Case No: B2/2015/3476

Neutral Citation Number: [2017] EWCA Civ 68
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
HH JUDGE BAILEY
CLAIM NO. 3YM51519

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 February 2017

Before :

LORD JUSTICE PATTEN
and
LORD JUSTICE BEATSON

- -

Between :

	SAVILLS (UK) LIMITED	**Claimant/ Appellant**
	- and -	
	(1) PETER GORDON BLACKER **(2) Sidemanor limited**	**Defendants/ Respondents**

- -
- -

Glenn Willetts (instructed by FBC Manby Bowdler LLP) for the **Claimant**
Simon Goldstone (instructed by Ross & Co Solicitors) for the **Defendants**

Hearing date : 31 January 2017

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Judgment **Lord Justice Patten :**

1. This is an appeal by the claimant, Savills (UK) Limited ("Savills"), against an order of HH Judge Bailey made in the County Court at Central London on 6 October 2015. The judge dismissed Savills' claim for the sum of £120,400.00 plus VAT which they say is due to them as agents' commission on the sale of a property known as the Mill Ride Estate, near Ascot, Berkshire ("the Estate").

2.The Estate originally housed some racing stables but since the early 1990's it has been laid out as an 18-hole golf course with a club house and associated buildings and facilities such as a driving range and putting green. There are about 150 acres of land. On part of the Estate is a detached residential dwelling known as Barn Hill Cottage ("the Cottage"). The Estate was acquired by the second defendant, Sidemanor Limited ("Sidemanor"), in 2003 with the benefit of a loan from Barclays Bank. Sidemanor is a private company owned and controlled by Mr Peter Blacker, the first defendant, through a holding company called British Ensign Golf Limited ("BEGL"). Mr Blacker was also one of the directors of Sidemanor at the times material to this appeal.

3.The evidence before the judge was that Barclays had agreed with BEGL as a term of the finance that the loan to value ratio in respect of the mortgage of the Estate should not fall below 60 per cent and that by early 2012, as a result of some valuations carried out by Savills for the bank, BEGL and Sidemanor found themselves under considerable pressure from Barclays to reduce the amount of the outstanding loan. The income from the golf course had also failed to match the original profit forecasts.

4.Sidemanor had earlier attempted to reduce its indebtedness by selling the Cottage in November 2010 (with the consent of Barclays) for £750,000. But the increased pressure from the bank in late 2011 caused Mr Blacker and his co-director, Mr Charles Parker, to consider ways in which the value of the Estate could be optimised and the property sold. Their view was that this could best be achieved by obtaining planning permission to develop the golf course into a large mansion house and associated parkland which would be attractive to high-end international buyers. Savills were instructed by Sidemanor, together with a planning consultant, Mr Nick Tubbs, to advise on the planning prospects and were paid by Sidemanor for the planning services which they provided.

5.Mr Blacker's evidence was that he and Mr Parker realised in 2011 that if the Estate was to obtain planning permission and be sold for development as a single dwelling it would be necessary to buy back the Cottage. Barclays were unwilling to advance any further monies to the company for that purpose and so on 8 September 2011 Mr Blacker exchanged contracts to purchase the Cottage in his own name for £1.1m and paid the deposit of £110,000 out of his own funds. Completion was originally scheduled for 28 October 2011 but Mr Blacker subsequently agreed with the vendors (on payment of a further £190,000 of the purchase price) to postpone the completion date to 23 November 2012 when the vendors would transfer the Cottage to whichever purchaser Mr Blacker directed.

6.In the February 2012 valuation report relating to the Estate prepared for Barclays Bank, Savills produced a number of different valuations ranging from £2.5m to £10m. The highest of these valuations assumed a sale of the Estate (including the Cottage) with vacant possession and with the benefit of planning permission for the construction of a single large PPS7 style residence on the site. The original intention was that the Estate would be marketed once planning permission had been obtained. At this point, as I have

indicated, Savills had only been engaged to deal with the planning application which was being handled through their planning department.

7. But on 10 September 2012 Mr Paul Finnegan, one of the directors of Savills working in their country house department, received an email from Mr Tubbs following an earlier telephone conversation about the price at which the Estate should be marketed with the benefit of planning permission.

8. In this email Mr Tubbs indicated that he thought that the time had arrived to get Savills "formally appointed as Peter's sole selling agents" and suggested that a meeting be arranged later that week. Mr Tubbs had not indicated in his email any change in the existing marketing strategy of offering the Estate for sale once planning permission had been obtained. But Mr Finnegan's evidence to the judge was that he was prompted by the email to prepare a written marketing report which could be used to formalise the appointment of Savills as selling agents.

9. Mr Finnegan therefore produced a report dated 12 September 2012 entitled "Recommendations for the Marketing and Sale of Mill Ride Estate". The report begins by setting out "Your Objectives" which are stated as being the sale of the Estate once planning consent has been granted for a major mansion house. There is then a "Property Description" section containing more details of the proposed development followed by an analysis of the state of the market. In the next section, Savills recommended an asking price (with full planning permission) in the region of £15m. Under the heading "Method of sale and timing" the report includes the statement:

> "We recommend a sale by private treaty. We suggest that the estate is offered for sale as soon as planning consent has been granted and we advise that the marketing is initially carried out on a very private basis."

10. Towards the end of the report is a section headed "Fees and Terms of Business" which says this:

> "We have various legal responsibilities that we need to fulfil before we can act for you. The Estate Agents Act requires that our instructions are confirmed in writing and I enclose our Terms of Business, unless varied by this report, which you should sign if you wish to proceed. Under the Anti Money Laundering Regulations, along with banks and solicitors for example, we are required to verify the identity of our clients and therefore we may ask you for information to assist us with these requirements.
>
> We are very keen to act on your behalf. Acting as your agents with sole selling rights, (please see paragraph 2 of our Terms of

> Business leaflet for a precise explanation of this term), our fee will be 2% of the sale price, exclusive of the agreed marketing charges and VAT."

11. The report ends with a page headed "Next Steps" which invites the client to sign and return "the enclosed additional copy of this letter and leaflet as your confirmation for us to proceed". There is then space for the client to sign the report underneath the words:

> "I confirm my instructions to proceed with the sale and marketing of Mill Ride Estate in accordance with this report and the attached Terms of Business."

12. Savills' standard Terms of Business (dated March 2012) were attached to the report.

13. The report was never signed by Mr Finnegan or by or on behalf of either of the defendants because on 18 September Mr Blacker emailed Mr Finnegan to inform him of a change in the marketing strategy. The facility from Barclays was due to expire in March 2013 and Mr Blacker had become concerned that planning permission might not be granted before then. Knight Frank had been to inspect the Estate on 31 August and had provided a marketing report on 5 September in which they indicated that they had been asked by Mr Blacker to advise on a sale of the Estate "as is" prior to the grant of planning permission. In his email to Mr Finnegan of 19 September Mr Blacker said that "we", meaning himself and Mr Tom Wilton (a property agent who had been giving advice to Mr Blacker) would like to instruct Savills and Knight Frank to sell the Estate by private treaty:

> "We would like both firms to supply a comprehensive list of developers and private individuals to whom you would like to introduce the property, in order that duplicate approaches are avoided. We wish to conclude a sale pre-planning and we will supply all interested parties with a pre-planning statement.
>
> …..
>
> We appreciate that you will need to be updated as the planning process is ongoing and may well involve an overage deal with a prospective purchaser.
>
> …..
>
> May I suggest the fees should be 1.25% to each firm with a separate arrangement relating to an overage uplift should that be negotiated with the party that succeeds in acquiring the site. Additional fees would continue to be paid to the professional team.

…..

I would like the marketing process to commence immediately but before offering this site to any selected parties can you please provide a list of the developers and individuals who you think would be interested."

14. Mr Blacker's indication that he wished a sale of the Estate to be concluded pre-planning and for marketing to begin at once obviously put pressure on Savills to settle the terms on which they were appointed agents. This was compounded by the fact that Mr Blacker was about to go abroad. Mr Finnegan was told by Mr Tubbs that he needed to act quickly if the terms of the instructions were to be signed before Mr Blacker departed. Mr Finnegan's evidence was that he hastily amended the draft report prepared on 12 September and took it to Mr Blacker's offices where Mr Blacker signed it.

15. The signed version of the report is dated 20 September 2012. I shall refer to it as "the Report". It is in the same format as the draft report but the Fees and Terms of Business section has been amended to reduce Savills' commission to 1.75% of the sale price and to reflect the fact that Knight Frank had also been appointed as selling agents. The section now reads:

"We have various legal responsibilities that we need to fulfil before we can act for you. The Estate Agents Act requires that our instructions are confirmed in writing and I enclose our Terms of Business, unless varied by this report, which you should sign if you wish to proceed. Under the Anti Money Laundering Regulations, along with banks and solicitors for example, we are required to verify the identity of our clients and therefore we may ask you for information to assist us with these requirements.

Acting as your joint agents with sole selling rights, (please see paragraph 2 of our Terms of Business leaflet for a precise explanation of this term), the fee arrangement will be as follows:

Savills' share of the fee will be 1.75% plus VAT, based on the sale price. Savills will act as lead agent whilst the planning process is ongoing with Roger Hepher will be available to provide serious prospective purchasers with appropriate information and comment on the proposed scheme.

I confirm that we would be very happy to work with Knight Frank in this important sale. Their share of the fee will be by separate agreement with you and will be in addition to the above."

16. Apart from this, there were no other material changes to the description of the marketing strategy in the report and the sections on "Your Objectives" and "Method of sale and timing" continued to refer as in the draft report to the Estate being offered for sale "as soon as planning consent has been granted".

17. Mr Blacker signed the report under the statement:

> "I confirm my instructions to proceed with the sale and marketing of Mill Ride Estate in accordance with this report and the attached Terms of Business."

18. It is convenient at this stage of the narrative to set out those parts of the Terms of Business which are material to this appeal. They begin with the following paragraph:

> "The Letter and the Terms of Business will together form the Terms of Appointment. To instruct us to act, you must sign and return a copy of the Letter to record agreement to our fees, costs, charges and Terms of Business. In these Terms of Appointment, any reference to "we", "our" or "us" is to Savills (L&P) Limited, and reference to "you" refers to the client to whom the Letter is addressed and references to the "Appointment" is to our appointment as your agent under the Terms of Appointment. In these terms the singular includes the plural and the masculine includes the feminine. Unless we hear from you to the contrary within seven days that you wish to negotiate changes, we will take them to be acceptable and accepted and will proceed accordingly by commencing and carrying out our work."

19. It is common ground that the reference to "the Letter" should be read as a reference to the Report which Mr Blacker signed.

20. The Terms of Business then continue as follows:

> 1.1 Our role and responsibilities as agent are set out in the Letter.
>
> …
>
> 2.0 **Fees**
>
> 2.1 Responsibility for payment of fees, costs & charges
>
> 2.1.1 The person or company identified in the Letter as the client is responsible for payment of our fees, costs and charges. If more than one party is to be responsible, the

Letter should be signed by all relevant parties and their liability will be joint and several.

2.2 **Calculation of fees**

2.2.1 We will act as your agents with sole selling rights, or jointly with another firm also with sole selling rights. This means you will be liable to pay us a sale fee (in addition to any other charges or costs which we have agreed with you) in the following circumstances (which are defined in The Estate Agents Act 1979):

(i) If unconditional contracts for the sale of the property are exchanged during the period during which we have sole selling rights, even if the purchaser was not found by us but by another agent or by any other person, including you;

(ii) If unconditional contracts for the sale of the property are exchanged after the expiry of the period during which we have sole selling rights but to a purchaser who was introduced to you during that period or with whom we had negotiations about the property during that period.

…..

2.2.6 Sales fees do not include such professional work as formal valuations for third parties, building works, preparation and checking of inventories, work linked with legal, tax and fiscal matters, planning advice, structural surveys, specialist tests and other professional work. Such matters are subject to separate fee arrangements. These Terms of Appointment relate to agency business alone and we will not accept responsibility for any of the aforementioned.

…..

18.0 **Order of Priority**

18.1 The Letter and these Terms of Business are to be read together as a single document which make up the Terms of Appointment. In the event of any conflict, the terms of the Letter will prevail.

…..

21.0 **Entire Agreement**

21.1 The Terms of Appointment constitute the entire agreement and understanding of the parties as to the subject matter of the Terms of Appointment. They supersede any prior agreement or understandings between the parties and no variation of the Terms of Appointment will be binding unless agreed in writing."

21. In late October 2012 a prospective purchaser for the Estate was introduced by Mr Graeme Cresswell, a colleague of Mr Blacker, without any involvement by either Savills or Knight Frank. An offer was made for the Estate without the benefit of planning permission in the sum of £6.88m and contracts were exchanged on 23 November 2012. It was a term of the agreement that the Cottage would also be transferred to the purchasers on the same day on payment of £1.1m out of the total consideration of £6.88m. This was used to complete Mr Blacker's purchase of the Cottage and to reimburse him for the deposit and other monies he had paid to the vendors. Completion of the sale of the remainder of the Estate took place on 2 January 2013.

22. Savills sought payment of the commission from Mr Blacker on the basis of clause 2.2.1(i) of the Terms and Conditions but payment was refused on the ground that no commission became payable under the agency agreement of 20 September 2012 in the event of the Estate being sold prior to the grant of planning permission. This argument is based on the references I have mentioned in the Report itself to the Estate being offered for sale as soon as planning consent is granted. So far as necessary, the defendants also rely on clause 18.1 of the Terms of Business which require the Report and the Terms of Business to be read together as a single document and in the event of any conflict for the terms of the Report to prevail. Insofar as it might be said that the Report should be construed in the light of the relevant surrounding circumstances at the date of the contract and the parties' understanding, based on those circumstances, of what they had intended to achieve, that is said to be excluded by clause 21.1 insofar as it contradicts the literal meaning of the terms of the Report. The first issue between the parties is thus the construction of the agreement.

23. The other issue relates to the identity of the contacting parties. Savills say that they contracted either with Mr Blacker alone or with him and Sidemanor, in which case they are jointly and severally liable for the commission: see clause 2.1.1 of the Terms of Business. If wrong about the construction of the agreement, the defendants say that it was a contract with Sidemanor alone for whom Mr Blacker acted as an agent when he signed the Report.

24. The judge accepted that in the light of the changed instructions from Mr Blacker, the failure by Mr Finnegan properly to revise the Report so as to remove references to the earlier marketing strategy of not selling before planning permission was probably due to carelessness on his part. But that was not enough in itself, he said, to free the parties, and in particular Savills, from the consequences of the language which they had used:

> "47. This was not a run-of-the-mill sale. It was the sale of a substantial estate which, in the view of Savills, with appropriate planning permission might have fetched as much as £15m. In those circumstances it is not surprising that a report was prepared, as opposed to a letter as is anticipated in the Residential Sales terms of business. These terms and conditions envisage a letter, which one might presume to be in common format, identifying in one or perhaps two sheets of paper the client, the property to be sold, and any special features of marketing and sale. The terms of business provide that "The letter and the terms of business will together form the terms of appointment". It is common ground however that the report is to be treated as the letter.
>
> 48. It is reasonable to infer that no consideration was given to the interplay of the report and the terms and conditions when the contract was prepared. That is not a serious matter as the terms and conditions make it plain that in the case of conflict the report should prevail. But it is important to consider the contractual document as a whole, bearing in mind (a) the principles and guidance as to the proper approach to construction laid down by the House of Lords and other senior courts, and (b) the fact that the entirety of the contractual documentation was provided by Savills. If there are ambiguities or lacunae which are to the detriment of Savills they have no one but themselves to blame. They cannot look to the court to make good deficiencies.
>
> 49. I have endeavoured to indicate that the contract is not entirely consistent with the background as appears from the contemporaneous correspondence and Mr Peter Blacker's statement. It certainly does not match the imperative which appears from the 19 September email from which I have already quoted. There is no, and I suspect cannot be any, claim for rectification. The court must proceed on the written contract as it is. The court must resist any temptation to rewrite the parties' agreement as with hindsight it appears they might more sensibly or more profitably have drafted it. This is not a case for purposive construction or ingenious grappling with an unsatisfactory situation. It is a case for contractual construction, pure and simple. In that light, I turn to consider the report and the terms and conditions."

25. The judge then proceeded to construe the contract. He highlighted the passages in the Report which I have already referred to about offering the Estate for sale after the grant of planning permission. In relation to the section of the Report where Mr Blacker confirmed his instructions "to proceed with the sale and marketing of Mill Ride Estate in accordance with this report and the attached Terms of Business", the judge noted Mr Finnegan's acceptance in cross examination that this meant a sale with planning permission. He then went through the Terms of Business culminating in clause 18. His conclusions on the construction issue are contained in the following paragraphs of his judgment:

> "62. Against this background, Mr Goldstone for the defendant challenges the thrust of the claimant's case that they may simply rely upon the sale negotiated by Mr Blacker himself as giving rise to a fee under the provisions of clause 2.2.1. It is Mr Goldstone's submission that the essence of the contract as demonstrated by the report is that Savills will market and sell the property with planning permission for a major mansion house in accordance with the methods indicated in the report. It is wholly inappropriate, submits Mr Goldstone, for Savills to rely on 2.2.1 of the terms of business to entitle Savills to claim a fee in circumstances wholly outside those that are envisaged by the report. Even were it right for Savills to rely on the term at 2.2.1, it is evident from clause 18 that there is a conflict between the term "relied on" and the report, and clause 18 makes it clear that the report will prevail. There is of course nothing in the report which would preclude the vendor, Sidemanor, proceeding with a sale without planning permission. It is a report wholly geared to a planning permission sale, and to import from the terms and conditions a protection to Savills in the event that indeed occurred, is wholly inconsistent with the contract as a whole.
>
> 63. I agree. I do not consider that, interpreting this contract as a whole and having regard to the priority that must be given to the report over the conditions, any entitlement to a fee arises on a sale without planning permission in this event without any introduction by Savills. What the situation would have been had Savills acted in accordance with the request to be found particularly in the email of 19 September is quite another matter. It may be that the appropriate analysis would then have lead to some other contract. But taking this contract as a whole and interpreting it as I should, it does not in my judgment give Savills an entitlement to a fee where a sale takes place without planning permission. I can understand the concern of Mr Finnegan that he should not in the event receive a fee in respect of the sale which took place, but having, it seems to me, chosen to present the contract as he has, and having neglected, for whatever reason, in

> that contract to cover the position where planning permission is never obtained or a sale takes place without the benefit of planning permission, it is not for the court to make good that deficit."

26. The defendants accepted before the judge that clause 2.2.1 of the Terms of Business, read in isolation, did entitle Savills to the payment of the commission in the events which happened. As the Terms of Business record, estate agents are obliged by s.18 of the Estate Agents Act 1979 to provide their clients, in advance of any contract, with information about the services which they are proposing to offer together with particulars of the amount of their charges and the circumstances in which the client will become liable to pay them: see s.18(2). Clause 2.0 contained these particulars and clause 2.2.1 makes it clear that commission will be payable during the currency of an agency with sole selling rights if contracts for the sale of the property are exchanged with a purchaser even if (as in this case) that purchaser was not introduced by Savills.

27. The argument on construction which the judge accepted was that the effect of clause 2.2.1 was nullified by clause 18.1 because it was in conflict with the terms of the Report. Accordingly, the terms of the Report prevailed. That conflict is said to lie in the fact that, under the terms of the Report, no sale was to take place before the grant of planning permission. From this the judge reasoned that Savills had no entitlement to commission in respect of any sale which took place before that time.

28. Mr Willetts submits that this is a remarkable conclusion given that the agency came into existence in order to give effect to Mr Blacker's instructions that the Estate should be sold without further delay and without waiting for planning permission to be granted. Looked at objectively, these were the circumstances in which the contract was made and both parties must be taken to have intended that the contract should accommodate and give effect to Mr Blacker's instructions. On the judge's construction of the agreement, Savills would have had no entitlement to commission even if they had introduced a purchaser who exchanged contracts at any time prior to planning permission. The judge recognised this as the logical consequence of his construction of the agreement but said in [63] that this would have led to some other contract. It is not clear to me how that would have arisen but it is not necessary, I think, to pursue that.

29. For clause 18 of the Terms of Business to be engaged it is necessary to identify a conflict between the Terms of Business and the Report which therefore materially affects the nature and scope of the parties' legal rights under the agreement. The judge considered that this existed in relation to clause 2.2.1(i) because, on the true construction of the Report, Savills were required to market the Estate in the way described in the section headed "Method of sale and timing" and were not entitled to any commission except on a sale which resulted from the marketing of the property in that way.

30. Earlier in his judgment he quoted from the speech of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 892 at 912 which considers the circumstances in which the court is able to determine the meaning of a contract by reference to the likely intention of the parties notwithstanding that the language used may, according to its literal or ordinary meaning, not be capable of achieving that result:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd*. [1997] A.C. 749.
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes,

particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:

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

31. As is clear from the passage quoted, these principles were formulated in the context of an agreement which produced a result sufficiently at odds with the parties' supposed intentions as to suggest that something had gone wrong with the drafting. But the principles have subsequently been used to establish a generally applicable rule that the meaning of the contract must be ascertained by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean: see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at [21]-[26].

32. More recently in *Arnold v Britton* [2015] UKSC 36 the Supreme Court has emphasised the considerations which need to be borne in mind when considering how far to depart from the ordinary meaning of the language of the contract in order to produce what might be thought to be a commercially sensible result. Lord Neuberger said:

> "17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.
>
> 18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the

court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

33. It is not necessary for the purposes of this appeal to venture further into the question whether and, if so, how far the pendulum has swung in relation to Lord Hoffmann's view that the normal or dictionary meaning of the words used must always yield to context. It is clear that the judge in this case adopted a literal approach to the language

of the Report and thought that the obvious inconsistency between the terms of the Report and the instructions which Savills actually received from Mr Blacker was insufficient to free them from the consequences of Mr Finnegan's inept drafting. But that question depends on whether the natural and ordinary meaning of the language used produces a commercially unlikely result and, more importantly in this case, one which conflicts with the operation of clause 2.2.1 of the Terms of Business.

34. In signing the Report Mr Blacker confirmed his instructions to Savills "to proceed with the sale and marketing of the Mill Ride Estate in accordance with this report and the attached Terms of Business". The Report and the Terms of Business fulfil different functions, although both are part of the contract. The Report is essentially a marketing strategy agreed to by the vendor with a view to the sale of the property. The Terms of Business, in compliance with the 1979 Act, set out, *inter alia*, the circumstances in which the commission will become payable. To reach what the judge identified as the point of conflict between the Report and the Terms of Business it is necessary to read the marketing strategy outlined in the Report as prescriptive and, more importantly, as governing the circumstances in which the commission will become payable. There seem to me to be a number of difficulties about this.

35. The first and perhaps most obvious is that the strategy set out in the Report is in terms no more than a recommendation. The section on Method of sale and timing is phrased in terms of "we recommend" and "we suggest". Even if Mr Blacker's original instructions had continued at the date of the agreement to be to market the Estate only after planning permission was granted it would have been open to him to change the strategy at any time and to proceed to sell the Estate without further delay. The choice of marketing strategy is ultimately a matter for the vendor. The agent makes his recommendations and a strategy is agreed. But the vendor can always change his instructions and the agent is required to comply. I can see nothing in the ordinary meaning of the language used to justify reading the passages in the Report I have referred to as an immutable contractual requirement binding on both parties that the Estate be sold only after the grant of planning permission; still less that no commission should be payable except in those circumstances.

36. The judge's construction also fails in my view to recognise the different functions of the two parts of the agreement. The Report itself, apart from specifying the amount of the commission, contains no provision at all which governs its payment. Clause 2.2.1(i) sets out the circumstances in which the commission will be payable both in cases where Savills introduce the purchaser and in those in which a purchaser emerges by a different route during the currency of the agency. For clause 18 to achieve the result which the judge held that it did it is necessary to treat the marketing strategy set out in the Report not only as dictating the circumstances in which commission will be payable (i.e. only after planning permission) but also as qualifying rather than excluding the terms of clause 2.2.1. Otherwise one is left with a contract which contains no payment provisions at all. Again, I can see no justification for this construction of the agreement. The Terms

of Business are standard terms which Mr Blacker by his signature confirmed were part of the contract. There is no inconsistency between them and the relevant parts of the Report properly construed and they take effect in my view according to their terms. It is not necessary in these circumstances to resort to some kind of conforming construction of the agreement based on commercial purpose nor to decide whether the relevant matrix of fact should disregard the effect of the email of 19 September in the light of clause 21.1 of the Terms of Business. It is enough to rely on the ordinary and natural meaning of the words used.

37. The proper construction of the agreement is a question of law for the Court. We are not therefore assisted by what Mr Finnegan apparently conceded that the Report meant or by what Mr Blacker thought he was free to do. None of that evidence is either helpful or admissible. It follows that the commission was payable in the events which happened.

38. This brings me to the next and, I think, more difficult question of who were the contracting parties.

39. The Report was signed by Mr Blacker without qualification. He confirmed "my instructions to proceed with the sale". Clause 2.1.1 of the Terms of Business states that the person identified in the letter (in this case the Report) as the client is responsible for the payment of the fees but the Report does not identify the client beyond the reference to Mr Blacker and Mr Tubbs on the front page.

40. Savills do not contend that Mr Tubbs was one of the clients responsible for their fees or a party to the agreement. It is clear that the reference to Mr Blacker and Mr Tubbs dates back to the original report which was prepared as a set of marketing recommendations rather than a contractual document. Savills' case is that the contract was made either with Mr Blacker alone or with him and Sidemanor for whom he acted as agent in giving instructions for the sale of the Estate. Mr Goldstone submits that Sidemanor was the contracting party and that Mr Blacker came under no personal liability when entering into the agreement as the company's agent.

41. In the case of a written contract the question whether an agent is to be treated as having contracted personally is ultimately a question of construction: see *Universal Steam Navigation Company Ltd v James McKelvie and Company* [1923] AC 492. As a general rule, the signature by an agent without qualification is likely to create personal liability and the addition of words like "as agent" will exclude it. But these are only starting points in the exercise of construction and it is necessary to look at the whole agreement and any relevant and admissible surrounding circumstances in order to decide the capacity in which the relevant party contracted and whether liability was intended to be imposed on either agent or principal or on both.

42. Mr Blacker signed the contract, as I have said, without qualification but it was known by Savills that the instructions which he gave them related to the Estate as a whole which included the Cottage, of which he was the sole contractual purchaser and therefore vendor. Apart from the Cottage, the Estate belonged to Sidemanor and only the company could give instructions for its disposal. The judge, in my view, correctly identified that various clauses in the Terms of Business treated the client as being the owner of the property to be sold. Clause 2.2.2 calculates the commission payable by reference to the sale price and states:

> "In the event of an exchange or part exchange the sale price or part thereof will be the value attributed to your property."

43. Clause 2.4.2 states that:

> "Acceptance of the Terms of Appointment by you will constitute irrevocable authority to us to deduct (alternatively, to instruct your solicitors to deduct and pay to us) properly payable outstanding invoices, relating to the sale fee, out of the completion monies."

Similarly clause 2.4.5 says that:

> "We will be entitled to payment of our fees and other costs agreed if a ready willing and able purchaser is introduced to you by us in accordance with your instructions even if you subsequently withdraw or if exchange of contracts for the sale does not take place, irrespective of your reasons. A purchaser is 'ready, willing and able' if he is prepared and is able to exchange unconditional contracts for the purchase of your property. You will be liable to pay remuneration to us, in addition to any other costs or charges agreed, if such a purchaser is introduced by us in accordance with your instructions and this must be paid even if you subsequently withdraw or exchange contracts for the sale does not take place, irrespective of your reasons."

In both cases it is clear that the terms of the contract contemplate that the commission will be payable by the vendor of the property in respect of which the instructions have been given.

44. The judge, as I have said, identified the significance of these provisions in deciding who was liable for the commission but failed to give any effect to them. What he said was that:

> "In the present case there is the complication that while the estate was being sold by Sidemanor, Barn Hill Cottage was being sold by Mr Peter Blacker as contracting purchaser with the couple who had bought the cottage. But taking the contract as a whole,

> in the absence of any clear or indeed any provision in the report to indicate who the client is and who would be directly responsible for paying the fees, it seems to me that the appropriate analysis of the contract is that the client, and therefore the "you" in the terms and conditions, the person responsible for paying the fees, is Sidemanor."

45. With respect to the judge, I do not follow this reasoning. The absence of any clear identification of the client in the contract meant that the judge had to look at the entirety of the contract and all relevant circumstances in order to determine the liability for the commission. Mr Blacker had not expressly excluded any personal liability for the commission by the terms on which he signed the contract and the clauses in the Terms of Business referred to by the judge do strongly suggest that such liability was intended to attach to the vendors who had given the instructions. Absent any contrary indications, that is what one would expect. On that basis, Mr Blacker would be personally liable along with Sidemanor because they were the vendors of the two separate properties included in the sale.

46. In those circumstances, it is not clear to me what other provisions in the contract the judge was relying on to reach the conclusion that Sidemanor was intended to assume a liability for commission in respect of the sale of a property which it did not own. In my view, the only construction of the contract that is consistent with the Terms of Business and the fact that the instructions related to both properties is one which treats both Mr Blacker and Sidemanor as the clients and makes them jointly and severally liable for the commission in accordance with clause 2.1.1 of the Terms of Business.

47. For these reasons, I would allow the appeal.

Lord Justice Beatson :

48. I agree.