

## ADDRESS GIVEN AT THE BANKING & FINANCIAL SERVICES LAW ASSOCIATION CONFERENCE

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\*Sian Elias<sup>1</sup>

Before there were courts in New Zealand, before there was government, there was contract. It came with trade and “the complex cooperation and division of employments” that are inevitable in all but the most primitive societies. The lawless men who flocked to this most lawless of the outposts of empire came for opportunities they could only realise through orderly and secure dealings with each other and with the local inhabitants. They had great interest in seeing the pacts they entered into observed and they invoked law. They invented processes in which they sought to replicate the methods of the legal order they had left behind.

Some of the dealings were complex. James Busby, the British Resident in the Bay of Islands was drawn into the dispute about the terms of a contract made in 1831 by which two Ngapuhi chiefs commissioned a local European trader, Fishwick, to obtain a cutter in Sydney for their use in war raids. When the cutter was delivered, three such raids were carried out against Ngaiterangi in Tauranga. The raiding party on the vessel, which was called the *Emma* was shadowed by two missionary vessels which fluttered around trying to make peace. Security for payment for the boat was entered into, against the possibility that the chiefs would not return from the war. Pi, the principal chief, claimed to have later made payment for the vessel in timber and flax. But Fishwick took back possession apparently to set off against the price of gunpowder supplied to Pi. Pi later seized the *Emma* back from another trader, Poynter, who claimed to have bought it from Fishwick. Pi claimed that the supply of gunpowder had not affected his ownership of the cutter and was a separate bargain. Alternatively, he said that the debt he owed for the gunpowder did not extinguish his entire interest in the *Emma*. Busby was not able to resolve the dispute which bubbled on for years and much later vexed the administration of Poynter’s estate. This early dispute raised familiar problems in contract and was addressed as if subject to English law, which Pi as well as Fishwick was keen to invoke, being convinced of the merits of his case on the proper construction of the bargain struck by the parties.

The appeals to law for vindication of contracts are replicated in all frontier societies, as recent scholarship in North America has shown. Wherever there is trade or division of effort in a community, they are underpinned by contract.

What contracts mean, matters. It is not surprising then that Lord Goff described the staple diet of commercial litigation as being summed up in the word “construction.”<sup>2</sup> The work of construction is essentially the same whether it entails interpretation of

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<sup>1</sup> The Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand.

<sup>2</sup> Robert Goff “Commercial Contracts and the Commercial Court” [1984] Lloyd’s Maritime and Commercial Law Quarterly 382 at 385.

text, identification of the bargain from conduct, implication of terms, or identifying the purpose of the contract when considering what loss is properly attributable to its breach. Its purpose is to identify the bargain the parties have made. Not the bargain the court thinks ought reasonably to have been made. The bargain made does not turn on subjective intention. As Robert Stevens has engagingly put it, bargains don't take place in the heads of the parties.<sup>3</sup> They are actions in the world to be objectively identified.

The principles by which contracts are ascertained and interpreted are of course important and significant. When the organisers suggested I might speak about contractual interpretation, I wondered whether there was much that could be usefully added to all that has been written in recent years on the subject, in decisions and articles of high authority.

It is perhaps a little surprising that the topic remains one that generates so very much heat and difficulty. Once the position was reached in *Prenn v Simmonds*<sup>4</sup> that all contracts fall to be construed in the light of their surrounding circumstances and cannot be determined "purely on internal linguistic considerations," it might have been thought that evidence of contractual context would be admissible wherever relevant and helpful when parties dispute the meaning and effect of their agreement. It is not clear why special rules have remained as part of contract doctrine to limit evidence potentially highly relevant.

The New Zealand Supreme Court is not thought to have acquitted itself particularly well in its principal foray into this field in *Vector Gas v Bay of Plenty Energy Ltd*.<sup>5</sup> That was not a case I sat on, a fact for which I am grateful. It has not only been described as the worst in the Court's first ten years but the reasoning of each of the judges has been subject to withering criticism by Professor McLauchlan.<sup>6</sup> When I tried to say to my colleagues last week that I didn't think it was *that* bad, I was howled down – but then most of them had sat in the Court of Appeal and been overturned.

### **Context and meaning**

The strict literalism which held parties to the words used in written agreements and left judges to decide that plain meaning according to their own registers, has wilted under the insights that words do not have inherent meanings independent of their use. Corbin, indeed, insisted that it is crude to suppose that words have meanings independent of the people who use them to communicate. His view was:<sup>7</sup>

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<sup>3</sup> Robert Stevens "Rights Restricting Remedies" (paper presented to Obligations VII, Hong Kong, July 2014) at 9.

<sup>4</sup> *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384 per Lord Wilberforce.

<sup>5</sup> *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 (Blanchard, Tipping, McGrath, Wilson and Gault JJ).

<sup>6</sup> David McLauchlan "Contract Interpretation in the Supreme Court – Easy Case, Hard Law?" (2010) 16 NZBLQ 229.

<sup>7</sup> A L Corbin *Corbin on Contracts* (West Publishing Co, St Paul, vol 3, rev ed 1960) at 536.

[I]t can hardly be insisted on too often or too vigorously that language at its best is always a defective and uncertain instrument, that words do not define themselves, that terms and sentences in a contract, a deed, or a will do not apply themselves to external objects and performances, that the meaning of such terms and sentences consists of the ideas that they induce in the mind of some individual person who uses or hears or reads them, and that seldom in a litigated case do the words of a contract convey one identical meaning to the two contracting parties or to third parties.

In the United States, this thinking was adopted by Chief Justice Traynor, in California, who, in a case that has been highly influential in the United States, *Pacific Gas and Electric Co v Thomas Drayage and Rigging Co Inc*,<sup>8</sup> said that extrinsic evidence was necessary to “contradict the linguistic background of the judge”. He saw faith in “plain meaning” as a “remnant of a primitive faith in the inherent potency and inherent meaning of words”:<sup>9</sup>

If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents.

It is easy to overlook the vast majority of cases where dispute about meaning does not arise. In such cases, the meaning is treated as plain. Where however disputes arise about contractual meaning because the parties have not foreseen the consequences that have arisen, “plain” is not an adjective readily applied to the meaning. That is illustrated by the very many cases where appeal courts have set aside interpretations reached by lower courts. In such cases, evidence of common meaning shared by the parties on the terms in dispute may be of considerable help.

Lord Hoffmann’s restatement of the principles in *Investors’ Compensation Scheme Limited v West Bromwich Building Society*,<sup>10</sup> is justly celebrated. He explained interpretation as “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”.<sup>11</sup> He distinguished between the meaning a document would convey to a reasonable man, and the meaning of “its words”:<sup>12</sup>

The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

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<sup>8</sup> *Pacific Gas and Electric Co v Thomas Drayage and Rigging Co Inc* 69 Cal (2<sup>nd</sup>) 33.

<sup>9</sup> At 38.

<sup>10</sup> *Investors’ Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913.

<sup>11</sup> At 912.

<sup>12</sup> At 912.

Earlier, in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*,<sup>13</sup> Lord Hoffmann had echoed Corbin in saying that “words do not in themselves refer to anything, it is people who use words to refer to things”.<sup>14</sup> As a result, in understanding the meaning of the person who uses words, the background circumstances play, he said, “an indispensable part”.<sup>15</sup>

As Lord Steyn was later to point out in *Westminster City Council v National Asylum Support Service*,<sup>16</sup> Lord Hoffmann made it “crystal clear” that an ambiguity need not be established before the surrounding circumstances may be taken into account. All text “conveys meaning” only according to the circumstances in which it was used, making context always relevant.

The approach was accepted in New Zealand by the Court of Appeal in New Zealand in *Boat Park Ltd v Hutchinson*,<sup>17</sup> but in other cases judges, including appellate judges, continued to cite earlier authority and to look for ambiguity.<sup>18</sup> In *Vector* two judges of the Supreme Court treated ambiguity as being necessary before admission of extrinsic evidence should be permitted except in relation to estoppel or rectification or (as Wilson J suggested) there were questions about the “commercial sense” of the transaction. Professor McLauchlan has commented, rather tartly, that the Court divided 3/2 on whether there was ambiguity, suggesting the concept is a fragile filter.<sup>19</sup>

Lord Hoffmann, as Lord Wilberforce before him, excluded from the background which could illuminate meaning and ought to be considered, declarations of the “subjective intentions” of the parties and evidence of their previous negotiations. Lord Wilberforce had taken the view that the same principle excluded equally evidence of statements or actions during negotiations, at the time of the contract, or subsequent to the contract.<sup>20</sup> That position remains orthodoxy in England and in Australia.

In 2009 the House of Lords in *Chartbrook v Persimmon Homes*<sup>21</sup> declined to overturn the exclusion of pre-contractual negotiations on the basis that the admission of such evidence “would create greater uncertainty of outcome in disputes over interpretation, and add to the costs of advice, litigation, or arbitration”.<sup>22</sup> Lord Hoffmann accepted that evidence relating to prior negotiations might be admitted to establish context such as the facts that were known to the parties but could not be used directly as evidence of the meaning the parties understood. That is a

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<sup>13</sup> *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 774.

<sup>14</sup> At 778.

<sup>15</sup> At 774.

<sup>16</sup> *Westminster City Council v National Asylum Support Service* [2002] UKHL 38 [2002] 1 WLR 2956 at [5].

<sup>17</sup> *Boat Park Ltd v Hutchinson* [1999] 2 NZLR (CA) 74 at 81–82.

<sup>18</sup> See for example *Potter v Potter* [2003] 3 NZLR 145 (CA); and for earlier authority see *Benjamin Developments v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189 (CA) at 199; and *Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 1 NZLR 391 (PC).

<sup>19</sup> McLauchlan, above n 6, at 262.

<sup>20</sup> *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL) at 261.

<sup>21</sup> *Chartbrook v Persimmon Homes* [2009] UKHL 38, [2009] AC 1101.

<sup>22</sup> At [35].

distinction that might be thought to be rather subtle in application, if not in concept. It is of course established that such evidence is admissible in cases where rectification or estoppel by convention is claimed. A number of commentators have acknowledged that evidence of the parties' intentions is frequently put before the court by the addition of such claims.<sup>23</sup> Indeed, Lord Hoffmann treated the existence of rectification and estoppel as safety nets to prevent injustice as a result of the strict exclusion of the evidence in construing the meaning of the contract. Some critics have queried the need to pass up the more direct route.

In Australia, the decision of Mason CJ in the High Court in *Codelfa Construction Pty Ltd*<sup>24</sup> has not been explicitly departed from and remains authoritative. Mason CJ there said:<sup>25</sup>

The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of a 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.

Plain meaning then continues to feature in Australia. This was not a formalistic application of the parole evidence rule, because Mason J, as he then was, was prepared to admit evidence of surrounding circumstance and approved the approach of Lord Wilberforce in *Prenn v Simmonds*. Such evidence could not be admitted, however, to contradict "plain meaning," but "to establish objective background facts which were known to both parties and the subject-matter of the contract".<sup>26</sup> To this extent, they were admissible. Mason CJ did however leave the door ajar. He considered that if the parties had *refused* to adopt a provision that would contradict the meaning objectively presumed from their words, it might not be right to exclude the evidence:

It is possible that evidence of mutual intention, if amounting to concurrence, is receivable so as to negative an inference sought to be drawn from surrounding circumstances.<sup>27</sup>

The circumstances described may well have been considered to be rare and could be said to raise questions of bad faith if one party asserts a meaning he had joined in rejecting. I wonder too whether the effect of rejection of a provision and its impact on interpretation will often be apparent in the iterative process of concluding a contract. But the exception does strike me as difficult. 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.

In *Maggbury Pty Ltd v Hafele Australia Pty Ltd*<sup>28</sup> and in *Westfield Management Ltd v AMP*<sup>29</sup> the High Court applied *Investors' Compensation Scheme Ltd*. In *Royal*

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<sup>23</sup> See David McLauchlan "Contract Interpretation: What Is It About?" (2009) 31 Syd LR 5 at 37; and Donald Nicholls "My Kingdom for a Horse" (2005) 121 LQR 577 at 578.

<sup>24</sup> *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

<sup>25</sup> At 352.

<sup>26</sup> At 352.

<sup>27</sup> At 353.

<sup>28</sup> *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188.

*Botanic Gardens and Domain Trust v South Sydney City Council*<sup>30</sup> the High Court applied Mason CJ and did not refer to *Maggbury*. It found however that the contractual provision on its face was ambiguous and that evidence of background was admissible (which removed the ambiguity). It seems that Australia applies *Investors' Compensation Scheme* but that ambiguity in "plain meaning" may be important in the admission of contextual evidence.

As has been indicated, that preference in favour of admission of contextual evidence can also be seen in the decisions of two of the New Zealand Supreme Court judges in *Vector*. It may be that in deciding whether contextual evidence is relevant in a particular case, apparent ambiguity on the face of the agreement is seen as a powerful circumstance in favour of relevance. It is however not entirely easy to reconcile with the view that "plain meaning" is a mirage and that, in cases of dispute, context is always required when deciding what the contract meant to the parties, objectively assessed. On the insight derived from Corbin and apparently adopted by Lord Hoffmann, what is ambiguous itself cannot be determined from the language alone and always requires contextual assessment, even if only as a check against wrong assumption by the judge against his own referents for meaning.

Generally speaking, however, it seems to me that in the United Kingdom, Australia, and New Zealand, the insights provided by Lord Wilberforce and Lord Hoffmann are shared in that the meaning of the contract is to be objectively assessed by considering the words used in a wider context than the written documents themselves. Where there is perhaps emerging divergence is in respect of the exclusion of the parties' pre-contractual dealings and post-contractual conduct, and the place of a general presumption of commercial sense when interpreting contracts, such as has been suggested in the *Vector* case by some of the Judges and as finds support in some of the United Kingdom cases. On these points, perversely you might think, I am on the one hand attracted to what the Hon Dyson Heydon has called the "revolutionary" notion of admissibility in the case of admission of evidence of prior dealings and post-contractual conduct where relevant, but on the other view with considerable caution any overarching concept of "commercial sense" as a driver of interpretation. That will take me to the final kite I want to fly, which is to ask whether Chief Justice Spigelman is right to suggest a more calibrated interpretive response according to the nature of the contract.<sup>31</sup> I illustrate it by reference to contracts in respect of "public documents".

### **Concerns about context**

Before turning to these topics, however, I want to say something about the elephant in the room. That is, the concerns that have been expressed about the latitude provided by the Wilberforce/Hoffmann approach to context, even when limited by exclusion of pre-contractual dealings and post-contractual conduct. It has to be confronted because my sense is that the approach being taken is quite fluid. The

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<sup>29</sup> *Westfield Management Ltd v AMP Capital Property Nominees Ltd* [2012] HCA 54, (2012) 247 CLR 129.

<sup>30</sup> *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5, (2002) 240 CLR 45.

<sup>31</sup> James Spigelman *From Text to Context: Contemporary Contractual Interpretation* (2007) 81 Australian Law Journal 322.

elephant is the negative view taken of contextual interpretation and the persistent hankering after “plain meaning” expressed by many senior commercial practitioners. One experienced New Zealand commentator has said that the *Investors’ Compensation Scheme* decision has cast a “shadow of doubt over interpretation of even the most clearly worded contracts.”<sup>32</sup> This is not a New Zealand response only. Lord Steyn has also acknowledged that the changes have “upset the horses in the commercial paddock.”<sup>33</sup> You are better placed than I am to know how unsettled things remain. It may well be that some of you can point to practical problems that should give people like me pause. But it is also important not to start at shadows and end up maintaining possible impediments to correct decision-making through legal policy which is misdirected.

It is I think important to acknowledge that the exclusionary rules of evidence are not primary substantive legal doctrine but are, rather, subservient adjectival law. The substantive legal doctrine in issue here is that contractual obligations result from the common understanding of the parties, objectively assessed in the case of dispute. Because it is the common understanding, as it is reasonably and objectively to be ascertained, that binds, the divergent subjective opinions on that topic of the parties are irrelevant, at least unless the different understanding of one of the parties was known to the other, who did nothing to correct it. Mason CJ, in adopting a restrictive approach to contextual evidence in *Codelfa*, was motivated by the need to maintain the objective standard. But, as Lord Hoffmann made clear,<sup>34</sup> the objective determination of the bargain is a given. Lord Nicholls has pointed out that admitting reliable evidence of the parties’ pre-contractual dealings relating to shared understanding of meaning would not depart from the objective approach: “Rather this would enable the notional reasonable person to be more fully informed of the background context”.<sup>35</sup>

What is in issue is the evidence available to the decision-maker making the objective assessment. We have to be very careful about excluding evidence that is relevant (a matter for determination) that may be of help when its admission of itself does not affect any substantive doctrine of contract.

It is also important to acknowledge that experience usually shows that technical rules seldom produce greater certainty or are more simple to observe. In general, they create ferocious litigation about matters that are collateral and often they promote incorrect and unjust outcomes. Exclusionary rules of evidence often mean the reasonable objective person is deprived of relevant background knowledge he needs, as Lord Nicholls writing extra-judicially has described.<sup>36</sup>

It is sometimes said that the use of detailed background information in interpretation that is known only to the contracting parties is unfair on third parties. Alan Berg, although disavowing an argument that there should be a retreat to literalism,

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<sup>32</sup> Don Holborow “Contract Interpretation” [2004] NZLJ 272 at 272.

<sup>33</sup> Johan Steyn, ‘The Intractable Problem of the Interpretation of Legal Texts’ (2003) 25 Syd LR 5 at 8.

<sup>34</sup> *Chartbrook v Persimmon Homes* [2009] UKHL 38, [2009] AC 1101 at [33].

<sup>35</sup> Nicholls, above n 23, at 583.

<sup>36</sup> Nicholls, above n 23.

suggests that we should abandon “the fiction” the contracts are addressed to the original parties because “most professionally drafted commercial contracts are intended to be used by, and are therefore addressed to, people who will know the basic background to the deal, but no more than that”.<sup>37</sup> This concern is supported by Spigelman CJ writing extra-judicially who suggests that it is “a basic defect” in Lord Hoffman’s restatement that “it is not a scheme that can be applied to a substantial range of commercial contractual relationships”.<sup>38</sup>

A further concern is that extrinsic material will be used to “create” rather than cure ambiguity by calling into question the plain meaning of clauses in the contract. So, in *Melanesian Mission Trust Board v Australian Mutual Provident Society*<sup>39</sup> the Privy Council emphasised that extrinsic evidence could be admitted solely to resolve ambiguity, not to “create” ambiguity which according to the ordinary meaning of the words used in the document did not exist. It is feared that if prior-negotiations and other extrinsic materials are allowed to be used in interpretation practitioners will be unable, when faced with a contract they did not draft themselves, to accurately predict how it will be interpreted by the courts.<sup>40</sup>

Yet another concern voiced is that the admission of extrinsic material will unnecessarily prolong hearings. The spectre is raised of lawyers and judges sifting through thousands of pages of largely irrelevant documents just to ascertain whether there is anything that can call the apparent plain meaning of the contract into question.

These concerns have been confronted by Lord Nicholls, Lord Steyn and closer to home, Professor McLauchlan and Professor JW Carter. All are of the view that the assistance to be gained from admitting evidence of context outweighs the potential negative consequences and that in any case many of the concerns are overstated.

Pragmatic justifications for exclusion of evidence of pre-contractual dealings and post-contract conduct were not greatly stressed by Lord Hoffmann in *Chartbrook* when concluding that a case for departing from the long-standing rule of exclusion of pre-contractual dealings had not been established. He thought there was insufficient material before the House of Lords on which it could form a view “whether the suggested disadvantages of admissibility were outweighed by the advantages of doing more precise justice in exceptional cases or falling into line with international conventions”.<sup>41</sup> He allowed that it was possible that “empirical study (for example, by the Law Commission) may show that the alleged disadvantages of admissibility are not in practice very significant”.<sup>42</sup> Lord Nicholls has also argued that the exclusionary rules may not even speed up matters – in cases where extrinsic

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<sup>37</sup> Alan Berg “Thrashing Through the Undergrowth” (2006) 122 LQR 354 at 359.

<sup>38</sup> Spigelman , above n 31, at 330.

<sup>39</sup> *Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 1 NZLR 391 (PC) at 395.

<sup>40</sup> A Beck “Contract” [2011] NZ Law Review 363 at 368.

<sup>41</sup> *Chartbrook v Persimmon Homes* [2009] UKHL 38, [2009] AC 1101 at [41].

<sup>42</sup> At [41].

evidence is relevant and helpful it may be the quickest demonstration of what the parties intended.<sup>43</sup>

In relation to the suggestions of disadvantage to third parties, Lord Nicholls pointed out that the courts already take into account “objective” background matters known to the contracting parties but not necessarily to others. He accepted it may be appropriate when considering the interpretation of a document intended for commercial circulation to attach “added weight to the meaning the words bear on their face”: “The context afforded by the nature of the document is one of the matters the notional reasonable reader will take into account.” But there was, he thought, no reason to fear that admitting evidence of pre-contract negotiations where appropriate “will risk bringing English commercial law to its knees”.<sup>44</sup>

In response to suggestions that commercial certainty is fostered by an approach that does not allow access to context and focuses on the plain meaning JW Carter makes the point that it is “counter-intuitive to suggest that parties have been driven to litigation ... in relation to a contract which has a single plain meaning”.<sup>45</sup> He queries whether “certainty” is desirable if the “plain meaning” produces outcomes that are at odds with the objective intentions of the parties?

Stress on certainty also runs up against the cold reality that it is extremely difficult to predict outcomes when parties dispute the terms of their contracts, as is illustrated by the reversal in the House of Lords of the decisions of the Court of Appeal in *Manigh v Eagle Star* and *Investors’ Compensation Scheme* and as shown by the disagreements in *Vector* and the reversal of the decision in the Court of Appeal. Difficult cases are not likely to be made more difficult if relevant information bearing on the task of the court or the adviser may be accessed and may resolve with such information.

The question remains why the decision-maker should be deprived of important information which in some cases will prevent injustice. The potential injustice in wrong result arising out of the exclusion of pre-contractual dealings led Lord Hoffmann to promote reliance on the safety nets of estoppel by convention and rectification. If contextual evidence more generally was excluded, the need for reliance on such methods would increase. The simpler way must be to admit all such evidence as is relevant to the meaning of the contract.

How far should the net be cast? It is difficult to see why there should be an exclusion of evidence that is relevant and helpful. That leads me on to the question of the exclusion of pre-contractual dealings and post-contractual conduct.

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<sup>43</sup> Donald Nicholls “My Kingdom for a horse: The meaning of words” (2005) 121 LQR 577 at 587.

<sup>44</sup> Indeed, Charles Kerrigan has suggested that in cases involving long standard form contracts often the background documents will give a clearer indication of the objective intention of the parties and the purpose of the contract: Charles Kerrigan “The interpretation of contracts relating to financial transactions: Part 2: implications of the current position” (March 2014) Butterworths Journal of International Banking and Financial Law at 197.

<sup>45</sup> JW Carter “Context and Liberalism in Construction” (2014) 31 Journal of Contract Law 100 at 109.

### **Pre-contractual dealings and post-contractual conduct**

If context is important for contractual interpretation, the strength of the conceptual basis on which exclusion of pre-contractual dealings and post-contractual conduct requires better justification than has so far been put forward. If other contextual evidence is accepted to contribute to correct outcomes, it is difficult to see why the same is not the case in relation to the evidence most closely connected with the parties and their contract. It is not I think possible to draw a distinction between pre-contractual dealings and post-contractual conduct on any very sensible basis. Lord Wilberforce had said that “it is one and the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or subsequent to the contract.”<sup>46</sup> The courts in New Zealand have come close to rejecting the exclusionary remnants. On this we appear to be diverging from Australia and the United Kingdom, a course that, as McGrath J in *Vector* acknowledged was one that requires care because local variation is inherently undesirable in such matters.

But who is out of line in this? As critics of the exclusionary rules have pointed out, a number of key international agreements and standards for commercial contracting permit subsequent conduct and prior negotiations to be taken into account in interpreting contracts. Rule 4.3 of the UNIDROIT Principles allows the use of preliminary negotiations and subsequent conduct of the parties in interpreting contracts. Article 8(3) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) (now part of New Zealand law) also allows the use of both subsequent conduct and prior negotiations.

These international developments were influenced by the approach to contractual interpretation in the United States, in which the Contracts Re-statement (2<sup>nd</sup>) has since 1979 permitted evidence of pre-contractual dealings and post-contract conduct. Rational construction under this view requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties. The circumstances admissible in interpretation of the contract include the “entire situation, as it appeared to the parties and in appropriate cases may include facts known to one party of which the other had reason to know.”<sup>47</sup> There is no requirement of ambiguity. The rule is “not limited to cases where it is determined that the language used is ambiguous”.<sup>48</sup> Direct evidence is available.

Lord Hoffmann in *Chartbrook* did not find help in the UN Convention on Contracts of the International Sale of Goods or the UNIDROIT Principles of International Commercial Contracts. He regarded them as based on French contractual philosophy “which is altogether different from that of English law”.<sup>49</sup> English law he said depersonalises the contracting parties and asks not what their intentions actually were, but what a reasonable outside observer would have taken them to be and that it was therefore not open to simply transpose rules based on one philosophy of contractual interpretation to another.

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<sup>46</sup> *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL) at 261.

<sup>47</sup> American Law Institute *Restatement of the Law of Contract* (2<sup>nd</sup> ed, St Paul, Minnesota, 1981) at §220 comment B.

<sup>48</sup> At § 212 (1) comment B.

<sup>49</sup> *Chartbrook v Persimmon Homes* [2009] UKHL 38, [2009] AC 1101at [39].

JW Carter has criticised this view. First, he says the international approach is derived from US law. More importantly, he suggests that both the Principles and the Convention are concerned with the intention of the parties, objectively assessed. Since prior negotiations are a source of “communicated intention”, he asks “Why would a reasonable person assume a different intention if the parties have communicated their intention to each other?”<sup>50</sup>

The importance of remaining in step with these international trends has been stressed by Professor McLauchlan, Lord Nicholls and the Court of Appeal in *Attorney General v Dreux Holdings*.<sup>51</sup> It would be of concern if, as they have suggested, courts in England and Australia are “swimming against the tide”.<sup>52</sup> Whatever the theoretical underpinnings of these instruments, they give effect to international consensus.

Subsequent conduct of the parties to the making of a contract has traditionally been excluded in the interpretation of the contract for two reasons. First, because of concern that it would let in the subjective intentions of the parties and secondly because the contract is to be interpreted at the time of its making. It is not necessary to repeat that I think the first concern is misdirected because objective ascertainment is a given. But the second is surely less than convincing.

The concern about ambulatory meaning was expressed by Lord Reid in *James Miller & Partners v Whitworth Street Estates (Manchester Ltd)*. He expressed the view that if the courts were able to use post-contractual behaviour as an interpretive aid, a contract might mean “one thing the day it was signed but, by reason of subsequent events, means something different a month or year later.”<sup>53</sup>

The exclusion of post-contract conduct was questioned in New Zealand in the 1995 case *Attorney-General v Dreux Holdings*. Three judges left the question of subsequent conduct open, a course that is significant in itself given the clear statements against admission of such statements in other jurisdictions. Thomas J however took the view that such evidence is admissible. He considered that the fact that the parties had acted consistently with a particular interpretation could provide a reliable guide to meaning. He thought that Lord Reid had insufficiently focussed on the purpose of the evidence.<sup>54</sup>

It is admitted for the purpose of persuading the court that it provides a reliable guide to the meaning which the parties attributed to the contract when it was signed. The proper construction is assisted and not changed by the subsequent conduct. In this manner the Court’s ability to give effect to the mutual intention of the parties is undoubtedly furthered.

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<sup>50</sup> Carter, above n 45 at 107.

<sup>51</sup> *Attorney General v Dreux Holdings* (1996) 7 TCLR 617.

<sup>52</sup> Carter, above n 45, at 119.

<sup>53</sup> *James Miller & Partners v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603, per Lord Reid.

<sup>54</sup> *Attorney General v Dreux Holdings* (1996) 7 TCLR 617.

Professor McLauchlan in a note on the case predicted that “it would be surprising if [this view did] not eventually carry the day.”<sup>55</sup> In *Gibbons Holdings Ltd v Wholesale Distributors Ltd*,<sup>56</sup> a majority of the Supreme Court of New Zealand expressed some support for the admission of evidence of subsequent conduct when relevant to the objective assessment of the meaning of the contract as the parties understood it at the time of contracting.

Although in 2009 the House of Lords declined to depart from authority that pre-contractual dealings were not admissible, the reasoning has been criticised as “less than convincing”.<sup>57</sup> The principal basis given was that the final document adopted by the parties supersedes their negotiations (the view expressed in *Prenn*). Lord Wilberforce had treated this as a practical reason for exclusion but in *Chartbrook* it was regarded as more fundamental. In Australia, JW Carter suggests the suggestion that it is required by contractual doctrine is based on an old-fashioned view of the parole evidence rule which is concerned with the state of the bargain, and not its meaning. His view, echoing Corbin, is that “the fact that a document is found to supersede the parties’ negotiations, so that all the terms of the bargain are embodied (“integrated”) in the document, says nothing about what evidence should be available (as a matter of law) to construe those terms”.<sup>58</sup>

Lord Nicholls also questions the exclusion, considering that to take into account pre-contractual dealings when they shed light on the meaning the parties intended to convey by the words they used is not to depart from the objective approach. It simply permits the “notional reasonable person” to be more fully informed about the context.<sup>59</sup>

In New Zealand, the exclusion of pre-contractual dealings was questioned by Thomas J in *Yoshimoto v Canterbury Golf International Limited*.<sup>60</sup> He suggested that the parties’ negotiations and draft agreements should be admissible if reliable extrinsic evidence were available to confirm their actual intentions, a view the Privy Council when overturning the Court of Appeal decision did not find it necessary to consider.

In *Vector Gas Ltd v Bay of Plenty Energy Ltd* the exclusionary rule was considered by members of the Supreme Court. The issue remains open. Tipping J alone of the court considered that the pre-contractual dealings should be admitted in evidence and found them conclusive of the objective meaning of the contract. Blanchard J, with whom Gault J expressed general agreement (while holding that the material came in as part of the course of dealings which comprised the contract), left the matter formally unresolved, although he suggested a very wide scope to the “subject-matter” exception which further diminished the scope of the general rule and his preparedness in *Gibbons* to admit post-contractual conduct suggests that he was

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<sup>55</sup> David McLauchlan “Subsequent Conduct and Contract Interpretation: An Update” (1997) 3 NZBLQ 147 at 147.

<sup>56</sup> *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.

<sup>57</sup> Carter, above n 45, at 106.

<sup>58</sup> Carter, above n 45, at 106.

<sup>59</sup> Nicholls, above n 23, at 583.

<sup>60</sup> *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523 (CA).

sceptical of the value of the rule of exclusion. McGrath J, alone of the judges would have retained the rule and although he accepted a “subject-matter exception” would have confined it to identification of the subject of the contract rather than widening its scope to include meaning, as Blanchard J suggested. Wilson J steered a different path, holding that since the meaning of the provision was plain and not ambiguous there was no occasion to admit the contextual pre-contractual material (although if there had been ambiguity he would have admitted all pre-contractual dealings). Instead, he would have held that the requirements of estoppel by convention were met.

While the *Vector* case might suggest that the days of the exclusionary rule for pre-contractual dealings are numbered in New Zealand, the divergence of views in the Supreme Court and the turnover in the composition of the Court in the meantime suggest that it would be rash to express any confident prediction. When the matter does come back before the Court, the position in other comparable jurisdictions is likely to be a significant factor as is the wider international context. A practical consideration that will have to be taken into account is the fact that the evidence excluded as evidence of meaning is often admitted in the same proceedings for the different purposes of rectification or estoppel or because it falls within the areas exempted from the general exclusion of showing the facts within the knowledge of the parties or because it is relevant to identification of the subject of the contract.

One of the legacies of the exclusionary rules is that the development of more responsive principles to meet the concerns about type of contract and in particular the relevance of extrinsic evidence in the case of standard form or circulating contracts has been stunted by the blanket exclusion, the criticism made more generally of resort to extrinsic evidence under the *Investors’ Compensation Scheme* repositioning by Chief Justice Spigelmann.<sup>61</sup>

Courts have been more hesitant to allow the use of background materials in interpreting public documents, as is illustrated by *Slough Estates Ltd v Slough Borough Council*.<sup>62</sup> In interpreting a planning document submitted to a local council, Lord Reid considered that although it was established that the relevant background facts known to both parties to a contract would be relevant in construing a contract the same could not be said for a public document. With regards to a planning permission document such as this subsequent purchasers may have no means of knowing or discovering what facts were known to the planning authority. Evidence of facts that were known to the maker of the document but which are not common knowledge should not be admitted. “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.”<sup>63</sup> This is essentially the same argument made in relation to unfairness in application of the *Investors’ Compensation Scheme* approach on third parties. *Slough* was applied in *Opua Ferries Ltd v Fullers Bay of Islands Ltd*,<sup>64</sup> a ticket case against the background of a ferry timetable required to be made public under legislation. It has been applied at

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<sup>61</sup> Spigelman, above n 31.

<sup>62</sup> *Slough Estates Ltd v Slough Borough Council* [1971] AC 958 (HL).

<sup>63</sup> *Slough Estates Ltd v Slough Borough Council* [1971] AC 958 (HL) at 963.

<sup>64</sup> *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] 2 NZLR 740 (PC).

first instance in relation to public offer documents and advertisements under the Securities Act in which it was held that the letter in issue was to be viewed “objectively, through the lens of its recipient”.<sup>65</sup> Similar approaches have been taken in Australia in *Westfield Ltd v Perpetual Trustee Co Ltd*<sup>66</sup> and in England by the Court of Appeal in *Cherry Tree Investments Ltd v Landmain Ltd*.<sup>67</sup> These cases may point to a way forward. But it is a way forward that depends on addressing the contract doctrine that the meaning of all contracts is a question of working out what the parties objectively intended. If the meaning of commercially circulated documents are interpreted according to how they would be perceived objectively by a third party, then exclusion of the context in which they are created might be justified.

I should say just a word about interpretation according to a sense of “commercial reality”. It is hard not to feel uneasy that the idea is sometimes pressed into service to interpret the contract in the way the Court considers would have been preferable. It should not be necessary to say that interpretation sticks to the bargain made by the parties. The fact that a contract seems unduly favourable to one party is not, as Lord Hoffmann emphasised in *Chartbrook Ltd v Persimmon Homes Ltd* sufficient reason to suppose that it does not mean what it says.<sup>68</sup> Nor does the fact that a better commercial solution can be seen mean that the bargain actually made should be rewritten. Although a court may be driven to the conclusion that a mistake has been made, that is an extreme conclusion which is not easily reached. In general, parties are left to make their own bargains. As Lord Diplock once said, the only “justice” the courts are concerned to achieve in the case of those who have bargained on equal terms is that they stick to their agreements or provide the party who has kept his promise with compensation.

## Conclusion

When interpreting the bargain the parties have made, the starting point where they have reduced their agreement to writing is always the language used, construed in the context of the agreement as a whole and the background. Once it was recognised that plain meaning and ambiguity cannot be understood without context, rules of exclusion for pre-contractual dealings and post-contractual conduct need to be justified. The justification for a blanket rule of exclusion is pretty thin.

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<sup>65</sup> *R v Moses* HC AK CRI 2009-004-1388 [8 July 2011] at [254].

<sup>66</sup> *Westfield Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45, (2007) CLR 528.

<sup>67</sup> *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305.

<sup>68</sup> *Chartbrook v Persimmon Homes* [2009] UKHL 38, [2009] AC 1101 at [20].