THE CONSENSUS PRINCIPLE AND THE INTERPRETATION OF CONSTRUCTION CONTRACTS BY THE COURTS

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Judges sometimes reach unexpected decisions, declaring the law to be different from what most lawyers, and their clients, previously thought it to be. The Court of Appeal, when construing construction agreements, has seemed especially prone to doing this.

During a remarkable six-month period in 1994, the Court of Appeal delivered a series of three decisions which (to say the least) surprised construction lawyers and their clients: *Trafalgar House Construction (Regions) Ltd v General Surety and Guarantee Company Ltd* [1] on 22 February; *Perar BV v General Surety and Guarantee Company Ltd* [2] on 22 April; and *Crown Estate Commissioners v John Mowlem & Company Ltd* [3] on 29 July.[4] The first two cases related to performance bonds; the last to the final certificate issued under a building contract. (The House of Lords reversed *Trafalgar House* on appeal.[5])

Construction lawyers' reactions (described below) to all these decisions suggest that consensus about the meaning of the agreements construed by the Court of Appeal already existed in the industry and among construction lawyers: consensus to which the Court of Appeal's decisions appear to have run counter.

Construction lawyers, and other construction professionals, may argue about whether the Court of Appeal did or did not buck the consensus in each of the three 1994 cases. It is however difficult to avoid the conclusion that it did depart from prevailing opinion in *Trafalgar House*, since not only did the Court of Appeal's judgment run counter to the House of Lords decisions in the twin cases of *Trade Indemnity Company Ltd v Workington Harbour and Dock Board*[6] and *Workington Harbour and Dock Board v Trade Indemnity*

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1 *Trafalgar House Construction (Regions) Ltd v General Surety and Guarantee Company Ltd* 66 BLR 42, CA.

2 *Perar BV v General Surety and Guarantee Company Ltd* 66 BLR 72, CA.

3 *Crown Estate Commissioners v John Mowlem & Co Ltd* 70 BLR 1, CA.

4 The composition of the Court of Appeal was entirely different in each case: Bingham MR and Beldam and Saville LJJ in *Trafalgar House*; Straughton, Waite and Peter Gibson LJJ in *Perar*; and Russell and Stuart Smith LJJ and Sir John Megaw in *Crown Estate*.

5 See note 8.

6 *Trade Indemnity Company Ltd v Workington Harbour and Dock Board* [1937] AC 1, HL.

Company Ltd (No 2),[7] but it was in due course reversed by the House of Lords.[8]

The purpose of this paper is not to criticise any of the judges, whether in the Court of Appeal or the former Official Referees' Court, though some criticism is unavoidable. It may not even be especially relevant whether their decisions were objectively right or wrong. Perhaps the consensus was right and the judges were wrong, or perhaps the consensus was wrong and the judges were right.[9] The problem is not that the judges took the *wrong* decisions; it is that their decisions, whether objectively right or wrong, *differed* from the then prevailing consensus, on which basis the parties had entered into the agreements in question. Rather, the purpose of this paper is to encourage judges to adhere to current consensus by proposing sound legal reasons why they should do so; and to suggest how judges might depart from a legally unsound consensus in a way which protects the parties to existing contracts.

Trafalgar House and the temporary demise of the conditional bond

Before *Trafalgar House*,[10] construction lawyers and their clients considered conditional performance bonds to be a guarantee of the contractor's performance, and proof of the employer's damages to be a prerequisite of the bond's enforcement.[11] But the Court of Appeal held that such bonds are not guarantees and that their clear purpose is to assure the employer of immediate funds; effectively, that so-called conditional bonds are in reality no different from on-demand bonds, which require the surety to pay whatever the employer asserts in good faith to be his damages.[12]

Trafalgar House featured a traditionally worded conditional bond in favour of a main contractor to secure the performance of groundworks by a

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7 *Workington Harbour and Dock Board v Trade Indemnity Company Ltd (No 2)* [1938] 2 All ER 101, HL

8 *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Company Ltd* [1996] AC 199, HL.

9 The learned editor of Hudson notes, of the Court of Appeal's decision in *Trafalgar House* and a long list of other decisions which he criticises for their 'extraordinarily legalistic interpretations "offending business common sense"', that 'these are decisions of the English higher judiciary and not of the often more experienced Official Referee judges.' (See IN Duncan Wallace QC, *Hudson's Building and Engineering Contracts*, 11th edition, Sweet & Maxwell, 1995, General Introduction and Preface at page xvii.) However, in both *Trafalgar House* and *Perar* the Court of Appeal upheld decisions of the Official Referees, respectively Mr Recorder (Brian) Knight QC and His Honour Judge Michael Rich QC. And in *Crown Estate* the Court of Appeal effectively followed a decision by His Honour Judge Thayne Forbes QC in *Colbart Ltd v H Kumar*, 59 BLR 89, QB (OR).

10 See notes 1 and 8.

11 In *Trafalgar House* a subcontractor ('contractor') procured the bond in favour of the main contractor ('employer').

12 I am (almost) convinced, from their judgments and the cases they cited, that the Court of Appeal judges in *Trafalgar House* were simply unaware of the existence of a class of performance bonds – those of the on-demand or unconditional variety – specially created to meet what they considered to be the purpose of the conditional bond they were construing.

subcontractor. The subcontractor failed to perform properly. The main contractor asserted in good faith that his damages greatly exceeded the amount of the bond.

The lawyer on the Fleet Street omnibus might have expected the Court of Appeal's judgment to have followed the decisions of the House of Lords in *Trade Indemnity*[13] and *Workington*[14] (which concerned a bond similar to the one in *Trafalgar House* but without the customary second condition as to satisfaction and discharge by the surety[15]), and held that the claimant under a performance bond must prove both the breach and the amount of its damages.[16]

If our lawyer on the number 11 bus had forgotten about *Trade Indemnity* and *Workington* he might have expected the Court of Appeal to have based its decision on a proper construction of the contract. Reading the virtual requirement[17] (not included in the *Workington* bond) for the surety to satisfy and discharge the damages sustained by the main contractor up to the amount of the bond, he might have considered it reasonable for the claimant, like most claimants, to have to prove his damages.

On 9 February 1993, the judge at first instance, Mr Recorder Knight QC,[18] gave summary judgment for Trafalgar House for the full amount of the bond on the grounds that there was no arguable defence to the claim. The learned recorder's more detailed reasons are not indicated in the Court of Appeal judgments.

On 22 February 1994 the Court of Appeal dismissed the appeal by General Surety, holding that a bond is not a guarantee and that its clear purpose is to assure the claimant (at least if he is a main contractor)[19] of immediate funds; that is to say, that the surety must pay the sum (up to the amount of the bond) which the claimant asserts in good faith is his damages.

I have been unable to discover whether counsel for General Surety before the Court of Appeal mentioned the current consensus. But before the House of Lords counsel did argue that ever since *Calvert v London Dock Company*[20]

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13 See note 6.

14 See note 7.

15 '… or if on default by the Subcontractor the Surety shall satisfy and discharge the damages sustained by the Main Contractor thereby up to the amount of the above written Bond …'.

16 See note 7, at page 105.

17 See Saville LJ's remarks in *Trafalgar House*, see note 1, at page 50E-F.

18 As Brian Knight QC he appeared in the Court of Appeal for the losing party in *Perar* (see note 2).

19 Saville LJ, in support of the purpose for which he considered (conditional) performance bonds to be created, explained cogently how the failure of a subcontractor, especially for the groundworks, could be expected to put the main contractor in or at risk of breach of the main contract, and how such a default could affect the main contractor's cash flow under the main contract (see note 1, at pages 49I-50F). The effect on a building owner of a main contractor's failure, though potentially as serious, is not quite the same, and it is uncertain to me whether or not Saville LJ would have taken the same decision if he had been considering a bond provided by a main contractor.

20 *Calvert v London Dock Company* (1838) 2 Keen 638.

conditional bonds have been regarded as guarantees, and that the language of these bonds has an established meaning, which should not be changed.[21]

The reaction of the legal profession to the Court of Appeal's decision may be represented by the comments of Richard Davis, a solicitor and consultant at Masons: 'The industry received a shock in 1994 when the Court of Appeal construed a bond in the ICE (5th edition) form as a primary obligation … until the decision was overruled by the House of Lords.'[22]

A news report in *Building* on 18 March 1994,[23] probably written with the benefit of legal advice, described the Court of Appeal's decision as 'a surprise legal judgment [that] could convert thousands of standard performance guarantees into onerous on-demand bonds overnight.' According to the report, 'industry sources estimate the top four insurance companies alone have issued about 5,000 such bonds worth £950m to contractors and subcontractors.' Frank McCormac, senior legal adviser of Balfour Beatty, was reported as saying: 'This decision is wrong in my view and must be appealed.'[24]

In the same issue of *Building*, an article by Timothy Elliott QC seemed to endorse the Court of Appeal's 'cash flow' approach: 'What an employer wants from a bond is an immediate cash payment.' But Mr Elliott also appeared to acknowledge that the decision – though largely based on the 'cash flow' argument – did run counter to prevailing opinion: 'This is worrying stuff for bondsmen. On the face of it, if the court holds that a claim is made in good faith, the surety has to stump up. Pleas of set-off, final accounts and challenges as to proof of loss will not avail. This surprising decision is at variance with what many had understood to be the law.'

The eleventh edition of Hudson, published before the House of Lords decision in *Trafalgar House*, described the Court of Appeal's 'on-demand' interpretation of the wording of the bond as 'startling'.[25]

The House of Lords, on 29 June 1995, allowed General Surety's appeal on the grounds that a conditional performance bond is a guarantee and is therefore subject to proof of damage in order to establish liability.[26]

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21 See note 8, at page 201.

22 Richard Davis, *Construction Insolvency*, 2nd edition, Palladian Law Publishing Ltd, 1999, page 399. The author does not comment similarly on *Perar*, or directly criticise that decision. Incidentally, chapter 18 of *Construction Insolvency* contains an entirely unexpected, extraordinary and moving essay titled 'Images of Construction Insolvency', in which Richard Davis draws on judicial, literary, classical and mythological sources to analyse and illuminate the meanings of such concepts as the limited company, bonds, novation and termination.

23 At page 11.

24 For providing copies of the reports and articles cited in this paper, I am indebted to Jodie Deakin, library manager at the Builder Group; and to my former colleagues, Tim Raper and Louise Murphy of Speechly Bircham, solicitors, who gave me access to the press cuttings which I had accumulated on the three cases. I also acknowledge the help provided by the efficient staff of the Law Society library.

25 See note 9, page 1504.

26 See note 8.

If the Court of Appeal got it wrong in *Trafalgar House* – and the House of Lords said they did – they may be said to have got it wrong for two reasons. First, because they did not follow *Trade Indemnity* and *Workington*. And secondly, because they misunderstood the commercial and legal purpose of conditional performance bonds.

Perar and the innocent insolvent

Before *Perar*,[27] our second case on performance bonds, construction lawyers and their clients considered the contractor's insolvency under JCT contracts to be a breach of the building contract, entitling the employer to call any performance bond. But the Court of Appeal held that the contractor's insolvency is not of itself a breach of contract, but is rather a no-fault event covered by an exclusive code under which the parties contract out of their other remedies.

In *Perar* the bond was conditioned on default by the contractor, whose employment under the building contract was automatically determined on his going into administrative receivership. No directly relevant precedent was cited before the Court of Appeal, but on a literal interpretation of the bond, and the building contract to which it was collateral, there appeared to be no breach or default where the contractor's employment was automatically determined.

Nevertheless, in my view, the average construction lawyer would probably have taken the view that insolvency is a breach of contract and an act of default. That view would have been correct, except for the way in which JCT contracts at that time dealt with all forms of contractors' insolvency, treating them in effect as no-fault events.

His Honour Judge Michael Rich QC, giving judgment on 18 December 1992, held that the employer had no cause of action against the contractor because on determination the contractor was neither entitled nor obliged to continue with the works.

Deciding the appeal on 22 April 1994, the Court of Appeal held that the contractor was not in breach or default by becoming insolvent. In the absence of any saving for other rights and remedies of the employer, the determination provisions formed an exclusive code whereby the parties contracted out of other remedies.

A distinguished construction lawyer described the decision in *Perar* as 'another judgment on conditional bonds which produces a surprising if conventional result.'[28] The decision received adverse comment by the learned editors of the Building Law Reports, who wrote in their commentary on the case: 'The practical effect of this decision is that in a circumstance in which the employer most needs the bond, ie the administrative receivership of the

27 See note 2.
28 Robert Akenhead QC, *Building*, 5 August 1994, page 25.

contractor, the bond is unavailable.'[29] They did not, however, say that the decision was wrong, and *Perar* may be a good example of a case where the decision was right and the consensus wrong. The editors pointed out that the wording of such bonds, and possibly the JCT contracts, required reconsideration. The relevant JCT contracts have subsequently been amended so that automatic determination of the contractor's employment occurs only where a provisional liquidator is appointed or a winding up order is made.[30] In my view, to complete the protection of beneficiaries, performance bonds should state that such events (or any other event of insolvency) are deemed to be breaches of the principal contract.

Crown Estate and the excessively final certificate

Before *Crown Estate*,[31] construction lawyers and their clients considered the final certificate under JCT contracts to be conclusive as to the absence of defects except where the contract documents expressly require the architect's approval of the quality of materials or standards of workmanship. But the Court of Appeal held that standards and quality are inherently for the reasonable opinion of the architect, so that the final certificate is conclusive as to all such matters.

The JCT building contract in *Crown Estate* was in the JCT Standard Form, Private with Quantities, 1980 Edition. Clause 30.9.1 stated: 'Except as provided in clauses 30.9.2 and 30.9.3 [which covered the cases where arbitration or other proceedings had been commenced by either party before or within 28 days after the final certificate was issued] (and save in respect of fraud) the Final Certificate [which the architect had issued] shall have effect in any proceedings arising out of or in connection with this Contract … as … conclusive evidence that where the quality of materials or the standard of workmanship are to be to the reasonable satisfaction of the Architect, the same are to such satisfaction.' On a literal interpretation of these words, the final certificate is not conclusive except as to quality and standards which the building contract says are to be to the satisfaction of the architect. Of these there were no, or virtually no, examples in the *Crown Estate* building contract.

His Honour Judge James Fox-Andrews delivered judgment at first instance on 10 December 1993. He adopted a literal interpretation, holding that the final certificate was conclusive only as to matters relating to standard and quality which were expressed to be for the satisfaction of the architect.

The Court of Appeal held, on 29 July 1994, that *all* matters of standards and quality of work and materials are for the reasonable opinion of the architect. Therefore the final certificate was conclusive as to all such matters. The Court

29 See note 2, at page 75.

30 See for example: Standard Form of Building Contract, Private with Quantities, The Joint Contracts Tribunal Ltd, 1998 edition (JCT 98), clause 27.3.3; Standard Form of Building Contract, With Contractor's Design, The Joint Contracts Tribunal Ltd, 1998 edition (WCD 98), clause 27.3.3; Intermediate Form of Building Contract, The Joint Contracts Tribunal Ltd, 1998 edition (IFC 98), clause 7.3.3.

31 See note 3.

of Appeal's decision in *Crown Estate* led to a firestorm of articles and comment which persists to this day.

In February 1995 the respected legal columnist in *Building*, Tony Bingham, came out firmly in favour of the Court of Appeal, writing that *Crown Estate* had 'identified what the industry thought was the true position all along': with the exception of lawyers, who, 'or at least some of them, do not like the decision at all'. Mr Bingham's belief, if correct, is an indication that clients do not always agree with their lawyers; which raises the question considered below: if the courts are required to ascertain the current consensus on the effect of a particular common form agreement, whose consensus should they be looking for? That of construction lawyers, or that of their clients?

A noted construction solicitor has commented: 'The Court of Appeal caused consternation in the construction industry.'[32] The eminent commentator on construction law, Ian Duncan Wallace QC, noted that the *Crown Estate* decision '…(a) relates to wording wisely or unwisely used in hundreds if not thousands of public contracts [and] (b) involves future cost to the taxpayer of probably hundreds of millions if not billions of pounds through the uncompensated cost of repairing defects in public buildings caused by breach of contract …'.[33] Ian Duncan Wallace's comments highlight the damaging effect which a 'surprise' judgment on the meaning of a common form agreement can have on large numbers of parties who have entered into such agreements in the belief that they had a different meaning.

Writing some years later, another leading commentator, differing from Tony Bingham, described the JCT's subsequent amendment to its standard contracts (limiting the 'conclusiveness' of the final certificate to very narrow grounds) as being 'what most of the industry thought the clause had meant in the first place'.[34]

The JCT did not rush to adapt to the *Crown Estate* decision. But in March 1995 it issued a 'notice to users', bringing the case to the attention of users of its forms, and later issued formal amendments to its standard forms which inserted the word 'expressly' in the relevant place in clause 30.9.1.1.[35] The

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32 Tim O'Hara of DJ Freeman, *Property Week*, 8 November 1996.

33 Ian Duncan Wallace QC 'Not What the RIBA/JCT Meant: Loose Cannon in the Court of Appeal', (1995) 11 ConstLJ 184, page 194.

34 Tony Blackler in *Building*, 24 November 2000, page 56.

35 Or equivalent provisions in the Intermediate Form of Building Contract, The Joint Contracts Tribunal Ltd, 1998 edition (IFC 98) and the Agreement for Minor Building Works, The Joint Contracts Tribunal Ltd, 1998 edition (MW 98). Clause 30.9.1.1 of the Standard Form of Building Contract, Private with Quantities, The Joint Contracts Tribunal Ltd, 1998 edition (JCT 98) now states that the Final Certificate shall have effect as 'conclusive evidence that where and to the extent that any of the particular qualities of any materials or goods or any particular standard of an item of workmanship was described expressly in the Contract Drawings or the Contract Bills … or in any instruction issued by the Architect under … clause 5.3.1.1 or 5.4 or 7, to be for the approval of the Architect, the particular quality or standard was to the reasonable satisfaction of the Architect, but such Certificate shall not be conclusive evidence that such or any other materials or goods or workmanship comply or complies with any other requirement or term of this Contract'.

notice to users records that the Court of Appeal's judgment provided an interpretation of the effect of a final certificate under JCT 80[36] which was much wider than the Tribunal had intended.

The surprise and criticism which the Court of Appeal's decision met with reflected the fact that, despite the absence of any ambiguity, the court unnecessarily departed from a literal interpretation consistent with the contract's purpose.

The hazards of construction

Judges, when construing agreements, either see themselves as having no clear authority to follow a consensus among specialist lawyers and their clients which they perceive to be wrong in law; or are departing from a consensus because they are unaware of its existence or are not especially interested in it; or believe they know and are following the consensus when in fact they do not know it and are not following it.

True to classical principles of construction, judges infer the purpose of an instrument from what it says, and they usually think it wrong to consider external evidence.[37] However, judges – like the rest of us – cannot help forming their own opinions about the industries with whose legal problems they have become familiar.

The *ex cathedra* expression of such opinions can lead judges into difficulty. When (for example) Saville LJ bases his judgment in *Trafalgar House*[38] on his own understanding of the purpose of a performance bond, based on his own knowledge of the construction industry – a question of fact, or at any rate an external, or subjective factor - he invites the obvious criticism that his knowledge might be wrong.

It seems to me that expert evidence on such matters as the commercial and legal purpose of an instrument is essential; and that it is for counsel to introduce such evidence at first instance, and for the judge at first instance to rule on it as a question of fact, binding on the appeal judges except where it is wrong on the face of it. The introduction of expert evidence as to the commercial and legal purpose of a class of agreements lies at the heart of my proposal for a 'consensus principle', which would require judges to ascertain that purpose with the assistance of expert witnesses assembled by the parties on counsel's advice. The commercial and legal purpose of a class of instruments, so ascertained, constitutes a 'consensus', and judges should be loath to interpret any agreement in such a way as to disturb that consensus.

Difficult questions arise which this paper can make little attempt to answer. First, is the consensus which the judges should be seeking to ascertain,

36 Standard Form of Building Contract, Joint Contracts Tribunal, 1980 edition (JCT 80).

37 See Stephen Furst and Vivian Ramsey (editors) *Keating on Building Contracts*, 7th edition, Sweet & Maxwell, 2001, at para. 3-02A, and the authorities there cited.

38 See note 1.

consensus as to the commercial and legal purpose of a document or consensus as to its legal effect? They are nearly, but not quite, the same thing.

Secondly, is the appropriate consensus that in the construction industry as a whole or the consensus among construction lawyers in particular? As Tony Bingham's comments about *Crown Estate* suggest, the consensus among lawyers and the consensus among their clients can differ. On the one hand, it is construction industry clients who tell construction lawyers what they want and who take the risks involved in using standard and common form contracts. On the other hand, judges might consider the ascertainment of consensus to be an extension of their existing practice of referring to academic legal opinion, in which event it would be more appropriate for the courts to consult the opinions of practising lawyers.

Canons of construction

Each of the three 1994 decisions, both at first instance and on appeal, turns on the canons of construction of contracts adopted by the judges. There is clear authority for the proposition that the courts will uphold an established construction where a contract is based upon a standard form of commercial agreement. Lord Esher MR stated, in *Dunlop & Sons v Balfour Williamson & Company*:

> It is a wholesome rule that has often been laid down, that when a well-known document has been in constant use for a number of years, the Court, in construing it, should not break away from previous decisions, even if in the first instance they would have taken a different view, because all the documents made after the meaning of one has been judicially determined are taken to have been made on the faith of the rule so laid down.[39]

What is less clear is whether the courts should uphold an existing consensus about the meaning of 'a well-known document [which] has been in constant use for a number of years' where that consensus is not supported by any previous decision.

In construing agreements, judges must consider numerous matters, among them: the literal meaning of the words used; the expressed intention of the parties; the legal background against which the contract was made;[40] the desirability of certainty in cases where the contract is based upon a standard form of commercial agreement;[41] terms implied by custom of the relevant trade; a construction which does not permit one party to the contract to take advantage of his own wrong; and the reasonableness of the result.

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39 *Dunlop & Sons v Balfour Williamson & Co* [1892] 1 QB 507, CA at page 518.

40 See for example *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173, HL, at page 193; *Llanelli Railway and Dock Company v LNWR* [1875] LR 1 AppCas 550 at page 560; *The World Symphony* [1992] 2 Lloyd's Rep 115, CA; and *Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyd's Rep 516, CA.

41 See note 39 and *The Annefield* [1971] P 168.

If the judges decide that they must ascertain the relevant consensus and construe every contract in accordance with it, this means not only that the judges must take judicial note of the consensus, perhaps from their own knowledge (though the Court of Appeal's reasoning in *Trafalgar House* suggests otherwise[42]) or from counsel for the parties, but preferably (in my view) from expert evidence; but also that, if the consensus represents what would otherwise be bad law, the judges may find themselves unable to change it for fear of disturbing existing agreements. And though it may be correct to say that this is a matter for Parliament, in practice law reform (especially of the *ad hoc* variety) has a low priority on the Parliamentary agenda.

Resolving the paradox

Is there, then, any way in which judges can declare the law to be different from the consensus without affecting existing contracts, including the contract in the case before the judges? Such an approach would appear to contravene the doctrine whereby the judges declare what the law is but do not change it; and that once the judges have declared what the law is, that law must apply in the case before them, and in future cases involving similar facts and agreements which are not distinguishable.

The approach would enable the court in question, an appellate court, or a separate judicial authority, to say, in effect: 'We consider the current consensus among construction industry clients and their lawyers, as to the meaning of this class of agreements, to be wrong in law; but the court must follow the consensus in cases relating to existing agreements, since otherwise the parties to those agreements will lose rights which they thought they would have when they entered into them. However, our own view of the law will apply to any agreements made after (say) one month from today's date.'

Yet one only has to describe the problem, or to endeavour to draft a legislative rule for enabling the court to act in this way, to understand the inherent contradiction. The prevailing consensus represents, in effect, the parties' intentions. While the courts are satisfied that parties have entered into an agreement in reliance on an understanding of the law which accords with a prevailing consensus, then under any intention-based rule of construction the courts must continue to apply that consensus.

If however the court is unaware of the consensus, perhaps because counsel did not draw it to the court's attention or because no evidence was introduced to support it, then the court's decision is *per incuriam* and should not be considered legally binding.

Having argued the matter thus far, this paper might itself be in danger of bucking the consensus if it tried to suggest a definitive solution. Perhaps the judiciary, if persuaded of the merits, might consider itself already authorised to adopt some of the approaches suggested here.

42 See note 1.

In addition to the arguments already put forward, rule 1.1 of the Civil Procedure Rules lays down the overriding objective of enabling the court to deal with cases justly, which includes ensuring that the parties are on an equal footing. A decision which overturns a prevailing consensus may be unjust; and such a decision does not treat the parties on an equal footing since both contracting parties must have entered into their agreement in the knowledge and on the basis of the current consensus, which the court has overturned to the unexpected detriment of one party and to the uncovenanted benefit of the other. Essentially, such a decision has the same potentially unjust effect as retrospective legislation.

Moreover, article 1 of the First Protocol to the European Convention on Human Rights provides: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' It seems established that 'possessions' includes rights in action and, perhaps, that to deprive a contracting party judicially of contractual rights which both he and the other parties thought they were granting or purchasing, might be a breach of this article.[43]

I confess myself unable to suggest any way of allowing judges, without disturbing existing agreements, to correct legal errors in the current consensus, except the path mentioned above. The court would decide the case in hand according to the current consensus but would give public notice that when construing agreements of the same kind entered into after a stated date, it will rule according to the view it would have taken had it not considered itself obliged to follow the current consensus. At all events, it is for the judiciary to recognise the serious economic and human problems which can be caused by its periodical departures from the prevailing consensus, and to use its collective ingenuity to resolve those problems.

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[43] See for example *Burdov v. Russia* ECHR Application no. 59498/00 and *Smokovitis v. Greece* ECHR Application no. 46356/99.

'The object of the Society
is to promote the study and understanding of
construction law amongst all those involved
in the construction industry'

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