

# SOME ISSUES IN THE LAW OF CONTRACT INTERPRETATION IN AUSTRALIA

DAVID McLAUHLAN \*

## OUTLINE OF ADDRESS AND LIST OF AUTHORITIES

### I. INTRODUCTION

1. See generally Richard Calnan, *Principles of Contractual Interpretation* (2013, Oxford University Press). This little book provides a valuable introduction to the principles and current issues in the law of contract interpretation. It should be read from cover to cover by any judge or practitioner who has to wrestle with issues in this area. In the Prologue to the book the author reminds us, for example, that:
  - Interpretation is an art, not a science. As a result, “however far we try to create a body of law which explains how to interpret contracts, the interpretation of any particular contract will ultimately involve a question of judgement. You can get a long way with principled reasoning, but the final step is a leap of faith. It is important to understand the limits of logic, and where intuition takes over.”
  - “The vast majority of questions in relation to contracts are concerned with what they mean.”
  - “There are two main areas of dispute: how much background information should be available in interpreting a written contract; and how much leeway a court should have in twisting the words of the contract to reach what it regards as a ‘commercial’ result.”
2. The traditional or “literal” approach
  - Plain meaning rule. Extrinsic evidence is inadmissible unless the words are ambiguous, or there is a proven special technical meaning, trade usage or custom, or application of the plain meaning would lead to manifest absurdity or inconvenience.
  - Mason J in *Codelfa*: “The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.”<sup>1</sup>

---

\* Professor of Law, Victoria University of Wellington; Professorial Fellow, The University of Melbourne; Honorary Professor, TC Beirne School of Law, The University of Queensland.

<sup>1</sup> *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352. See also the often-cited statement of principle by Gibbs J in *Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99 at 110: “It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something

- Where the wording of the written contract is ambiguous the court may have regard to the surrounding circumstances, but such circumstances are “restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the ‘genesis’ and objectively the ‘aim’ of the transaction”.<sup>2</sup>
- Evidence of the parties’ negotiations in so far as they “consist of statements and actions of the parties which are reflective of their actual intentions and expectations” is inadmissible.<sup>3</sup> The court can only look to “the objective framework of facts within which the contract came into existence, and to the parties’ presumed intention in this setting”.<sup>4</sup>

### 3. The “contextual” approach

- Sometimes referred to as “commercial interpretation”<sup>5</sup> or “commonsense interpretation”.<sup>6</sup>
- Lord Hoffmann’s well-known restatement of the fundamental principles of interpretation in *Investors Compensation Scheme Ltd v West Bromwich Building Society (ICS)*:<sup>7</sup>

. . . I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of “legal” interpretation has been discarded. The principles may be summarised as follows:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the “matrix of fact” but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything [relevant<sup>8</sup>] which would have affected the way in which the language of the document would have been understood by a reasonable man.

---

different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust.” This case is the subject of an interesting discussion in Dharmananda and Firios, “Now we know our ABC: Reflections on the interpretation of contracts” (2014) 38 Aust Bar Rev 283.

<sup>2</sup> *Prenn v Simmonds* [1971] 1 WLR 1381 at 1385 per Lord Wilberforce.

<sup>3</sup> *Codelfa* at 352 per Mason J.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 770 and 771 per Lord Steyn. See also his Lordship’s observation in *Society of Lloyd’s v Robinson* [1999] 1 WLR 756 at 763: “Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.”

<sup>6</sup> *Mannai Investment* at 780 per Lord Hoffmann.

<sup>7</sup> [1998] 1 WLR 896 at 912–913.

<sup>8</sup> *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at [39].

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(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 Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.

(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 SA v Salen Rederierna AB* [1985] AC 191, 201:

“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.”

- The High Court of Australia has on several occasions endorsed the first *ICS* principle without making clear the implications of that principle for the admissibility of background evidence, any requirement of textual ambiguity and the plain meaning rule.<sup>9</sup>
- The key difference between the two approaches. Under the *ICS* approach there is a “single task of interpretation”. The document, its context and the commerciality of the rival contentions are not only indispensable but *inseparable* components of the interpretation process. A finding of *ambiguity* is not a precondition to a consideration of the factual background. The task of the court is to determine what a reasonable person would have understood the parties to have meant and “[t]he fact that the court might have to express that meaning in language quite different from that used by the parties . . . is no reason for not giving effect to what they appear to have meant”.<sup>10</sup> Indeed, Lord Hoffmann went so far as to say that:<sup>11</sup>

there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.

#### 4. Common misunderstandings of *ICS* approach.

<sup>9</sup> See *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at [11]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [8]; and *Byrnes v Kendle* (2011) 243 CLR 253 at [98].

<sup>10</sup> *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [21] per Lord Hoffmann.

<sup>11</sup> *Chartbrook* at [25].

- Lord Hoffmann did not suggest that the words used by the parties are unimportant. In his view, there will usually be no answer to the solution derived from giving the words their “ordinary” or conventional meaning. He stressed in his fifth principle in *ICS* that “we do not easily accept that people have made linguistic mistakes, particularly in formal documents”.<sup>12</sup>
- Lord Hoffmann also cautioned that “the fact that a contract may appear to be unduly favourable to one of the parties is not a sufficient reason for supposing that it does not mean what it says”.<sup>13</sup> It may be that “a provision favourable to one side was . . . in exchange for some concession elsewhere or simply a bad bargain”.<sup>14</sup> Sometimes even experienced commercial players make binding agreements that might be seen as making no commercial sense without there being any real question that the agreements do not mean what they appear to say.

## II. *BYRNES V KENDLE*

1. In *Byrnes v Kendle*<sup>15</sup> Heydon and Crennan JJ summarised the core legal principles governing contract interpretation as follows:

Contractual construction depends on finding the meaning of the language of the contract — the intention which the parties expressed, not the subjective intentions which they may have had, but did not express. A contract means what a reasonable person having all the background knowledge of the “surrounding circumstances” available to the parties would have understood them to be using the language in the contract to mean. But evidence of pre-contractual negotiations between the parties is inadmissible for the purpose of drawing inferences about what the contract meant unless it demonstrates knowledge of “surrounding circumstances”. And in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [(2004) 219 CLR 165, 211 ALR 342 at [40]] this Court said:

“It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.”

One reason why the examination of surrounding circumstances in order to decide what the words mean does not permit examination of pre-contractual negotiations is that the latter material is often appealed to purely to show what the words were *intended* to mean, which is impermissible. The rejected argument in *Chartbrook v Persimmon Homes Ltd* was that all pre-contractual negotiations should be examined, not just those pointing to surrounding circumstances in the mutual contemplation of the parties. The argument purported to accept that contractual construction was an objective process, and that evidence of what one party intended should not be admissible. But other parts of the argument undercut that approach. Mr Christopher Nugee QC submitted: “The question is not what the words

---

<sup>12</sup> See also *Mannai Investment* [1997] AC 749 at 774–5 (“[w]e start with an assumption that people will use words and grammar in a conventional way”) and *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at [39] (“the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage” and “[in *ICS*] I was certainly not encouraging a trawl through ‘background’ which could not have made a reasonable person think that the parties must have departed from conventional usage”). Lord Hoffmann was the dissenting judge in the latter case, but, in criticising the majority (at [37]) for giving ‘too little weight to the actual language and background’ of the document in question, he was not backtracking from his principles. He was simply unconvinced that there was anything in the background that would lead a reasonable person to think that the parties must have departed from conventional usage of the words.

<sup>13</sup> *Chartbrook* at [20].

<sup>14</sup> *Ibid.*

<sup>15</sup> (2011) 243 CLR 253 at [98]–[99].

meant but what *these parties meant*. ... Letting in the negotiations gives the court the best chance of ascertaining what *the parties meant*.” It would have been revolutionary to have accepted that argument.

## 2. Some conceptual difficulties

- The distinction between “subjective” and “objective” intention.
- Is it *revolutionary* to suggest that the search is for what *the parties meant*?
- Accepting and giving effect to evidence from the parties’ negotiations of their actual mutual intention is not in any way inconsistent with an objective approach.<sup>16</sup> Of course, in the *great majority* of interpretation disputes that come before the courts the parties did not, at the time of formation, contemplate the situation that has arisen. There is no question, therefore, of their having formed an actual intention as to the meaning of the relevant words. Accordingly, the court can only seek to resolve the dispute by reference to the parties’ presumed intention.

## 3. Although the rule excluding evidence of prior negotiations as an aid to interpretation (the exclusionary rule) is well established in Australia and unlikely to be revisited in the foreseeable future, it is now subject to so many qualifications and exceptions that is questionable whether much of substance remains. Various legal mechanisms are available to give effect to a clearly proven actual mutual intention of the parties.

- The “safety devices” of rectification and estoppel by convention are alternative means of enforcing an agreed meaning reached in the course of negotiations and thus “will in most cases prevent the exclusionary rule from causing injustice”.<sup>17</sup> These “remedies” are said to “lie outside the exclusionary rule, since they start from the premise that, as a matter of construction, the agreement does not have the meaning for which the party seeking rectification or raising an estoppel contends”.<sup>18</sup>
- In *Chartbrook* Lord Hoffmann said that “[i]f the parties have negotiated an agreement upon some common assumption, which may include an assumption that certain words will bear a certain meaning, they may be estopped from contending that the words should be given a different meaning”.<sup>19</sup> The law in Australia is uncertain.<sup>20</sup> (Surely a

---

<sup>16</sup> See D Nicholls, “My Kingdom for a Horse: The Meaning of Words” (2005) 121 LQR 577 at 583 (Admitting reliable evidence from the parties’ pre-contract exchanges of the meaning they intended the words in dispute to bear “would not be a departure from the objective approach. Rather, this would enable the notional reasonable person to be more fully informed of the background context.”). See also A Burrows, ‘Construction and Rectification’ in A Burrows & E Peel (eds), *Contract Terms* (2007) 77 at 82–3: “It has sometimes been suggested that the exclusion of previous negotiations and declarations of intention is logically dictated by the objective approach. But that is not so and tends to confuse the approach being applied with the separate question of what evidence is to be permitted in applying that approach. To allow in previous negotiations or declarations of intention (including witness statements as to what was said between the parties) is consistent with an objective approach in that one is still ascertaining a party’s intentions through objective evidence. In particular, an objective approach would not permit evidence of *undeclared* intention or of what a party thought the previous negotiations meant.” The author notes (at 83n) that, for example, “witness statements as to what a party was inwardly intending at the time would be contrary to the objective approach”.

<sup>17</sup> *Chartbrook* at [47].

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid*.

more principled approach would be that, where it is proven that the parties to a proposed contract negotiated on the basis of a common understanding that a particular term has a certain meaning, that meaning *is* the meaning of the term. Where is the sense in saying to the party who attempts to depart from the understanding: “The contract does not mean what both parties intended it to mean but, because both proceeded on the basis that it did mean what it was intended to mean, you are precluded from denying that meaning; it is unconscionable for you to invoke or enforce the true meaning when the other party relied to its detriment on the existence of a different meaning when it entered into the contract”?)

- The “objective facts” exception to the exclusionary rule. In *Chartbrook* Lord Hoffmann said that the rule does not exclude the use of evidence of prior negotiations “to establish that a fact which may be relevant as background was known to the parties”.<sup>21</sup> Similarly, in *Codelfa* Mason J, while holding that evidence of prior negotiations is inadmissible “in so far as [those negotiations] consist of statements and actions of the parties which are reflective of their actual intentions and expectations”,<sup>22</sup> also said:<sup>23</sup>

Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible.

In the light of this, it can be argued that communications between the parties irrefutably establishing an actual mutual intention as to the meaning of a term is an objective background fact and therefore admissible? Further, if evidence of prior negotiations is admissible to identify the subject matter of the contract — for example, a conversation showing that a contract for the sale of ‘your wool’ was intended to include both wool produced on the seller’s farm and wool that the seller had bought in from other farms<sup>24</sup> — why should the position be different if the dispute relates to a more subsidiary term in respect of which there is reliable evidence as to the parties’ intended meaning?

- The “private dictionary” principle stated by Kerr J in *The Karen Oltmann* (where the evidence irrefutably established that the parties used the word “after” to mean “on the expiry of”):<sup>25</sup>

If a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the

---

<sup>20</sup> Contrary authority includes *Johnson Matthey Ltd v AC Rochester Overseas Corp* (1990) 23 NSWLR 190 at 195 and *Australian Co-operative Foods Ltd v Norco Co-operative Ltd* (1999) 46 NSWLR 267 at [52]. However, *Johnson* was not followed in *Whittet v State Bank of New South Wales* (1991) 24 NSWLR 146 at 153 where Rolfe J said that “[i]t would be strange ... if matters arising out of pre-contractual negotiations, which could be proved to the extent necessary to justify rectification, namely, by clear and convincing proof, could not be relied upon to found an estoppel by convention because of the source from which they arose”. The conflict was noted but left unresolved by the New South Wales Court of Appeal in *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [227] and *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at [34] and [577].

<sup>21</sup> At [42].

<sup>22</sup> At 352.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Macdonald v Longbottom* (1859) 1 E & E 977, 120 ER 1177, a decision approved in both *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384 and *Codelfa* at 349.

<sup>25</sup> [1976] 2 Lloyd’s Rep 708 at 712.

words bore only one of the two possible meanings, then it is permissible for the Court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the words as the result of their common intention. Such cases would not support a claim for rectification of the contract, because the choice of words in the contract would not result from any mistake. The words used in the contract would *ex hypothesi* reflect the meaning which both parties intended.

This principle has been accepted as good law on several occasions by the Australian courts.<sup>26</sup> But cf *Chartbrook*<sup>27</sup> where Lord Hoffmann dubiously confined the principle to situations where evidence is sought to be adduced “that the parties habitually used words in an unconventional sense in order to support an argument that words in a contract should bear a similar unconventional meaning”. The distinction drawn here is difficult to sustain. Why is it that the court can admit evidence that, say, the parties always, or for a particular transaction, used “apples” to mean “pears”, but not evidence that they used words in one of two conventional senses? If, as Lord Hoffmann said in the *ICS* case,<sup>28</sup> evidence can be admitted to show that Alice and Humpty Dumpty understood the word “glory” to mean “a nice knock-down argument”, why cannot we admit evidence to show that parties used the word “after” to mean “on the expiry of”?

- Common rejection of meaning. In *Codelfa* Mason J conceded that “[t]here may perhaps be one situation in which evidence of the actual intention of the parties should be allowed to prevail over their presumed intention”.<sup>29</sup> His Honour continued:<sup>30</sup>

If it transpires that the parties have refused to include in the contract a provision which would give effect to the presumed intention of persons in their position it may be proper to receive evidence of that refusal. After all, the court is interpreting the contract which the parties have made and in that exercise the court takes into account what reasonable men in that situation would have intended to convey by the words chosen. But is it right to carry that exercise to the point of placing on the words of the contract a meaning which the parties have united in rejecting? It is possible that evidence of mutual intention, if amounting to concurrence, is receivable so as to negative an inference sought to be drawn from surrounding circumstances.

Despite the tentative terms in which it is expressed, this exception has been widely followed in Australia.<sup>31</sup> In my view, however, it is difficult to see any principled basis

<sup>26</sup> See *Spunwill Pty Ltd v BAB Pty Ltd* (1994) 36 NSWLR 290 at 309; *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2003] NSWCA 74 at [74]–[78]; *BP Australia Pty Ltd v Nyran Pty Ltd* (2003) 198 ALR 442 at [34]; *Optus Vision Ltd v Australian Rugby League Ltd* [2003] NSWSC 288 at [71]; *Gate Gourmet Australia Pty Ltd v Gate Gourmet Holding AG* [2004] NSWSC 149 at [182] (“extrinsic evidence is admissible to show that the parties by agreement or common assumption adopted a particular interpretation of a word or words in a written document”); and *Lodge Partners Pty Ltd v Pegum* (2009) 255 ALR 516 at [31].

<sup>27</sup> *Chartbrook* [2009] 1 AC 1101 at [45], followed in *Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd* [2012] VSCA 134 at [103].

<sup>28</sup> [1998] 1 WLR 896 at 914.

<sup>29</sup> At 352.

<sup>30</sup> At 352–353.

<sup>31</sup> See, eg, *Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd* [2012] VSCA 134 at [100]; *Mrocki v Mountview Prestige Homes Pty Ltd* [2012] VSCA 74, [29]–[30]; *HIGB Pty Ltd v Townsville City Council* [2009] QSC 285 at [16]–[18]; *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2008] NSWSC 274 at [63]; *Elesanar Constructions Pty Ltd v State of Queensland* [2007] QCA 208 at [47]–[49]; *Tymbook Pty Ltd v State of Victoria* [2007] VSC 140 at [68]–[69]; *Sunset Vineyard Management Pty Ltd v Southcorp Wines Pty Ltd* [2006] VSC 234 at [62]–[63], affirmed [2008] VSCA 96 at [49]; *BP Australia Pty Ltd v Nyran Pty Ltd* (2003) 198 ALR 442 at [24]; *Aberdeen Asset Management Ltd v Challenger Wealthlink Management Ltd* [2002] NSWCA 245 at [23]–[24]; *Moorooka Shopping Town (Nominees) Pty Ltd v Kilmartin* [1999] QSC 195 at [12]–[13]; *Eso Australia Ltd v Australian Petroleum*

for limiting the admissibility of evidence of the parties' actual intention to the situation where they have refused to include a particular provision in the contract. Their actual intention, if clearly proven, surely ought to prevail regardless of the form or manner in which that intention happens to be manifested. As Lord Nicholls of Birkenhead, writing extra-judicially, has observed, Mason J's qualification "lets the cat out of the bag": it "destroys the rationale for an absolute rule" against admitting evidence of prior negotiations.<sup>32</sup> Why allow evidence of the fact that the parties have "united in rejecting" a particular meaning but disallow evidence of the fact that they have united in *accepting* a particular meaning? Lord Nicholls concluded that "[t]here can be no answer to that question".<sup>33</sup> In any event, the distinction will be unworkable in most situations. Usually, it will be difficult to disentangle the two scenarios. The very evidence demonstrating that the parties rejected a particular meaning will also show what the intended meaning was. Alternatively, proof of the parties' acceptance of a particular meaning will necessarily entail the further conclusion that they rejected the alleged different meaning.<sup>34</sup>

### III. THE *CODELFA* "TRUE RULE"

#### 1. In *Byrnes v Kendle* Heydon and Crennan JJ also said:<sup>35</sup>

That course [ie, "examination of surrounding circumstances in order to decide what the words mean"] is permissible, but how far is controversial. This Court said in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at 62-63 [39]; [2002] HCA 5 that until this Court had decided on whether there were differences between *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; [1998] 1 All ER 98 and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; [1982] HCA 24, and if so which should be preferred, the latter case should be followed in Australia. The question has not been argued or decided in this Court. The opinions stated in *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382 at 384-385 [1]-[4] and 406-407 [112]-[113] and *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at 616-618 [14]-[18], 621-622 [42], 626 [63] and 663-678 [239]-[305] must be read in this light.

#### 2. The trouble with this reaffirmation of *Codelfa* is that at the same time the court, in *Byrnes* itself<sup>36</sup> and on several earlier occasions,<sup>37</sup> has been endorsing the first *ICS* principle under which "[i]nterpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This principle is inconsistent with *Codelfa* because, as

---

*Agents' & Distributors' Association* [1999] 3 VR 642 at 647; *MCA International BV v Northern Star Holdings Ltd* (1991) 4 ACSR 719 at 724-727; *NZI Capital Corp Pty Ltd v Child* (1991) 23 NSWLR 481 at 493; *Centrepont Custodians Pty Ltd v Lidgerwood Investments Pty Ltd* [1990] VR 411 at 423.

<sup>32</sup> Donald Nicholls "My Kingdom for a Horse: The Meaning of Words" (2005) 121 LQR 577 at 584.

<sup>33</sup> *Ibid.* In *Elesanar Constructions Pty Ltd v State of Queensland* [2007] QCA 208 at [47] Fryberg J observed, in my view correctly, that there there was "no distinction of principle" between the situation described by Mason J and "one where the parties have expressly assigned a meaning to a provision which has been included in the contract".

<sup>34</sup> As in, for example, *MCA International BV v Northern Star Holdings Ltd* (1991) 4 ACSR 719 at 727.

<sup>35</sup> (2011) 243 CLR 253 at [99] n 155.

<sup>36</sup> At [98].

<sup>37</sup> See, eg, *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at [11]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40].



amplified by Lord Hoffmann, it not only allows but *requires* consideration of the background to the contract as part of the “single task of interpretation” regardless of whether there is any perceived ambiguity.

3. Did *Royal Botanic* affirm the *Codelfa* ‘true rule’? The full text of the relevant passage in the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *Royal Botanic* is as follows:<sup>38</sup>

. . . [R]eference was made in argument to several decisions of the House of Lords, delivered since *Codelfa* but without reference to it. Particular reference was made to passages in the speeches of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* and of Lord Bingham of Cornhill and Lord Hoffmann in *Bank of Credit and Commerce International SA v Ali*, in which the principles of contractual construction are discussed. It is unnecessary to determine whether their Lordships there took a broader view of the admissible ‘background’ than was taken in *Codelfa* or, if so, whether those views should be preferred to those of this Court. Until that determination is made by this Court, other Australian courts, if they discern any inconsistency with *Codelfa*, should continue to follow *Codelfa*.

It has been plausibly argued<sup>39</sup> that “the note of caution sounded by the High Court” in this passage did not relate to the first *ICS* principle, “which rejected a requirement of ambiguity before examining the surrounding circumstances”, but rather to the second principle, which, as explained in *Bank of Credit and Commerce International SA v Ali*,<sup>40</sup> states that the admissible background “includes absolutely anything [relevant] which would have affected the way in which the language of the document would have been understood by a reasonable man”. This view gains credence from the fact that in *Maggbury Pty Ltd v Hafele Australia Pty Ltd*,<sup>41</sup> which was decided less than three months before *Royal Botanic*, three of the same judges<sup>42</sup> who gave the above advice in *Royal Botanic* specifically approved the first *ICS* principle as well as the statement by Lord Bingham in *Bank of Credit and Commerce International SA v Ali*<sup>43</sup> that “[t]o ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties’ relationship and *all the relevant facts surrounding the transaction so far as known to the parties*”.<sup>44</sup>

4. Nevertheless, in the special leave decision in *Western Export Services Inc v Jireh International Pty Ltd*,<sup>45</sup> three Justices of the court stated that the lower courts were bound to follow Mason J’s “true rule” until that rule is disapproved or revised by the High Court, adding that “[t]he position of *Codelfa*, as a binding authority, was made clear in the joint reasons of five Justices in [*Royal Botanic*] and it should not have been necessary to reiterate the point here”,<sup>46</sup> and that “[w]e do not read anything said in this court” in the earlier cases that had apparently accepted Lord Hoffmann’s first principle in

<sup>38</sup> (2002) 240 CLR 45 at [39] (footnotes omitted)

<sup>39</sup> By Campbell JA in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at [281]–[285].

<sup>40</sup> [2002] 1 AC 251 at [39].

<sup>41</sup> (2001) 210 CLR 181 at [11].

<sup>42</sup> Gleeson CJ, Gummow and Hayne JJ.

<sup>43</sup> [2002] 1 AC 251 at [8] (emphasis added).

<sup>44</sup> Admittedly, the judges also referred to *Codelfa*, but in *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407; (2009) 76 NSWLR 603 at [276] Campbell JA argued that ‘[i]t is notable that the reference to *Codelfa* is not just to page 352 and the statement of the “true rule”, but to the wider discussion’ of modern developments in the law of contract interpretation.

<sup>45</sup> (2011) 282 ALR 604 (Gummow, Heydon and Bell JJ)

<sup>46</sup> At [4].

ICS “as operating inconsistently with” the true rule stated by Mason J in *Codelfa*.<sup>47</sup> As noted above, the latter observation is difficult to justify.<sup>48</sup>

5. Despite heavy criticism<sup>49</sup> and its dubious precedential status,<sup>50</sup> the special leave decision has been cited and followed in numerous first instance and intermediate appeal court decisions.<sup>51</sup> As a result, it has provoked renewed, but somewhat sterile, focus on the question of the meaning of the word “ambiguity”, an issue that was thought to have been no longer relevant after the decisions of intermediate appeal courts holding that it is unnecessary to find ambiguity before it is permissible to have regard to surrounding circumstances.<sup>52</sup> Prior to those decisions Spigelman CJ, in *Gardiner v Agricultural and Rural Finance Pty Ltd*,<sup>53</sup> had reiterated the view he expressed in *South Sydney Council v Royal Botanic Gardens*<sup>54</sup> that in *Codelfa* Mason J had in mind a broad concept of ambiguity that “does not refer only to a situation in which the words used have more than one meaning”. The Chief Justice found support for this view in Mason J’s statement that evidence of surrounding circumstances is admissible if the language is ambiguous *or susceptible of more than one meaning*. His Honour’s reference “to the proposition that language may not only be ‘ambiguous’ but also ‘susceptible of more than one meaning’ invoked a concept of ‘ambiguity’ extending to any situation in which the scope and applicability of the [language] was, for whatever reason, doubtful”.<sup>55</sup> This view was endorsed in several cases decided prior to the special leave decision in *Jireh*.<sup>56</sup>

---

<sup>47</sup> At [5].

<sup>48</sup> The court also said that even if the agreement in question “should be construed as understood by a reasonable person in the position of the parties, with knowledge of the surrounding circumstances and the object of the transaction, the result would have been no different”. But see the severe criticism of the outcome in this case by D McLauchlan and M Lees, “Construction Controversy” (2011) 28 JCL 101. For the reasons given in that article, it would be difficult to find a more unjust outcome in any contract case decided by the Australian courts in recent years.

<sup>49</sup> See D McLauchlan and M Lees, “More Construction Controversy” (2012) 29 JCL 97 and K Mason, “The Distinctiveness and Independence of Intermediate Courts of Appeal” (2012) 86 ALJ 308. The latter suggests (at 331) that the “deliberately stinging remarks” of the three Justices “show that relations between the two tiers of appellate courts are in a serious plight. The Justices may, with respect, be entitled to think that maintaining good relations between the two tiers is not part of their constitutional function; but the High Court would be gravely concerned if it knew the depth of consternation that this incident has caused within Australian ICAs. The three Justices’ decision not to grant special leave to resolve a genuine disagreement, but rather to issue their own summary judgment in the matter is, in my opinion, an extraordinary response to the situation and it indicates that some of the current Justices are more concerned with issues of precedent and precedence than elucidating the law. Their Honours apparently consider the gateway matter to be clear beyond argument. But surely that was not something capable of being fairly addressed within a brief special leave application. In any event, the opposite view was definitely open ... Given the duty of every judge to state the law as he or she sees it, the lower court judges should not have been rebuked on this occasion, in this manner or by way of what was essentially an advisory opinion. The genuine confusion created by the High Court statements on several occasions since *Codelfa* and the ambiguity in the Canute-like dictum in *Royal Botanic* deserved a more considered response than occurred on 28 October 2011.”

<sup>50</sup> See O Jones, “Are the High Court’s Reasons for Refusing Special Leave Binding?” (2013) 87 ALJ 774.

<sup>51</sup> But see *Schwartz v Hadid* [2013] NSWCA 89 at [37] and [85] where the question of the authority of the court’s earlier decision in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 rejecting the ambiguity threshold was left open.

<sup>52</sup> *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006) 236 ALR 561; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603; *MBF Investments Pty Ltd v Nolan* [2011] VSCA 114.

<sup>53</sup> [2007] NSWCA 235 at [12].

<sup>54</sup> [1999] NSWCA 478 at [35].

<sup>55</sup> It is difficult to accept that Mason J did intend to draw the distinction. Certainly, he did not do so earlier in his judgment in *Codelfa*. Thus, his Honour described the ruling of the House of Lords in *Great Western Railway and Midland Railway v Bristol Corp* (1918) 87 LJ Ch 414 as being that “evidence of surrounding

6. The notion that ambiguity is a “broad concept” covering any situation where the parties’ intention is “doubtful” has been accepted in several WA cases decided since the special leave decision: see *Vincent Nominees Pty Ltd v Western Australian Planning Commission* [2012] WASC 28 at [54]; *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 at [119]; *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 294 ALR 550 at [77]; *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2013] WASC 194 at [127]; *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [108]; *Netglory Pty Ltd v Caratti* [2013] WASC 364 at [213]. An even more liberal conception of “ambiguity” was stated by Pullin JA in *McCourt v Cranston* [2012] WASC 60 at [24]. His Honour suggested that admission of evidence of surrounding circumstances is permissible where the contract is merely “difficult to understand”. (This would be satisfied in most commercial contract cases coming before the courts nowadays given the complexity of the facts and the contract documents. Further, it is inconsistent with the often-quoted statement of Lord Wilberforce in *Wickman Machine Tool Sales Ltd v Schuler* [1974] AC 235 at 261 that ambiguity “is not to be equated with difficulty of construction”). Pullin JA also said (at [25]–[26]:

If a trial judge decides that the contract under examination is not ambiguous or susceptible of more than one meaning, and rules that evidence of surrounding circumstances is not admissible, and an appeal court then decides that decision to be in error, then the case will have to be reheard, because relevant evidence will have been excluded. If, however, the trial judge receives evidence of surrounding circumstances and evidence of the object or aim of the transaction, and if the trial judge’s construction is found to be in error, then the Court of Appeal will be able to remedy that on appeal without sending it back for retrial.

Until the High Court says more about the subject, it would be wise for trial judges, in cases where a party reasonably contends that the contract is ambiguous or susceptible of more than one meaning and there is relevant evidence of objective relevant surrounding circumstances known to both parties or objective evidence of the aim or object of the transaction, to allow that evidence in provisionally, even if the trial judge considers that his or her likely conclusion will be to reject the argument of the party contending that the agreement is ambiguous or susceptible of more than one meaning.

7. However, see the statement by McLure P in *Hancock Prospecting* (above at [78]) that “the extent to which admissible evidence of surrounding circumstances can influence the interpretation of a contract depends, in the final analysis, on how far the language of the contract is legitimately capable of stretching. Generally, the language can never be construed as having a meaning it cannot reasonably bear.” See also Justice Kenneth Martin, “Contractual Construction: Surrounding Circumstances and the Ambiguity Gateway” (2013) 37 ABR 118 at 135: “In practice this all looks to deliver a rather expansive gateway to a reception of surrounding factual circumstances known at the time of contracting. However, it is important to remember that there arises a point beyond

---

circumstances was inadmissible except to resolve an ambiguity, *that is, where the words are susceptible of more than one meaning*” (at 350, emphasis added). In any event, the word “ambiguity” *does* embrace situations involving both verbal (including syntactical) ambiguity and doubtful applicability. In ordinary parlance we say that words are ambiguous if there is a grammatical difficulty which enables them to be read in more than one way *and* when there is a difficulty of application because they are too vague or imprecise to provide an answer to the situation that has arisen. See generally E A Farnsworth, “‘Meaning’ in the Law of Contract” (1967) Yale LJ 939.

<sup>56</sup> *Burger King Corp v Hungry Jack’s Pty Ltd* [2001] NSWCA 187 at [138]; *Ginger Development Enterprises Pty Ltd v Crown Developments Australia Pty Ltd* [2003] NSWCA 296 at [20]; *BP Australia Pty Ltd v Nyran Pty Ltd* [2004] FCAFC 163 at [31]; *Club Hotels Operations Pty Ltd v CHG Australia Pty Ltd* [2005] NSWSC 998 at [114]; and *Wachmer v Jaksic* [2007] WASC 313.

which the text's meaning cannot be stretched, no matter how much background evidence is raised. At that point the interpretation exercise effectively ends — what follows resembles, in reality, an exercise in rectification, rather than interpretation. This conceptual distinction between interpretation and rectification needs to be both remembered and honoured.”<sup>57</sup>

8. It is important to recognise that the above observations are fundamentally at odds with the *ICS* approach. At the very heart of Lord Hoffmann's principles is the notion that, although words may have an ordinary meaning in one context, the same words may, when used in another context, convey an entirely different meaning to a reasonable person with knowledge of the background to the contract.<sup>58</sup> Further, parties may use the “wrong” words — words that by their ordinary or conventional usage cannot bear the meaning contended for — but nevertheless convey the latter meaning tolerably clearly. Whereas under Mason J's true rule it is impermissible to contradict “the language” of the contract in the absence (presumably) of absurdity, under Lord Hoffmann's principles it suffices that a reasonable person with knowledge of the background would not give that language its ordinary meaning.<sup>59</sup> Thus, in ordinary parlance “12 January” does not mean “13 January”, but in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*<sup>60</sup> a majority of the House of Lords held that a tenant's notice to terminate a lease “on 12 January” meant “on 13 January” (the date on which the tenant was entitled to terminate the lease) because in the circumstances a reasonable person in the position of the landlord with knowledge of the terms of the contract would have understood that the tenant wished to determine the lease on 13 January but wrongly wrote 12 January. In *ICS* itself the House of Lords substituted the words “any claim sounding in rescission (whether for undue influence or otherwise)” for “any claim (whether sounding in rescission for undue influence or otherwise)” because that was “what the parties using [the latter] words against the relevant background would reasonably have been

---

<sup>57</sup> With regard to the latter observation concerning the distinction between interpretation and rectification, cf G McMeel, *The Construction of Contracts* (2nd ed, 2011), para 17.63, who suggests, as do other commentators, that the *ICS* approach to interpretation of contracts has usurped much of the function of rectification. However, in my view, the claim is exaggerated because, ordinarily, rectification will provide the only viable basis for relief where a term is mistakenly omitted from or included in the document, or where the term that allegedly fails to reflect the true bargain has a plain meaning and the admissible background does not suggest that something has gone wrong with the language or syntax (as in *Daventry District Council v Daventry & District Housing Ltd* [2012] 1 WLR 1333). See also *Cherry Tree Investments Ltd v Landmain Ltd* [2013] Ch 305 at [98] per Lewison LJ (“this case demonstrates that there is still a useful role for rectification to play”). For a discussion of recent developments in this area, see D McLauchlan, “Refining Rectification” (2014) 130 LQR 83.

<sup>58</sup> As Tipping J pointed out in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 at [22], “[t]he objective approach [does not] require there to be an embargo on going outside the terms of the written instrument when the words in issue appear to have a plain and unambiguous meaning. This is because a meaning that may appear to the court to be plain and unambiguous, devoid of external context, may not ultimately, in context, be what a reasonable person aware of all the relevant circumstances would consider the parties intended their words to mean . . . While displacement of an apparently plain and unambiguous meaning may well be difficult as a matter of proof, an absolute rule precluding any attempt would not be consistent either with principle or with modern authority.”

<sup>59</sup> As Lord Hoffmann pointed out in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101; [2009] 4 All ER 677 at [37], *ICS* decided two main points: “first, that it was not necessary to find an ‘ambiguity’ before one could have any regard to background and, secondly, that the meaning which the parties would reasonably be taken to have intended could be given effect despite the fact that it was not, according to conventional usage, an ‘available’ meaning of the words or syntax which they had actually used”.

<sup>60</sup> [1997] AC 749.

understood to mean”.<sup>61</sup> And in *Chartbrook* a formula providing for payment of “23.4% of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value less the Costs and Incentives” was held to mean “*the amount by which 23.4% of the price achieved for each Residential Unit (less the Costs and Incentives) is in excess of the Minimum Guaranteed Residential Unit Value*”. As a result of this “verbal rearrangement”, the total amount owing to Chartbrook was only £897,051, not the £4,484,862 claimed.

#### IV. A RETREAT FROM *JIREH* (AND *CODELFA*)?

1. In the recent case of *Electricity Generation Corp v Woodside Energy Ltd* four members of the High Court (French CJ, Hayne, Crennan and Kiefel JJ) said:<sup>62</sup>

[T]his Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding “of the genesis of the transaction, the background, the context [and] the market in which the parties are operating”. As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption “that the parties ... intended to produce a commercial result”. A commercial contract is to be construed so as to avoid it “making commercial nonsense or working commercial inconvenience”.

No reference was made to *Jireh*. Nevertheless, in *Mainteck Services Pty Ltd v Stein Hurtey SA* the NSWCA (per Leeming JA, with whom Ward JA and Emmett JA concurred) held that:<sup>63</sup>

To the extent that what was said in *Jireh* supports a proposition that ‘ambiguity’ can be evaluated without regard to surrounding circumstances and commercial purpose or objects, it is clear that it is inconsistent with what was said in *Woodside*. The judgment confirms that not only will the language used “require consideration” but so too will the surrounding circumstances and the commercial purpose or objects.

In other words, what was said in *Jireh* has been impliedly overruled because “*Woodside* endorses and requires a contextual approach to the construction of commercial contracts”.<sup>64</sup>

2. Interestingly, Leeming JA did not find anything in this view that was inconsistent with the *Codelfa* “true” rule. His Honour said:<sup>65</sup>

There is no inconsistency because whether contractual language has a “plain meaning” is (a) a conclusion and (b) a conclusion which cannot be reached until one has had regard to the context. That accords with what was said by Allsop P in *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407; 76 NSWLR 603 at [17]:

---

<sup>61</sup> [1998] 1 WLR 896 at 913.

<sup>62</sup> [2014] HCA 7; 88 ALJR 447 at [35] (footnotes omitted).

<sup>63</sup> [2014] NSWCA 184 at [71].

<sup>64</sup> At [86].

<sup>65</sup> At [79]–[80].

“the phrase used by Mason J in *Codelfa Construction* (at 352) ‘if the language is ambiguous or susceptible of more than one meaning’ does not mean that the susceptibility of the language to more than one meaning must be assessed without reference to the surrounding circumstances ...”

Mason J was indicating that there are very real limits to the extent to which grammatical meaning can be displaced by contextual considerations. However, in order to determine whether more than one meaning is available, it may be necessary first to turn to the context.

And he later added:<sup>66</sup>

the approach to construction of written commercial contracts reflected in *Woodside* at [35] accords with what had been said in familiar passages in *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; 218 CLR 451 at [22] (construction “requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction”); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165 at [40] (“The meaning of the terms ... normally requires consideration not only of the text but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction”); and the endorsement in *Wilkie v Gordian Runoff Ltd* [2005] HCA 17; 221 CLR 522 at [15] of the proposition that “Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure”. It means also that the Australian approach mirrors that adopted in England, New Zealand, Singapore and Hong Kong: *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444; *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27; 3 SLR(R) 1029 (where the Court’s reasons delivered by V K Rajah JA for the Court survey much of the English decisions and academic literature); *Fully Profit (Asia) Ltd v Secretary for Justice* [2013] HKCFA 40; 6 HKC 374.

3. In my view, however, the above dicta and those of the High Court in *Woodside* are simply yet more chapters in the sorry history of inconsistent and mixed messages concerning the principles of contract interpretation that have emanated from the Australian courts over the past 50 years or so. At heart, Leeming JA says the same as the NSWCA said in *Franklins v Metcash*, yet the court and other intermediate appellate courts were rapped over the knuckles in the *Jireh* special leave decision for not following the *Codelfa* “true” rule. Therefore, it cannot be said that Australian law is settled until the High Court *explicitly* lays the latter rule to rest. The dicta in *Woodside* said nothing new. They repeated what the Court had said in several pre-*Jireh* decisions.<sup>67</sup> Incomprehensibly, the judges in *Jireh* said that they could not see anything in those decisions that was inconsistent with *Codelfa*.<sup>68</sup>

## V. CONCLUSION

1. Speaking at the University of Sydney in September 2002, Lord Steyn said: “The purpose of interpretation is sometimes mistakenly thought to be a search for the meaning of words. This in turn leads to the assumption that one must identify an ambiguity as a precondition to taking into account evidence of the setting of a legal text. Enormous energy

---

<sup>66</sup> At [84].

<sup>67</sup> See the quotations from *Pacific Carriers*, *Toll* and *Wilkie* in the previous paragraph of the text. See also *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at [22] and *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [8].

<sup>68</sup> See further D McLauchlan and M Lees, “More Construction Controversy” (2012) 29 JCL 97.

and ingenuity is expended in finding ambiguities. This is the wrong starting point. Language can never be understood divorced from its context.”<sup>69</sup>

2. The fact that judges in Australia have often disagreed as to whether particular words had a plain meaning<sup>70</sup> never seems to have shaken their belief in the inherent truth and wisdom of the plain meaning rule. Neither did the withering criticisms of that rule by renowned scholars such as Wigmore<sup>71</sup> and Corbin. For the latter, whose multi-volume treatise on the law of contract has been called “the greatest law book ever written”,<sup>72</sup> the rule was a source of considerable exasperation:<sup>73</sup>

There are times when an author is incompetent, and even intellectually and morally dishonest, if he fails to attack [such] an often repeated statement of law . . . There are many cases, practically never subjected to criticism, in which the court has considered extrinsic evidence as a basis for finding that the written words are “ambiguous”; instead of “ambiguity” admitting the evidence, the evidence establishes the ambiguity. Learned judges have often differed as to whether the written words are “ambiguous”, each one sometimes asserting that *his* meaning is “plain and clear”. All that any court has to do in order to admit relevant extrinsic evidence is to assert that the written words are “ambiguous”; this has been done in many cases in which the ordinary reader can perceive no ambiguity until he sees the extrinsic evidence.

The author regarded the rule as one based on “a great illusion . . . that words, either singly or in combination, have a ‘meaning’ that is independent of the persons who use them” and under which “[i]t is crudely supposed that words have a ‘true’, or ‘legal’, meaning (described as ‘objective’)”, whereas in truth “[w]ords, oral or written, are merely a medium by which one person attempts to convey his thoughts to another person” and “[i]t is individual men who have ‘meanings’ which they try to convey to others by the use of words; and it is individual men who receive ‘meanings’ by reason of words used by others”.<sup>74</sup> He also curtly dismissed the parol evidence rule as irrelevant in interpretation disputes because “[t]he terms of any contract must be given a meaning by

---

<sup>69</sup> Johan Steyn, “The Intractable Problem of the Interpretation of Legal Texts” (2003) 25 Syd L Rev 5 at 6. See also *Westminster City Council v National Asylum Support Service* [2002] UKHL 38; [2002] 1 WLR 2956; [2002] 4 All ER 654 at [5] where his Lordship said: “The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen . . . [I]n his important judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913, Lord Hoffmann made crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account.”

<sup>70</sup> See, eg, *Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99; *Lewis Construction (Engineering) Pty Ltd v Southern Electric Authority of Queensland* (1976) 11 ALR 305; and *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289.

<sup>71</sup> J H Wigmore, *Wigmore on Evidence* (Chadbourn rev, 1981), Vol 9, §2460–2475.

<sup>72</sup> Grant Gilmore, *The Death of Contract* (1974) 57.

<sup>73</sup> A L Corbin, *Corbin on Contracts* (rev ed 1960) Vol 3, 1971 Pocket Part, §543AA. See also §536 (pp 27–8): “[I]t can hardly be insisted on too often or too vigorously that language at its best is always a defective and uncertain instrument, that words do not define themselves, that terms and sentences in a contract, a deed, or a will do not apply themselves to external objects and performances, that the meaning of such terms and sentences consists of the ideas that they induce in the mind of some individual person who uses or hears or reads them, and that seldom in a litigated case do the words of a contract convey one identical meaning to the two contracting parties or to third persons.”

<sup>74</sup> *Corbin*, Vol 1, §106 (p 474). See also Vol 3, rev ed 1960, 1971 Pocket Part, § 543A: “Words, in themselves alone, have no ‘meaning’; it is always some *person* who has a ‘meaning’, a person who uses them to convey his thoughts (*his* ‘meaning’), or a person who hears or reads the words and thereby receives a ‘meaning’ and understanding (a ‘meaning’ and thoughts that are *his own*). This latter person may be one who is a party to the agreement, the judge, or any other third person.”

interpretation before it can be determined whether an attempt is being made to ‘vary or contradict’ them”.<sup>75</sup> That rule is about whether a *term* may be *added* to a written contract, not whether extrinsic evidence may be admitted for the purpose of *interpretation*.

3. Compare *Westpac Banking Corp v Newey* [2013] NSWSC 847 (ambiguity found; “Westpac” construed to mean “Westpac or any of its related bodies corporate”) with *Jireh International Pty Ltd v Western Export Services Inc* [2011] NSWCA 137 (no ambiguity; “sales by Jireh . . . to GJGC stores” did not include sales to such stores by Jireh’s associated entities).

\*\*\*\*\*

---

<sup>75</sup> *Corbin*, Vol 3, §543 (pp 130–31).