



University of St Andrews
Law Journal

Institute of Legal and Constitutional Research



Title: The Many Faces of the ‘Reasonable Businessman’: Has Commercial Common Sense Become a Judicial Vehicle for Normative Idealism in Scots Law?

Author(s): Canel Derya Paris Atik

Source: *University of St Andrews Law Journal* 6, no. 2 (October 2026): 25-42.

Published by: Institute of Legal and Constitutional Research, University of St Andrews

Stable URL: <https://doi.org/10.15664/stalj.v6i2.3224>

DOI: 10.15664/stalj.v6i2.3224

This work is protected under Creative Commons Attribution 4.0 International (CC BY 4.0) License 2020.

The author(s) retain copyright holding, having permitted the *University of St Andrews Law Journal* to distribute (publish) their work.

The *University of St Andrews Law Journal* is an Open-Access publication of the University of St Andrews, recorded by the ISSN National Centre for the UK. Published in partnership with the Institute of Legal and Constitutional Research, University of St Andrews.

Copyright © 2026 University of St Andrews Law Journal

All use subject to:

<https://creativecommons.org/licenses/by/4.0/>

ISSN 2634-5102

The Many Faces of the ‘Reasonable Businessman’: Has Commercial Common Sense Become a Judicial Vehicle for Normative Idealism in Scots Law?

By Canel Derya Paris Atik¹²⁸

Introduction

Lord President Dunedin once asserted: ‘commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say’.¹²⁹ Nonetheless, complications arise where the language of a contractual document, intended to give legal effect to the parties’ agreement, admits more than one possible interpretation. ‘Commercial common sense’ (CCS) is one of the interpretative tools employed by Scottish courts when ascertaining the intention of the contracting parties and is most prominently employed in the interpretation of commercial contracts.¹³⁰ Broadly, judicial employment of CCS involves consideration of the rival interpretations advanced by the respective parties, seeking to reach ‘a view as to which construction is more consistent with business common sense’.¹³¹ In other words, the court asks which party’s interpretation better reflects the commercial purpose and context of the parties’ agreement. It is only when one turns to the substantive foundations of CCS that the doctrine’s apparent coherence begins to fracture. The difficulty lies in identifying what ‘commercial sensibility’ means, and whether its composite principles are sufficiently common or determinate to guide judicial reasoning.

The article’s argument is developed in two stages. To commence, Part One traces the evolution of CCS’s purpose as a tool of contractual interpretation. It demonstrates that, while CCS was initially devised to assist in determining the parties’ objective intention, recent developments risk displacing that function. Authoritative Scottish cases such as *Grove v Cape* and *Ashtead v Granton* reveal an expanded conception of CCS, under which considerations of commercial fairness, equivalence and proportionality may inform the construction of commercial agreements. This development, it is argued, jeopardises CCS’s credibility as a doctrine originally concerned with ascertaining the parties’ commercial intention. Having outlined these judicial developments, Part One concludes that the judiciary has yet to articulate a stable normative framework by which CCS may be appraised, leaving CCS insufficiently settled to provide meaningful guidance to judges, solicitors or contracting parties.

Part Two then turns to the legal, jurisprudential and policy implications of this doctrinal instability. Central to this article’s argument is the distinction between two manifestations of CCS: a principled, intention-

¹²⁸ Law finalist at the University of Edinburgh (2026). I wish to thank the Editorial Board for their thoughtful engagement with this article throughout the pre-publication process. I also extend my sincerest gratitude to my dearest friend and peer, Aisha Marie Johannessen, for her meticulous and attentive feedback on earlier versions of this work. All errors that remain are my own.

¹²⁹ *Muirhead & Turnbull v Dickson* (1905) 7 F 686.

¹³⁰ Patrick Hodge, Lord Hodge, “Can Judges Use Business Common Sense in Interpreting Contracts?,” in *Comparative Contract Law: British and American Perspectives*, ed. Larry A. DiMatteo and Martin Hogg (Oxford University Press, 2015), p. 274.

¹³¹ *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 [11]–[12].

based formulation, which serves the discernment of the contract's commercial purpose, and a broader, values-based iteration, which risks venturing beyond interpretation into the prescriptive adjustment of contractual outcomes. Rather than advocating for the discontinuation of the doctrine, however, this article proposes that CCS be returned to its historic boundaries and confined to its narrower, interpretative function. That position is defended on the basis that such restoration promotes legal certainty and interpretative predictability and, most significantly, reinstates intention as the organising principle of contractual interpretation.

1. The Meaning and Purpose of Commercial Common Sense

1.1. Purpose, Origins and Deviations

In matters of contractual interpretation, the overarching objective of the judiciary is to identify the intention of the parties. The relevant legal position concerning contractual interpretation was comprehensively articulated by the UK Supreme Court in *Rainy Sky*, which has since been affirmed and adapted by the Inner House of the Court of Session (CSIH) in a series of Scottish cases, including *Grove v Cape*,¹³² *@SIPP v Insight*,¹³³ *Hoe v Andersen*,¹³⁴ *Ashtead v Granton*,¹³⁵ and *Paterson v Angelline*.¹³⁶ Seeking to ascertain the parties' objective intention, the interpretative exercise will involve a close examination of the language used by the parties, and will seek to discern:

*'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.'*¹³⁷

Beyond the language itself, relevant surrounding circumstances should be considered alongside the language. Where such an examination reveals two plausible interpretations, 'the court is entitled to prefer the construction which is consistent with business common sense and to reject the other'.¹³⁸ Thus, CCS must not be applied in all cases engaging contractual interpretation; rather, it is applied where the contractual language is objectively equivocal and, accordingly, admits more than one plausible interpretation.¹³⁹

CCS is therefore best understood as one among several interpretative tools available to the court, all of which serve the shared purpose of identifying the parties' objectively discerned contractual intention. Though articulated in the English context, Lord Steyn's reasoning in the House of Lords case of *Mannai Investment* clarifies judicial rationale for applying CCS, observing that:

¹³² *Grove Investments Ltd v Cape Building Products Ltd* [2014] CSIH 43 [9].

¹³³ *@SIPP Pension Trustees v Insight Travel Services Ltd* [2015] CSIH 91, 2016 SC 243 [17].

¹³⁴ *Hoe International Ltd v Andersen* [2017] CSIH 9, 2017 SC 313 [19].

¹³⁵ *Ashtead Plant Hire Co Ltd v Granton Central Developments Ltd* [2020] CSIH 2, 2020 SC 244 [12].

¹³⁶ *Paterson v Angelline (Scotland) Ltd* [2022] CSIH 33, 2022 SC 240 [21].

¹³⁷ *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 [21].

¹³⁸ *Rainy Sky* (n 137) [21].

¹³⁹ *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 [17]–[18].

*[...] a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them.*¹⁴⁰

Thus, the concept of CCS was formulated to ensure that ‘semantic niceties’ would not be favoured at the expense of the parties’ true commercial intention.¹⁴¹ Historically, critics of an excessively literalist approach to contractual interpretation feared that an ‘over-refined and nitpicking semantic analysis’ might prejudice commercial agents and businessmen in the interpretation of their own contracts.¹⁴² This issue is pertinent given that, as opposed to businessmen themselves, it is judges and legal professionals who ultimately construe and juridically settle the meaning of a commercial contract. Furthermore, concerns were raised that a ‘pedantic lawyer’¹⁴³ might bypass the reasonable implications of commercial clauses, by focusing too closely on the linguistic minutiae at the expense of the broader aims of the commercial agreement. CCS provided a solution to this predicament. Where strict adherence to a literalist interpretative technique guided the interpreter toward a conclusion reflective of an ‘improbable and unbusinesslike intention’,¹⁴⁴ the interpreter of the ambiguous contract was entitled to prefer the commercially sensible interpretation, as the latter could be presumed to represent the intention of the parties more faithfully. Thus, the application of CCS sought to ensure that the contract would be construed alongside its contextual periphery, as well as against its commercial background,¹⁴⁵ to ensure that the commercial objectives of the agreement were adequately considered throughout the interpretative exercise. It is this restrained, intention-centred iteration of CCS that this article distinguishes from the more expansive and normatively charged form the doctrine has assumed in contemporary case law.

While a purpose-centric approach to the interpretative exercise may be favourable, contemporary adaptations of CCS no longer retain their footing in the discernible intentions or purposes devised by the parties. Cautioning against a judicial venture into the realm of contractual rectification, Mr Justice Briggs warned:

*‘The dictates of common sense may enable the court to choose between alternative interpretations [...] But this does not [...] subject the parties to the individual judge’s own notions of what might have been the most sensible solution to the parties’ conundrum.’*¹⁴⁶

This article contends that recent developments embody precisely this risk: rather than remaining anchored in the parties’ objectively ascertained intentions, CCS’s conceptual boundaries have increasingly been expanded so as to accommodate considerations of commercial fairness, cooperation and proportionality within the interpretative

¹⁴⁰ *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 771A–B (Lord Steyn).

¹⁴¹ *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* [2000] 1 Lloyd’s Rep 339 [23] (Mance LJ), citing *Mitsui Construction Co Ltd v Attorney-General of Hong Kong* (1986) 33 BLR 1 (PC).

¹⁴² Neil Andrews, “Interpretation of Contracts and ‘Commercial Common Sense’: Do Not Overplay This Useful Criterion,” *Cambridge Law Journal* 76, no. 1 (2017), p. 42.

¹⁴³ *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279 [59] (Lord Hoffmann).

¹⁴⁴ *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* (n 141) [23] (Mance LJ), citing *Mitsui Construction Co Ltd v Attorney-General of Hong Kong* (n 141).

¹⁴⁵ *Ravennavi SpA v New Century Shipbuilding Co Ltd* [2007] EWCA Civ 58, [2007] 2 Lloyd’s Rep 24 [12] (Moore-Bick LJ).

¹⁴⁶ *Jackson v Dear* [2012] EWHC 2060 (Ch) [40] (Briggs J), affd *BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd* [2013] EWCA Civ 416 [24].

exercise. While the earlier approach derived legitimacy from its grounding in the parties' intention, the latter risks conferring excessive interpretative discretion on courts, thereby permitting the contractual bargain to be displaced by judicial assessments of commercial reasonableness. These developments will be considered in greater depth in the ensuing section, which examines the meaning of CCS in the Scottish context, and asks what, in contemporary case law, is understood to substantiate a commercially sensible contract.

1.2. The Meaning: CCS and its Substantive Framework

This section will demonstrate that, despite an abundance of authoritative case law, the judiciary remains divided as to the normative margins of CCS as a legal tool. A closer examination of leading cases reveals two principal ramifications of that indeterminacy. First, it has generated variation among the judicial approaches taken to the application of CCS. Second, it has facilitated the emergence of a broader substantive framework through which considerations of transactional fairness, proportionality, and equitable burden allocation may exert influence on the interpretative exercise. These developments are analysed further below.

a. *Grove v Cape* [2014]

The highly scrutinised case of *Grove v Cape* [2014]¹⁴⁷ concerned a dispute over the meaning of dilapidation provisions in a commercial lease.¹⁴⁸ The tenants contended that the relevant provision served to compensate the landlord in the event of a contractual breach, with respect to its severity and its resulting losses, whereas the landlord asserted that the clause provided for a fixed payment, irrespective of losses *actually* incurred.¹⁴⁹ Ultimately, the tenants' construction was upheld on the basis that it best accorded with CCS.¹⁵⁰

In delivering the opinion of the CSIH, Lord Drummond Young identified factors to be considered when determining whether an agreement may be characterised as commercially sensible. Affirmative indicators included (a) a cooperative and mutually beneficial nature,¹⁵¹ whereas negative indicators included terms that were (b) excessively or disproportionately burdensome;¹⁵² (c) commercially unpredictable;¹⁵³ or, in the instance of subsidiary terms, (d) radically at odds with common law rules.¹⁵⁴ Furthermore, Lord Drummond Young articulated that the landlord's construction could not succeed for the following reasons: (a) when evaluating the contract's context and the provision's purpose, the clause sought to provide a remedy for the tenants' breach of contract, which a sum covering the landlord's true loss (as a result of the tenants' breach) was best positioned to achieve;¹⁵⁵ (b) the landlord's decision to estimate costs, rather than calculate costs after the necessary works had been carried out, appeared to defy CCS as estimated costs could not accurately represent losses actually

¹⁴⁷ On academic scrutiny, see Laura Macgregor, "Crossing the Line between Business Common Sense and Perceived Fairness in Contractual Interpretation," *Edinburgh Law Review* 19, no. 3 (2015), pp. 378–83.

¹⁴⁸ *Grove Investments* (n 132) [1].

¹⁴⁹ *Grove Investments* (n 132) [3]–[4].

¹⁵⁰ *Grove Investments* (n 132) [16]–[19].

¹⁵¹ *Grove Investments* (n 132) [11].

¹⁵² *Grove Investments* (n 132) [11].

¹⁵³ *Grove Investments* (n 132) [11].

¹⁵⁴ *Grove Investments* (n 132) [12].

¹⁵⁵ *Grove Investments* (n 132) [17].

incurred;¹⁵⁶ (c) had the landlord concluded that reconstruction or demolition of the building constituted the most economically advantageous course, this would have imposed a disproportionate and arbitrary burden on the tenants, thereby opposing CCS;¹⁵⁷ and (d) the tenants' interpretation provided total compensation to the landlord for the loss it suffered, thereby reflecting CCS.¹⁵⁸

As identified above, in its truest form, CCS serves as an interpretative tool that aids in the discernment of the commercial purpose of an agreement. In this respect, the earlier approach sought to uphold the intention and consent of the parties, and ultimately, enforce the object of their mutual bargain. The judicial reasoning in *Grove*, however, arguably reflects a broader conception of CCS. Rather than foregrounding the parties' contractual intention, CCS is framed as encompassing expectations of commercial cooperation, equitable distributions of burden and transactional predictability. Not only, then, is party intention at risk of being relegated, but the interpretative exercise itself becomes receptive to normative and evaluative standards that are not easily reconciled with the doctrine's original function.

The consequences of this normative shift are twofold. First, Lord Drummond Young identified four characteristics understood to substantiate, or otherwise indicate the absence of, CCS, thereby complicating the earlier and narrower understanding of the doctrine. Second, the decision introduced additional normative hurdles to be overcome by judges attempting subsequent application. For instance, a judge would now be required to consider whether a clause is too commercially unpredictable to accord with CCS, notwithstanding the absence of any clear jurisprudential basis for treating commercial unpredictability as a freestanding objection in contractual principle. Nor is such an inquiry one that admits mechanical application. On this account, *Grove* left the scope and substantive content of CCS in a less settled doctrinal position.

b. *@SIPP v Insight* [2015]

The subsequent case of *@SIPP* [2015] once more concerned the interpretation of a commercial lease.¹⁵⁹ The Inner House found in favour of the party whose construction better aligned with the natural meaning of both contested clauses, thus leaving 'no room' for the other party's constructions.¹⁶⁰ Drawing on the guidance provided by the UKSC case of *Arnold v Britton*, the Inner House concluded that CCS could not operate where its application would involve a 'substantial and unjustified departure from [the] natural meaning' of the contract.¹⁶¹

More pertinent for the purposes of this article, *@SIPP* was one of the first cases to meaningfully qualify *Grove*'s expansive and arguably idealistic characterisation of CCS. In delivering the opinion of the Inner House, Lady Smith emphasised that as a matter of law: (a) expectations of cooperation and mutuality should not be applied indiscriminately across all kinds of contractual relationships; (b) commercial contracts may be 'hard fought' and entered into for individual gain; (c) commercial contracts need not be fair; and (d) the fact that the parties had gambled on prospective outcomes does not warrant judicial intervention where the commercially

¹⁵⁶ *Grove Investments* (n 132) [17].

¹⁵⁷ *Grove Investments* (n 132) [18].

¹⁵⁸ *Grove Investments* (n 132) [19].

¹⁵⁹ *@SIPP* (n 133) [1].

¹⁶⁰ *@SIPP* (n 133) [44].

¹⁶¹ *@SIPP* (n 133) [19].

preferable outcome did not materialise.¹⁶²

Following *Grove*, CCS's scope had been materially broadened, such that it could no longer be said to serve the sole purpose of discerning the commercial objective of an agreement. However, Lady Smith had forewarned the judiciary against excessive reliance on the commercial principles established by its predecessors in *Grove*. Whether or not one agrees with the facets of CCS as established in *Grove*, it appears that @SIPP's subsequent qualification of these facets rendered the substantive foundations of CCS both unsettled and doctrinally opaque. While the CSH's retreat from the expansive approach embraced in *Grove* may have been a welcome development for practitioners and academics alike, it exposed an underlying difficulty: uncertainty at the appellate level as to the nature and operational scope of CCS itself. @SIPP therefore signalled an emerging tension in the judiciary's treatment of CCS: the absence of judicial consensus as to the doctrine's scope, with consequential implications for legal certainty both for subsequent courts and for the commercial parties whose disputes came before them.

c. *Ashtead v Granton* [2020]

Finally, the dispute in *Ashtead* arose as a result of disagreement surrounding a rent review clause, which established the scope of matters to be regarded in the calculation of the open market rent for the purposes of a prospective rent review.¹⁶³ The tenants contended that all constructions and improvements carried out with respect to the leased subjects should be disregarded, including those financed by the landlord, whereas the landlord asserted that the clause only excluded those undertaken by the tenant or the tenant's predecessors.¹⁶⁴ Having taken CCS into account, the CSH concluded that the clause was intended to apply to improvements undertaken or buildings constructed by the tenant at their own expense, or by the landlord following the tenancy start-date.¹⁶⁵

Delivering the opinion of the CSH, Lord Drummond Young once more articulated a rationale akin to that which he provided in *Grove*, asserting that CCS should be measured with reference to: (a) the 'principle of equivalence',¹⁶⁶ which asserts that the parties' obligations should be 'broadly equivalent';¹⁶⁷ (b) the principle of *pacta sunt servanda*, whereby parties will 'normally' avoid unreasonable or disproportionate burdens seeing as they will be bound to these obligations thereafter; and (c) commercial predictability, which permits one to assume that parties would 'normally' evade arbitrary windfalls.¹⁶⁸ Cumulatively, these three features constitute the normative framework whereby CCS might be appraised. Additionally, Lord Drummond Young indicated that further features may be considered, as the stated principles did not substantiate 'an exhaustive list'.¹⁶⁹ The objective observer would likely recognise the striking similarities between Lord Drummond Young's accounts of CCS between *Grove* and *Ashtead*¹⁷⁰, thereby rendering it questionable to what degree the cautions voiced by Lady

¹⁶² @SIPP (n 133) [44].

¹⁶³ *Ashtead* (n 135) [6].

¹⁶⁴ *Ashtead* (n 135) [1].

¹⁶⁵ *Ashtead* (n 135) [34].

¹⁶⁶ *Ashtead* (n 135) [34].

¹⁶⁷ *Ashtead* (n 135) [16].

¹⁶⁸ *Ashtead* (n 135) [16].

¹⁶⁹ *Ashtead* (n 135) [16].

¹⁷⁰ Contrast *Ashtead* (n 135) [16], [34] with *Grove Investments* (n 132) [11].

Smith in *@SIPP* were indeed heeded. Furthermore, Lord Drummond Young's characterisation of the aforementioned list as non-exhaustive raises *prima facie* concerns as to how much the scope of CCS may be expanded before it ceases to qualify as an interpretative instrument and begins to act solely as a facilitator of contractual rectification.

Beyond reasserting the normative framework initially presented in *Grove*, the CSIH in *Ashtead* sought to further clarify the deductive process by which commercially sensible constructions may be identified. Lord Drummond Young described the deductive exercise as dual-pronged. As a starting point, the interpreter should inquire whether the 'conclusion, [that is, a deduction or inference, is] one that is widely held by those with a knowledge of the particular field under consideration.' Subsequently, one must evaluate how sensible the 'converse of the conclusion' is. If it is insensible, then one's initial conclusion is 'likely' correct. CCS involves the application of this deductive exercise to business transactions 'with the addition of elementary microeconomics', but not such as to substantiate a 'full professional economic analysis.' Finally, one ought to inquire whether a 'reasonable businessman' would have conducted their affairs in such a manner, given the case's unique circumstances.¹⁷¹

Two rather significant implications arose following *Ashtead*. On one account, *Ashtead* reaffirmed judicial rationale which paralleled that of *Grove*, thereby undermining both the conservative approach taken by the court in *@SIPP* and that of the UKSC in *Arnold v Britton*. Moreover, *Ashtead* introduced an additional dimension of analysis into the interpretative exercise, thereby further complicating an already convoluted normative framework by which CCS may be construed. In particular, the complexity of the analytical framework to be applied in cases engaging CCS warrants closer examination. Following *Ashtead*, a court seeking to interpret an ambiguous contract in accordance with CCS must consider the following elements: (a) to what degree the terms of the agreement are "broadly equivalent"; (b) the reasonableness and proportionality of burden allocation; (c) the commercial predictability of rival terms; (d) whether a construction reflects microeconomic "common sense" as per the test identified above; and (e) whether reasonable businessmen would have contracted in such a manner.

The judicial rationale employed in *Ashtead*, as well as its derivative commercial principles, has since been affirmatively applied by the Outer House in the subsequent cases of *Coal v Technip* [2021],¹⁷² *Mast v Chalmers* [2022],¹⁷³ and *Scottish Ministers v Scot Roads* [2022].¹⁷⁴ *Ashtead* most overtly exhibits the growing dissonance between CCS's origins as an interpretative tool grounded in the parties' contractual intention and its modern, norm-laden counterpart. Whereas contractual intention formerly occupied the doctrine's foremost position, contemporary adaptations risk allowing evaluative assessments of commercial fairness, proportionality, and predictability to assume an elevated role in the construction of commercial agreements. Judicial discretion represents a derivative risk within this paradigm, as these concepts are construed and appraised by reference to judicial understandings of commercial rationality. This development is significant, as it risks obscuring CCS's substantive meaning, diluting its historical purpose and undermining its reliability as a guiding principle in

¹⁷¹ *Ashtead* (n 135) [14].

¹⁷² *Coal Pension Properties Ltd v Technip UK Ltd* [2021] CSOH 39, 2021 SLT 1224 [22].

¹⁷³ *Mast Group Ltd v Chalmers* [2022] CSOH 43 [38].

¹⁷⁴ *Scottish Ministers v Scot Roads Partnership Project Ltd* [2022] CSOH 19 [10].

contractual interpretation. Notwithstanding the objective complexity of the assessment framework advanced in *Ashtead*, the true difficulty with the approach lies in its apparent incompatibility with the intention-centric foundations of contractual doctrine and, secondarily, in the instability it generates for a legal order committed to contractual certainty.

d. Concluding Remarks

CCS may have once served the justifiable purpose of identifying and upholding the parties' objectively ascertained intention. However, as the preceding section has demonstrated, the contemporary common law position indicates that CCS has since absorbed further functions. In particular, the Scottish judiciary has increasingly treated CCS as requiring consideration of normative factors that extend beyond the doctrine's foundational purpose of discerning the commercial object of the agreement at hand. On this understanding, what was once a principally intention-centred interpretative aid risks becoming an evaluative framework concerned with ensuring commercial fairness, proportionality and reasonableness in contractual relations. This reorientation carries consequential jurisprudential, legal and policy implications. Within the Scottish legal system, freedom of contract remains a principle of indispensable significance; yet, that freedom cannot be meaningful if it is merely formal or deontological. The conceptual weight of contractual freedom is substantially curtailed if the legal consequences of consensual bargains are not subsequently upheld in court. These legal, ethical and policy-oriented shortcomings will be examined further below.

2. The Case for Restoration

2.1. The Jurisprudential Argument: A Scots Law Perspective on Contract-Policing

The preceding section analysed the judicial treatment of CCS in the CSIH cases of *Grove v Cape* and *Ashtead v Granton*, against the backdrop of the more conservative approaches taken in *@SIPP* and the authoritative UKSC case of *Arnold v Britton*. It observed that the Inner House recognised characteristics of equivalence, proportionality and reasonableness, *inter alia*, as markers of commercial sensibility. Accordingly, disputed commercial contracts that come before the courts may be vulnerable to construction by reference to these expectations, rendering non-conforming interpretations susceptible to normative realignment. As Richardson has persuasively contended, the Inner House's emphasis on equivalence, fairness and commercial predictability may be overstated given the otherwise individualistic nature of Scots contract law.¹⁷⁵ Particularly in relation to the principle of equivalence, Scots law does not impose a requirement of consideration akin to that of English law, thereby making its prominence appear incongruous within the broader Scottish legal framework.

Furthermore, an analogy may be drawn between CCS and a broader principle of 'good faith' within Scots contract law. Both concepts uncover a jurisprudential tension between, on one hand, a judicial inclination to

¹⁷⁵ Lorna Richardson, "Commercial Common Sense' Again: What Role in Contract Interpretation?," *Edinburgh Law Review* 25, no. 1 (2021), p. 93.

establish overarching contractual principles and, on the other, the maintenance of an individualistic, consent-based contractual framework. However, the Scottish judiciary has a long-standing history of resisting the application of a generic principle of ‘good faith’ in Scots law, due to unfavourable consequences it has been said to yield for the broader legal system.¹⁷⁶ MacQueen identifies that, while a positive requirement of good faith may appear desirable at face value, it has thus far been opposed by the Scottish judiciary on the basis that it may adversely affect legal certainty and require contracting parties to take account of each other’s bargaining positions at the expense of their own interests.¹⁷⁷ Additionally, to embrace a principle as expansive as good faith may undermine the freedom of contract, as it may ‘overwhelm the enforcement of express contractual terms’.¹⁷⁸ Ultimately, the costs borne by legal certainty, contractual freedom, and individualism within contract theory are the same, whether they arise through CCS or through the introduction of an overarching duty of good faith. In light of the Scottish courts’ enduring resistance to a comprehensive good faith principle, the judiciary’s willingness to accommodate analogous commercial principles through CCS appears difficult to reconcile with the existing doctrinal position.

3. The Broader Legal Framework: CCS and Its Practical Implications for Contractual Certainty

3.1. Anti-Literalism, Commercial Purpose and ‘Absurdity Prevention’

Historically, CCS was devised to ensure that the interpretative exercise would not stagnate in the face of textual absurdities. As noted by Andrews, this provides commercial parties with a valuable safeguard. Where the written terms admit competing interpretations, the judiciary may seek to discern the parties’ commercial aim and uphold the construction which best supports its materialisation.¹⁷⁹ Defending the merits of CCS in this domain, Lord Bingham stated: ‘the instrument must speak for itself, but it must do so *in situ* and not be transported to the laboratory for microscopic analysis.’¹⁸⁰ In addition to ensuring that the discernment of the parties’ intention is not distorted by linguistic niceties, Andrews asserts that judicial consideration of CCS also contributes to procedural efficiency and lowers transaction costs. In this respect, the application of CCS ensures that lower courts do not place undue emphasis on grammatical accuracy or linguistic minutiae, thereby lowering the likelihood of such cases being retried at the appellate level.¹⁸¹

Mitchell further notes that the application of the tool may enable the courts to adopt a fact-sensitive approach to their judicial reasoning. In facilitating a thorough analysis of the case’s commercial background, both power and information asymmetries may be identified and corrected.¹⁸² Moreover, such an analysis enriches the

¹⁷⁶ Hector Lewis MacQueen, “Good Faith in the Scots Law of Contract: An Undisclosed Principle?,” University of Edinburgh School of Law Working Paper Series (2011), p. 7.

¹⁷⁷ MacQueen, “Good Faith in the Scots Law of Contract,” p. 5.

¹⁷⁸ Hector Lewis MacQueen and Shannon O’Byrne, “The Principle of Good Faith in Contractual Performance: A Scottish-Canadian Comparison,” *Edinburgh Law Review* 23, no. 3 (2019), p. 327.

¹⁷⁹ Andrews, “Interpretation of Contracts,” p. 41.

¹⁸⁰ *Arbuthnot v Fagan* [1995] CLC 1396, 1400 (Sir Thomas Bingham MR), cited in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All ER (Comm) 601 [59] (Beatson LJ).

¹⁸¹ Andrews, “Interpretation of Contracts,” pp. 41–42.

¹⁸² Catherine Mitchell, “Interpreting Commercial Contracts: The Policing Role of Context in English Law,” in *Comparative Contract Law:*

courts' understanding of the parties' relationship, thereby enhancing their ability to reach faithful conclusions about what the parties truly agreed.¹⁸³ One might therefore argue that such an approach is fairer than that favoured by literalists, given its capacity to accommodate peripheral facts relevant to the interpretative exercise. On this understanding, the employment of CCS may be thought to enhance the court's understanding of the commercial circumstances that gave rise to the parties' contract, thereby rendering the resulting interpretations truer to the parties' intentions.

These arguments are compelling, but their cogency draws strength from theory, rather than present practice. As exhibited in the preceding analysis, and as legal scholarship has observed, common law developments have increasingly characterised CCS as encompassing broader principles of equivalence, proportionality and reasonableness.¹⁸⁴ These principles may align with the terms to which the parties have consensually bound themselves; however, they may also exert pressure on those terms where the parties' bargain does not accord with the court's conception of commercial rationality. In such circumstances, the integrity of the bargain is jeopardised; indeed, the interpretation most consistent with the parties' intention may be displaced by that which best adheres to judicially identified standards of commercial reasonableness. Such a development poses a plausible threat to contractual certainty but, more significantly, it rests uneasily with the consent-based foundations of contract law, a tension to be examined further below.

3.2. Legal Certainty

Should the Scottish judiciary pursue its current trajectory of straining the foundational underpinnings of CCS, as exemplified in *Grove* and *Ashtead*, legal certainty is likely to bear the most acute cost. Contractual certainty may be said to exist where there is discernible continuity in the normative rules applied to matters of contractual interpretation. Speaking extra-judicially on the subject of contractual certainty, Lord Neuberger stated:

*'If the judge is so swayed [by their sympathies for an unlucky litigant], the danger is that the resulting decision will muddy the clear water of certainty which is such an important ingredient in the rule of law.'*¹⁸⁵

The passage captures the inherent tension that persists between the law's normative commitment to justice and the legal system's reliance on institutional predictability. Legal certainty may sometimes necessitate outcomes that appear inequitable in their particular circumstances; however, while case-by-case equity may secure justice for the parties before the court, doctrinal stability cultivates the conditions under which parties in analogous circumstances can arrange their contractual affairs with confidence. Since contract law relies upon parties'

British and American Perspectives, ed. Larry A. DiMatteo and Martin Hogg (Oxford University Press, 2015), p. 234.

¹⁸³ Mitchell, "Interpreting Commercial Contracts," p. 233.

¹⁸⁴ Richardson, "'Commercial Common Sense' Again," p. 93.

¹⁸⁵ David Neuberger, Lord Neuberger of Abbotsbury, "Express and Implied Terms in Contracts," speech at the School of Law, Singapore Management University, August 19, 2016, [18].

informed understanding of the legal status quo, interpretative latitude must remain restrained by stable legal principles if parties are to undertake and allocate commercial risks. Indeed, equity remains relevant to adjudication; the point of the present argument is not to reject this premise, but to emphasise that equity cannot exist in a state of perpetual doctrinal flux; it must operate within a known and dependable legal framework if the law is to remain consistent, replicable and compatible with the rule of law.

In a speech on contractual interpretation, Lord Hamblen identified the three institutionally vital functions performed by legal certainty: (1) a consistent normative framework enhances fairness by ensuring that varying parties receive similar outcomes in materially comparable cases;¹⁸⁶ (2) should a dispute arise as to the meaning of the contract, the parties and their legal representatives should be able to anticipate the judiciary's response to the questions engaged by the dispute;¹⁸⁷ and (3) there is a public policy interest in the procedural efficiency of contract-related litigation, where excessive time and resources should not be allocated to what 'should be a limited interpretative task'.¹⁸⁸ Having established the overarching significance of legal certainty, we will now consider how the Scottish judiciary's open-textured and under-specified approach to CCS may operate to its detriment.

i. Judicial Knowledge

A necessary condition of legal certainty, as identified by Lord Hamblen, is the preservation of continuity within the normative framework employed in cases of a comparable nature. Yet, can one be certain that all judges at varying levels of the judicial hierarchy are equally well-versed in the subtleties of commercial practices, thereby qualifying them to authoritatively discern the 'commercially sensible' interpretation from the 'insensible' one? Such is the concern raised across a diverse body of legal scholarship, including McLauchlan who cautioned:

*'a judge's idea of commercial common sense may be [...] as reliable as a businessman's idea of legal principle.'*¹⁸⁹

Richardson contends that the issue may be one of experience, where judges with greater cumulative experience presiding over commercial courts may be better positioned to recognise a commercially sensible construction than judges lacking such experience.¹⁹⁰ Similarly, Robertson acknowledges that while judges may regularly be called upon to adjudicate on ill-defined legal principles such as 'good faith', these matters remain reasonably familiar to a judge whose deliberations frequently engage concepts derived from broader notions of justice and fairness. On the contrary, a well-founded judgement concerning CCS is predicated on knowledge of the relevant commercial circumstances, objectives, expertise, experience and acumen of the parties, all of which a judge may not possess or have had sufficient exposure to throughout their professional career.¹⁹¹ Furthermore, Lord Neuberger identifies

¹⁸⁶ Nicholas Hamblen, Lord Hamblen of Kersey, "Contractual Interpretation—An Anglo/Australian Journey," Lehan Lecture, September 3, 2024, [2](a).

¹⁸⁷ Hamblen, "Contractual Interpretation—An Anglo/Australian Journey," [2](b).

¹⁸⁸ Hamblen, "Contractual Interpretation—An Anglo/Australian Journey," [2](c).

¹⁸⁹ David McLauchlan, "The Lingering Confusion and Uncertainty in the Law of Contract Interpretation," *Lloyd's Maritime and Commercial Law Quarterly* (2015), p. 430.

¹⁹⁰ Richardson, "Commercial Common Sense' Again," p. 93.

¹⁹¹ Suzanne Robertson, "Making Sense of Commercial Common Sense," *Victoria University of Wellington Law Review* 49, no. 2 (2018), p.

a ‘substantial danger’ in the post-contractual task of discerning ‘commercially sensible’ constructions, where a judge may find themselves subconsciously influenced by the circumstances that have unfolded since the contract was entered into. On this basis, the hypothetical judge may reach a misguided conclusion as to the ‘commercial sensibility’ of an action (i.e. agreeing to an unfavourable term), and fail to consider the psychological state of the parties at the time of contractual formation.¹⁹² In view of these practical challenges, the judiciary’s confidence in its ability to ascertain consistency in its outcomes may well be unduly optimistic. Accordingly, the degree to which the present framework is ‘legally certain’ may be equally oversold.

The final contention levelled against judicial confidence in appraisals of CCS concerns the degree to which the judiciary overestimates the ‘commercial sensibility’ of the contracting parties, thereby overlooking the notable possibility of commercial parties having approached their engagements with a competitive and optimistic spirit.¹⁹³ This point is raised by Lord Sumption, as he warns against excessive judicial confidence in their appraisals of the ‘commercial reasonableness or likelihood’ of any particular course of action.¹⁹⁴ Similarly, Lewison asserts that judges may have preconceived notions as to what contracts of a specific character set out to achieve. However, Lewison cautions against judicial intervention which seeks to reinterpret the language of the contract to align with such preconceptions, as doing so risks undermining the true intentions of the commercial parties.¹⁹⁵

ii. Judicial Disharmony

In alignment with the findings of the preceding analysis, Richardson compellingly asserts: ‘there is no clear understanding of commercial common sense among the Inner House’.¹⁹⁶ While Richardson’s contention preceded the case of *Ashtead v Granton*, the statement may carry even greater weight in the present context, in light of *Ashtead’s* reassertion of *Grove*-like principles following *@SIPP*. Central to the issue of judicial disharmony is the absence of established judicial guidelines to be considered in commercial cases concerning contractual interpretation. Returning to the essential significance of continuity for legal certainty, Lim contends that the absence of judicial guidance may be obscuring the task for presiding judges, thereby contributing to the inconsistent outcomes observed across cases.¹⁹⁷ Thus, instead of retaining its footing in consolidated normative requirements, Mitchell asserts that CCS is conceptually rooted in judicial value judgements.¹⁹⁸ By nature, these judgements are characteristically malleable, inconsistent, and highly reliant on the individual judge’s experience, as well as their own ethical predispositions. For instance, in *Ashtead*, Lord Drummond Young invited the judiciary to inquire how the ‘reasonable businessman’ might conduct their affairs under the given circumstances, for the

295.

¹⁹² David Neuberger, Lord Neuberger of Abbotsbury, “The Impact of Pre- and Post-Contractual Conduct on Contractual Interpretation,” Banking Services and Finance Law Association Conference, Queenstown, August 11, 2014, [19]–[20].

¹⁹³ Hamblen, “Contractual Interpretation—An Anglo/Australian Journey,” [17].

¹⁹⁴ Jonathan Sumption, Lord Sumption, “A Question of Taste: The Supreme Court and the Interpretation of Contracts,” Harris Society Annual Lecture, Keble College, Oxford, May 8, 2017.

¹⁹⁵ Kim Lewison, *The Interpretation of Contracts*, 6th ed. (Sweet & Maxwell, 2015), p. 208.

¹⁹⁶ Lorna Richardson, “Commercial Common Sense in Contractual Interpretation: Further Views from the Inner House,” *Edinburgh Law Review* 21, no. 3 (2017), p. 429.

¹⁹⁷ Ernest Lim, “Commercial Purpose and Business Common Sense in Contractual Interpretation,” *King’s Law Journal* 23, no. 1 (2012), p. 96.

¹⁹⁸ Mitchell, “Interpreting Commercial Contracts,” pp. 241–42.

purposes of determining the ‘commercially sensible’ construction.¹⁹⁹ However, Moore identifies an inherent difficulty with such a line of reasoning: namely, what constitutes the approach taken by a ‘reasonable businessman’?²⁰⁰ In seeking to replicate a commercially ‘reasonable’ approach, judges may adopt differing perspectives on how the reasonable businessman might approach a given transaction: which commercial factors they would seek to prioritise, which they would be willing to compromise in furtherance of their broader commercial aims and the degree of risk they would be prepared to absorb.²⁰¹ Lord Drummond Young’s notional ‘reasonable businessman’ therefore remains difficult to characterise. In the absence of a uniform conceptualisation of commercial rationality, this construct risks generating conflicting judicial assessments, thereby undermining legal certainty.

3.3. Interpretation or Rectification: The Consent Dilemma

The preceding analysis has indicated that contemporary iterations of CCS plausibly compromise intention’s centrality within the interpretative exercise. On this basis, one of the most potent critiques of the Scottish approach to CCS concerns the degree to which it resists reconciliation with the foundational Scots contract law principles of *consensus in idem* (‘meeting of the minds’) and the sanctity of contract, according to which parties are bound to honour the obligations they have undertaken. Given the elasticity of CCS as a legal concept, concerns have been raised as to the ease with which judges may ‘rectify’ commercial agreements that have unravelled unfavourably for a particular party.²⁰² By characterising commercial engagements by reference to equivalence, proportionality and reasonableness, terms agreed outwith these notional bounds are less likely to be subsequently upheld, notwithstanding their grounding in the parties’ intention. The concern, then, is that the agreement to which the parties bound themselves through consent, capacity and intention may be adjusted so as to align more closely with the judiciary’s conception of commercial good sense. In this manner, the critique concerns whether judicial assessments of commercial rationality have come to occupy the position previously held by contractual intention.

Furthermore, Moore asserts that judges may fall victim to the fallacy of ‘outcome-led’ decision-making, whereby judges apply the relevant legal materials to an intuitive decision made *ex ante*, as opposed to reaching their decisions after having examined the relevant materials.²⁰³ Having analysed the English judiciary’s treatment of CCS across a diverse body of cases, Moore has identified discernible patterns in the decision-making tendencies of presiding judges. Strikingly, Moore’s research revealed a judicial tendency to favour the interests of: (1) non-property parties over property parties; (2) the interests of parties with high contractual adjustment costs over those with relatively lower adjustment costs; and (3) the interests of parties with higher sunk costs over those with

¹⁹⁹ *Ashtead* (n 135) [14].

²⁰⁰ Marc T. Moore, “Commercial Common Sense in Contract Interpretation: A Legal Realist Analysis,” *SSRN Electronic Journal* (2024), p. 5.

²⁰¹ Moore, “Commercial Common Sense in Contract Interpretation,” pp. 5–6.

²⁰² Andrews, “Interpretation of Contracts,” pp. 56–60.

²⁰³ Moore, “Commercial Common Sense in Contract Interpretation,” p. 7.

lower sunk costs.²⁰⁴ While Moore's findings are not determinative in the Scottish context, they may serve as a cautionary illustration. They suggest that, where courts are empowered to evaluate commercial reasonableness in the abstract, such decision-making may be affected by a broader tendency to favour the 'disadvantaged' parties over parties whose cumulative losses would not affect them as gravely.

Appealing to broader notions of justice and fairness may be enticing, but, as Cabrelli has compellingly advanced, a superficially disadvantageous bargain may have been reached through intentional concession and compromise, thereby representing the only means through which the parties were able to reach *consensus in idem*.²⁰⁵ Furthermore, once *consensus in idem* has been attained, it should not be readily displaced in the name of fairness, or other morally charged arguments presented through the language of commercial rationality. To adopt such a course would render Scots law vulnerable to scrutiny on the basis that its current framework risks diminishing the priority traditionally afforded to party consent. In such circumstances, the systemic costs to contractual certainty may ultimately outweigh the hardship experienced by individual parties obliged to perform the agreements they have willingly undertaken.

4. The Policy Argument: When Guesswork Becomes Costly

In *Hoe v Andersen* [2017], the Inner House asserted that CCS serves as an antidote against an 'over-strict and over-literal' approach to contractual interpretation. By enabling the court to consider CCS, parties are relieved of the obligation to account for every conceivable contingency within their contract, thereby shortening contractual documents and reducing transaction costs. By contrast, Richardson maintains that the employment of CCS is likely to give rise to further disputes surrounding the meaning of the contract, thereby raising transaction costs for the parties involved, and placing undue strain on public expenditure.²⁰⁶ Given the present judicial stance on CCS, Richardson's prediction should be heeded. There is a conceivable risk that non-favoured parties may challenge judicial findings on the basis that the 'commercial principles' guiding the courts' consideration of CCS were prioritised over the commercial objective of their agreement. Lower-level courts, seeking to adhere to precedent, may apply the principles established in *Ashtead* when interpreting contracts in future disputes. Where judicial reasoning is guided by an abstract conception of 'commercial good sense', parties dissatisfied with their outcomes may feel incentivised to appeal, thereby prolonging litigation and raising costs both for themselves and for the public treasury. Such procedural inefficiencies may yet be reduced if the judiciary reconsiders the scope and utility of its 'commercial principles' and reaffirms CCS as a tool of contractual interpretation, rather than rectification.

²⁰⁴ Moore, "Commercial Common Sense in Contract Interpretation," p. 17.

²⁰⁵ David Louis Cabrelli, "Interpretation of Contracts, Objectivity and the Elision of Consent Reached through Concession and Compromise," University of Edinburgh School of Law Legal Studies Research Paper Series (2010), pp. 15–16.

²⁰⁶ Richardson, "Commercial Common Sense in Contractual Interpretation," p. 428.

Conclusion

It is no surprise that the greater part of existing literature on CCS advocates the doctrine's redundancy, given the propensity of its modern usage to undermine parties' intentions. In doing so, it poses a plausible threat to the consent-centric foundations of contract law, thereby rendering the case for its retention analytically demanding. However, as this article has demonstrated, such perspectives fail to account for the range of functions attributed to CCS, including its alleged or improper use as a means of quasi-rectification. Indeed, CCS originated as a narrower concept, designed to assist courts in the identification of the construction that most faithfully reflected the parties' objective intention. The practical difficulties that later crystallised did not follow from the proper exercise of this function but emerged once CCS was made to bear a normative weight it was never *designed* to carry. Absurdity prevention is one thing; mandating the cooperation of contractual parties and a broadly equivalent allocation of burdens is quite another. Thus, while the retirement of the CCS doctrine might resolve some of the complexities discussed in Part Two, it would do so only at the cost of a tool that, properly restrained, serves as an asset to contractual interpretation. The correct response, therefore, is not the wholesale abandonment of CCS, but its restoration to its historical and legitimate function.

BIBLIOGRAPHY

- Andrews, Neil. “Interpretation of Contracts and ‘Commercial Common Sense’: Do Not Overplay This Useful Criterion.” *Cambridge Law Journal* 76, no. 1 (2017): 36–62.
<https://doi.org/10.1017/S0008197316000805>.
- Arbuthnot v Fagan* [1995] CLC 1396.
- Arnold v Britton* [2015] UKSC 36, [2015] AC 1619.
- Ashtead Plant Hire Co Ltd v Granton Central Developments Ltd* [2020] CSIH 2, 2020 SC 244.
- BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd* [2013] EWCA Civ 416.
- Cabrelli, David Louis. “Interpretation of Contracts, Objectivity and the Elision of Consent Reached through Concession and Compromise.” University of Edinburgh School of Law Legal Studies Research Paper Series, 2010. <https://doi.org/10.2139/ssrn.1556335>.
- Coal Pension Properties Ltd v Technip UK Ltd* [2021] CSOH 39, 2021 SLT 1224.
- Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All ER (Comm) 601.
- Grove Investments Ltd v Cape Building Products Ltd* [2014] CSIH 43.
- Hamblen, Nicholas, Lord Hamblen of Kersey. “Contractual Interpretation—An Anglo/Australian Journey.” Lehan Lecture, September 3, 2024. <https://supremecourt.uk/speeches/contractual-interpretation>.
- Hodge, Patrick, Lord Hodge. “Can Judges Use Business Common Sense in Interpreting Contracts?” In *Comparative Contract Law: British and American Perspectives*, edited by Larry A. DiMatteo and Martin Hogg, 272–283. Oxford University Press, 2015.
<https://doi.org/10.1093/acprof:oso/9780198728733.003.0029>.
- Hoe International Ltd v Andersen* [2017] CSIH 9, 2017 SC 313.
- Jackson v Dear* [2012] EWHC 2060 (Ch).
- Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279.
- Lewison, Kim. *The Interpretation of Contracts*. 6th ed. Sweet & Maxwell, 2015.
- Lim, Ernest. “Commercial Purpose and Business Common Sense in Contractual Interpretation.” *King’s Law Journal* 23, no. 1 (2012): 94–100. <https://doi.org/10.5235/096157612800081187>.
- Macgregor, Laura. “Crossing the Line between Business Common Sense and Perceived Fairness in Contractual Interpretation.” *Edinburgh Law Review* 19, no. 3 (2015): 378–83.
<https://doi.org/10.3366/elr.2015.0298>.
- MacQueen, Hector Lewis. “Good Faith in the Scots Law of Contract: An Undisclosed Principle?” University of Edinburgh School of Law Working Paper Series, 2011. <https://doi.org/10.2139/ssrn.1905547>.
- MacQueen, Hector Lewis, and Shannon O’Byrne. “The Principle of Good Faith in Contractual Performance: A Scottish-Canadian Comparison.” *Edinburgh Law Review* 23, no. 3 (2019): 301–31.
<https://doi.org/10.3366/elr.2019.0571>.
- Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.
- Mast Group Ltd v Chalmers* [2022] CSOH 43.
- McLauchlan, David. “The Lingering Confusion and Uncertainty in the Law of Contract Interpretation.” *Lloyd’s Maritime and Commercial Law Quarterly* (2015): 406–38. <https://doi.org/10.2139/ssrn.2653500>.
- Mitchell, Catherine. “Interpreting Commercial Contracts: The Policing Role of Context in English Law.” In *Comparative Contract Law: British and American Perspectives*, edited by Larry A. DiMatteo and Martin Hogg, 231–247. Oxford University Press, 2015.
<https://doi.org/10.1093/acprof:oso/9780198728733.003.0027>.
- Mitsui Construction Co Ltd v Attorney-General of Hong Kong* (1986) 33 BLR 1 (PC).

- Moore, Marc T. “Commercial Common Sense in Contract Interpretation: A Legal Realist Analysis.” *SSRN Electronic Journal*, 2024. <https://doi.org/10.2139/ssrn.4838071>.
- Muirhead & Turnbull v Dickson* (1905) 7 F 686.
- Neuberger, David, Lord Neuberger of Abbotsbury. “Express and Implied Terms in Contracts.” School of Law, Singapore Management University, August 19, 2016. <https://supremecourt.uk/speeches/lord-neuberger-at-the-school-of-law-singapore-management-university>.
- Neuberger, David, Lord Neuberger of Abbotsbury. “The Impact of Pre- and Post-Contractual Conduct on Contractual Interpretation.” Banking Services and Finance Law Association Conference, Queenstown, August 11, 2014. <https://supremecourt.uk/speeches/lord-neuberger-at-the-banking-services-and-finance-law-association-conference-queenstown-2>.
- Paterson v Angelline (Scotland) Ltd* [2022] CSIH 33, 2022 SC 240.
- Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900.
- Ravennavi SpA v New Century Shipbuilding Co Ltd* [2007] EWCA Civ 58, [2007] 2 Lloyd’s Rep 24.
- Richardson, Lorna. “‘Commercial Common Sense’ Again: What Role in Contract Interpretation?” *Edinburgh Law Review* 25, no. 1 (2021): 89–94. <https://doi.org/10.3366/elr.2021.0674>.
- Richardson, Lorna. “Commercial Common Sense in Contractual Interpretation: Further Views from the Inner House.” *Edinburgh Law Review* 21, no. 3 (2017): 423–29. <https://doi.org/10.3366/elr.2017.0439>.
- Robertson, Suzanne. “Making Sense of Commercial Common Sense.” *Victoria University of Wellington Law Review* 49, no. 2 (2018): 279–96. <https://doi.org/10.26686/vuwlr.v49i2.5325>.
- Scottish Ministers v Scot Roads Partnership Project Ltd* [2022] CSOH 19.
- Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* [2000] 1 Lloyd’s Rep 339.
- @SIPP Pension Trustees v Insight Travel Services Ltd* [2015] CSIH 91, 2016 SC 243.
- Sumption, Jonathan, Lord Sumption. “A Question of Taste: The Supreme Court and the Interpretation of Contracts.” Harris Society Annual Lecture, Keble College, Oxford, May 8, 2017. <https://supremecourt.uk/speeches/lord-sumption-gives-the-harris-society-annual-lecture-keble-college-oxford>.
- Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173.