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RESEARCH ARTICLE

Purposive contractual interpretation

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Abstract

It is now well recognised that contractual purposes play an important role in the construction of contracts. The methods by which purposes are taken into account have not, however, been systematically explored. This paper considers three central issues in the purposive construction of contracts: first, the reasons contractual purposes are relevant to the interpretation of express terms and the identification of implied terms; secondly, the way in which contractual purposes are identified and distinguished from individual party interests; and, thirdly, the different ways in which contractual purposes inform the processes of interpretation and implication. It is argued that reference to contractual purposes can both raise and resolve interpretive choices, and that purposive construction plays a significant and under-recognised role in the identification of implied terms.

Keywords: contract; interpretation; implied terms; construction; objectivity

Introduction

Authoritative summaries of the principles of contract interpretation now routinely include the purposes of the contract and the provision in question as factors that must be taken into account in the ascertainment of the meaning of a contractual provision.[1] A perusal of recent appellate court decisions shows that contractual purposes are not infrequently taken into account, and sometimes play a significant role in resolving interpretation questions.[2] There has, however, been a dearth of systematic exploration of this well-accepted and important aspect of the construction of contracts. Greater attention needs to be paid to the identification of contractual purposes and the methods by which they are taken into account in order to improve both transparency and consistency in the purposive construction of contractual terms. The three principal questions to be addressed are: first, why a consideration of purpose is relevant and useful in the construction of contracts; secondly, how contractual purposes are identified; and thirdly, how contractual purposes inform interpretation and implication. The essence of the analysis is as follows.

Reference to contractual purposes in the construction of a contract is best understood to be justified on the basis that it informs the objective meaning of the instrument. While the interpretation of express terms and the identification of implied terms involve different processes of reasoning and analysis, both are concerned to identify what a reasonable person would understand the contract to

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[1]Eg *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15] (Lord Neuberger, with whom Lord Sumption and Lord Hodge agreed); *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12, (2017) 261 CLR 544 at [16] (Kiefel, Bell and Gordon JJ).

[2]See eg *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at [45]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*, above n 1, at [17].

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mean.[3] While purposive construction could be justified on the basis either that it helps to identify the intentions of the parties or on the basis that it helps to identify the objective meaning of the instrument, a focus on objective meaning more accurately characterises the nature of the interpretive exercises involved in construing express terms and identifying implied terms.

It might be expected that identifying the purposes of a bilateral instrument such as a contract would be fundamentally different from the identification of the purposes of a unilateral instrument such as a statute or a notice. Close consideration shows, however, that there is not in fact a significant difference. The reason is that contractual purposes are those that are adopted as elements of the bargain. The bilateral nature of contracts causes no difficulties for the identification of contractual purposes, provided there is no confusion between mutually adopted contractual purposes and the individual interests of the contracting parties.

In the interpretation of express terms, it is well accepted that contractual purposes can be invoked to resolve constructional choices that arise by virtue of other factors, such as textual ambiguity. Potentially more controversial is the question whether contractual purposes can also, in themselves, raise constructional choices. In other words, can an inconsistency between an express term and a contractual purpose raise a question of interpretation that would not otherwise arise? We will see that it can, but other factors necessarily come into play, such as whether the instrument has been carefully drafted. Only in limited circumstances will inconsistency with a contractual purpose require a departure from the meaning that would otherwise be attributed to a contractual provision.

Although the identification of an implied term, like the interpretation of an express term, involves determining what a reasonable person would understand a contract to mean, it is now accepted that the filling of a gap in the express terms requires an entirely different method from the interpretation of an express term. As we will see, identifying an implied term by reference to business efficacy is an exercise in purposive construction. But even if the contract as a whole can be considered efficacious without an implication, an implication may be required in order to prevent a secondary or subsidiary purpose from being defeated. In these difficult cases, purposive interpretation offers a more rational and predictable reasoning process than alternatives such as 'obviousness'.

Purposive construction is a form of contextual interpretation, but it is not one that is unfaithful or disloyal to the text. It is a fundamental principle of contract interpretation that a contractual instrument must be read as a whole. In almost all cases the context that informs purposive interpretation is internal to the contractual instrument. Contractual purposes are usually derived from the contract terms and will almost always be in harmony with them. In the rare instances of disharmony, contractual purposes will not always be controlling, for the reasons explored in this paper, but they must always be taken into account.

1. Meaning, Intention and Purpose

Contractual interpretation has traditionally been characterised as an exercise which aims to identify the 'mutual intentions' of the contracting parties.[4] Since the parties' intentions are generally determined objectively, however, it is said that the question of intention 'resolves itself in a search for the meaning of language in its contractual setting'.[5] Thus, in *Rainy Sky SA v Kookmin Bank* Lord Clarke made the perplexing statement that the 'ultimate aim' in interpreting a contractual provision 'is to determine what the parties meant by the language used, *which involves* ascertaining what a

[3]On the relationship between interpretation and implication, see A Robertson 'The foundations of implied terms: logic, efficacy and purpose' in S Degeling, J Edleman and J Goudkamp (eds) *Contract in Commercial Law* (Sydney: Law Book Co, 2016) pp 148–151.

[4]G Leggatt 'Making sense of contracts: the rational choice theory' (2015) 131 LQ Rev 454 at 454–455, citing the example of *BCCI v Ali* [2001] UKHL 8, [2002] 1 AC 251 at [8] (Lord Bingham); K Lewison *The Interpretation of Contracts* (London: Sweet & Maxwell, 6th edn, 2015) p 30, citing the example of *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 1011.

[5]*Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580 at 1587 (Lord Steyn).

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reasonable person would have understood the parties to have meant'.[6] What a reasonable person would have understood the parties to have meant may be a sensible proxy for 'what the parties meant', but cannot be equated with it.[7] The essential problem is that expressions such as 'the intentions of the parties' and 'what the parties meant by the language used' are apt to cause confusion because they encompass the uncommunicated intentions of the parties. While a strong version of the objective approach to interpretation remains somewhat controversial,[8] and may even be subject to limited exceptions,[9] it is clearly inaccurate to characterise the exercise as one that is concerned to identify the intentions of the contracting parties.

The idea that interpretation is essentially concerned with objective meaning rather than the intentions of the parties was recognised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.[10] The first of the principles of contract interpretation articulated by Lord Hoffmann in that case was that the interpretation of a contractual document is 'the ascertainment of *the meaning which the document would convey to reasonable person*' having all of the background knowledge available to the parties.[11] Lord Hoffmann's statement seems to have had the effect of establishing objective meaning, rather than party intentions, as the object of the inquiry.[12] Interpretation is now generally understood as a process by which the objective meaning of the instrument is determined,[13] although the view that the courts are concerned to identify the intentions of the contracting parties has proved to be remarkably persistent and has not yet been fully shaken off.[14]

Reference to contractual purposes in the process of interpretation can be justified on the basis of either party intentions or objective meaning. Because contracting parties can be taken to intend contractual provisions to serve the purposes of the contract of which they form part, reference to purpose provides guidance as to what the parties are likely to have intended. Alternatively, recourse to purpose can be justified on the basis that consideration of purpose informs the objective meaning of contractual provisions: a reasonable person reads a contractual provision in light of the perceived purposes of the provision and the contract as a whole, and favours meanings that accord with those purposes.

While there may not be any significant distinction in practice between the intentions of the parties, determined objectively, and what a reasonable person would understand a contractual instrument to mean, the shift in judicial language from intention to objective meaning is nevertheless important. A focus on the meaning of the instrument more accurately characterises the nature of the exercise.[15] The relevant question is what a reasonable person in the position of the parties would understand the

[6]Above n 2, at [14] (emphasis added).

[7]See eg D McLauchlan 'The contract that neither party intends' (2012) 29 J Cont L 26 (esp at 36–37, discussing *Brambles Holdings Ltd v Bathurst City Council* [2001] NSWCA 61, (2001) 53 NSWLR 153) and W Baude and SE Sachs 'The law of interpretation' (2017) 130 Harv L Rev 1079 at 1090–1092.

[8]See eg D McLauchlan 'Objectivity in contract' (2005) U Qld LJ 479.

[9]See eg *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352–353 (Mason J, with whom Stephen and Wilson JJ agreed); cf G McMeel *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford: Oxford University Press, 3rd edn, 2017) p 161.

[10][1998] 1 WLR 896.

[11]Ibid, at 912.

[12]McMeel, above n 9, pp 32–33 and 42–44 and Lewison, above n 4, pp 29–33.

[13]See eg *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [10] (Lord Hodge, with whom Lord Neuberger, Lord Mance, Lord Clarke and Lord Sumption agreed); *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*, above n 1, at [16] (Kiefel, Bell and Gordon JJ) and [73] (Nettle J).

[14]Eg *Multi-Link Leisure Developments Ltd v North Lanarkshire Council* [2010] UKSC 47, [2011] 1 All ER 175 at [20]; *Barts and the London NHS Trust v Verma* [2013] UKSC 20, [2013] WLR (D) 152 at [26]; *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129 at [19]; *Arnold v Britton*, above n 1, at [15]; *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at [56]; R Calnan *Principles of Contract Interpretation* (Oxford: Oxford University Press, 2013) p 11.

[15]This has long been recognised in relation to the interpretation of legal texts: see eg OW Holmes 'The theory of legal interpretation' (1899) 12 Harv L Rev 417 at 417–418 and F Frankfurter 'Some reflections on the reading of statutes' (1947) 47 Colum L Rev 527 at 538.

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instrument to mean, and that question is answered by reference to the text in its context.[16] The interpretive process is not an attempt to retrace the thought processes of the parties, but involves 'new thinking' about an issue that typically 'has yet to be thought about'.[17] As Lewison has argued, reference to intention is therefore inaccurate and distracting and ought to be abandoned in the interests of clarity.[18] The greater clarity provided by a focus on objective meaning has advantages for the processes of both interpretation and implication. It makes clear the irrelevance in all or almost all cases of the actual intentions of the parties, and the irrelevance of the fact that, on the issue in question, the parties may very well have not formed a common intention.[19] A focus on objective meaning also highlights the irrelevance of the parties' personal characteristics and preferences.[20] Moreover, and this is particularly important in the present context, it makes it clear that contractual purposes can only be inferred from the instrument and its context, and cannot be derived from speculation about the parties' individual goals or interests, or speculation about what the parties were or were not 'concerned with'.[21]

The reason contractual purposes are taken into account in construction, then, is not because they provide a guide to the parties' intentions, but because they influence the way in which a reasonable person would understand the instrument on which the parties have agreed. As a matter of law, contractual rights and obligations are (primarily, and relevantly) those on which the contracting parties have agreed, and what the parties are taken to have agreed is determined objectively, by reference to what a reasonable person would understand the instrument to mean. If a contractual provision could mean A or B, and B is more consistent with what a reasonable person would understand to be the purpose of the provision or the instrument, then a reasonable person would understand the provision to mean B, and would therefore reasonably understand the parties to have agreed B.

2. Identifying Contractual Purposes

Contractual purposes are the ends to which a contract and its constituent provisions are directed. The 'aim, or object, or commercial purpose' of a contract or contractual provision is of course to be determined objectively, by reference to what a reasonable person in the position of the parties would understand to be the aim of the contract or clause.[22] Although it has long been recognised that extrinsic evidence may be used to identify the aims and objectives of a contract,[23] in the great majority of cases contractual purposes are simply inferred from the express terms. What is important is that, absent relevant extrinsic evidence, contractual purposes are inferred from the text, 'judged against the objective contextual background', and are not divined by 'speculating about the real intention of the parties'.[24]

The most obvious difference between the purposive interpretation of contracts and the purposive interpretation of statutes is that contracts have bilateral sets of purposes, whereas statutes have unilateral sets. Both contracts and statutes have purposes which can be identified at different levels.[25] At the

[16] *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] 1 WLR 3251 at [18] (Lord Steyn, with whom Lord Nicholls and Lord Walker agreed).

[17] A Barak *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005) pp 33–34.

[18] Lewison, above n 4, pp 10 and 30–31. On the latter question, see Leggatt, above n 4, at 460–465.

[19] See *Summit Investment Inc v British Steel Corporation ('The Sounion')* [1987] 1 Lloyd's Rep 230 (CA) at 233.

[20] *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 at 996 (Lord Wilberforce). See also Lord Hoffmann 'The intolerable wrestle with words and meanings' [1997] 114 S African LJ 656 at 661–665.

[21] *Deutsche Genossenschaftsbank v Burnhope*, above n 5, at 1587 (Lord Steyn).

[22] *Reardon Smith Line Ltd v Hansen-Tangen*, above n 20, at 996 (Lord Wilberforce).

[23] Eg *Prenn v Simmonds* [1971] 1 WLR 1381 at 1385 (Lord Wilberforce, citing in support Cardozo J in *Utica City National Bank v Gunn* (1918) 118 NE 607). A recent case in which the purpose of a particular provision was identified by extrinsic evidence was *Cherry v Steele-Park* [2017] NSWCA 295 (although, as discussed below, the identified purpose did not ultimately influence its interpretation).

[24] *Deutsche Genossenschaftsbank v Burnhope*, above n 5, at 1587 (Lord Steyn).

[25] O Jones *Bennion on Statutory Interpretation: A Code* (London: LexisNexis, 6th edn, 2013) pp 848–849 (identifying the different levels of purposes in statutes).

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highest level, individual contracts and statutes may form part of a broader contractual or statutory scheme. In such cases, overarching purposes may be identified at a level that transcends the particular contracts and statutes forming part of that scheme. At an intermediate level are the principal purposes of individual contracts and statutes. At a lowest level are the secondary purposes of individual contracts or statutes, which may be pursued by particular provisions or groups of provisions. Although both contractual and statutory purposes have the common characteristic that they can be identified at different levels, statutory purposes are unitary in the sense that the legislature can properly be understood to act with a single set of purposes, whereas contractual purposes are always at least bilateral. To say, for example, that the main purpose of a construction contract is to have the work in question completed is manifestly one-sided. A more comprehensive or even-handed statement is that the main purpose is to have the work completed 'by the contractor … in return for payment by the principal in accordance with the contract'.[26] Similarly, in *SA Maritime et Commerciale of Geneva v Anglo-Iranian Oil Co Ltd*, Devil J held that the object of a particular charterparty was 'to provide for a ship that will, *at the agreed rate*, perform the voyages which the charterers want performed'.[27] Where the main purpose on one side is simply to earn a payment, it is common in practice to ignore the payment side in articulating 'the' contractual purpose. In *Glynn v Margetson & Co*, for example, the House of Lords identified 'the main object and intent' of a contract of carriage to be the voyage agreed upon, namely 'the carriage of oranges from Malaga to Liverpool'.[28] It could be said that an additional primary purpose of the contract was for the carrier to earn the freight, but as is very commonly the case this was not relevant to the issue at hand and did not need to be expressly stated.

A contract can usefully be distinguished in this regard from a notice given by one party, the purpose or purposes of which will be unilateral. In *Mannai Investment Ltd v Eagle Star Assurance Co Ltd*[29] the House of Lords was able to resolve a question of interpretation of a notice by reference to its purpose. The notice in question was given pursuant to a break clause in a lease. The tenant had a contractual right to terminate the lease on 13 January, but gave a notice purporting to terminate the lease on 12 January. The Court of Appeal held that the notice was not an effective exercise of the tenant's contractual right. As Lord Steyn said, however, the notice served only one purpose, which was to inform the landlord that the tenant was exercising its right under the break clause to terminate the lease. With that simple and obvious purpose in mind, a reasonable recipient of the notice would 'ignore immaterial errors' and would understand that the tenant wished to terminate the lease on 13 January in accordance with its terms.[30]

The fact that contractual purposes are bilateral does not mean that they are conflicting. Both the contract as a whole, and any individual provision, may be understood to represent an accommodation and reconciliation of two competing sets of interests. The existence of competing interests does not prevent the identification of a purpose favouring one party if that is the bargain that has apparently been struck. The distinction between individual *interests* and agreed *purposes* is crucial. The purpose of a rent review clause in a lease, for example, is generally to ensure that the rent keeps pace with inflation or the market rate for similar rental properties.[31] That purpose may inform the interpretation of the clause notwithstanding the conflict between tenant's interest in paying as little rent as possible and the landlord's interest in maximising its return. A bargain struck in favour of a purpose reflecting or favouring the interests of one party may reflect an industry consensus as to where the particular risk or burden should lie, may have been part of the deal originally made, or may have been conceded during negotiations in return for concessions made in the other direction. Regardless of how the risks

[26] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 258 (Priestley JA, justifying the implication of a term controlling a discretionary power to terminate).

[27] *SA Maritime et Commerciale* [1953] 1 WLR 1379 at 1382 (emphasis added).

[28] [1893] AC 351 at 355.

[29] [1997] AC 749.

[30] *Mannai Investment*, above n 29, at 768 (Lord Steyn).

[31] See eg *British Gas Corporation v Universities Superannuation Scheme* [1986] 1 WLR 398 (Ch D) at 401–402; *The Law Land Company Ltd v Consumers' Association Ltd* (1980) 255 EG 617 (CA).

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or burdens come to be allocated, when a contract is made the parties' competing interests are merged in the adoption of a common set of goals. Once a particular aim is recognised as a contractual purpose then it can inform the interpretation of the contract in the same way that a legislative purpose informs the interpretation of legislation.

Even where individual interests do not conflict, they have no role to play in purposive construction if they are not adopted as elements of the bargain struck between the parties. Assume, for example, that A offers to purchase the timber standing on B's land. B declines the offer, but indicates that she is willing to sell the land at its market value, and this leads to the formation of a written contract for the sale of the land which makes no reference to the timber. The acquisition of the timber may be A's purpose in entering into the contract, but A's acquisition of the timber is not a contractual purpose. Absent some indication that it was mutually adopted as a purpose of the bargain, A's interest in the acquisition of the timber must be ignored in the identification of contractual purposes. This hypothetical situation can be contrasted with *Krell v Henry*, where communications between the parties led to the conclusion that the hirer's purpose (viewing the coronation) was 'the basis of the contact as much for the lessor as for the hirer'.[32]

In *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* May LJ observed that it is 'important, in attributing a purpose to a commercial transaction, to be sure that it is the purpose of both parties and not just one'.[33] Since particular contractual purposes commonly do represent or implement the interests of only one party, it might be more accurate to say that it is important to be sure that the claimed contractual purpose is one that both parties evidently adopted, rather than that it *be the purpose* of both parties. As May LJ went on to say: 'Many contracts represent a compromise between what one party wishes to obtain and the other is willing to give'.[34] Opposing interests will not therefore usually translate into conflicting contractual purposes, but will merge in the common adoption of contractual purposes which will often, taken individually, favour or protect the interests of one party. The adoption of common purposes by way of contractual bargains means that the purposive interpretation of contracts is not significantly different from the purposive interpretation of unilateral legal texts such as notices, statutes or wills. Once a purpose has been mutually adopted as a contractual purpose, it can inform the interpretation of the contract in the same way that a purpose informs the interpretation of a statute or a notice. Contracting parties will almost invariably have divergent and competing interests, but those interests are either subsumed or superseded by the adoption of a set of common purposes by way of bargain. The purposive interpretation of a contract depends on the drawing of a clear distinction between, on the one hand, the individual interests and goals of the contracting parties and, on the other hand, the purposes that are mutually adopted as elements of the bargain.

3. The Purposive Interpretation of Express Terms

In *Antaios Compania SA v Salen AB ('The Antaios')*[35] Lord Diplock deprecated the use of the phrase 'purposive construction' in the contractual context. Lord Diplock was not advocating a more literal approach, but preferred 'business commonsense' to 'purposive construction' as the guiding criterion. Resort to purpose in contractual interpretation is now so well established that its legitimacy as an interpretative technique is beyond question, and there can be no valid objection to the use of an accurate label. As will be discussed below, purposive construction is best understood, not as an alternative to business commonsense, but as a distinctive interpretive technique within that broader cateogory.

[32][1903] 2 KB 740 at 751 (Vaughan Williams LJ).
[33][1990] 1 QB 818 at 870.
[34]Ibid, at 870.
[35][1985] AC 191 at 201, echoed by Lord Steyn in *Mannai Investment Ltd v Eagle Star Assurance Co Ltd*, above n 29, at 770.

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Some may be reluctant to embrace the notion of 'purposive construction' on the basis that it is sometimes equated with a strained, creative or liberal interpretation. In the context of statutory interpretation, Francis Bennion has observed that there is a tendency to equate a purposive interpretation with a strained interpretation and, indeed, to contrast a purposive construction with a literal one and treat them as polar opposites.[36] As Bennion notes, however, a purposive interpretation is not necessarily a strained or creative one. Any interpretative exercise that takes account of a contractual purpose could be characterised as a purposive construction. A consideration of purpose in most instances will simply confirm the meaning that would be gleaned from the language alone.[37]

(a) Resolving constructional choices

Contractual purposes are commonly used to resolve constructional choices, or choices that must be made in the interpretation of a contractual instrument. The circumstances in which constructional choices arise cannot be comprehensively catalogued, but they include vague wording, inconsistent provisions, instances in which it appears that something has gone wrong with the language of a term, cases in which a term appears to be inconsistent with business common sense (eg because it appears arbitrary or irrational or lacks an apparent purpose), and circumstances in which contractual language is, on its face, open to more than one meaning. In *Rainy Sky SA v Kookmin Bank* Lord Clarke said on behalf of a unanimous Supreme Court that, if language is open to more than one meaning, the choice between the available meanings may be resolved by reference to the commercial purpose of the agreement, even if neither reading is absurd, irrational or flouts common sense.[38] In *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*, for example, it was unclear whether a clause of a lease required the tenant to pay all taxes and outgoings levied in respect of the demised land or only those levied on the tenant itself.[39] The clause was construed by reference to the 'commercial purpose' of the lease, which was 'to recreate, as far as possible, in a lease, the conditions which would have existed following a sale'.[40] In light of that object it was clear that the clause imposed on the tenant an obligation to assume all of the liabilities of an owner and to pay all outgoings levied in respect of the land.[41]

In *Ecosse Property Holdings v Gee Dee Nominees* the main purpose of the contract was invoked to construe an ambiguous provision. A subsidiary contractual purpose can also be invoked for this purpose, as it was in *Summit Investment Inc v British Steel Corporation ('The Sounion')*.[42] That case concerned the interpretation of a clause in a charterparty made on the basis of a widely-used standard form promulgated by the New York Produce Exchange. Clause 2 provided that the charterer was to pay for fuel except as otherwise agreed, while clause 20 provided that:

> Fuel used by the vessel while off hire, also for cooking, condensing water, or for grates and stoves to be agreed as to quantity, and the cost of replacing same, to be allowed by Owners.

At issue was the extent of the owner's liability under clause 20 with respect to fuel used for 'cooking, condensing water, or for grates and stoves'. The expression 'grates and stoves' had been retained

[36]Jones, above n 23, pp 846–847, on the latter point quoting *Carter v Bradbeer* [1975] 1 WLR 1204 at 1206–1207 (Lord Diplock).

[37]Jones, above n 23, p 847.

[38]*Rainy Sky SA v Kookmin Bank*, above n 2, at [43], drawing on *Co-operative Wholesale Society Ltd v National Westminster Bank plc* [1995] 1 EGLR 97 at [23] (Lord Hoffmann) and *Barclays Bank plc v HHY Luxembourg SARL* [2011] 1 BCLC 336 at [26] (Longmore LJ).

[39]Above n 1.

[40]*Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*, above n 1, at [17]–[19].

[41]Above n 1, at [27].

[42]*The Sounion*, above n 19.

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through various revisions of the form since its introduction in 1913, even though the expression referred to coal-burning methods of heating crew quarters which were no longer in use. Donaldson LJ described it as a 'hopelessly dubious and archaic form of words'.[43] The owner maintained that it was (relevantly) liable only for the cost of fuel used for cooking, condensing water and heating, while the charterer argued that the owner was liable for all fuel used for the crew's domestic purposes, including purposes such as air conditioning and refrigerating food which had arisen since the last revision of the form in 1946. Lloyd LJ said that '[i]f ever a case were designed to separate the purposive sheep from the literalist goats this is it'.[44] The Court of Appeal held that the 'pattern of the charter' was that the charterer was responsible for the cost of fuel used to propel the vessel, while the owner was responsible for the cost of fuel burned for the crew's domestic purposes.[45] The purpose of clause 20, read in light of the contract as a whole, was to effect that pattern of responsibility, and this required 'grates and stoves' to be understood to refer to all of the crew's domestic purposes.

(b) Raising constructional choices

Potentially more controversial is the question whether a contractual purpose can be used to raise a constructional choice that does not arise from an examination of the language of the provision in question when considered in isolation. The question, in other words, is whether inconsistency with primary purpose of the contract, the purpose of the provision in question, or the purpose of another provision or set of provisions in the contract, raises a constructional choice which would not arise from consideration of the language of the provision taken by itself. This is an example of what Richard Fallon has called 'interpretive dissonance': discordance between the first-blush meaning of a provision and what an interpreter would expect the provision to stipulate in light of its broader context or the consequences of adopting different interpretations.[46]

It would be overly simplistic to characterise this as a question whether inconsistency with a contractual purpose justifies a departure from plain meaning. In the first place, plainness of meaning is better understood as a sliding scale, rather than a binary divide. In *Arnold v Britton*, for example, Lord Neuberger noted that the clearer the natural meaning of the words to be interpreted, 'the more difficult it is to justify departing from it' and, conversely, the less clear, 'the more ready the court can properly be to depart from their natural meaning'.[47] Secondly, and most importantly, it is universally accepted that a contractual provision must be interpreted in light of the agreement as a whole.[48] If the meaning that one might attribute to a clause in isolation is inconsistent with a contractual purpose, that inconsistency raises a question as to what a reasonable person would understand to be the meaning of the provision. It gives rise to an interpretive dissonance which must be resolved one way or the other. Inconsistency between the meaning of the language and an apparent contractual purpose may be said to create an ambiguity or constructional choice. Since it is clearly incorrect as a matter of law to read a particular contractual provision in isolation from the remainder of the agreement, a contractual provision cannot properly be said to be unambiguous or to bear a plain meaning if it is inconsistent with a contractual purpose manifested by the agreement.[49]

Thirdly, other factors properly influence the extent to which it is justifiable to understand a particular provision in a way that strains its language. It is well accepted, for example, that the greater the care that appears to have been taken in the preparation of a legal text, the greater the attention

[43]Ibid, at 235.

[44]Ibid.

[45]Ibid (Lloyd LJ, with whom Nicholls LJ agreed).

[46]RH Fallon Jr 'Three symmetries between textualist and purposivist theories of dtatutory interpretation – and the irreducible roles of values and judgment within both' (2014) 99 Cornell L Rev 685, esp at 689.

[47]*Arnold v Britton*, above n 1, at [18].

[48]See eg *Leader v Duffey* (1888) 13 App Cas 294 at 301; *Glynn v Margetson & Co*, above n 28, at 357; *Wood v Capita Insurance Services Ltd*, above n 13, at [10]; Lewison, above n 4, pp 363–370.

[49]On the need to consider context, including commercial purpose, before it can be concluded that the meaning of a provision is plain or unambiguous, see *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184, (2014) 89 NSWLR 633 at [71]–[79].

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that should be paid to its language.[50] Conversely, a broader and more flexible approach is taken to the interpretation of texts drafted more loosely, imprecisely or hurriedly. As Lord Hodge JSC said in *Wood v Capita Insurance Services Ltd*, the weight given to the wider context in determining the objective meaning of contractual language depends on 'the nature, formality and quality of drafting of the contract', and a greater emphasis on the factual matrix may be needed to interpret correctly agreements that are informal, brief or prepared without professional assistance.[51] Since contracts are generally drafted with greater speed, less deliberation and fewer hands than statutes, a purposive approach may be expected to play a greater role in the interpretation of contracts than statutes. And within the field of contract interpretation the less carefully an agreement has been drafted the more inclined courts will be to favour an interpretation that accords with contractual purposes over one that does not.

(i) Raising and resolving a constructional choice

There is support in the authorities for the notion that a constructional choice arises where the apparently plain meaning of a provision would defeat the main object of the contract.[52] In *Glynn v Margetson & Co* Lord Halsbury said that 'one must in the first instance look at the whole of the instrument and not at one part of it only' and 'one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract'.[53] In that case a plainly worded deviation clause in a contract for the carriage of goods was read down to conform to the main object of the contract, although it must be noted that the deviation clause was in a printed form, while the main purpose was derived from the details of the particular voyage. The strong language used by Lord Halsbury must be understood in that light.[54] A contract for the carriage of a shipment of oranges from Malaga to Liverpool was made on the basis of the shipowner's standard form bill of lading, which left spaces for the port of shipment and description of the goods to be specified for each transaction, but included printed words giving the shipowner:

> liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo or passengers, or for any other purpose whatsoever.

The shipowner relied on that clause to justify a deviation which, although relatively short, took the loaded vessel in the opposite direction from Liverpool, resulting in the oranges spoiling. The House of Lords held that the deviation clause, which was drafted for general use without a particular voyage in mind, must be construed so as not to defeat the 'main object and intent' of the contract, which was 'the carriage of oranges from Malaga to Liverpool'.[55] The main object of the contract was, in other words, to carry a perishable cargo from one named port to another.[56] The deviation clause had to be interpreted so as not to defeat that object, and could therefore only be understood to allow the

[50]See eg *Mitsui Construction Co v Attorney-General of Hong Kong* (1986) 33 BLR 1 at 14, quoted with approval in *Rainy Sky SA v Kookmin Bank*, above n 2, at [26] and *Multi-Link Leisure Developments Ltd v North Lanarkshire Council*, above n 14, at [20], *HP Mercantile Pty Ltd v Hartnett* [2016] NSWCA 342 at [141]–[147] and Jones, above n 23, p 781. This is linked to the first point in the paragraph above: see *Arnold v Britton*, above n 1, at [18].

[51]*Wood v Capita Insurance Services Ltd*, above n 13, at [10] and [13] (Lord Hodge, with whom Lord Neuberger, Lord Mance, Lord Clarke and Lord Sumption agreed).

[52]In addition to the cases discussed below, see *The Law Land Company Ltd v Consumers' Association Ltd* (1980) 255 EG 617, discussed in Lewison, above n 4, p 525.

[53]*Glynn v Margetson & Co*, above n 28, at 357.

[54]Lewison, above n 4, p 377 takes the view that Lord Halsbury's dictum should be understood to be confined to 'cases involving printed forms or other standard form contracts'.

[55]*Glynn v Margetson & Co*, above n 28, at 355 (Lord Herschell LC).

[56]Ibid, at 357 (Lord Halsbury).

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shipowner to make deviations consistent with that object. That allowed the shipowner to call only at those ports situated along the agreed route.

Further support for the notion that conflict between an express term and a contractual purpose raises a constructional choice, even in the absence of any ambiguity in the language of the express term, comes from *Thorney Park Golf Club Ltd v Myers Catering Ltd*.[57] The defendant in that case had provided catering services to the claimant pursuant to a contract that was terminable on three months' notice. The parties then entered into a new agreement, clause 4 of which provided that 'In order for this contract to be reasonable for both parties to develop and invest in a viable business development plan an initial term of three years … must be agreed.' Clause 6 of the new agreement provided that the claimant could terminate the agreement immediately upon certain breaches by the defendant, or otherwise without reason on the giving of four months' notice. The issue was whether the contract was terminable on four months' notice within the initial three-year period, or only thereafter. The trial judge considered that the meaning of clause 6 was clear: it plainly allowed termination on four months' notice given at any time. An appeal was allowed on the basis that the judge failed to give 'suitable effect to clause 4' and to the 'commercial sense of the Agreement as a whole.'[58] For the Court of Appeal, the right to terminate provided by clause 6 must be exercisable only after the initial three-year term in order to give effect to the purpose set out in clause 4, which was to allow the parties to 'develop and invest in a viable business development plan'. As David McLauchlan has noted, this was not a case involving the reconciliation of inconsistent terms.[59] It is not unusual for a commercial contract to subsist for a fixed term with one or both parties given power to terminate during that term.[60] The constructional choice was raised by conflict between what the trial judge found to be the plain meaning of clause 6 and a manifest contractual purpose. That choice was resolved in favour of protecting the contractual purpose, which overrode what clause 6 would have been understood to mean if considered in isolation. There were two clear justifications for the overriding influence of contractual purpose in the face of what the Court of Appeal recognised to be a forceful argument based on the syntax of clause 6:[61] first, the purpose was clearly manifested in the express terms of the agreement; and, secondly, as McCombe LJ noted, the document had been drafted by lay people without legal assistance and there was an obvious lack of precision in the text.[62]

(ii) Raising but not resolving a constructional choice

The fact that an inconsistency with a contractual purpose has raised a constructional choice does not mean that the choice will necessarily be resolved by construing the provision in a way that accommodates the purpose. There may be a predisposition to interpret contractual provisions in a way that is consistent with apparent contractual purposes, but other factors may overwhelm that predisposition, and it is not uncommon for them to do so. Lord Diplock made the point in the statutory interpretation context that the exercise remains an interpretative one:

> I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction.[63]

In the contractual context, this issue most commonly arises in the interpretation of clauses exempting one of the parties from liability. In *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*, for example, a

[57][2015] EWCA Civ 19.
[58]Ibid, at [27].
[59]D McLauchlan 'The ICS principles: a failed "revolution" in contract interpretation' (2016) 27 NZ Universities LR 263 at 292.
[60]*Thorney Park Golf Club*, above n 57, at [23].
[61]Ibid, at [27].
[62]Ibid, at [24].
[63]*Jones v Wrotham Park Settled Estates* [1980] AC 74 at 105.

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clause in a bill of lading provided that the carrier's responsibility 'shall be deemed … to cease absolutely' after the goods are discharged from the ship. The carrier relied on that clause to avoid liability for misdelivery.[64] The Privy Council held that the clause must be limited to the extent necessary to give effect to the main object and intent of the contract, which included proper delivery of the goods. That object would be defeated if the carrier was 'at liberty, at its own will and pleasure' to deliver the goods to someone not entitled to them.[65] But in *Nissho Iwai Australia Ltd v Malaysian International Shipping Corp Berhad* the High Court of Australia pointed out that in some instances, such as where an exemption clause stipulates an event that will always result in the defeat of the main object of the contract, there is no escaping the conclusion that liability is to be denied on the happening of the event.[66] In other words, conformity with the object of the contract is only one influence on the way in which a reasonable person will understand a contractual provision. In some instances, countervailing influences will compel the conclusion that an exemption clause must be interpreted in such a way that the main object of the contract can in particular circumstances be defeated.

Wood v Capita Insurance Services Ltd provides a clear example of a case in which the identifiable purpose of a contractual provision did not govern its interpretation.[67] A contract for the sale of shares in a company that sold insurance required the sellers of the shares to indemnify the buyers against compensation payments arising out of certain claims or complaints relating to the mis-selling of insurance:

> The Sellers undertake to pay to the Buyer an amount equal to the amount which would be required to indemnify the Buyer and each member of the Buyer's Group against all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by the Company following and arising out of claims or complaints registered with the FSA, the Financial Services Ombudsman or any other Authority against the Company, the Sellers or any Relevant Person and which relate to the period prior to the Completion Date pertaining to any mis-selling or suspected mis-selling of any insurance or insurance related product or service.

The issue was whether the indemnity applied to a compensation scheme that was initiated by the company itself after the company discovered that its salespeople had systematically misled customers. The payments made by the company did not arise out of any actions, claims or complaints by customers. The Supreme Court held that the purpose of the clause was to indemnify the buyer against losses occasioned by mis-selling.[68] But the agreement went on to set out a number of warranties made by the sellers which were more broadly worded, and 'which probably covered the circumstances that eventuated'.[69] Those warranties had a lifespan of only two years, whereas the indemnity was unlimited as to time. A detailed examination of the agreement as a whole therefore pointed to the existence of a scheme in which it made business sense for the indemnity to have a limited effect within the scope of its purpose. Both a close reading of the language of the clause and the broader context of the agreement confirmed that the apparent purpose of the clause did not govern the meaning it would convey to a reasonable person.

A good illustration of the limits of purpose as an influence on interpretation is that a clearly-worded contractual provision will not be read down merely because it exceeds its clearly identifiable contractual purpose. In *Cherry v Steele-Park*[70] a company contracted to purchase land, expressly

[64][1959] AC 576.
[65]Ibid, at 587.
[66](1989) 167 CLR 219 at 227.
[67]Above n 13.
[68]Ibid, at [40].
[69]Ibid.
[70]Above n 23.

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promising to pay the vendor the amount of any shortfall if the contract was validly terminated by the vendor and the land resold at a lower price. The parties later entered into a variation agreement by which the completion date was extended in return for the purchaser's promise to pay certain additional sums to the vendor. At the time the variation agreement was entered into, the directors of the purchaser company provided a guarantee with respect to all amounts payable by the purchaser to the vendor 'on any account at any time under or in connection with the [variation agreement] or any transaction contemplated by [that agreement], whether present or future actual or contingent'. The purchaser ultimately defaulted, the land was resold, and the vendor sought to recover the shortfall on the resale from the directors pursuant to the guarantee. Correspondence between the parties' solicitors made it clear that the purpose of the guarantee was only to secure the obligation to make the additional payments relating to the extension, and that if those sums had been paid immediately the guarantee would not have be needed.

Although the court accepted that the commercial purpose of the guarantee was limited to securing the payment of the additional sums, the directors were nevertheless held liable for the shortfall. This seemed to be a result of two factors operating in combination: first, the unequivocally clear wording of the guarantee and, secondly, the fact that giving effect to the meaning the provision bore on its face did not threaten to defeat or even undermine its apparent purpose, but only exceeded it. An ambiguous provision might be read down on the basis that, on one available meaning, it exceeds its contractual purpose, but a reasonable person will not read down a clearly worded provision on the basis that it goes further than its purpose requires. It may also be noted that, in contrast with the *Thorney Park Golf Club* case discussed above, the purpose was derived entirely from extrinsic evidence and was not reflected in the instrument itself. Moreover, although the guarantee contained 'some drafting infelicities', it had been prepared with some deliberation by the parties' legal representatives.[71] This justified attending more closely to the language used and placing less weight on the apparent contractual purpose.

(iii) Purpose and commercial common sense

Purposive interpretation is best understood as an interpretative technique within the broader category of giving effect to commercial common sense.[72] The commercial common sense principle reflects the notion that a reasonable person will be guided in his or her interpretation of a commercial agreement by the idea that both the instrument as a whole and its constituent provisions should, as far as possible, make sense from a commercial perspective. That includes the purposive notions that the meaning of constituent provisions should accord with the overall purposes of the agreement,[73] and that constituent provisions should be understood in ways that are consistent with their own apparent purposes. But taking account of purpose is just one aspect of commercial sense. Commercial sense also requires that contractual provisions be read, so far as possible, so as not to create commercial nonsense or inconvenience.[74] It requires that contractual provisions be understood so as not to make 'the structure and language' of the provision 'appear arbitrary and irrational'.[75] Purposive interpretation will sometimes overlap with other aspects of the commercial common sense principle: an interpretation may be consistent with an apparent contractual purpose, and also preferable because the alternative construction is not supported by any apparent purpose.[76]

An example of overlap between purpose and the broader commercial common sense principle is provided by *SA Maritime et Commerciale of Geneva v Anglo-Iranian Oil Co Ld*.[77] A clause in a

[71] *Cherry v Steele-Park*, above n 23, at [17].

[72] N Andrews 'Interpretation of contracts and "commercial common sense": do not overplay this useful criterion' [2016] Camb LJ 1 at 8–9.

[73] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*, above n 1, at [17].

[74] *Electricity Generation Corporation (trading as Verve Energy) v Woodside Energy Ltd* [2014] HCA 7, (2014) 251 CLR 640 at [35].

[75] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [20].

[76] See McMeel, above n 9, p 55.

[77] *SA Maritime et Commerciale*, above n 27, affirmed [1954] 1 WLR 492 (CA).

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charterparty gave shipowners 'the liberty of substituting a coiled vessel of similar size and position at any time before or during the charterparty'. The issue was whether the owners, having made one substitution before commencement, were entitled to make a second substitution during the term when the originally substituted vessel needed repairs. The language of the clause gave no indication as to whether it allowed only one substitution.[78] Devlin J observed that the object of the charterparty was to provide a ship that would, 'at the agreed rate, provide the voyages which the charterers want performed'. Seen in that light, the object of the clause in question was to ensure that an accident to a particular ship would not bring the charterparty to an end if the owners had an identical ship available.[79] A purposive interpretation of the clause would therefore allow multiple substitutions. Devlin J also noted that, because it was a matter of indifference to the charterer which vessel was used, there were no commercial reasons for limiting the owner to one substitution.[80] In modern parlance, therefore, a purposive interpretation of the clause coincided with the interpretation dictated by commercial common sense.

A purposive interpretation also coincided with commercial common sense in *Rainy Sky SA v Kookmin Bank*.[81] The claimants in that case had contracted to purchase vessels from a shipbuilder and had paid instalments pursuant to the shipbuilding contracts. The instalments were secured by advance payment bonds issued by the defendant bank. When the shipbuilder entered into a debt work-out procedure with its creditors, the buyers exercised contractual rights to demand repayment of the instalments they had paid. The issue was whether the bank was obliged to pay to the buyers – pursuant to the advance payment bonds issued by the bank – an amount equal to the instalments they had paid. Under paragraph 3 of the bonds, the bank promised to pay on demand 'all such sums' due to the buyers under the contracts, but it was not clear whether 'such sums' referred back to the 'pre-delivery instalments' mentioned earlier in paragraph 3 (as argued by the buyers), or to the sums repayable to the buyers on rejection or total loss of the vessels mentioned in paragraph 2 (as argued by the bank). The buyers' interpretation of paragraph 3 of the bonds was preferred to that advanced by the bank because the buyer's interpretation was consistent with the commercial purpose of the bonds, while 'no credible commercial reasons were advanced for the limited scope of the bonds being advanced by the bank'.[82] Lord Clarke did not expressly identify the purpose of the bonds, but it seemed that he must have accepted the buyers' submission that 'the purpose of the bond was to guarantee the refund of pre-delivery instalments'.[83] The buyers' interpretation was preferred because it was consistent with the apparent purpose of the bonds, and because the alternative interpretation made no commercial sense.

4. Purpose in the Implication of Terms

It is now well accepted that the identification of implied terms in particular contracts, like the interpretation of express terms, is an interpretive exercise, the ultimate aim of which is to determine what a reasonable person would understand the instrument to mean.[84] The identification of implied terms is, however, understood to be a 'more ambitious undertaking' than the interpretation of express terms.[85] It involves a different process of analysis and should be undertaken separately from the

[78] *SA Maritime et Commerciale*, above n 27, at 1380 (Devlin J); [1954] 1 WLR 492 at 496 (Romer LJ).

[79] *SA Maritime et Commerciale*, above n 27, at 1382.

[80] Ibid, at 1382–1383.

[81] *Rainy Sky SA v Kookmin Bank*, above n 2.

[82] *Rainy Sky SA v Kookmin Bank*, above n 2, at [44] (Lord Clarke, with whom Lord Phillips, Lord Mance, Lord Kerr and Lord Wilson agreed).

[83] *Rainy Sky SA v Kookmin Bank*, above n 2, at [9].

[84] *Codelfa Construction Pty Ltd v State Rail Authority of NSW*, above n 9, at 345; *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [21]; *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [26].

[85] *Philips Electronique Grand Public SA v British Sky Broadcasting* [1995] EMLR 472 (CA) at 481 (Lord Bingham MR), quoted with approval in *Marks and Spencer v BNP Paribas*, above n 84, at [29].

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interpretation of any relevant express terms.[86] Before turning to the role of purpose in the identification of implied terms in particular contracts, it is necessary to set to one side the categories of implied terms that do not rest on contractual purposes. These include terms which are implied as a matter of logic or direct inference from the express words of the contract,[87] terms implied on the basis of custom,[88] and terms implied in particular classes of contract as a matter of law.[89]

If we set aside those other categories of implied terms then we are left with terms that are implied in particular contracts to make those contracts work. This category of implied terms is an exercise in purposive interpretation. A term is implied where a reasonable person would understand the term to form part of the contract because (a) an additional term is necessary to enable the fulfilment of a contractual purpose, and (b) the term in question represents a singularly apt solution to that problem. This reconceptualisation of this category of implied terms provides a solution to the difficulties inherent in the concepts of necessity, business efficacy and obviousness. Despite their venerable histories, these vague concepts have dogged the law on implied terms.

The most recent attempt to reformulate the law on terms implied to make particular contracts work was that of Lord Neuberger, with the concurrence of Lord Sumption and Lord Hodge, in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*.[90] Lord Neuberger endorsed a modified version of the well-known formula articulated by Lord Simon in the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* as the best available framework for the identification of implied terms. There were three key elements in the reformulation.[91] First, Lord Neuberger held that that business efficacy and obviousness should be treated as alternative bases for the implication of terms in fact, rather than cumulative requirements in a single formula or test. Secondly, he indicated that Lord Simon's first requirement, that the term be reasonable and equitable, does not add anything of substance to the other requirements and can be set to one side. Thirdly, he suggested that a more helpful way of putting the 'business efficacy' requirement may be to say that 'a term can only be implied if, without the term, the contract would lack commercial or practical coherence'.[92] The effect of Lord Neuberger's restatement is that a term will be implied in a written contract if it is capable of clear expression, consistent with the express terms and, either: (a) is necessary to give business efficacy (or commercial or practical coherence) to the contract; or (b) is so obvious that 'it goes without saying'.[93]

As a matter of language, to say that something lacks 'efficacy' is to say that it lacks the capacity to achieve its intended object.[94] The notion that 'business efficacy' is concerned with the capacity of a contract to fulfil its primary purpose is not only true as a matter of language but also as a matter of law. When a court asks whether a term is needed to give business efficacy to a contract the court is posing the question whether the term is needed to prevent a primary purpose of the contract from being defeated. The purpose of the contract in *The Moorcock*, for example, was to provide a safe berth for the ship.[95] In the circumstances in which the contract was made, fulfilment of that purpose depended on an obligation on the part of the wharfingers to ensure that the berth was safe. Bowen LJ observed that 'all consideration would fail unless some care had been taken to see that the ground was safe'.[96]

[86]*Marks and Spencer v BNP Paribas*, above n 84, at [27]–[28].

[87]See eg JW Carter *The Construction of Commercial Contracts* (Oxford: Hart Publishing, 2013) para [3–23]; D McLauchlan 'Construction and implication: in defence of Belize Telecom [2014] LMCLQ 203 at 208–209; Robertson, above n 4, pp 153–155.

[88]Eg *Nelson v Dahl* (1879) 12 Ch D 568 (CA); *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 (HCA).

[89]Eg *Liverpool City Council v Irwin* [1977] CA 239 (HL).

[90]*Marks and Spencer v BNP Paribas*, above n 84, at [14]–[32].

[91]Ibid, at [21].

[92]*Marks and Spencer v BNP Paribas*, above n 84, at [21] (adopting in the third point a suggestion made by Lord Sumption during argument).

[93]*Marks and Spencer v BNP Paribas*, above n 84, at [21].

[94]'Efficacy, OED Online, Oxford University Press, June 2017 (accessed 27 August 2017).

[95](1889) LR 14 PD 64.

[96](1889) LR 14 PD 64 at 69.

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The reason 'obviousness' has emerged as an alternative ground for the implication of a term is that there are some instances in which a reasonable person would understand a term to be implied in a contract even though, because its primary purposes can be fulfilled without any implication, the contract does not lack 'efficacy'. But the cases show that terms are not only implied to prevent the defeat of primary contractual purposes, but also to prevent the defeat of secondary contractual purposes. In other words, a reasonable person understands a contract to imply a term which is necessary to defeat any identifiable contractual purpose, whether it is a primary contractual purpose or a secondary contractual purpose, provided the term said to be implied represents a singularly apt solution to the problem in question and is consistent with the express terms.

The problem with 'obviousness' as an independent basis for the implication of terms is that there is no reasoning process by which it can be determined whether a term is obvious or not. Obviousness therefore functions as a *deus ex machina*. There is, however, no need to resort to providential solutions in cases falling outside the business efficacy principle. The cases said to support the notion that 'obviousness' provides an independent basis for the implication of terms either provide that support by way of obiter dicta, rely on obviousness alongside other grounds such as the interpretation of express terms, can be explained on a more orthodox basis, or are more rationally explained on the basis that the term in question was needed to ensure the fulfilment of a secondary contractual purpose.[97] Not only can leading cases be more rationally explained on this basis, but it is evident from the reasoning that leading cases have in fact been decided on that basis.

In *Attorney General of Belize v Belize Telecom Ltd*, for example, the issue was whether it was an implied term of the articles of association of a privatised telecommunications company that directors appointed by a special shareholder would cease to hold office when the appointor ceased to hold the qualifying shareholding that, under the articles of association, provided the power to make the appointment.[98] Fulfilment of the primary purposes of the articles of association did not depend on an implied automatic termination of the appointments because the company could function effectively without it. But an implied term was needed to ensure the fulfilment of a secondary purpose of the articles of association, namely 'the overriding purpose of the machinery of appointment and removal of directors' which was to ensure that 'the board reflects shareholder interests in accordance with the scheme laid out in the articles'.[99] Similarly, in *Equitable Life Assurance Society v Hyman*, the issue was whether life assurance policies included an implied term that the directors would not neutralise an annuity rate guarantee by adjusting the final bonus paid to those policy holders who sought to take advantage of it. The term was not necessary to give the contract efficacy: an affected policy 'could function perfectly well as a tax investment vehicle and pensions device without the implied term'.[100] But the term was needed to prevent the defeat of a secondary contractual purpose, namely the purpose of the annuity rate guarantee. The 'self-evident commercial object' of that contractual provision was to 'protect the policyholder against a fall in market annuity rates'.[101] Without the implication, the policyholder received no such protection.

What the purposive implication of terms has in common with the purposive interpretation of express terms is that a complete answer to neither problem is provided by the identification of a contractual purpose that needs to be protected and a mechanism for protecting that contractual purpose. In each case there may be other factors that prevent the adoption of the purposive construction. In the case of an implied term, there are two other crucial requirements: first, the implication must be

[97] See Roberson, above n 4, pp 163–164. The most important of these is *Mosvolds Rederi A/S v Food Corp of India (The 'Damodar General TJ Park' and 'King Theras')* [1986] 2 Lloyd's Rep 68, discussed at length in Robertson, above n 4, pp 159–161.

[98] *Attorney General of Belize v Belize Telecom Ltd*, above n 84.

[99] *Attorney General of Belize v Belize Telecom Ltd*, above n 84, at [32].

[100] H Collins 'Implied terms: the foundation in good faith and fair dealing' (2014) 67 CLP 297 at 317.

[101] [2002] 1 AC 408 at 459 (Lord Steyn, with whom Lord Slynn, Lord Hoffmann, Lord Cooke and Lord Hobhouse agreed). Cf Lord Grabiner QC 'The iterative process of contractual interpretation' (2012) 128 LQ Rev 41 at 58 (arguing that this was pure speculation, but not suggesting any alternative purpose for the annuity rate guarantee).

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consistent with the express terms;[102] secondly, the implication must be a singularly appropriate solution to the problem that has arisen. There is no doubt that a term will not be implied if multiple, equally reasonable solutions were available to deal with the problem in question.[103] This has commonly been described as a requirement that the solution be 'so obvious that "it goes without saying"',[104] but Lord Hoffmann has provided very strong reasons for abandoning both the 'obviousness' formulation and the officious bystander test for assessing it. First, the 'obviousness' formulation suggests that the solution must be immediately apparent. The fact that a particular issue is complicated is, however, no reason to deny an implied term, provided that careful consideration reveals that 'only one answer would be consistent with the rest of the instrument'.[105] Secondly, the officious bystander test creates unnecessary confusion by bringing to mind the actual parties, and inviting speculation as to how those particular parties might have reacted to the proposed solution.[106] Those problems are avoided, and the relevant issue addressed is more directly, if obviousness and the officious bystander are abandoned in favour of the question whether the solution in question is singularly appropriate.[107]

The purposive approach to the implication of terms also works negatively, to show why terms are not implied in particular circumstances. In *Marks and Spencer v BNP Paribas* a lease required rent to be paid in advance, but a break clause gave the tenant an entitlement to terminate the lease part-way through a rent period. The issue was whether, when the tenant exercised the right to terminate, the landlord was under an implied obligation to repay the rent representing the period following the break date. Under a purposive approach the implied term argument does not even get off the ground on those facts because it is not possible to point to a contractual purpose which would be undermined by the absence of an implied term requiring repayment. In contrast, it is difficult to identify any reasoning process by which one could conclude that a term requiring repayment of the advance rental was not 'obvious' or was not required to give 'commercial or practical coherence' to the contract. Although Lord Neuberger suggested in *Marks and Spencer v BNP Paribas* that 'commercial or practical coherence' may be a more helpful formula than necessity for business efficacy,[108] it was telling that the concept of 'coherence' played no part in Lord Neuberger's reasoning in relation to the facts of that case.

The great advantage that a purposive approach to implication has over notions of 'obviousness' and 'coherence' is that obviousness and coherence are too abstract to provide a reasoning process by which it can be concluded that a contract must be understood to include an implied term. A purposive approach, on the other hand, sets out a clear and predictable path of reasoning by which a court or legal adviser can determine whether a term is implied. It is necessary first to identify a contractual purpose that would be frustrated if a term were not implied to protect it. Secondly, it is necessary to identify a term that would have the effect of protecting the purpose. Thirdly, it is necessary to be sure that the term in question represents a singularly apt solution to the problem in question. If there are multiple reasonable ways in which the problem might have been solved, then the contract cannot be understood to mean that any one of them is implied. Fourthly, the term in question must be consistent with the express terms. Only if those requirements are satisfied can we conclude that the contract must mean that the term is implied. Because a purposive explanation of implied terms is more rational and less impressionistic than obviousness or coherence, it provides more effective protection against the

[102] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) at 283.

[103] *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 (HL) at 609–610 (Lord Pearson, with whom Lord Guest and Lord Diplock agreed), 614 (Lord Cross); *Codelfa Construction Pty Ltd v State Rail Authority of NSW*, above n 9, at 355–356 (Mason J, with whom Stephen and Wilson JJ agreed).

[104] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, above n 102, at 283.

[105] *Attorney General of Belize v Belize Telecom Ltd*, above n 84, at [25] (Lord Hoffmann, giving the judgment of the Board).

[106] Hoffmann, above n 18, at 662.

[107] See further Robertson, above n 4, pp 161–164.

[108] *Marks and Spencer v BNP Paribas*, above n 84, at [21].

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possibility that a term might be implied simply because it is 'fair' or 'reasonable'. That possibility is commonly regarded as the greatest danger posed by excessive judicial discretion in this area.[109]

Conclusion

Purposive construction involves a distinctive reasoning process which unites the interpretation of express contractual terms with the identification of implied contractual terms. The processes differ in significant ways, but share the goal of identifying the meaning of contractual instruments, and share the broad methodology of identifying relevant contractual purposes and, where possible, construing the instrument so as to give effect to them. In each case the promotion of contractual purposes is only one factor in a complex inquiry. This is most obvious in the interpretation of express terms, which routinely involves the weighing of a range of relevant factors pointing in different directions. Purposive construction is just one mechanism for identifying and resolving constructional choices in the interpretation of express terms. Even the rare cases in which the protection of a contractual purpose might both raise and resolve a constructional choice which would not otherwise arise will depend on other factors. We have seen, for example, that those factors include whether the provision in question is in a standard form, how clearly it is worded, how carefully it was drafted, and how strongly the contractual purpose in question is manifested in the contract terms. In the identification of implied terms the promotion of contractual purposes is constrained by the need to identify a singular mechanism for doing so which is consistent with the express terms. Nonetheless, a purposive approach provides a powerful explanation of this most important category of implied terms, and offers a set of tools which can greatly sharpen analysis of the difficult problems raised by these cases.

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[109]See, eg *Marks and Spencer v BNP Paribas*, above n 84, at [21]; PS Davies 'Recent developments in the law of implied terms' [2010] LMCLQ 140.

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