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THE *CONTRA PROFERENTEM* RULE: CONTRACT LAW'S GREAT SURVIVOR

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Abstract: The *contra proferentem* rule has been under sustained attack in recent years, as judges doubt whether it has any role to play in modern commercial contract law. This article sheds light on the function of the rule by examining its historical development. The rule has been part of English contract law for over six hundred years, playing very different roles at each stage of its development. Lawyers since the medieval period have criticised the rule, but have succeeded in continually repurposing it to fit with new conceptions of contract law and to address the most pressing concerns of their day. This paper shows that the *contra proferentem* rule can provide a fascinating case study in the development of common law doctrine, and argues that the future need not be wholly bleak for one of our longest-lived canons of construction.

Keywords: contract law, legal history, interpretation, *contra proferentem*

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1. Introduction

The *contra proferentem* rule is in its death throes, at least if recent dicta are to be believed. ‘There are now only skeletal, if any, remains’ of the rule;¹ it is ‘rarely, if ever, of any assistance,’² ‘of uncertain application and little utility,’³ and ‘very much a last refuge, almost an admission of defeat, when it comes to construing a document.’⁴ The weaknesses of the rule are well-rehearsed: it is out of step with the ordinary principles of contractual interpretation; relies on the ‘abstruse’ process of identifying a *proferens*; and ultimately leads to arbitrary results.⁵ These criticisms, however, are nothing new. The *contra proferentem* rule has been part of English law since the medieval period, and lawyers have been noticing the same problems with it for centuries. Yet despite the opprobrium heaped upon it, the rule is perhaps our longest-lived maxim of construction.

A full version of the rule was given by Edward Coke: ‘*verba cartarum fortius accipiuntur contra proferentem*,’⁶ or ‘the words of deeds are to be taken more strongly against the one who put them forward.’ Thus, when the words of a contract are ambiguous, the rule requires us to choose the meaning that is less favourable to the party who put forward the wording. The form of the rule has been remarkably

¹ *Multiplex Construction (Europe) v Dunne* [2017] EWHC 3073 (TCC), [27].

² *K/S Victoria Street v House of Fraser (Stores Management)* [2011] EWCA Civ 904, [68].

³ *CDV Software Entertainment v Gamecock Media Europe* [2009] EWHC 2965, [56].

⁴ *BNY Mellon Corporate Trustee Services v LBG Capital No 1* [2016] UKSC 29, [53].

⁵ *K/S Victoria Street v House of Fraser (Stores Management)* (n 2) [68].

⁶ Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (1st edn, The Societie of Stationers 1628) 36a.

consistent throughout the centuries. However, its substance is more slippery, continually evolving to fit the shifting priorities of contract law. Even today, the rule is difficult to pin down. In what sense must the words of the contract be ‘ambiguous’,⁷ or a meaning ‘less favourable’?⁸ And, perhaps most obviously, what does ‘put forward’ mean?⁹

Staughton LJ, commenting on the difficulty of the rule, once suggested that ‘diligent historical research’ might help to clear it up.¹⁰ Indeed, some modern criticisms of the rule seem to be based on a misunderstanding of its history. One account, for example, explains that it was imported from the civil law by Edward Coke and Francis Bacon. It had little role to play, perhaps applying only to unilateral grants, until the rise of standard form contracts. It was then put to use as ‘an early form of consumer protection.’¹¹ In fact, however, an investigation of the case law shows that the rule has played an important role in contractual interpretation for many centuries.

This article will examine how the rule has been used in England since the medieval period: how have lawyers of the past identified a *proferens*, and why have they seen fit to construe against her? It will demonstrate that explanations of the rule have been constantly changing to adapt to new understandings of contracts. The rule

⁷ JW Carter, “‘Commercial’ Construction and the Canada SS Rules’ (1995) 9 Journal of Contract Law 69, 81f.

⁸ *Hin-Pro International Logistics v Compania Sud Americana de Vapores* [2015] 1 CLC 901, [74].

⁹ Sir Kim Lewison, *The Interpretation of Contracts* (6th edn, Sweet & Maxwell 2015) 391ff.

¹⁰ *Youell v Bland Welch & Co (No 1)* [1992] 2 Lloyds Rep 127, 134.

¹¹ Lewison (n 9) 388f, quoting *Oxonica Energy v Neuftec* [2008] EWHC 2127 (Pat), [90].

therefore provides a case study in the development of common law contract doctrines, and the ways in which their substance can radically change while their form remains stable. A better understanding of the rule's historical functions can also help us to identify the role it can play in contract law today. The article thus concludes by asking what the future ought to hold for the *contra proferentem* rule.

At this stage, it is worth offering one clarification. This article deals only with the *contra proferentem* rule *stricto sensu*: that is, as explained above, a rule that obtains when the words of the contract are ambiguous. It excludes from its scope a separate, but closely related, rule, which requires exclusion clauses to be narrowly interpreted. The rule about exclusion clauses applies even to unambiguous contract terms,¹² and is often considered to be a separate rule entirely.¹³ However, the two rules do have a shared history, which will be discussed briefly below.

2. The Medieval *Contra Proferentem* Rule

The *contra proferentem* rule was first formulated by the glossators of the medieval *ius commune*. It was an amalgam of several older principles of Roman law, which required ambiguous contracts to be interpreted against the party who could have avoided the ambiguity, being variously the stipulator, the lessor or the vendor.¹⁴ It is not clear whether these rules were of much practical significance in classical Roman

¹² Carter (n 7) 82.

¹³ *Youell v Bland Welch & Co. (No. 1)* (n 10) 134. See also the references at n 165 below.

¹⁴ See, for example, D.2.14.39 (Papinian), D.18.1.21 (Paul), and D.34.5.27 (Celsus).

law.¹⁵ However, when the glossators attempted to reduce the Digest's maxims of interpretation to a coherent set of principles, they included *ambiguitas contra proferentem* as a rule of last resort.¹⁶

Like many maxims of the *ius commune*, the rule then percolated into the medieval common law.¹⁷ It was cited there with some regularity since at least the late fourteenth century,¹⁸ in the form of the admonition that a party's words must be taken 'most strongly against him.'¹⁹ In the fifteenth century, the rule was applied both to pleadings and to deeds, in roughly equal proportions.²⁰ It was also used to interpret both ambiguous words and contradictory deeds. In 1429, for example, Juyn CB put the case of one who made a feoffment of land in fee, but reserved the profits of the land for himself. Since this was contradictory, he argued, it was the feoffee who

¹⁵ Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 640.

¹⁶ *ibid.*

¹⁷ On this process, see, for example, Peter Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims* (Edinburgh University Press 1966) 154ff; Norman Doe and Simon Pulleyn, 'The Durability of Maxims in Canon Law: From Regulae Iuris to Canonical Principles' in Troy L. Harris (ed), *Studies in Canon Law and Common Law in Honor of R. H. Helmholz* (Robbins Collection Publications 2015) 309. In this case, canon law may have been an intermediary. The principle is discussed at length in the ordinary gloss to VI.5.13.57: see, for example, col. 836 of the 1582 *Editio Romana*. I am grateful to Lorenzo Maniscalco for his advice on canon law.

¹⁸ One early case is *Plessington v Mowbray & Ellerton* (1382) Mich 6 Ric 2 pl 17 (1996 AF 147-151) 148.

¹⁹ YB (1430) Mich 9 Hen VI pl 31 f49b-50b, 50b; (1522) YB Pas 14 Hen VIII pl 9 f29b-31a, 30a.

²⁰ On pleadings, see, for example, YB (1423) Mich 2 Hen VI pl 1 fl a-4b; YB (1464) Mich 4 Edw IV pl 15 f32b-34b; YB (1505) Mich 21 Hen VII pl 47 f38a-38b.

would have the profits, ‘because the deed will be taken more for the advantage of the feoffee than for the advantage of the feoffor.’²¹ In 1440, Newton CJ applied the rule to the case of an ambiguous deed. If two men granted him all their goods, the deed would pass both the goods that they held in common and the goods they each owned separately, because a deed was to be taken most strongly against its maker.²²

Late-medieval lawyers had a standard explanation for the *contra proferentem* rule. The party who set the terms was responsible for them, and it was his own fault if they later turned out to his disadvantage. In one 1494 case, for example, Sjt Rede argued that a party must perform a bond according to its letter, because ‘it was his folly that he wanted to be thus bound, and also the deed of a man is taken the most strongly against him who made the deed.’²³ This was of a piece with medieval lawyers’ generally uncompromising approach to parties who sought to escape their self-imposed obligations.²⁴ Others occasionally suggested a different rationale for the rule. Thirning CJ, for example, thought that a deed would be taken ‘for the greatest advantage of him to whom the deed was made, and to any meaning that may be understood... so that the grant may be performed, and the will of the grantor observed.’²⁵ The grantor had intended the grant to be made, and so it was better to give it some meaning than to allow it to fail for uncertainty.

²¹ YB (1429) Trin 7 Hen VI pl 21 f43b-44a, 43b.

²² YB (1440) Mich 19 Hen VI pl 7 f3b-4b, 4a.

²³ YB (1494) Hil 9 Hen VII pl 11 f17a-18a, 17b. See also YB (1462) Pas 2 Edw IV pl 6 f2a-4a, 2a.

²⁴ AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1st edn, Oxford University Press 1975) 32; David Ibbetson, ‘Fault and Absolute Liability in Pre-Modern Contract Law’ (1997) 18 *Journal of Legal History* 1, 8f.

²⁵ YB (1406) Trin 7 Hen IV pl 9 16b-17a, 16b.

Even at this stage, there was some ambiguity as to who was a *proferens*. Was it the maker of the deed, as Newton CJ argued, or the grantor, as Juyn CB had suggested? In fact, the two were, at least in theory, one and the same person. During the medieval period, the courts had strict rules about which party must speak which terms in a deed. A grantor must be the one to set out the terms of his grant, whether he used a deed poll, sealed only by him, or an indenture, sealed by both parties.²⁶ Thus, it was possible for lawyers to identify the maker of the deed with the grantor. In a 1423 case, for example, Sjt Paston argued that a feoffment would be taken ‘most strongly against him who enfeoffed me, because it is his own deed.’²⁷

There was, though, a further complication. While many deeds could be made by the grantor alone, some required terms to be spoken by the grantee as well. For example, a lessor could grant the land and reserve the rent,²⁸ but it was the lessee who must covenant to keep the premises in good repair.²⁹ A lease involving such reciprocal grants would have to be made by an indenture, and was often written in the third person.³⁰ Who was the *proferens* of this kind of deed? In 1469, Choke J proposed an answer: an indenture containing reciprocal grants would simply be carved up into the terms spoken by each party. The court must ask ‘who made the deed in that clause which belongs to him,’ considering, for example, who was

²⁶ JM Kaye, *Medieval English Conveyances* (Cambridge University Press 2009) 8.

²⁷ YB (1423) Mich 2 Hen VI pl 2 f4b-5a, 4b.

²⁸ Kaye (n 26) 11.

²⁹ See, for example, *Anon* (1537) Dyer 33a.

³⁰ Kaye (n 26) 8. See also Thomas Littleton, *Tenures* (Robert Redman 1538) 112 (first published in 1481).

granting something in the term at issue.³¹ On this view, each term of a deed could be identified as the grant of one of the parties, so that each party was the *proferens* of some of the terms.

However, there was another contemporary view of indentures, which posed more significant problems for the *contra proferentem* rule. Thomas Littleton, for example, wrote that an indenture sealed by both parties was ‘the deed of both, and also every part of the indenture is the deed of both parties.’³² This was the case even if the terms had been spoken by only one party, or by each party separately in the first person.³³ But if every part of the indenture was made by both parties, how could one of them be identified as the *proferens* of the term? This problem was raised in a case in 1480. Sjt Townshend had argued that a bond must be ‘interpreted more beneficially for the grantee.’³⁴ Bryan CJ responded, ‘You speak well of a deed not indented, but when there is an indenture it is the deed of both of them, by my understanding, so it cannot be taken more beneficially to one than to the other.’³⁵ As early as the fifteenth century, then, a difficulty with the rule’s substance had been noted: in an agreement made by two parties, how could only one be the *proferens*? This problem would not easily be resolved.

3. Indentures and Intentions

³¹ YB (1469) Trin 9 Edw IV pl 22 f19b-22a, 21b.

³² Littleton (n 30) 112v.

³³ Kaye (n 26) 10.

³⁴ YB (1480) Mich 20 Edw IV pl 2 8b-9a, 8b.

³⁵ *ibid.*

The *contra proferentem* rule, however, continued to thrive. By 1535 it was so well-established that Audley LC described it as ‘a maxim in the law,’³⁶ and it was one of the most frequently-cited principles of construction in Plowden’s *Commentaries* and Coke’s Reports.³⁷ Coke appears to have been the first to revive the Latin tag *contra proferentem*,³⁸ followed by Bacon, who described the rule as ‘one of the most common grounds of the law.’³⁹ While the rule was generally seen as a means of interpreting ambiguous documents, it could also be used to determine which part of a contradictory deed would be valid.⁴⁰

As in the medieval period, lawyers identified the *proferens* by asking who was responsible for the term in question. Thus, a grant was to be ‘taken most strongly against the grantor,’⁴¹ and ‘most beneficially for them to whom the grant or gift was made.’⁴² Lawyers continued to argue that nobody should complain about the consequences of his own folly. When applying the rule to pleadings, for example, the

³⁶ YB (1535) Trin 27 Hen 8 pl 6 fl4b-20a, 18b. On the use of maxims in this period, see generally Ian Williams, ‘The Role of Rules: Legal Maxims in Early-Modern Common Law Principle and Practice’ in Maksymilian Del Mar and Michael Lobban (eds), *Law in Theory and History: New Essays on a Neglected Dialogue* (Hart Publishing 2016).

³⁷ By the sixteenth century, the courts had begun to enforce some informal contracts using the action of assumpsit. However, the interpretation of these contracts was a question for the jury: Sir John Baker, *An Introduction to English Legal History* (4th edn, Oxford University Press 2007) 351. Evidence of the rule, therefore, continues to be found only in cases involving contracts made by deed.

³⁸ Coke (n 6) 36a.

³⁹ Francis Bacon, *The Elements of the Common Lawes of England* (1st edn, J More 1630) 11.

⁴⁰ *Baldwin’s Case* (1589) 2 Co Rep 23a, 24a.

⁴¹ *Throckmerton v Tracy* (1555) Plow 145, 152.

⁴² *Reniger v Fogossa* (1550) Plow 1, 10.

Barons of the Exchequer observed that it was ‘reasonable to take it in that sense which makes against [the plaintiff], for if his complaint lies in the other point it is his folly that he did not show it precisely.’⁴³ Likewise, they continued to take a strict approach to contractual obligations, insisting that the law ‘interprets the words and actions of every man most strongly against himself.’⁴⁴ Bacon described the rule as ‘a schoolmaster of wisdom and diligence in making men watchful in their own business.’⁴⁵

However, the issues raised by indentures continued to trouble the courts. In *Browning v Beston* (1555), for example, Sjt Gawdy took the traditional view, arguing that a rent must be reserved by a lessor, rather than being granted by the lessee. It was ‘utterly against reason,’ he said, ‘to take the words of one person as the words of another,’ even when ‘he is party to the same indenture.’⁴⁶ Sjt Morgan replied that ‘the chief matter to be considered is the assent of the parties.’⁴⁷ No words spoken by the lessor could be effective without the agreement of the lessee, as ‘a contract cannot be without an assent between two or more, wherefore the assent of both parties is the perfection of the contract.’ Thus, ‘the law sayeth, that although the words come out of the mouth of the one only, yet they are the words of both in effect and operation of law.’⁴⁸ Sjt Catlyn agreed that ‘in contracts it is not material which of the parties speak the words, if the other agrees to them, for the agreement of the minds of the parties is

⁴³ *Stradling v Morgan* (1560) Plow 199, 202a.

⁴⁴ *Colthirst v Bejushin* (1550) Plow 21, 29.

⁴⁵ Bacon (n 39) 11.

⁴⁶ *Browning v Beston* (1555) Plow 131, 136.

⁴⁷ *ibid* 137.

⁴⁸ *ibid* 138.

the only thing the law respects in contracts.’⁴⁹ Although *Browning* was ultimately decided on a point of pleading, Sjts Morgan and Catlyn’s argument gained an authority of its own.⁵⁰ By the end of the sixteenth century, it was generally accepted that ‘every part of such indentures is the deed of either of the said parties.’⁵¹

The effects of this shift can be seen in the courts’ approach to interpretation. While the medieval courts had been primarily interested in identifying ‘the will of the grantor,’⁵² lawyers of the sixteenth century discussed ‘the intent of both the parties.’⁵³ It was recognised that this focus on the parties’ agreement caused problems for the *contra proferentem* rule. In *Browning*, Sjt Stanford and John Walsh concluded that the rule could not apply to indentures at all. In a deed poll, they explained, ‘the words shall be taken most strongly against the grantor, and most available to the grantee.’ However, ‘it is not so in a deed indented, because the law makes each party privy to the speech of the other.’⁵⁴ Although this argument was occasionally repeated,⁵⁵ there is no indication that it was ever successful.

⁴⁹ *ibid* 140a.

⁵⁰ *Thomas v Ward* (1590) Cro Eliz 202, 202; *Domina Russell v Gulwell* (1599) BL Add MS 25203 f49v, f49v.

⁵¹ William West, *The First Part of Symboleography* (2nd edn, Thomas Wight and Bonham Norton 1598) s 47. See also Coke (n 6) 280v.

⁵² Kaye (n 26) 243. See, for example, YB (1344) Mich 18-19 Edw III pl 91 (RS 362-365) 362.

⁵³ *Chapman v Dalton* (1565) Plow 284, 290a. See also *Browning v Beston* (n 46) 140.

⁵⁴ *Browning v Beston* (n 46) 134.

⁵⁵ *Saunders & Starkey v Stanfourde* (undated) Hunt MS El 482 f70, f72v. This case probably dates from the 1580s.

Other lawyers, therefore, attempted to fold the *contra proferentem* rule into their new approach to the interpretation of deeds, linking the rule to the intentions of the parties. For example, in Edward Hake's *Dialogue on Equity*, composed at the end of the sixteenth century, one participant objected to the rule: a deed could not be 'construed according to the intent of the parties' and, at the same time, 'most beneficially for the grantee.' Hake's explanation was that, although 'deeds and grants must be expounded most for the benefit of grantees,' the grantees were 'not so to be favoured, as that the grant thereby should be expounded contrary to reason, which no doubt it should be if it were construed against the intent of the parties.'⁵⁶

Early modern lawyers had a strong presumption that the parties to a deed would have intended to do what was reasonable.⁵⁷ Their intentions could therefore be discovered using interpretive maxims based on reason, such as the *contra proferentem* rule.⁵⁸ In *Miller v Manwaring* (1633), for example, the court held that 'deeds are to be construed, that they shall pass things according to the intent of the parties, and the strongest against the grantor according to the apparent intent.'⁵⁹ Since both parties wished the grant to be made, it was reasonable to assume that they intended the grantee to benefit by it. The rule was also linked with other interpretive maxims: for example, that a deed should be construed so as to have some effect. In *Dashper v*

⁵⁶ Edward Hake, *Epieikeia: A Dialogue on Equity in Three Parts* (DEC Yale ed, Yale University Press 1953) 54.

⁵⁷ See generally Joanna McCunn, 'Revolutions in Contractual Interpretation: A Historical Perspective' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing 2018) 148ff.

⁵⁸ *Throckmerton v Tracy* (n 41) 160.

⁵⁹ *Miller and Johns v Manwaring* (1633) Cro Car 397, 399.

Dashper (1592), the court explained that the parties did not wish their grant to be ‘utterly void, and therefore it may not reasonably be taken that the grantor intended a void and idle thing or act; therefore the law must expound this grant most beneficially for the grantee.’⁶⁰

Since the courts’ focus was on identifying what the parties would reasonably have intended, the *contra proferentem* rule could be trumped with a reference to the demands of reason. In *Humfrey Lofield’s Case* (1612), a lessee tried to invoke the rule to avoid paying a year’s worth of rent. ‘The words of the reservation are the words of the lessor,’ he argued, ‘and the reservation is his act, and therefore shall not be extended beyond the words.’⁶¹ He was unsuccessful. Coke, commenting on the case, observed that ‘a reservation shall be expounded according to the reasonable intention of the parties, to be collected by the words of their deed.’⁶² Here, it was apparent that the parties had intended the rent to be paid for the whole duration of the lease, so there was no room for the *contra proferentem* rule to operate.⁶³ Similarly, if a construction *contra proferentem* would destroy the force of the deed, the courts would prefer to read the document so as to preserve its effect.⁶⁴

By treating the rule as a means of identifying the parties’ reasonable intentions, lawyers could bypass the awkwardness of separating out their interests. However, they tended to fudge the question of how, exactly, the rule helped them

⁶⁰ *Dashper v Dashper* (1592) 1 And 289, 290. See also *Butt’s Case* (1600) 7 Co Rep 23a, 23a.

⁶¹ *Humfrey Lofield’s Case* (1612) 10 Co Rep 106a, 106b.

⁶² *ibid* 107b.

⁶³ See also *Hill v Grange* (1556) Plow 164, 171a.

⁶⁴ *Mallorye v Payne* (1601) BL Add MS 25203 f358, f360v.

identify the parties' intention. In fact, when discussing the construction of wills, lawyers explicitly contrasted interpretation according to the writer's intention with interpretation *contra proferentem*, suggesting some unease about the relationship between the two.⁶⁵

Indeed, other lawyers of the time seemed unconvinced by the usual explanation of the rule. They took a third approach: accepting that the rule did apply to the interpretation of indentures, but arguing that it had nothing to do with the intentions of the parties. Bacon, for example, explained that the rule made

an end of many questions and doubts about construction of words: for if the labour were only to pick out the intention of the parties, every judge would have a several sense, whereas this rule doth give them a sway to take the law more certainly one way.⁶⁶

For Bacon, the rule was simply a tiebreaker, which helped judges to construe words when the parties' intentions were otherwise unidentifiable. Choosing to construe against the *proferens* was a policy choice: taking deeds for the benefit of grantees was advantageous because it produced 'quiet and certainty' by favouring 'acts and conveyances executed.'⁶⁷ He went on to warn that, being 'a rule of some strictness

⁶⁵ *Le Serjaunts Case* (1567) Hunt MS El 482 f3, f3; *Ewer v Heydon* (1599) 2 And 123, 123.

⁶⁶ Bacon (n 39) 11.

⁶⁷ *ibid.*

and rigour,’ it must be ‘the last to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail.’⁶⁸

The *contra proferentem* rule, then, had survived a major reconceptualisation of contractual interpretation. Now that deeds were no longer seen as collections of each party’s separate grants, the rule was not so straightforward to apply. However, it had acquired a broadly-accepted new explanation: that its function was to identify the reasonable common intention of the parties. But lawyers were not always sure that it could contribute to this goal. Some despaired, suggesting that it was only a rule appropriate for interpreting unilateral grants, or a tool of judicial policy rather than an aid to finding meaning.

In some ways, little changed in the next hundred years. In the eighteenth century, lawyers were still citing Plowden, Coke and Bacon as authority for the *contra proferentem* rule,⁶⁹ and providing familiar explanations for it. Jeffrey Gilbert, for example, wrote that the rule would encourage grantors ‘to avoid all ambiguity and obscurity’ in their words.⁷⁰ In *Drinkwater v Corporation of the London Insurance* (1767), Wilmot CJ opined that ‘in a doubtful case, I think the turn of the scale ought to be given against the speaker, because he hath not fully and clearly explained himself.’⁷¹

⁶⁸ *ibid* 16.

⁶⁹ *Franks v Martin* (1759) 1 Eden 309, 320; *Lord Paget v Milles* (1781) 3 Doug. K.B. 43, 43.

⁷⁰ Columbia Law School Singleton MS 31, f145. I am grateful to Michael Lobban for this reference.

⁷¹ *Drinkwater v Corporation of the London Assurance* (1767) 2 Wils. K.B. 363, 364.

At the same time, though, a different approach to the rule was beginning to come to the fore. Until now, lawyers had largely focused on the party who had spoken the words. During the eighteenth century, however, they began to consider more explicitly the position of the other party, who had relied on or given something in exchange for the *proferens*' promise. In 1737, for example, Henry Ballow drew a contrast between deeds and wills. Since a will was 'for the benefit of the testator,' it would not be taken most beneficially for the devisee. However,

a deed imports a valuable consideration, and is for the advantage of the grantee alone; and therefore if there be any doubt in the sense, the words are to be taken most forcibly against the grantor, that he may not by the obscure wording find means to evade it.⁷²

Similarly, Matthew Bacon wrote that a grant was to be construed 'most strong against the grantor, because he is presumed to have received a valuable consideration for what he parts with.'⁷³ Although valuable consideration was not actually required

⁷² Henry Ballow, *A Treatise of Equity* (1st edn, Nutt & Gosling 1737) 51. Ballow borrowed heavily from the works of Samuel Pufendorf, as annotated by Jean Barbeyrac: David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 2002) 218, n 98. Pufendorf argued that using ambiguous words could be tantamount to lying, but did not link this point to the *contra proferentem* rule: Samuel Pufendorf, *Of the Law of Nature and Nations* (Basil Kennett tr, 4th edn, J Walthoe et al 1729) 324; see Hans Erich Troje, 'Ambiguitas Contra Stipulatorem' (1961) 27 *Studia et documenta historiae et iuris* 93, 107. Barbeyrac noted the rule at a later point in the treatise, explaining it on the basis that the obligor ought to speak clearly: Samuel Pufendorf 537, n 4.

⁷³ Matthew Bacon, *A New Abridgment of the Law*, vol 2 (1st edn, Lintot 1736) 665.

for contracts made by deed, lawyers presumed that there was some kind of reciprocity involved in the transaction, which justified the application of the rule.⁷⁴

William Blackstone's treatment of the rule was an amalgam of the old and the new. He began with the essentially medieval explanation: it would 'make men sufficiently careful, not to prejudice their own interest by the too extensive meaning of their words.' Like Ballow, however, he also thought that it would prevent parties acting unfairly: it would ensure that 'all manner of deceit in any grant is avoided,' since parties could not 'affect ambiguous and intricate expressions' to exploit later. He then retreated to the sixteenth century, citing *Browning* to explain that the rule did not apply to indentures, but only to deeds poll. He concluded by quoting Francis Bacon: 'this, being a rule of some strictness and rigour, is the last to be resorted to, and is never to be relied upon, but where all other rules of exposition fail.'⁷⁵ Blackstone's account, then, was heavily reliant on centuries-old sources. However, within decades, a slew of new treatises would reshape English understandings of contract law, and put a new spin on the *contra proferentem* rule.

4. Consensus and the Objective Principle

⁷⁴ It was presumed that a deed was made on good consideration: William Blackstone, *Commentaries on the Laws of England*, vol 2 (1st edn, Clarendon Press 1766) 296. However, this does not explain Ballow's and Bacon's insistence that there was a presumption of valuable consideration, since the two concepts were quite separate: *ibid* 297.

⁷⁵ Blackstone (n 74) 380.

Contract law theory first got off the ground in England in the early nineteenth century.⁷⁶ Judges and treatise writers developed a model of contract law strongly influenced by will theory, especially by the writings of the French jurist Robert Joseph Pothier.⁷⁷ They emphasised the centrality of the parties' agreement: a contract was formed when the minds of the parties met and reached a consensus.⁷⁸ It would obviously not be easy to fit the *contra proferentem* rule into this model. Pothier himself acknowledged the rule as one of last resort; its explanation, again, was that 'the creditor must blame himself for not having explained himself better.'⁷⁹ Had English lawyers accepted will theory whole-heartedly, they might have continued to doubt whether the rule applied to agreements at all.

Contra proferentem, however, was swiftly thrown a lifeline. The common law's acceptance of will theory was attenuated by its adoption of the objective principle, which emphasised the parties' apparent agreement over their actual states of mind.⁸⁰ The principle, as espoused by Joseph Chitty, was derived from the moral philosophy of William Paley.⁸¹ Paley was more concerned with the promisee's

⁷⁶ AWB Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 LQR 247, 250. By this stage, contracts not under seal had long been actionable. Jury trials began to disappear from contract cases in the mid-nineteenth century: Ibbetson (n 72) 221, fn 8. The *contra proferentem* can therefore be found in cases on all kinds of contracts in this period. The courts applied the same rules of construction to all written contracts: *Seddon v Senate* (1810) 13 East 63, 74.

⁷⁷ Ibbetson (n 72) 220; Simpson (n 76) 255f.

⁷⁸ Simpson (n 76) 265f.

⁷⁹ Robert Joseph Pothier, *Traité Des Obligations*, vol 1 (1st edn, Debure l'aîné 1761) 109.

⁸⁰ Ibbetson (n 72) 221.

⁸¹ Joseph Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal* (2nd edn, S Sweet 1834) 62f. Paley's theory was first included in Chitty's expanded second edition.

expectations than the intentions of the promisor. He argued that a promise must be understood in the sense ‘in which the promisor believed that the promisee accepted his promise,’⁸² in order to prevent the promisor from exploiting deliberate ambiguities in his words.⁸³ Later in the century, the principle was refined. As Frederick Pollock observed, Paley’s rule might ‘give the promisee either too much or too little.’ Pollock’s version of the principle therefore introduced an element of reasonableness: ‘the right meaning of any expression is that which may be fairly presumed to be understood by it.’⁸⁴

Nineteenth-century discussions of the *contra proferentem* rule were slotted into this model. Chitty, for example, made much the same points as Blackstone: the purpose of *contra proferentem* was to ‘defeat studied ambiguity and deceitful intricacy of expression,’ but, being ‘of some strictness and rigour,’ it was a rule of last resort.⁸⁵ This explanation fit well with Chitty’s wholesale adoption of Paley’s objective principle, which was also intended to prevent the promisor from making ‘his escape through some ambiguity in the expressions which he used.’⁸⁶ Later in the century, lawyers began to emphasise the rule’s association with a reasonable

⁸² William Paley, *The Principles of Moral and Political Philosophy* (1st edn, R Faulder 1785) 107.

⁸³ *ibid* 108; see John Phillips, ‘Smith v Hughes (1871)’ in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing 2008) 213.

⁸⁴ Sir Frederick Pollock, *Principles of Contract* (5th edn, Stevens and Sons 1889) 235. Compare the formulations of the principle offered by Blackburn J and Hannen J in *Smith v Hughes* (1870-71) L.R. 6 Q.B. 597 at 607 and 610 respectively.

⁸⁵ Chitty (n 81) 80.

⁸⁶ *ibid* 63. See also Thomas Platt, *A Practical Treatise on the Law of Covenants* (1st edn, Saunders and Benning 1829) 141.

understanding of the contract, linking it to the later form of the objective principle. In *Fowkes v Manchester and London Life Assurance* (1863), Blackburn J explained that the *contra proferentem* rule required ambiguous words ‘to be construed in that sense in which a prudent and reasonable man on the other side would understand them.’⁸⁷

Lawyers also continued to refer to the rule’s traditional justification: the *proferens* only had himself to blame if he left an ambiguity in his terms. One casebook explained that ‘natural self-love will prevent a man from unnecessarily using language to his own disadvantage.’⁸⁸ However, this explanation was now often combined with a concern for the other party’s interests. Richard Preston, for example, wrote that the purpose of the rule was both ‘to prevent any injury from the use of ambiguous terms, and to punish the party whose meaning they express.’⁸⁹ Again, such arguments were often linked to the objective principle.⁹⁰

As in the sixteenth century, however, there were sceptics. Some lawyers found the rule impossible to reconcile with their general approach to contractual interpretation, and concluded that it was simply a policy-based, or even an arbitrary,

⁸⁷ *Fowkes v Manchester and London Life Assurance and Loan Association* (1863) 3 B. & S. 917, 929f.

⁸⁸ John William Smith, *A Selection of Leading Cases on Various Branches of the Law*, vol II (Thomas Willes Chitty, John Herbert Williams and Walter Hussey Griffith eds, 12th edn, Sweet & Maxwell 1915) 510.

⁸⁹ Edward Hilliard and Richard Preston (eds), *Sheppard’s Touchstone of Common Assurances* (7th edn, J & W T Clarke 1820) 88.

⁹⁰ Herbert Broom, *A Selection of Legal Maxims, Classified and Illustrated* (Herbert F Manisty and Herbert Chitty eds, 7th edn, Sweet & Maxwell 1900) 446. See *Mayer v Isaac* (1840) 6 M. & W. 605, 612.

tiebreaker. Broom, for example, followed Bacon, explaining that the rule helped to quash doubts and encourage quiet possession.⁹¹ Pollock, meanwhile, thought that it was ‘entitled, as it were, only to a casting vote’ when the parties ‘had no intention at all’ on the point. Since ‘any rule not inconsistent with justice is better than uncertainty,’ he approved using *contra proferentem* to ‘turn the scale,’ adding that it ‘matters little’ whether the rule had a convincing explanation or not.⁹²

Lawyers were also still finding it difficult to identify the *proferens*. Several treatise writers followed Blackstone and asserted that the rule applied only, or at least most convincingly, to deeds poll, although this was not in fact the case in practice.⁹³ Others referred off-handedly to the *proferens* as ‘the party who used’ the words,⁹⁴ but this was not always helpful. In *Birrell v Dryer* (1884), for example, an issue arose on the meaning of a term in a marine insurance policy that ‘warranted no St Lawrence between the 1st of October and the 1st of April.’ The question was whether this term prohibited navigation of the Gulf of St Lawrence or only the River St Lawrence. Lords Blackburn and Watson objected to the application of the *contra proferentem* rule on the ground that the term could not ‘be considered as the words of one party

⁹¹ Herbert Broom, *A Selection of Legal Maxims, Classified and Illustrated* (1st edn, Maxwell & Son 1845) 129.

⁹² Pollock (n 84) 245.

⁹³ Broom (n 91) 129; George Frederick Wharton, *Legal Maxims, with Observations and Cases* (2nd edn, Law Times 1892) 190; Stephen Martin Leake, *Principles of the Law of Contracts* (AE Randall ed, 4th edn, Stevens and Sons 1902) 150.

⁹⁴ Sir William R Anson, *Principles of the English Law of Contract* (1st edn, Clarendon Press 1879) 242; Pollock (n 84) 245.

more than the other.’⁹⁵ Lord Watson observed that, while the underwriters were usually the *proferentes* in an insurance policy, the term in question had actually been inserted by the shipowner to obtain a lower premium.⁹⁶ However, the identification of the *proferens* must depend, not on the history of the drafting, but on the ‘character and substance of the condition.’ Here, ‘in substance, its authorship is attributable to both parties alike,’ because it was ‘a definition of the subject-matter of the insurance.’⁹⁷ Not all terms, then, could be interpreted *contra proferentem* at all.

The rule was certainly still one of last resort.⁹⁸ Henry Colebrooke wrote that it could only be considered ‘as a last resource of interpretation, in case of doubt, if the obscurity cannot be cleared up by the intention of the contracting parties, or by any other circumstance, and all rules of exposition of words fail.’⁹⁹ In *Birrell*, Lord Selborne LC found that there was in fact no ‘ambiguity or uncertainty, sufficient to prevent the application to this case of the ordinary rules and presumptions of construction.’ The ‘fair and natural meaning’ of the words ‘no St Lawrence’ excluded both Gulf and River. There was therefore no ‘necessity for resorting to presumptions in favour of or against either party.’¹⁰⁰

⁹⁵ *Birrell v Dryer* (1884) 9 App Cas 345, 352.

⁹⁶ *ibid* 354.

⁹⁷ *ibid*.

⁹⁸ *Chitty* (n 81) 80; *Broom* (n 91) 441, 447; *Lindus v Melrose* (1858) 3 H. & N. 177, 182.

⁹⁹ Henry Thomas Colebrooke, *Treatise on Obligations and Contracts*, vol I (1st edn, Black, Kingsbury, Parbury and Allen 1818) 72.

¹⁰⁰ *Birrell v Dryer* (n 95) 350.

In *Taylor v Corporation of St Helens* (1877), Jessel MR argued trenchantly that, even as a rule of last resort, *contra proferentem* was entirely otiose. Although he admitted that it was found ‘in a great many textbooks, and, I am afraid, also in a great many judgments of ancient date,’ he thought that it could not

be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty.¹⁰¹

A few later writers noted Jessel MR’s critique, but only to dismiss it.¹⁰² They observed that the maxim had subsequently been approved by the House of Lords, without reference to *Taylor*. Furthermore, the cases cited by Jessel MR as authority for his ‘ordinary and proper rules of construction’ all concerned the interpretation of wills, to which the *contra proferentem* rule had certainly never applied.¹⁰³ As the Michigan Law Journal pointed out, Jessel MR was somewhat begging the question by declaring that it was not one of these rules in the first place.¹⁰⁴ And, the authors argued, was it not better to adopt the *contra proferentem* rule than to let the grant

¹⁰¹ *Taylor v Corporation of St Helens* (1877) 6 Ch D 264, 270f.

¹⁰² JM Lely, *Wharton’s Law-Lexicon: Forming an Epitome of the Law of England* (10th edn, Stevens and Sons 1902) 788; Joseph Chitty, *A Treatise on the Law of Contracts* (JM Lely ed, 14th edn, Sweet & Maxwell 1904) 102; Pollock (n 84) 245.

¹⁰³ Bacon, for example, wrote that the ‘rule hath no place at all... in devises and wills’: Bacon (n 39) 24. See also the cases cited at n 65 above.

¹⁰⁴ ‘Contra Proferentem’ (1897) 6 Mich L. J. 213, 217.

perish, and permit the grantor to avoid his grant?¹⁰⁵ In the event, Jessel MR's broadside had little effect.

At the end of the nineteenth century, then, the *contra proferentem* rule had been wrestled into a paradigm of contract law based on will theory and the objective principle. However, it also had its detractors. Many lawyers felt that their ordinary rules of construction were sufficient to identify the meaning of the contract. They thought of the *contra proferentem* rule as an extraordinary tiebreaker, and not a way of identifying meaning at all. The problems of using the rule in practice had also become more acute. Since lawyers were now so focused on the parties' agreement, they found it difficult, or even impossible, to identify the *proferens* of a term.

5. The Rise of Consumer Protection

The rule, however, was about to find a new niche. In the late eighteenth century, lawyers were already arguing that it was 'peculiarly necessary' to construe fire insurance policies *contra proferentem* because they were 'entered into without examination, and without any previous negotiation.'¹⁰⁶ By the mid-nineteenth century, the rule was being cited increasingly often in cases on standard form contracts, often consumer insurance policies.¹⁰⁷ In *Anderson v Fitzgerald* (1853), Lord St. Leonards noted that such contracts were 'often entered into with men in

¹⁰⁵ *ibid* 218.

¹⁰⁶ *Routledge v Burrell* (1789) 1 H. Bl. 254, 256.

¹⁰⁷ For example, *Borradaile v Hunter* (1843) 5 Man. & G. 639; *Anderson v Fitzgerald* (1853) IV House of Lords Cases (Clark's) 484; *Fowkes v Manchester and London Life Assurance and Loan Association* (n 87).

humble conditions of life, who can but ill understand them.’¹⁰⁸ As a result, they ‘ought to be so framed, that he who runs can read.’¹⁰⁹ Unless the words were clear, he warned, they would

lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable portion of their income, when in point of fact, from the very commencement, the policy was not worth the paper upon which it was written.¹¹⁰

As the use of standard form contracts increased, and judicial fears over their propriety with it, the *contra proferentem* rule began to be seen primarily as a tool for protecting these ‘humble men.’

Standard form contracts themselves were nothing new. They had been used for marine insurance, for example, since the sixteenth century, but generally between merchants of equal commercial experience and bargaining power.¹¹¹ Problems only arose when parties with greater economic power began to use standard forms to

¹⁰⁸ *Anderson v Fitzgerald* (n 107) 510.

¹⁰⁹ *ibid* 510.

¹¹⁰ *ibid* 507. See also *Fowkes v Manchester and London Life Assurance and Loan Association* (n 87) 925.

¹¹¹ Guido Rossi, *Insurance in Elizabethan England: The London Code* (Cambridge University Press 2016) 27. For a history of standard form contracts, see generally O Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law* (Sweet & Maxwell 1937) 10ff.

impose terms disadvantageous to weaker parties.¹¹² This use of standard forms resulted in a fundamental shift in how contracts were understood. It was difficult to maintain that contracts were based on the parties' will when, as Friedrich Kessler observed, one party's contractual intention was 'but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.'¹¹³ The parties' agreement was shown to be 'little more than a façade.'¹¹⁴

What was bad for will theory was, however, a boon to the *contra proferentem* rule. When one party simply assented to terms stipulated by the other, it was easy to identify the *proferens*. With the parties' intentions in the background, greater reliance had to be placed on the objective principle.¹¹⁵ And, as we have seen, lawyers had long thought that the *contra proferentem* rule could be used to prevent a *proferens* from acting unconscionably by taking advantage of an ambiguity she herself had created. Since this problem was even more acute with standard form contracts, the rule was an obvious tool for judges seeking to protect the weaker parties in such agreements.¹¹⁶ These were often, but not always, consumers: many cases involved standard form contracts between two commercial parties.¹¹⁷ By 1967, one commentator could

¹¹² Prausnitz (n 111) 16.

¹¹³ Friedrich Kessler, 'Contracts of Adhesion - Some Thoughts about Freedom of Contract' (1943) 43 Columbia Law Review 629, 632.

¹¹⁴ Ibbetson (n 72) 248.

¹¹⁵ *ibid* 246.

¹¹⁶ Kessler (n 113) 633.

¹¹⁷ The form was usually drafted by one party: see, for example, *The Baltyk* [1948] P 1; *Fluflon v Frost* [1966] FSR 184; *Jaques v Lloyd D George & Partners* [1968] 1 WLR 625. Occasionally the courts

observe that exclusion clauses in standard form contracts provided ‘the most frequent illustrations of the *contra proferentem* rule.’¹¹⁸

When applying the rule, judges at least claimed to find the words they were construing ambiguous. As Stephen Waddams has observed, it is not very useful to accuse them of being disingenuous, since ‘in many cases it is a matter of opinion how far the court has been influenced by the thought that an adverse interpretation would make the contract unconscionable.’¹¹⁹ Nonetheless, there are some twentieth-century cases where a finding of ambiguity does rather seem to strain credulity. In *English v Western* (1940), for example, a car insurance policy excluded liability for ‘death or injury to any member of the assured’s household who is being carried’ in the car. The Court of Appeal found that this was ambiguous, since ‘a member of the assured’s household’ could mean either a member of the same household as the assured, or a member of a household of which the assured was the head. They duly read the clause *contra proferentem*, holding that it required the assured to be the householder.¹²⁰ Since the assured was a seventeen-year-old boy, and the injured party his sister, the case fell outside the exclusion clause.¹²¹

considered applying the rule to an industry standard form: *Louis Dreyfus & Cie v Parnaso Cia Naviera* [1959] 1 QB 498.

¹¹⁸ Gerald Dworkin (ed), *Odgers’ Construction of Deeds and Statutes* (5th edn, Sweet & Maxwell 1967) 98.

¹¹⁹ SM Waddams, ‘Unconscionability in Contracts’ (1976) 39 MLR 369, 382.

¹²⁰ *English v Western* [1940] 2 KB 156, 163f.

¹²¹ *ibid* 166f. *Lake v Simmons* may be thought to be another dubious case. There, the notion of ‘entrusting’ a customer with goods was found to be ambiguous, and, in its narrow sense, not to cover handing over goods for the customer to take away: *Lake v Simmons* [1927] AC 487.

The courts were primarily concerned that companies were taking advantage of consumers by framing their contracts in ambiguous terms. In *Etherington v Lancashire and Yorkshire Accident Insurance* (1909), for example, Vaughan Williams LJ quoted Lord St. Leonards' judgment in *Anderson v Fitzgerald*, arguing that a policy that was not clearly expressed might cause a misunderstanding with serious consequences for the insured. As a result, the *contra proferentem* rule must apply 'strongly' to insurance policies.¹²² Similarly, in *Houghton v Trafalgar Insurance* (1954), Romer LJ explained that a car insurance policy 'ought to be clear and unambiguous so that the motorist knows exactly where he stands.'¹²³ Other judges recognised that, by attempting to remedy this procedural unfairness, they were also striking a blow for the substantive fairness of the contract. In *Kelly v Cornhill Insurance* (1964), Lord Reid expressly linked the *contra proferentem* rule to the realisation of a fair result: 'if the company do not choose to be more explicit, we must reach a reasonable result as best we can.'¹²⁴ Lord Denning MR viewed all techniques of adverse construction as barely-disguised attempts to control the substantive reasonableness of terms.¹²⁵

The *contra proferentem* rule was only one of a suite of techniques of adverse construction used by the courts, alongside, for example, the rule that exclusion clauses

¹²² *Etherington v Lancashire and Yorkshire Accident Insurance Company* [1909] 1 KB 591, 596.

¹²³ *Houghton v Trafalgar Insurance* [1954] 1 QB 247, 250. See also *Alder v Moore* [1961] 2 QB 57, 68.

¹²⁴ *Kelly v Cornhill Insurance Co* [1964] 1 WLR 158, 168.

¹²⁵ *Gillespie Brothers & Co v Roy Bowles Transport* [1973] QB 400, 415.

must be narrowly construed, and the doctrine of fundamental breach.¹²⁶ As has already been explained, we are here only concerned with the *contra proferentem* rule *stricto sensu*: the rule that is invoked on the basis of some ambiguity in the language of the contract. In contrast, neither the rule about exclusion clauses nor the doctrine of fundamental breach is premised on the existence of ambiguous language. However, it would be remiss not to note how closely these rules are connected to *contra proferentem*. They require the narrow construction of terms that allow a party ‘to diminish or exclude his basic obligation, or any common law duty which arises apart from contract.’¹²⁷ Although the words of the exclusion clause itself may be clear, the contract seems contradictory: the party is ‘taking with one hand what had been given with the other.’¹²⁸ This dissonance between the language of the clause and the apparent purpose of the contract creates an ambiguity of its own.¹²⁹ Thus, the rule about exclusion clauses can be seen as an instance of construing a contradictory document *contra proferentem*. As we have seen, the *contra proferentem* rule has been used in this way since the medieval period, and has long been linked to the principle that a grantor is presumed not to derogate from his own grant. In its broadest sense, then, *contra proferentem* also covers the rule about exclusion clauses and the doctrine

¹²⁶ Waddams (n 119) 382. For a discussion of these techniques, see Dworkin (n 118) 100ff.

¹²⁷ *Youell v Bland Welch & Co. (No. 1)* (n 10) 134.

¹²⁸ *Bank of Credit and Commerce International v Ali* [2002] 1 AC 251, 278; see also Edwin Peel, ‘Whither Contra Proferentem?’ in Burrows, Andrew and Peel, Edwin (eds), *Contract Terms* (1st edn, Oxford University Press 2007) 66.

¹²⁹ Andrew Robertson, ‘Purposive Contractual Interpretation’ Legal Studies (forthcoming).

of fundamental breach. Indeed, some judges have used '*contra proferentem*' loosely to describe the narrow construction of even unambiguous exclusion clauses.¹³⁰

The problem with adverse construction, however, is that it is an ineffective way to control the substantive fairness of contracts. Commentators have frequently warned that, at some point, the contract will be so clearly written that the court cannot possibly construe it *contra proferentem*.¹³¹ Examining the issue in 1975, the Law Commission concluded that exclusion clauses were 'in many cases a serious social evil' and that the rules of adverse construction were 'far from adequate' to control them.¹³² Their report led to the Unfair Contract Terms Act 1977, which allowed the courts to control the substantive reasonableness of exclusion clauses. This was followed in 1994 by legislation implementing an EEC Directive on unfair terms in consumer contracts.¹³³ The Directive not only imposed controls on unfair terms, but also provided for a statutory form of the *contra proferentem* rule: 'where there is doubt about the meaning of a term, the interpretation most favourable to the consumer

¹³⁰ *John Carter v Hanson Haulage* [1965] 2 QB 495, 504; *Adams v Richardson & Starling* [1969] 1 WLR 1645, 1653.

¹³¹ *Gillespie Brothers & Co v Roy Bowles Transport* (n 125) 415; KN Llewellyn, 'Book Review' (1939) 52 Harvard Law Review 700, 703; Dworkin (n 118) 99; Waddams (n 119) 379. A good example is *Re Brown's Claim* [1915] 2 Ch 167. The Court of Appeal reluctantly refused to apply the *contra proferentem* rule to an unambiguous insurance policy: *ibid* 170.

¹³² The Law Commission and Scottish Law Commission, 'Exemption Clauses: Second Report' (1975) Law Com No 69, Scot Law Com No 39, 19.

¹³³ Council Directive 1993/13/EEC on unfair terms in consumer contracts. This was originally implemented by the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159; followed by the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083; and now the Consumer Rights Act 2015, Part 2.

shall prevail.’¹³⁴ Lewison has observed that there is ‘no significant difference between the *contra proferentem* principle and this statutory rule of interpretation.’¹³⁵ Except, presumably, the obvious: the statutory rule is solely a means of protecting consumers, the trader being conclusively presumed to be the *proferens*.

This legislation prompted a ‘far reaching change in judicial attitude’ to the construction of contracts.¹³⁶ In *Photo Production v Securicor* (1980), for example, Lord Diplock noted that the courts had sometimes placed ‘very strained constructions upon exclusion clauses, mainly in what to-day would be called consumer contracts and contracts of adhesion.’ He thought that ‘any need for this kind of judicial distortion of the English language has been banished’ by the 1977 Act.¹³⁷ The courts should rely on the protections of the Act, and no longer strain to find ambiguities in commercial contracts.¹³⁸ However, this did not necessarily mean that the *contra proferentem* rule was surplus to requirements. Their Lordships’ disapproval was directed at techniques of adverse construction in general, rather than *contra proferentem* in particular, and they specifically exempted cases that genuinely turned

¹³⁴ Dir 1993/13/EEC, art 5; UTCCR 1994, reg 6; UTCCR 1999, reg 7(2); Consumer Rights Act 2015, s 69(1).

¹³⁵ Lewison (n 9) 403.

¹³⁶ *ibid* 607.

¹³⁷ *Photo Production v Securicor Transport* [1980] AC 827, 851.

¹³⁸ See also *George Mitchell (Chesterhall) v Finney Lock Seeds* [1983] QB 284, 297ff.

on the construction of the contract.¹³⁹ Where there was a true ambiguity, the *contra proferentem* rule would still have a role to play.¹⁴⁰

Events, however, were to vindicate the warning given by Karl Llewellyn in 1939. Since rules of adverse construction ‘purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction, they seriously embarrass later efforts at true construction.’¹⁴¹ The *contra proferentem* rule, having been fixed in lawyers’ minds as a tool of consumer protection, would now struggle to be understood as a genuine rule of contractual interpretation.

6. *Contra Proferentem* and ICS

At first, it seemed as though older conceptions of the rule might reassert themselves. In *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong* (1996), Lord Mustill explained that

the basis of the *contra proferentem* principle is that a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if the words leave room for doubt

¹³⁹ *Photo Production v Securicor Transport* (n 137) 845. See also *Ailsa Craig Fishing Co v Malvern Fishing Co* [1983] 1 WLR 964, 966.

¹⁴⁰ See also *Carter* (n 7) 90.

¹⁴¹ Llewellyn (n 131) 703.

about whether he is intended to have a particular benefit there is reason to suppose that he is not.¹⁴²

The antecedents of this discussion should be plain. Like generations of lawyers before him, Lord Mustill thought that the rule was part of an exercise in identifying the reasonable meaning of the parties. In Anson's *Law of Contract*, *Tam Wing Chuen* was used as the new authority for an explanation of *contra proferentem* originally derived from the 1863 case of *Fowkes v Manchester and London Life Assurance and Loan Association*.¹⁴³

The common law of contractual interpretation, however, was about to be revamped by Lord Hoffmann. In *Investors Compensation Scheme v West Bromwich Building Society* (1998) (*ICS*), he declared that interpretation was 'the ascertainment of the meaning which the document would convey to a reasonable person' in the position of the parties.¹⁴⁴ On the face of it, there was no reason why *contra proferentem* could not be slotted into this scheme, as one aspect of the objective principle. However, Lord Hoffmann had a strong dislike of anything that smacked of an interpretive maxim. In *ICS*, he deplored maxims as 'the old intellectual baggage of "legal" interpretation';¹⁴⁵ elsewhere, he described them as 'slightly repellent.'¹⁴⁶ The rules of interpretation were to be assimilated 'to the common sense principles by

¹⁴² *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong* [1996] BCC 288, 394.

¹⁴³ J Beatson (ed), *Anson's Law of Contract* (27th edn, Oxford University Press 1998) 159. The reference to *Fowkes* had been dropped in the 22nd edition.

¹⁴⁴ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912.

¹⁴⁵ *ibid.*

¹⁴⁶ Lord Hoffmann, 'The Intolerable Wrestle with Words and Meanings' (1997) 114 SALJ 656, 657.

which any serious utterance would be interpreted in ordinary life,’¹⁴⁷ which certainly did not include obscure Latin sayings. A reasonable person, taking into account the context of the contract, ought to be able to identify its meaning without any ambiguity.¹⁴⁸ If ambiguity persisted, she would prefer the meaning that accorded best with business common sense.¹⁴⁹ She would have no need for the *contra proferentem* rule.

In the wake of *ICS*, lawyers began to wonder whether *contra proferentem* remained part of their ‘intellectual hand luggage’ allowance.¹⁵⁰ The consensus was that it probably did, but that it was not a part of the *ICS* scheme. Lord Neuberger described the rule as ‘very much a last refuge, almost an admission of defeat, when it comes to construing a document.’¹⁵¹ It must only be resorted to if ordinary principles of construction failed. In *K/S Victoria Street v House of Fraser* (2011), he explained that

‘rules’ of interpretation such as *contra proferentem* are rarely decisive as to the meaning of any provisions of a commercial contract. The words used, commercial sense, and the documentary and factual context, are, and should be, normally enough to determine the meaning of a contractual provision.¹⁵²

¹⁴⁷ *Investors Compensation Scheme v West Bromwich Building Society* (n 144) 912.

¹⁴⁸ *ibid* 913; *Mannai Investment v Eagle Star Life Assurance* [1997] AC 749 945, 775.

¹⁴⁹ *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, 2908.

¹⁵⁰ *The Tychy (No 2)* [2001] 2 Lloyds Rep 403, [29].

¹⁵¹ *BNY Mellon Corporate Trustee Services v LBG Capital No 1* (n 4) [53].

¹⁵² *K/S Victoria Street v House of Fraser (Stores Management)* (n 2) [68].

The rule, then, was generally rationalised as a policy tool. In *Egan v Static Control Components* (2004), Arden LJ suggested that the *contra proferentem* rule would only apply when a ‘reason of public policy’ meant that the *ICS* principles should be displaced.¹⁵³ This reason was generally identified as the avoidance of unfairness to a party in a weaker bargaining position:¹⁵⁴ perhaps a small business, falling outside the scope of the consumer protection legislation. Sedley LJ, for example, explained that the ‘origin and first purpose’ of the rule was ‘to limit the power of a dominant contractor who is able to deal on his own take-it-or-leave-it terms with others.’¹⁵⁵ Neuberger LJ thought that the rule might be of assistance only in construing a standard form contract.¹⁵⁶ Indeed, the most frequent observation made about the rule was that it had ‘a very limited role’ in the interpretation of ‘commercial contracts, negotiated between parties of equal bargaining power.’¹⁵⁷ At most, it was ‘a rule of last resort’ where the *ICS* approach ‘fails to provide a sure conclusion, or any conclusion at all, to the meaning intended by the parties.’¹⁵⁸

¹⁵³ *Egan v Static Control Components (Europe)* [2004] EWCA Civ 392, [37].

¹⁵⁴ Gerard McMeel, *The Construction of Contracts* (2nd edn, Oxford University Press 2011) 287.

¹⁵⁵ *Association of British Travel Agents v British Airways* [2000] 2 ER Comm 204, 220. See also *Taberna Europe CDO II v Selskabet AF1* [2016] EWCA Civ 1262, [23].

¹⁵⁶ *Taylor v Rive Droite Music* [2005] EWCA Civ 1300, [142]; see also *CDV Software Entertainment v Gamecock Media Europe* (n 3) [56]; *SAS Institute v World Programming* [2013] EWCA Civ 1482, [108].

¹⁵⁷ *Persimmon Homes v Ove Arup & Partners* [2017] EWCA Civ 373, [52]; see also *K/S Victoria Street v House of Fraser (Stores Management)* (n 2) [68]; *Transocean Drilling UK v Providence Resources* [2016] EWCA Civ 372, [20]; *Haberdashers’ Aske’s Federation Trust v Lakehouse Contracts* [2018] EWHC 558 (TCC), [85].

¹⁵⁸ Peel (n 128) 57.

A minority of judges did continue to view the rule as part of the interpretive process. In *Bank of Credit and Commerce International v Ali* (2002), for example, Lord Clyde explained that interpretive maxims are simply ‘reflections upon the way in which people may ordinarily be expected to express themselves.’¹⁵⁹ *Contra proferentem* could contribute to an understanding of the parties’ meaning, because ‘if an agreement seeks to curtail the possible liabilities of one party, he, if not both of them, will generally be concerned to secure that the writing clearly covers that curtailment.’¹⁶⁰

But distaste for the rule did not arise solely from its putative basis in public policy. Lawyers were also concerned by the continued difficulty of identifying a *proferens*. Lord Neuberger described the question as ‘abstruse.’¹⁶¹ In Australia, Campbell J cited several dozen conflicting cases on the identification of the *proferens*, from *Browning v Beston* onwards.¹⁶² Peter Prescott QC, sitting as a deputy judge, understandably found the result ‘bewildering.’¹⁶³ It is little wonder that the rule was so unpopular when its effects seemed to be so arbitrary.¹⁶⁴

¹⁵⁹ *Bank of Credit and Commerce International v Ali* (n 128) 282.

¹⁶⁰ *ibid* 282. See also *Whitecap Leisure v John H Rundle* [2008] EWCA Civ 429, [21]-[22].

¹⁶¹ *K/S Victoria Street v House of Fraser (Stores Management)* (n 2) [68].

¹⁶² *North v Marina* [2003] NSWSC 64, [57]-[72].

¹⁶³ *Oxonica Energy v Neuftec* (n 11) [89]. See Lewison (n 9) 391.

¹⁶⁴ Hoffmann J once opined that the rule should not be applied to a lease for this reason: *Amax International v Custodian Holdings* [1986] 2 EGLR 111, 112.

The rule about exclusion clauses, on the other hand, was thriving. The courts re-asserted that the two were separate rules.¹⁶⁵ In *Nobahar-Cookson v Hut Group* (2016), Briggs LJ accepted that the classic *contra proferentem* rule was ‘not now regarded as of any significant weight for the purpose of construing commercial contracts.’¹⁶⁶ However, ‘recent decisions about exclusion clauses have continued to affirm the utility of the principle that, if necessary to resolve ambiguity, they should be narrowly construed, including in relation to commercial contracts.’¹⁶⁷ While the rule about exclusion clauses continued to be useful, *contra proferentem* was to be consigned to the dustbin of history.

7. The Future of the *Contra Proferentem* Rule

The *contra proferentem* rule, then, seems to be coming to an ignominious end. It is seen as a tool of public policy, devised by interventionist judges to solve a problem that no longer exists. After all, there are now separate rules dealing with consumer contracts and exclusion clauses, the main preserves of the *contra proferentem* rule for much of the twentieth century. Even if the rule could be applied to commercial contracts, it seems unappealing: based on an outdated model of contracting, it will inevitably lead to arbitrary results. No wonder judges continue to doubt whether there

¹⁶⁵ *Transocean Drilling UK v Providence Resources* (n 157) [20]. See also *Association of British Travel Agents v British Airways* (n 155) [43]; *Persimmon Homes v Ove Arup & Partners* (n 157) [51]; *Peel* (n 128) 53; *McMeel* (n 154) 288; HG Beale, *Chitty on Contracts*, vol 1 (32nd edn, Sweet & Maxwell 2015) 15–012.

¹⁶⁶ *Nobahar-Cookson v Hut Group* [2016] EWCA Civ 573, [12].

¹⁶⁷ *ibid* [16].

is anything left of the rule at all. But nobody has been quite willing to sound its death knell.¹⁶⁸ Can we offer any justification for its continued existence?

Lawyers of the past have taken two main approaches to the rule. Some have defended it as a policy choice: not part of the interpretive process, but a means of choosing between competing interpretations.¹⁶⁹ The rule encourages good drafting, or quiet possession, or simply functions as a more-or-less arbitrary tiebreaker. In recent years, some theorists have supported the rule on the basis that it incentivises clarity and promotes an efficient allocation of drafting risks.¹⁷⁰ And the English courts, as we have seen, primarily view the rule as a means of protecting weaker parties. On this approach, the rule does not assist with the search for the meaning of the contract, but can be used to shield those at a disadvantage in the contracting process.

An advantage of the policy-based approach is that it becomes relatively easy to identify the *proferens*. We simply look for the stronger party, or the most efficient risk-avoider. But it is submitted that it would be undesirable to explain the rule purely in policy terms. To do so would be to cement its position as an anomaly in the law and undermine the coherence of the rules of contractual interpretation. A better

¹⁶⁸ Its existence was recently, if half-heartedly, affirmed in *Atlasnavios-Navegação v Navigators Insurance Co* [2018] UKSC 26, [48].

¹⁶⁹ *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 WLR 468, 477; *Morris v Blackpool Borough Council* [2014] EWCA Civ 1384, [53].

¹⁷⁰ Richard A Posner, *Economic Analysis of Law* (7th edn, Aspen Publishers 2007) 109; Péter Cserne, 'Policy Considerations in Contract Interpretation: The Contra Proferentem Rule from a Comparative Law and Economics Perspective' [2007] Hungarian Association for Law and Economics Working Papers 14.

explanation of the rule would be defensible on the same basis as other principles of construction, thus affirming the consistency and intelligibility of the law.¹⁷¹

And indeed, for several centuries lawyers have presented a competing conception of the rule, one which does see it as part of the search for the reasonable meaning of the contract. For example, sixteenth-century lawyers argued that a reasonable party does not leave ambiguities if he intends to benefit himself. Later lawyers added that a reasonable party does not induce others to contract with him on a misleading basis. By linking the rule to the objective principle in this way, we can defend it on the same basis as our general approach to contractual interpretation.

As Lord Steyn has observed, the objective principle requires us to adopt the viewpoint of, not the parties themselves, but a hypothetical reasonable person. The reasonable person ‘pursues his own commercial self-interest’ but ‘is by definition not dishonest.’¹⁷² Thus, being rationally self-interested, he will not leave an ambiguity in the words of his contract if he intended to benefit himself by them. The objective principle also sifts out unconscionable behaviour: we assume that he did not introduce the ambiguity to deceive the other party, and that ‘a fair construction best matches the reasonable expectations of the parties.’¹⁷³ It is therefore true that the *contra proferentem* rule plays a role in preventing sharp dealing, but only within the confines of our ordinary approach to interpretation. The objective approach to construction is

¹⁷¹ Stephen A Smith, *Contract Theory* (Oxford University Press 2007) 11.

¹⁷² Johan Steyn, ‘Contract Law: Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 LQR 433, 434.

¹⁷³ *ibid* 441. See also David Campbell, ‘Good Faith and the Ubiquity of the “Relational” Contract’ (2014) 77 MLR 460, 485.

always ‘infused with a bias in favour of the just and reasonable interpretation,’ because it assumes that the parties are honest and reasonable people.¹⁷⁴ In this way, the rule can contribute to levelling the playing field between the parties, but it is not an exception to other principles of construction.

The *contra proferentem* rule simply institutes a presumption about the interests and motivations of the drafter, which we must consider when ascertaining what her words mean. These are, of course, also factors that we take into account when interpreting any utterance in everyday life. In a contractual context, they may carry little weight when compared to, for example, the ordinary meaning of her words or the commercial purpose of the agreement. This is why it has been constantly reiterated that the *contra proferentem* rule is one of last resort. However, like the objective principle, it is a means of finding the meaning of a contract when the parties’ intentions are otherwise impossible to identify.¹⁷⁵ It might be asked why this common-sense idea should be bestowed with the dignity of a Latin tag, when it could simply be folded into the objective principle. The answer is that maxims are useful *aides-memoires*, capturing particular intuitions about common-sense construction, and ensuring that judges take a reasonably consistent approach to interpretation.¹⁷⁶

The *contra proferentem* rule can therefore be defended in the same terms as other modern principles of contractual interpretation. However, we then come to the

¹⁷⁴ Mindy Chen-Wishart, ‘Contractual Mistake, Intention in Formation and Vitiating: The Oxymoron of *Smith v Hughes*’ in Jason W Neyers, Richard Bonaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 351.

¹⁷⁵ *ibid* 345.

¹⁷⁶ *Cusack v London Borough of Harrow* [2013] 1 WLR 2022, 2040.

perennial problem with the rule: how do we decide which party is the *proferens*? A number of options present themselves. First, we could take the objective principle to its logical conclusion, and hold that the *proferens* is whichever party a reasonable person would identify as putting forward the term. Indeed, this seems to be the approach that has been historically most common. Medieval and early modern lawyers simply assumed that the grantor was responsible for the terms of his grant. In some more recent cases, the courts have held that the person who benefits from the clause is responsible for its content.¹⁷⁷ The problem, as Campbell J has pointed out, is that these two presumptions are often directly contradictory. Must a party be careful not to give away too much, or not to receive too little?¹⁷⁸ Deeming one party to be the *proferens* makes sense when there is a convention for assigning each term to each party. However, there seems to be no such consensus today.

In the absence of any intuition about which party is responsible for which terms, we are thrown back to the facts of the case. One possibility is that the *proferens* is the person relying on the term before the court: the '*proferens coram iudice*.'¹⁷⁹ But this surely cannot be the case. As the Court of Appeal pointed out in *Dresdner Kleinwort v Attrill* (2013), 'the meaning of the clause cannot vary depending upon who is praying it in aid.'¹⁸⁰ The identity of the *proferens* must be fixed at the time the contract is drafted, rather than shifting when it turns out to favour one party over the other.

¹⁷⁷ See, most recently, *Goldman Sachs International v Procession House Trustee* [2018] EWHC 1523 (Ch), [62].

¹⁷⁸ *North v Marina* (n 162) [67].

¹⁷⁹ *Financial Services Authority v Asset L.I.* [2013] EWHC 178 (Ch), [115].

¹⁸⁰ *Dresdner Kleinwort v Attrill* [2013] EWCA Civ 394, [50].

Is the *proferens*, then, the party who drafted the term: the ‘*proferens in contrahendo*’?¹⁸¹ Admittedly, this does not seem to be immediately attractive either. Common lawyers prefer to keep the history of the parties’ negotiations out of the interpretive process. It is true that an exception can be made to establish an objective fact known to both parties: in this case, the identity of the drafter.¹⁸² However, any expedition into the negotiations is seen as inherently undesirable, in large part due to the uncertainty it would create.¹⁸³ If contractual rights were to be assigned to a third party, for example, she might be unaware that the other party was entitled to the benefit of the *contra proferentem* rule when construing the contract. On the other hand, as Lord Hoffmann has accepted, third parties already run the same risk with any form of admissible background information.¹⁸⁴

There would also be a certain amount of arbitrariness involved in construing against the drafter of a term in a negotiated contract. In many cases, both parties will have worked on the term in question, leaving us to apply an unsatisfactory ‘last shot fired’ rule.¹⁸⁵ One answer to this objection is that the *contra proferentem* rule should simply not apply to terms that have been substantially negotiated by both parties. The proposed rationale of the rule is based on the assumption that one party had the opportunity to benefit from drafting the term. If the other party significantly

¹⁸¹ *Financial Services Authority v Asset L.I.* (n 179) [115].

¹⁸² *Lewison* (n 9) 392; *North v Marina* (n 162) [71].

¹⁸³ *Chartbrook v Persimmon Homes* [2009] 1 AC 1101, [36].

¹⁸⁴ *ibid* [40].

¹⁸⁵ *McMeel* (n 154) 259; see Preston Torbert, ‘A Study of the Risks of Contract Ambiguity’ [2014]

Coase-Sandor Institute for Law & Economics Working Paper No. 686, 28.

contributed to the drafting, the rule is no longer needed. This approach would therefore fit with the courts' recent insistence that the rule does not apply to freely-negotiated commercial contracts.¹⁸⁶

Common lawyers have spent over 500 years observing problems with the *contra proferentem* rule, and repurposing it to deal with their concerns. We still have the opportunity to do so today. By explaining the rule as a facet of the objective principle, which seeks to identify the reasonable meaning of the contract by taking into account the presumed interests of the drafter, we would no longer have to view it as an embarrassing anomaly in contract law.

David Ibbetson has observed that the common law 'is capable of sloughing off outdated rules,' but is very bad at 'losing doctrines or whole bodies of ideas.' They might be 'hedged round with exceptions' or 'given functions radically different from their original purposes; but their essence survives.'¹⁸⁷ The *contra proferentem* rule provides an excellent illustration of this tendency. It is a throwback to an older mode of contracting that has been wrestled into the twenty-first century, surviving multiple reconceptualisations of not just contractual interpretation, but contracts themselves. At various times, it has been seen as an inducement to avoid folly, a guide to what a reasonable promisor would have intended or a reasonable promisee understood, a purely arbitrary tiebreaker, a guard against unconscionable behaviour and a tool to prevent the imposition of unfair terms. It has survived the move to an agreement-

¹⁸⁶ In California, the *contra proferentem* rule is not applied to contracts that have been jointly drafted or 'actively negotiated': Torbert (n 185) 30f.

¹⁸⁷ Ibbetson (n 72) 301.

based understanding of contracts, the rise of will theory, and the usurpation of its role in consumer protection. It is not clear what the future holds for the *contra proferentem* rule, but it has certainly had a storied past. Like Theseus' ship, it has been entirely transformed, while simultaneously remaining the same rule for centuries.

9,219 words (without footnotes)

12,476 words (with footnotes)