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Contract: missed opportunity?

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reviews *Vector v Bay of Plenty Energy*

In *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5 the Supreme Court confronted the questions of contractual interpretation, and of what extrinsic evidence may be adduced to prove the meaning of contractual terms. Throughout the 20th century the parol evidence rule, under which the admission of extrinsic evidence to assist in the interpretation of contracts was severely limited, was gradually worn down, primarily through the creation of numerous exceptions combined with a judicial re-examination of the principles of contractual interpretation. The result is an area of law that is over-complicated, which hampers the ability of practitioners to provide sound advice to clients.

Unfortunately, *Vector Gas* has done little to solve the problems besetting this. To an extent, this is not surprising. Contractual interpretation cases only arise where words can bear more than one meaning, and so it comes as no surprise that after looking at previous tests adopted in New Zealand and other common law jurisdictions, the Supreme Court has failed to adopt a consistent approach, arriving at a unanimous conclusion but by very different routes.

Nevertheless, the decision is significant in the way in which it deals with the admissibility of pre-contractual negotiations. There is now strong authority that such negotiations are admissible; unfortunately, on which basis remains unclear. The divergent approaches of the judges have merely allowed the existing confusion to continue.

THE CURRENT LAW

The approach of the New Zealand courts to contractual interpretation can be said to be guided by the five principles set out by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at [912]-[913]. The five principles can be summarised as:

- the purpose of interpretation is to find the meaning which the document would convey to a reasonable person, having all the background knowledge which would have been reasonably available to the parties at the time of the contract;
- the background is any material reasonably available to the parties which would have affected the way in which the language of the document would have been understood by a reasonable man;
- previous negotiations of the parties and their declarations of their subjective intent are excluded from the admissible background, and they are only admissible in an action for rectification. This distinction is made for reasons of practical policy;
- the meaning a document conveys to a reasonable person is not the same thing as the meaning of its words. The meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean; and
- the proposition that words should be given their natural ordinary meaning is not an absolute rule and, if a reasonable person would conclude from the background that something must have gone wrong with the language, then the courts will not attribute to the parties an intention which they plainly could not have had.

These principles are now widely accepted in New Zealand, having been first accepted by the Court of Appeal in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74, and their adoption has been described as heralding a "move from a literal approach to a more common-sense purposive approach to the interpretation of contracts" (Burrows, Finn & Todd *Law of Contract in New Zealand* (3rd ed 2007) at 161). However, although there has been a move towards a purposive approach, the principles in *Investors' Compensation* are often referred to as setting out an "objective" approach to contractual interpretation (see, for example, Tipping J in *Vector Gas*, at [21]).

These principles might seem clear enough. However, they have not been applied consistently by the New Zealand courts, and debate still rages as to their precise limits (compare, for example, *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 and *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789. There is disagreement as to the evidence a court may legitimately consider. There has been disagreement as to whether an ambiguity is necessary before reference could be had to the background. In *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189, the Court of Appeal held that the "obligations, rights and responsibilities" of the parties should be determined from the contract unless there was an ambiguity. That position was confirmed when, in *Potter v Potter* [2003] 3 NZLR 145, 156 (CA) Fisher J said:

> Although a contract is to be interpreted in its factual setting, there is no justification for invoking rules which exist solely to resolve ambiguities in order to create an ambiguity which, according to the ordinary meaning of the words used in the document, is not there.

However, the Court of Appeal later said that an ambiguity is not necessary for the factual background to be considered (*Ansley v Prospectus Nominees Unlimited* [2004] 2 NZLR 590, and *Starrenburg v Mortre Holdings Ltd* (2004) 6 NZCPR 193).

Further confusion exists as to what evidence can be used as part of the factual background for the purposes of interpretation. Although the major focus of the principles of contractual interpretation is upon what a reasonable person would conclude the words to mean, having the background information, all background information was later refined by Lord Hoffmann to mean anything a reasonable person

would regard as relevant (*Bank of Credit and Commerce International SA v Ali* [2001] 1 All ER 961 (HL)).

There has also for a long time been a limit on the use of pre-contractual negotiations. The leading House of Lords decision of *Prenn v Simmonds* [1971] 1 WLR 1381 clearly established that exclusion. However, its precise limits are unclear. For example, in the third principle set out by Lord Hoffmann in *Investors' Compensation*, the exclusion of pre-contractual negotiations was mentioned where they relate to declarations of subjective intent. Does that mean that where pre-contractual negotiations relate to matters other than declarations of subjective intent, they should be admissible?

Similarly, it had for a considerable time been accepted that evidence of the conduct of the parties post-contract was not admissible to assist the Court in interpreting the contract. One reason for this was a fear that inviting an examination of subsequent conduct would lead to a "subsequent meaning" being given to the words of the contract (see, for example, *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 603 per Lord Reid).

However, the rule was revisited by the Supreme Court in *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37; [2008] 1 NZLR 277 where a majority held that subsequent conduct can be admissible in certain circumstances. Tipping J said:

> [52] … As a matter of principle, the court should not deprive itself of any material which may be helpful in ascertaining the parties' jointly intended meaning … I say that on the basis that any form of material extrinsic to the document should be admissible only if capable of shedding light on the meaning intended by both parties.

That conclusion was based on the rationale, expanded and refined in *Vector Gas*, that it is the court's job to determine through an objective exercise what the parties intended the words to mean.

Before considering that, and the question of pre-contractual negotiations, it is worth summarising the state of the law before *Vector Gas*:

- first, an "objective" approach is generally taken to questions of contractual interpretation, with a general emphasis on the words of the contract as giving the clearest indication of intention;
- second, extrinsic evidence can be relied upon, even when the words are clear; and
- third, extrinsic evidence does not include pre-contractual negotiations (apart from certain exceptions) although subsequent conduct can be relevant.

PRE-CONTRACTUAL NEGOTIATIONS

Vector Gas has arguably changed the law in relation to the admissibility of pre-contractual negotiations. Ever since *Prenn v Simmonds*, there has been a rule that pre-contractual negotiations should not be admitted, except in certain circumstances. Numerous reasons have been advanced for this approach. Lord Hoffmann has put it down to matters of practical policy, most recently in the House of Lords' decision in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.

In that case, the House of Lords was asked to reconsider *Prenn v Simmonds* and declined to do so. Lord Hoffmann, in the primary judgment, set out that questions concerning the admissibility of evidence are normally based on relevance or irrelevance, but in certain circumstances inadmissibility can be based on pragmatic grounds, including:

- that admissibility would lead to greater uncertainty of outcome and disputes over interpretation;
- it would lead to time-consuming and more expensive cases; and
- it is difficult to draw the line between pre-contractual negotiations which are helpful and those which are merely subjective statements of intent.

As a result, their Lordships upheld the inadmissibility of pre-contractual negotiations. For further arguments as to why pre-contractual negotiations should not be admissible, see Spigelman "From Text to Context: Contemporary Contractual Interpretation" (2007) 81 ALJ 322, and for a comprehensive response see McLauchlan "Contract Interpretation: What Is It About?" (2009) 31 Syd LR 1.

The rule came under specific consideration in *Vector Gas*. The case involved an interim agreement for supply of gas which was reached between the appellant and the respondent following the appellant's cancellation of an existing agreement for the supply of gas. The basic issue in the case was the meaning of the words in the interim agreement "$6.50 per GJ", and whether that price could be taken to be inclusive or exclusive of the costs of supply. The Court of Appeal held that it was a price inclusive of supply, but the Supreme Court unanimously overturned that ruling.

In doing so, the majority of the Court relied on correspondence between the lawyers for both parties before the final agreement was reached. The basis on which that evidence was referred to, however, differed between the judges.

Blanchard J had referred to pre-contractual negotiations, but on the basis of one of the existing exceptions to the exclusionary rule. There is established authority that in order to ascertain the reasonable background knowledge, including the subject matter of the transaction, the Court may have reference to pre-contractual negotiations (see, *Bank of Scotland v Dunedin Property Investment Ltd* [1998] SC 657). On the basis that the pre-contractual negotiations can shed light on the subject matter of the contract, Blanchard J said:

> [14] … I see no reason why it can be called in aid, if necessary, for the purpose of ascertaining that the contract was concerned with gas supply but not to learn that it dealt with gas only. If there is, as I think, a subject matter exception, there cannot sensibly be degrees of subject matter. There is of course an important qualification that any material which is simply declarative of the subjective intentions of one party must be disregarded.

Beyond allowing the evidence on the basis of the existing exceptions to the exclusionary rule, Blanchard J left the issue of how much further the courts should go towards admitting evidence of pre-contractual negotiations for another day.

Gault J, who concurred with Blanchard J (at [151]), did not address the issue specifically, although he did consider the pre-contractual negotiations as being necessary to comprehend what the terms of the agreement were (at [152]).

In contrast, McGrath J explicitly affirmed the current exclusionary rule and supported the decision of the House of Lords in *Chartbrook* (*Vector*, at [75], [76]). However, his Honour did affirm the principle that extrinsic material can be used to attempt to identify the subject matter of the contract, although unlike Blanchard J, he did not consider that the pre-contractual negotiations in this case was evidence that went to the subject matter of the contract (at [83]).

Having noted that there were exceptions to the exclusionary rule, McGrath J allowed the evidence on the basis that it

went towards establishing estoppel by convention. Estoppel by convention arises where the parties have registered a common understanding on an issue, and one party later seeks to resile from that understanding. On the basis that the pre-contractual negotiations could be admissible to support such a claim, and that such a claim needed to be considered, McGrath J came to the same conclusion as the rest of the Court.

The approaches of Blanchard and McGrath JJ contrasted strongly with those of Tipping and Wilson JJ. Tipping J attempted to sweep away many of the old rules in relation to contractual interpretation, and in particular in relation to the admission of evidence. Following his approach in *Gibbons Holdings*, his Honour concluded that as a general principle pre-contractual negotiations should be admissible:

> [31] The key point is that extrinsic evidence is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both or all parties intended their words to bear.

In his Honour's view, the touchstone for exclusion of evidence should be irrelevance. Like Lord Hoffmann in *Investors' Compensation*, he stated that subjective statements and declarations of intent were irrelevant to the matters the Court should consider. However, beyond such irrelevant matters the general position should be that such evidence is admissible.

As his Honour correctly points out, this is consistent with s 7 of the Evidence Act 2006, which states that all evidence that is relevant is admissible unless specifically excluded in situations which do not apply to contractual interpretation cases. Section 7(3) of the Evidence Act defines evidence as relevant "if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding".

Pre-contractual negotiations which are not statements of subjective intent but which objectively point to the parties intentions must be relevant as going towards a matter of consequence to the determination of the proceeding. Pre-contractual negotiations which are statements of subjective intent must be irrelevant, and therefore excluded, as the court does not have regard to the subjective intentions of the parties, only intentions which are objectively established.

Wilson J reached the same conclusion as Tipping J, although within a different framework. In particular, Wilson J referred to the general admission of extrinsic evidence only in situations where there was ambiguity, where the words made no commercial sense, or there was an argument about estoppel:

> [122] Final negotiations may well be relevant; the time has come to move in this country the barrier imposed by *Prenn v Simmonds* to looking at those negotiations in the situation where they illuminate, in advance of consensus being achieved, what the parties were intending to achieve in their contract.

What does this mean for the lawyer who is considering what evidence to put before the court in a situation where the interpretation of a contract is in dispute?

First, there is now strong authority that pre-contractual negotiations should be considered unless they are merely subjective declarations of intent. That is consistent with the positions of Tipping and Wilson JJ.

Further, it is highly arguable that it is consistent with the principles espoused by Blanchard J, who specifically referred to the need to avoid subjective declarations of intent, but accepted that pre-contractual negotiations could be used to illuminate questions of subject-matter of which, he concluded, it was not possible to have "degrees".

The context for that comment was that, in a situation such as the one the Court was considering, one could not logically refer to pre-contractual negotiations to determine that the subject matter of the contract was gas, but not refer to the negotiations for the purpose of ascertaining whether the price for gas was inclusive of supply, it also being a question of the subject matter of the contract.

It could be argued that in placing restrictions on the use of pre-contractual negotiations, by excluding them when they are simply subjective declarations of intent, Blanchard J has at least partially agreed with the principles outlined by Tipping J by referring to a clear limiting principle and acknowledging a reasonably wide subject matter exception for when such evidence can be admitted.

It is also claimed, specifically by Tipping J at footnote 30 of the judgment that, such an approach is consistent with the speech given by Lord Hoffmann in *Chartbrook* at [34]:

> It therefore follows that while it is true that, as Lord Wilberforce said, inadmissibility is normally based on irrelevance, there will be cases in which it can be justified only on pragmatic grounds. It is unclear from that statement whether there are other reasons to justify the inadmissibility of irrelevant material, namely subjective declarations of intent, or whether it is a reference to ostensibly relevant material which goes towards demonstrating a matter of objective context.

While practitioners should now justifiably take the position that pre-contractual evidence is admissible, on which basis is unclear. *Vector Gas* leaves the principles undefined. Take, for example, the fact that although Blanchard and McGrath JJ agree there is an exception to the exclusionary rule where the pre-contractual negotiations shed light on the subject matter of a contract, agreement as to what the subject matter is can be difficult. That leaves this area of law uncertain and ambiguous, which is precisely one of the arguments used in favour of excluding pre-contractual negotiations.

It is for those reasons that the approach of Tipping J is preferable. The Court would have done better to have adopted his principled basis upon which evidence can be considered in contractual interpretation cases. The same can be said for the general approach to contractual interpretation.

PRINCIPLES OF CONTRACTUAL INTERPRETATION

Vector Gas is also important for the way in which it failed to clarify what principles apply in cases of contractual interpretation. Although, as discussed, there is a general consensus that the "objective" approach should be followed, it is quite clear that an objective test means different things to different people. This is not surprising. As Professor MacLauchlan pointed out, the reality is that words do mean different things to different people. *Vector Gas* itself is an example of this, with divergent views on whether "$6.50 per GJ" was ambiguous as to the question of supply.

As a result, when people advocate for an objective approach to contractual interpretation, it is important that we distinguish what that actually means. Does that mean finding an objective meaning to the words, or objectively ascertaining

what the parties intended the words to mean? This distinction is quite important, and it is clear from *Vector Gas* that although everyone can happily ascribe to an objective test, it does mean different things to different people.

In all the judgments in *Vector Gas*, the principles laid down in *Investors' Compensation* were, broadly speaking, endorsed. However, when expanding on what it means to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge available to the parties, there was a significant divergence in approach.

Blanchard J affirmed the principle that there is no need for ambiguity before one looks at the background and facts behind the formation of a contract. However, in arriving at his decision, Blanchard J took a more traditional approach. His Honour considered first the meaning of the words and then relied on the fifth *Investors' Compensation* principle set out by Lord Hoffmann, namely that the law will not require judges to attribute to parties an intention which they plainly could not have had (at [11]), particularly in light of the commercial sensibility of the transaction. Lord Diplock expressed this principle in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at [233]:

> if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

In light of the relevant background material, his Honour concluded that it could not have been the intention of the parties for $6.50 per GJ to mean $6.50 including supply. Particular emphasis was placed on the fact that the interim arrangement was entered into in lieu of an application for an interim injunction being made. Had such an application been made and granted an undertaking for damages would have been necessary. Had there been such an undertaking then Vector Gas would have received considerably more than under the interpretation of the interim agreement advanced by Bay of Plenty Energy. In other words, it was the fact that the commercial nature of the transaction fell outside what Blanchard J considered would have been reasonable on the part of Vector Gas Ltd which led his Honour to conclude that $6.50 per GJ was a price excluding the costs of supply.

Beyond those reasons, the judgment does not engage the broad question about which principles should apply in contractual interpretation cases. Gault J, in adopting the reasons of Blanchard J, did not consider the principles of contractual interpretation, instead concluding that:

> [151] This case can be approached without any detailed examination of the principles applicable to the interpretation to be given to the words of a formal contractual document.

This contrasts strongly with the approach adopted by the other judges where clear divisions can be seen.

McGrath J emphasises the principles set out in *Investors Compensation Scheme* and in *Chartbrook*. Indeed, at [66] the judgment of Lord Hoffmann in *Chartbrook* is summarised by McGrath J as acknowledging:

> … that giving effect to what a reasonable person would have understood the parties to have meant, when using the language which they did, might sometimes require the use of different language. It emphasises that that presents no barrier to applying the contextual interpretation. Plain and unambiguous, ordinary meanings can be displaced by context and background although, as is also emphasised in *Chartbrook*, there must be a strong case to persuade the Court that something has gone wrong with the contractual language.

In this regard McGrath J is merely adopting a very orthodox approach to the question of contractual interpretation. That is reflected where, at [76], he says that "at present in contractual interpretation, intention plays no real part", and that the idea that the Court should attempt to interpret on the basis on what the parties intended the words to mean has been rejected for sound reasons.

Mason J's comments in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; [1982] 149 CLR 337 are specifically endorsed at [77]:

> We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time-consuming but would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract.

As a result, although McGrath J considers that the Court should not give a meaning to the words in a contract which the parties themselves clearly did not intend, the primary consideration for the courts is the actual meaning of the words in the contract.

Wilson J also appears to depart from *Investors' Compensation*:

> [119] The general principle is that the words of an enforceable commercial contract should be given their ordinary meaning in the context of the contract in which they appear, because the parties are presumed to have intended the words to be given that meaning.

His Honour then outlines that that principle is subject to three exceptions:

- ambiguity;
- where the words do not make commercial sense; and
- cases where there is an argument of estoppel.

The Judge also notes that rectification is another exception to this, although it is treated as a separate doctrine. Indeed, throughout the judgments rectification is consistently treated separately and it is concluded there is a requirement that it be specifically pleaded. The reason for this is not clear – it is an equitable doctrine, like estoppel, which is not subject to the same restrictions.

Wilson J appears to be suggesting that extrinsic material should not normally be viewed until such time as one of these three exceptions is relied upon. That approach is inconsistent with comments from the other members of the Court, particularly in relation to there being no need for ambiguity before extrinsic material can be relied upon. In this regard, Wilson J appears to be resurrecting the plain meaning rule which had previously been abandoned:

> [127] The Court should, I believe, go beyond the contract itself only to resolve a relevant ambiguity for the purpose of addressing issues of commercial sense or estoppel. To do so in other situations is not only unnecessary but also undesirable because it may, through the introduction of extrinsic material, create uncertainty in the interpretation of a contract which is intrinsically unambiguous.

It would appear, therefore, that on Wilson J's analysis, the plain meaning principle still stands but with numerous exceptions. It was on the basis of exceptions regarding both commercial sense and estoppel that his Honour was willing to allow pre-contractual negotiations to be admitted as extrinsic evidence in this case in order to interpret the words of the interim agreement.

All of these approaches contrast strongly with that of Tipping J, who outlined a principled approach to questions of contractual interpretation, and it is this approach which it is submitted should be preferred. His Honour said:

> [19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. A necessary inquiry, therefore, concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. … To be properly informed the Court must be aware of the commercial or other context in which the contract was made, and of all the facts and circumstances known to and likely to be operating on the parties' minds.

As a result, his Honour has set down that the basic principle of contractual interpretation is to ascertain what the parties intended the words to mean. In order to do so, it is necessary to have reference to context, and so it is always permissible to go outside the written words of the contract in order to determine that context. As his Honour said:

> [23] While there were no necessary pre-conditions which must be satisfied before going outside the words of the contract, the exercise is and remains one of interpretation. Subject to the private dictionary and estoppel exceptions to be mentioned below, it is fundamental that words can never be construed as having a meaning they cannot reasonably bear.

When it comes to the objective approach to contractual interpretation, therefore, Tipping J refers to it not in the sense of attempting to give words an objective meaning. Rather, the court is to approach it with an objective mind. Hence declarations of subjective intent are excluded from the evidence which the court can look at. Further, it is emphasised that if the words in a contract carry a plain meaning then a high level of evidence will be required before the courts will disregard those words and place another meaning on them. With respect to the Supreme Court, this decision leaves the law of contractual interpretation in a rather confused state.

The approach adopted by McGrath J would lead to an emphasis on the words of the contract, but with exceptions where the court can look outside the words of the contract for meaning (but not at pre-contractual negotiations). Those exceptions revolve around questions of business common-sense, estoppel and rectification.

The approach of Wilson J is similar save insofar as he would allow pre-contractual negotiations as evidence in order to add context to the Court's interpretation exercise. However, the emphasis is still placed upon what the words objectively mean, with evidence only to be adduced in situations where there is ambiguity, or where questions of estoppel by convention, lack of commercial sense or rectification arise. These two approaches are, broadly speaking, similar, but a difference exists in terms of what evidence the courts can rely upon when looking at the context.

In contrast, Tipping J has adopted a much more principled approach by focussing squarely on the parties' intentions, with the court able to look at a range of relevant evidence to determine that intention. In that regard, his Honour has merely recognised as a primary principle what the court seeks to achieve at any rate. In one sense, it is simply re-phrasing and re-emphasising the fifth principle in *Investors' Compensation*. Instead of the courts not allowing words to mean something the parties did not intend, the court interprets the words so that they do mean what the parties intended. That is the preferable approach. As Anderson J said in *Gibbons Holdings*:

> [74] To regulate the rights and obligations of the parties by reference to something other than the rights and obligations they in fact mutually settled upon is to pay more regard to linguistic form than substantive rights and obligations.

Further, what is the point of allowing for exceptions in relation to estoppel by convention, private dictionaries or commercial unreasonableness if the court is not concerned with the parties' intentions? If the court is concerned with the parties' intention, then that should be the primary focus of their inquiry. In that context the plain meaning of the words carries appropriate evidential weight, but it is not determinative of the dispute.

Tipping J's approach has its limits. As his Honour said, the words used should not be construed to mean something they cannot reasonably mean, unless there is an estoppel or private dictionary argument (for example, the parties agree that black does actually mean white, see *Mitchell v Henry* (1880) 15 Ch D 18 discussed by McLauchlan at 23). In such cases, it is inappropriate for courts to try to interpret the words. Instead, recourse can be had to other doctrines, such as estoppel by convention or rectification, to give effect to the intention of the parties. Either way, the focus is still on the intention of the parties. Tipping J has expressly recognised that principle.

CONCLUSION

Vector Gas is significant. Although the majority did not join in expressly allowing pre-contractual negotiations as evidence before the Court, the decisions of Tipping and Wilson JJ in this regard must be highly persuasive to the lower courts. In addition, the ambiguity of Blanchard J's judgment adds to the pressure to abolish the rule excluding pre-contractual negotiations altogether.

The divergent approaches taken to the basic principles of contractual interpretation are, however, disappointing. The fact that both Tipping and Wilson JJ claimed that their approaches were consistent with that of Lord Hoffmann in *Investors' Compensation* shows that when it comes to language, different words mean different things to different people. It is for that reason that the approach of Tipping J, to emphasise the intention of the parties, should be preferred. It is that policy which already underpins most of the exceptions that have developed to erode the plain meaning rule, and it is that principled approach which should be applied by the courts. ❐