

Obligations in Commercial Contracts: A Matter of Law or Interpretation?

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Abstract

English commercial contract law is undergoing its own ‘interpretative turn’. According to Lord Hoffmann, disputes concerning implied terms in contracts and the extent of the defendant’s liability for loss on breach are resolved by searching for the meaning of the parties’ agreement. The process is one of contextual interpretation of the contract (understood in a broad sense which regards the contractual agreement as incorporating more than just the text), rather than the external application of autonomous legal rules derived from authoritative precedents. On the one hand this agreement-centred approach can be regarded as the natural consequence of a definitive principle of contractual liability—obligations are assumed by the parties, rather than imposed on them. On this basis, Lord Hoffmann is simply reasserting the facilitative character of commercial contract law. On the other hand this approach raises questions about the scope and limits of the legal regulation of commercial activity by courts. At its most extreme, the interpretative approach espoused by Lord Hoffmann admits of only an attenuated commitment to commercial contract law as a repository of non-instrumental normative values. Instead, commercial contract law is perceived only as a loose grouping of pragmatic considerations, given a superficial veneer of coherence by reference to a substantively empty concept of interpretation. The article traces the development of this interpretative turn and assesses some of its positive and negative implications, both for the operation of other rules of contract law and for our general understanding of the role of the law in regulating commercial activity.

This article examines a recent development within the English common law of contract. This is that judges resolving contract disputes, at least among commercial contractors, are increasingly required to undertake that task by paying less attention to the rules of contract law and more attention to the agreement between the parties. To put this in another way, there are signs in the case law that the application of the rules and doctrines of contract law is diminishing in importance in favour of a broad process of interpreting the commercial contract. This is not to say that the contract law rules will not be relevant to resolving the dispute, but rather to say that their focus is different. According to this revised understanding, the role of the rules is not to function as independent external standards that regulate the agreement, but to assist in an interpretative exercise of deciding what the agreement between the parties means. The chief architect of this development has been Lord Hoffmann, in a series of judgments over a 15-year period prior to his retirement in 2009. This article traces the development of this ‘interpretative turn’, outlines some possible motivations for it, and attempts to identify some of its implications, both positive and negative. The article is impressionistic and speculative, and ultimately it seeks neither to criticize nor defend the development, simply to try and draw it out. It could be that the development described here amounts only to a slight change in emphasis, rather than any substantive change in direction. Either way, if commercial contract law is moving to a position where the parties’ agreement is regarded as a much more important source of answers to questions about contractual obligations and liability than the rules of contract law, then this is worthy of closer examination, even if in the end we conclude that its effects are relatively benign or that it is yet too early to assess whether it is an altogether welcome development.¹

An Initial Objection

The first thing that might be said is that this is not a new development at all—contractual obligations have always been sourced from the agreement between the parties. Upholding the intentions of the parties and freedom of contract have been presented as the defining philosophy of the English common law of contract for upwards of 150 years. For some scholars, Brian Coote for example, it is a basic normative principle of contractual liability that in relation to both the primary obligation to perform a contractual agreement and the secondary obligation to pay damages for non-performance, the obligation is *assumed* by the parties as opposed to being externally imposed on them.² This is in keeping with the understanding of the English common law of contracts as largely a system of defaults, with few mandatory rules.³ The extent to which parties do contract around the rules is a matter for empirical investigation, but irrespective of the results of this enquiry, the point remains that contract law is formulated on the basis that most of its rules are excludable.⁴ The parties can strive to achieve any different legal effect to the defaults through their contract, provided they do not fall foul of any public policy, vitiating factors, or statutory controls regulating various aspects of unfairness.⁵ That contractual obligations are assumed voluntarily also provides a means of distinguishing the obligations of contract from those arising under the law of unjust enrichment and the law of tort.⁶ Many scholars continue to defend the idea that the distinctive characteristic of a contractual obligation is that it is rooted in the autonomy and consent of the parties.⁷ For these scholars, this characteristic plays a central role in explaining and justifying why the law enforces certain kinds of agreement.

While it may appear trite to say contractual obligation is rooted in agreement, once we move from the abstract to the particular the point becomes mired in controversy. On a practical level many contract law disputes arise precisely because the parties appear either not to have agreed anything, or their agreement is unclear, or for one reason or another one party no longer wishes to be bound by what was agreed. On the legal level the existence of and controls on standard form contracts, the primacy placed on objectivity, the possibility of implied terms in law and fact, and some stringency on the part of judges in determining whether the parties have been successful in contracting out of the general law,⁸ amongst other things, have all undermined the notion that contractual liability is founded on agreement. Similarly, the law plays a significant if not definitive role in moulding our understandings of the practice of economic exchange by, for example, positing the conditions for legal enforceability, a scheme of remedies for breach and prescribing the limits on self-interested dealing. While it may be relatively straightforward to identify the rules of contract law it is more difficult to detect a coherent pattern of normative values that justifies them, still less to regard these values as ‘agreement-centred’, although much depends here on the rule-type. Some rules (for example, the postal rule of acceptance) appear justified chiefly on pragmatic grounds—a rule one way or the other is simply required, the content of the rule appears morally neutral and the parties are free to stipulate an alternative through express terms. Rules such as those relating to economic duress, undue influence or fraud, appear more firmly rooted in normative considerations related to either ensuring that consent and the exercise of autonomy is genuine, or castigating dishonesty and manifest abuse of power. Other rules appear justified on the basis of a more general conception of fairness—mitigation of loss, for example, which shields the defendant from liability for losses caused not by his breach but by the unreasonable conduct of the claimant post-breach. These rules will apply irrespective of the agreement and the parties’ intentions. Some notionally mandatory doctrines and rules of contract law, seemingly justified on the basis of some important principle or prized policy—privity of contract, for example, or the parol evidence rule, or the

rule excluding prior negotiations from contract interpretation—appear almost deliberately designed to undermine the parties’ agreement. As such their operation may be controversial and they are subject to myriad exceptions that aim to ameliorate their worst effects and render them less troublesome in practice.⁹

Despite the rhetoric concerning freedom and voluntariness, then, it has been relatively easy for courts to reassert the important role of contract law in determining the scope of contractual obligations and the extent of liability for breach, even if some of the legal impositions on the agreement are sought to be justified, meaningfully or otherwise, by reference to the ‘presumed intentions of the parties’. Nevertheless, it is possible to detect that the balance between what is determinable by reference to the parties’ agreement and what is determined by rules of law is shifting in favour of the agreement. What is interesting about this shift is that it is not being justified by a renewed appeal to party autonomy or freedom of contract, although these values might ultimately underlie the shift, but rather it is presented as the natural consequence of the everyday judicial task of interpreting the agreement. The process of contract interpretation has been subject to widespread scrutiny in recent years, inspired by Lord Hoffmann’s restatement of the principles of contract interpretation in the *Investors Compensation Scheme* decision in 1997.¹⁰ In subsequent decisions Lord Hoffmann has expanded the scope and significance of contract interpretation such that, for him at least, it appears the judicial role in a contract dispute is not so much to formulate, apply and refine the rules of contract law, as to embark on an extended process of finding out what the contract means, and to use the conclusions from this interpretative enquiry to resolve the dispute. The rules of law may well be relevant, but they are not the place where the judge starts. As well as reconceptualizing the judicial role as one of interpreting the contract, the interpretative process itself has been re-evaluated to embrace a contextual rather than textual method. That is, meaning in contract is determined by examining all the relevant commercial background knowledge that the parties (or their reasonable counterparts) bring to the agreement.¹¹ This contextual interpretation process both incorporates the written contract and arguably extends it by making available to the judge a range of background information about the circumstances of the agreement (with one or two notable exceptions, for example, the prior negotiations leading up to the agreement) which may be relevant to determining the parties’ obligations. Thus, contextual interpretation can expand the range of matters that can be regarded as governed by the agreement, thereby reducing the scope for the application of the rules of law to fill ‘gaps’. When justification for outcomes in commercial contract law disputes is increasingly sought from within the agreement we might wonder how the interpretative process of deriving these outcomes works, if the idea of agreement is being stretched beyond its capacity to justify outcomes and what effect this expanded role for contract interpretation may have on the rules of contract law.

Tracing the Modern Development

There are four House of Lords judgments from Lord Hoffmann that mark significant milestones in this development towards asserting the importance of interpretation in fixing on contractual obligations. These are not the only decisions heralding the shift, but they appear to be the most important. To be clear, the point being made is not that these cases raise identical questions of legal or normative principle. Taken individually, the decisions discussed in this section may be regarded as raising quite separate legal issues. In particular, the *Investors* decision deals only with the relatively isolated problem of how a contract is to

be interpreted by courts, whereas other decisions concern the extent to which liability on breach can be determined by implicit as well as explicit agreement. In regarding these developments as related, and as part of the same movement towards adopting an interpretative approach (which for the purposes of this article should be understood as involving a broader process than fixing on the meaning to be attributed to doubtful or ambiguous express contract terms), it may be that the discussion confuses three essentially different lines of enquiry that are best kept separate: how courts should interpret written contracts, the proper scope of freedom of contract and the potential reach of interpretation. However, these questions are not entirely discrete. How courts interpret contracts could be regarded as largely a practical matter, not involving any great issues of normative principle, but that really depends on how that process is undertaken and what the favoured method of interpretation is. This in turn will affect the reach of interpretation, or what can be achieved through contract interpretation, and that in turn will have implications for freedom of contract (which in essence concerns the balance of contract power between the parties and the law). Alternatively, it might be argued that when one is trying to detect trends or discern a change in attitude in legal reasoning in commercial agreements, some generality in approach is inevitable. Assessing the implications of this 'interpretative turn' may involve trying to make some abstract connections between seemingly diverse points of law, but this is not an unusual feature of legal method, particularly when dealing with a relatively novel development.

South Australia Asset Management Corporation v York Montague Ltd¹²

This decision concerned the defendant valuer's concurrent liability in contract and tort for the claimant's losses following a negligent property valuation. The decision is significant in trailing Lord Hoffmann's later approach to the contract law remoteness rule in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*.¹³ In *SAAMCO* the valuer had negligently overvalued property provided as the security against which the claimant lender had advanced money. Had the true valuation been known, the claimant would not have proceeded with the loan transaction. The claimant's losses were inflated by a general fall in property values. The House of Lords decided that the measure of damages was limited to the amount of the overvaluation and did not include all of the losses attributable to a general decline in the property market.

Lord Hoffmann gave the leading speech. He noted that much of the discussion in the Court of Appeal assumed that the necessary starting point for analysis was the correct measure of damages *according to the law* for the loss the claimant suffered. In contract this would be decided under the general principles of *Robinson v Harman*:¹⁴ the claimant should be put in the position he would have been in had the contract been performed. In this case one could say that had the contract been performed the valuation would have been accurate, the lender would not have entered into the transaction and would have avoided all the loss. Lord Hoffmann thought that this was the wrong place to begin. He asserted that one does not begin with the general law, but with determining the kind of loss for which the claimant is entitled to compensation. This depended on the scope of the duty undertaken by the defendant valuer (or, in an alternative formulation, the consequences for which the valuer is responsible). In a contract case this would be determined first by what the defendant had agreed to do under the contract or what the law would imply. This in turn would depend upon the 'construction of the agreement as a whole in its commercial setting'.¹⁵ Thus the compensatable loss was determined by reference to the agreement, not the independent application of the external rules of law, although these would come into play if the agreement provided no answer. Lord Hoffmann accepted that there were exceptional cases where the wrongdoer should be liable

for all the consequences of his conduct, but *SAAMCO* was not an exceptional case. The recovery of the losses due to a falling market were ‘outside the scope of the liability which the parties would reasonably have considered that the valuer was undertaking’.¹⁶ Thus the claimant recovered only the difference between the stated value of the properties and their actual value at the time of the valuation.

In truth, to conclude that the extent of the valuer’s duty is derived from the agreement requires some stretching of the idea of agreement, but it is arguable that this is the precise benefit that yields from regarding the process as *interpretative*. In *SAAMCO*, the determination of the scope of the valuer’s duty was based on an amalgam of contextual factors surrounding the agreement including what it is reasonable for a valuer to assume responsibility for (the claimant’s argument entailed that having given a negligent valuation the whole risk of the transaction, including the risk of market movements, fell on the valuer, even though there were many other considerations going into the claimant’s decision to advance money, of which the valuer would have no knowledge and over which he could exercise no control¹⁷). What is significant, though, is that the liability for the loss is not determined first by reference to the independent application of the external rules of law. While the ultimate conclusion in *SAAMCO* may not be fully derived from the agreement and the intentions of the parties, it appears that it is *not at all* derived from the rules about the protection of the expectation interest in contract law damages, as expressed in *Robinson v Harman*. Rather, the context of the transaction gives rise to a more nuanced interpretation concerning the scope of the valuer’s duty, which is a logically prior enquiry to determining the measure of damages the claimant is entitled to receive under the rules of contract law. The initial question to be answered is simply what has the claimant contracted for? Interpretation of the agreement thus displaces, or at least delays, consideration of the legal rules about damages.

Investors Compensation Scheme v West Bromwich Building Society

A year after *SAAMCO* Lord Hoffmann delivered a comprehensive statement of the principles of contract interpretation in *Investors Compensation Scheme v West Bromwich Building Society*.¹⁸ Ostensibly, Lord Hoffmann only spelt out how courts should undertake the relatively discrete activity of attributing meaning to doubtful or ambiguous express contract terms. The gist of his principles is that the meaning sought is that conveyed to a reasonable person with all the relevant background knowledge available to the parties when they made their agreement. In rejecting a textual and plain meaning approach to contract interpretation, and asserting that all meaning is contextually derived from the background and contract purposes, Lord Hoffmann potentially expands the range of outcomes and obligations that it is possible to draw from the ‘agreement’. Although this may not be evident from the *Investors* decision itself, which raised an issue concerning the precise wording of the contract text, once committed to a method of contextual interpretation it can be difficult to rein the method in on a principled basis (as the difficulty posed by the continued exclusion of prior negotiations from contract interpretation arguably demonstrates). This is partly due to the fluid nature of ‘context’ from whence the text derives its meaning, and partly due to the interpretative nature of the process. Reference to context (in the sense of factual background to the contract) can give rise to many different possible interpretations of the contract and may, in some circumstances, bring to light understandings or expectations that undermine the contract text. Hugh Collins has noted that for a committed contextualist, as Lord Hoffmann arguably is, it is not too much to say that context matters more than the text.¹⁹ Once it is recognized that contextual interpretation carries with it the possibility of undermining the contract text, it

should also be recognized that the ‘thing’ to be interpreted has shifted from the express terms to the entire contractual relationship. While many contract scholars would regard this as a welcome development, since it would allow the law to better comprehend all the dimensions of the commercial agreement, rather confining itself to an examination of the abstract version represented by the written contract, it would probably be wrong to attribute an intent on the part of Lord Hoffmann to destabilize the express terms. Instead the process of contract interpretation appears to be in danger of destabilizing contract law. This is because this expanded role for context in contract interpretation, at least in Lord Hoffmann’s hands, seems to have brought about two related developments. The first is that some legal techniques that appear to operate semi-independently of the agreement—when the agreement appears to give no answer, and the court is required to fill the gap—are better understood as applications of contextual interpretative method. The second, presaged in *SAAMCO*, is that the scope for the imposition of external legal rules is reduced in favour of this process of interpreting the agreement in its context. We see the first in operation in relation to implied terms in fact in Lord Hoffmann’s speech in the Privy Council decision in *AG of Belize v Belize Telecom Ltd* and the second in *The Achilles*.

Attorney General of Belize v Belize Telecom Ltd ²⁰

In this case Lord Hoffmann sought to assimilate contextual interpretation with the process of implication of terms in fact into an agreement so that they are regarded as part of the same process of drawing out what a reasonable person would understand the contract to mean.²¹ Although seemingly qualitatively different from interpretation, which involves the search for the meaning of the agreement, rather than plugging gaps, for Lord Hoffmann implication is part of the same process of contract interpretation.²² According to Lord Hoffmann, where there is no express term, a court must resist the temptation to imply a term to make the contract reasonable or more fair since the most likely inference from silence in the contract terms is that nothing is to happen, and the loss caused by the unanticipated event lies where it falls.²³ In other cases where some other meaning is suggested to the reasonable person an implied term may be necessary to spell this out, but it is not an *ex post* addition to the obligations already assumed under the instrument. While not dispensing with the traditional ‘business efficacy’ and ‘officious bystander’ legal tests for implication Lord Hoffmann did regard these as manifestations of this interpretative approach, routes towards the same interpretative outcome, or just as different ways of expressing the interpretative test.²⁴ Now in itself this might not be regarded as either a novel or important development, since courts have always strived to make the justification for implication agreement-centred by stressing that the implication is necessary to make the contract effective in achieving its aims, thereby upholding the intentions of the parties. For present purposes, however, the case is significant for its incorporation of implication of terms into the general process of contract interpretation. This demonstrates the potential for interpretation to subsume the operation and application of rules of contract law. So understood, the contract rules (or some of them at any rate) do not function to supply or shape the obligations. Rather, they function as mechanisms through which the interpretation process is undertaken, the point of that interpretation process being to derive obligations, as far as possible, from the agreement. This is exactly what we see occurring in *The Achilles*.

The Achilles

Lord Hoffmann’s decision in *The Achilles*,²⁵ like *AG of Belize* after it, is a progression from the contextual interpretative method advanced in *Investors* combined with the scope of duty

idea expressed in *SAAMCO*. The issue in this case concerned the extent of a charterer's liability following the late return of a ship to the owners, with the consequence that the owner was obliged to renegotiate the hire on the following fixture and accept a lower rate. Was the charterer liable for the loss of profit on the entire following fixture, or just for the period of the delay? The traditional approach is to decide this issue by applying an external legal standard, that is to say the remoteness rule derived from *Hadley v Baxendale*,²⁶ provided that the parties have not agreed anything else. According to the rule, if the loss arises naturally from the breach or is within the contemplation of the parties at the time of the contract as the probable result of breach, the defendant is liable to compensate it. Two members of the House of Lords, Lord Rodger and Lady Hale, decided that the owner's loss was too remote using this orthodox contract law rule because of the extreme volatility in the charter market at the time. For Lord Hoffmann the extent of the charterer's liability was not a matter of the application of external legal standards. Instead the *Hadley v Baxendale* rule stated only the presumed intention of the parties. While departing from this presumption would be unusual, nevertheless the presumption could be rebutted if a contextual interpretation of the contract suggested the parties had contracted on the basis of a different understanding as to the extent of their liability. For Lord Hoffmann, the issue involved 'not ... the interpretation of any particular language in the contract, but (as in the case of an implied term) ... the interpretation of the contract as a whole, construed in its commercial setting'.²⁷ The relevant interpretative enquiry in *The Achilleas* was not about the meaning to be attributed to ambiguous words, but a much broader one: had the charterers assumed responsibility for the risk of a loss that was unquantifiable when the contract was made?²⁸ Lord Hoffmann gave a negative answer to this question for two related reasons, both derived from the application of his contextual interpretative method.

The first relates to the tacit understandings prevalent within the industry (including shipping lawyers). According to Lord Hoffmann, the industry understanding was that the charterer's liability was restricted to the difference between the market rate and the charter rate for the period of delay.²⁹ A contextual interpretative approach to the agreement is appropriate here since it permits incorporation of this broader conventional understanding into the agreement. If it is the conventional understanding, it may matter little if the parties did not have the understanding in their mind when they entered into the contract. To the extent the parties did not contract for anything different, the conventional understanding may form part of their tacit intentions derived from the general background against which they reached their agreement.³⁰ The second element of context is what is taken to be reasonable commercial behaviour amongst the relevant group of contractors. This is more general than the understanding of shipping lawyers about the extent of a charterer's liability for damages for late redelivery. Instead, the appeal is to a kind of objective commercial prudence. A prudent business person would not understand the contract to mean a party had assumed the risk just by knowledge or foreseeability of it, since it was unquantifiable, and 'Anyone asked to assume a large and unpredictable risk will require some premium in exchange'.³¹ Is judging the parties' behaviour according to this prudential standard, or the market understandings, really an exercise in interpretation of the agreement? Arguably it is, if one understands interpretation to apply to the contract as a whole in its commercial setting, as Lord Hoffmann appears to do, rather than a discrete process confined to deciding the meaning of vague contract terms. This referent, the prudent business person, is also included in Lord Hoffmann's interpretative test: interpretation is the search for the meaning that is conveyed to a *reasonable person with all the relevant background information available to the parties* when they made their agreement. The result is that the extent of the charterer's liability appears derived from a contextual interpretation of the parties' agreement. The scope of

operation of the *Hadley v Baxendale* rule, like *Robinson v Harman* in *SAAMCO*, is limited. In *The Achilles* then we see Lord Hoffmann recasting one of the rules of contract law as a statement of the presumed intentions of the parties, liable to be rebutted by an expanded process of contract interpretation. Even though the contract contains no express terms dealing with the issue, liability is sourced from the agreement, broadly understood, not the independent operation of the default rules.

Scepticism

An initial reaction to this may be to say that four pronouncements from a single senior judge, although highly authoritative and influential, do not constitute a change in direction of any magnitude. It is true that *AG of Belize* was a Privy Council decision and not strictly binding. Further, the idea that implication of terms is an exercise in contract interpretation, with the consequent decreased significance placed on the legal rules, has received rather lukewarm treatment in recent case law. In *The Reborn*³² the Court of Appeal regarded Lord Hoffmann as restating the necessity test for implication, and not as effecting a substantially different test. The ‘officious bystander’ test was referred to by Lord Clarke in the very recent Supreme Court decision in *Aberdeen City Council v Stewart Milne Group Ltd.*³³ *AG of Belize* was not mentioned at all in the substantive speeches given by Lord Hope and Lord Clarke. *The Achilles* itself was equivocal, as only Lord Hope was clearly in agreement with Lord Hoffmann. On the other hand the specific idea that the extent of the defendant’s liability for consequential loss depends on the agreement, and not on the external application of rules of law, has support amongst some contract scholars.³⁴ Further, Lord Hoffmann’s interpretative approach to the rules is not an isolated development. There are at least two aspects of it that are familiar in contract law.

The first is that the reformulation of *Hadley v Baxendale* as a rebuttable presumption of the intentions of the parties demonstrates that the common law rules of contract are always liable to be remoulded or reinterpreted as being of a different character or having a different effect to that previously understood. Mandatory rules may become rules of construction. Default rules that apply if not contracted around become rebuttable presumptions of the parties’ intentions, liable to be ousted by evidence of a contrary intention that can be derived either explicitly from contract terms or implicitly from the behaviour of the parties (or the conventions of the industry). Thus, we should not be surprised if it is sought to impart the view that contract law rules are amenable to being ‘interpreted out of’ through a contextual reading of the agreement. Another relatively recent example of the tendency amongst the senior judiciary to re-evaluate the basis for contract doctrines is the rule of fundamental breach. Succinctly stated, this was a rule that an ordinary breach having particularly serious consequences for the innocent party disentitled the party in breach from relying on any exclusion clause.³⁵ In *Karsales (Harrow) Ltd v Wallis*³⁶ Lord Denning stated his understanding that this was a substantive rule of law, operating independently of the parties’ intentions. The House of Lords denied this in *The Suisse Atlantique*³⁷ and again, more forcefully, in *Photo Production Ltd v Securicor Transport Ltd.*³⁸ The rule of fundamental breach was at most a rule of construction based on the presumed intention of the parties, and of course, their intention could be shown to be otherwise. With careful drafting, an exclusion clause could excuse even a fundamental breach.³⁹

The second reason why Lord Hoffmann's treatment of *Hadley v Baxendale* is not an isolated incident is that we can see a similar concern to justify outcomes by reference to the agreement, not the rules of law, in relation to the issue of damages for non-pecuniary loss following a breach of contract. Until relatively recently, damages for non-pecuniary losses—disappointment, mental distress, and the like—were thought unavailable on the basis of a general rule of law justified by policy considerations (these being the subjectivity of the loss, the floodgates argument, the possible punitive element and remoteness).⁴⁰ There were exceptions to the rule, but they tended to be confined to narrow grounds. Following the House of Lords decision in *Farley v Skinner*⁴¹ there is every reason to regard the issue of recovery for non-pecuniary losses as determined by an interpretation of the contractual obligation undertaken.⁴² *Farley* concerned a claim for damages for breach of contract following a surveyor's negligent failure to investigate the level of aircraft noise affecting a property, after he had been specifically instructed to do so. The claimant suffered no financial loss from the surveyor's breach, just discomfort because of the noise. The Court of Appeal said that law and policy did not allow recovery for this kind of loss in a surveyor's contract. But the House of Lords overturned this and reinstated the trial judge's award of £10,000. The House of Lords reasoned that the claimant had suffered a 'deprivation of contractual benefit'.⁴³ Lord Steyn's approach in *Farley* was to allow recovery since the surveyor was 'in breach of a distinct and important contractual obligation'.⁴⁴ A substantial award was made possible by the court focusing on whether the defendant undertook any obligation in relation to preventing that loss, rather than on whether it was a type of loss for which recovery was simply precluded under the legal rules. This again manifests an agreement-centred and interpretative approach to liability, against the operation of rules of law. It also shows that in some areas of contract law the move to an agreement-centred approach could be regarded as a positive development. The House of Lords decision in *Farley* was itself a response to criticism that contract law was ineffective in protecting the performance interest of contractors who do not make contracts with the aim of securing purely financial benefits. It is thus possible, although speculative, to articulate Lord Hoffmann's interpretative turn as part of an ongoing trend to reassert and render more meaningful the idea that liability under contract arises internally from the parties' agreement.

Motivations Behind the Interpretative Turn

To recap: the most usual source of obligations in commercial contracts is evidently the express terms, and understanding the meaning of the express terms is the most obvious interpretative task that the courts will undertake. However Lord Hoffmann, by bringing into sharper focus the contextual nature of contract interpretation and recasting the operation of some contract law rules as essentially describing an interpretative undertaking, has potentially widened the range of questions that can be answered by reference to the parties' agreement, and has thereby reduced the scope for the operation of legal rules that might otherwise apply. This makes interpretation or construction of the contract much more significant. What might have motivated this 'interpretative turn' that places the parties' agreement back at the centre of the analysis for contract law?

One undoubtedly influential factor is that having largely been liberated from responsibility for policing consumer contracts, and other contracts carrying stark potential for abuse, the sphere of operation of the common law of contract has returned to the commercial agreement. Here there may be some scepticism that the law has much of a role to play, given what socio-

legal and empirical scholarship suggests about the marginal significance of law to business dealings.⁴⁵ But we should be careful not to overstate this point and there is still an important role for contracts and contract law in commerce, even if the precise contours of the legal role, and the specific design of the rules that will best facilitate commerce, remain matters of debate.⁴⁶ Commercial contracts are undoubtedly the arena where the English common law of contract feels it has a significant level of fit and where the weight it attaches to the value of freedom of contract is more than merely rhetorical. Justifying outcomes as far as possible from the agreement may thus achieve greater congruence with the ‘reasonable expectations’ of commercial contractors. In a commercial agreement there is reduced scope for a court to substitute its own view of reasonableness or for imposing outcomes on external ‘rule of law’ grounds, although much depends here on the type of contract in question and the characteristics of the contracting parties.

The interpretative turn also recognizes that commercial contracting takes place against a normatively rich background (possibly a very long negotiating period, industry norms and customs, previous dealings), which provides potentially relevant evidence of the parties’ intentions and gives another layer of meaning to their agreement. How much of this normatively rich background is accessible and relevant to the legal determination of the dispute, and whether courts can, do and should take it into account, are matters of debate. But given the complexity of modern commercial dealing, and the fact that commercial contractors are not a homogenous group, courts may feel less confident in regulating commercial contracts according to an autonomous set of legal rules in favour of an interpretative approach which seeks to determine as much as possible within the framework of the agreement. So, for example, if we are to ask why in *The Achilles* the ‘tacit intention’ of the parties is to incorporate the conventional understanding in the industry, rather than the *Hadley v Baxendale* default rule, or some other allocation of risk, it may be simply that if any intention must be attributed to the parties, it should be that derived from the conventional understandings, since parties are more likely to be aware of those (insofar as they differ from the applicable contract law defaults) and make their contract according to them.⁴⁷ Many empirical studies of contracting behaviour support the soundness of this intuition.⁴⁸ More likely the pre-eminence accorded to the conventional understanding is justified from an application of the objective standard of the reasonable person or ‘audience’ to whom charter contracts are addressed and who is in possession of all the background knowledge *available* to the parties, not necessarily actually *known* by them (which is a standard flexible enough to include owners, charterers and their lawyers). If this group are aware of the conventional understanding then, insofar as the written contract does not express any alternative, that is what their agreement should be taken to incorporate. Such a meaning is presumably in accordance with what this group would *reasonably expect* and may rely upon. Now while there might be some debate about the nature of this conventional understanding and whether there was evidence to support it,⁴⁹ Lord Hoffmann shows some willingness to examine this grey area of tacit intentions and expectations that lies in the gap between the express contract terms and the application of the contract law default rules, and to use it in determining the extent of the charterer’s liability.

Does it matter if the interpretative turn reduces the scope for the operation of the legal rules, given that parties can contract around them in any case? This question does not have a straightforward answer. Freedom of contract ascribes a role to contract law rules (in the main, they are defaults), and Lord Hoffmann’s approach merely allows the further curtailment of the rules in favour of what can sensibly be regarded as governed by the parties’ agreement, accessed through the process of interpretation. Whether curtailment of the rules matters

depends upon what those rules are for and the extent to which the values they express (if any) are thought to be important incidents of a contractual obligation recognized and enforceable by the law. Ultimately it may depend upon whether one believes the role of law is to *regulate* commercial behaviour by advancing a set of detailed substantive rules that inform contractors what they can and cannot do, or to *facilitate* commerce by setting the outer limits of permissible behaviour, leaving the details to freedom of contract. This point is examined further below, as part of a general consideration of the limitations and possible benefits of the interpretative turn.

The Limitations of the Interpretative Turn

Agreements Run Out

If the argument is that an interpretative approach is preferable to the application of rules of law because it is more ‘agreement-centred’ then it appears to falter on the fact that at some point the agreement will run out. When that happens, seeking to justify outcomes by reference to the parties’ agreement invokes a fiction and the courts will have to impose an outcome based on the rules of law. One might address this by pointing out that meaning and obligations may be accessible from other parts of the parties’ deal or business relationship aside from the express terms. Attention to context and the other contract terms may help in assuaging doubt about the fiction, as with the conventional understandings of shipping lawyers in *The Achilleas*, but helpful elements of the context may be inadmissible as subjective and irrelevant. In this respect the exclusion of prior negotiations from the interpretative exercise is to be regretted.⁵⁰ Some support for the view that the agreement can cover matters wider than those that appear in express terms can be seen in the debate over the proper basis for implied terms. The idea that the parties consent to implied terms or that they are based on the parties’ intentions in any meaningful sense is thought to present difficulties.⁵¹ Contracts by their nature contain gaps, and these are not necessarily filled by asking solely whether a proposed implied term is necessary to give effect to what a reasonable person would understand the contract to mean, in circumstances when it was not expressly said. Still less can the implication be sensibly *justified* in those terms. The whole idea that a court does not add to the agreement by implication may be dismissed as nonsensical. Nevertheless, that a person can meaningfully be said to have intentions concerning some state of affairs that are not actually in their mind at the relevant time is a position supported by some contract scholars, who hold that tacit intentions at the very least must be incorporated into the agreement *ab initio*, under a process of pragmatic inference.⁵²

Alternatively, we might say that this criticism that the agreement will run out does not pay sufficient regard to the nature of the contextual interpretative test. In judicial statements about contract interpretation, it is often said that the aim of it is to discover the objective intentions of the parties. In Lord Hoffmann’s hands the first principle of contract interpretation does not refer to the parties’ intentions at all. Rather, there is the suggestion that interpretation works independently of the parties’ intentions—it is the meaning conveyed to a reasonable person with the background knowledge available to the parties that is sought, not the meaning the parties’ intended. No doubt it is expected that the meaning communicated to a reasonable person will coincide with the meaning intended by the parties, yet interpretation operates with reference to a wider range of factors and a wider background. If we require outcomes to be justified by reference to the parties’ intentions then arguably this will exhaust the matters that

can be covered by the agreement more quickly than with the application of contextual interpretative method. Of course even contextual interpretation may only take us so far. There may come a point at which the agreement runs out and some other process or rules must take over for determining liability. When that point is reached there are various options. The court may apply the relevant default rule; or else we can simply say that it may be that *nothing is to happen* and that this is what the *contract means*.⁵³ At the extreme level the contract might fail for uncertainty, but the greater flexibility that an interpretative approach provides may prevent this from happening in all but an extreme case where it is doubtful the parties intended to create formal legal obligations at all.⁵⁴

Interpretation is a Smokescreen for Judicial Activism

The second limitation is related to the first. The agreement-centred and interpretative approach could be dismissed as a smokescreen that suggests party autonomy but sanctions judicial activism in the commercial sphere by allowing reasonable outcomes to be imposed on the parties. Judges can interfere with the agreement it appears without even the constraints offered by the rules of contract law. On this basis, courts do not interpret the agreement to reveal the meaning inherent in the agreement, but substantially shape (or construct) that meaning through interpretation.⁵⁵ While an interpretative approach appears to champion party autonomy one only has to look at references to standards such as ‘commercial reasonableness’ that are peppered throughout the cases to understand that interpretations are imposed on parties rather than drawn out from a contextual interpretation of the agreement. If this is the case it may be better that judges confine themselves to applying the rules ‘fixed and announced beforehand’⁵⁶ rather than embark on speculative interpretative enquiry with the aim of uncovering contract meaning to resolve the dispute.

A slightly different version of this criticism relates to judicial competence in assessing obligations and liability according to an agreement-centred and interpretative process rather than the rules of law. Edwin Peel has observed that whether Lord Hoffmann has adopted the correct approach to remoteness in *The Achilleas* really depends upon an economic analysis of pricing in charter markets and whether this was based on the *Hadley* rule or the conventional understanding of the extent of the charterer’s liability.⁵⁷ Since this kind of consequentialist economic analysis never takes place, the courts are reduced to adopting ‘a muddling through’ strategy.⁵⁸ The external default rules, such as *Hadley v Baxendale*, may therefore be more suitable for discharging the legal task of determining the extent of liability, even if the rules occasionally give rise to an unpalatable result. After all, if parties dislike the rules, it is always open to them to deal with the problem by stipulating their own outcomes in the express terms. John Gava and Janey Greene have similarly expressed doubts that judges working within the common law tradition, given their background, training and the limitations of their role, can comprehend the full contractual context that an interpretative approach would seem to demand.⁵⁹ More recently Gava has defended a form of pragmatic legalism as a legitimate approach for a judge to adopt.⁶⁰ He is opposed to what he perceives to be ill-conceived and ill-directed judicial activism in the commercial sphere, particularly since this activism is often couched in opaque doctrinal terms with unclear justification. Gava seeks to defend legalism as a judicial practice rather than a theoretical position. The judge’s duty is confined to applying the rules as justified through orthodox common law method characterized by interstitial development.

There is some force in these criticisms but no more than in any other area of law where judges have some room for manoeuvre. The attraction of explaining the judicial role as one of

interpreting the contract is that it precisely captures that the process incorporates elements of freedom and restraint. On the surface, though, Lord Hoffmann's approach, with its warnings against judges seeking to make contracts more fair and reasonable, seeks to confine the operation of judicial discretion in interpretation. Of course judges are the contract interpreters (at least when the parties bring their dispute before a court) and there is no escape from their values, at the very least concerning what 'judging' involves and the role of contract law in regulating market activity. But the same criticism of judicial activism can be raised in relation to the operation of rules of law, which, given the number of formulations, reformulations, exceptions and so on, are generally manipulable to achieve some preferred outcome over another. An interpretative approach may be thought to offer more of a constraint since judges rarely impose outcomes on parties, which the text simply *cannot* bear, or which cannot be justified by reference to the wider context.⁶¹ Although there may be a range of such outcomes available, the meaning accorded to the agreement will usually correspond with the reasonable expectations of at least one of the parties. Here of course it must be remembered that interpretation is required precisely because there is *doubt*,⁶² where the meaning to be attributed to the contract or any other object is not readily accessible, or when the results of applying the rules seem so extreme the parties cannot, as reasonable people, be reckoned to have intended them. In the context of a contract dispute there is always an element of doubt about what the parties have agreed, such that it is difficult to determine absolutely that one interpretation is demonstrably right and another demonstrably wrong. This is why it is relatively rare for interpretative outcomes in commercial cases to be dismissed as substantively incorrect, or for interpretative methods to be criticized on the basis that they will yield the wrong answer in a dispute. Rather the criticisms directed at interpretative methods are usually practical ones concerning their effect on certainty and predictability in the law, or that they create additional expense.⁶³ If anything, it is outcomes sought to be justified on external rule-based grounds that are liable to be regarded as misapplying or misunderstanding the rules, as is demonstrated by the criticism levelled at the application of *Hadley v Baxendale* by Lord Rodger and Lady Hale in *The Achilles*.⁶⁴

A Contingent Contract Law?

These criticisms about the fictions of interpretation, the perils of judicial activism and the likelihood of judicial error are cogent, compelling and well known. There is another, less obvious, implication of the interpretative turn, however, that is worth drawing out and that may make us more cautious about concluding the 'interpretative turn' is unequivocally beneficial. The thrust of the criticism is not that the interpretative turn expects too much from the parties' agreement or from judges, but that it demands too little from contract law. The greater the number of issues that are deemed to be covered by the parties' agreement (interpreted contextually), the less room there is for the operation of the legal rules, except insofar as they constitute mandatory requirements. It is often observed that mandatory rules are few and far between in the English common law of contract.⁶⁵ The lack of mandatory rules may reflect the ideal of freedom of contract, or it may reflect some lack of confidence that the rules of contract law are fit for purpose in providing a framework for commercial dealing. To seek to uphold the agreement and justify outcomes according to the parties' agreement, rather than the rules of law, may be seen as a route to the meaningful facilitation of commerce by the law. But here lurks the danger of paying too much attention to the needs of the commercial contracting community and perceiving the common law of contract as little more than a commodity, a product with a discernible market that must be designed to fit market needs. Such concerns would focus on price and the lowering of costs at the expense of the development of legal principle. Just such a concern was illustrated recently by Lord

Hoffmann in the House of Lords case of *Chartbrook Ltd v Persimmon Homes Ltd*.⁶⁶ In this case, policy considerations concerning the cost of litigation and the certainty and predictability of the law were used to justify the continued exclusion of prior negotiations from contract interpretation, notwithstanding that the evidence of negotiations clearly indicated what the parties objectively intended by their agreement. There is some irony here, in that one of Lord Hoffmann's reasons for retaining the rule was that it was a long-standing rule of contract law, and abolition would lead to uncertainty. This did not appear to be a concern in *The Achilles*.

The interpretative turn then may be a response to the criticism that the dogma and doctrine of contract law is too rigid and unresponsive to serve commercial interests. This is a source of much criticism of commercial contract law.⁶⁷ In relation to regulating commercial contracts there are so many pragmatic considerations jostling for attention it is difficult to say the law should reflect any particular general values above those that would appeal to those in the market for a certain design of contract law rules (which in practical terms is lawyers rather than the commercial parties themselves). Treating contract problems as matters to be determined by interpretation of the agreement reconnects perceived matters of contractual justice more directly to the idea of simply enforcing what the parties have agreed. This may be justified on the basis that the law should seek to encourage the parties to consider and record their obligations clearly and in advance, to read documents before signing and so on. But, as Collins notes, placing interpretation of the contract at the centre of the analysis raises the possibility that contract law can be reduced to a set of precepts concerning how the interpretative process is to be conducted, these precepts then engulfing and superseding the operation of many of the rules of contract law.⁶⁸ Whilst an interpretative approach may allow for a greater degree of flexibility in the law which is appropriate to facilitating complex, non-homogenous commercial dealings (as Lord Hoffmann himself observed, 'Different commercial relationships require different solutions'⁶⁹) it arguably leads to reliance on a set of substantively empty categories of analysis, such as 'reasonable expectation', whose appeal lies precisely in the fact that so much can be justified within their ambit.⁷⁰ The idea of contract law as a public good serving a public function, reflective of a wider set of social as opposed to purely commercial values, is of little importance in this scheme.

This matters if one adheres to the view that while contract law is important to facilitating commercial transactions, this is not its only function and that it has a regulatory role in commercial dealing that extends beyond merely curbing the very worst excesses of self-interested behaviour. Contract law is the *generally applicable law* on contractual obligations and part of a larger set of rules of private law. Stephen Smith writes that private law presents itself in normative language: the language of 'duties', 'rights', 'wrongs' and, as a normative institution, '[it] tells citizens how they ought to behave'.⁷¹ This normativity is important to how people understand and react to the law, since it provides reasons for obedience and action that are not solely instrumental or concerned with avoiding unpleasant sanctions. Hence one talks not just of contracts, but contractual *obligations*. Certainly, the rules of contract law may be regarded as more power-conferring than duty-imposing,⁷² but nevertheless this normative basis is not absent since 'welfare-enhancing exchange necessarily rests on a moral framework institutionalized in law'.⁷³ On this view, contract law cannot be concerned solely with interpreting commercial contract behaviour, but directing and guiding it according to this moral framework. The precise point of many, although not all, rules of law is to articulate this normativity in more concrete terms. When one refers to 'rules of law' one is not just referring to standards that are justifiable on the basis of the intentions of the parties, presumed or otherwise, nor standards that are applicable because an interpretation of

the agreement suggests as much. One is appealing to something deeper—that the rules of law have force whether the parties like it or not, because such rules are regarded as upholding what is just or reasonable, some important or defining principle of contractual liability, or prized policy, even if the law is content that some of these rules are excludable by the parties (a power which itself may be subject to legal control).⁷⁴ On this basis, the point of conceptualising fundamental breach as a rule of *law* is that this expresses something about contract law's underlying values: that a promise to render performance could not be emptied of all content and the obligation rendered largely illusory through the formal operation of contract terms. This substantive normativity is much more clearly displayed in other schemes of contract law rules. Thus, some European contract law instruments perceive their task as setting standards for commercial behaviour by positing measures such as non-excludable duties of good faith in performance.⁷⁵ But this is not to say that English law is devoid of such commitments. Terms are often implied in law that set standards for performance, or that limit the exercise of discretionary contract powers (the implied term of trust and confidence in the employment contract,⁷⁶ for example, or the restriction on a mortgage lender's discretionary power to vary interest rates⁷⁷). Nevertheless, a commercial contract law that perceives its primary task as one of interpretation arguably reduces its capacity to be a repository of independent and substantive normative principles concerning the importance of making and performing agreements, and its capacity to develop standards according to which commercial contractors should conduct their dealings. To be clear, this is not to say what these normative principles or external standards are, but only to say that, insofar as we believe such principles to exist and to matter, we can better manifest our commitment to them, and our pursuit of them, through rule-formulation rather than the technique of interpretation.

Why is it contended that the technique of interpretation is so limited in this respect? After all, one response is to say that the same outcomes are likely to be achieved by adopting either an interpretative method or a rule-based method. So in *The Achilles* Lord Rodger and Lady Hale achieved the same substantive result as Lord Hoffmann by applying the *Hadley* rule. Similarly, in relation to mistakes in documents, very often the mistake can be 'corrected' either through the doctrine of rectification or by means of a contextual interpretation of the agreement. Given the likelihood of uniform results by either method, what does it matter if we prefer contract interpretation over the operation of the rules of law? A response to this might be that interpretation is a parasitic activity. It is a *method* for extracting meaning from the contract. It is not a substantive value that contract law upholds, nor a quality we ascribe either to the agreement or the contracting parties. Interpretation always proceeds in relation to some object already existing and this object will shape and determine the interpretations available. To interpret a set of circumstances to reach a conclusion on liability is not the same as applying an external rule to reach the same end. The processes are different not least because the sources of authority are different (the parties and the agreement in interpretation; the law in the application of rules). It might be said that this fear of contract law being emptied of substantive normative content is unjustified. Whether an interpretative approach will have this effect depends upon the terms of your interpretative test and it may be that reference to the 'meaning conveyed to a reasonable person' in Lord Hoffmann's test is sufficiently flexible to admit a range of considerations including normative principles of good faith, fair dealing and so on, which can be given substance either by the practices of the contractors concerned or a 'default ethic' depending on the context of the contractual relationship.⁷⁸ It may therefore be entirely possible for an individual judge to pursue a normative agenda through the auspices of interpretation. Indeed it might be said that an interpretative approach allowed Lord Hoffmann to reach a substantively fair outcome where the *Hadley* rule may not. Thus in both *The Achilles* and *SAAMCO* the interpretative method

effectively prevented the defendant incurring a level of liability wholly disproportionate to his degree of fault.

The problem with this response is that while an interpretative method may champion certain techniques at the expense of others, and this may have the effect of privileging certain values over others, this is a contingency that turns on the framing of the interpretative test advanced and the identification of the relevant context. English contract law's interpretative test seeks only to find the meaning the contract conveys to a reasonable person with the background knowledge of the parties. On the face of it, the test appears devoid of any wider normative commitment.⁷⁹ This interpretative enquiry necessarily must mediate outcomes through the specific contract context and the relationship that is the subject of the dispute. So the conclusion in *The Achilles* appears to derive from the conventional understandings in the industry, and it is not the result of an application of an external legal standard which could be taken to support, as a normative principle, the idea that the extent of a person's liability for damages should be proportionate with their level of culpability. One might answer that a rule like *Hadley v Baxendale*, like many other rules of contract law, does not of itself demonstrate any normative commitments, but is simply a default to deal with the allocation of risk of loss from a breach of contract, and could have been designed in many different ways.⁸⁰ Hence one cannot link it with any deeper moral principle, unlike say the mandatory rules against fraud, duress, illegality, penalties and so on.⁸¹ Admittedly, and as recognized in the opening paragraphs of the article, many rules of contract law are more pragmatic than principled. However, many rules can be understood both as pragmatic *and* as embodying a valued principle. Thus, while not being the strongest example one might use, it could be argued that *Hadley* demands openness from the parties about the extent of their likely losses and for information about potential losses to be shared between the parties. This then allows the parties the opportunity to bargain over the assumption of responsibility for potential losses, ameliorating the 'unfair surprise' of disproportionate liability. Note that this is not to suggest that this *is* the basis for the *Hadley* rule, nor to defend its design; it is only to argue that *rules* have the potential to be a direct and patent vehicle for this kind of substantive normative commitment. We may regard this potential normativity of the rules to be either negligible or insignificant while the parties retain ultimate power to contract around the rules. But the existence of 'default inertia' and the 'status quo bias'⁸² amongst contracting parties suggests that the law should take some care over the design of its default rules since they will often be adopted by the parties, even if only inadvertently.

Since an interpretative approach precludes the operation of the external rules it also precludes consideration of whether those rules express some important principle of contractual liability that should be upheld. An interpretative approach that clouds this issue lacks a degree of transparency. It is arguable that the problem with *The Achilles* was not the rule in *Hadley* per se, but was rather that the application of this rule to the facts of the case seemed to lead to a wholly unreasonable result, which the courts were anxious to avoid. Writing extra-judicially, Lord Hoffmann criticized 'the high degree of indeterminacy which a pure foreseeability test creates'.⁸³ His explicit criticism appears to be of the bluntness of the *Hadley* rule and its emphasis on 'the single concept of foreseeability', but there is an implicit criticism of the system of precedent which encourages this rule-bound approach,⁸⁴ and even criticism as to the appropriateness of the rules as against the operation of broader principles.⁸⁵ Adopting an interpretative approach in *The Achilles* allows Lord Hoffmann to avoid the unwelcome effect of the *Hadley v Baxendale* rule, but gives us no indication of what is substantively wrong with the rule, or how the rule might be redesigned or reformed to prevent these negative effects occurring in the future. Operation of the rules of law will sometimes

have surprising and undesirable consequences (hence the parties can usually contract out of their operation and stipulate something else), but it is not clear that adopting an interpretative approach resolves these problems, nor allows the law to engage with them directly. Nor does it appear to resolve the problem of indeterminacy.

A further difficulty with the interpretative approach is that while contract context may be important to the determination of obligations, the centrality accorded to the idea of agreement may place undue emphasis on manifestations of consent to the express terms of an agreement. At the extreme, a totally agreement-centred approach allows that contract terms can set the factual basis upon which the parties make their agreement. In some circumstances, therefore, the courts are willing to support the parties' attempt to create a kind of alternative and amoral legal reality to the actual reality in which they found themselves and thereby limit the operation of duties that might otherwise arise under the general law. In *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* Moore-Bick LJ in the Court of Appeal remarked:⁸⁶ There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not ... Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. Moore-Bick LJ suggests here that if the parties have agreed it, then the 'real world' will not be permitted to encroach upon the contractual statement of 'facts'. On this basis the court was prepared to accept that signature of the terms of the contract, which set forward the true basis for the transaction, but which were not read, could prevent an action in misrepresentation arising, notwithstanding that the claimant may, in reality, have relied on misrepresentations when entering into the agreement.

One of the main difficulties with the interpretative turn then is not that it is freedom of contract recast, it is that the greater the scope for contractual obligations to be regarded as a matter of contract interpretation and not contract law, the more we bring into question whether our contract law can be regarded as necessarily, as opposed to contingently, a repository of substantive normative values at all. While in some circumstances and contracting contexts it is acceptable for commercial parties to seek to oust the operation of contract law, with the interpretative turn contract law appears to be ousting the operation of itself, and thus ousting the opportunity to use case determination as a means to demonstrate its normative commitments and communicate these to commercial contractors.

Benefits of the Interpretative Turn

What has been presented here as a 'development' in contract law may not be anything of the kind, and may simply be a reassertion of the power that commercial parties have always had to contract out of the general law, and a recognition on the part of law of the importance of this power. It may be that the common law of contract, being almost wholly applicable to commercial contracts, is right to embrace a pragmatic and individualized approach to dispute resolution pursued through an enhanced concept of interpretation of the parties' agreement. Looking at the current law of contract one could hardly claim it is a coherent body of principled doctrine displaying clear normative commitments.⁸⁷ A contract law that defers to the agreement at the expense of its own rigid doctrines may be more effective in protecting the performance interests of contractors and hence in supporting the reasons why contracts

are entered into in the first place. As well as criticisms related to its limited importance for the conduct of commerce, contract law remedies have long faced censure for attaching too much significance to the economic benefits of performance rather than the performance itself. This limitation is again a relic of its commercial roots. *Farley v Skinner* provides some room for optimism that a contract law that pays greater attention to the actual obligations the parties have undertaken is better able to protect a wider range of performance interests beyond traditional financial ones.

We have seen that one likely motivation for the interpretative turn is the return of the English common law of contract to its commercial roots. If an interpretative approach increases the pragmatism and flexibility of the law then this may be well suited to the needs of commercial contractors. Contract law is often criticized for its rigidity and commitment to arid doctrines that appear to be of doubtful relevance to business people. The requirements for creating a legally enforceable contract are often considered to be a hindrance to business. If contract law is to pay greater attention to the agreement between the parties, then this suggests that it could become more individualistic, responsive, and dynamic in its approach to regulating commercial contractual relations. This attention to the parties' agreement may have two particular beneficial effects for commercial agreements. The first is that obligations do not have to be transformed to fit the existing framework of legal rules and remedies to be effective. Rather it is the legal framework that must be remoulded. Obligations that the parties assume, however flexible, cannot be denounced as conceptually impossible,⁸⁸ and contractors cannot simply be told that something cannot be done by contractual means. The second potential benefit is that the parties can incorporate by contractual means what may be denied them by operation of the general law. These benefits may reduce the possibility of contractual obligations being void for uncertainty, at least once an initial threshold of intention to create legal obligations is shown to have been passed.

An example of the first benefit is provided by the recent Court of Appeal decision in *Durham Tees Valley Airport Ltd v BMI Baby Ltd*.⁸⁹ The owners of DTVA entered into a 10 year contract with BMI Baby (the budget-airline subsidiary of British Midland Ltd) under which the airline agreed to base two aircraft at the airport by a certain date. The deadline for achieving this was later extended by a novation and variation agreement. In return, DTVA offered various financial incentives to BMI Baby and also undertook a £10 million redevelopment of the airport. BMI Baby was not able to make a profit from the operation and the airline withdrew from DTVA with 8 years of the agreement left to run. DTVA claimed damages for breach of the agreement. Davis J at first instance concluded that there was a contractual obligation on BMI Baby to 'establish ... and thereafter to continue to base and to operate two aircraft: and this obligation was for the term of the contract'.⁹⁰ Nevertheless, he was unable to determine precisely what it was they were obliged to do beyond this. Questions as to how many flights BMI Baby was expected to operate and the number of passengers they were obliged to carry did not have any objectively ascertainable answers. The end result was that the 'contract' failed for uncertainty since the judge held that there was no basis upon which workable terms could be implied. It seems clear that what weighed with the judge in the case was his inability to formulate specific terms that could yield a quantifiable damages award for breach. Within the backward-looking legal context of litigation, this concern is understandable, but to regard it as determinative of the issue of liability fails to interpret the agreement in its industry context, since it did not take account of industry conditions that militated against specifying formal obligations as to flying programmes with any degree of certainty or any expectation of permanence.⁹¹ The Court of Appeal on the other hand accepted that the contract did not fail for uncertainty since performance would give its vague

provisions content.⁹² For the Court of Appeal it was an error, although an understandable one, to filter the determination of the obligations arising through the remedial scheme for breach of contract and allow the difficulty of formulating a remedy to determine the entire issue of enforceability. Once the judge had determined that liability for breach had arisen on the basis of interpreting the contract he was left simply with the task of assessing damages. While this would be difficult, it was not impossible, and did not prevent the contract being enforceable. Although formulating the remedies in these sorts of cases is a challenge, it is significant that the Court of Appeal recognized that the availability of legal remedies did not determine the obligations assumed, rather understanding and interpreting the parties' obligations came first.

The second possible benefit from the interpretative turn is that interests that are not currently protected through the general principles of contract law could be secured by the parties through contractual means. In other words, the power to create an 'alternative legal reality' that was exercised in *Peekay* could be used for good. For example, it is well-known that English law does not recognize any agreement between the parties to negotiate in good faith. This applies to both a duty implied in law and also it seems an express duty imposed by the parties themselves through a contract.⁹³ The classic statement of the English law position comes from Lord Ackner in *Walford v Miles*.⁹⁴ There he said that 'the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations'. This suggests that the refusal of contract law to recognize such an agreement is justified on principled grounds since the duty is inconsistent with what it means to be a negotiating party under the legal rules. Hence the proposed duty had 'no legal content'. The reasons for this attitude are varied, incorporating both principled and practical concerns. To the extent that Lord Ackner regarded the lack of a duty of good faith in the law as reflecting some principled stance or intrinsic truth about contracting parties and the values of contract law (for example, that there is some inherent connection between 'contracting' and party conflict⁹⁵) it may need to be abandoned under an interpretative approach. At the very least a truly interpretative approach would require in the case of some contracts the jettisoning of the idea that contracting parties are self-interested, inflexible and uncooperative and that contract law has relevance only to contractors that display these features. It would not be easy to conclude that such an express duty of good faith falls foul of the adversarial and individualistic values of contract law, since the shift to an interpretative approach to the agreement means contract law can evince no *a priori* commitment to such values. An agreement forged in the spirit of co-operation must be interpreted as such, and one forged in an atmosphere of self-interest and adversarialism should be interpreted in that context. The advantage of the interpretative turn is that it allows for greater sensitivity to these varying contexts, and hence a more nuanced legal approach to the regulation of commercial contracting.

Conclusion

Evidently not everything concerning the contract or contract law can be reduced to a matter of interpretation. Contract law must posit some non-negotiable 'rules' according to which the practice takes place, if only for the purposes of identifying what the practice is and what basic standards apply. To the extent that these rules are justified on non-instrumental grounds, as expressing some fundamental or definitional principles of contractual obligation the ability to 'interpret around' them must be regarded as problematic. The main argument presented here is that the 'interpretative turn' in contract law, whereby the rules of contract law reduce in

scope and significance in favour of the interpretation of the parties' agreement, may have implications for how we understand contract law and contracts themselves, in particular how far we can understand the rules of contract law as embodying a coherent scheme of values that reflect normative commitments beyond those of upholding agreements freely made. While not likely perhaps to absorb the whole of contract law, Lord Hoffmann's interpretative approach seems to presume that more of the obligations assumed by the parties, both primary and secondary, are identifiable by interpreting their agreement, rather than determined by applying external rules of law justified on *a priori* grounds of either principle or policy. The interpretative turn has both benefits and costs in this respect. It may reflect an acknowledgment that the rules and doctrines of classical contract law are unsuited to regulating modern, complex commercial dealing, and that facilitating modern commercial contracts requires an individualistic approach to each agreement, which an interpretative method can best effect. On the negative side, however, the interpretative turn is another example of the tendency of modern contract law to express itself in terms of empty independent normative substance. While interpretation presents the potential for normativity and evaluation this is only in opaque and contingent terms, depending on your interpretative test and the values already inherent in the 'object' you are interpreting. Thus we can remain equivocal over whether an interpretative approach serves commerce, given that it seems unlikely to assist in making modern contract law any more principled, certain, or transparent. The values that contract law will reflect will depend on the values displayed in the individual contract and its accompanying context, not ones imposed from outside by way of independent legal norms which at least have the potential to pursue coherence according to a normative scheme. It may be that this matters little in commercial contract law and freedom of contract remains the overriding normative principle. But there is a counter-argument that a law that merely interprets, rather than directs, can appear seriously impoverished.

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Footnotes

¹ Other scholars have also noticed a shift in contract law towards seeking to make outcomes more ‘agreement-centred’: see Andrew Robertson, ‘The Limits of Voluntariness in Contract’ (2005) 29 Melbourne University Law Review 179 and ‘The Basis of the Remoteness Rule in Contract’ (2008) 28 LS 172; Hugh Collins, ‘Lord Hoffmann and the Common Law of Contract’ (2009) 5 ERCL 474; and specifically in relation to the remoteness rule, Adam Kramer, ‘An Agreement-centred Approach to Remoteness and Contract Damages’ in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart 2005) 249.

² Brian Coote, *Contract as Assumption* (Hart 2010) 1.

³ Hugh Beale, ‘The Impact of the Decisions of the European Courts on English Contract Law: The Limits of Voluntary Harmonization’ (2010) 3 Eur Rev Pri Law 501, 521 and Collins (n 1) 474–5.

⁴ Ian Ayres, ‘Valuing Modern Contract Scholarship’ (2003) 112 Yale LJ 881, 885–6.

⁵ For judicial comments on the specific nature of the legal protection provided by contract see Hobhouse J in *EE Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 WLR 221, 228.

⁶ See Stephen A Smith, *Contract Theory* (OUP 2004) 103–5. Some scholars seek to defend a division between different branches of private law while not maintaining that the distinctions turn on whether the obligation is voluntarily assumed: see for example Steve Hedley, *Restitution: Its Division and Ordering* (Sweet and Maxwell 2001) 63–66.

⁷ Eg Smith, *ibid*; Charles Fried, *Contract as Promise* (Harvard University Press 1981); Randy E Barnett, ‘A Consent Theory of Contract’ (1986) 86 Columbia LR 269.

⁸ A recent example of the necessity for a clear intention to contract around the general rules is provided by *Re Sigma Finance Corp (in administrative receivership)* [2009] UKSC 2, [2010] 1 All ER 571.

⁹ The comprehensive exception to the privity of contract rule enacted by the Contracts (Rights of Third Parties) Act 1999, s 1(1) is an example here.

¹⁰ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896.

¹¹ *ibid* 912–3. See also Catherine Mitchell, *Interpretation of Contracts* (Routledge-Cavendish 2007) ch 2.

¹² [1997] AC 191.

¹³ [2008] UKHL 48, [2009] 1 AC 61.

¹⁴ (1848) 1 Exch 850, 154 ER 363.

¹⁵ *SAAMCO* (n12) 212 (Lord Hoffmann).

¹⁶ *The Achilleas* (n 13) [17] (Lord Hoffmann).

¹⁷ See *SAAMCO* (n 12) 211. This accords with the view of Andrew Tettenborn who, in his analysis of the remoteness rules on breach, distinguishes between the instrumental effects of the contract (losses connected to which the defendant can rightly be said to be responsible) and the effects attributable to how the claimant runs his business (and for which the defendant should not be responsible): ‘*Hadley v Baxendale* Foreseeability: a Principle Beyond its Sell-by Date?’ (2007) 23 J Contract Law 120, 134ff.

¹⁸ *Investors* (n 10).

¹⁹ Hugh Collins, ‘Objectivity and Committed Contextualism in Interpretation’ in Sarah Worthington (ed), *Commercial Law and Commercial Practice* (Hart 2003) 193. See also Smith (n 6) 276.

²⁰ [2009] UKPC 10, [2009] Bus LR 1316.

²¹ Some scholars have long supported the idea that implication of terms in fact can be understood as an exercise in contract interpretation, or at least that they are closely related processes: Adam Kramer, ‘Implication in Fact as an Instance of Contractual Interpretation’

(2004) 63 CLJ 384; Gerard McMeel, *The Construction of Contracts* (2nd edn, OUP 2011) 12–15.

²² *AG of Belize* (n 20) [17].

²³ *ibid.* For a recent application see *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc (The Reborn)* [2009] EWCA Civ 531, [2010] 1 All ER (Comm) 1.

²⁴ *AG of Belize* (n 20) [25]. Lord Hoffmann’s treatment of the traditional tests for implication has provoked criticism on the basis that the business efficacy and officious bystander tests are in fact more onerous than the ‘reasonable person’ test stipulated in *AG of Belize*: see John McCaughran, ‘Implied Terms: The Journey of the Man on the Clapham Omnibus’ (2011) 70 CLJ 607; Elizabeth Macdonald, ‘Casting Aside “Officious Bystanders” and “Business Efficacy”?’ (2009) 26 J Contract Law 97; McMeel (n 21) 12–13.

²⁵ *The Achilleas* (n 13).

²⁶ (1854) 9 Exch 341, 156 ER 145.

²⁷ *The Achilleas* (n 13) [11].

²⁸ *ibid.* Lord Hope was largely in agreement. Lord Walker agreed with elements of both Lord Hoffmann’s and the orthodox approach.

²⁹ *The Achilleas* [6]–[8]. See also Lord Hoffmann, ‘*The Achilleas*: Custom and Practice or Foreseeability?’ (2010) 14 Edinburgh LR 47, 48–9.

³⁰ For arguments along these lines see Randy Barnett, ‘The Sound of Silence: Default Rules and Contractual Consent’ (1992) 78 Virginia LR 821, 826, 866; Christopher A Riley, ‘Designing Default Rules in Contract Law’ (2000) 20 OJLS 367, 369ff; Kramer (n 21) p 387ff.

³¹ *The Achilleas* (n 13) [13].

³² *The Reborn* (n 23).

³³ [2011] UKSC 56, 2012 SLT 205 [33]. See also the recent Technology and Construction Court decision in *Leander Construction Ltd v Mulalley and Co Ltd* [2011] EWHC 3449 (TCC), [2012] BLR 152. *AG of Belize* was mentioned in this latter case, but at [24]–[25] dicta from *The Reborn*, to the effect that the test for implication in fact remains necessity and not reasonableness, were relied upon.

³⁴ Adam Kramer, ‘The New Test of Remoteness in Contract’ (2009) 125 LQR 408; Tettenborn (n 17); more sceptical are Edwin Peel, ‘Remoteness Revisited’ (2009) 125 LQR 6, and Andrew Robertson, ‘The Basis of the Remoteness Rule in Contract’ (n 1).

³⁵ David Yates, *Exclusion Clauses in Contracts* (2nd edn, Sweet and Maxwell 1982) 223.

³⁶ [1956] 1 WLR 936.

³⁷ [1967] AC 361.

³⁸ [1980] AC 827.

³⁹ As the facts in *Photo Production v Securicor* (ibid) amply demonstrate.

⁴⁰ The rule was questionably derived from *Addis v Gramophone Co Ltd* [1909] AC 488.

⁴¹ [2001] UKHL 49, [2002] 2 AC 732.

⁴² Nelson Enonchong, ‘Breach of Contract and Damages for Mental Distress’ (1996) 16 OJLS 617; Catherine Mitchell, ‘Promise, Performance and Damages for Breach of Contract’ (2003) 2 J Obligations & Remedies 67.

⁴³ *Farley* (n 41) [86] and [106] (Lord Scott).

⁴⁴ *Farley* (n 41) [15].

⁴⁵ See for example Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 ASR 55, and Hugh Beale and Tony Dugdale, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2 BJLS 45.

⁴⁶ See Catherine Mitchell, 'Contracts and Contract Law: Challenging the Distinction Between the "Real" and "Paper" Deal' (2009) 29 OJLS 675.

⁴⁷ See Barnett (n 30) 829.

⁴⁸ Macaulay (n 45); Beale and Dugdale (n 45).

⁴⁹ Peel (n 34) 11.

⁵⁰ See further Catherine Mitchell, 'Contract Interpretation: Pragmatism, Principle and the Prior Negotiations Rule' (2010) 26 J Cont L 134.

⁵¹ Riley (n 30) 369ff.

⁵² Adam Kramer 'The New Test of Remoteness in Contract' (2009) 125 LQR 408, 410. On pragmatic inference see Kramer (n 21) 385.

⁵³ See Lord Hoffmann in *AG of Belize* (n 20) [17].

⁵⁴ *Baird Textile Holdings Ltd v Marks and Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737, perhaps provides an example of just such a case.

⁵⁵ Robertson (n 1) 202ff.

⁵⁶ Friedrich A Hayek, *The Road to Serfdom* (Routledge 1991) 54.

⁵⁷ Peel (n 34) 11. Peel recognises that the legal rules, however framed, may in fact have a minimal effect on contract pricing.

⁵⁸ Anthony Duggan, 'Commercial Law and the Limits of the Black Letter Approach' in Worthington (n 19) 597–98. The idea of a 'muddling through' strategy is attributed to C Lindblom, but PS Atiyah also made the same point: *Pragmatism and Theory in English Law* (Hamlyn Lectures 39th series, Stevens 1987) 43. This is not to suggest that courts do not assess consequences in legal reasoning. Teasing out the implications of adopting one contract interpretation over another is often regarded as an important part of the process of reaching a decision: see Lord Goff, 'The Iterative Process of Contractual Interpretation' (2012) 128 LQR 41, 46.

⁵⁹ John Gava and Janey Greene, 'Do We Need a Hybrid Law of Contract? Why Hugh Collins is Wrong and Why it Matters' (2004) 63 CLJ 605.

⁶⁰ John Gava, 'Dixonian Strict Legalism, *Wilson v Darling Island Stevedoring* and Contracting in the Real World' (2010) 30 OJLS 519.

⁶¹ Although Lord Lloyd's dissent in the *Investors* decision was made on this basis: [1998] 1 WLR 896, 904.

⁶² Neil MacCormick, *Rhetoric and the Rule of Law* (OUP 2005) 121–22.

⁶³ See for example, Sir Christopher Staughton, 'How do the Courts Interpret Commercial Contracts?' (1999) 58 CLJ 303, 307.

⁶⁴ See for example Peel (n 34) 8, who argues that their approach confused type of loss with its extent.

⁶⁵ Beale (n 3).

⁶⁶ [2009] UKHL 38, [2009] 1 AC 1101.

⁶⁷ See Christian Twigg-Flesner and Gonzalo Villalta Puig, 'Introduction: The Boundaries of Commercial Law' in Christian Twigg-Flesner and Gonzalo Villalta Puig (eds) *Boundaries of Commercial and Trade Law* (Sellier 2011) 16–19.

⁶⁸ Collins (n 1) 475.

⁶⁹ Lord Hoffmann ‘The *Achilleas*: Custom and Practice or Foreseeability?’ (2010) 14 Edinburgh LR 47, 58.

⁷⁰ On the substantive emptiness of ‘reasonable expectations’ see Catherine Mitchell, ‘Leading a Life of it Own? The Roles of Reasonable Expectation in Contract Law’ (2003) 23 OJLS 639.

⁷¹ Stephen A Smith, ‘The Normativity of Private Law’ (2011) 31 OJLS 215, 215 and 221.

⁷² HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 27–28.

⁷³ David Campbell, ‘The Incompleteness of Our Understanding of the Law and Economics of Relational Contract’ (2004) Wisconsin LR 645, 673.

⁷⁴ As with the operation of the Unfair Contract Terms Act 1977 for example.

⁷⁵ See for example the Draft Common Frame of Reference which contains non-excludable duties to negotiate a contract in good faith and to perform contractual obligations in good faith: see respectively Book II, art 3:301 and Book III, art 1: 103. See also Roger Brownsword, *Contract Law: Themes for the Twenty-First Century* (2nd edn, OUP 2006) 111–12.

⁷⁶ *Malik v Bank of Credit and Commerce International SA (in liq)* [1997] UKHL 23, [1998] AC 20.

⁷⁷ *Paragon Finance plc v Nash* [2001] EWCA Civ 1466.

⁷⁸ Roger Brownsword, ‘After Investors: Interpretation, Expectation and the Implicit Dimension of the “New Contextualism” ’ in David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract* (Hart 2003) 103, 107 and 123ff.

⁷⁹ Compare, for example, Ronald Dworkin’s method of constructive interpretation which encapsulates a normative commitment in the terms of the interpretative test: ‘constructive

interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong': *Law's Empire* (Fontana 1986) 52.

⁸⁰ Richard Craswell for example argues that many default rules do not display clear normative commitments since moral theories tell us little about the 'background' rules that determine obligations, although they might be relevant to the design of 'agreement' rules: 'Contract Law, Default Rules and the Philosophy of Promising' (1989) 88 *Michigan L R* 489, 504.

⁸¹ *ibid*, 519.

⁸² On default inertia see Ian Ayres and Robert Gertner, 'Majoritarian vs Minoritarian Defaults' (1999) 51 *Stanford L R* 1591, 1598; Russell Korobkin, 'The Status Quo Bias and Contract Default Rules' (1998) 83 *Cornell L R* 608.

⁸³ Hoffmann (n 69) 51.

⁸⁴ *ibid* 53.

⁸⁵ *ibid* 54.

⁸⁶ [2006] EWCA 386, [2006] 2 *Lloyd's Rep* 511 [56].

⁸⁷ 'Modern contract law probably works well enough in the great mass of circumstances, but its theory today is a mess': Atiyah (n 58) 173.

⁸⁸ Lord Hoffmann *Re: Bank of Credit and Commerce International SA (in liq) (No 8)* [1998] AC 214, 228 (Lord Hoffmann).

⁸⁹ [2010] EWCA Civ 485, [2011] 1 *All ER (Comm)* 731.

⁹⁰ [2009] EWHC 852 (Ch), [2009] 2 *All ER (Comm)* 1083 [82].

⁹¹ DTVA (CA) (n 89) [99].

⁹² *ibid* [55].

⁹³ The problem with the latter is the lack of certainty in the scope of the duty. But see obiter dicta comments of Longmore LJ in *Petromec Inc v Petroleo Brasileiro SA Petrobas (No 3)* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep 121. He expressed doubts about the contention that express agreements to negotiate in good faith could never be enforceable.

⁹⁴ [1992] AC 128 (HL) 138 (all the other law lords agreed). Lord Steyn called that part of the decision that held an express agreement to negotiate in good faith was unenforceable 'surprising': 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433, 439.

⁹⁵ This might be borne out by those scholars that suggest legal contracts only have relevance where norms of trust do not operate between the parties: see Mitchell (n 46)