Why is it so hard to interpret a contract?

Abstract:
Potentially there are three stages in the construction of a written contract corresponding to identification of context (and terms), determining the meaning and legal effect of a contract and the application of the contract and the factual circumstances which have arisen. There is much more to contract construction than a search for meaning. It is necessary to distinguish between analysis of principles of commercial construction and analysis of contract doctrine applied by construction. What a contract means is conceptually distinct from its effect as a matter of law. Although the legal effect of a contract is a matter of intention which is often determined by construction, the main role of construction is to apply contract doctrine.

Construction is a specialised process. The construction of any contract, or communication in connection with a contract or proposed contract, is affected by legal rules. There is no reason to expect the construction process to be supported by any particular theory of language or communication. Equally there seems little doubt that some of the problems in construction as a legal subject stem from adherence to outdated notions about language and communication. An obvious example is the fascination of the law with “plain meaning”. This paper explores, in particular, one aspect of this difficulty and that is the attempts that have been made by Lord Hoffmann, commencing with his speech in the case of Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 to provide some guidance in this difficult area. Lawyers need to understand, since it is often forgotten, that most agreements work and as a matter of commercial reality, it would behove lawyers well to spend more time focusing on what it is that makes agreements work, rather than what to do when they do not. This can be a highly technical area ensnared by a morass of case law. The subject is too vast and it would, indeed, be inappropriate, to undertake a review of that case law in this paper. Instead it concentrates on a particular aspect of contract construction in an attempt to highlight where the law may have taken something of a wrong turning. A list of the cases discussed and any relevant quotations from authority will be distributed at the seminar.

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Biography:
David Yates is a solicitor and a U.S Attorney-at-Law and holds degrees from the Universities of Oxford and Cambridge. He has held appointments in the Universities of Hull, Bristol and Manchester in the U.K. as well as continuing to hold visiting professorships at a number of overseas universities in Australia, the United States and Asia. He is also an Adjunct Professor of Law in the University of Sydney. He was Foundation Professor of Law, Dean of the School of Law and Pro-Vice-Chancellor of the University of Essex before joining Baker & McKenzie, in 1987 as the international firm's Director of Professional Development. He was also a partner in that firm with a practice in general commercial law, international sales and transport law, was the firm’s Director of Strategic Planning and Development, followed by a period before his retirement from legal practice as the Firm’s global Chief Operating Officer (Managing Partner). He is currently the Warden of Robinson College in the University of Cambridge and an Honorary Fellow of St. Catherine’s College Oxford.