"Plain Speaking : or, Calling a Spade an Horticultural Instrument"
– Monday 19 November 2001 –

– Hon Mr Justice Litton, GBM –

The subject of my talk this evening is plain speaking : Simple communication. I regard this is a considerable personal challenge : For if, at the end of the next 25 minutes, I find half of you asleep, and the other half at the exit, not only would I have failed in my personal endeavour : I would have failed the very cause that I espouse with some passion.

I was privileged earlier on in the year to work with the Steering Committee in putting forward draft mortgage documents for consultation with interested parties. The aim of the proposals was to modernize the language and the layout of these essential legal instruments : And many of you will think : Not before time. For who can truly say that they fully understand the effect of legal documents which go on for several pages without any headings, commas and full-stops ?

In working on this project I soon came to realize that I was not involved simply with the technique of legal drafting, but with something much more fundamental : Something that can be encapsulated in one important word : CHANGE. Change brought about by Hong Kong's transition from a British Crown Colony to being a part of China, intimately involved in the evolutionary processes of the Mainland. Economically, we are now wholly integrated with the Mainland and cross-border commerce is Hong Kong's life-blood.

It must be remembered that the forms of legal instruments still in use today in Hong Kong date from 18th Century Britain, when the vast majority of the population was illiterate and instruments such as insurance policies and debentures were the tools of a very small minority of persons : Business people located in a few key cities. And in conducting business in Britain in the 18th Century, only one language was ever used : English. It seems absurd, in this context, to think that such instruments with their forms unchanged might still be relevant in the Hong Kong of today. Hong Kong is a progressive society : We have prospered over the past ½ century because we are responsive to change. As far as forms used for legal documents are concerned, all over the

world they have been modernized. In the English-speaking world plain English is used : It would be difficult now to find in business communities in London or Sydney mortgage deeds using 17th century English : And yet, in Hong Kong, solicitors are still putting forward for their client's signature mortgage deeds, debentures and the like which 150 years before had already attracted scorn from writers like Charles Dickens.

Hong Kong, post-1997, is seeking a new role in the world and a new identity : The slogan "Asia's World City" is much used. It is said that the next phase in our development will be to evolve into a knowledge – based economy. Whatever that may mean, one thing is certain : The communication of ideas holds the key to such evolution. It was Malcolm Forbes – the publisher of Forbes Magazine – who said that the purpose of education is to replace an empty mind with an open mind. So what I would urge is simply this : Do not cling to the old forms and precedents as if they were lifeboats in a stormy sea : They are nothing more than wreckage from the past : Approach the new forms with an open mind.

And remember this : There is a fundamental difference between knowledge and wisdom : knowledge is the process of piling up facts : Wisdom lies in its simplification.

It may not be fully appreciated by the legal profession that, over the past 30 years, a sea-change has occurred over the way the courts approach the construction of documents. Courts are no longer bound simply by the written words. This change was spear-headed by Lord Wilberforce's speech in *Prenn v. Simonds* [1971] 1 WLR 1381 where appeared the well-known passage :

> "The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations."

What this means is that, in construing a written document, courts must look beyond the language and see what the circumstances were with reference to which the words were used, and the *object* which the person using them had in mind.

Then came *Wickman Machine Tool Sales v. Shuler* [1974] AC 235 which concerned an English distributorship for a German manufacturing company. The German company sought to terminate the

agreement on the ground of failure of a "condition". They argued that the word "condition" had acquired a precise legal meaning : a term of a contract the breach of which entitled the other party to rescind : It was to be contrasted with the word "warranty" the breach of which gave a right to damages but did not entitle the injured person to rescind.

The House of Lords (by a majority) held that although that was the primary meaning of "condition" in a legal document, viewed against the object of the contract as a whole, the word should be given its popular sense : The German company was therefore not entitled to rescind the agreement.

A further boost to this approach was given in *Reardon-Smith Line v. Hansen-Tangen* [1976] 1 WLR 989. This is how Lord Denning MR in the Court of Appeal introduced the story :

> "Three months ago a big oil tanker was launched in Japan. She was named *Diana Prosperity*. The name was not well chosen : Prosperity is not her future. She is now nearly completed and ready to be delivered, but no one wants her. There is no work for oil tankers to do. She will be laid up somewhere or other, eating her head off. Someone or other will lose hire. Someone or other will have to pay large sums for laying her up. The loss runs into £11 million, and probably much more. There are likely losses on other tankers newly built. On whom is the loss to fall?"

The story started in 1972 when there was a big demand for tankers. The Sanko group in Japan launched an ambitious scheme to capture the world market : It was called the Sanko plan. They proposed to build 50 tankers of 80,000 tons each to be delivered from 1975 onwards. The deal required enormous sums of money : Existing shipyards had to be enlarged; new shipyards had to be built. To raise the necessary money this is what Sanko did : They granted time charters of the vessels long before they were built at rates considerably *below* the market rates of hire . They made firm fixtures of the non-existing vessels for 10 years onwards, from 1975 : at $3.00 per ton as against the then market rate of $3.50 per ton. The fixtures were binding upon Sanko and the charterers : Sanko were bound to get the tankers built; the charterers were bound to take them. Armed with these charters the Sanko group were able to raise money from the bankers to carry out the plan.

There were sub-charters : The case *Reardon-Smith Line v. Hansen-Tangen* was between English sub-charterers and Norwegian charterers. That sub-charter was made in mid-1973 when charter hire rates were still rising. The hire rate was fixed at $4.50 per ton. Then came the oil crisis in 1974 when the price of oil quadrupled and the market collapsed. Sanko was, of course, holding the Norwegian charterer to its bargain and continued to build. The keel for the ship in question was laid in February 1975 and she was launched in December of the same year. But the Norwegians refused to take delivery. They said that the vessel they had chartered was described as a vessel :

> "… to be built by Osaka Shipbuilding Co. Ltd and known as Hull no. 354 until named …"

But the vessel tendered for delivery was built by a different company : The Oshima Shipbuilding Co Ltd at Oshima, 300 miles from Osaka, and known as hull no. 004 of Oshima. It was however built under the Osaka company's supervision, using many of that company's personnel. The vessel was identical in every other respect with the charter, but the Norwegians said that this difference in description entitled them to refuse delivery. The English sub-charterers took the same point against the Norwegians.

The position regarding the Oshima Shipbuilding Co. Ltd was that it was a joint-venture company 50% owned by the Sanko group. Under Japanese law these shipbuilding contracts could not be carried out without the government's permission. The licence to build granted to the Oshima company gave the hall number as "Hull no. 004, Osaka No. 354".

Could the Japanese company hold the Norwegians to their bargain?

The House of Lords, affirming the decision of the Court of Appeal, said Yes.

The courts are not slaves of words. To arrive at the parties' true intention, the court had to look at the commercial purpose of the transaction : In this regard the identification by hull number was a trivial matter : the stipulation "to be built by Osaka Shipbuilding Co. Ltd and known as Hull no. 354 until named …" was not a condition precedent of the contract. The common sense approach of the courts is emphasized in this passage of Lord Wilberforce's judgment :

> "When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties".

The sea-change which I referred to earlier was emphasized recently in a judgment of Lord Hoffmann's in the House of Lords. The case in question is *I.C.S. Ltd v. West Bromwich Building Society* [1998] 1 WLR 896.

The background to this is the collapse of the equity and property markets in the U.K. in the early 1990s. Home-owners, elderly retired people, had been lured into schemes whereby they mortgaged their homes for investment in equity-linked bonds. The fall in equities and house prices and the rise in interest rates caused them severe losses. They had claims against their financial advisers, building societies and solicitors.

Under an Investors Compensation Scheme a management company ICS Ltd was set up whereby the investors were partly compensated. A claim form was drafted for the investors to sign, whereby they assigned to ICS all their claims – with a reservation against the building societies : the object of this reservation, in essence, was this : In case the building societies went against the investors for the balance, their right to claim an abatement arising from undue influence, and maybe other matters, should be intact. This was section 3(b) of the form, which gave rise to the litigation.

ICS, having partially paid off a group of investors, brought proceedings against the Bromwich Building Society. The building society said : "You have no right to sue us : under s.3(b) of your claim form, the right of suit has been reserved to the investors." So the case turned on the construction of section 3(b).

The claim form was so badly drafted that, in the Court of Appeal, Leggatt LJ simply threw up his hands : He focused on the internal linguistics of the clause and did not look beyond that to the overall object of the transaction. He was reversed in the House of Lords. In Lord Hoffmann's judgment he said that since the modern approach to

construction has gained currency all the old intellectual baggage of "legal" interpretation has been discarded. He summarized the principles in 5 propositions. Let me give us Nos.4 and 5 :

> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax : see *Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd* [1997] A.C. 749.
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> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201 :
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> > "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

You would have noted Lord Hoffmann's reference to *Mannai Investment v. Eagle Star*.

It concerned a long lease of office premises in Jermyn St. London SW1. There was a clause – clause 7(13) – in the lease for early determination by the tenant, by serving not less than six months' notice to expire on the "third anniversary of the term commencement date". The parties were agreed that that date was 13 January 1995.

The tenant served notice in June 1994 as follows :

> "Pursuant to clause 7(13) of the lease we as tenant hereby give notice to you to determine the lease on 12 January 1995".

Was this notice effective to determine the tenancy?

The 12 January was 12 January. It was not 13 January, the contractual date for termination. The argument against the tenant boiled down to this : The notice of termination was not in accordance with the lease; it was inconsistent with the proviso for early termination : As Lord Goff (dissenting) puts it : "The tenant has failed to use the right key which alone is capable of turning the lock".

This is powerful stuff.

To counter that you needed something even more powerful.

The question, ultimately, was how a reasonable recipient of the notice – a reasonable landlord in the position of the respondent – would have understood the notice. Lord Hoffmann approached it in this way : In ordinary speech one can convey meaning unambiguously by using the wrong words.

* As obstinate as an allegory on the banks of the Nile
* "How is Mary?"

In a recent judgment in the Court of Final Appeal *Jumbo King Ltd v. Faithful Properties Ltd* [1999] 2 HKCFAR 279 Lord Hoffmann said :

> "… the Judge's approach [to construction] was far too narrow and literal. The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. And this involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects while it was intended to achieve … the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean".

If there is one thing which I have learned, in the course of 9 years as a Judge, it is this : Words do not persuade. Words are just words. It is the *ideas* behind the words that change minds.

Accent, grammar, pronunciation : these are peripheral matters :

STORY OF ALAIN PROST : Formula 1 driver.

I congratulate the Hong Kong Mortgage Corporation on embarking on a very worthy project and wish it every success.