

Striking the Right Balance: Revisiting Scotland's Approach to Interpretation

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A. INTRODUCTION

The development of rules on the interpretation of contract by the Scottish courts has been the subject of great debate.¹ Currently, the court can apply one of several different interpretative approaches, and whilst each method is reasonably clear, their application remains unpredictable. Commercial contracts are negotiated rigorously and specially drafted to conform to very specific facts, the terms defining the obligations imposed upon the parties.² Thus, having clear and predictable rules in this area of law is imperative as, ultimately, interpretation has the power to determine the meaning of the parties' rights and obligations.

In this essay, each interpretative approach will be discussed in turn, providing the reader with a picture of the way in which this area of law has developed, prior to recapping the current law.³ Examining the most recent Supreme Court case will show that, in an attempt to provide clarity, Lord Hodge established that interpretation is an iterative process.⁴

The work of Scotland's institutional writers have played a significant role in developing this area of law.⁵ In 1826, the fifth edition of George Joseph Bell *Commentaries on Mercantile Jurisprudence* was published.⁶ This work is considered a formal source of Scots law.⁷ Therefore, analysis provided here covers not only the modern law but also the historical perspective. In particular, this paper seeks to explore Bell's analysis of interpretation in order to aid our understanding of the modern law. Bell's analysis of interpretation is considered against the backdrop of two separate themes, equity and the principle of freedom of contract. The development and role of equity in legal history will be a central focus. This essay explores the various conceptualisations of the meaning and place of equity in Scots law.⁸ It is widely accepted that equity and common law in Scotland go hand-in-hand,⁹ however it will be questioned if the growing significance of equity in interpretation poses a threat to the principle of freedom of contract.

Whilst this research seeks to examine key ideas through Bells' work, the nature of this essay is reflective rather than prescriptive. In other words, a solution for the current state of the law will not be

¹ See for instance: Hector MacQueen, *Gloag & Henderson: The Law of Scotland*, 15th edn (2022) ch 6: The Construction of Contracts; Lord Sumpton, *A Question of Taste: The Supreme Court and Interpretation*, Harris Society Annual Lecture, Keble College Oxford, May 2017; Richardson, 'Commercial Common Sense in Contractual interpretation: Further views from the Inner House' (2017) 21 EdinLR 423; Richardson 'Commercial Common Sense Again: What role in contract interpretation?' (2021) 25 EdinLR 89.

² MacQueen and Thomson, *Contract Law in Scotland*, 5th edn (2020) para 4.25.

³ *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

⁴ *Ibid.*

⁵ H MacQueen, *The Law of the Obligations in Scots Law*, 2013/42, Edinburgh Law School Working Papers Series 1.

⁶ George Joseph Bell, *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence*, 5th edition (1826).

⁷ H MacQueen *The Law of the Obligations in Scots Law*, 2013/42, Edinburgh Law School Working Papers Series 2.

⁸ D J Carr, *Ideas of Equity*, (2017).

⁹ See, D J Carr, *Ideas of Equity*, (2017); D Carpi (ed), *The Concept of Equity: An interdisciplinary Assessment* (2007) 11; Henry Home, Lord Kames, *Principles of Equity* (3rd edn, 1778, reprinted by the Edinburgh Legal Education Trust in Old Studies in Scots Law vol 4, 2013).

provided in this paper. The central aim is to reflect on the incremental development of interpretation, and to consider both the contemporary and historical perspectives on interpretation.

B. THE MODERN SCOTTISH POSITION

The historical development of the law of contractual interpretation in Scotland has been one of failed experiments and a lack of clarity. This has provoked extensive examination.¹⁰ The aim of this essay is not to provide a comprehensive account of Scotland's troubled past. Instead, the author will highlight the pivotal developments in case law. In doing so, it will be evident that the judiciary's approach to interpretation has changed incrementally.¹¹

Prior to exploring the interpretative approaches, we can reflect on the nature of the judiciary's task. It has been widely accepted in Scots law that the court must consider the parties intentions objectively.¹² Lord Dunedin touched upon the objective approach in *Muirhead & Turnbull v Dickson*, 'Commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say'.¹³ The court's task is therefore to determine the contracting parties' obligations, drawing for this purpose on both the terms expressed in the contract and the parties' actions.¹⁴ It is important to establish this point at this particular stage of the paper as, whilst the author explores each interpretative approach, it must be noted that they hold the same central purpose; to ascertain the objective intention of the contracting parties.

i) *Development of the interpretative approaches*

This section briefly describes the meaning of each approach. Given that much work on this area is already in print, it is not necessary here to examine the well-documented tension between the approaches.¹⁵

The literal approach

Using a literal approach, a court considers the ordinary and natural meaning of the language contained in the contract. In *Charter Reinsurance Co Ltd v Fagan* Lord Mustill stated,

¹⁰ See for instance L Macgregor, 'Crossing the line between business common sense and perceived fairness in contractual interpretation', (2015) 19 EdinLR 378; L Richardson, 'Commercial Common Sense in Contractual interpretation: Further views from the Inner House', (2017) 21 EdinLR 423; L Richardson, 'Commercial Common Sense Again: What role in contract interpretation?' (2021) 25 EdinLR 89; Lewison, *The Interpretation of Contracts*, 8th edn (2023).

¹¹ *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

¹² Hector MacQueen, *Gloag & Henderson: The Law of Scotland*, 15th edn (2022) ch. 6: The Construction of Contracts.

¹³ *Muirhead & Turnbull v Dickson* (1905) 7 F 686, Lord Dunedin para 694.

¹⁴ *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125, Lord Reid para 35.

¹⁵ W W McBryde, *The Law of Contract in Scotland*, 3rd edn (2007) ch 8 Construction of contracts;

L Richardson, 'Commercial Common Sense in Contractual interpretation: Further views from the Inner House', (2017) 21 EdinLR 423; L Richardson, 'Commercial Common Sense Again: What role in contract interpretation?' (2021) 25 EdinLR 89.

“I believe that most expressions do have a natural meaning, in the sense of their meaning in ordinary speech...The inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used”.¹⁶

The court begins its inquiry by considering the ordinary meaning of the language contained in the contract, giving effect to the specific wording chosen by the parties. This method respects the parties’ right to freedom of contract by reflecting the obligations which they expected to be bound by. Ultimately, this approach prevents unwelcome surprises. This makes the literal approach predictable in nature.

Moving Towards the Contextual Approach

At times, the literal approach fails to embody the contractual intentions of the parties and consequently a shift towards a contextual approach was made.¹⁷ Lord Hoffmann in particular argued that, in the absence of context, language cannot be accurately interpreted due to its inherent ambiguity.¹⁸ This approach requires the court to consider the surrounding context to gain a comprehensive understanding of the provision, going beyond the language alone.

Investors Compensation Scheme v West Bromwich Building Society,¹⁹ was a key development of this approach as Lord Hoffman re-established the principles of interpretation.²⁰ Lord Hoffman stated, ‘Almost all of the old intellectual baggage of interpretation had been discarded’.²¹ The issue adjudicated upon by the House of Lords concerned allegedly ‘slovenly drafting’²², not ambiguous language. Therefore, the literal approach did not provide an adequate solution. To put it simply, the facts of the case demanded an alternative solution. Consequently, the contextual approach was used. At this stage of the development of the law, the contextual approach could be applied even where the language of the contract was unambiguous.

Commercial Common Sense

Moving forward, *Rainy Sky S.A. and Others v Kookmin Bank* will now be considered.²³ The facts of this case will not be explored here, instead the author will analyse component parts of the judgement to establish the meaning and purpose of commercial common sense. Lord Clarke begins by stating,

¹⁶ *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, para 384.

¹⁷ See for instance, *Prenn v Simmonds* [1971] 1 WLR 1381; *Ashtead Plant Hire Co v Granton Central Developments Ltd* [2020] CSIH2, 2020 SC 244.

¹⁸ *Investors Compensation Scheme v West Bromwich Building Society*, [1998] 1 All ER 98, HL, 1 WLR 896.

¹⁹ [1998] 1 All ER 98, HL, 1 WLR 896.

²⁰ *Investors Compensation Scheme v West Bromwich Building Society*, [1998] 1 All ER 98, HL, 1 WLR 896, Lord Hoffman 17, 18.

²¹ *Investors Compensation Scheme v West Bromwich Building Society*, [1998] 1 All ER 98, HL, 1 WLR 896, Lord Hoffman 17.

²² *Investors Compensation Scheme v West Bromwich Building Society*, [1998] 1 All ER 98, HL, 1 WLR 896, Lord Hoffman 4.

²³ [2011] UKSC 50.

“The ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant ... [T]he relevant reasonable person is one who has 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”.²⁴

When applying this approach, the court takes an objective approach, interpreting the language used by the contracting parties from the perspective of a ‘reasonable person’. In other words, the court must ask, what would a reasonable businessperson have understood the wording in the contract to mean given the circumstances?²⁵ By using this method, the court is not confined to the literal construction of the provision. Instead, the broader commercial purpose of the contract can be considered. Lord Clarke further clarifies the meaning and purpose of this approach,

“The language used by the parties will often have more than one potential meaning. I would accept... that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has 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, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other”.²⁶

This suggests that the interpretation of a commercial contract is a process. It is often the case that the language contained in the contract has more than one potential meaning. Therefore, the court must consider which is the most likely meaning between the different possible constructions. In doing so, a vast range of factors must be considered. If there is a construction of the provision which yields commercial common sense, this is the construction which should be chosen.²⁷ However, it must be noted that commercial common sense can only be applied where there are two possible constructions of the provision. In other words, the court is only able to use this approach if there is more than one possible interpretation of the provision.

²⁴ *Rainy Sky SA and Others v Kookmin Bank* [2011] UKSC 50, para 14.

²⁵ *Rainy Sky SA and Others v Kookmin Bank* [2011] UKSC 50, para 14; Lewison, *The Interpretation of Contracts*, 8th edn (2023), ch 2 section 7.

²⁶ *Rainy Sky SA and Others v Kookmin Bank* [2011] UKSC 50, Lord Clarke para 21.

²⁷ *Ibid.*

Commercial Common Sense and Fairness

Lord Clarke sought to clarify both the meaning and purpose of commercial common sense in *Rainy Sky*.²⁸ However, following his decision, the use of commercial common sense continued to be a contested issue within the Court of Session.²⁹ This judicial tension has been the subject of a good deal of scholarly debate and therefore will not be examined here. However, Lord Drummond Young's controversial application of commercial common sense is worth exploring, especially with regard to its connection to fairness.

In *Grove Investments Ltd v Cape Building Products Ltd* the Inner House held, "In construing contracts it is also important to bear in mind that a contract is a cooperative enterprise, entered into by parties for their mutual benefit".³⁰ Furthermore, the Inner House held that the common law would provide an appropriate benchmark for determining what is commercially sensible.³¹ If the construction of a provision is radically different from the common law position, then it would be unlikely to be commercially sensible. Therefore, an alternative construction should be chosen.

A differently constituted bench of the Inner House in *@SIPP Pension Trustees v Insight Travel Services* criticised Lord Drummond Young's approach.³² The court held that, although some types of contracts require higher levels of co-operation or mutuality, this is not to say that the contracting parties cannot enter into contracts to pursue their own objectives.³³ Moreover, to use the common law as the benchmark could lead to confusion between what is commercially sensible and what is fair.³⁴ Commercial contracts are inherently complex - the common law will not always be sufficient in providing the necessary default rules.³⁵

Whether the common law is an appropriate benchmark is questionable. The author would agree with these criticisms. The court has blurred the line between what is fair and what is commercially sensible. To avoid commercial uncertainty, we must be clear on where the line falls between fairness and commercial common sense.³⁶ Certain types of contracts certainly do demand a higher degree of trust.³⁷

²⁸ *Rainy Sky SA and Others v Kookmin Bank* [2011] UKSC 50.

²⁹ See for instance, *Grove Investments Ltd v Cape Building Products Ltd* [2014] CSIH 43; *Sipp Pension Trustees v Insight Travel Services Ltd* [2015] CSIH 91; *Arnold v Britton* [2015] UKSC 36.

³⁰ *Grove Investments Ltd v Cape Building Products Ltd* [2014] CSIH 43, para 11.

³¹ *Grove Investments Ltd v Cape Building Products Ltd* [2014] CSIH 43, para 12.

³² *Sipp Pension Trustees v Insight Travel Services Ltd* [2015] CSIH 91.

³³ *Sipp Pension Trustees v Insight Travel Services Ltd* [2015] CSIH 91, para 44.

³⁴ *Sipp Pension Trustees v Insight Travel Services Ltd* [2015] CSIH 91, para 44; L Macgregor, 'Crossing the line between business common sense and perceived fairness in contractual interpretation', (2015) 19 EdinLR 378 383.

³⁵ *Sipp Pension Trustees v Insight Travel Services Ltd* [2015] CSIH 91, para 44; L Richardson, 'Commercial Common Sense Again: What role in contract interpretation?' (2021) 25 EdinLR 89 91.

³⁶ L Macgregor, 'Crossing the line between business common sense and perceived fairness in contractual interpretation', (2015) 19 EdinLR 378 383.

³⁷ For instance, Joint venture agreements, Agency, Partnerships.

Nevertheless, it undermines the competitive nature of commercial dealings to suggest that a contract is generally a co-operative enterprise.³⁸

ii) *Current law*

Thus far, this essay has explored each of the interpretative approaches in turn, providing the reader with a picture of crucial developments in this area of law and bringing to question issues regarding fairness. We can now move to consider the most recent Supreme Court decision,³⁹ in which Lord Hodge in particular clarified the contemporary approach to interpretation.

In *Wood v Capita Insurance Services Ltd*⁴⁰ the appellants, Capita Insurance Ltd, agreed to purchase the insurance company Sureterm Direct Limited from the respondents in a share purchase agreement.⁴¹ Capita were informed that, subsequent to the agreement, there had been several allegations regarding employees' misconduct.⁴² Following these allegations the Financial Services Authority conducted an investigation. After their investigation they instructed Capita to implement a remediation scheme to compensate any misled customers.⁴³ Capita argued that the mis-selling occurred prior to the agreement which they had reached with the respondents. Therefore, the substantial loss incurred by the remediation scheme should fall within the indemnity clause contained in the contract.⁴⁴ The Supreme Court adjudicated upon the interpretation of the indemnity clause to determine if the remediation scheme fell within its scope.

The approach of the Supreme Court can be analysed. In their view, a general approach of interpretation would simply be insufficient in tackling the inherently individualistic nature of commercial contracts. In other words, a one size fits all rule simply does not work for interpretation. Instead of attempting to place the interpretative approaches into a hierarchy, Lord Hodge built upon Lord Clarke's formulation of the 'unitary exercise' in *Rainy Sky*.⁴⁵ Lord Hodge maintained, 'Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation.'⁴⁶ He suggested that the different approaches should be considered as 'tools', enabling the court to choose the most appropriate approach according to the facts at hand.⁴⁷ Consequently, this case established that the interpretative approaches are interchangeable and not mutually exclusive. Ultimately, the approaches are not confined to a

³⁸ *Grove Investments Ltd v Cape Building Products Ltd* [2014] CSIH 43, para 11.

³⁹ [2017] UKSC 24.

⁴⁰ *Ibid.*

⁴¹ *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, para 2.

⁴² *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, para 5.

⁴³ *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, para 6.

⁴⁴ *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, para 7.

⁴⁵ *Rainy Sky SA and Others v Kookmin Bank* [2011] UKSC 50, Lord Clarke para 21.

⁴⁶ *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, para 13.

⁴⁷ *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, para 13; *Sigma Finance Corp'n* [2010] 1 A11 ER 571, Lord Mance para 12.

hierarchical system. The court has the freedom to choose the most appropriate approach according to the facts.

A recent Inner House decision, *Rocep-Lusol Holdings Limited v Lindal Dispenser GmbH* demonstrates interpretation as an iterative process.⁴⁸ In this case the commercial court adjudicated upon the construction of a provision in a licensing agreement.⁴⁹ To ascertain the meaning of the provision, the Outer House applied the contextual approach.⁵⁰ In a reclaiming motion however, the defender maintained that the Outer House had erred in their construction of the contract in their decision.⁵¹ Upon appeal, the Inner House refused the reclaiming motion. It was held that the commercial judge had not erred in his decision for the following reasons. The Inner House referred to Lord Hodge's decision in *Wood v Capita*,⁵² highlighting that it is undisputed that interpretation is now an iterative process.⁵³ The contextual facts were not irrelevant in this case and therefore, the commercial judge was correct in selecting this as the appropriate approach.⁵⁴

This case demonstrates that interpretation is an iterative process. One could ask why the commercial common sense approach was not used here. The Inner House held that, as neither of the parties relied upon this construction of the provision, the approach would not be referred to.⁵⁵ Crucially, the Inner House judges considered a vast range of factors before selecting the most appropriate method of interpretation. Evidently the Inner House applied the Supreme Court's approach in *Wood v Capita*.⁵⁶

C. HISTORICAL PERSPECTIVE

Each respective interpretative method has been explored in turn, providing the reader with an overview of the current law. The work of Bell, the Scottish institutional writer will now be considered, providing a historical perspective on the modern law.

i) *Bell on Interpretation*

Upon his appointment as the chair of Scots law in 1822, Bell gave an inaugural lecture in which he stated 'The students would be taught to know what the law actually was, they would also be furnished with the means of forming an opinion of what it ought to be.'⁵⁷ The author draws attention to this

⁴⁸ *Rocep-Lusol Holdings Limited v Lindal Dispenser GmbH* [2025] CSIH 20.

⁴⁹ *Rocep-Lusol Holdings Limited v Lindal Dispenser GmbH* [2025] CSIH 20, para 1.

⁵⁰ *Rocep-Lusol Holdings Limited v Lindal Dispenser GmbH* [2025] CSIH 20, para 8.

⁵¹ *Rocep-Lusol Holdings Limited v Lindal Dispenser GmbH* [2025] CSIH 20, para 9; this was one of two of the grounds, for the purpose of this paper only ground one will be considered.

⁵² *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, para 10-13.

⁵³ *Rocep-Lusol Holdings Limited v Lindal Dispenser GmbH* [2025] CSIH 20, para 18.

⁵⁴ *Rocep-Lusol Holdings Limited v Lindal Dispenser GmbH* [2025] CSIH 20, para 19.

⁵⁵ *Rocep-Lusol Holdings Limited v Lindal Dispenser GmbH* [2025] CSIH 20, para 30.

⁵⁶ *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

⁵⁷ *The Scotsman* 16 Nov 1822; Reid, K 2011, *From Textbook to Book of Authority: The Principles of George Joseph Bell*, EdinLR 15 1 10.

statement to highlight Bell's position as both an advocate and a lecturer at the university. Whilst encouraging students to understand the current position of the law, he encouraged them to form their own normative views. The author encourages the reader to keep this statement in mind as we move to explore Bell's views on interpretation. His two most significant works were written with different aims in mind. *Commentaries*⁵⁸ was written for the use of legal practitioners whereas, *Principles*⁵⁹ was formulated for that of his students.⁶⁰ Both will be considered to gain a comprehensive understanding of Bell's approach to interpretation.

Bell's approach to interpretation can be illustrated by considering two passages from *Commentaries* in particular. He stated:

"The construction or interpretation of a contract, is the inference, by the act of reason, or the collecting from proper indications, of the true meaning of the parties. And the great object which the law in all cases has in contemplation, as furnishing the leading principle of the rules to be observed, is, that justice is to be done between the parties, by enforcing the performance of their agreement, according to the sense in which it was mutually understood and relied upon at the time of making it".⁶¹

He continued:

"Where the words are of precise and unambiguous meaning, leading to no absurdity, that meaning is to be taken as conveying the true intention of the parties. But should there be manifest absurdity in the application of such meaning to the particular occasion, this will let in construction for discovering the true intention".⁶²

We can consider first of all the meaning of 'proper indications', drawn from the first passage.⁶³ Bell states that the purpose of interpretation is to ascertain the intentions of the contracting parties from 'proper indications'.⁶⁴ It could be suggested that Bell favoured an approach which primarily considered the written word. Bell maintained that the language contained in the contract, when given its ordinary and plain meaning, should be considered conclusive of the parties' intentions.⁶⁵ Examining the written agreement is essential to obtain the 'true meaning' of the contract and is the clearest indication of the rights and obligations of the parties. Later in the first passage, Bell implies that the court owes a duty to bring a sense of 'justice' to the process of interpretation.⁶⁶ Bell

⁵⁸ George Joseph Bell, *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence*, 5th edition (1826).

⁵⁹ George Joseph Bell, *Principles of the Law of Scotland*, 4th edition (1839).

⁶⁰ G.J. Bell, *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence*, 5th edition (1826), Introduction by Laura Macgregor 1.

⁶¹ G.J. Bell, *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence*, 5th edition (1826) 432 1.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ G.J. Bell, *Principles of the Law of Scotland*, 4th edition (1839) §524.

⁶⁵ Ibid.

⁶⁶ G.J. Bell, *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence*, 5th edition (1826) 432 1.

frequently referred to equity in his work and considered the doctrine to be infused in Scots law.⁶⁷ Therefore, it could be useful to consider equity in more depth in order to understand Bell's conceptualisation of justice.

Turning to consider the second passage, this illustrates that, for Bell, the starting position is the plain and ordinary meaning of the words. He was not indifferent to the limitations of this approach. Bell indicated that there are two kinds of ambiguity. In the first type, the ambiguity is apparent on the face of the contract and can be resolved by considering the context and language of the contract itself.⁶⁸ This is known as a patent ambiguity.⁶⁹ The second type is one which does not arise from the language itself but instead, the ambiguity arises due to its application. This second ambiguity is referred to as a latent ambiguity.⁷⁰ Here, the language is precise and unambiguous. Problems arise however when the contracting parties apply the provision. Due to a lack of linguistic ambiguity, the literal approach would be an insufficient approach here. Instead, the latent ambiguity requires an alternative approach.

Evidently, the literal approach is endorsed as a starting point by Bell. However, it is limited to language which is 'precise' and 'unambiguous'.⁷¹ Consequently, it is important to acknowledge this limitation and explore other approaches. Although Bell's work was, of course, written prior to the development of the modern notion of commercial common sense, the author notes a likeness between Bell's ideas and this approach. Where strictly interpreting the provision according to the language would lead to an absurd result, Bell accepted a departure from this approach to ensure a logical outcome. Evidently, an exploration of the different interpretative approaches is imperative to ascertain the parties' true intentions.

Notably, the word 'true' is used repetitively by Bell. This might suggest that he favoured a more subjective approach, in other words, that he advocated a search for the parties' actual intentions. In taking this position, he could have been influenced by the Continental European approach, more specifically French law, which applied a subjective approach.⁷² Although constraints of space rule out further consideration of this possible source, it is at least interesting to note the possible influence of civilian sources.⁷³

Crucially, justice forms a common thread through Bell's analysis of interpretation. On one hand, the written agreement is, arguably, the clearest indication of their contractual intentions and must

⁶⁷ K C G Reid, "George Joseph Bell's Inaugural Lecture" (2014) 18 EdinLR 341 356 355.

⁶⁸ G.J. Bell, *Principles of the Law of Scotland*, 4th edition (1839) §524.

⁶⁹ Gloag, *Contract* 372; C Lewis, and L Macgregor, ch3 Interpretation of Contract, *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, (2004) 71.

⁷⁰ Ibid.

⁷¹ G.J. Bell, *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence*, 5th-edition (1826) 432 1.

⁷² Bell used French authors such as Pothier as a point of reference in his Commentaries, however, it is uncertain if the references were made to directly influence Scots law; Bell, *Comm* 5th edn (1826), I.

⁷³ L Macgregor, "The Use of the Civil Law and the Law Merchant as Sources in the Works of George Joseph Bell" in J Hardman, A MacPherson and A Wilson (eds), *The Development of Commercial Law in Scotland Vol 1* (forthcoming).

therefore be honoured. Yet, the court is expected to avoid an ‘absurd’ outcome,⁷⁴ even if, judging from the written words, this is what the parties seem to have agreed. Applying an idea of justice at the same time as balancing these two competing interests makes the court’s task difficult. However, despite this difficulty, bringing a sense of justice appears to be a central concern for Bell. Vitally, this balancing act continues to be visible in modern Scots law and will be explored further.

D. THE ROLE OF EQUITY

To aid our understanding of Bell’s view of interpretation it is worth exploring the meaning and place of equity in Scots law, a doctrine which he referenced throughout his work.

i) Meaning of Equity

Although it has been suggested that equity plays an important role in Scots law, its definition is nevertheless contested. Stair suggested that equity is infused into the law, acting as the justification for legal rules.⁷⁵ Equity could be categorised as a latent source of law.⁷⁶ In other words, the doctrine is the normative underpinning of all other legal principles. Therefore, in challenging situations, equity can be used as a source of legal guidance.⁷⁷ Notably, during this time period, equity appeared to be closely linked to ideas of natural law theory making it unsurprising that natural law theorist Stair would take this view.

Kames builds upon Stair’s conceptualisation of equity, and consequently his work will be considered in this analysis.⁷⁸ Interestingly, his exclusive focus on equity led some to question whether it was correct to include him within the category of Scottish institutional writers.⁷⁹ Nonetheless, the author submits that the connections made between equity, societal change and governance will provide a useful insight into the meaning of equity.⁸⁰

Kames suggested that a legal system should act in response to changes in society, and he considered that equity, as a principle of justice, could assist in this process.⁸¹ Thus, the court’s equitable discretion to amend rules allows the law to develop, especially in times of societal transition. The role of equity within the legal system is given a normative justification by Kames,

⁷⁴ G.J. Bell, *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence*, 5th edition (1826) 432 1.

⁷⁵ Stair, Institute I.1.6; D J Carr, *Ideas of Equity*, (2017) para 2-13. J Ford, *Law and Opinion in Scotland During Seventeenth Century*, (2008) EdinLR 499.

⁷⁶ D J Carr, *Ideas of Equity*, (2017), para 2-04.

⁷⁷ Stair Institute I.15; S Bogle, *Morality Before the Enlightenment: An Interpretation of Viscount Stair’s Natural Law Theory*, C 1681, (2023), *Journal of Scottish Philosophy* 21 2 203.

⁷⁸ Lord Kames, *Historical Law-Tracts*, (1758).

⁷⁹ P Stein, ‘Legal Thought in Eighteenth-Century Scotland’ 1957 JR 1; D J Carr, *Ideas of Equity*, (2017) para 2-28.

⁸⁰ Lord Kames, *Historical Law-Tracts*, (1758).

⁸¹ P Stein, ‘Legal Thought in Eighteenth-Century Scotland’ 1957 JR 1, 10; D Carpi (ed), *The Concept of Equity: An interdisciplinary Assessment* (2007) 11; D J Carr, *Ideas of Equity*, (2017) para 2-28.

“A court of equity, by long and various practice, finding its own strength and utility, and impelled by the principle of justice, boldly undertakes a matter still more arduous, and that is to correct or mitigate the rigour, and what even in a proper sense may be termed the injustice of common law”.⁸²

Equity is used by the court to mitigate the impact of the common law. In other words, equity ensures that contracting parties are not subject to unduly harsh or unfair outcomes. However, this view was criticised by Bell who argued that Kames was ‘distinctly wrong’ in his opinion of equity.⁸³ As discussed previously, Bell considered that equity was inherent to Scots law and thus criticised Kames for attempting to separate law and equity, in the way it was separated in English law.⁸⁴

Moving to the modern law, we can continue to see equity as a latent source of law. It has been suggested that, in a modern context, equity can be understood as a byword for discretion.⁸⁵ The court is granted the power to amend certain rules where the implementation of the regular rule would cause an unduly harsh or unfair outcome.⁸⁶ The remedy of specific implement provides an example of this discretion in Scots contract law. The pursuer has a legal right to this remedy,⁸⁷ however the court can use its equitable discretion to refuse the remedy if there are ‘very cogent reasons’ to do so.⁸⁸ If the implementation of the contract is impossible, illegal, or imposes unduly harsh burdens on the defender, then the court has the discretion to refuse the remedy.⁸⁹ However, to state that equity is only a byword for discretion would undermine its place in Scots law. Equity is therefore understood as both a latent source of law and a byword for discretion.

ii) *Place of Equity in Scots Law*

Some have suggested that equity is ‘woven into the fabric of the law itself.’⁹⁰ This emphasises that the doctrine is not restricted to one discrete area of law, instead it is embodied in the system as a whole. Lord Cooper of Culross stated, ‘With us law and equity have never been separated, and equity has tended to predominate.’⁹¹ This suggests that equity is an intrinsic feature of Scots law which underpins other legal principles.⁹²

⁸² Kames, *Principles* Vol I, 15-16; 2-39.

⁸³ *Notes on Bell’s Lectures 1825-26*, By Thomas Lees (Edinburgh University Library); K C G Reid, “*George Joseph Bell’s Inaugural Lecture*” (2014) 18 EdinLR 341 at 356, 346.

⁸⁴ K C G Reid, “*George Joseph Bell’s Inaugural Lecture*” (2014) 18 EdinLR 341 355.

⁸⁵ D J Carr, *Ideas of Equity*, (2017) para 2-04.

⁸⁶ D J Carr, *Ideas of Equity*, (2017) para 2-05.

⁸⁷ *Stewart v Kennedy* (No 1) (1890) 17R (HL) 1, Lord Watson.

⁸⁸ *Grahame v Swan and Ors (Magistrates of Kirkcaldy)* (1882) 9R (HL) 91, Lord Watson.

⁸⁹ *Davidson v MacPherson* (1880) 30 SLR 2.

⁹⁰ D J Carr, *Ideas of Equity*, (2017) para 2-03.

⁹¹ Lord Cooper of Culross, *Selected Papers 1922-1954* (1957) 124.

⁹² D J Carr, *Ideas of Equity*, (2017) para 2-03.

Undoubtedly, equity plays a significant role in Scots law. However, to some degree, the doctrine is limited in scope. Whitty draws a distinction between equity and public policy to illustrate this idea. He states that, similar to public policy, equity is used to shape private law but is not a formal source of law.⁹³ Consequently, they are both essential in shaping the law, however only in a supplementary role.⁹⁴ Carr criticised this idea, suggesting that this comparison downplays the role of equity in Scots law.⁹⁵ Evidently, there are contrasting opinions concerning the place of equity in Scots law. The author agrees with Whitty's distinction. Equity undeniably plays an important role in shaping the law in Scotland, however, its limitations should not be overlooked.

E. THE PRINCIPLE OF FREEDOM OF CONTRACT

Whilst equity undoubtedly plays a central role in Scots law, so too does the principle of freedom of contract. Contracting parties have the freedom to draft the terms contained in the contract. They have the power to choose the very words of which they will be bound by. The crucial issue therefore concerns the courts growing equitable discretion. Whilst the judiciary attempts to bring a sense of justice to the contracting parties, the author questions if this pursuit of fairness ultimately undermines the principle of freedom of contract. Lord Sumpton argued that commercial contracts are not intended to be fair as the nature of commercial dealing itself is competitive.⁹⁶ Contracting parties rigorously negotiate the terms of a contract and should therefore have the autonomy to bind themselves to the agreement, irrespective of any underlying moral considerations concerning fairness.

The Scottish Law Commission touched upon these concerns regarding the use of commercial common sense. The Commission stated that commercial common sense should be used carefully by the court and should not be used to allow contracting parties to escape unfavourable bargains.⁹⁷ Moreover, the court should be careful not to re-write the terms in an attempt to align the contract with business common sense.⁹⁸ Again, it is suggested that the judiciary should tread carefully when using this approach. The purpose of interpretation is to ascertain the parties intentions; not to allow parties to escape bad bargains.

Following extensive criticism regarding the use of commercial common sense,⁹⁹ the court now considers a vast range of factors before applying this approach. In doing so, the principle of freedom

⁹³ N Whitty, "Borrowing from English Equity and Minority Shareholders' Actions" in E Reid and D L Carey Miller (eds), *A mixed Legal System in Transition*, (2005); D J Carr, *Ideas of Equity*, (2017) para 2-70.

⁹⁴ Ibid.

⁹⁵ D J Carr, *Ideas of Equity*, (2017) para 2-70.

⁹⁶ Lord Sumpton, *A Question of Taste: The Supreme Court and Interpretation*, Harris Society Annual Lecture, Keble College Oxford, May 2017 10.

⁹⁷ Scottish Law Commission, *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (Scot Law Com No 252, 2018), para 8.8.

⁹⁸ Lewison, *The Interpretation of Contracts*, 8th edn, (2023) ch 2 section 7 para 2.64.

⁹⁹ For instance, see, L Macgregor, 'Crossing the line between business common sense and perceived fairness In contractual interpretation', (2015) 19 EdinLR 378; Lord Sumpton, *A Question of Taste: The Supreme Court and Interpretation*, Harris Society Annual Lecture, Keble College Oxford, May 2017; Lewison, *The Interpretation of Contracts*, 8th edn (2023).

of contract is respected. For example, the Inner House in *Rocep-Lusol Holdings Limited v Lindal Dispenser GmbH* did not apply commercial common sense as this approach was not relied upon by the parties in their submissions.¹⁰⁰ This case illustrates that interpretation is now an iterative process, therefore the court can choose the most appropriate method on a case-by-case basis. Even though the court has greater discretion to select the approach used, this is not to suggest that commercial common sense is used without due consideration.

F. CONCLUDING REMARKS

The author sought to explore both the contemporary and historical perspectives on contractual interpretation to gain a further understanding of the approaches used. Consequently, key issues arising in this area of law were also identified and examined.

Each interpretative approach was considered in turn, highlighting key developments in the law. Crucially the development of commercial common sense brought to light questions regarding fairness. As the law continued to develop, tension within the Inner House regarding the use of the approaches became increasingly evident. In particular, it was questioned whether the line between fairness and commercial common sense had become blurred. In an attempt to diffuse this tension and provide clarity, Lord Hodge's landmark judgment in *Wood v Capita* established interpretation as an iterative process. The court was granted greater flexibility and a wider discretion to select the most appropriate approach on a case-by-case basis. This approach aligns well with the individualistic nature of commercial contracts, granting the court sufficient flexibility to interpret the contract in accordance with its factual context. However, it could be argued that questions regarding fairness and predictability remain because of the increased equitable discretion.

Subsequently, the author sought to explore Bell's contribution to the law of contractual interpretation, looking at his work against the backdrop of his role as a Scottish institutional writer. It became apparent that ideas of justice and equity were present in his writing. In order to understand Bell's conceptualisation of justice, equity was explored further. Evidently, the meaning of equity has developed significantly between Bell's time and modern times. However, a common thread in both the historical and contemporary understanding of equity is that of justice and fairness. Reflecting upon Bell's work prompted the author to question whether ideas of justice and equity continue to play a significant role in modern contractual interpretation.

Ultimately, this question led to the consideration of the principle of freedom of contract which is, arguably, threatened by the growing significance of fairness in judicial decisions. Taken together, this

¹⁰⁰ [2025] CSIH 20, para 30.

research demonstrates that the judiciary must continue to work on striking the correct balance between ensuring fair outcomes, whilst also respecting the competitive nature of commercial contract law and the parties' right to freedom of contract.

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