communicator in his design of the utterance should be used by the interpreter in her interpretation of it.

Consequently, it is clear that the contextual information, to be relevant, must be shared. An interpreter will only process contextual information that the communicator knew, since only that information will have been used in designing the utterance (and conversely, a communicator will not factor into his design any contextual information that the interpreter does not have since she will not be able to interpret it). In Lord Hoffmann's words in *BCCI v Ali*: '[i]t would be contrary to basic principles of construction for the meaning of a document to be affected by facts which were known to one party but not reasonably available to the other'.³¹ This mutuality is an important limitation on the relevant contextual

²⁶ See W.V. Harris, *Interpretative Acts: In Search of Meaning* (1988) *passim*. Harris notes at 60: 'The very possibility of understanding discourse depends on the user being able to calculate what the audience knows or is aware of and what attitudes it holds, and further to assume that the audience will be aware that such calculations have occurred and such assumptions have been made'.

²⁷ This label was first used by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381 (HL).

²⁸ The latter statement was made by Lord Dunedin in *Charrington and Co Ltd v Wooder* [1914] AC 71 (quoted with approval by Lord Wilberforce in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (HL)).

²⁹ At 912–13. See also the American Restatement (Second) Contracts, §202(1), according to which, words are to be interpreted in the light of 'all of the circumstances'.

³⁰ See Lord Hoffmann's discussion in *BCCI v Ali* [2001] 2 WLR 735 at 749, where he emphasizes that, of course, the admissible background must be relevant, but is otherwise without conceptual boundary.

³¹ *Ibid.* See also Staughton LJ's first principle of interpretation in *New Hampshire Insurance Co. v MGN Ltd.* [1996] CLC 1692 (CA), and Lord Wilberforce's statement in *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384.

information.³² Henceforth, such mutually held information (knowledge, beliefs, assumptions) will be referred to as 'mutual context'.³³ Personal common ground is mutual context that is inferred from the communicators' shared experiences, for example the meaning given to a word in a previous negotiation or elsewhere in the document in question. Communal common ground is mutual context that is inferred from the communicators' membership of the same community, for example the language of the English, the dialect of lawyers, and the usual purposes and ways of doing things of builders.³⁴

It should also be observed that the nature of commercial contractual documents may in some ways restrict, and in other ways enlarge, the mutual context that an interpreter will use to find the apparently intended meaning: (1) Because contractual documents are written, they cannot make use of body language or voice modulation. (2) Because contractual documents are designed to be read and re-read at a different time and place to those at which they were drafted, there will be less mutual context concerning the location and immediate circumstances of the communication than there would be in the case of an oral communication. This also means, however, that other parts of a document (part of the mutual context), earlier or later, are highly relevant in interpreting a particular clause, since the document can be re-read and considered at leisure. (3) Some contractual documents (such as bills of lading, letters of credit, leases, standard forms and collective bargains) are designed to be read by third parties. In such cases a communicator could only use information known to all the audience in designing his meaning. Therefore, in cases in which an interpreter does not appear to be the only intended audience for an utterance, the interpreter should employ in her interpretation only information that is mutual to all the apparently intended audience.³⁵ The judge should not be considered a part of the apparently intended audience for the purposes of limiting the relevant mutual context, however, since

³² In fact, the requisite *mutuality* encompasses a lot more than merely sharing: I would only expect an interpreter of my communication to use knowledge if we both knew it, *and* we both knew that the other knew it *and* we both knew that the other knew that we knew it, etc. The so-called 'mutual knowledge paradox' describes the problem of a finite brain having to process the infinite information seemingly required to verify mutuality and so communicate successfully. The paradox can be solved by truncating the inquiry to the level that seems safe in a particular situation ('truncation heuristics'), or inferring mutuality in cases of physical co-presence (for example when two people make eye contact to make sure that they are mutually aware that they are both present) or communal co-presence (two people are both members of a community and so can infer fully mutual knowledge of certain things). See D. Blakemore, *Understanding Utterances: An Introduction to Pragmatics* (1992) at 20; H.H. Clark and C.R. Marshall, 'Definite Reference and Mutual Knowledge' in H.H. Clark (ed.), *Arenas of Language Use* (1993).

³³ S.R. Schiffer, *Meaning* (1972) uses the term 'mutual knowledge', and D.K. Lewis, *Convention* (1969) uses the term 'common knowledge'.

³⁴ See H.H. Clark and T.B. Carlson, 'Context for Comprehension' (1980) in H.H. Clark (ed.), *Arenas of Language Use* (1993). For the two categories of common ground see H.H. Clark and E.F. Schaefer, 'Dealing with Overhearers' (1989) in H.H. Clark (ed.), *Arenas of Language Use* (1993) at 257ff. For discussion of dialects as part of communal mutual context see H.H. Clark, 'Communal Lexicons' in K. Malmkjaer and J. Williams (eds), *Context in Language Learning and Language Understanding* (1998). Dialects are discussed below in section 8.

³⁵ Hence Lord Hoffmann correctly observes, above n 16 at 666–8, that pre-contractual negotiations (being personal common ground) will not be relevant to mutual context cases where third parties are concerned. See the concerns raised by Lord Devlin, 'Morals and the Law of Contract' in *The Enforcement of Morals* (1965) at 44, Saville LJ in *National Bank of Sharjah v Dellborg* (CA, 9 July 1997), K. Lewison 'O Brave New World: The Modern Approach to The Interpretation of Contracts', presented to the Birmingham Chancery and Commercial Bar Association, 27 April 2000, available at http://www.falcon-chambers.com/articles/interpretation_contracts.html.

the judge has, through his ability to hear evidence, all the mutual context that the parties have. (4) Most contractual documents are not drafted by the communicator and interpreter, but by their lawyers. Even though the parties still attribute the communication to the principal rather than the lawyer—it is the principal who is bound to the contract—the use of lawyers means that interpreters and communicators can attribute certain of lawyers' knowledge and techniques to each other, specifically knowledge of legal terminology and the technique of precise and careful writing.³⁶ In addition, personal exchanges between the parties that were not brought to the attention of the lawyers will not be part of the intended mutual context.

A final point of relevance concerns the law's approach to personal mutual context. Pre-contractual negotiations are part of the surrounding circumstances that are used to design, and hence interpret, the apparent (i.e. objectively determined) meaning of a document, unless the document is intended to be seen by third parties not privy to the negotiations.³⁷ There is a legal rule that prohibits the admission of evidence of pre-contractual negotiations, which rule is thus inconsistent with the common sense principles of everyday interpretation.³⁸ Unless this restriction can be justified on policy grounds, it should be abolished as it artificially limits the process of pragmatic interpretation (through the use of mutual context), and thus prevents contracts being given the meaning that they were intended to take.³⁹

5. *Pragmatic Inference, Normality and Reasonable Expectations*

Given the textual and contextual information, circumscribed by the requirement that such information be mutual, how, then, does the pragmatic method identify the single apparently intended meaning? Given a linguistic meaning that is salient in a particular community, how does the interpreter decide to what extent the interpreter intended to use inference to replace that linguistic meaning, and to

³⁶ For a brief discussion of roles in communication (distinguishing the formulator and the principal) see H.H. Clark, *Using Language* (1996) at 20, and E. Goffman, *Forms of Talk* (1981) at 144ff. See also D. Kurzon, *It is Hereby Performed: Legal Speech Acts* (1986). For further discussion of specialist dialects such as legal terminology and standard terms, see below section 8.

³⁷ See discussion above at text to n 35 and surrounding.

³⁸ As Lord Hoffmann recognized in *ICS* at 912–13. In *Canterbury Golf International Ltd v Hideo Yoshimoto* [2002] UKPC 40, the Privy Council, in a speech delivered by Lord Hoffmann, declined to re-examine the law excluding evidence of pre-contractual negotiations on the grounds that, in the instant case, such evidence was not helpful. For the not dissimilar Australian position see *Royal Botanic Gardens and Domain Trust v South Sydney Council* (2002) 186 ALR 289.

³⁹ This is thus normatively arbitrary as it renders the justification for the enforcement of contracts incoherent: see E. Weinrib, *The Idea of Private Law* (1995) at 39. For further (mostly critical) discussion of the rule against evidence of pre-contractual negotiations and other rules of evidence (such as the rules prohibiting admission of parol evidence, evidence of the subjective intention of the parties and evidence of the subsequent conduct of the parties) see Chuah (2001) 12 *ICCLR* 294; Corbin (1965) 50 *Cornell LQ* 161; Hoffmann, above n 16 at 666–9; McLauchlan (1999) 30 *VUWLR* 175, (1997) 113 *LQR* 237, (1996) 2 *NZBLQ* 237; McMeel, (2003) 119 *LQR* 272; Steyn (1988) *CLP* 23.

what extent the interpreter intended to use inference to supplement that linguistic meaning? In so replacing or supplementing, what shared standard must be used to incorporate the contextual information and fill the apparent gaps?

The processes of replacement and supplementation of the linguistic meaning are discussed below at sections 7 and 8. It is not self-evident which common standard is used to come to mutually predictable inferential conclusions to the above inquiries, but intuition suggests that we use the same standard in non-natural (purposive) interpretation that we use in natural (causational) interpretation. When looking for natural meaning, one decides that smoke means fire and spots mean measles because smoke *usually* means fire and spots *usually* mean measles. Similarly, interpreters of nonnatural meaning make an assumption of normality, and use it infer what the communicator meant.

They are aided by a body of information as to the way things are normally done (normal beliefs, purposes, goals and ways of using language) that forms part of the mutual context of the parties. In Lord Hoffmann's words, 'We use words in daily life against a background of knowledge which we assume that our listeners share and we need not therefore specifically mention'.⁴⁰ It seems that the application of these norms to the specific situation of the communicator is what we call, in contract law, the 'reasonable expectations of the parties'. As Reiter and Swan observe, 'The notion of "reasonable expectations" is not an empty concept. What gives it content is the fact that all contracting behaviour occurs in a particular social context'.⁴¹ Reasonable expectations will be discussed further at the end of section 7.

Thus far we have seen that an interpreter makes an assumption of rationality, an assumption that the communicator intends to communicate, an assumption of optimal design and an assumption of normality (combined with knowledge of the way things are normally done and what people normally want—the reasonable expectations of the parties). In looking for the apparently intended meaning there are two main raw materials at the interpreter's disposal. The first is the text. Assuming optimal design, and using the norms of communication, the interpreter can infer how much of the linguistic meaning of the text was part of the meaning that was intended to be communicated—usually most of it (discussed further in the next section). The second main material is the apparent purposes of the communicator, themselves inferred from the assumptions of rationality and normality and the mutual context—what would a normal person in the communicator's shoes intend? Assuming that the communication is intended to further the communicator's goals, knowing the communicator's goals enables the interpreter to make assessments of what the communicator is likely to have intended. As Hoffmann LJ (as he then was) observed: '[L]anguage is a very

⁴⁰ Hoffmann, above n 16 at 658.

⁴¹ 'Study 1: Contracts and the Protection of Reasonable Expectations' in B. Reiter and J. Swan (eds), *Studies in Contract Law* (1980) at 8. Reiter and Swan go on to talk about the implication of information by using an example of a cloakroom, which is quoted below at text to n 76.

flexible instrument and, if it is capable of more than one construction [i.e. is ambiguous], one chooses that which seems most likely to give effect to the commercial purpose of the agreement'.⁴² Given these materials, the interpreter must infer what meaning was intended, in other words how and how far the communicator intended the linguistic meaning to be replaced and supplemented.

Of course, the interpreter can never be sure that the communicator means what a normal communicator would have meant, just as she can never be sure that smoke means fire—guesswork is an unsure business—however the interpreter of nonnatural meaning has an advantage over the interpreter of natural meaning. This advantage can be found in the cooperative nature of the process of communication that gives rise to the objective principle, such that the mutually known norms of behaviour (the matrix of fact leading to reasonable expectations) provide a common default position around which the parties can communicate. If the communicator does not have the usual beliefs, purposes, goals or ways of using language, then he should make that clear to the interpreter, and the fact that the utterance is designed around the assumption of normality makes the correctness of that assumption self-fulfilling. Indeed, this makes for efficient communication since, by definition, the communicator will *usually* intend what he is taken to intend and will not need to disabuse the interpreter of any assumptions as to his beliefs or purposes. Hence, if I promise to buy a car but need it for a particular journey, or I do not want it to have wheels, or I want it delivered upside down as I am going to use it in a work of art, then I must say more than that I promise to buy the car. If I want it delivered in a reasonable time, or with the wheels on, or delivered the right way up, then I need not say more because the usual purpose and things that I can be expected to take for granted actually accord with my intended meaning.⁴³

6. *The Limits of the Presumption in Favour of the Linguistic Meaning*

The linguistic meaning (or 'textual meaning', 'literal meaning' or 'timeless meaning'⁴⁴) of an utterance is the meaning discovered by application of the linguistic code that is conventionally used in a particular community. Linguistic encoding is

⁴² *Co-operative Wholesale Society Ltd v National Westminster Bank plc* [1995] 1 EGLR 97 (CA).

⁴³ It should be noted that normality is not as simple as assessing the most frequent behaviour, since behaviour is so specialized that the parties will never have encountered the same situation with anyone else before. Rather, it is a question of modelling what is normal—what motivations and behaviours are normal—through a set of general observations. These may include the assumption that the communicator is being relevant, sincere and truthful (which assumptions are also bolstered by the fact that the communicator has committed to the cooperative process of communication). See further P. Grice's Cooperative Principle ('Logic and Conversation' (1967) in *Studies in the Way of Words* (1989)) and D. Sperber and D. Wilson's Relevance Principle (*Relevance* (2nd edn, 1995)), and discussion of the principle of charity above at n 7 and accompanying text.

⁴⁴ The phrase 'timeless meaning' comes from P. Grice, 'Utterer's Meaning, Sentence-Meaning, and Word-Meaning' (1967) in *Studies in the Way of Words* (1989). Grice contrasted this with 'occasion-meaning' which denotes the meaning of an utterance that was intended by the particular communicator in the particular circumstances.

an efficient and reliable way of communicating: efficient because languages have evolved for the sole purpose of facilitating communicating, and reliable because, since everyone in a society learns their language, mutual knowledge of a large body of linguistic norms can be reliably inferred on very little evidence (if you hear a couple of words of correct English you can assume that the speaker knows the language). For this reason, it is normal to intend a linguistic code to be applied to discover the meaning of one's utterance, and hence an interpreter will normally assume that the linguistic meaning of an utterance was intended.

This presumption in favour of the linguistic meaning being intended has limits. The first limitation arises because linguistic norms, being conventional and standardized tools for use by many, are necessarily both imprecise and uncertain (ambiguous and vague). In addition, whilst linguistic meaning can only be conveyed expressly, pragmatic inference allows information to be conveyed impliedly by reading between the lines (nuance, connotation, irony, things that go without saying). As a result of these inefficiencies and inadequacies, linguistic meaning is the intended meaning *only as far as it goes*. In many situations the linguistic meaning will be incomplete (ambiguous, vague or omitting coverage of a topic) in a way that it does not appear that the communicator intended to be incomplete. In such cases there is (what I call) an implied licence to pragmatically infer material on top of the linguistic meaning. This licence to infer, and the supplementation of the linguistic meaning in cases in which the latter is incomplete, are discussed in the next section. It should be noted, however, that it is never patently perceptible that the linguistic meaning falls short of the intended meaning—it depends upon extrinsic evidence as to the mutual context in order to determine the purpose and expectations of the communicator, and hence the extent of the intended meaning. Consequently, the commonly espoused rule that restricts pragmatic inference and the use of extrinsic evidence to cases of clear and unambiguous linguistic meaning cannot be justified.⁴⁵

The second qualification to communicators' support for the linguistic meaning stems from the fact that people sometimes make mistakes in drafting. In addition, there will often be a rival linguistic code that the parties appeared to intend to govern their utterances; we call this a dialect. In both of these cases the linguistic meaning was not the meaning that was intended by the communicator, and so the interpreter must use pragmatic inference to discover the intended meaning. Thus it can be said that the linguistic meaning is only *prima facie* the intended meaning of an utterance.

Subject to these two wide-ranging qualifications, the linguistic meaning is the apparently intended meaning of an utterance, and contract law agrees that the starting point for ascertaining the meaning of a contractual document is its

⁴⁵ A.K. Corbin 'The Interpretation of Words and the Parol Evidence Rule', 50 *Cornell LQ* 161 (1965). See also Traynor J in *Pacific Gas and Electric Co v G.W. Thomas Drayage & Rigging Co Inc.* 69 Cal. 2d. 33 (1968, Supreme Court of California) at 37, 39; J.P. McBaine 'The Rule Against Disturbing Plain Meaning of Writings', 31 *Cal L Rev* 145 (1943); D.W. McLauchlan 'The Plain Meaning Rule of Contract Interpretation' (1996) 2 *NZBLQ* 80.

linguistic meaning, also known as the ‘grammatical and ordinary sense’,⁴⁶ the words’ ‘ordinary and popular sense’⁴⁷ and the ‘natural and ordinary meaning’.⁴⁸ In the words of Lord MacMillan:

It is, of course, entirely legitimate to invoke the context as an aid to interpretation. But when it is sought by a context to qualify language otherwise plain and unambiguous, the implications of the context must be of a compelling nature.⁴⁹

The presumption in favour of the ordinary meaning is, thus, both a common sense principle of everyday communication and a principle of contractual interpretation.⁵⁰

7. *The Use of Pragmatic Inference to Supplement the Linguistic Meaning*

The interpreter will need to supplement the linguistic meaning in four types of situation, the first two of which are:

Deixis. This arises whenever an indexical term—a label that refers to and identifies something that exists in the world (such as ‘John Smith’ or ‘the blue Robin Reliant with registration A305 RCA’) is used.

Linguistic ambiguity. This arises whenever a word (or, sometimes, a grammatical construction) has more than one ordinary (i.e. conventional) meaning.

An example of how the process of pragmatic inference works in such cases can be found by looking at the case of *The Karen Oltmann*, heard before Kerr J in 1976.⁵¹ In that case a two year charterparty permitted an option to redeliver the vessel to be exercised by the charterers ‘after 12 months’ trading’. Linguistically, this phrase is ambiguous,⁵² as it could denote either that early redelivery is permissible at any time after 12 months’ trading (the defendant charterers’ contention), or

⁴⁶ *Grey v Pearson* (1857) 6 HL Cas 61 at 106, per Lord Wensleydale.

⁴⁷ *Robertson v French* (1803) 4 East 130 at 135, per Lord Ellenborough CJ.

⁴⁸ Per Lord Hoffmann in *ICS*. The use of the term ‘natural meaning’ in this sense is likely to cause confusion. One pre-existing meaning of this term is in opposition to nonnatural meaning, and was discussed above at n 6 and accompanying text. The other is in opposition to conventional meaning, and refers to a meaning related to a word in a necessary rather than contingent way. Except for sound—or appearance—symbolic words such as those that exhibit onomatopoeia, the natural meaning view (see Plato’s *Cratylus* (360 BC)) has given way to the conventional meaning view (see J. Locke, *An Essay Concerning Human Understanding* (1689) at ¶3.2.1).

⁴⁹ *Hvalfangerselskapet Polaris Aktieselskap v Unilever Ltd* (1933) 46 Ll L Rep 29 (HL). However, couching this presumption in reference to ‘plain and unambiguous’ language is problematic, as is discussed above at the text accompanying n 45.

⁵⁰ In addition, this presumption is also a restatement of the ordinary evidential burden. Under our adjudicative process, the burden falls on each party to prove that a particular interpretation is the correct one. Because judges and most individuals are expert in ordinary language, language is one of the only types of mutual context that in practice does not need to be proven by the presentation of evidence (rather than judicial cognizance). Because of this, the burden of proof falls on anyone wishing to show any elements of intended meaning beyond the linguistic meaning, since they require further mutual knowledge which it cannot be assumed both the parties and the judge will also know. Cf. Lord Wilberforce’s comments in *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 at 423 (PC).

⁵¹ *Partenreederei M.S. Karen Oltmann v Wscarsdale Shipping Co Ltd* [1976] 2 Lloyd’s Rep 708.

⁵² Kerr J., *ibid* at 710 and 711.

that early redelivery is permissible only at the specific point of time marked by the passage of 12 months' trading (the plaintiff shipowner's contention). Significantly, no normal contractor would be ambivalent as to the way in which this important issue is resolved, and so clearly the intended meaning goes beyond the ambiguous linguistic meaning. In such cases there is an implied licence to supplement the linguistic meaning through pragmatic inference to the extent that it appears that the utterance's meaning was intended to go; here an implied licence to disambiguate.

The next step is to determine what it would be normal to intend by the words 'after 12 months' trading' in the circumstances. One relevant factor, particularly in the interpretation of carefully designed utterances such as commercial documents, is the so-called Choice Principle.⁵³ This principle, following from the assumption of optimal design, allows the interpreter to draw conclusions from the communicator's selection of particular words and grammatical constructions instead of others. Even though the charterparty could have been drafted to indicate either meaning more clearly,⁵⁴ Kerr J was rightly persuaded that the omission of the words 'at any time' before the words 'after 12 months trading' made it apparent that the parties intended to refer to a specific instance and not a period of time beginning after 12 months.⁵⁵ This is persuasive for two reasons. The first is that, as Kerr J observed, it is common in charterparties to include the words 'at any time' when that is what is meant.⁵⁶ Since the parties would have mutually known this (allowing for the specialist knowledge that the parties' lawyers bring to them), the failure to include these words is an important indication that the parties did not intend their meaning. The second reason for the persuasiveness of the omission is that it would have been simpler to include such words to point to the charterers' contended meaning than it would be to use extra words to point to the shipowners' contended meaning. The omission to do either points more strongly towards the shipowners' contended meaning being intended.

In addition, evidence of pre-contractual negotiations (which is admissible here) shows that the parties had ascribed a particular meaning to the words. Although this did not amount to an estoppel,⁵⁷ it did amount to the parties having a 'common meaning' since they had 'negotiated on an agreed basis that the words bore only one of the two possible meanings', specifically the meaning argued for by the shipowners.⁵⁸ This means that the parties' personal (as opposed to communal) mutual context allows them to select one of the meanings as salient since they had used the words in that sense in relevant earlier communications. The parties in such a case have a personal dialect (as discussed in the next section)

⁵³ H.H. Clark, 'Words, the World, and Their Possibilities' in H.H. Clark (ed), *Arenas of Language Use* (1993).

⁵⁴ As Kerr J. observed, above n 51 at 711.

⁵⁵ *Ibid* at 710.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at 713.

⁵⁸ *Ibid* at 711-13.

and usually, as here, this overrides any other considerations or any more general assessment as discussed above. Here, however, the personal dialect confirmed the meaning that pragmatic inference would otherwise have reached through the Choice Principle—the charterparty was intended to give the charterers an option to redeliver the vessel at the point of time upon the passing of 12 months' trading and no later, as Kerr J correctly found.

The other two types of situation in which the linguistic meaning requires supplementation provide more room for interpreter error:

Linguistic vagueness. This arises whenever the conventional meaning of a word is indeterminate and hence uncertain, in that there exist borderline cases which cannot be said to fall within the meaning of the utterance nor can they be said to fall without that meaning.⁵⁹

Things that go without saying. This situation arises whenever pragmatic inference can point to something that would usually be meant even though it is not part of the linguistic meaning (and so has not been 'said').

Unlike in cases of deixis or ambiguity, it is not always clear in these categories of case whether, and to what extent, the intended meaning extends further than the linguistic meaning. In other words, it is not always clear to what extent a licence to supplement can be implied.

A famous example of a vagueness arose in *Arcos v Ronaasen*, heard by the House of Lords in 1933.⁶⁰ In this case two contracts for the sale of a quantity of Russian timber, c.i.f. the River Thames, were concluded. Since a wrongful rejection of the documents by the buyer, the staves had lain on an open wharf exposed to rain. Six months after delivery, in a falling market, the buyers sought to reject the goods on the grounds that they did not conform to the contract description, which specified that the staves should be $\frac{1}{2}$ inch thick (as well as specifying a length for the staves, and a range within which the breadth of the staves must fall). The goods were not measured at the time of delivery, but when the umpire inspected the goods after some nine or ten months' exposure to the elements on the wharf, it was found that the staves were mostly over the required $\frac{1}{2}$ inch thickness (although over 75% were less than $\frac{1}{16}$ inch over). The umpire found (or at least the House of Lords interpreted his statements as finding⁶¹) that although when delivered the staves had been thinner than at the time of inspection, still they had been mostly over $\frac{1}{2}$ inch thick.

The problems in this case arise from the vagueness of the linguistic meaning of the word 'inch'. Distance can be either infinitely precise or more or less approximate. As the precision required by users varies (although in no situation requiring infinite precision, which is impossible to achieve) the convention as to the

⁵⁹ For further discussion of vagueness see T. Williamson, *Vagueness* (1994). For discussion of vagueness in relation to law in general, and contract law in particular, see T.A.O. Endicott, 'Objectivity, Subjectivity and Incomplete Agreements' in J. Horder (ed.), *Oxford Essays in Jurisprudence* (Fourth Series, 2000) at 162.

⁶⁰ [1933] AC 470.

⁶¹ Ibid at 475, 476 and 479.

meaning of the word 'inch' has never become more precise than 'about an inch'. In everyday conversation the intended meaning may be equally as vague as the linguistic meaning; where nothing turns on precision, the communicator may not mind the vagueness. With commercial contractual documents, though, the mutually appreciated desire for certainty without subsequent clarification cannot be achieved by an agreement that is as vague as the linguistic meaning of 'inch'. Consequently, there is an implied licence for the interpreter to supplement the linguistic meaning to provide precision to the degree that it appears that the intended meaning exhibits.⁶²

During the arbitration of the *Arcos* dispute, the umpire concluded that the shipped staves were 'commercially within and merchantable under the contract specification'. Lord Buckmaster in the House of Lords was of the opinion that 'the fact that the goods were merchantable under the contract is no test proper to be applied in determining whether the goods satisfied the contract description'.⁶³ Lord Buckmaster is correct that, in general, conformity to contract description should not be measured by merchantability or fitness for purpose which, after all, satisfies a quite independent contractual term. However, the umpire's formulation will be correct for many cases. Where the commercial purpose is known in advance, and here the purpose of making cement barrels from the staves was part of the mutual context at the time of contracting,⁶⁴ the interpreter is entitled to conclude that the normal reason for specifying the thickness is the instrumental one of ensuring that the staves are usable for the vendor's stated purpose. Of course, the specification should not be rendered nugatory and is not merely a guideline, but where it is vague (as it will always be), where goods conforming to specification would satisfy a known purpose,⁶⁵ and where the specification is not so precisely defined as to suggest that more precision is desired than a purposive interpretation will allow,⁶⁶ then the purposively interpreted meaning will reasonably appear to be the intended meaning. If so, the agreement was for staves that were *about ½ inch thick but in any case of a suitable thickness for making cement barrels*, and thus the goods conform. If the communicator does not intend the normal,

⁶² The extent of the implied licence to infer depends upon the extent of the author of the utterance's apparent care in formulation. A commercial contractual document falls in between an off-the-cuff remark at one end of the scale, and a constitutional document, piece of great literature or a document believed to come from God at the other end of the scale. See R.A. Posner, *Law and Literature* (1988) at 245ff. At 245 Posner quotes from S.H. Olsen: 'When an author offers a text to his audience *as a literary work of art* he commits himself to providing a text which repays a certainty type of attention. Literary interpretation is governed by what one might call a principle of charity: one gives the work the particular type of attention which literary interpretation represents because one assumes that the author has honoured his commitment'. It should be noted, however, that because pragmatic inference is more open to mistake than linguistic decoding, the need for certainty without subsequent clarification also means that contractors will appear to intend less supplementation than they might otherwise, since they will appear to want to maximize certainty by minimizing the need for recourse to non-linguistic material. See R. Goff 'Commercial Contracts and the Commercial Court' [1984] *LMCLQ* 382.

⁶³ Above n 60 at 474.

⁶⁴ *Ibid* at 478.

⁶⁵ Where goods conforming to expressed specification would not fulfil a desired function, obviously the function cannot be used (i.e. does not reasonably appear to be intended to be used) to reduce the vagueness of the specification. See, for example, *Lynch v Thorne* [1956] 1 All ER 744.

⁶⁶ If the thickness required had been specified not as ½ inch thick but 0.547 inches thick (or even 0.500 inches thick) then that would suggest that precision is important, otherwise why specify to three decimal places?

and therefore default, meaning, then he must disavow it by specifying a margin within which the thickness must fall, as he did with regard to the staves' breadth. No such disavowal can be found here.

Lord Atkin was of the opinion that 'if the seller wants a margin he *must and in my experience does* stipulate for it' [italics added] and therefore the contract was for staves of $\frac{1}{2}$ inch thick, permitting only 'microscopic deviations' (in Lord Warrington's words, deviations 'so slight as to be negligible'). The important part of this statement is the italicized part. If, as Lord Atkin seems to believe, there is a trade practice or reasonable expectation amongst commercial traders or the drafters of commercial contracts that, unless a margin is stipulated, specifications are strict with only microscopic deviations permissible (since, after all, the parties are commercial adversaries at arm's length), this would form part of the communal mutual context and would inform the reasonable interpretation of the contract.⁶⁷ It would then be necessary to decide what size of deviation is 'negligible'—which itself depends upon the specific case and upon norms that were not presented in evidence (since in some industries a literally 'microscopic' deviation may be significant), and is not an easy matter once the aid to construction that is communicator's purpose has been abandoned. The allowance for microscopic deviations is surely not justified on the grounds that *de minimis non curat lex*, but rather on the grounds that a literally perfect tender is impossible and therefore could not be required even where precision is paramount, in other words on the grounds that this is what was agreed. Of course, if the trade practice or societal expectation assumed by Lord Atkin was not proven, the *Arcos* decision is simply incorrect.

The other type of supplementation occurs when, without the indication that deixis, ambiguity or vagueness provide, there is something that would normally go without saying. The more primary, or core, a piece of information is, the less likely it is to go without saying;⁶⁸ secondary information, or detail, on the other hand, is more reliably inferred (being related to expressed primary information) and is less efficiently expressed (being less likely to be important and so less worth the costs in speaking or drafting time that come with linguistic encoding).

A brief example of such supplementation can be found in the case of *BCCI v Ali*.⁶⁹ The appeal involved a release by Mr Naeem of his former employer BCCI's liability for 'any or all claims whether under statute, Common Law or in Equity of whatsoever nature that exist or may exist', and whether that release extended to the dismissed employee's claim for stigma damages (available after *Mahmud v BCCI*⁷⁰)—a claim of which neither party were or could have been aware at the time of contracting. The House of Lords were agreed that, even though the

⁶⁷ In any case, the decision in *Arcos* may have created such a trade practice—the practice of the 'perfect tender' requirement.

⁶⁸ Hence the strict test for the supplementation of contractual documents by the implication of primary terms. See A. Kramer 'The Implication of Terms as an Instance of Contractual Interpretation', forthcoming.

⁶⁹ [2001] 2 WLR 735 (HL).

⁷⁰ [1998] AC 20.

purpose of a release is to ‘wipe the slate clean’,⁷¹ a normal party intending to release literally all claims (which is the linguistic meaning of the phrase) would have been clearer about that drastic intention. In other words, it would be normal to intend qualifications to the linguistic meaning and such qualifications had not been disavowed; thus there was an implied licence to supplement by inferring such qualifications.

The House was divided, however, as to the particular qualifications that would be normally intended to go without saying in the circumstances of the case. The House were all agreed that, given that (as was mutually known) the release was signed upon the termination of Mr Naeem’s employment, it would be normal to intend the release only to apply to claims arising out of that employment (indeed the liquidators conceded this point). The majority of the House also held that if normal parties had intended such a ‘remarkable’ result as to exclude claims of which they were unaware (such as the claim for stigma damages) then they would have used clearer words.⁷² Lord Hoffmann, in contrast, believed the words to be as clear as they could have been in intending to preclude the implication of qualifications, and believed that the lack of a dispute between the parties meant that there was no further limit on the clause’s ambit that would be normally intended and so could be inferred.⁷³ He was impressed by the mutually obvious lack of a commercial purpose that the agreement would have if it did not apply to claims of which the parties were unaware, since there were no claims of which they were aware.⁷⁴ Lord Hoffmann’s position is certainly persuasive, but ultimately the issue is one of fact. The important thing is that, although disagreeing on the answer, the judges agreed on the question of construction and the principles to be applied to that question.⁷⁵

As well as qualifying expressed terms, as in *Ali*, the information that goes without saying usually adds to the expressed terms, often on the grounds that the information would be reasonably expected. If I book a room in a hotel and pay for it, it is clear that the contract has been breached if I am given a room without a bed, even though linguistic meaning of the word ‘room’ does not include any reference to its contents and is not (in this respect) ambiguous or vague.⁷⁶ Such intended implied secondary information is ubiquitous, as Barry Reiter and John Swan demonstrate:

Contracts as simple as the one created by leaving a coat in a checkroom occur in a context that extends far beyond the words on the printed ticket handed over in return for the coat. The coat’s owner assumes that the cloakroom will be secured commensurate with the appearances of security offered; that unauthorized persons will not be admitted freely

⁷¹ Lord Nicholls at 744.

⁷² See particularly the statements of Lord Clyde at 762.

⁷³ At 749 ff.

⁷⁴ At 751.

⁷⁵ See Lord Hoffmann at 748.

⁷⁶ Goddard’s example is of a sale of ‘the picture in my room’, which sale implicitly includes the frame of the picture and not just the canvas. D. Goddard ‘The myth of subjectivity’ (1987) 7 *Legal Studies* 263 at 273.

into the area; that the attendant should not be permitted to set the coat on fire or steal it with impunity; and that the coat will be returned on presentation of the voucher.⁷⁷

8. *The Use of Pragmatic Inference to Replace the Linguistic Meaning*

Sometimes the communicator will (apparently) intend part of the linguistic meaning to be actually replaced by meaning from another source, rather than merely supplemented. Most usually, this will occur in cases of dialect—whereby a variation of a language has been used by the parties themselves (what the law calls a ‘course of dealing’) or is in use by a community of which the parties are members (what the law calls ‘custom’, ‘trade usage’ or ‘scientific terms’). Whenever words in an utterance could take a dialectal as well as the basic linguistic meaning, the interpreter must decide, given the mutual context, which meaning it would be more normal to intend.⁷⁸ Unless the parties have expressly defined a personal meaning for the term,⁷⁹ the balancing will depend upon which meaning is more likely to have been intended given the communicator’s apparent purpose, as well as whether the dialect is apropos to the topic or situation of the utterance. In *The Karen Oltmann*, discussed above, the meaning of ‘after 12 months’ trading’ that the parties had used in pre-contractual negotiations provided a personal meaning that, in a contract to which the negotiations were pursuant, it would be normal to continue to intend in the absence of disavowal.⁸⁰ Standard trade clauses and legal terms of art make up particular dialects used by the legal community. These dialects are apposite to the need for precision and certainty in commercial documents, and their mutual knowledge is easily inferable among the legally-trained, thus there should be a strong presumption that the specialist meaning of such clauses or terms is intended to displace the linguistic meaning.⁸¹

Another situation in which the linguistic meaning is not intended is where the presumption of optimal design is rebutted and it is reasonably apparent that the communicator made a mistake in drafting the text. A good example is provided by the case of *Mannai Investments Co. Ltd v Eagle Star Life Assurance Co. Ltd*.⁸² In that case, a tenant served a notice to quit, giving the required six months notice, but put the wrong break date in the notice—the date that the tenant wrote was

⁷⁷ Above n 41 at 8.

⁷⁸ Where words have a dialectal meaning but are meaningless under ordinary language, the interpretation is easy. In *Leach v Jay* (1877) 6 Ch D 496, Jessel MR found the interpretation of the word ‘seised’ in a will to be easy, since the word is ‘not only technical, but a word that has no signification in ordinary language at all’.

⁷⁹ In which case it would be normal to intend that meaning. This is why Lord Hoffmann says, in his opinion in *ICS* (at 914), that once Humpty-Dumpty (in Carroll’s *Through the Looking Glass* at ch 6) had explained to Alice what he meant by ‘glory’ (namely, ‘a nice knock-down argument’), she should have understood him to mean just that.

⁸⁰ *The Karen Oltmann* was an easier than usual case of dialect because the dialectal meaning did not replace the linguistic meaning, it merely preferred one of the two linguistic meanings of the linguistically ambiguous phrase.

⁸¹ Of course, this is only a presumption, as *Re George and the Goldsmiths and General Burglary Insurance Association Ltd* [1899] 1 QB 595 shows. See the cases quoted and cited by Lewison at ¶4.08 and *Chitty* at ¶12-052.

⁸² [1997] AC 749. See also *Hartog v Colin & Shields* [1939] 3 All ER 566.

one day too early. Although the notice made good linguistic sense, it made so little sense of the purposes of a normal communicator in the tenant's position (since with the wrong break date the notice would serve no purpose) that the House of Lords, in effect, held that the presumption of optimal design had been rebutted and the interpreter should have known that the communicator had made a mistake.⁸³ Consequently, the reasonably apparent meaning of the notice was as a notice to quit with the correct break date. Rebutting the presumption of optimal design involves deciding that it is more likely that a mistake was made than that the linguistic meaning was intended. Relevant to the likelihood of a mistake is the nature of the document in question (mistakes are unlikely in commercial contracts, but more likely in badly drafted ones⁸⁴) and the nature of the potential mistake (mis-spellings, omissions of words, malapropisms or other types of slip of the tongue or pen are all common types of mistake).⁸⁵

9. *What Crossed the Communicator's Mind*

The main criticism of the interpretative approach outlined in this article is likely to be that much of the material pragmatically inferred by the common sense principles cannot be intended because it never crossed the communicator's mind.⁸⁶ If we accept the objective principle, we can restate that criticism in the following way: it is fictional to say that a particular meaning reasonably *appears* to have been intended when it does not even *appear* to have crossed the communicator's mind.

This assertion that a particular meaning does not appear to have crossed the communicator's mind is correct, but the criticism misses the point; even the linguistic meaning of an utterance never crosses the communicator's mind. The process by which our thoughts are formulated into words is non-conscious, like a habit or reflex,⁸⁷ and, at most, the skeleton of the linguistic meaning crosses the communicator's mind. We harness the mutual context, and disavow it when necessary, without it crossing the 'front' of our mind.⁸⁸ We intend to communicate precise and certain ideas, but they are best described by principles

⁸³ By way of contrast see *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd* [1983] Com LR 158, where a mistake in design was not reasonably apparent as the offer still made good sense and could reasonably have been intended.

⁸⁴ Per Lord Bridge in *Mitsui Construction Co Ltd v A-G of Hong Kong* (1986) 33 BLR 1 (PC) at 14.

⁸⁵ It should be noted that in cases of mistaken drafting the courts have two responses available: one is to amend the document by construction (where the mistake is small), as in *Nittan (UK) Ltd v Solent Steel Fabrication Ltd* [1981] 1 Lloyd's Rep 633, and the other is to rectify the document. Arguments from coherence and consistency of the law would suggest that only one response (probably the second) should be used.

⁸⁶ See for example C. Fried, *Contract as Promise* (1981) at 60, and P.S. Atiyah, 'Judicial Techniques and the Law of Contract' in *Essays on Contract* (1986).

⁸⁷ D. Cooper, *Knowledge of Language* (1975) at ch 7.

⁸⁸ See Lord Wilberforce's statements in *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 (HL) at 997: 'in the search for the relevant background, there may be facts, which form part of the circumstances in which the parties contract, in which one or both may take no particular interest, their minds being addressed to or concentrated on other facts, so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed'. See also the comments of Chadwick LJ in *Bromarin AB and AMR v IMD Investments Ltd* [1999] STC 301; [1999] BTC 74 (CA) at ¶39-40.

or purposes, rules or impressions, than by strictly defined ideas, which is one reason why pragmatic inference works so well, and why linguistic meanings have remained vague. ‘Crossing our minds’ simply does not make sense as a description of how we in fact communicate.⁸⁹ Although we may not foresee a particular case, we intend the result in that particular case because we intend the rules that can be applied to provide that result.⁹⁰ In this way, the meaning of a communication is dynamic; its content is as much procedural as substantive. Meaning thus extends as far as the application of the rules extends.

To take Wittgenstein’s famous example of supplementation, ‘Someone says to me: “Shew the children a game.” I teach them gaming with dice, and the other says “I didn’t mean that sort of game.” Must the exclusion of the game with dice have come before his mind when he gave the order?’⁹¹ It goes without saying that influences that are normally seen as harmful or corrupting would not be intended to be included, given the speaker’s apparent purposes and values, unless the speaker expressly says otherwise.⁹² It could be said that it is the speaker’s reasonable expectation that dice games not be taught. Nevertheless, Wittgenstein is correct that the possibility of a dice game would not cross the speaker’s mind.

Thus, whether or not something crossed the mind of the contractor is irrelevant to the question of whether it was part of the intended meaning. The relevant inquiry of an interpreter is whether the particular something can be found in the world of principles (such as background reasonable expectations) that the contractor intended, the limits of that world being found in the boundaries of the implied licence to supplement. A communicator *does* intend that which he would have intended if he had thought about an issue, since if we know what he would have intended then that means that the principles that the communicator intended cover the issue.

10. *When Interpretation Fails: Uncertain Utterances and Incomplete Intentions*

There are two types of situation in which the interpreter will be unable to discover an intended meaning on a particular issue: the first is where the intended meaning (rather than merely the linguistic meaning) is incomplete. This occurs when it is not reasonable to think that the communicator intended anything on the particular issue, when:

no analysis of the contract or its context can indicate much that is useful in determining the allocation of loss—a loss that is not only unexpected and unallocated by the parties

⁸⁹ See L. Wittgenstein, *The Blue and Brown Books* (1958) at 25.

⁹⁰ See J.B. White ‘The Desire for Meaning in Law and Literature’ (2000) *CLP* 131 at 133–4.

⁹¹ *Philosophical Investigations* (trans G.E.M. Anscombe, 1972) at 33.

⁹² Even if, unbeknown to the person asked to teach the game, the speaker is a professional gambler and does not think of dice games as harmful or corrupting, the speaker will be still justifiably angry if a dice game is taught since the teacher should not (without knowing about the speaker’s personal characteristics) have taken the speaker to mean a game with dice. This is an application of the mutual context concept discussed above.

but so unexpected that the background facts, even if clearly proved in evidence and fully understood by both parties, have nothing useful to say.⁹³

Because of the interpretative tools held within the mutual context—the purpose of the parties, the normal way of doing things, the reasonable expectations of the parties—serious cases of incompleteness of intended meaning are likely to be rare. However, because the interpretative tools held within the mutual context are themselves vague, it is likely that most contracts are incomplete, at least with respect to their minute details.⁹⁴ In such cases, if the incompleteness does not render the contract unworkable, and provided the parties intended there to be a binding agreement, the court may uphold what is left of the agreement.⁹⁵ If the contract is upheld and the incomplete feature of the agreement is at issue, then the court will have to decide the case on principles external to the agreement in order to uphold the facility of contracting.⁹⁶ When the incompleteness is serious enough that there is not enough of an agreement to uphold, the contract may automatically come to an end,⁹⁷ or it may be void *ab initio*.

The second situation in which an interpreter cannot fully discover an intended meaning is where the utterance is uncertain. This arises when the intended meaning (the agreement) has not run out, but the design of the utterance is inadequate such that the utterance cannot be sufficiently supplemented by the pragmatic inference. Common examples include *Falck v Williams*⁹⁸ and *Raffles v Wichelhaus*,⁹⁹ two cases in which the contractual utterance included a linguistic ambiguity that was irresolvable by pragmatic inference.¹⁰⁰ In such cases, the incompleteness will usually be the fault of the communicator who has not drafted the utterance clearly enough, and thus it is arguable that an interpreter (and court) should be entitled to resolve the ambiguity against the communicator, in other words the interpreter should be able to disambiguate by election.¹⁰¹ If this is not justifiable, and in cases where the communicator was not at fault in his drafting of the utterance, the contract must be held void (where the

⁹³ J. Swan, 'Study 7: The Allocation of Risk in Mistake and Frustration' in B. Reiter and J. Swan (eds), *Studies in Contract Law* (1980) at 233.

⁹⁴ See Endicott, above n 18, convincingly refuting arguments to the contrary made by B. Langille and A. Ripstein (1996) 2 *Legal Theory* 63.

⁹⁵ E.g. *Perry v Suffolk Ltd* [1916] 2 Ch 187.

⁹⁶ Endicott, above n 18 at 161 and 163ff.

⁹⁷ This occurs in frustration cases where the contract is incomplete as to the allocation of risk of a particular frustrating event. In such cases in which the agreement has nothing to say one might argue that the losses should be split down the middle between the parties (J. Swan, above n 113 at 233) although that is not the basis upon which the Law Reform (Frustrated Contracts) Act 1943 is currently applied.

⁹⁸ [1900] AC 176.

⁹⁹ (1864) 2 H and C 906.

¹⁰⁰ As Simpson observes, (1975) 91 *LQR* 247, due to the court in *Raffles* not giving reasons, the court may in fact have decided that the ambiguity was resolvable, and that the reasonable interpretation of the accepted offer was that the *Peerless* argued for by the defendants was the apparently intended vessel.

¹⁰¹ This is the *contra proferentem* rule, discussed below at n 106. The rule may also be justifiable by a norm whereby a communicator can be assumed to take care of his own interests, and so to be ambivalent about any ambiguities that he has left (see Lord Mustill in *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] 2 BCLC 69 (PC), and E.W. Patterson, 'The Interpretation and Construction of Contracts', 64 *Columbia L Rev* 833 at 835ff (1964).)

incompleteness is as to an important issue) or the ambiguity resolved through external principles (as discussed in the previous paragraph).¹⁰²

11. *Questioning the Application of Methods of Conversational Interpretation to Contracts*

It has so far been assumed that Lord Hoffmann is right and that contracts should be interpreted as if they were communications by an author, as are other utterances. Two main objections to this premise must briefly be discussed and rejected.

The first objection is that contracts are like art or social practices, rather than like conversation; in other words, they must be interpreted as entities distinct from their authors, and, thus, distinct from their authors' intentions. This may justify not using everyday principles to interpret statutes (it convinces Dworkin¹⁰³), but the enforcement of contracts is justified by their being intended, and this prevents departure from authorial intention except where such departure is necessary.

The second objection to the everyday communication interpretation approach prescribed here applies to contracts that are drawn up by both parties, often after negotiation. This feature has been simply put by Holmes: 'it is obvious that they [contractual agreements] express the wishes not of one person but of two, and those two adversaries'.¹⁰⁴ In other words, how can there be 'an intention' when the communicator is a group of two people? Often a document or other contractual utterance is treated by the parties as having been drafted or proposed by one party, particularly in cases of standard form contracts or other contracts of adhesion. In some cases it will be the offeror who is treated as the drafter (such as in cases of tender and subsequent acceptance), and in other cases it will be the offeree who is treated as the drafter (such as in cases of goods purchased in a shop in which the consumer offers to take the goods on the vendor's advertised terms), but in all of these cases the communication fits the model of the sole communicator that has so far been assumed throughout this article, as the interpretation (including inference of purpose etc.) is premised upon the terms coming from one party.¹⁰⁵ Even if the contract as a whole does not fit the communicator/communicatee model, it may be that particular terms do, when those terms have been

¹⁰² The contract in *Raffles* appears to have been held to be void (but see discussion above at n 100). See also the explanation by Endicott, above n 18 at 159ff. Lord MacNaghten in *Falck v Williams* was of the view that the contract in that case was also void, even though he accepts that the ambiguity was Falck's fault. Smith argues that in these circumstances, Williams should have had an election to resolve the ambiguity, J.C. Smith, *The Law of Contract* (4th edn, 2002).

¹⁰³ R. Dworkin, *Law's Empire* (1986) at 50–3.

¹⁰⁴ 'The Theory of Legal Interpretation', 12 *Harvard L Rev* 417 at 419 (1898–1899).

¹⁰⁵ Although both parties are bound by the agreement in such cases, one party's commitment (the acceptance of the tender, the offer to take goods on advertised terms) is referential to the other party's terms—it reasonably appears to be an acceptance of whatever terms the other party reasonably appears to have proposed. Thus, the agreement is formed upon the reasonably apparent meaning of the proposer's utterance. *A fortiori*, wills, and notices to quit such as that in *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, are clear cases of unilateral communications that can be interpreted by the everyday principles.

proffered (drafted) by only one party—courts are used to identifying the profferer in their application of the *contra proferentem* rule.¹⁰⁶

Nevertheless, it must be accepted that often terms will have been co-drafted, or that a term drafted by one party will then be appropriated by the other through negotiations such that the term is to be treated as being communicated by both parties. As Gloag states:

in ordinary contracts where parties are contracting on an equal footing it may fairly be assumed that the ultimate terms are arrived at by mutual adjustment, and do not represent the language of one party more than the other.¹⁰⁷

In such cases the problem of having two authors arises, and applying the everyday principles to ordinary utterances of that type would lead to a different apparently intended meaning for each author. However we are talking about agreements, for which the problem does not arise, since to have made an agreement the parties must have known or intended that it would have only one meaning (that is what an agreement means).¹⁰⁸ Given this feature of the communications in question, a meaning of a term or document proffered by both parties will only reasonably appear to a party to be intended if it reasonably appears to have been intended by both parties. The mutual context remains the same, but the purpose that is inferred and then used by an interpreter must be a purpose that takes account of the competing goals of the two parties—it must be an aggregate purpose of the two parties.¹⁰⁹ Because inferring an aggregate purpose may be more difficult than inferring an individual's purpose, there may reasonably appear to be less licence to infer in co-drafting cases than in utterances with one drafter, since the risks of mistake are greater. In addition, neither party can be held responsible for a drafting mistake or incompleteness.¹¹⁰

12. Conclusion

Deconstructing the principally intuitive task of interpretation is not easy. Showing that interpretation (even contractual interpretation) involves pragmatic

¹⁰⁶ This rule is an application of the common sense principle whereby responsibility for ambiguity usually falls on the drafter, discussed above at the text accompanying n 101. For an example of routinely mentioning the identity of the profferer (even though pre-contractual negotiations are supposedly inadmissible) see *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corporation* [2000] 1 Lloyd's Rep 339 at Mance LJ's ¶27. For the contrary view that the proferens is the party benefited by the clause and not the drafter, see Lewison at ¶6.07. Staughton LJ believes that there are two rules of *contra proferentem*, reflecting these two interpretations: *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep 127 at 134, approved in *Zeus Tradition Marine Ltd v Bell ('The Zeus V')* [2000] 2 Lloyd's Rep 587 (CA) at Potter LJ's ¶30.

¹⁰⁷ W. Gloag, *Contract* (2nd edn, 1985) at 400.

¹⁰⁸ See J. Steyn, 'Interpretation: Legal Texts and their Landscape' in B. Markesinis (ed.), *The Clifford Chance Millennium Lectures* (2000) at 81.

¹⁰⁹ To put it another way, in commercial cases parties can be expected to intend things that are to their detriment, since in bargains they will need to assume liability or give up property or time in order to get something in return. See *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] QB 818 (CA) at 870 and Lord Wilberforce's comments in *Prenn v Simmonds* [1971] 1 WLR 1381 (HL).

¹¹⁰ Hence the *contra proferentem* rule is probably inapplicable to co-drafted contracts: see *Levison v Farin* [1978] 2 All ER 1149 at 1156 and *Kleinwort Benson Ltd v Malaysian Mining Corporation Berhad* [1988] 1 WLR 799.

assumptions and a complex web of mutual beliefs requires these assumptions and beliefs to be identified and, as Searle has observed:

It takes a conscious effort to prise them off and examine them, and, incidentally, when one does prise them off it tends to produce an enormous sense of annoyance and insecurity in philosophers, linguists, and psychologists—or at any rate such has been my experience.¹¹¹

Perhaps now it is time to add the lawyer to the list of the annoyed. Intuitively applying the interpretative method does not require deconstruction and analysis, but arguing about what outcome the method dictates (for yes, there is plenty of room for argument) is something that does require us to think about how we interpret. A contract lawyer is in the business of arguing about the best interpretation of a document, and so needs to understand what he or she is arguing about.

To this end, this article contains a brief outline of an account of contractual interpretation as a special application of the method of everyday interpretation. It shows that ‘common sense principles of interpretation’, ‘the matrix of fact’ and ‘the parties’ reasonable expectations’ are all versatile and useful concepts with a sound theoretical basis, rather than fig-leaves to cover unprincipled decision-making.¹¹² It is hoped that this account will provide other concepts (such as the mutual context, the assumption of normality and the implied licence to infer) that will be useful to contract lawyers in understanding and arguing about interpretation, and in delimiting applications of the surrounding circumstances. It is also hoped that the article will show the way to areas for further fruitful investigation, both on the points raised herein, and, also, in other areas of contract law that could be seen as agreement-centred.¹¹³ If there is one point to take away from the article, it must be that for all of us the meaning of a communication—the actually intended and hence legitimately attributed meaning—is much more than the conventional meaning of the squiggles on the page. We should not shy away from the task of trying to understand the complex processes of designing and interpreting a communication, difficult though it may be. Perhaps Oliver Wendell Holmes was right when he said that ‘although practical men generally prefer to leave their major premises inarticulate, yet even for practical purposes theory generally turns out the most important thing in the end’.¹¹⁴

¹¹¹ *Expression and Meaning* (1979) at 133.

¹¹² Ironically, in an article about causation, Lord Hoffmann himself described the phrase ‘common sense’ as one of the judicial expressions that was most frequently used to ‘[conceal] a complete absence of any form of reasoning.’ ‘Common Sense and Causing Loss’, Lecture to the Chancery Bar Association, 15 June 1999.

¹¹³ This extends to the obvious areas of implied terms and allocation of risk of mistake or frustrating events, as well as, less obviously, the allocation of responsibility for breach, currently governed by the remoteness and mental distress rules. For work that has already re-evaluated some of these areas with an agreement-centred approach in mind, see Langille and A. Ripstein, above n 94 and A.J. Morris (1997) 56 *Cambridge LJ* 147. Cf. J. Swan, above n 94. See also A. Kramer ‘The Implication of Terms as an Instance of Contractual Interpretation’ and ‘Remoteness of Damage as an Instance of Contractual Interpretation’, both forthcoming.

¹¹⁴ ‘The Theory of Legal Interpretation’, 12 *Harvard L Rev* 417 at 420 (1898–1899).