

HOW TO INTERPRET THE CONTRACT TO YOUR CLIENT'S ADVANTAGE AFTER *CHARTBROOK*: THE FACTUAL MATRIX RELOADED

by

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Jonathan Seitler specialises in property litigation and professional negligence arising out of it. In recent months he has acted in a large number of high-profile property litigation and professional negligence cases.

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Jonathan is highly recommended in the legal directories: Chambers UK says he is an 'impressive courtroom advocate', with 'extreme cleverness and creativity'. In November 2007 Jonathan was named as Chambers & Partners Real Estate Silk of the Year.

The Legal 500 says that he is 'an excellent fighter, a first-class tactician and is highly responsive and commercial'. It has also said that Jonathan's "easy manner belies a sharp tactical mind which is much in demand".

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Julian has appeared in a number of high-profile cases, most recently with Christopher Nugee QC on the winning side in the House of Lords in *Chartbrook Limited v Persimmon Homes Limited* [2009] 3 WLR 267, the subject of his talk today.

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Chartbrook Limited v Persimmon Homes Limited [2009] UKHL 38: the case, the issues and the implications

by

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The full judgment can be found at [2009] 3WLR 267

The background

1. Chartbrook owned a site in Wandsworth. Chartbrook entered into an agreement with Persimmon pursuant to which Persimmon was to obtain planning permission, construct a mixed residential and commercial development on the site consisting of commercial premises below and residential flats above with basement car-parking, and then sell the flats. Persimmon was given power under the Agreement to require Chartbrook to grant leases to the respective purchaser of each flat sold. The commercial premises were then to be granted back to Chartbrook on terms set out in the Agreement.
2. Persimmon agreed to pay Chartbrook a price consisting of two parts:
 - (1) the first part of the price was a guaranteed minimum sum (called the "Total Land Value") based on the net internal areas of the residential and commercial parts (and number of residential car parking spaces) for which permission was obtained. This sum was payable in instalments upon sale of each residential unit, commercial unit or residential car parking space, or in specified percentages on a series of fixed backstop dates.
 - (2) the second part of the price was an additional payment (called the Balancing Payment), calculated solely by reference to the sale price of the flats. The Balancing Payment was defined as being the "Additional Residential Payment" (or "ARP") which was in turn defined as meaning "23.4% of the price achieved for each Residential Unit in excess of the Minimum Guarantee Residential Unit Value less the Costs and Incentives".

Apart from the agreed price, Persimmon was entitled to keep all other sums received by it from sales of the flats (and residential car parking spaces).

3. In the event planning permission was obtained and the development was built. A dispute arose over the second part of the price.

The clause in question

4. The “Additional Residential Payment” (or “ARP”) was defined as meaning:

“23.4% of the price achieved for each Residential Unit in excess of the Minimum Guarantee Residential Unit Value less the Costs and Incentives [as defined]”

Simplified for present purposes the material words can be put as:

“23.4% of the price achieved for each [flat] in excess of the [minimum sum]”

5. Persimmon’s case was that Chartbrook was to receive either a fixed % (in the event 23.4%) of the sales revenue from the flats or the minimum guaranteed amount, whichever was the greater. This means that there would only be a Balancing Payment if 23.4% of the net sales proceeds of the flats exceeded the minimum amounts; and had the effect of giving Chartbrook a share of the upside if sales exceeded expectations.
6. Chartbrook’s case was that it was entitled to receive a Balancing Payment calculated as 23.4% of the amount by which the sales proceeds exceeded the minimum guaranteed amount. Since the sales proceeds were bound to exceed the minimum amount by a long way (the minimum amount was £53,438 whilst the anticipated sale price was £200,000) this would produce a substantial extra payment in any event.
7. The impact this had on the amounts payable to Chartbrook are shown by the figures:

(1) Persimmon’s case

Net sales proceeds	£23,848,788
23.4% of above	£ 5,580,616
Minimum guaranteed sums	£ 4,683,565
Balancing Payment	£ 897,051
Minimum + BP	<u>£ 5,580,616</u>

(2) Chartbrook’s case

Net sales proceeds	£23,848,788
Minimum guaranteed sums	£ 4,683,565
excess	£19,165,223
23.4% of excess (Balancing Payment)	£ 4,484,862
Minimum + BP	<u>£ 9,168,427</u>

The pre-contractual material

8. In the course of negotiating the agreement, Persimmon had set out its proposals in relation to the price in a series of letters written to Chartbrook.
9. Persimmon initially offered to pay Chartbrook for a straightforward % of sales proceeds, it wrote:

“we would be prepared to pay you 29.8% of the net sales proceeds generated from the private sale residential element of the scheme ... by tying your land value to a percentage of the income, you will automatically share in any sale uplift that we experience”
10. In a letter a few days later, Persimmon repeated this offer and added to this an offer to pay a minimum amount by reference to certain backstop dates, ie an amount psf (NIA) of private residential accommodation payable on certain fixed dates regardless of when the flats actually sold.
11. There was no dispute that shortly afterwards Chartbrook communicated to Persimmon its acceptance in principle of this offer.
12. Persimmon’s solicitor, then produced the first draft of the agreement which from the outset contained the Additional Residential Payment or ARP in precisely the same form as it appeared in the final agreement (subject to a later change in the percentage figure necessitated by Chartbrook’s desire to add more land into the site).
13. The basic structure of the price was never re-negotiated.

The proceedings in the Courts below

14. When Persimmon refused to pay the additional amount Chartbrook claimed was due, Chartbrook sued Persimmon. In addition to putting forward its interpretation of the ARP, Persimmon counterclaimed for rectification on the basis that, if the ARP did not mean what Persimmon said, it failed to reflect the parties intentions.
15. The trial was heard by Briggs J – see *Chartbrook v Persimmon* [2007] 1 All ER (Comm) 1083. He found in favour of Chartbrook both on interpretation and rectification. He said:

“The ordinary meaning of the definition of ARP seems to me clearly to point towards Chartbrook’s rather than Persimmon’s construction. Taking it stage by stage, ARP means 23.4% of something. To the question “23.4% of what?” the clear answer is the excess of the price achieved for each [flat] over the [minimum sum]”
16. And he saw nothing in the context to compel any different interpretation. He also rejected Persimmon’s invitation to have regard to the pre-contractual letters on the basis of the long-standing rule set out in *Prenn v Simmonds* [1971] 1 WLR 1381 which excluded the pre-contractual negotiations of the parties from the evidence admissible on a point of construction.
17. On rectification Briggs J had no difficulty in finding that Persimmon intended at the time of the contract for the ARP to provide for a price consisting of a fixed percentage of the sales revenue from the flats ie. an ARP in accordance with Persimmon’s interpretation.
18. The issue therefore turned on the intention of Chartbrook. He heard evidence from the directors of Chartbrook. They insisted that their understanding of the price was that for which Chartbrook contended. They accepted that the pre-contractual letters did not provide for such a price and therefore could not have provided the origin of their understanding. They could not explain where their understanding came from. But they said that they must have misunderstood the letters at the time. Although he found the question of the directors’ intentions one of “real difficulty”, the trial judge was not prepared to find that they had been dishonest in their evidence and concluded that Persimmon had failed to prove that they shared Persimmon’s intention as to the price. So Persimmon had failed to prove its case on rectification.
19. Persimmon’s appeal to the Court of Appeal was dismissed by a majority – *Chartbrook v Persimmon* [2008] 2 All ER (Comm) 387. The three Lord Justices (Tuckey, Lawrence Collins, and Rimer LJ) were unanimous in rejecting (i) the admissibility of the pre-contractual letters on the basis of the exclusionary rule; and (ii) Persimmon’s appeal against the trial judge’s finding of fact as to the belief and intention of Chartbrook’s directors.
20. But on the question of interpretation Lawrence Collins LJ dissented saying that “it is very difficult (and probably impossible) to discern the commercial sense behind Chartbrook’s interpretation” (para 92) and that a number of factors “lead me powerfully to the conclusion that Persimmon’s construction is the right one” (para 94).

The three issues in the appeal to the House of Lords

21. There were three issues in Persimmon's appeal to the House of Lords:
- (1) The first issue was as to the true scope of the "exclusionary rule" under which the negotiations of the parties are in general inadmissible to construe a contract.
 - (2) The second issue was the construction of the ARP. This would potentially be affected by the prior question of admissibility.
 - (3) The third issue, which only arose if the Persimmon's argument on construction was rejected, was the rectification of the Agreement.

Construction

22. The House of Lords unanimously allowed Persimmon's appeal on the basis that the proper interpretation of the ARP was that contended for by Persimmon. In the event, giving the leading judgment, Lord Hoffman addressed the issue of construction first.
23. Lord Hoffman acknowledged that an ordinary reading of the wording of the ARP favoured Chartbrook's interpretation. He made clear that it requires a strong case to persuade the Court something has gone wrong with the language of the contract and he noted that neither Briggs J nor the majority of the Court of Appeal thought such a case had been made out. "It is, I am afraid," he said "not unusual that an interpretation which does not strike one person as sufficiently irrational to justify a conclusion that there has been a linguistic mistake will seem commercially absurd to another" – para [15].
24. But in this case he concluded that to interpret the ARP in accordance with the ordinary rules of syntax "makes no commercial sense" – para [16]. He was influenced by the use of the term "Minimum Guaranteed" in the definition of the minimum sum which he said connoted a basic payment with an additional payment contingent on a future event. He saw Chartbrook's construction as leaving virtually no contingency at all because even if the market suffered a catastrophic fall, Chartbrook was still likely to receive a balancing payment. He found it particularly hard to believe that rational parties would identify such a precise figure as the minimum sum in this case (£53,438) to estimate the point at which a fall in the market became so catastrophic as to deny Chartbrook a balancing payment. He concluded that, on Chartbrook's interpretation, the structure and language of the various provisions in relation to the price appeared "arbitrary and irrational" – para [20].

Admissibility of pre-contractual negotiations

25. Despite it being unnecessary to address the other two issues, Lord Hoffman went on to do so. On the question of admissibility of pre-contractual negotiations, Persimmon contended that the true scope of the exclusionary rule was only to exclude pre-contractual negotiations where they were “unhelpful” to use the words of Lord Wilberforce in *Prenn v Simmonds*. Where instead they disclosed a clear pre-contractual consensus on the very point in issue, Persimmon argued they were not excluded. Alternatively Persimmon invited the House of Lords to make a limited and principled relaxation of the rule to admit pre-contractual material in such cases.
26. The House of Lords unanimously affirmed the exclusionary rule and rejected the suggestion that it was limited in scope in the way Persimmon contended. Lord Hoffman giving the leading judgment accepted that it would not be inconsistent with the objective theory of contractual interpretation to admit evidence of previous communications between the parties – para [33]. So the rationale for excluding them in all cases is a pragmatic one.
27. Lord Hoffman then considered the pragmatic reasons for the rule.
 - (1) Admitting pre-contractual material is creative of uncertainty and cost in disputes. It would be necessary to look at the often voluminous pre-contractual material to try to work out what the parties meant and can add greatly to the length of litigation.
 - (2) Pre-contractual material raises problems of its own different from other background material. It may be “drenched in subjectivity” (para [38]) and is often highly contentious. Experience in the wake of *Pepper v Hart* in the field of statutory interpretation suggested to Lord Hoffman that admitting pre-contractual material may encourage self-serving statements in negotiations.
 - (3) There would be an increased risk that a third party who took an interest under a contract would find it meant something different to what they thought – para [40] - (though Lord Hoffman accepted that the problem of a third party not having access to all the relevant interpretative material is inherent in the contextual approach and reliance on background material, much of which may be unknown to a third party).
28. He concluded there was no clearly established case for departing from the exclusionary rule. He accepted it may result in injustice in some cases, but said such a rule was justified in the “general interest of economy and predictability in obtaining advice and adjudicating disputes” – para [41]. Without empirical study such as by the Law Commission it was not possible to conclude that the disadvantages of the rule outweigh the risks of relaxing it. Their Lordships took comfort from the fact that in most cases the “safety nets of rectification and estoppel by convention” would ensure that no injustice was done.
29. The House of Lords also clarified the boundaries of the exclusionary rule by disapproving the case which had given rise to a significant extension of the so-called “private dictionary” principle, namely *The Karen Oltmann* [1976] 2 Lloyd’s Rep 708 – para [47]. In that case Kerr J had said that

“if a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if the parties have in effect negotiated on an agreed basis that the words bore only one of the two meanings, then it is permissible for the court to examine extrinsic evidence to see whether the parties have in fact used the words in question in one sense only”.

30. Whilst accepting that evidence of an unconventional usage was always admissible to establish a “private dictionary” in much the same way as evidence of trade usage, Lord Hoffman disapproved Kerr J’s approach as an illegitimate extension of that principle.

Rectification

31. Persimmon had sought both to renew its appeal against the judge’s finding of fact and to raise a new point on the proper approach to rectification. Persimmon’s new point was to argue that the mistake required for rectification of a written contract was not a mistake as to whether the written contract accorded with the actual subjective intention of the party in question, but a mistake as to whether the written contract reflected the prior objective consensus between the parties (Persimmon called this the “objective theory of rectification”).
32. Relying on their long standing rule of not hearing appeals against a concurrent finding of fact made by the courts below, the House of Lords refused to hear the appeal on the facts.
33. But, Lord Hoffman (with whose remarks three of the other four members of the panel expressly associated themselves) went on to endorse the objective theory of rectification.
34. Lord Hoffman reviewed the authorities cited by Persimmon. He concluded that the authorities suggested that the common continuing intention required for rectification is not a subjective intention but an objective intention ie. the intention as it would appear to an objective observer by reference to the parties’ outward acts towards one another – para [60]. In the present case, he concluded, there was no evidence to suggest that the outward consensus was ever based upon anything other than the pre-contractual letters, the terms of which were accepted by Chartbrook – para [66]. It followed that it mattered not that the directors of Chartbrook subjectively thought the letters meant something different. Both parties were mistaken in thinking that the written contract reflected the prior objective consensus and Persimmon was entitled to rectification.

Implications of the decision

35. *Chartbrook v Persimmon* provides a powerful reminder of the interpretative power of the factual and commercial context in which an agreement is made. The ordinary meaning of the ARP read in isolation clearly bore the

meaning for which Chartbrook contended. But once the context revealed that a mistake had occurred in the language of the ARP, it did not matter how much correction or re-arrangement of the wording (“red ink”) was required to interpret the contract correctly. The question in every case is simply, what would the contract mean to a reasonable person with all the background knowledge available to the parties.

36. But the case also serves as a stark reminder of how unpredictable questions of interpretation can be under the modern contextual approach. Lord Hoffman himself accepted that a meaning which does not strike one judge as irrational could seem commercially absurd to another – para [15]. *Chartbrook v Persimmon* provides a salutary example. Prior to reaching the House of Lords three out of the four judges who had heard the case in the courts below had found in favour of Chartbrook on the construction of the ARP with the result that Persimmon had lost both at trial and in the Court of Appeal. In the Court of Appeal Rimer LJ had gone so far as to say that Persimmon’s interpretation “fundamentally distorts the meaning and arithmetic of the ARP”. Yet the House of Lords took a very different view and unanimously rejected Chartbrook’s interpretation as “arbitrary and irrational”.
37. For practitioners involved in drawing up written contracts one simple lesson to be derived from *Chartbrook v Persimmon*. Where, as here, a term contains a formula, it will usually be much clearer if algebraic symbols are used in preference to words. Lord Hoffman observed that if algebraic symbols had been used in this case the ARP would have been much clearer – para [17]. Provided it is drawn up carefully and correctly, a worked example will also often help to clarify the formula upon which the parties are agreeing. Putting a formula into words can be a hostage to fortune that may result in a lack of clarity at great cost to the parties.
38. The rule excluding pre-contractual material from being admissible on a point of interpretation is clearly here to stay for the present. Indeed with the disapproval of *The Karen Oltmann* line of “private dictionary” cases, it is arguably harder than ever to rely legitimately on pre-contractual material.
39. Nevertheless, this may not be the case in the long term. Lord Hoffman accepted the logic of admissibility in principle on the basis that pre-contractual material plainly is part of the context in which a reasonable person would understand what the parties have said in the final contract. He also accepted that empirical study by the Law Commission may show that the alleged disadvantages of admissibility are not in practice very significant or are outweighed by the advantages. Whether the Law Commission or the Government will examine the issue in future is unknown, but we may not have seen the last of pre-contractual material being used in aid to interpretation.
40. For now, a party wishing to put pre-contractual material before the court will still need to resort to other means for adducing it, such as arguing the material reveals an objective background fact, or raising an argument of estoppel by convention or rectification. Baroness Hale offered some encouragement to the view that once the material is before the court it will have an effect on a judge’s view of interpretation. She said in her speech that she “would not have found it quite so easy to reach this conclusion [on the construction of the ARP] had we not been made aware of the agreement which the parties had reached on this aspect of their bargain during the negotiations which led up to the formal contract” – para [99].

41. But it is rectification that represents the most far-reaching aspect of the judgment. This was the first time the House of Lords had considered the rectification of a contract for over 50 years and the endorsement of the objective theory is at the very least a significant clarification of the law of rectification for common mistake, some would say a radical change.
42. Clarification of the law was much-needed. Prior to *Chartbrook v Persimmon* there appeared to be two contrasting strands of thinking reflected in the case law. One strand of thinking had its origins in rectification as an equitable remedy and emphasised equity's concern to bring a written contract into accord with the true intentions of the parties. This view favoured regard being had to the parties' subjective intentions.
43. The other strand of thinking had its origins in the common law of contract and saw rectification as a means to ensuring the written contract was in accord with the true contractual consensus between the parties. This view favoured regard being had purely to the parties' objective consensus.
44. The House of Lords has come down clearly in favour of the latter view and their judgment casts serious doubt on the approach taken in a number of the authorities that explicitly or otherwise proceeded on the assumption (as did the parties, Briggs J and the Court of Appeal in this case) that the subjective intentions of the parties were critical to rectification. This seems likely to put an abrupt stop to the recent trend away from strict need for "outward expression of accord" in cases such as *Munt v Beasley* [2006] EWCA Civ 370.

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JS's construction of documents crib sheet

Does this interpretation get the right balance between a literal and purposive approach?

*"Courts will never construe words in a vacuum. To a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief. To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view pedantic, sterile and productive of error. But that is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he means. To my mind construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive: the instrument must speak for itself but it must do so in situ and not be transported to the laboratory for microscopic analysis."*ⁱ

*"The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."*ⁱⁱ
Unreasonable = not 'business common sense'

Note: (i) The factual matrix like everything else, is assessed objectivelyⁱⁱⁱ; (ii) Ambiguity is no longer a threshold question for the admissibility of contextual material^{iv} (iii) the purposive white van is being driven very hard right now. Some people think it is improperly trespassing on rectification^v

Is this interpretation consistent with the 'internal context'?

"In the construction of all instruments it is the duty of the Court not to confine itself to the force of a particular expression, but to collect the intention from the whole instrument taken together"^{vi}
You usually take the date to ascertain meaning as the date of the contract.

Is this interpretation consistent with the 'external context'?

Out: earlier drafts; In: deletions to a standard form; agreed notes of meetings; side letters; related contracts.

Legal rules:

Strictness - contra proferentem (one person's draft; limitation or exclusion of liability clauses (including entire agreement and non-reliance clauses); contracts of insurance/guarantee/comfort; options (break clauses);

Statutory - requirements of reasonableness in s.3 Misrepresentation Act 1967; Unfair Contract Terms Act 1977; Unfair Terms in Consumer Contracts Regulations 1999: terms will only be reasonable where the parties are of relatively equal bargaining power and the clauses reflect the reality of the negotiations which have occurred;

Presumptions - (i) s.61 LPA 1925 - persons, singular/plural, month = calendar month etc; contracting party cannot take advantage of its own wrong; (ii) clear words are required to exclude legal remedies; (iii) presumption that document will be construed to give a lawful result; technical words (including legal terms of art) have a technical meaning; (iv) time not of essence of rent review machinery; (v) owner of land abutting highway or river owns ½ the soil of the roadway or river bed, etc.

'canons' - where one or more particular items are listed without any general description, the specific identification of those instances is generally taken to exclude from the scope of the clause similar but distinct items / where general language follows specific, the general is limited to the same type or genus as identified in the general words / the rule of distributive construction.

Sham transactions - acts done or documents executed by the parties which, through a common intention, are intended to give to third parties or the court the appearance of creating different legal rights and obligations from the actual rights and obligations they truly intended to create^{vii} / Penalties.

Are there implied terms?

Three sources:

The term is necessary to reflect established usage

Evidence is necessary: the term must be certain, notorious and reasonable.

Entire agreement clauses exclude these but not the others^{viii}

‘Without the term the contract won’t work’

The duty to co-operate to bring about an agreed objective / not to do anything to undermine it^{ix}

Implied term as to duration - terminable on reasonable notice

The term is needed (for policy reasons) to make the contract say all the things the parties didn’t say but which are appropriate given the nature of the contract (‘goes without saying’)

Note: (i) questions of reasonableness, fairness and the balancing of competing policy considerations are more important than the chimerical standard of necessity^x; (ii) you can overdo the officious bystander because the test is objective - the parties are depersonalised and assumed to be reasonable: “*The trouble with this vivid bit of pantomime is that it puts at the forefront of the judicial mind the actual parties, in all their unreasonableness, and invites the submission by counsel that his or her client would obviously not have said ‘of course’ to any such thing.*”^{xi}

ⁱ Sir Thomas Bingham MR in *Arbuthott v Fagan* [1996] LRLR 135,139 followed in *Charter Reinsurance v Fagan* [1997] AC 313, 326.

ⁱⁱ Lord Reid in *Schuler AG v Wickman Machine Tool Sales* [1974] AC 235 HL.

ⁱⁱⁱ Lord Wilberforce in *The Diana Prosperity* [1976] 1 WLR 989 HL

^{iv} Lord Hoffmann in *ICS v West Bromwich Building Society* [1998] 1 WLR 896 HL principle 4

^v M Bridge, ‘The Future of English Private Transactional Law’ [2002] CLP 191, 213-4.

^{vi} Leach V-C in *Hume v Rundell* (1824) 2 S&S 1174, 177

^{vii} *Snook v London & West Riding Investments* [1967] 2 QB 786, CA.

^{viii} *Exxonmobil Sales and Supply Copr v Texaco* [2003] EWHC 1964 (Comm)

^{ix} *Hargreaves Transport v Lynch* [1969] 1 WLR 215 CA

^x Dyson LJ in *Crossley v Faithful & Gould Holdings* [2004] EWCA Civ 293

^{xi} Lord Hoffmann, ‘The Intolerable Wrestle with Words and meaning’ (1998) 56 SALJ 656, 662.