

Court of Appeal confirms role of commercial common sense in contract interpretation

On 26 April 2023, the Court of Appeal handed down judgment in *ASSIA v BT* [2023] EWCA Civ 451 which considered the correct interpretation of a patent laundering clause in a global patent cross-licence entered into as part of a settlement of global patent litigation between BT and ASSIA. [Gideon Shirazi](#) (led by Nicholas Saunders KC of Brick Court Chambers) acted for the successful respondent, BT.

In the present case, ASSIA (a telecoms patent-holding company holding various patents in the field of DSL (Digital Subscriber Line) technology) sued BT in 2020, alleging that BT's use of its internally developed Digital Line Management technology in connection with the provision of its VULA wholesale product to third party communications providers using its fibre-to-the-cabinet telecoms network in the UK fell foul of a patent laundering clause in a global patent cross-licence.

A major issue in the case was the place of commercial common sense in modern contract interpretation. The Court of Appeal concluded that commercial common sense was relevant wherever there are possible rival interpretations of a clause, and that this required two realistic constructions of the words. Notably, the court appeared to consider that the two realistic interpretations must appear from an analysis of the words (rather than ambiguity itself derived from the relevant background or the application of hindsight or the alleged goal of the settlement terms) and that it is only once one or more realistic interpretations of the words have been identified that commercial common sense comes into play. The court also distinguished between the application of commercial common sense in the normal process of contractual interpretation and the situation where it is clear that something has gone wrong with the language and so the court adopts a "corrective construction", where the court left open that commercial common sense may have a broader application.

In this case, the court held that the first of the two scenarios applied in this case: there were two possible rival interpretations but that all the factors supported BT's construction. Accordingly, the court held that BT's construction was correct. The second scenario – the Court adopting a corrective construction – did not arise.