

CONTRACTUAL INTERPRETATION

Helen Winkelmann, Susan Glazebrook and Ellen France***

I INTRODUCTION

We start with some general points about the interpretation of contracts, before discussing in more detail the methodology of interpretation and, in particular, the modern purposive approach to interpretation with its greater use of extrinsic aids to interpretation.¹ Relevant differences between colloquium jurisdictions are highlighted and similarities to and differences from the position in England and Wales are discussed.² We then deal with implied terms, the parol evidence rule and interpretive approaches to certain types of contracts, including oral contracts, consumer contracts (including insurance), online contracts and registered instruments.³

* Chief Justice of New Zealand.

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1 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) is generally credited as having brought about the modern approach to interpretation. This modern approach, with its greater focus on a contextual and purposive analysis than in traditional approaches, has been compared to the modern approach to statutory interpretation: see *Zurich Insurance (Singapore) PTE Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27, [2008] 3 SLR(R) 1029 at [133]; *Manulife Bank of Canada v Conlin* [1996] 3 SCR 415 at [36] per L'Heureux-Dubé J (dissenting in result); and *Manitoba Hydro Electric Board v John Inglis Co* (1999) 142 Man R (2d) 1 (CA) at [48]. See also Michael Kirby "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts" (2003) 24 Stat L R 95; Andrew Burrows "Lecture 1: Statutory Interpretation" in *The Hamlyn lectures: Thinking about Statutes – Interpretation, Interaction, Improvement* (Cambridge University Press, Cambridge, 2018) 1, particularly at 34–40; and Jacinta Dharmananda and Leon Firios "Interpreting statutes and contracts: A distinction without difference?" (2015) 89 ALJ 580.

2 All our jurisdictions, to a greater or lesser extent, will still refer to British precedents in this area. When Canada is referred to, Quebec is not included unless specifically indicated.

3 This article is intended to be a survey of the position in the colloquium jurisdictions and of academic commentary on issues relating to contractual interpretation. We are not to be taken as endorsing any point of view, except in terms of current New Zealand precedent. Any developments in the law in New Zealand in this area would occur in light of the relevant precedents and any arguments that might be made in future cases.

II GENERAL POINTS

A Objective Approach to Interpretation

In the common law world contracts (at least wholly written ones) are interpreted objectively.⁴ This means that the uncommunicated subjective intentions of the parties to the contract are not relevant. The theoretical underpinning of this approach is that a person should be held to the bargain actually reached with the other party and not what he or she might have thought was the bargain.⁵ This is particularly the case where parties negotiate their positions and reduce their bargain to writing, with the written document recording the obligations they agree to perform.⁶

There is debate about whether the objective approach to the interpretation of written contracts means that the actual mutual intent of the parties (where this can be ascertained) is always irrelevant. On a wholly objective view of interpretation,⁷ the only relevant inquiry is the parties' presumed intent. As Mason J said in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*:⁸

4 See the famous case of *Smith v Hughes* (1871) LR 6 QB 597 where Blackburn J (with whom the other members of the Court agreed in the result) stated at 607:

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

5 At least absent factors like misrepresentation, illegality, mistake or circumstances giving rise to estoppel by convention.

6 With the exception of cases including collateral or partly written and partly oral contracts. We discuss the position relating to purely oral contracts below.

7 It has, however, been questioned whether there is in fact such a thing as a wholly objective view of interpretation: Robert McDougall "The Interpretation of Commercial Contracts – Hunting for the Intention of the Parties" (paper delivered at the College of Law Specialist Legal Conference, Sydney, 18 May 2018) at [12]:

The phrases cloak the application of value judgments to the particular issue; and they allow for variable judgments to be made as to the result of their application to particular facts. They are, in short, labels used to justify the choice of a particular interpretation, or to disguise what is (and necessarily must be) the individual judge's reaction to the text that she or he is asked to interpret.

8 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352. But see the criticism of the wholly objective approach in David McLauchlan "The Contract That Neither Party Intends" (2012) 29 JCL 26 at 31 where Professor McLauchlan points to what he calls the "absurd" proposition that parties to a contract could be held to an agreement that neither actually intended. In such a case, he argues there should, in fact, be no contract at all because to find a contract or adopt an interpretation that reliable evidence shows is contrary to the actual intentions of the parties would allow one party to perpetrate a fraud on the other: at 30. See also Donald Nicholls "My Kingdom for a Horse: The Meaning of Words" (2005) 121 LQR 577; and the comparison between the approach in the United States and

Consequently when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties ...

There are two main formulations of the test for interpretation in the colloquium jurisdictions and in England and Wales. The first is "the ascertainment of the meaning which the *document* would convey to a reasonable person".⁹ The second involves identifying "what the *parties meant* through the eyes of a reasonable reader".¹⁰ Thus one approach concentrates on the meaning of the document and the other on the perceived intention of the parties.

jurisdictions like Australia made in Tony Cole "The Parol Evidence Rule: A Comparative Analysis and Proposal" (2003) 26 UNSWLJ 680 at 681.

- 9 *Investors Compensation Scheme*, above n 1, at 912 per Lord Hoffmann (emphasis added). This was also the overall approach taken by the majority of the New Zealand Supreme Court (McGrath, Glazebrook and Arnold JJ) in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]. See also *Zurich Insurance*, above n 1, at [121] per Rajah JA for the Court of Appeal of Singapore. See *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70, (2001) 210 CLR 181 at [11] per Gleeson CJ, Gummow and Hayne JJ; and *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37, (2015) 256 CLR 104 at [46] per French CJ, Nettle and Gordon JJ (with whom the other members of the Court agreed) for the High Court of Australia. See also *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [10] per Lord Hodge (with whom all other members of the Court agreed): "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement."
- 10 *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [17] per Lord Neuberger (emphasis added) (with whom Lord Sumption and Lord Hughes agreed), [76]–[77] per Lord Hodge and [114] per Lord Carnwath (dissenting in the result). In Canada, see *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53, [2014] 2 SCR 633 at [49] per Rothstein J (with whom the other members of the Court agreed) where it was held that "the goal of the exercise is to ascertain the objective intent of the parties". See also *Lim Sze Eng v Lin Choo Mee* [2018] SGCA 84, [2019] 1 SLR 414 at [60] and following summarising the discussion of the principles of contractual interpretation set out in *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Pusy Koon* [2017] SGCA 70, [2018] 1 SLR 170; and *Yap Son On v Ding Pei Zhen* [2016] SGCA 68, [2017] 1 SLR 219 at [30]. This was also the position taken by Tipping J in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19]. Similarly, Gault J noted at [151] that the task was one of "ascertaining objectively what the parties must be taken to have agreed to". Neither Blanchard J nor Wilson J commented on the general approach to be taken and McGrath J used the "meaning the document conveys to a reasonable user" formulation at [76]. The former Chief Justice, Elias CJ, did not sit on the *Vector Gas* appeal but she does appear to have favoured the second formulation. In an address given at the Banking and Financial Services Law Association conference in 2014, she said "Its [the "work of construction"] purpose is to identify the bargain the parties have made. Not the bargain the court thinks ought reasonably to have been made": Sian Elias, former Chief Justice of New Zealand "Address Given at the Banking & Financial Services Law Association Conference" (Millennium Hotel, Queenstown, New Zealand, 11 August 2014) at 2.

It might be that the differing formulations lead to little difference in practice.¹¹ Both include the notion of a reasonable person in the exercise. Neither is conceptually inconsistent with the use of extrinsic aids to interpretation (and in particular consideration of the "context" in which the contract was formed). Nevertheless, on the second formulation, it might be more difficult to resist an argument that evidence of the parties' actual mutual intentions is admissible, where these can be ascertained through examining prior negotiations or subsequent conduct. Professor McLauchlan says:¹²

It is difficult to see how a court could possibly refuse to give effect to a clearly proven actual mutual intention on the ground that a reasonable person in the position of the parties would not have given the language that meaning. That seems to be a contradiction. A reasonable person in the position of the parties must surely give the language the meaning that the parties intend.

Also relevant to ascertaining the appropriate methodology of interpretation (and in particular the material it is legitimate to take into account) is the fact that contracts may be relied on not just by the original parties but by others, such as creditors, employees, shareholders and assignees.¹³ Contracts are also likely to be interpreted by laypeople, rather than by lawyers, in everyday situations over the life of the contract. These factors may suggest, at least for contracts where third party reliance is likely, that it is the document that should be interpreted and could also point away from too great a reliance on background that is not obvious and readily available to relevant third parties.

Further, where interpretation issues do come before the courts, this is very often the result of a situation arising that has not been foreseen by the parties when the contract was entered into.¹⁴ This would mean that the parties would not, at the time the contract was formed, have had any actual

11 Lord Hoffmann, sitting in the Hong Kong Court of Final Appeal, in fact used the second formulation, saying: "The construction of a document is not a game with words. It is an attempt to *discover what a reasonable person would have understood the parties to mean*": *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279 at [59] (emphasis added). Indeed, in, *Investors Compensation Scheme* itself, above n 1, at 912–913 at principle four, Lord Hoffmann arguably also used the second formulation, saying that "the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean".

12 David McLauchlan "Contract Interpretation: What Is It About?" (2009) 31 Syd L Rev 5 at 28.

13 We include in the term "assignees" those who have purchased the shares in a company where the value of the shares might be affected by the contracts already entered into by that company. Due diligence exercises in such cases would normally only be able to have regard to the documents themselves and any obvious background.

14 David McLauchlan makes the point that the "great majority of interpretation disputes that come before the courts have the common feature that the parties did not, at the time of formation, contemplate the situation that has arisen": McLauchlan, above n 12, at 9.

intention about how the dispute should be resolved. Assessment of the meaning of the document and/or presumed intention is therefore all that is left.

B Correcting Mistakes

In *Chartbrook Ltd v Persimmon Homes Ltd*, Lord Hoffmann suggested a very wide role for the courts in correcting perceived errors in contracts:¹⁵

[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.

Whether something has "gone wrong with the language" is often discoverable only after consideration of the background context or matrix of fact. Thus to a degree this inquiry is linked to the use of extrinsic materials. As Lord Hoffmann's fifth principle in *Investors Compensation Scheme Ltd v West Bromwich Building Society* provides:¹⁶

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.

Given it is often necessary to consider the wider context, the ability of courts to "correct mistakes" may be limited in jurisdictions, like Australia, that require an ambiguity in the document before resort may be had to extrinsic materials.¹⁷ As discussed below, some would say this limitation is a good thing and that, if there are mistakes made in the language, these should be corrected by way of rectification.¹⁸

15 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101 at [25].

16 *Investors Compensation Scheme*, above n 1, at 912–913 per Lord Hoffmann.

17 This is a particularly contested issue in Australia. See the discussion of Australia's approach(es) in David McLauchlan "Plain Meaning and Commercial Construction: Has Australia Adopted the ICS Principles?" (2009) 25 JCL 7.

18 New Zealand also has statutory remedies for contractual mistakes: see Contract and Commercial Law Act 2017, pt 2, sub-pt 2 (previously the Contractual Mistakes Act 1977 (repealed)). See also NC Seddon and RA Bigwood *Cheshire & Fifoot: Law of Contract* (11th ed, LexisNexis, Chatswood (NSW), 2017) at ch 12 for mistake in Australia; and John McCamus *The Law of Contracts* (2nd ed, Irwin Law, Toronto, 2012) at ch 13 for mistake in Canada. See *Chwee Kin Keong v DigilandMall.com Pte Ltd* [2005] 1 SLR(R) 502 (CA) where the Singapore Court of Appeal endorsed the doctrine of common mistake at common law and in equity. See also Lee Pey Woan "Unilateral Mistake in Common Law and Equity – *Solle v Butcher* Reinstated" (2006) 22 JCL 81; Andrew Phang "Contract Formation and Mistake in Cyberspace – The

C Commercial Purpose

It is often said that contracts should be interpreted to give effect to their commercial purpose.¹⁹ It makes sense to try and ascertain the commercial reasons for a contract and interpret the words to achieve those objectives as far as possible: commercial parties enter into contracts for commercial purposes. An issue that arises, however, is the extent to which courts should interpret contracts to avoid arriving at what they perceive to be "unreasonable" or "uncommercial" results.²⁰ There is a

Singapore Experience" (2005) 17 SAclJ 361; and Andrew Phang "Contract Formation and Mistake in Cyberspace" (2005) 21 JCL 197.

- 19 See *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 (HL) at 201 per Lord Diplock (with whom the other Law Lords agreed):

... 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.

Commercial purpose is one of the two cardinal principles of contractual interpretation identified in Jonathan Morgan *Great Debates in Contract Law* (Palgrave Macmillan, Hampshire (UK), 2012) at 91. The other was that words must be understood in their context. See also *Vector Gas*, above n 10, at [14] per Blanchard J and [62] per McGrath J (using the language "commercial purpose"); *Firm PI*, above n 9, at [79] per McGrath, Glazebrook and Arnold JJ; *Mount Bruce Mining*, above n 9, at [47] per French CJ, Nettle and Gordon JJ (with whom the other members of the Court agreed); *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 (HL) at 995–996 per Lord Wilberforce (with whom the other Law Lords agreed); *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749 (HL) at 770 per Lord Steyn; *Zurich Insurance*, above n 1, at [131]; and *Marble Holding Ltd v Yatin Development Ltd* (2008) 11 HKCFAR 222 at [31] per Mortimer NPJ (with whom the other members of the Court agreed). But see also the cautionary comments of Lord Neuberger in *Arnold v Britton*, above n 10, at [15]:

When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

See also Andrew Robertson "Purposive contractual interpretation" (2019) 39 *Legal Studies* 230 for a discussion of the importance of contractual purpose in interpretation.

- 20 See for example the comments of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235 (HL) at 251:

The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

question whether courts are always well equipped to understand the commercial imperatives²¹ and there will be particular issues where it is necessary to distinguish between what may be seen as "bad drafting" that does not achieve the mutual commercial objectives of the parties and what are merely "bad bargains", at least for one of the parties.²²

Even in *Chartbrook* it was recognised that the fact that a contract appears to be "unduly favourable" to one of the parties is not a sufficient reason for supposing that the term in dispute does not mean what it says.²³ It has often also been said that it is not the task of the courts to rewrite a contract.²⁴ The Hong Kong Court of Final Appeal in *Sinoearn International Ltd v Hyundai-CCECC Joint Venture* endorsed the point made by Lord Neuberger in *Skansa Rashleigh Weatherfoild Ltd v Somerfield Stores Ltd* that:²⁵

... the surrounding circumstances and commercial common sense do not represent a licence to the court to re-write a contract merely because its terms seem somewhat unexpected, a little unreasonable, or not commercially very wise. The contract will contain the words the parties have chosen to use in order to identify their contractual rights and obligations. At least between them, they have control over the words they use and what they agree, and in that respect the words of the written contract are different from the surrounding circumstances or commercial common sense which the parties cannot control, at least to the same extent.

See also *Chartbrook*, above n 15, at [20] where Lord Hoffmann noted that the striking feature of the case was not that the provisions on the rejected interpretation were favourable to one party but that the suggested construction was one that would make the provisions "appear arbitrary and irrational". See also *Jireh International Pty Ltd t/as Gloria Jeans Coffee v Western Exports Services Inc* [2011] NSWCA 137 at [55] where Macfarlan JA (with whom the other members of the Court agreed) commented:

A court is not justified in disregarding unambiguous language simply because the contract would have a more commercial and businesslike operation if an interpretation different to that dictated by the language were adopted.

- 21 Including whether the wording is a negotiated compromise. See *Wood v Capita*, above n 9, at [11] per Lord Hodge (with whom all other justices agreed): "the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms".
- 22 Such "bad bargains" may have been unfavourable to one party from inception or may have, through the passage of time, transpired to be "bad bargains" for one party because of an unexpected event that was not anticipated at the time the contract was entered into, but not amounting to frustration.
- 23 *Chartbrook*, above n 15, at [20].
- 24 See for example *Glaswegian Enterprises Inc v BC Tel Mobility Cellular Inc* (1997) 49 BCLR (3d) 317 (CA) at [20]. Some would say that Lord Hoffmann's comments in *Chartbrook*, above n 15, at [25] in fact do suggest a contract can be rewritten.
- 25 *Sinoearn International Ltd v Hyundai-CCECC Joint Venture* (2013) 16 HKCFAR 632 at [78], citing the comments of Neuberger LJ in *Skansa Rashleigh Weatherfoild Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732 at [21].

D Usurping the Role of Rectification?

There are those who consider that the new contextual approach to interpreting contracts has, contrary to what its advocates maintain, in fact led to the courts effectively rewriting contracts. Sir Richard Buxton has criticised the *Investors Compensation Scheme* approach for its blurring of the lines between interpretation and rectification. In his view, principle five "overrode the previous understanding that, rectification apart, the court could not depart from the words of the document to find an agreement different from that stated in the document".²⁶ He considers that the new approach is no longer about ascertaining the meaning of what was *said* (interpretation) at all, but about what the parties meant to (but did not actually) say.²⁷

Mistakes being fixed through interpretation may also cut across estoppel by convention. Where the parties to a contract act on mutual assumptions that do not accord with the words of the contract, estoppel by convention may apply to prevent a party from insisting on the contractual provisions where it is unjust to do so.²⁸ For it to apply:²⁹

... both parties [must be] thinking the same; they both know that the other is thinking the same and each expressly or implicitly agrees that the basis of their thinking shall be the basis of the contract.

E Certainty

This leads naturally to another issue, that of the need for commercial certainty. The concern is that the modern, more contextual, purposive approach to contractual interpretation is less predictable than the traditional textual or literalist approach.³⁰ Lord Hoffmann accepted there are issues in this regard:³¹

26 Richard Buxton "'Construction' and Rectification after *Chartbrook*" [2010] 69 CLJ 253 at 256.

27 A similar point was made in *Wickman*, above n 20, at 263 where Lord Simon of Glaisdale (with whom a majority of the members of the House agreed in the result) adopted a passage from Robert F Norton *A Treatise on Deeds (1906)* (Sweet & Maxwell, London, 1906) at 43:

... the question to be answered always is, "What is the meaning of what the parties have said?" not "What did the parties mean to say?" ... it being a presumption *juris et de jure* ... that the parties intended to say that which they have said.

28 See the discussion on estoppel by convention in *Vector Gas*, above n 10, at [25] per Tipping J, [67]–[69], [74] and [84] per McGrath J, and [124] and [140] per Wilson J.

29 *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* CA159/92, 30 March 1993 at 24 per Tipping J for the Court, partially reported at [1996] 1 NZLR 548.

30 This may be one of the reasons why some jurisdictions require an ambiguity before departing from a "plain meaning" approach to interpretation: for example, Australia.

31 *Chartbrook*, above n 15, at [37].

... the law of contract is an institution designed to enforce promises with a high degree of predictability and that the more one allows conventional meanings or syntax to be displaced by inferences drawn from background, the less predictable the outcome is likely to be.

The other side of the argument is that words only take on meaning when understood in context,³² and this means that using a contextual approach to interpretation in fact promotes commercial certainty by ensuring that contracts are interpreted to accord with the parties' actual intentions. Catherine Mitchell, however, observes that, while context may help resolve some linguistic disputes, notably ambiguity, "[c]ontext is no more determinate and unequivocal than language".³³

F Canons of Construction

In the past, under the traditional approach to interpretation with its concentration on the words used, much reliance was placed on so-called canons of construction in contract law.³⁴ In *Zurich Insurance (Singapore) PTE Ltd v B-Gold Interior Design & Construction Pte Ltd*, the Singapore Court of Appeal held that several of these canons have continuing relevance in the interpretation exercise.³⁵ On the other hand, the Supreme Court of Canada has said that the "interpretation of contracts has evolved towards a practical, common-sense approach, not dominated by technical rules of construction".³⁶

32 See the academic discussion contending that the "natural and ordinary" meaning principle is a fallacy in the sense that words can only ever be understood in context: Gerard McMeel "The Rise of Commercial Construction in Contract Law" [1998] LMCLQ 382. See also David McLauchlan "The Plain Meaning Rule of Contract Interpretation" (1996) 2 NZBLQ 80; David McLauchlan "Subsequent Conduct as an Aid to Interpretation" (1996) 2 NZBLQ 237; David McLauchlan "Common Assumptions and Contract Interpretation" (1997) 113 LQR 237; David McLauchlan "A Contract Contradiction" (1999) 30 VUWLR 175; and David McLauchlan "The New Law of Contract Interpretation" (2000) 19 NZULR 147. See also Catherine Mitchell "Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' deal" (2009) 29 OJLS 675. See also the discussion of Lord Hoffmann in *Mannai*, above n 19, at 774–776. Even Mason J in *Codelfa*, above n 8, who appeared to favour a "plain meaning" approach noted at 348:

On the other hand, it has frequently been acknowledged that there is more to the construction of the words of written instruments than merely assigning to them their plain and ordinary meaning ... This has led to a recognition that evidence of surrounding circumstances is admissible in aid of the construction of a contract.

33 Catherine Mitchell *Interpretation of Contracts* (Routledge-Cavendish, Abingdon (UK), 2007) at 68.

34 For contract, see for example William Story *Story's Law of Contracts (Vol II)* (4th ed, Little, Brown & Co, Boston, 1856) at ch 21. For statutes, see for example Peter Maxwell *On the Interpretation of Statutes* (William Maxwell & Son, London, 1875).

35 *Zurich Insurance*, above n 1, at [131] per Rajah JA for the Court (with whom all other members of the Court agreed).

36 *Sattva*, above n 10, at [47] per Rothstein J for a unanimous Court. It appears that the canons are still, however, used in Canada: see McCamus, above n 18, at 760.

Canons of construction may well have been too rigidly applied in the past. On the other hand, a "common sense" approach can lead to differing results, depending on the "sense" of a particular judge which may in fact not be "common". Arguably, at least some of the so-called canons of construction in fact reflect a common understanding of how we use words. Using the canons may thus in some cases give some structure to the enquiry without disregarding common sense.

G The Reasonable Person

The "reasonable person" inquiry can cause issues in any "objective" inquiry. This is because judiciaries still tend to be largely made up of privileged, middle class men and usually also from the dominant ethnic group in the particular jurisdiction.³⁷ Their view of what is reasonable may well be coloured by their background, including their cultural background.³⁸

As an illustration, in early New Zealand, injustice arose through colonial misunderstanding of the nature of the relationship Māori have to the land and the collective nature of Māori society.³⁹ The same will have been true in other jurisdictions where there are indigenous peoples.⁴⁰

One of the justifications put forward for the use of extrinsic evidence in the interpretation of contracts has been that it can serve to "contradict the linguistic background of the judge".⁴¹ We would add that it might also assist in neutralising other areas of a judge's background and experience that might lead to decisions being based on erroneous assumptions in a particular case.

H International Dimension

As we discuss in more detail below, the jurisdictions covered by this colloquium have differing approaches to the admission of extrinsic evidence in contractual interpretation. At the international level, the International Institute for the Unification of Private Law (UNIDROIT) principles,⁴² and

³⁷ And given the level of education and experience involved to become a judge in a common law system, women judges and those from other ethnic groups will still tend to be middle class and privileged.

³⁸ There have recently been projects in various jurisdictions rewriting judgments which illustrate how different the reasoning might have been if a feminist perspective had been taken. See for example Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand: Te Rino – A Two-Stranded Rope* (Hart Publishing, Oregon, 2017). This project also had a stream that examined the intersection of gender and indigeneity.

³⁹ See Richard Boast *Buying the Land, Selling the Land: Govts and Māori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008); and PG McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011).

⁴⁰ See for example *Mabo v Queensland (No 2)* (1992) 175 CLR 1. See also *Calder v British Columbia (Attorney-General)* [1973] SCR 313.

⁴¹ *Pacific Gas & Electric Co v Thomas Drayage & Rigging Co Inc* 69 Cal (2d) 33 (1968) at [37], citing Arthur L Corbin *Corbin on Contracts* (West Publishing Company, Minnesota, 1960) at 225, n 56.

⁴² International Institute for the Unification of Private Law *UNIDROIT Principles of International Commercial Contracts with Official Commentary* (2016) [UNIDROIT Principles], art 4.3.

the United Nations Convention on Contracts for the International Sale of Goods (CISG),⁴³ treat as admissible all relevant context, including prior negotiations and the subsequent conduct of the parties.

In *Chartbrook*, Lord Hoffmann said that these international standards are based on the French view of contractual interpretation as against that in English law:⁴⁴

French law regards the intentions of the parties as a pure question of subjective fact, their *volonté psychologique*, uninfluenced by any rules of law. It follows that any evidence of what they said or did, whether to each other or to third parties, may be relevant to establishing what their intentions actually were ...

However, we note that in the United States the *Restatement (Second) of the Law of Contract*, despite being a common law jurisdiction, allows evidence of pre-contractual negotiations to ascertain the meaning of a contractual document.⁴⁵

Our survey of the position in England and Wales and the colloquium jurisdictions will show differences in approach to the use of extrinsic materials and in other areas of interpretation. The position internationally shows even more variation. There is an issue whether, in an increasingly global environment, the approach to contractual interpretation and the use of extrinsic materials should be aligned across the world.

III THE METHODOLOGY OF INTERPRETATION

Interpretation of a contractual document is performed through the use of "intrinsic" and "extrinsic" materials, being tools used in the interpretive process found within, and outside of, the document.⁴⁶ In most jurisdictions covered by this colloquium, however, there remain restrictions on the use of some types of extrinsic evidence (and in particular prior negotiations and subsequent conduct).

43 United Nations Convention on Contracts for the International Sale of Goods 1489 UNTS 3 (opened for signature 11 April 1980, entered into force 1 January 1988) [CISG], art 8(3). Australia, Canada, China, New Zealand and Singapore are all parties, but not Hong Kong. See also the discussion in Elias, above n 10, at 10–11.

44 *Chartbrook*, above n 15, at [39]. See also the position under the Civil Code of Québec 1991, Book Five, Cap 2, Title 1, Div IV and in particular art 1425. This generally reflects what is called the subjective view of interpretation under civil law. See for example K Zweigert and H Kötz *Introduction to Comparative Law* (3rd ed, Clarendon Press, Oxford, 1998) for a comparison between common law and civil law systems.

45 American Law Institute *Restatement (Second) of the Law of Contract* (2nd ed, St Paul, Minnesota, 1981) § 214(c).

46 See Andrew Phang and Yihan Goh "Contract Law in Commonwealth Countries: Uniformity or Divergence?" (2019) 31 *SAcLJ* 170 for a general overview of the extent to which the Commonwealth countries converge or diverge in their approaches to interpretation.

However wide the sources used, the primary aim is to interpret the language the parties have used in the document, while recognising (at least to some degree) that, as Corbin says, "language at its best is always a defective and uncertain instrument". He went on to say that:⁴⁷

... 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 parties.

IV INTRINSIC MATERIALS

In this section we discuss the two "intrinsic" materials that are used to determine the meaning of a clause in a contract: the words themselves and the contract as a whole.

A The Words

In the past there was an almost exclusive focus on the words of the contract and their dictionary meaning.⁴⁸ This was variously described as the "literal", "natural", "ordinary", "conventional" or "plain" meaning, or as some combination of these. Despite the more modern approach to contractual interpretation and particularly the emphasis on wider extrinsic context discussed below, the aim, as noted above, is nevertheless to interpret the words used.

Recently, the United Kingdom Supreme Court in *Arnold v Britton*,⁴⁹ in what has been said to be a partial retreat from the approach in *Investors Compensation Scheme*,⁵⁰ placed emphasis on the words of the provision in question, noting:⁵¹

47 Corbin, above n 41, at 536.

48 See for example *Shore v Wilson* (1842) 9 Cl & F 355 at 565–566, 8 ER 450 at 532–533; *A & J Inglis v Buttery* (1878) 3 App Cas 552 (HL) at 577; and *Great Western Railway and Midland Railway v Bristol Corp* (1918) 87 LJ Ch 414 (HL) at 418–419 per Lord Atkinson and 424–425 per Lord Shaw.

49 *Arnold v Britton*, above n 10.

50 See the discussion in Ryan Catterwell "Striking a balance in contract interpretation: the primacy of the text" (2019) 23 Edin L R 52; Lord Sumption "A question of taste: the Supreme Court and the interpretation of contracts" (2017) 17 OUCJLJ 301; Leonard Hoffmann "Language and Lawyers" (2018) 134 LQR 553; Geoffrey Vos "Contractual Interpretation: Do Judges Sometimes Say One Thing and Do Another?" (2017) 23 Canta LR 1; and Tim Smith and Sam Cathro "The interpretation of contracts" (2019) 925 Law Talk 49 at 51. See the discussion below at 15 in the main text on *Wood v Capita*, above n 9.

51 *Arnold v Britton*, above n 10, at [17] per Lord Neuberger in a majority judgment (with whom Lord Sumption, Lord Hughes and Lord Hodge agreed). The concentration on the words, however, is not necessarily inconsistent with the *Investors Compensation Scheme* approach, above n 1. In the case of *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251 at [39] per Lord Hoffmann (dissenting in the result but clarifying his comments in *Investors Compensation Scheme*, above n 1) said that the "primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage".

The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision.

B Context of Document

Even those most enthusiastic about focussing on the words of a contractual provision do recognise that the words must nevertheless be read in their context, both in the clause and in the contract as a whole. Lord Mustill commented in *Charter Reinsurance Co Ltd v Fagan* that the words used by the parties in the contract in question "must be set in the landscape of the instrument as a whole".⁵² It has also been recognised that in some circumstances references to the plain meaning of a term will not be helpful because "the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another".⁵³

The internal contractual context will be particularly important when another contractual term appears to overlap or conflict with the term that is the subject of interpretation. This may concern provisions in a single contractual document or in different documents recording the same transaction. When there is a conflict between two provisions in a contract, the court must read down the apparent scope or effect of one (or both) to resolve it. Courts will usually try and make sure that some effect is given to each clause but sometimes that is not possible.⁵⁴

The New Zealand case of *Totara Investments Ltd v Crismac Ltd* is a good illustration of this principle.⁵⁵ In that case, a number of loans were secured by mortgages over personal property. The property ultimately became worthless and the mortgagee attempted to exercise a power of attorney contained in the mortgage documents to take further security. The mortgagor argued that this power should be read subject to a provision in the loan agreements that its liability be limited to the value of the security provided.

Counsel for the mortgagee argued that the limited recourse clause should be read as subject to the power of attorney and that such a reading avoided the latter being made redundant. The Supreme

52 *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 (HL) at 384 (with whom Lord Goff, Lord Griffiths and Lord Browne-Wilkinson agreed). See also *Zurich Insurance*, above n 1, at [53] per Rajah JA (with whom all members of the Court agreed); and *Jireh International*, above n 20, at [55] per Macfarlan JA (with whom the other members of the Court agreed).

53 *Fagan*, above n 52, at 391 per Lord Hoffmann, writing a concurring judgment and agreeing in the result with the majority judgment of Lord Mustill.

54 See also *BG Checo International Ltd v British Columbia Hydro and Power Authority* [1993] 1 SCR 12 at [9] per La Forest and McLachlin JJ (L'Heureux-Dubé and Gonthier JJ concurring): "Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective".

55 *Totara Investments Ltd v Crismac Ltd* [2010] NZSC 36, [2010] 3 NZLR 285.

Court rejected this argument and instead read down and effectively made redundant the power of attorney provision. Blanchard J, delivering the decision of the Court, held, in agreement with the Court of Appeal, that the loan agreement was the controlling document and that the limited recourse clause was the paramount provision. It was thus to be given full effect even though this rendered the attorney provision largely redundant.⁵⁶

It has been suggested that arguments, such as that made by the mortgagee in *Totara*, against a particular reading of a contractual clause on the grounds that it would render the clause redundant, are often of limited value.⁵⁷

I think, my Lords, that the argument from redundancy is seldom an entirely secure one. The fact is that even in legal documents (or, some might say, especially in legal documents) people often use superfluous words. Sometimes the draftsmanship is clumsy; more often the cause is a lawyer's desire to be certain that every conceivable point has been covered. One has only to read the covenants in a traditional lease to realise that draftsmen lack inhibition about using too many words.

V *EXTRINSIC MATERIALS*

The three main extrinsic materials that may be used to determine the meaning of a clause in a contract are:

- (a) the factual matrix (background context);
- (b) evidence of prior negotiations; and
- (c) evidence of subsequent conduct.

Much of the debate surrounding how far a court can go in interpreting a contract and whether extrinsic materials should be used in that process concerns a tug of war between the primacy of the language versus the context and background facts.⁵⁸ Also controversial is whether the actual (as against objectively presumed) intention of the parties to the contract should ever prevail.⁵⁹

56 At [24] and [30]–[31]. It must be said that this was probably a case of choosing which clause to render redundant in the circumstances.

57 *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] AC 266 (HL) at 274 per Lord Hoffmann (with whom the other members of the Court agreed in separate judgments).

58 Some commentators also suggest that practicality should be an important consideration: see John Bond "The use of extrinsic evidence in aid of construction: a plea for pragmatism" [2016] Qld J Schol 9 at [10]: "the pursuit of theoretical purity can sometimes occur with insufficient attention to feasibility and practical consequences".

59 See McLauchlan, above n 8.

A *Factual Matrix*

Common law courts had long used context to interpret contracts, most commonly when there was an ambiguity in the wording.⁶⁰ An approach to interpretation that takes into account the wider context, without the necessity for ambiguity, was heralded in the much celebrated speech of Lord Wilberforce in *Prenn v Simmonds*.⁶¹

The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. ... We must ... inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view.

This led to the well-known restatement of the law of contractual interpretation in *Investors Compensation Scheme*, which said that the task requires:⁶²

... 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.

In *Wood v Capita Insurance Services Ltd*⁶³ the United Kingdom Supreme Court, in a judgment delivered by Lord Hodge (with whom all other justices agreed), said that *Arnold v Britton* did not

60 Relevant background was also admitted in specific instances. For example, a private dictionary meaning: *Partenreederei MS Karen Oltmann v Scarsdale Shipping Co Ltd* [1976] 2 Lloyd's Rep 708 (QB) [*The Karen Oltmann*], but see the criticism of whether this is a legitimate private dictionary exception in the Court of Appeal judgment in *Chartbrook Ltd v Persimmon Homes Ltd* [2008] EWCA Civ 183 at [121] per Kerr LJ (note that the decision was reversed by the House of Lords in *Chartbrook*, above n 15); to establish an oral term for a partly-written and partly-oral contract (*Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 61 and 89–90; and *McRoberts v Whissell* 2006 ABCA 388); to establish the existence of a prior collateral contract (*Harris v Sydney Glass & Tile Co* (1904) 2 CLR 227 at 236 and 238; and *Balfour v Tarasenko* 2016 BCCA 438); or to establish a trade, customary or technical meaning (see *Hvalfangerselskapet Polaris Aktieselskap v Unilever Ltd* (1933) 39 ComCas 1 (HL); and *Shore v Wilson* (1842) 9 Cl & F 355 at 555 per Parke B and at 567 per Tindal CJ, 8 ER 450 at 529 per Parke B and at 533 per Tindal CJ). Mason J in *Codelfa*, above n 8, also left open the possibility of admission of evidence that the parties had *refused* to adopt a provision that would not accord with the objective meaning the words might convey: at 363. In *Elias*, above n 10, at 5, *Elias* comments that: "It is not clear why in principle a meaning the parties have rejected should be admitted if a meaning the parties have accepted is not."

61 *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) at 1383–1384.

62 *Investors Compensation Scheme*, above n 1, at 912 per Lord Hoffmann. In *Wood v Capita*, above n 9, at [10], Lord Hodge (for the Court) said that the second principle in *Investors Compensation* was not new: "But Lord Bingham of Cornhill in an extra-judicial writing, *A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision* Edin LR Vol 12, 374–390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree."

63 *Wood v Capita*, above n 9.

herald a retreat from a position where wider context can be considered.⁶⁴ Instead, the extent to which a court largely relies on context in interpreting the words of a contract depends on the circumstances:⁶⁵

[10] The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. ...

[11] ... Interpretation is ... a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause ... and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest ... Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

[12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated ... To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

The background (wider context) to a contract, also known as the "matrix of fact" or "surrounding circumstances", has been said to include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable [person]",⁶⁶ subject only to the criterion of relevance.⁶⁷ Context may thus include the nature of the industry or market concerned and the practices adopted by it;⁶⁸ the history of dealings between the parties; the relative states of knowledge and experience of the parties; the legal

⁶⁴ *Arnold v Britton*, above n 10, at [8].

⁶⁵ *Wood v Capita*, above n 9.

⁶⁶ *Investors Compensation Scheme*, above n 1, at 912–913. See also *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA) at 81–82; and *Zurich Insurance*, above n 1, at [56] and [57].

⁶⁷ *Ali*, above n 51, at [39].

⁶⁸ See for example *Hi-Tech Group Inc v Sears Canada Inc* (2001) 52 OR (3d) 97 (CA).

background, including any Acts of Parliament;⁶⁹ the origins of the contract;⁷⁰ particular concerns and needs of the parties; other interconnected contracts or subcontracts; and, of course, the commercial purpose behind the contract, if any.

In our colloquium jurisdictions, only Australia still maintains the position that ambiguity is required before the wider extrinsic context can be considered. The current position seems to be as stated in *Codelfa*,⁷¹ where Mason J held:⁷²

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.

It has, however, been suggested that *Codelfa* has not necessarily constrained the lower courts' use of extrinsic materials in Australia.⁷³ One scholar has noted that:⁷⁴

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

69 See for example statutes like the Contract and Commercial Law Act 2017 (NZ).

70 See for example *Canada Deposit Insurance Corp v Commonwealth Trust Co* [1998] 1 WWR 484 (BCCA).

71 *Codelfa*, above n 8. See also *Australian Broadcasting Commission v Australasian Performing Rights Association* (1973) 129 CLR 99.

72 *Codelfa*, above n 8, at 352 per Mason J (with whom the other Members of the Court agreed in the result but in separate judgments) (emphasis added). This position on the requirement for ambiguity has been questioned by lower courts but affirmed by the High Court in several cases: see *Mount Bruce Mining*, above n 9, at [48] per French CJ, Nettle and Gordon JJ and [118]–[120] per Bell and Gageler JJ agreeing.

73 See for example Maha Char "Construction of Contracts: The Ambiguity Gateway and the Current State of the Law" (2018) 44 UWAL Rev 65. See also Bond, above n 58, at [21] where that author notes: "by early 2011 it seemed clear that it was a corollary of the objective theory of contract itself that identification of ambiguity in the terms of an agreement was not a necessary precursor to the examination of surrounding circumstances", citing *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407, (2009) 76 NSWLR 603 at [14]–[18] per Allsop P, at [49] per Giles JA and [239]–[305] per Campbell JA; *Synergy Protection Agency Pty Ltd v North Sydney Leagues' Club Ltd* [2009] NSWCA 140 at [22] per Allsop P (with whom Tobias and Basten JJA agreed); *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234, (2009) 261 ALR 382 at [3] per Allsop P (with whom Basten JA agreed); *Movie Network Channels Pty Ltd v Optus Vision Pty Ltd* [2010] NSWCA 111 at [68] per Macfarlan JA (with whom Young JA and Sackville AJA agreed); *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2006] FCAFC 144, (2006) 156 FCR 1 at [51] per Weinberg J, [100] per Kenny J and [238] per Lander J; *Ralph v Diakyne Pty Ltd* [2010] FCAFC 18 at [46] to [47] per Finn, Sundberg and Jacobson JJ; and *MBF Investments Pty Ltd v Nolan* [2011] VSCA 114, (2011) 37 VR 116 at [197]–[203] per Neave, Redlich and Weinberg JJA. But again see Bond, above n 58, who also cautions that intermediate appellate courts "appeared to retreat from the full flourish of the 'ambiguity is unnecessary' proposition (or at least to treat the proposition with some reserve)" (at [25]) in light of the "trilogy of High Court reminders that overruling *Codelfa* was a matter for the High Court, and not intermediate courts of appeal" (at [24]).

74 Corbin, above n 41, at § 543AA (emphasis added).

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.

Canada,⁷⁵ New Zealand,⁷⁶ Hong Kong⁷⁷ and Singapore,⁷⁸ have all essentially adopted the approach in *Investors Compensation Scheme*. The leading case in Canada on the relevance and admissibility of context is the decision of the Supreme Court in *Sattva Capital Corp v Creston Moly Corp*.⁷⁹ Rothstein J for the Court stated that:⁸⁰

The overriding concern is to determine "the intent of the parties and the scope of their understanding". To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning ...

The meaning of words is ... derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement ...

Even with the wider view of the use of context, it is, however, recognised that the text remains important, albeit sometimes the background may show that the "plain" meaning of the words used is not the intended one. As said in the New Zealand context:⁸¹

While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue,

75 *Sattva*, above n 10.

76 The New Zealand Court of Appeal adopted the *Investors Compensation Scheme* principles in *Boat Park*, above n 66, at 81–82 per Thomas J for the Court.

77 See for example *Fully Profit (Asia) Ltd v Secretary for Justice* (2013) 16 HKCFAR 351 at [15] per Ma CJ (with whom the other judges agreed), referring to the *Jumbo King*, above n 11, decision generally, which took a similar approach to *Investors Compensation*, above n 1, and in which Lord Hoffmann NPJ delivered the judgment of the Court.

78 The Singapore Court of Appeal in *Zurich Insurance*, above n 1, held that extrinsic evidence to interpret a contract is admissible under Singapore law only if it is "relevant, reasonably available to all the contracting parties and relates to a clear or obvious context" (at [132(d)] per Rajah JA for the whole Court). It must also "go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon" (at [127] per Rajah JA for the whole Court). The Singapore Court of Appeal in *Xia Zhengyan v Geng Changqing* [2015] SGCA 22 at [62] per Leong JA for the Court and other cases has, however, sounded the caution that some aspects of the admissibility of wider context (and in particular prior negotiations and subsequent conduct) are still open questions under Singapore law.

79 *Sattva*, above n 10.

80 At [47]–[48].

81 *Firm PI*, above n 9, at [63] (footnotes omitted).

construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

Further, the extent of context it is appropriate to rely on may in itself be contextual.⁸² As was said in the majority judgment of the New Zealand Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, straying too far from the language or using too broad a background may not be appropriate where third party reliance on a contract is likely:⁸³

It should not be over-looked, however, that the language of many commercial contracts will have features that ordinary language ... is unlikely to have, namely that it will result from a process of negotiation, will attempt to record in a formal way the consensus reached and will have the important purpose of creating certainty, both for the parties and for third parties ... The fact that parties are aware their contract might be relied upon by a third party may justify a more restrictive approach to the use of background in some instances, the parties' awareness being itself part of the relevant background.

Similarly, the Singapore Court of Appeal has said that courts may be reluctant to go outside the words used in standard form, consumer and commercial documents:⁸⁴

To summarise, the approach adopted in Singapore to the admissibility of extrinsic evidence to affect written contracts is a pragmatic and principled one. The main features of this approach are ... :

- (a) A court should take into account the essence and attributes of the document being examined. The court's treatment of extrinsic evidence at various stages of the analytical process may differ depending on the nature of the document. In general, the court ought to be more reluctant to allow extrinsic evidence to affect standard form contracts and commercial documents ...

B Prior Negotiations

In *Investors Compensation Scheme*, Lord Hoffmann excluded from the admissible context "the previous negotiations of the parties and their declarations of subjective intent".⁸⁵ He said that the

82 As Lord Hodge recognised in *Wood v Capita*, above n 9, at [13]. See the discussion in James Spigelman "From text to context: contemporary contractual interpretation" (2007) 81 ALJ 322 at 334–336. See also *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [36]–[37] per Lord Hoffmann.

83 *Firm PI*, above n 9, at [62]. See also the discussion of third party reliance in Matthew Barber and Rod Thomas "Contractual Interpretation, Registered Documents and Third Party Effects" (2014) 77 MLR 597; Don McMorland "The interpretation of registered instruments" [2016] NZLJ 166; and McLauchlan, above n 12, at 38. See also below at 51 and following in the main text for a discussion of the interpretation of registered instruments.

84 *Zurich Insurance*, above n 1, at [132].

law made this distinction "for reasons of practical policy".⁸⁶ Later, in *Chartbrook*, Lord Hoffmann explained what these practical problems are in the following terms:⁸⁷

The admission of pre-contractual negotiations would create greater uncertainty of outcome in disputes over interpretation and add to the cost of advice, litigation or arbitration.

He did, however, say that a counter-argument to this is that such evidence is often tendered to support claims of rectification and estoppel and that therefore there would be little time or cost saving. Further, as the evidence was admitted and read for other purposes, it could also in any event influence the court when it was interpreting the contract.⁸⁸

There are, however, principled as well as practical reasons for restricting evidence of prior negotiations. As Lord Hoffmann said, allowing such evidence would require departure from a long line of authority.⁸⁹ He conceded that there would be cases where prior negotiations would show actual mutual intention but in most instances they would not and thus the evidence would simply be irrelevant.⁹⁰ There would also be difficulty in distinguishing between statements of the parties during negotiations that "embody at least a provisional consensus" and those which "merely reflect the aspirations of one or other of the parties".⁹¹

On balance, Lord Hoffmann did not consider that there was a "clearly established case" for departing from the rule that evidence of prior negotiations was inadmissible.⁹² Interestingly, and some would say illogically,⁹³ it was emphasised in *Chartbrook* that the exclusionary rule only excludes evidence which is tendered for the purpose of drawing inferences about what the contract *means*. The rule does not exclude the use of such evidence for other purposes: for example, to establish that a relevant background fact was known to the parties as part of the "context" or "matrix

85 *Investors Compensation Scheme*, above n 1, at 913. As to what the search for "intention" in contract interpretation means, compare Brian Coote "Reflections on Intention in the Law of Contract" [2006] NZ L Rev 183. Coote argues that the disjunction between the common law's focus on objective intention (which may disregard the parties' actual intentions) and the parties' actual subjective intentions is a rational and necessary response to practical constraints in terms of gathering evidence of extrinsic materials: at 183.

86 *Investors Compensation Scheme*, above n 1, at 913.

87 *Chartbrook*, above n 15, at [35].

88 At [35].

89 At [30].

90 At [33].

91 At [38].

92 At [41].

93 See McLauchlan "A Contract Contradiction", above n 32; DW McLauchlan "Objectivity in Contract" (2005) 24 UQLJ 479; and McLauchlan, above n 12.

of fact".⁹⁴ We comment that there could be difficulty in drawing a line between evidence of prior negotiations showing admissible "context" and evidence of "prior negotiations" tendered for the purpose of showing the meaning of a contract.

Turning to the position in the colloquium jurisdictions, in *Codelfa*, the High Court of Australia expressly acknowledged the admissibility of evidence of prior negotiations only insofar as it establishes objective background facts, subject of course to that jurisdiction's requirement for a pre-existing ambiguity.⁹⁵ Canada's position appears to be similar.⁹⁶ The distinction between negotiations being used to interpret a contract and being used to show objective facts has also been drawn in Hong Kong:⁹⁷

... pre-contractual negotiations are excluded as irrelevant since the Court is concerned with discovering the parties' objectively ascertained contractual intention, and not with their "declarations of subjective intent". ... But the absence of court proceedings or of prior negotiations between the parties signing the Agreement [which was at issue in the case] is an objective fact of an obviously different character.

There is a qualitative difference between reference to such negative facts as an aspect of the factual matrix and reference to any negotiations between parties seeking to reach a consensus as an aid to construction.

In New Zealand the admissibility of evidence of prior negotiations was left open by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.⁹⁸ A majority of the Court held that the earlier correspondence at issue in that case formed an estoppel. As to whether that evidence could be used to interpret the contract, McGrath J agreed with the House of Lords in *Chartbrook* that the exclusionary rule must stand for reasons of practical policy.⁹⁹ This meant that evidence regarding

94 *Chartbrook*, above n 15, at [42]. Nor does it restrict evidence of negotiations to support a claim for rectification or estoppel. These uses, Lord Hoffmann says, operate outside the rule rather than exceptions to it. See also the other uses for prior negotiations outlined at n 60 above, including *The Karen Oltmann*, above n 60, at 712, where it was held that prior negotiations may be admissible in cases where the parties have essentially adopted their own private dictionary meaning of the word or words that are the subject of the dispute.

95 *Codelfa*, above n 8, at 352.

96 See *Indian Molybdenum Ltd v R* [1951] 3 DLR 497 (SCC) at [21]–[24]; *Hoefle v Bonguard & Co* [1945] SCR 360; *East Wind Construction Ltd v Chase* (1987) 77 NSR (2d) 274 (NSCA); and *Head v Inter Tan Can Ltd* (1991) 5 OR (3d) 192 (OGD).

97 *Yen Wing Choi v Match Power Investment Ltd* [2011] HKEC 796 (CFA) at [16] and [18].

98 *Vector Gas*, above n 10. The exclusionary rule had been strictly adhered to in the past. See for example *Potter v Potter* [2003] 3 NZLR 145 (CA) at [34]; *Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 NZLR 731 (CA) at 740, where the Court of Appeal said it was "wrong in principle" to look at negotiations and subjective intentions; *Horgan v Thompson* (2004) 5 NZCPR 81 (CA); *Globe Holdings Ltd v Floratos* [1998] 3 NZLR 331 (CA) at 334; and *Hawker v Vickers* [1991] 1 NZLR 399 (CA) at 402–403.

99 *Vector Gas*, above n 10, at [78]–[79].

negotiations was inadmissible insofar as it went beyond evidence of the background facts known to the parties.¹⁰⁰ Blanchard J, with whom Gault J agreed, thought that prior negotiations could be called in aid to establish background facts which were known to both parties and also the subject matter of the contract.¹⁰¹ Whether New Zealand courts might go further did not need to be decided.¹⁰² Wilson J was prepared to depart from the exclusionary rule and to use pre-contract negotiations to "illuminate ... what the parties were intending to achieve in their contract", but only if the contractual term was ambiguous.¹⁰³ Tipping J would have allowed evidence of prior negotiations to the extent that it "show[ed] objectively the meaning the parties intended their words to convey".¹⁰⁴ That, he said, was distinct from the subjective content of negotiations which showed "how the parties were thinking, their individual intentions and the stance they were taking at different stages of the negotiating process".¹⁰⁵

In *Zurich Insurance*, the Singapore Court of Appeal took a wider view, saying that there should be no absolute prohibition on the admission of evidence of prior negotiations, although in the normal case such evidence would likely fall foul of the requirements to be relevant, reasonably available to all contracting parties and clear and obvious.¹⁰⁶

In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*, the issue of whether evidence of prior negotiations should be admissible for interpreting contracts was, however, left open. In a judgment of Menon CJ for the Court, it was held that the contextual approach to contractual interpretation is consistent with the Singapore Evidence Act 1997 and that it "might entail a migration towards the principles adopted in civil law jurisdictions".¹⁰⁷ In this he was particularly referring to evidence of prior negotiations and subsequent conduct (which he dubbed the "robust approach").¹⁰⁸ However,

100 At [70], position affirmed at [78].

101 On this point, Blanchard J (at [4], [7], [11] and [13]) and Gault J (at [151] adopting Blanchard J's reasoning) therefore took a wider approach than McGrath J.

102 At [13].

103 At [122], [119] and [129].

104 At [27].

105 At [27].

106 *Zurich Insurance*, above n 1, at [132(d)]. But see *Xia Zhengyan*, above n 78, at [62] per Leong JA (for the Court) which sounded the caution that the admissibility issue is still an open question under Singapore law. See also V K Rajah "Redrawing the Boundaries of Contractual Interpretation: From Text to Context to Pre-text and Beyond" (2010) 22 SAclJ 513 at 520 where Rajah JA, writing extrajudicially, said *Zurich Insurance* "cautiously suggested" prior negotiations were admissible for the purposes of interpretation.

107 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43, [2013] 4 SLR 193 at [34].

108 At [35]–[38].

there were issues (including practical ones) on the wholesale adoption of this approach.¹⁰⁹ He said:¹¹⁰

Before leaving this issue, we make one final observation. Asst Prof Goh has, after a comprehensive survey of the historical literature on the law governing the admissibility of prior negotiations, argued that the seemingly blanket exclusionary rule against the admissibility of prior negotiations was a product of a historical misstep by the courts and is inconsistent with the EA [Evidence Act]: Goh Yihan, "The Case for Departing From the Exclusionary Rule Against Prior Negotiations in the Interpretation of Contracts in Singapore" (2013) 25 SAclJ 182. We prefer to leave for another occasion the consideration of whether this argument is to be accepted in principle; and if so, whether evidence of prior negotiations should nonetheless be excluded as irrelevant or unhelpful for the policy reasons set out by Lord Hoffmann in *Chartbrook* at [34]–[38]; or on the ground that it may amount to parol evidence of subjective intent and not fall within ss 97 to 100 of the EA. Whichever way that may eventually be resolved, any future attempt to rely on such material should be made with full consciousness of the concerns already expressed and in compliance with the pleading requirements we have just prescribed.

The exclusionary rule with regard to prior negotiations has been severely criticised by some academics for being unsound in principle.¹¹¹ Others argue that there are principled reasons for its retention,¹¹² and the rule is largely praised by practitioners for the limitation it imposes on the amount of material that needs to be gathered for interpretation disputes.¹¹³

Arguments for the rule's retention include the practical arguments outlined above, as well as the other arguments canvassed by Lord Hoffmann in *Chartbrook*. Prior negotiations are said to be irrelevant in that such negotiations often reveal no more than what a party or parties hoped at one stage that the contract might say. They are superseded by, and merged into, the final contract itself.¹¹⁴ Other arguments in favour of excluding evidence of prior negotiations include that

109 At [66].

110 At [75].

111 See McLauchlan "A Contract Contradiction", above n 32; and McLauchlan, above n 93.

112 See Richard Calnan "Construction of Commercial Contracts, Construction & Interpretation: A Practitioner's Perspective" in Andrew Burrows and Edwin Peel (eds) *Contract Terms* (Oxford University Press, Oxford, 2006) 17 at 18; Christopher Staughton "How Do the Courts Interpret Commercial Contracts?" (1999) 58 CLJ 303 at 306; Lord Bingham "A New Thing Under the Sun? The Interpretation of Contracts and the *ICS* Decision" (2008) 12 Edin L Rev 374 at 389; and Hugh Collins "Objectivity and Committed Contextualism in Interpretation" in Sarah Worthington (ed) *Commercial Law, Commercial Practice* (Hart Publishing, Oregon, 2003) 189 at 195.

113 See *Chartbrook*, above n 15, at [36]. Lord Steyn has said that the contextual approach has "upset the horses in the commercial paddock" in Johan Steyn "The Intractable Problem of the Interpretation of Legal Texts" (2003) 25 Syd LR 5 at 9. See also Don Holborow "Contract Interpretation" [2004] NZLJ 272.

114 *Indian Molybdenum Ltd v R*, above n 96, at [21]–[24].

contracts are often relevant to third persons in addition to the parties themselves and third persons will rarely have access to prior negotiations.¹¹⁵ In any event, it is said limiting the cost and time of interpretive disputes to create more efficient and orderly litigation is a worthy goal in its own right.

As a counter, it has been argued that allowing evidence of prior negotiations to be received as an aid to interpretation does not mean that the inquiry becomes one about the subjective intentions of the parties. So there:¹¹⁶

... is no problem [with the rule] if [the parties' "subjective intentions"] means 'undisclosed' or 'uncommunicated' intentions. No one would suggest that a court should be able to interpret the words in accordance with the secret intention of one of the parties. ... It is entirely another matter, however, to suggest, as it often is, that the actual intentions of the parties are *irrelevant*.

As Lord Nicholls has pointed out, the mere fact that pre-contract negotiations "may afford direct evidence of the parties' actual intentions ... is not a reason for banning their use. That would be perverse."¹¹⁷ Arden LJ has criticised the rule saying it would not be an "attractive result" to ignore a clear definition in the negotiations which was not to be found in the final contract.¹¹⁸ And, as Lord Macnaghten lamented in an early case, referring to evidence of prior negotiations that showed exactly what the parties understood the supposedly disputed term of the contract to mean:¹¹⁹

Why should [the Judge] listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?

We understand the concern about prolonging proceedings if evidence of negotiations is allowed as a matter of course. Further, interpretation points often come to court for the very reason that they concern issues that have not been anticipated at the time the contract is made or the legislation

¹¹⁵ See the discussion in *Firm PI*, above n 9, at [62].

¹¹⁶ McLauchlan, above n 12, at 12 (emphasis added).

¹¹⁷ Nicholls, above n 8, at 583. See also *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277 at [122] where Thomas J noted:

The notion that an intention can be imposed on the parties contrary to their actual intention is repugnant to any concept of fairness, common sense, and the reasonable expectations of honest men and women. It should be repugnant to the common law.

See also McLauchlan, above n 8, at 30.

¹¹⁸ *ProForce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69 at [57]. The other members of the Court agreed with Arden LJ in the result but preferred not to express views on the point.

¹¹⁹ *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 (HL) at 431. The other members of the Court gave judgment agreeing in the result but made no mention of this point.

passed. Prior negotiations will be of little assistance in such cases.¹²⁰ It would only be very rare cases that negotiations would clearly show mutual intent.

On the other hand, evidence of prior negotiations is admissible in a claim for rectification, which often accompanies an interpretation claim.¹²¹ Such evidence is also admissible in most of our jurisdictions if it shows "objective facts".¹²² This means that restricting the use of such evidence for interpretation might in fact not lead to a reduction of the amount of evidence before the court, given the material for rectification is before the court at the same time. Further, as was pointed out by Lord Nicholls and Lord Macnaghten, mere inconvenience cannot really justify the exclusion of relevant evidence.¹²³ As noted above, Professor McLauchlan would argue strongly that, where there is evidence of the parties' actual and mutual intentions, it would be odd to ignore that, especially if the aim of interpretation is to ascertain what the parties actually agreed.¹²⁴

There remains the issue of third parties: the argument is that, when third parties are relying on a contract, it is unreasonable for material that is not accessible to them to be used in an interpretation exercise.¹²⁵ It may, however, be doubted that many third parties in fact rely on the exact terms of a contracts. Where they are likely to do so, this might be addressed by the contextual approach to context set out above,¹²⁶ and procedural requirements similar to those imposed by the Singapore Court of Appeal, discussed below.¹²⁷ We note too that third parties relying on contracts (at least ones to which they have not become a party) may be subject to the risk of contracts being rectified in any event.

As to assignees, Lord Hoffmann in *Chartbrook* said that the law sometimes deals with possible third party reliance by restricting the background available but normally a contract is treated as being addressed to the parties alone and "an assignee must either inquire as to any relevant

120 The same can often be said about extrinsic material in statutory interpretation.

121 As was the case in *Chartbrook*, above n 15.

122 See the discussion in *Codelfa*, above n 8; *Langley Lo-Cost Builders Ltd v 474835 BC Ltd* 2000 BCCA 365, (2000) 76 BCLR (3d) 278; and *Yen Wing Choi*, above n 97, at [17]–[18].

123 Nicholls, above n 8, at 583; and *Bwllfa*, above n 119, at 431. The other members of the Court gave judgment agreeing in the result but made no mention of this point.

124 McLauchlan, above n 12, at 28, quoted above at 4 in the main text.

125 A point made by Alan Berg "Thrashing through the Undergrowth" (2006) 122 LQR 354 at 359. See also Spigelman, above n 82, at 334–336.

126 See the discussion above at 19 in the main text on *Firm PI*, above n 9.

127 At 29 in the main text and following.

background or take his [or her] chance on how that might affect the meaning a court will give to the document".¹²⁸

C Subsequent Conduct

Evidence of subsequent conduct has several potential uses. It may be used to ascertain the existence and terms of the original agreement that was made orally or only partially expressed in writing.¹²⁹ It can also be used to infer a separate agreement that may have varied the original contract or given rise to an estoppel. And, of course, it might also be used to interpret the meaning of a written contract. It is the latter potential use that is the most controversial.

In *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd*, the House of Lords held that a contract cannot be construed by reference to the subsequent conduct of the parties.¹³⁰ This was because the meaning of a contract is to be determined at the time when it was made, and thus evidence of the subsequent conduct of the parties is inadmissible.¹³¹ The High Court of Australia agreed that subsequent conduct is inadmissible for the purpose of interpreting a contract in *Agricultural and Rural Finance Pty Ltd v Gardiner*.¹³²

In *Marble Holding Ltd v Yatin Development Ltd*, the Hong Kong Court of Final Appeal noted that post-agreement conduct of the parties is, as in Australia and England, generally not admissible.¹³³ More recently, however, the Court held in *Tai Fat Development Holding Co Ltd v The Incorporated Owners of Gold King Industrial Building*:¹³⁴

128 *Chartbrook*, above n 15, at [40]. See also the discussion in *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161 at [100]–[102] per William Young and O'Regan JJ, [138]–[140] per Elias CJ, [151] per Glazebrook J and [162] per Ellen France J.

129 See for example *Thorne v Major* [2009] UKHL 18, [2009] 1 WLR 776 which, though concerning a proprietary estoppel, shows the use of such oral evidence.

130 *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] AC 583 (HL) at 603 per Lord Reid, 606 per Lord Hodson, 611 per Viscount Dilhorne and 615 per Lord Wilberforce. See also *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57, (2008) 238 CLR 570 for Australia; *Whiteside v Celestica International Inc* 2014 ONCA 420 for Canada; and, though not in issue and not fully discussed, *Zurich Insurance*, above n 1, for Singapore, where it was opined by Rajah JA for the Court that it would be admissible if it met certain requirements at [132]; and *Tai Fat Development Holding Co Ltd v The Incorporated Owners of Gold King Industrial Building* [2017] HKEC 1366 (CFA) at [72] for Hong Kong.

131 See *Wickman*, above n 20. However, if it is accepted that subsequent conduct of the parties is helpful for oral contracts, the reason given does not appear to be particularly sound.

132 *Gardiner*, above n 130.

133 *Marble Holding*, above n 19, at [20]–[21] (citations omitted).

134 *Tai Fat*, above n 130, at [72].

The parties' subsequent conducts were also admissible to construe a document if the relevant conducts have probative value to prove a matter that would be relevant to construction of the contract.

Canada appears to adopt a more liberal approach than Australia and some courts have been willing to admit evidence of post-contractual conduct as long as there is an ambiguity to be resolved.¹³⁵ If the provisions are not ambiguous, the conduct of the parties, mistaken or otherwise, may not be considered for interpretation purposes, since this would alter the plain meaning of the contractual language.¹³⁶ Even if there is an ambiguity, the conduct must be unequivocal and intentional,¹³⁷ and reasonably proximate to the time the contract is entered into.¹³⁸ The most useful evidence will be that of intentional acts of individuals which are related only to the agreement and are consistent with only one of the alternative interpretations.¹³⁹ The court has discretion as to the weight to be attached to the subsequent conduct, particularly where the acts of parties may be consistent with only one of two alternative interpretations.¹⁴⁰

In Singapore, earlier authority followed Australia and excluded evidence of subsequent conduct in interpretation disputes. This settled approach was questioned following the Court of Appeal's decision in *Zurich Insurance* which, as noted above, said there was no absolute rule excluding of evidence of subsequent conduct.¹⁴¹ Rajah JA, for the Court, said, however, that "the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by [the Court of Appeal] at a more appropriate juncture".¹⁴²

In *Sports Connection Pte Ltd v Deuter Sports GmbH*,¹⁴³ the Singapore Court of Appeal admitted an email sent after the conclusion of a distributorship agreement in a dispute related to the

135 *Canadian Encyclopedic Digest* (4th ed, Thomson Reuters, Canada, 2017) Contracts IX.2 at § 568. There is no Supreme Court of Canada authority specifically on the point but in *Gilchrist v Western Star Trucks Inc* 2000 BCCA 70, (2000) 73 BCLR (3d) 102 at [23] per Saunders JA (with whom the other members of the Court agreed), the Court noted that in the absence of an ambiguity, subsequent conduct was inadmissible.

136 *Canadian Encyclopedic Digest*, above n 135, at § 570. It can be considered for rectification.

137 See *Lewis v Union of BC Performers* (1996) BCLR (3d) 382 (CA).

138 *Union Natural Gas Co v Chatham Gas Co* (1918) 56 SCR 253 at [65] per Idington J (with whom a majority of the Court agreed). Or a course of conduct commencing reasonably early and continuing thereafter: *Hoefle*, above n 96, at [76] per Estey J (with whom a majority of the Court agreed in the result).

139 *Fleckenstein v Deutsche Bank Securities Ltd* 2002 BCCA 74, (2002) 97 BCLR (3d) 237.

140 *Mississauga Teachers' Retirement Village Ltd Partnership v LMC (1993) Ltd* (2004) 134 ACWS (3d) 913 (ONCA) at [13] (per curiam).

141 *Zurich Insurance*, above n 1.

142 At [132(d)].

143 *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 (SGCA).

interpretation of a non-competition clause.¹⁴⁴ Importantly, however, the Court emphasised that it was not laying down a general principle. Indeed, it stressed that subsequent conduct was unlikely to be admissible where:¹⁴⁵

... a party attempts to trawl through evidence in an attempt to favour its subjective interpretations of the contract and/or where a party attempts to persuade the court to adopt a different interpretation from that suggested by the plain language of the contract ...

In a later statement on subsequent conduct, in *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna*, the Singapore Court of Appeal held that, because contractual interpretation is concerned with the objective ascertainment of the parties' intentions at the time the contract was formed, subsequent conduct, "in so far as [it] reveal[s] the subjective intention of the parties, will generally be irrelevant in this exercise".¹⁴⁶

In New Zealand, a majority of the Supreme Court has considered subsequent conduct to be admissible.¹⁴⁷ That was, broadly speaking, on the basis that such evidence "may be helpful" in assessing the parties' intended meaning.¹⁴⁸ The observations on this were obiter, however, as all agreed that the same result was achieved on an interpretation of the contract without the need to consider subsequent conduct. There were some differences expressed as to the potential scope of evidence of subsequent conduct. In particular, two of the members of the Court who expressed a view on this aspect suggested that, to ensure consistency with the objective approach to contract interpretation, the focus would necessarily be on post-contract conduct which was shared or mutual to the parties.¹⁴⁹ Thomas J, however, was concerned to avoid additional qualifications to admissibility which might undermine the reason for admission of this evidence. On his approach "it should be sufficient that" after the contract the relevant party had "acted inconsistently with the meaning it now asserts in court".¹⁵⁰

We understand the argument that subsequent conduct (particularly if mutual) could logically be relevant to ascertaining the meaning of a contract, provided it was sufficiently proximate to the time

144 For a discussion on this case see Yihan Goh "Towards a Consistent Use of Subsequent Conduct in Singapore Contract Law" (2017) 5 JBL 387.

145 *Sports Connection*, above 143, at [70]–[71].

146 *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] SGCA 19, [2016] 2 SLR 1083 at [55] (emphasis omitted).

147 *Gibbons Holdings*, above n 117.

148 See for example, at [7] per Blanchard J and [52] per Tipping J.

149 At [53] per Tipping J and [73] per Anderson J.

150 At [136].

the contract was entered into. But it seems unlikely to be conclusive evidence. For example, subsequent conduct could have been based on a misunderstanding of the terms of the contract.

We note too that, where a person relying on a contract is not the person whose subsequent conduct is at issue (for example a creditor or assignee), then there may be a particular question as to accessibility of evidence of such conduct for that third party. This leads to the question of how appropriate it is to use subsequent conduct as an aid to interpretation or in such cases. There is always rectification if the contract does not reflect the parties' actual intention and estoppel if the parties have been operating on a mutual assumption and it would be unfair for a party to depart from that.¹⁵¹

D Procedural Requirements

The Singapore Court of Appeal in *Sembcorp* laid down some procedural requirements for the admission of extrinsic evidence to alleviate some of the concerns about being inundated with essentially irrelevant material designed merely to elucidate the subjective intentions of the parties.¹⁵² These are to be applied not only in interpretation disputes but also where there is a question of rectification or implication of terms. The Court set four requirements:¹⁵³

- (a) first, parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract;
- (b) second, the factual circumstances in which the facts in (a) were known to both or all the relevant parties must also be pleaded with sufficient particularity;
- (c) third, parties should in their pleadings specify the effect which such facts will have on their contended construction; and
- (d) fourth, the obligation of parties to disclose evidence would be limited by the extent to which the evidence are relevant to the facts pleaded in (a) and (b).

The Court commented that the four requirements were consistent with the limits prescribed in *Zurich Insurance* that, for extrinsic evidence to be admissible, it must be "relevant, reasonably available to all the contracting parties and [must relate] to a clear or obvious context".¹⁵⁴ It also said that failure to meet those requirements would lead to the courts granting the evidence little weight

151 See the discussion above at 8 in the main text for the requirements for an estoppel.

152 *Sembcorp*, above n 107, at [73]–[74].

153 At [73].

154 At [74].

and could lead to adverse costs awards. It said that the "key point is that parties should be clear about the specific aspects and purpose of the factual matrix which they intend to rely on".¹⁵⁵

It is interesting to us that in civil law jurisdictions there does not seem to be a struggle to control the admission of self-serving low value evidence. This may be attributable to civil law jurisdictions (and we venture this observation in full knowledge of our ignorance) not attaching the same weight to oral evidence that we, in common law systems, do. If this is right, it may mean that the assessment in civil law jurisdictions of what the parties agreed is typically undertaken using objectively ascertainable evidence (as it is in common law jurisdictions). The result between the two different civil and common law tests may be therefore be the same in the end.

VI IMPLIED TERMS

The discussion of extrinsic material would not be complete without referring to the implication of terms into contracts, beyond those expressly agreed. Such terms may be implied by custom, implied by law in particular classes or all classes of contract, or implied in fact in particular cases to give business efficacy to a contract.¹⁵⁶ We are particularly concerned with the latter, given it is the most controversial of the three, but we briefly comment on terms implied by custom and implied by law.

Terms implied by custom are, in a sense, derived from matters extrinsic to the contract. The rationale for this was set out by Parke B as follows:¹⁵⁷

It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages.

As the importation of custom rests on presumed intention, it cannot survive an express term to the contrary in the contract.¹⁵⁸

A term may also be implied by operation of law, either common law or statute, in certain categories of relationship.¹⁵⁹ As an example, terms such as "merchantable quality" when goods are

¹⁵⁵ At [74].

¹⁵⁶ See *Commonwealth Bank of Australia v Barker* [2014] HCA 32, (2014) 253 CLR 169 at [21].

¹⁵⁷ *Hutton v Warren* (1836) 1 M & W 466 (Exch) at 475–476, 150 ER 517 at 521 per Parke B for the Court. The case involved a local custom in tenancies. See also *Seddon and Bigwood*, above n 18, at [10.54] for the position in Australia.

¹⁵⁸ See for example *Les Affréteurs Réunis Société Anonyme v Leopold Walford (London) Ltd* [1919] AC 801 (HL) at 809 per Lord Birkenhead LC with whom the other Law Lords agreed.

sold by description began to be implied into contracts for the sale of goods in the first part of the 19th century and, by the end of that century, these imported terms were beginning to be codified.¹⁶⁰ Terms may also be implied through applicable international instruments.¹⁶¹ Other examples include cases where the terms implied by law "redress power imbalances in certain classes of contracts such as employment, landlord-lessee, and insurance contracts" where good faith is particularly important.¹⁶² Indeed, the Supreme Court of Canada in *Bhasin v Hrynew* said that good faith contractual performance is implied as an organising principle for the whole of Canadian contract law.¹⁶³

Turning now to the third category: terms implied in fact to give a contract business efficacy. This traditionally was distinct from the task of contractual interpretation and subject to special rules.¹⁶⁴ In *BP Refinery (Westernport) Pty Ltd v President Councillors and Ratepayers of the Shire of Hastings*, Lord Simon set out five principles for the implication of terms into particular contracts:¹⁶⁵

... for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without

159 See *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 AC 523 at [55].

160 Jeremy Finn, Stephen Todd and Matthew Barber *Burrows*, *Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2017) at [6.4.2], where the authors cite *Gardiner v Gray* (1815) 4 Camp 144, 171 ER 46 (KB). See also, for example, the following colloquium jurisdictions' statutes implying a term of "merchantable quality" or similar into contracts for sale of goods: Contract and Commercial Law Act 2017 (NZ), s 139; Sale of Goods Act 1923 (NSW), s 64; Sale of Goods Act 1896 (Qld), s 17(c); Sale of Goods Act 1972 (NT), s 19(b); Sale of Goods Act 1954 (ACT), s 19(3); Sale of Goods Act 1895 (WA), s 14(3); Goods Act 1958 (Vic), s 19(b); Sale of Goods Act 1896 (Tas), s 19(b); Sale of Goods Act (Cap 393, 1999 Rev Ed) (SG), s 14; Sale of Goods Ordinance (Cap 26) (HK), s 16(2); Sale of Goods Act RSO 1990 c S1, s 15(2); Sale of Goods Act RSA 2000 c S-2, s 16(4); and Sale of Goods Act RSBC 1996 c 410, s 18(b). See also Sale of Goods Act 1979 (UK), s 14(2).

161 See for example CISG, above n 43, art 55:

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

162 *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 SCR 494 at [44], citing *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299; and *Machtinger v HOJ Industries Ltd* [1992] 1 SCR 986.

163 At [62], [69] and [93] per Cromwell J for the Court.

164 See *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 (HL) at 481 per Lord Steyn.

165 *BP Refinery (Westernport) Pty Ltd v President Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 277 (PC) at 283.

saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

An "officious bystander" test has generally, although not universally, been seen as the "practical mode by which the business efficacy test is implemented".¹⁶⁶ MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd*, quoted by Lord Simon in *BP Refinery*, explained the concept as follows:¹⁶⁷

Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!".

In 2009, Lord Hoffmann, delivering the judgment of the Board in *Attorney General of Belize v Belize Telecom Ltd*,¹⁶⁸ arguably signalled a radical departure from the settled orthodoxy in connection with the implication of terms in fact into particular contracts, both as to the nature of the task in which the courts were engaged and the test to be applied.¹⁶⁹ He said that:¹⁷⁰

It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. ... There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

Dealing with the five requirements set out in *BP Refinery*, Lord Hoffmann said the:¹⁷¹

... list is best regarded, not as a series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so.

Likewise, Lord Hoffmann considered that the:¹⁷²

¹⁶⁶ *Foo Jong Peng v Phua Kiah Mai* [2012] SGCA 55, [2012] 4 SLR 1267 at [28] (emphasis omitted); and *Sembcorp*, above n 107, at [89].

¹⁶⁷ *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 (CA) at 227 per MacKinnon LJ, cited in part in *BP Refinery*, above n 165, at 283.

¹⁶⁸ *Belize Telecom*, above n 82. This was a unanimous judgment of the Board (Lord Hoffmann, Lady Hale, Lord Rodger, Lord Carswell and Lord Brown).

¹⁶⁹ Yihan Goh "Lost but Found Again: The Traditional Tests for Implied Terms in Fact: *Marks & Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd*" (2016) 3 JBL 231 at 236.

¹⁷⁰ *Belize Telecom*, above n 82, at [21].

¹⁷¹ At [27].

... requirement that the implied term must 'go without saying' is no more than another way of saying that, although the instrument does not expressly say so, that is what a reasonable person would understand it to mean.

He considered that the officious bystander test, sourced from *Shirlaw*, carried the risk of barren argument over how the actual parties would have reacted to the proposed amendment.¹⁷³

Lord Hoffmann appeared to be jettisoning the business efficacy test in favour of a test as to what a reasonable person would understand the contract to mean, understood against the background circumstances at the time of formation.¹⁷⁴ Lord Hoffmann thus equated implication with interpretation. This can perhaps be explained by his views on the extent of the courts' powers to correct mistakes and ensure business efficacy discussed above.¹⁷⁵ While not clearly disapproving the application of the *BP Refinery* test, he characterised it as an (arguably) flawed method of identifying what the contract would reasonably be understood to mean, to be gleaned from the words of the contract itself, and not as a search for the presumed intention of the parties.¹⁷⁶

While some have debated whether subsuming implication into interpretation was the effect of *Belize Telecom*, Yihan Goh makes a convincing case that it was:¹⁷⁷

172 At [25].

173 At [25].

174 His Lordship said at [21]:

... this question can be reformulated in various ways which a court may find helpful in providing an answer—the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on—but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

175 See *Chartbrook*, above n 15, at [25] per Lord Hoffmann.

176 *Belize Telecom*, above n 82, at [27].

177 Goh, above n 169, at 236. See also *Ward Equipment Ltd v Preston* [2017] NZCA 444, [2018] NZCCLR 15 at [93] per Kós P (in a judgment concurring in the result and orders made but disagreeing with the majority comprising French and Winkelmann JJ on the issue of implication of terms), referring to Lord Carnwath in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [60]. He drew a distinction between interpretation and construction, seeing implication as coming under the latter. See also the different perspectives discussed in Matthew Barber "Implied terms" [2013] NZLJ 238 at 240 who contends that:

... it is not clear as a matter of principle that implication should merge with the process of interpretation. Expressed in the simplest way, adding a term and working out what a term (or a contract) means seem to be different tasks.

But compare David McLauchlan "More on implied terms" [2013] NZLJ 346 at 347 who argues "it is difficult to justify drawing a sharp distinction between interpretation and implication".

[If] Lord Hoffmann's words in [*Belize Telecom*] were subjected to the *Investors Compensation Scheme* principles of contextual interpretation, it is more probable than not that a reasonable person with the relevant background facts would find that they were meant to substitute the traditional tests of implication with one of reasonableness.

The lingering confusion after *Belize Telecom* – given the Board had not disapproved of the *BP Refinery* test – caused Vos J in *Spencer v Secretary of State for Defence* to note that the authorities:¹⁷⁸

... do not entirely speak with one voice: some seem to consider that Lord Hoffmann was merely encapsulating the existing law, and others recognise the case as a persuasive departure from what was thought to be the law on implied terms up until 2009.

Five years later, the Supreme Court of the United Kingdom in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* had cause to revisit the law of implication of terms in fact. Lord Neuberger, writing for the majority, said that, while interpretation and implication are related, Lord Hoffmann's judgment "could obscure the fact that construing the words used and implying additional words are different processes governed by different rules".¹⁷⁹ Lord Neuberger accepted that the factors taken into account on an issue of construction are also taken into account on an issue of implication. But that did not mean that the exercise of implication was properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation:¹⁸⁰

When one is implying a term or a phrase, one is not construing words, as the words to be implied are *ex hypothesi* not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.

Lord Neuberger observed that it is only once the process of construing the express words is complete that the issue of implied terms falls to be considered.¹⁸¹ He noted, with approval, the Singaporean Court of Appeal's refusal in *Foo Jong Peng v Phua Kiah Mai* to follow the reasoning in *Belize Telecom*, at least insofar as *Belize Telecom* suggested that the traditional "business efficacy"

¹⁷⁸ *Spencer v Secretary of State for Defence* [2012] EWHC 120 (Ch), [2012] All ER (Comm) 480 at [52].

¹⁷⁹ *Marks and Spencer*, above n 177, at [26].

¹⁸⁰ At [27].

¹⁸¹ At [28].

and "officious bystander" tests are not central to the implication of terms.¹⁸² Such reasoning was again applied by the Singapore Court of Appeal in *Sembcorp*.¹⁸³

Lord Neuberger said that the Singapore Court of Appeal was "right to hold that the law governing the circumstances in which a term will be implied into a contract remains unchanged following [*Belize Telecom*]"¹⁸⁴ More generally he said that *Belize Telecom* was "open to more than one interpretation", and that some of these interpretations were wrong in law.¹⁸⁵ He said that it was necessary to emphasise that there has been no dilution of the requirements which have to be satisfied before a term will be implied.¹⁸⁶

On the other hand, there was not necessarily a wholehearted total endorsement of *BP Refinery*. Lord Neuberger questioned whether Lord Simon's first requirement, reasonableness and equitableness, "will usually, if ever, add anything".¹⁸⁷ He described business necessity and obviousness as alternative bases for implication, noting that usually both would be satisfied.¹⁸⁸ He expressed doubt as to the formulation of the business efficacy test, saying what is necessary for business efficacy "involves a value judgment".¹⁸⁹ He said it may be better to say "that a term can only be implied if, without the term, the contract would lack commercial or practical coherence".¹⁹⁰ He commented that, if the officious bystander approach is used, the question must be formulated with care.¹⁹¹

In the same case, Lord Carnwath agreed that there had been no relaxation of the "traditional, highly restrictive approach to implication of terms",¹⁹² but also considered that there was no reason to depart from what had been said in *Belize Telecom*,¹⁹³ noting that it can be a useful discipline to remind oneself that the object remains to discover what the parties have agreed to or "must have

182 At [24], citing *Foo Jong Peng*, above n 166.

183 *Sembcorp*, above n 107.

184 *Marks and Spencer*, above n 177, at [24].

185 At [31].

186 At [24].

187 At [21].

188 At [21].

189 At [21].

190 At [21].

191 At [21].

192 At [66].

193 At [69].

intended to agree".¹⁹⁴ He said it was not necessary to draw a sharp distinction between interpretation and implication, emphasising that the exercise of contractual interpretation is an iterative, rather than sequential process.¹⁹⁵

Lord Neuberger's comments in *Marks and Spencer* endorsing the *BP Refinery* approach have themselves attracted a great deal of comment.¹⁹⁶ As Barber notes:¹⁹⁷

At first glance, Lord Neuberger's general approach to implied terms appears a cautious reversion to previous doctrine. Further scrutiny of the approach and its application in *Marks and Spencer*, however, reveals a number of features that undermine this: the finding that the business efficacy and officious bystander tests are always alternatives; the recasting of business efficacy as commercial or practical coherence; reference to the intention of the parties unmediated by the *BP Refinery* requirements in the case itself; and a seeming willingness to imply a term despite a contractual provision on point in a detailed, professionally-prepared document. Although there are limits on what can be drawn from this single judgment, there is some suggestion of a softened approach (as if responding to some of the difficulties of the more traditional approach).

How have *Belize Telecom* and *Marks and Spencer* fared in the colloquium jurisdictions? And where does this leave the law of implied terms? As already noted, the courts in Singapore have engaged in some depth with the reasoning in *Belize Telecom* and decided not to follow it. In both

194 At [69]. See also *Geys v Société Générale, London Branch*, above 159, at [55] per Lady Hale:

... there are those terms which are implied into a particular contract because, on its proper construction, the parties must have intended to include them ... Such terms are only implied where it is necessary to give business efficacy to the particular contract in question.

195 At [67]–[73]. See also *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [2016] 1 WLR 85 at [42] at [44] per Lord Mance (in agreement with Lord Hodge and Lord Carnwath):

I would not encourage advocates or courts to adopt too rigid or sequential an approach to the processes of consideration of the express terms and of consideration of the possibility of an implication. Without derogating from the requirement to construe any contract as a whole, particular provisions of a contract may I think give rise to a necessary implication, which, once recognised, will itself throw light on the scope and meaning of other express provisions of the contract. ... the processes of consideration of express terms and of the possibility that an implication exists are all part of an overall, and potentially iterative, process of objective construction of the contract as a whole.

196 See the comments in *Marks and Spencer*, above n 177, at [21].

197 Matthew Barber "*Marks and Spencer* and the Future of Implied Terms" (2016) 27 NZULR 767 at 780. See also Jonathan Chew "The Resurgence of Implied Terms (but not for Apportioning Rent)" (2017) 16 Conv 398 at 403.

Foo Jong Peng and *Sembcorp* the Court of Appeal affirmed the *BP Refinery* orthodoxy.¹⁹⁸ In *Sembcorp*, that Court set out a three-step process for the implication of terms in fact:¹⁹⁹

- (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
- (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
- (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

In Hong Kong, the Court of Appeal in *Sui v Fubon Bank (Hong Kong) Ltd*, endorsed Lord Neuberger's comments in *Marks and Spencer*.²⁰⁰ The reasoning in that case suggests a more traditional distinction between interpretation and implication but notes the importance of starting with the express terms. The Court held:²⁰¹

... it must be recognized that construction of express terms and implication of terms involve different techniques. Though the overall exercise is an iterative one, in most (if not all) cases it would be appropriate to start from the construction of the express terms by reference to the context and surrounding circumstances known to the parties.

The Supreme Court of Canada has not yet had occasion to consider *Belize Telecom* fully.²⁰² The Canadian approach draws upon the line of cases which precede *BP Refinery*, but are nevertheless part of the same family tree. In *Canadian Pacific Hotels Ltd v Bank of Montreal Le Dain J* said:²⁰³

... I am of the opinion that the duty contended for cannot be implied as a term of the banker and customer relationship in a particular case under the other category of implication based on presumed

198 *Foo Jong Peng*, above n 166; and *Sembcorp*, above n 108, at [77]–[79].

199 *Sembcorp*, above n 107, at [101]. This three-step analysis was critiqued by Lord Carnwath in *Marks and Spencer*, above n 177, at [64]–[66].

200 *Sui v Fubon Bank (Hong Kong) Ltd formerly known as International Bank of Asia Ltd* [2019] HKCFA 261 at [31]–[32].

201 At [29].

202 Or, has chosen not to do so. In *Canada (Attorney General) v Fontaine* 2017 SCC 47, [2017] 2 SCR 205 the Supreme Court did not mention the approval of parts of *Belize Telecom* in the Ontario Court of Appeal in *Fontaine v Canada (Attorney General)* 2016 ONCA 241, (2016) 130 OR (3d) 1.

203 *Canadian Pacific Hotels Ltd v Bank of Montreal* [1987] 1 SCR 711 at 775–776 (Estey, McIntyre, Lamer and Wilson JJ concurring).

intention — the implication of a term as necessary to give business efficacy to a contract or as otherwise meeting the "officious bystander" test as a term which the parties would say, if questioned, that they had obviously assumed. It is clear from the established law and practice, including the recognition and use of verification agreements, that the duty contended for is not necessary to the business efficacy of the banker and customer relationship and cannot otherwise be presumed to have been intended by the customer.

Later, in *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, Iacobucci J noted that:²⁰⁴

As mentioned, LeDain J stated in *Canadian Pacific Hotels Ltd*, supra, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis.

The reasoning in *MJB Enterprises* was affirmed by the Supreme Court of Canada in *Double N Earthmovers Ltd v City of Edmonton*.²⁰⁵ A majority of the Court held that a contract may contain implied terms if they meet the test set out in *Canadian Pacific Hotels* and *MJB Enterprises*.²⁰⁶ The majority reiterated Iacobucci J's statement in *MJB Enterprises* that there must be a degree of obviousness to an implied term, in order that the Court not "slide into determining the intentions of reasonable parties".²⁰⁷

The position in New Zealand is unclear. The *Belize Telecom* approach has been referred to by the Supreme Court with approval.²⁰⁸ Later, however, in *Mobil Oil New Zealand Ltd v Development Auckland Ltd*, the Court said that there was "scope for argument whether adoption of the undiluted version of Lord Hoffmann's interpretation approach is appropriate" and that *Belize Telecom* had

204 *MJB Enterprises Ltd v Defence Construction (1951) Ltd* [1999] 1 SCR 619 at [29] per Iacobucci J for the Court.

205 *Double N Earthmovers Ltd v City of Edmonton* 2007 SCC 3, [2007] 1 SCR 116.

206 At [30] per Abella and Rothstein JJ (with whom Lebel, Deschamps and Fish JJ agreed).

207 At [31], quoting *MJB Enterprises Ltd*, above n 204, at [29].

208 *Nielsen v Dysart Timbers Ltd* [2009] NZSC 43, [2009] 3 NZLR 160 at [25] per Tipping and Wilson JJ and [62] and [64] per McGrath J. However, Barber, above n 177, at 239 has noted that, given the case

... was about the implicit conditions on which offers are based, or whether an offer can be terminated because of a fundamental change in circumstances, *Belize* was considered to be of marginal relevance.

been "significantly qualified" by *Marks and Spencer*.²⁰⁹ It nonetheless approached the issue in that case as "most sensibly addressed by way of interpretation".²¹⁰

The Australian High Court recently affirmed the *BP Refinery* test in *Commonwealth Bank of Australia v Barker*,²¹¹ while also stating that the implication of terms is a species of interpretation, in a similar vein to the approach taken in *Belize Telecom*. The Court noted that "implication of a term in fact in a contract, by reference to what is necessary to give it business efficacy, was described in [*Codelfa Construction*] as raising issues".²¹²

... "as to the meaning and effect of the contract" ... Implication is not "an orthodox exercise in the interpretation of the language of a contract, that is, assigning a meaning to a particular provision". It is nevertheless an "exercise in interpretation, though not an orthodox instance."

Both New Zealand and Australia therefore are open to treating implication as a matter of interpretation in certain cases. It may be that this is because some cases of implication can relate to interpretation of the words of the contract by finding necessary implications from those words, which was the case in *Mobil Oil*. In cases where there are true gaps in the contractual language the *BP Refinery* criteria may well be the appropriate analysis. New Zealand and Australia perhaps align more closely with the views of Lord Carnwath in *Marks and Spencer*, to the extent that his Lordship observed that *Belize Telecom* is not necessarily inconsistent with the traditional approach in *BP Refinery* and that it was not necessary to draw a sharp distinction between interpretation and implication.²¹³

VII PAROL EVIDENCE RULE

It is not possible to leave the topic of extrinsic evidence without at least a brief discussion of the parol evidence rule.²¹⁴ This rule excludes extrinsic evidence that would "contradict, vary, add to or

209 *Mobil Oil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89, [2017] 1 NZLR 48 at [81].

210 At [81].

211 *Commonwealth Bank of Australia v Barker*, above n 156, at [21]–[22] and [21], n 89. The Court noted terms will be implied if they meet the *BP Refinery* criteria, while also noting that *Belize* characterised the exercise of implication of terms in fact as a process of construction, without entering into debate on its appropriateness, noting only that Lord Hoffmann's approach has been debated: at [22].

212 At [22] (footnotes omitted), citing *Codelfa*, above n 8, at 345 per Mason J with whom Stephen and Wilson JJ agreed.

213 *Marks and Spencer*, above n 177, at [66] and [69].

214 Some commentary has noted that a less misleading name for the rule would be the "extrinsic evidence rule": Geoffrey Marston "The Parol Evidence Rule: The Law Commission Speaks" (1986) 45 CLJ 192 at 192. See also *Bruce v AWB Ltd* [2000] FCA 594 at [8]; and *Youell v Bland Welch & Co Ltd* [1990] 2 Lloyd's Rep 423 (Comm).

subtract from" the terms of a written document.²¹⁵ Tony Cole notes the rule has been "frequently attacked for the injustices that result from its application and sometimes even for a lack of rationality in its justification".²¹⁶

At first blush, the rule could be seen as restricting the use of extrinsic evidence in interpreting contracts, at least where the interpretation appears at odds with the meaning the document would have had without that extrinsic evidence.²¹⁷ The argument is, however, that, even in those cases, the exercise remains one of interpretation and therefore there is no variation of the contract to conflict with the parol evidence rule.²¹⁸

The parol evidence rule would also not apply where what has occurred is an oral variation of the contract where such a variation qualifies as an oral contract in its own right or where there was an oral collateral contract prior to the written agreement.²¹⁹ Whether such oral variation is effective,

215 This description was used in *Bank of Australasia v Palmer* [1897] AC 540 (PC) at 545 per Lord Morris for a unanimous Board. It has been used on myriad subsequent occasions. See *Zurich Insurance*, above n 1, at [32]–[40] for a full description of the rule. See also Law Commission of England and Wales *Law of Contract: The Parol Evidence Rule* (Law Com No 154, 1986) at [1.2].

216 Cole, above n 8, at 680, referring to John D Calamari and Joseph M Perillo "A Plea For a Uniform Parol Evidence Rule and Principles of Contract Interpretation" (1967) 42 Ind LJ 333; Arthur L Corbin "The Interpretation of Words and the Parol Evidence Rule" (1965) 50 CLQ 161; Lawrence Cunningham "Toward a Prudential and Credibility-Centered Parol Evidence Rule" (2000) 68 U Cin L Rev 269; Eric A Posner "The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contract Interpretation" (1998) 146 U Pa L Rev 533; Stephen F Ross and Daniel Tranen "The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation" (1998) 87 Geo LJ 195; Morris G Shanker "In Defense of the Sales Statute of Frauds and Parole Evidence Rule: A Fair Price of Admission to the Courts" (1995) 100 Com LJ 259; and Justin Sweet "Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule" (1968) 53 Cornell L Rev 1036.

217 This is certainly the way it has been used in the past. See the extreme examples of *In the Goods of Peel* (1870) LR 2 P & D 46; and *In Re Fish; Ingham v Rayner* [1894] 2 Ch 83. In *Mannai*, above n 19, at 777–778, Lord Hoffmann criticises the rule as an "extraordinary rule of construction ... capable of producing results which offend against common sense"; and at 778:

I think that the rule is not merely capricious but also ... incoherent. It is based upon an ancient fallacy which assumes that descriptions and proper names can somehow inherently refer to people or things. In fact, of course, words do not in themselves refer to anything; it is people who *use* words to refer to things.

218 Much of the traditional reluctance to admit extrinsic evidence based on the parol evidence rule was shed after the speeches of Lord Wilberforce in *Prenn v Simmonds*, above n 61, at 1383–1384; and *Reardon Smith Line*, above n 19, at 995–996, which heralded the modern approach to contractual interpretation where the "matrix of fact" is always admissible (despite the supposed restrictions of the parol evidence rule).

219 The rule does not apply to contracts that were intended to be partly written and partly oral, and in these cases evidence of extrinsic terms is admissible: see the comment in *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133 at 143 per Isaacs J (Rich J concurring and Knox CJ agreeing in the result). In relation to prior collateral contracts, see for example *LG Thorne & Co Pty Ltd v Thomas Borthwick & Sons (Australasia) Ltd* (1955) 56 SR (NSW) 81 at 89 and 96.

however, may depend on whether there is a "no oral variation" clause in the original contract, as discussed below. Other exceptions to the parol evidence rule include where rectification is at issue, implied terms and misrepresentation.²²⁰

In 1976 the Law Commission of England and Wales, in a working paper, suggested that the rule should be abolished because it had been so greatly reduced by exceptions that it no longer served any useful purpose and just led to uncertainty in the law.²²¹ This recommendation was reversed by a differently constituted Commission in 1986 on the basis that the rule now has a narrow compass and does not exclude evidence necessary for ascertaining and giving effect to the parties' true intention.²²² The Law Reform Commissions of British Columbia and Ontario have also criticised the rule.²²³ The rule, however, survives, at least in name, in all colloquium jurisdictions.²²⁴

One of the debates in relation to what is left of the parol evidence rule is the question of whether it is a rule of evidence or a substantive rule of law. The interpretation of written contracts (and thus in effect the parol evidence rule) has traditionally been seen as a rule of substantive law.²²⁵ But, if the parol evidence rule is seen as one of evidence, we suggest that it may be overtaken, or quietly retired, by the codification of the rules of evidence.

220 Other exceptions were discussed in Law Commission of England and Wales *Law of Contract: The Parol Evidence Rule* (Working Paper No 70, 1976) at 6–13.

221 At [44]. See also Seddon and Bigwood, above n 18, at 425: "the trouble [the rule] causes is greater than its worth".

222 Law Commission of England and Wales, above n 215, at [1.7].

223 See Law Reform Commission of British Columbia *Report on Parol Evidence Rule* (LRC 44, 1979); and Ontario Law Reform Commission *Report on Amendment of the Law of Contracts* (Ministry of the Attorney General, Toronto, 1987). The British Columbia Report recommended total abrogation of the rule: at 13. The Ontario Report recommended that evidence of oral agreement to terms not included in, or inconsistent with, a written document should be admissible to prove the real bargain between the parties: at 163.

224 See for example in Singapore, *Zurich Insurance*, above n 1, at [108], citing *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR 891 (CA) (but note the criticisms of the *Zurich Insurance* Court as to the rule and its operation given the multiple exceptions to its application). See also *Tak & Co Inc v AEL Corp Ltd* (1995) 5 NZBLC 103,887 (HC) at 103,892 per Hammond J; and *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189 (CA) (for New Zealand); *Equiscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55, (2004) 218 CLR 471 at [35] (for Australia); *Hawrish v Bank of Montreal* [1969] SCR 515 (for Canada) and see the comments in *Sattva*, above n 10, at [59]–[60] which confirm its existence but narrow its scope; and *Cheuk Tze-Kwok v Leung Yin-King* [1993] 2 HKLR 169 (CA) at 175 per Penlington JA with whom Fuad VP and Nazareth JA agreed (for Hong Kong).

225 See, for an example of the two sides of the debate before the application of the rule was narrowed, Paul R Jackiewicz "Evidence – The Parol Evidence Rule: Its Narrow Concept as a Substantive Rule of Law" (1955) 30 Notre Dame L Rev 653. Jackiewicz considered that the majority view was that it is a substantive rule of law. See also McCamus, above n 18, at 198 who contends the rule is one more appropriately seen as a substantive rule of contract law in that it "determines that undertakings given in certain circumstances are unenforceable".

The Singapore High Court, in *BQP v BQQ*, in relation to an arbitration claim under the Singapore's International Arbitration Act Rules, recently took the view that the parol evidence rule is one of evidence.²²⁶ This was based in part on *Sembcorp* where the Court of Appeal had taken a similar view in the domestic context, although this was based on particular statutory provisions that may not exist in other jurisdictions.²²⁷ The issue had significance in an arbitration context as, even in contracts governed by Singapore law, an arbitrator is not bound by Singapore rules of evidence.²²⁸ In *Sembcorp*, the Court of Appeal left open whether the rule had been totally subsumed within provisions of its Evidence Act.²²⁹

In New Zealand, the parol evidence rule has faded from view rather than being expressly discarded. We suggest this is a consequence of the Evidence Act 2006 which largely codifies the rules relating to the admission of evidence. In the New Zealand Supreme Court decision in *Vector Gas*, Tipping J noted that exclusion of evidence under the parol evidence rule would require reconciliation with the provisions of the Evidence Act.²³⁰

We suggest that increasingly in New Zealand issues of admissibility of evidence in connection with contractual interpretation are arguably being addressed simply by reference to whether the evidence is relevant to the issues in a particular case. On this approach particular categories of evidence are not excluded by the parol evidence rule or any other rule of construction. Rather, the focus is on the relevance and probative value of the evidence, assessed in the light of the objective legal test for the interpretation of written contracts.

We also note at this point that the Canadian Supreme Court in *Sattva* held that the view that contractual interpretation was a question of law was based on a historical anachronism and did not

226 *BQP v BQQ* [2018] SGHC 55. The High Court refused leave to appeal: at [130]. The decision has not met with universal acclaim: see for example David Foxton "Arbitration without Parol?: *BQP v BQQ*" (2018) LMCLQ 309 at 314.

227 *Sembcorp*, above n 107, at [112].

228 The rules giving procedural freedom to arbitrators would be similar in most jurisdictions under arbitration treaties. The relevant rule of the Singapore International Arbitration Centre (SIAC) Rules (2013) is r 16.2: "the Tribunal shall determine the relevance, materiality and admissibility of all evidence. Evidence need not be admissible in law". Other arbitration treaties provide similarly: for example, UNCITRAL Arbitration Rules (2013), art 27(4); and London Court of International Arbitration Rules 2014, art 22. We note that another issue in *BQP*, above n 226, was whether the SIAC Rules or other arbitration rules applied, which was central to the determination of whether the arbitral tribunal in *BQP* had jurisdiction: at [97].

229 At least insofar as it relates to prior negotiations: *Sembcorp*, above n 107, at [75].

230 *Vector Gas*, above n 10, at [29]. The other judges did not comment on this point.

accord with the exercise actually carried out by the courts. Instead, the issue is of mixed fact and law.²³¹

VIII PARTICULAR TYPES OF CONTRACTS

We now turn to the interpretation exercise as it relates to particular types of contracts, starting with oral contracts.

A Oral Contracts

For oral contracts, the courts will first be concerned with whether an oral contract exists and then with ascertaining the terms as these are, by their very nature, not written down. Ascertaining the terms of an oral contract has been held to be a question of fact.²³² This means that all evidence to assist that task is admissible, including evidence of the parties' subjective intentions and subsequent conduct.²³³

In *Thorner v Major*, Lord Neuberger explained the reasons for this and for the contrast with purely written contracts as follows:²³⁴

This shows that (a) the interpretation of a purely written contract is a matter of law, and depends on a relatively objective contextual assessment, which almost always excludes evidence of the parties' subjective understanding of what they were agreeing, but (b) the interpretation of an oral contract is a matter of fact (I suggest inference from primary fact), rather than one of law, on which the parties' subjective understanding of what they were agreeing is admissible.

The reason for this dichotomy is partly historical. Juries were often illiterate, and could therefore not interpret written contracts, whereas they could interpret oral ones. But it also has a good practical basis. If the contract is solely in writing, the parties rarely give evidence as to the terms of the contract, so it is

231 *Sattva*, above n 10, at [45] and [50]. This may have implications for appeals which may be more limited. This does not apply in the case of standard form contracts where the correctness test applies, which is viewed as a question of law: *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co* 2016 SCC 37, [2016] 2 SCR 23. See also Scott HD Bower, Russell J Kruger and Jonathan McDaniel "Canadian Contractual Interpretation Just Got More Difficult" (16 September 2016) Bennett Jones <www.bennettjones.com>. Appeals are treated differently in New Zealand, and in most cases there is no clear distinction between an appeal on the facts and an appeal on the law: see *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

232 *Carmichael v National Power Plc* [1999] 1 WLR 2042 (HL).

233 At 2051. For discussion see David McLauchlan "Contract Formation and Subjective Intention" (2017) 34 JCL 41.

234 See *Thorner v Major*, above n 129, at [82]–[83]. Similar views have been expressed in Australia and New Zealand. See for example *Gardiner v Grigg* (1938) 38 SR (NSW) 524 at 532 and 537; *Handbury v Nolan* (1977) 13 ALR 339 (HCA) at 346; *Masterton Homes*, above n 73, at [90]; *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26, (2016) 260 CLR 1 at [27] and [245]–[246]; and *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [20].

cost-effective and practical to exclude evidence of their understanding as to its effect. On the other hand, if the contract was made orally, the parties will inevitably be giving evidence as to what was said and done at the relevant discussions or meetings, and it could be rather artificial to exclude evidence as to their contemporary understanding. Secondly, and perhaps more importantly, memory is often unreliable and self-serving, so it is better to exclude evidence of actual understanding when there is no doubt as to the terms of the contract, as when it is in writing. However, it is very often positively helpful to have such evidence to assist in the interpretation of an oral contract, as the parties will rarely, if ever, be able to recollect all the details and circumstances of the relevant conversations.

As can be seen, Lord Neuberger was grounding the differences in interpretation between oral and written contracts in the historical, the practical (cost and time saving) and in the rules of evidence (the best evidence rule).

The question, however, might be asked whether there is really a proper reason for such a stark distinction between purely written contracts and oral ones in terms of admissible evidence.²³⁵ The answer may come down to the view one has on the conceptual basis of contractual interpretation and in particular the question asked at the beginning – is it ascertainment of the meaning of the document or of the (mutual) intention of the parties?²³⁶

B Contracts with "No Oral Variation" Clauses

This section concerns written contracts with clauses providing that there can be no oral variations. The traditional arguments for treating no oral modification provisions as not effective to exclude later oral amending contracts were summarised by Cardozo J in an oft-cited passage from *Beatty v Guggenheim Exploration Co*:²³⁷

Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. "Every such agreement is ended by the new one which contradicts it" (*Westchester F Ins Co v Earle* 33 Mich 143, 153). What is excluded by

235 The issue may be particularly acute where there is a contract that is partly oral and partly written. The same contract would then potentially be interpreted using different evidence.

236 We note that, in *Stevenson Brown Ltd v Montecillo Trust* [2017] NZCA 57 at [5], it was held that oral contracts are also interpreted objectively. This reasoning has been criticised by McLauchlan, above n 233, at 43 on the grounds that the authorities relied on (*Prenn v Simmonds*, above n 61, *Chartbrook*, above n 15 and *Vector Gas*, above n 10) concerned the objective approach to determining the meaning of a written contract, which is a question of law, as compared to the formation of oral contracts, which is a question of fact. This, he contends, means that for oral contracts there is:

... no limit to the relevant evidence that may be admitted. That evidence may include evidence of the parties' actual intentions and what they thought had been agreed, their negotiations prior to the point of formation and their subsequent conduct.

237 *Beatty v Guggenheim Exploration Co* 225 NY 380 (1919) at 387–388, quoted in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119 at [7].

one act, is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again ...

The Australian and Canadian courts have taken the same approach. There is a useful discussion of the Australian position by Finn J in the Federal Court of Australia in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*.²³⁸ Finn J noted that "the usual objection raised to depriving a no oral modification clause of legal effect is that it involves a failure to give effect to what the parties have agreed".²³⁹ He continued that the "vice in it, though, is that a later oral or implied contract is itself an agreement".²⁴⁰ In terms of the Canadian jurisprudence, in *Shelanu Inc v Print Three Franchising Corp* the Court of Appeal for Ontario considered that the subsequent oral modification best reflected the intentions of the parties rather than the original written agreement.²⁴¹

By contrast, in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*,²⁴² it was recently held by the United Kingdom Supreme Court that an oral modification to a contract with a "no oral variation" clause was not legally effective because it was not in writing. Lord Sumption delivered the main judgment allowing the appeal from the decision of the Court of Appeal.²⁴³

Lord Sumption said that in the Court of Appeal, Kitchin LJ had treated party autonomy as the key consideration favouring the view that an oral variation could be effective. Lord Sumption rejected that notion stating:²⁴⁴

Party autonomy operates up to the point where the contract is made, but thereafter only to the extent that the contract allows. Nearly all contracts bind the parties to some course of action, and to that extent restrict their autonomy. The real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed. There are many cases in which a particular form of agreement is prescribed by statute: contracts for the sale of land, certain regulated consumer contracts, and so on. There is no principled reason by the parties should not adopt the same principle by agreement.

Lord Sumption, noting the widespread use of no oral modification clauses, identified three reasons for their inclusion:²⁴⁵

238 *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50, (2003) 128 FCR 1.

239 At [220].

240 At [220].

241 *Shelanu Inc v Print Three Franchising Corp* (2003) 64 OR (3d) 533 (ONCA) at [54]–[59].

242 *Rock Advertising*, above n 237.

243 Comprising Lady Hale, Lord Wilson, Lord Sumption and Lord Lloyd-Jones. Lord Briggs delivered a separate judgment adopting different reasoning but reached the same outcome.

244 *Rock Advertising*, above n 237, at [11].

- (1) Prevention of attempts to bypass the written agreement by informal means, so making summary judgment more practicable.
- (2) Certainty – avoidance of disputes about both whether a variation was intended and as to its terms.²⁴⁶
- (3) Provides for some formality which makes it easier for corporations to maintain internal controls as to authorisations for changes.

Lord Sumption considered that the law of contract did not usually interfere with legitimate business objectives such as these except for clear public policy reasons. In his view, "there is no mischief in No Oral Modification clauses, nor do they frustrate or contravene any policy of the law".²⁴⁷ Nor was there any conceptual inconsistency between the general position that contracts can be made informally and a particular rule giving effect to these clauses. Lord Sumption drew support in this respect from the provisions of both the CISG²⁴⁸ and from the UNIDROIT *Principles of International Commercial Contracts*.²⁴⁹ Lord Sumption also saw an analogy with the approach to entire agreement clauses.²⁵⁰ Further, Lord Sumption observed that Part 2 of the United States Uniform Commercial Code introduced a general requirement that contracts of sale above a specified

245 At [12].

246 See also Robert Harris "Modifications, Wrangles, and Bypassing" [2018] LMCLQ 441 at 443.

247 *Rock Advertising*, above n 237, at [12].

248 CISG, above n 43, art 11 provides that a contract of sale "need not be concluded in or evidenced by writing" and there is no other requirement as to form. Article 29(2) however states:

A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

249 UNIDROIT Principles, above n 42. The UNIDROIT Principles similarly do not, generally, prescribe any particular form. But art 2.1.18 states that:

A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.

250 *Rock Advertising*, above n 237, at [14]. In the United Kingdom, these clauses are routinely applied. See for example *Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] 2 Lloyd's Rep 611 (Ch) at [7]; and *Moran Yacht & Ship Inc v Pisarev* [2016] EWCA Civ 317, [2017] 1 All ER (Comm) 62 at [18]. However, in New Zealand, entire agreement clauses will only be enforced if it is "fair and reasonable" to do so in the circumstances: *Contract and Commercial Law Act 2017*, s 50(2).

value be in writing along with a "conditional provision" giving effect to no oral modification clauses.²⁵¹

All this meant that the purported oral variation in that case was ineffective as it was not in writing as required by the contract. Lord Sumption's response to suggestions of resultant hardship was that principles of estoppel will apply as the safeguard against injustice where one party has relied on a purported oral variation to their detriment.²⁵²

There have been criticisms both of the notion that there is no mischief in enforcing these clauses and as to the aspects of Lord Sumption's reasoning. Richard Calnan notes that the "centrality" of party autonomy "led the Court of Appeal to one conclusion, and the Supreme Court to the diametrically opposite one".²⁵³ Some argue that the Court of Appeal approach in *Rock Advertising* may in fact represent the parties' intentions in a truer sense.²⁵⁴

Apart from this, the main criticism from a policy perspective is that Lord Sumption's approach does not acknowledge unequal bargaining power.²⁵⁵ Professor McKendrick notes that an argument against the approach taken in *Rock Advertising* is that it can lead to "hardship or unfairness" where the parties have gone ahead in good faith to give effect to the oral modification and "either deliberately decided" that it was unnecessary to follow the no oral modification provision or have "simply overlooked, or forgotten about" the clause.²⁵⁶ There are also suggestions that in particular types of contracts, such as franchise or other relational contracts,²⁵⁷ which may be "evolutionary",²⁵⁸ the approach may operate unfairly. Estoppel was not thought to be sufficient to address these concerns. That was because it would require an unequivocal representation that the

251 At [8].

252 At [16].

253 Richard Calnan "Contractual variation clauses" (2018) 8 JIBFL 487 at 487.

254 See for example Josias Senu and Mahmoud Serewel "Between a rock and a hard place: no oral modification clauses after *Rock Advertising v MWB*" (2018) 18 OUCLJ 150 at 154; and James C Fisher "Contract variation in the common law: A critical response to *Rock Advertising v MBW Business Exchange*" (2018) 47 CLWR 196 at 199. See also Ewan McKendrick "The legal effect of an Anti-oral Variation Clause" (2017) 32 JIBLR 439.

255 Senu and Serewel, above n 254, at 154.

256 McKendrick, above n 254, at 443.

257 In *Shelanu*, above n 241, at [58], Weiler JA noted the contract in issue was a franchise agreement, a form of "contract of adhesion" where the main clauses were presented on a "take it or leave it" basis. There is usually, in such cases, an "inherent inequality of bargaining power between the parties".

258 Finn J observed that relational contracts "may be evolutionary in character": *GEC Marconi*, above n 238, at [220].

variation be valid notwithstanding the terms of the contract, and something further would be required for this than merely the informal promise.²⁵⁹

It remains to be seen whether other jurisdictions will follow the United Kingdom's recent approach. In a recent Australian case, it was observed that the matter was not ripe for reconsideration there and that the reasons given in the United Kingdom Supreme Court were not "particularly persuasive".²⁶⁰ Similarly, a recent Canadian decision on the issue neither cited nor considered the approach taken in the United Kingdom.²⁶¹ In both New Zealand and Singapore, the courts have commented that oral variations clauses may be ineffective.²⁶² Those cases, however, predate the Supreme Court's decision.

C Consumer Contracts

As we discussed above, terms can be implied into contracts because of custom, including trade custom.²⁶³ Trade usage can also colour the interpretation of specialist terms in contracts.²⁶⁴ The issue arises whether this should be the case where one party to the contract is a consumer unlikely to be versed in trade usage or indeed with earlier case law dealing with interpretation issues for trade contracts.

As we note above, the Singapore Court of Appeal suggested that limited background should be taken into account with consumer contracts.²⁶⁵ This presumably recognised the type of issues

259 *Senu and Serewel*, above n 254, at 158. The other criticism of the judgment was its failure to grapple with the issue of whether the consideration provided (which was in effect a part-payment of a debt) was sufficient: *Steve Foster and Adam Reilly "Show a little consideration: the Supreme Court's refusal to address the rule on part payment of a debt"* (2018) 23 *Cov LJ* 53; and Marcus Roberts "*Foakes v Beer: Bloodied, Bowed, But Still Binding Authority?*" (2018) 29 *KLJ* 344. That debate is beyond the scope of this article.

260 *Cenric Group v TWT Property Group* [2018] NSWSC 1570 at [103].

261 *Honey Bee (Hong Kong) Ltd v VitaSound Audio Inc* 2018 ONSC 5787 at [46].

262 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] SGCA 19, [2018] 1 *SLR* 979 at [90]; and *Beneficial Finance Ltd v Brown* [2017] NZHC 964 at [74]. Compare *Conqueror International Ltd v Mach's Gladiator Ltd* [2018] NZHC 265 at [43]. It appears that the courts of Hong Kong have not revisited the issue recently.

263 See for example *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 *CLR* 226 at 236; *Forivermor Ltd v ANZ Bank New Zealand Ltd* [2014] NZCA 129 at [42]; *London & Lancashire Fire Insurance Co v Bolands* [1924] AC 836 (HL); and *The "Freiya" v The "RS"* (1922) 65 *DLR* 218 (Exchequer Court of Canada).

264 See for example *Lake v Simmons* [1927] AC 487 (HL) at 508–509; and *Young v Sun Alliance & London Insurance Ltd* [1977] 1 *WLR* 104 (CA) at 107. Compare *Board of Trustees of The Tate Gallery v Duffy Construction Ltd* [2007] EWHC 361 (TCC) at [37]–[42].

265 *Zurich Insurance*, above n 1, at [110].

discussed above. We also note that in consumer contracts there can be consumer protection legislation that affects contractual freedom.²⁶⁶ Further the principle of *contra proferentem* is likely to come into play, in part at least to recognise unequal bargaining power.²⁶⁷

The idea that the words of consumer contracts should speak for themselves is arguably even stronger where a contract is presented in "plain English terms", as recognised in *Ross v NRMA Life Ltd*.²⁶⁸ In that case, Young J noted that the relevant insurance contract had been translated into "plain English" and should be interpreted in this light and not with regard to arcane meanings derived from previous case law. He said:²⁶⁹

First of all, it is a difficult hurdle to jump, that when an insurer deliberately alters the standard wording of insurance policies and presents a "Plain English" policy, that the insured really has to go back to all the ancient old law that was applicable in the mumbo jumbo legalese that the parties have deliberately decided to avoid. It would be strange indeed if inelegant plain English was held to have the same effect of the old time mumbo jumbo.

D Online Contracts

The issue of consumer rights becomes even more acute with the use of contracts in connection with the provision of online services, information and entertainment. Users are frequently called to "accept" complex terms and conditions as a pre-condition to accessing low or even no value services and entertainment. Such contracts challenge standard conceptions of offer and acceptance in contract law and also present difficulties in assessing mutual intent, whether on an objective or subjective basis.

Online contracts often contain terms that substantially erode individuals' privacy by allowing data collection and use, including sensitive health data, and sometimes even enabling tracking of the hour-to-hour movements of the user. Most users lack the technical knowledge to understand the implications of what they agree to and the value of the transaction does not justify their taking the time to do so. Inequality of knowledge and bargaining power is acute.²⁷⁰

266 See for example Fair Trading Act 1986, s 26A; and Australian Securities and Investments Commission Act 2001 (Cth), s 12BF.

267 See for example *British Traders Insurance Co Ltd v James* [1968] NZLR 1157 (CA) at 1161 per North P. The Supreme Court of Canada noted that the correctness standard applies in relation to interpretation of consumer contracts, the interpretation being purely a question of law: *Ledcor Construction*, above n 231, at [4] per McLachlin CJ and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

268 *Ross v NRMA Life Ltd* (1993) 7 ANZ Ins Cas ¶61-170 (NSWSC).

269 At 77,963.

270 As was recognised in *Douez v Facebook Inc* 2017 SCC 33, [2017] 1 SCR 751. See also the commentary in John Enman-Beech "When is a Contract Not a Contract? *Douez v Facebook Inc* and Boilerplate" (2018) 60 CBLJ 428.

There is little to no incentive on providers to reduce the length or complexity of electronic contracts, particularly when their length is not bound by the size of the page and the cost of printing and when the user does not read, and therefore does not protest about, their content. As a consequence, electronic contracts have become longer and are frequently incomprehensible. Paypal's full terms and conditions apparently extend to 36,725 words and iTunes' privacy policy and terms and conditions some 19,972 words; longer than *Hamlet* and *Macbeth* respectively.²⁷¹

Some regulatory frameworks, such as the EU General Data Protection Regulation,²⁷² set high standards requiring consent to be obtained for the collection and use of information. Individuals must agree to their information being collected and that agreement must be secured in response to clear advice about how the data is to be used. But, in reality, it is doubtful that, however plain the language employed, it will be effective in bringing home to consumers the rights they are waiving. Even if these contracts were comprehensible, the opportunity costs of reading them would be substantial; one study found it would take the average American 201 hours per year to read all the standard form contracts encountered online.²⁷³ It would be a rare inhabitant of the online space who would read more than a fraction of the contracts they enter into.

There are two principal ways contractual terms are purportedly incorporated into online contracts on the Internet. The first is through "clickwrap agreements" which are formed when a consumer clicks on a button acknowledging that they have read and agreed to the terms and conditions after being given the opportunity to read those terms and conditions. The second is "browsewrap agreements" where no "acceptance" through clicking is required, but there is some notation on the website that, by proceeding onto the website, they are accepting the terms and conditions of use of the website. It is likely that the second type of "contract" would be more difficult to enforce.

There is surprisingly little authority as yet on the extent to which online contracts are enforceable and, if so, the terms that would be held to be incorporated in them and how the terms would be interpreted.²⁷⁴ We predict litigation (and regulation) will increase. At the least, it seems

271 Oliver Bray "The App Effect: How Apps are Changing the Legal Landscape" (2013) 19(2) CTLR 66 at 66.

272 Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection) [2016] OJ L119/1.

273 Cheryl B Preston "'Please Note: You Have Waived Everything': Can Notice Redeem Online Contracts?" (2015) 64 Am U L Rev 535 at 553.

274 See for example *ProCD Inc v Zeidenberg* 86 F 3d 1447 (7th Cir 1996); *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm), [2012] LRR 742; *eBay International AG v Creative Festival Entertainment Pty Ltd* [2006] FCA 1768, (2006) 170 FCR 450; *Douez v Facebook Inc*, above n 270; *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002); *Century 21 Canada Limited Partnership v Rogers Communications Inc* 2011 BCSC 1196, (2011) 26 BCLR (5th) 300; and *Blacklock's Reporter v Canada (Attorney-General)* 2016 FC 1255, [2017] 2 FCR 256.

likely there will be a strong *contra proferentem* approach taken to interpretation issues. Further, we suspect that values, such as privacy and human rights principles (whether enshrined in constitutions or legislation), will be brought into play to limit broad language appearing on its face to justify extensive intrusion into privacy and other values.²⁷⁵

E Registered Instruments

In this section, we discuss issues relating to the interpretation of registered instruments and the extent to which extrinsic materials should be used in the interpretive process. In *Belize Telecom*, Lord Hoffmann, delivering the judgment of the Board, noted:²⁷⁶

Because the [Company's] articles are required to be registered, addressed to anyone who wishes to inspect them, the admissible background for the purposes of construction must be limited to what any reader would reasonably be supposed to know. It cannot include extrinsic facts which were known only to some of the people involved in the formation of the company.

The Board does not consider that this principle has any application in the present case. The implication as to the composition of the board is not based upon extrinsic evidence of which only a limited number of people would have known but upon the scheme of the articles themselves and, to a very limited extent, such background as was apparent from the memorandum of association and everyone in Belize would have known, namely that telecommunications had been a state monopoly and that the company was part of a scheme of privatisation.

More recent is the decision in *Cherry Tree Investments Ltd v Landmain Ltd* in the Court of Appeal of England and Wales.²⁷⁷ Arden LJ, in dissent, would have allowed extrinsic material in the interpretation of registered documents unless there are or may be third parties who would be prejudicially affected by admission.²⁷⁸ She noted the test for exclusion of extrinsic material was whether the document is to be addressed to third parties.²⁷⁹ Arden LJ therefore would admit

275 See for example *R v Gomboc* 2010 SCC 55, [2010] 3 SCR 211; and *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710.

276 *Belize Telecom*, above n 82, at [36]–[37] per Lord Hoffmann.

277 *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305. See also *Slough Estates Ltd v Slough Borough Council (No 2)* [1971] AC 958 (HL) at 962 per Lord Reid (in obiter and concurring with the main judgment delivered by Lord Pearson, with whom the other Law Lords agreed):

Of course, extrinsic evidence may be required to identify a thing or place referred to, but that is a very different thing from using evidence of facts which were known to the maker of the document but which are not common knowledge to alter or qualify the apparent meaning of words or phrases used in such a document. Members of the public, entitled to rely on a public document, surely ought not to be subject to the risk of its apparent meaning being altered by the introduction of such evidence.

278 At [54].

279 At [41], citing *Belize Telecom*, above n 82.

material where the agreement was between the original parties and there was no risk of prejudicial effect on third parties.²⁸⁰

Lewison LJ did not agree. In his view a contract cannot mean one thing to the parties and another to those who might be affected by it.²⁸¹ The majority nevertheless held that extrinsic evidence was admissible but that it would have little weight. In view of the public nature of a registered charge, which was addressed to anyone who wished to inspect the register and could be expected to rely on it, a reasonable person would conclude that matters which the parties had chosen to keep private should not influence those parts of the bargain which they had made public in the register.²⁸²

In *Trump International Golf Club Scotland Ltd v Scottish Ministers*, the Supreme Court of the United Kingdom considered the approach to interpreting planning permissions and similar public documents.²⁸³ The Court did not refer to the *Cherry Tree* decision, but in substance took an approach more consistent with that of the majority in that case. Lord Hodge noted:²⁸⁴

Differences in the nature of documents will influence the extent to which the court may look at the factual background to assist interpretation. Thus third parties may have an interest in a public document, such as a planning permission or a consent under s 36 of the 1989 Act, in contrast with many contracts. As a result, the shared knowledge of the applicant for permission and the drafter of the condition does not have the relevance to the process of interpretation that the shared knowledge of parties to a contract, in which there may be no third party interest, has. There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission ...

When the court is concerned with the interpretation of words in a condition in a public document ... it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole.

Lord Hodge also noted the Court will "exercise great restraint in implying terms into public documents which have criminal sanctions" but saw "no principled reason for excluding implication altogether".²⁸⁵

280 At [58].

281 At [99].

282 At [130] per Lewison LJ with whom Longmore LJ, in a separate judgment, agreed.

283 *Trump International Golf Club Scotland Ltd*, above n 195.

284 At [33]–[34] per Lord Hodge (with whom all other members of the Court agreed, including Lord Mance and Lord Carnwath who gave separate but concurring opinions).

285 At [35].

The leading Australian case, *Westfield Management Ltd v Perpetual Trustee Co Ltd*,²⁸⁶ took a much more hard-line approach on the topic of extrinsic material and registered documents. The effect of the judgment in *Westfield* was that establishing the intention or contemplation of the parties to an instrument registered under the Real Property Act 1900 (NSW) by reference to material extrinsic to the instrument would be contrary to the principles of indefeasibility of title under the Torrens system.²⁸⁷

In New Zealand, in *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust*, it was accepted that a "very flexible approach to the admission of extrinsic evidence as bearing on the construction of registered documents" could undermine indefeasibility of title.²⁸⁸ On the other hand, it was considered that a rigid rule excluding such evidence could lead to perverse outcomes. The approach therefore was to leave some flexibility. Registered documents should generally be construed "without regard to extrinsic evidence which is particular to the original parties and is not apparent on the face of the register".²⁸⁹ Recourse can be had.²⁹⁰

286 *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45, (2007) 233 CLR 528. Prior to this, extrinsic material was often held to be available for the interpretation of registered interests in land in cases of ambiguity: *Gallagher v Rainbow* (1994) 179 CLR 624 at 639–640. But see *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 at [151] per Campbell JA (with whom the other members of the Court in concurring judgments agreed):

However, the way those principles [of contractual interpretation] come to be applied to a particular contract can be affected by aspects of the contract such as whether it is assignable, whether it will endure for a longer time rather than a shorter time, and whether the provision that is in question is one to which indefeasibility attaches by virtue of the contract being embodied in an instrument that is registered on a Torrens title register. All these are matters that would be taken into account by the reasonable person seeking to understand what the words of the document conveyed. That is because the reasonable person seeking to understand what the words convey would understand that the meaning of the words of the document does not change with time or with the identity of the person who happens to be seeking to understand the document. That reasonable person would therefore understand that the sort of background knowledge that is able to be used as an aid to construction, has to be background knowledge that is accessible to all the people who it is reasonably foreseeable might, in the future, need to construe the document.

287 See the discussion in *Westfield*, above n 286, at [37]–[42]. The Torrens system of "title by registration" is based on the principle of indefeasibility of titles, where registration confers on the proprietor an indefeasible title, subject to a few exceptions such as fraud, claims *in personam* and statutory exceptions.

288 *Green Growth*, above n 128, at [73]–[74] per William Young and O'Regan JJ, and [100] per Glazebrook J agreeing with all of William Young and O'Regan JJ's judgment, apart from the interpretation of the covenant.

289 At [74(a)]. This does not, however, limit rights to apply for rectification. Rectification is not available, however, against subsequent owners: *Green Growth*, above n 128, at [100]–[102] per William Young and O'Regan JJ, [138]–[140] per Elias CJ, [151] per Glazebrook J and [162] per Ellen France J.

290 At [74(c)]. Compare the approach of Arden LJ in dissent in *Cherry Tree*, above n 277, at [36]–[54].

... to facts which a reasonable future reader of the document could be expected to be aware of and would recognise as relevant and which they have access to, such as the configuration of land, any physical features to which the document relates or refers and any material referred to in the document.

It seems to us that, in the area of registered documents, the courts take into account the following considerations. First, there is the need to ensure the reliability of a public register and the predictability of outcome. Secondly, there is the consideration that, if the parties agree a form of words that they know are to be relied upon by third parties, then they can be presumed to have agreed that the words will bear their ordinary meaning. Finally, the courts will take into account the need for fairness to third parties where it is likely third parties will be relying on a contract.

IX SOME CONCLUDING OBSERVATIONS

A number of values or considerations are in play when common law jurisdictions interpret written contracts. Sometimes these surface in the discussion in a case, while on other occasions the values can be seen to inform the approach implicitly.

The first value is the notion of party autonomy. One of the fundamental tenets of a liberal democracy is that an individual should have control over his or her capital, whether that capital is in the form of labour, money or other resources. Flowing from this belief system is the idea that, in all but the rarest of circumstances, people should be free to make bargains affecting their own resources, however improvident, and the related idea that the courts should not be in the business of remaking bargains.

Next is the notion that the text of a written contract should be at the centre of any issue of the interpretation of written contracts because that is the agreed record of the bargain that was made.

On the other hand, as the law of rectification makes plain, we do want people to be held to the bargains they make. We find it repugnant to hold parties to the text of a contract if that text does not record the bargain reached. This has led over time to the courts in the colloquium jurisdictions, to varying degrees, accepting that the meaning of words may require context and that to constrain courts to the words of the contract only may result in people being held to bargains they did not make.

The next value is certainty in the law. If people agree something in writing, the outcome of any enforcement of that contract by the courts should be predictable. This is given great weight in this area because we attribute value to stability in the law and predictability in contractual relations. This value reinforces the centrality of the text to the interpretive task.

Related to the value of certainty is the desire to be fair to third parties, where third parties are likely to be relying on a contract. The same desire for fairness also informs the approach to consumer and online contracts. This leads to restrictions on the extent of background context that can be taken into account in interpreting certain types of contracts such as registered instruments.

Unsurprisingly, in a common law system adhering to precedent and the principle of stare decisis, the importance of history has been stressed in the cases.

A desire to control the cost and delay caused by litigation is apparent from the cases. This objective is pursued through the discipline of excluding evidence of marginal relevance or dubious probative value.

Finally, the value perhaps least given voice in the case law is the pure evidential analysis of relevance and probative value. Linked to this is the notion that the best evidence is objective and contemporary: hence the concentration on documentary evidence rather than subjective expressions of intent.

The objective legal test we apply when interpreting a written contract was formulated by reference to, and as a compromise between, these philosophical, historical, practical and evidential considerations. Further, when and to what extent context can be relied on in common law jurisdictions depends on the limitations the particular jurisdiction places on each of the values and considerations outlined above. For example, the value placed on autonomy of the parties does not, except for purely oral contracts, extend to embracing the civil and international law test of searching to ascertain the actual mutual intent of the parties. The words chosen by the parties remain paramount and the test objective on either formulation of the test discussed at the start of this article: the view a reasonable person would take of the meaning of the document or the view that same reasonable person would consider to be the intent of the parties.

In part this objective test is a recognition of the reality of the situation – the courts will always, to a greater or lesser extent, be reconstructing the terms of the agreement after the fact in light of the assertion of differing interpretations by the parties. Further, the situation that has arisen was usually not within the contemplation of the parties at the time the bargain was made. In large part, however, the objective approach taken relates to some of the other values outlined, such as concentration on the best evidence of the words actually used by the parties in a written contract and commercial certainty. It may be argued that this means the common law approach lacks the conceptual simplicity of the civil law but that might just be a necessary function of the competing values identified above and the common law method.

