

CONTRACTING FOR 'CONTEXTUALISM' – HOW CAN PARTIES INFLUENCE THE INTERPRETATION METHOD APPLIED TO THEIR AGREEMENT?

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*Since the High Court refusal of leave to appeal against the New South Wales Court of Appeal in *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604, there has been much debate as to whether the identification of ambiguity is a pre-requisite to the admission of extrinsic evidence of surrounding circumstances and the commercial purpose of the contract in contract interpretation in Australia. And indeed, if it is, whether it should be. However, very little attention has been paid to the question of whether, and how, contracting parties might influence the interpretation method applied to their agreement. In her article, Catherine Mitchell¹ argues how parties may use an entire agreement clause to evidence the parties' intention that they do not wish for the background circumstances to be taken into account. This article considers the converse, that is, how the parties, at the time of drafting their contracts, may direct a court to look at context. It concludes that there are good reasons for directing the court to look at context and allows contracting parties to take control at a time when the interpretation rules are very uncertain.*

I INTRODUCTION

Contracts should mean what they say but unfortunately disputes about the meaning of contracts frequently occur. This is, at least in part, due to the simple fact that words do not have intrinsic natural meanings. There are also many incomplete contracts as, while the parties will try to anticipate the issues that may arise during the term of a contract, it is not possible to provide for every contingency. The result is that each contract will contain gaps.² When a dispute arises as to what a particular term means, a court will often be called upon to

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¹ Catherine Mitchell, 'Entire Agreement Clauses: Contracting Out of Contextualism' (2006) 22 *Journal of Contract Law* 222.

² Donald Robertson, 'The International Harmonisation of Australian Contract Law' (2012) 29 *Journal of Contract Law* 1 at 10.

interpret the contract and fill the gap.³ But what interpretation method should the court apply?

In England, it is well settled that courts interpret a contract in light of the circumstances in which it was made. However, the position is not as clear in Australia. In late 2011 the High Court in *Western Export Services Inc v Jireh International Pty Ltd*⁴ (*Jireh*) held that the position stated by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*⁵ (*Codelfa*) was the true position, that is, that:

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.⁶

Jireh is inconsistent with a number of decisions of the High Court, and of state and Federal Courts since *Codelfa*, that did not require the identification of ambiguity before admitting extrinsic evidence of surrounding circumstances and the commercial purpose of the contract.⁷

There has been much debate since *Jireh* as to which approach is correct and concern has been expressed about the uncertainty that the conflicting High Court decisions have created. This concern is shared by the Commonwealth Attorney-General's Department, which is reflected in the release of a discussion paper exploring the scope for reforming Australian contract law, particularly regarding the interpretation of contracts. However, very little attention has been paid to the question of whether, and how, contracting parties might influence the interpretation method applied to their agreement.

In her article, Catherine Mitchell⁸ argues how parties may use an entire agreement clause to evidence the parties' intention that they do not wish for the background circumstances to be taken into account. However, there may be circumstances when the parties *do* wish for this background information to be taken into account.

This article considers how the parties, at the time of drafting their contracts, may direct a court to look at context. It concludes that it is possible for the parties to influence the interpretation method applied to their agreement and that there are good reasons for directing the court to look at context. However, regardless of this practical measure, the uncertainty left by *Jireh* needs to be resolved. Although contract law reform in the context of harmonisation is a good idea, it is submitted, for the reasons outlined in this article, that the High Court is the appropriate body to reconsider and rule on the ambiguity issue.

³ See, eg, *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

⁴ (2011) 282 ALR 604.

⁵ (1982) 149 CLR 337.

⁶ *Ibid* 352.

⁷ See, eg, *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 and *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 discussed below.

⁸ Mitchell, above n 1.

II SETTLED LIMITS ON THE USE OF BACKGROUND EVIDENCE IN CONTRACT INTERPRETATION

Regardless of whether *Codelfa* is correct, there are settled limits on use of background evidence which it is useful to review. Some of the more important rules are set out below.

Exception to the parol evidence rule

The parol evidence rule provides that where the parties have recorded the terms of their contract in a document, evidence of extrinsic terms that subtract from, add to, vary or contradict the language of a written instrument are excluded.⁹ However, there are many exceptions to this rule. For our purposes, there is an exception that provides that evidence of the background in which the contract was formed is admissible, in certain circumstances, to assist in the interpretation of the contract.¹⁰ This is the starting point. Whether or not there must first be an ambiguity or uncertainty is a separate question.

Subjective intention excluded

The fundamental difference between Australian and English law and other legal systems, particularly European civil law,¹¹ is that when interpreting a contract, a court will consider what a reasonable person would conclude was objectively intended by the words used in the contract.¹² This is referred to as the objective theory of contract interpretation. It means that evidence of the subjective intention of the parties is inadmissible.¹³ However, evidence of subjective intent is admissible in a rectification claim.

Prior negotiations excluded

Consistent with the objective theory of contract interpretation, there is a distinction between:

- 1 Introducing evidence of prior negotiations to establish objective background facts known to both parties (or that are sufficiently notorious that it can be presumed they were so known); and
- 2 To establish that the parties were united in rejecting a possible construction, such as the parties refused to include a term, by deleting words or clauses.

⁹ Sir Kim Lewison and David Hughes, *The Interpretation of Contracts in Australia*, (Thomson Reuters, Sydney, 2012) 89 [3.10]; James J Spigelman, 'Contractual Interpretation: A Comparative Perspective' (2011) 85 *Australian Law Journal* 412, 414.

¹⁰ Lewison and Hughes, above n 9, 109–22 [3.14].

¹¹ *Ibid* 24 [2.01]; Spigelman, above n 9, 426.

¹² *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461–2 [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40]; see also F M Douglas, 'Modern Approaches to the Construction and Interpretation of Contracts' (2009) 32 *Australian Bar Review* 158, 159.

¹³ Lewison and Hughes, above n 9, 116–22 [3.14.5].

In Australia, prior negotiations are only admissible in this context.¹⁴ They are not admissible insofar as the evidence consists of statements and conduct of the parties that reflect their actual intentions and expectations.

There is some debate about how you can practically apply the distinction between leading evidence of prior negotiations as evidence of intention as opposed to establishing the surrounding circumstances,¹⁵ but this is beyond the scope of this article.

Subsequent conduct excluded

Subsequent conduct is never admissible for interpretation where the agreement is wholly written.¹⁶ However, subsequent conduct is admissible for rectification of the contract.¹⁷

III STRICT LITERALIST APPROACH VERSUS MODERN CONTEXTUAL APPROACH

The following sections examine the history of the development of cases regarding the use of background evidence in contract interpretation in Australia and the principles that are applied in England. But before this analysis is undertaken, it is worth explaining the differences between the two approaches.

The position stated in *Codelfa* which has been reaffirmed in *Jireh* excludes extrinsic evidence of the surrounding circumstances and the commercial purpose of a contract to inform the meaning of a contract unless a term is ambiguous. To identify ambiguity, words are given their plain or natural and ordinary meaning. This is a relatively formal or strict approach to language that presumes words have intrinsic natural meanings.

In England, however, a more contextual approach to contract interpretation is adopted. This approach looks to common or commercial sense and the wider circumstances surrounding the contract on the basis that the words of a contract can only be understood against the context in which they were agreed.¹⁸ Relevantly, ambiguity is not a pre-condition to use of surrounding circumstances.

¹⁴ *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 348 and 352; *Ibid* 73–81 [3.08]; Joshua Thomson, Leigh Warnick and Kenneth Martin, *Commercial Contract Clauses* (Thomson Reuters, 2012) [1010]–[1710]; Lindy Willmott, Sharon A Christensen, Desmond A Butler and William M Dixon, *Contract Law*, 3rd ed, (Oxford University Press, Melbourne, 2009), 303 [9.105].

¹⁵ Douglas, above n 12, 161; J Edward Bayley, 'Negotiations and Subsequent Conduct in Contract Interpretation: Principles and Practical Concerns' (2011-2012) 28 *Journal of Contract Law* 179.

¹⁶ *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570; Lewison and Hughes, above n 9, 122–30 [3.15]; Douglas, above n 12, 165–7; Spigelman, above n 9, 423–4.

¹⁷ N C Seddon, R A Bigwood and M P Ellinghaus, *Cheshire & Fifoot: Law of Contract*, 10th ed, (LexisNexis, Sydney, 2012), 700 [12.30].

¹⁸ *Prenn v Simmonds* [1971] 3 All ER 237; *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98.

IV CURRENT AUSTRALIAN POSITION

A *Ambiguity as the gateway to surrounding circumstances: Codelfa and Royal Botanic Gardens and Domain Trust v South Sydney City Council*¹⁹

In *Codelfa*, evidence of surrounding circumstances was held to be admissible if the text of the contract was first found to be ambiguous. Mason J stated that:

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. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although ... if the facts are notorious knowledge of them will be presumed.²⁰

To summarise, according to the formulation in *Codelfa*, the law allows for the admission of extrinsic evidence only if the language in dispute is ambiguous or susceptible of more than one meaning, and the evidence is of objective background, not merely of subjective intention.²¹ Whether there is a distinction between the word ‘ambiguous’ and the subsequent phrase ‘or susceptible of more than one meaning’,²² requires some attention.

On one view, all words are susceptible of more than one meaning, as the ‘meaning’ given to them in a particular case is only the meaning that the words bear in the particular circumstances of that case.²³ Ambiguity may be where the words themselves are ambiguous (patent ambiguity) or where external circumstances create doubt or difficulty (latent ambiguity).²⁴ Obviously, to determine latent ambiguity, one needs to have regard to surrounding circumstances before the determination is made. This strict literalist approach prevailed in Australia for 20 years.²⁵ *Jireh* cited *Royal Botanic*²⁶ as evidence of this strict approach.²⁷

¹⁹ (2002) 140 CLR 45 (*Royal Botanic*).

²⁰ *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 352.

²¹ Seddon, Bigwood and Ellinghaus, above n 17, 420–1; Lewison and Hughes, above n 99, 20–4 [2.02].

²² See generally James J Spigelman, ‘From Text to Context: Contemporary Contractual Interpretation’ (2007) 81 *Australian Law Journal* 322, 325–6; David McLauchlan, ‘Plain Meaning and Commercial Construction: Has Australia Adopted the ICS Principles?’ (2009) 25 *Journal of Contract Law* 7, 16–17.

²³ Ryan Catterwell, ‘Contract Interpretation and Conveyancing’ (2012) 86 *Australian Law Journal* 223, 224.

²⁴ Derek Wong and Brent Michael, ‘Western Export Services v Jireh International: Ambiguity as the Gateway to Surrounding Circumstances?’ (2012) 86 *Australian Law Journal* 57, 59.

²⁵ *Manufacturers Mutual Insurance Ltd v Withers* (1988) 5 ANZ Ins Cases 60-853, 75, 343, approved in *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) NSWLR 326, 358. See also *B & B Constructions (Aust) v Brian A Cheeseman & Associates Pty Ltd* (1994) 35 NSWLR 227, 234–7 and *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 140 CLR 45.

²⁶ (2002) 140 CLR 45.

²⁷ Suzanne Cleary and Serge Radojevic, ‘Surrounding Circumstances: What is the “True” True Rule?’ (2012) 24 *Australian Construction Law Bulletin* 80, 80.

*B Move to a more modern contextual approach:
Pacific Carriers, Toll and Ansett*

It has been suggested that in the cases of *Maggbury Pty Ltd v Hafele Australia Pty Ltd*,²⁸ *Pacific Carriers Ltd v BNP Paribas*,²⁹ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*³⁰ and *International Air Transport Association v Ansett Australia Holdings Ltd*,³¹ following *Codelfa*, the High Court took a more 'relaxed' approach to the requirement for ambiguity.³² In these cases, the judges seemed to resolve the ambiguity question on a practical rather than a theoretical level as, on one argument, every word in the English language is capable of more than one meaning. This is explored below.

The first case is *Pacific Carriers*. There was no mention of ambiguity in this case. Rather, evidence of the circumstances known to both parties, and of the purpose of the transaction, was treated as the necessary foundation of an objective approach to the construction of contracts.³³

Similarly, in *Toll*, the High Court limited the test to consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.³⁴ The relevant passage is as follows:

It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.³⁵

The object of the transaction is to be ascertained objectively,³⁶ by considering what a reasonable person in the situation of the parties would have concluded is the object.³⁷ Again, the Court did not discuss the requirement for ambiguity before permitting an examination of surrounding circumstances to construe the contract.³⁸

²⁸ (2001) 210 CLR 181.

²⁹ (2004) 218 CLR 451.

³⁰ (2004) 219 CLR 165.

³¹ (2008) 234 CLR 151.

³² Lewison and Hughes, above n 99, 112–3 [3.14.2].

³³ *Pacific Carriers* (2004) 218 CLR 451, 463; Tracy Caspersz, 'Do Contracts Mean What They Say?' (2012) 39 *Brief* 26, 27.

³⁴ Jeffrey Goldberger, 'Contract Law in Australia: A Case Law Update' (2012) 26 *Commercial Law Quarterly* 7, 8; McLauchlan, above n 22, 24.

³⁵ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179 [40].

³⁶ *Ibid.*

³⁷ *Ibid.*; J W Carter, LexisNexis, *Carter on Contract* (at Service 33) [13-040].

³⁸ Cleary and Radojevic, above n 27, 81; M Walton SC, 'Case Note: Where Now Ambiguity?' (2011) 35 *Australian Bar Review* 176, 178; Caspersz, above n 33, 27.

The next case is *Ansett* where again the High Court did not refer to the requirement for ambiguity.³⁹ Gleeson CJ stated:

In giving a commercial contract a businesslike interpretation, it is necessary to consider the language used by the parties, the circumstances addressed by the contract, and the objects which it is intended to secure. An appreciation of the commercial purpose of a contract calls for an understanding of the genesis of the transaction, the background, and the market. This is a case in which the Court's general understanding of background and purpose is supplemented by specific information as to the genesis of the transaction. The Agreement has a history; and that history is part of the context in which the contract takes its meaning.⁴⁰

In the absence of clear direction from the High Court, there have been numerous cases in the intermediate appellate and lower courts where judges have taken different views on the applicable principles of interpretation. This has led some judges to the conclusion that ambiguity was no longer required and that surrounding circumstances could be considered in all cases.⁴¹ One notable case is *Franklins Pty Ltd v Metcash Trading Ltd*.⁴²

However, although neither *Pacific Carriers, Toll* nor *Ansett* referred to the requirement for ambiguity, in none of these decisions did the Justices overrule *Codelfa*.⁴³ This leads to the suggestion by Spigelman J, writing extra-judicially, that 'Codelfa has been superseded, without being overruled.'⁴⁴

C Current position: *Jireh*

Despite this history, the High Court refused special leave to appeal against a decision of the New South Wales Court of Appeal in *Jireh* in late 2011. *Jireh* involved a dispute over the construction of an agreement concerning the franchising in Australia of Gloria Jean's Coffee Stores. A brief overview of the facts are as follows:

- 1 Western Export Services Inc ('WES') agreed to supply Gloria Jean's products to Jireh International Pty Ltd, the master franchisee of Gloria Jean's in Australia ('Jireh'), which would then supply those products to Gloria Jean's franchises throughout Australia;⁴⁵
- 2 Clause 3 of the contract between WES and Jireh ('Contract') provided for a commission to be paid to WES of five percent of the ex-factory price of the

³⁹ Douglas, above n 12, 163; Caspersz, above n 33, 27.

⁴⁰ *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 160 [8].

⁴¹ See, eg, *Coopers Brewery Ltd v Lion Nathan Australia Pty Ltd* (2006) 156 FCR 1, [100]; *Vercorp Pty Ltd v ACN 096 278 483 Pty Ltd (No 2)* [2010] QSC 405 [24]; Elisabeth Peden and J W Carter, 'Incorporation of Terms by Signature: L'Estrange Rules!' (2005) 21 *Journal of Contract Law* 96, 105.

⁴² (2009) 76 NSWLR 603.

⁴³ Walton, above n 38, 179; Spigelman, above n 9, 421; James J Spigelman, 'Extrinsic Material and the Interpretation of Insurance Contracts' (2011) 22 *Insurance Law Journal* 143, 156.

⁴⁴ Spigelman, above n 22, 329.

⁴⁵ Caspersz, above n 33, 26; David McLauchlan and Matthew Lees, 'Construction Controversy' (2011) 28 *Journal of Contract Law* 101, 111–13.

coffees, teas and other products sold by Jireh to the franchises throughout Australia and in other countries;

- 3 After entering into the Contract, Jireh did some internal restructuring that resulted in a related entity of Jireh being the supplier of Gloria Jean's products to Gloria Jean's franchises throughout Australia;⁴⁶
- 4 Jireh never paid the commission to WES on the basis that Jireh never supplied the Gloria Jean's products to the franchises. Rather, it was one of Jireh's related entities; and
- 5 Jireh argued that its internal restructure was not intended to avoid paying the commission to WES.

The disagreement arose as to whether, as a matter of interpretation, the commission was payable on sales made by the related entity as well as by Jireh.⁴⁷ The High Court declined to intervene as on a literal interpretation of clause 3 because the words 'or a related entity' were not included, and the terms of the clause were not ambiguous.⁴⁸

The Court went on to hold that the previous literal approach of *Codelfa* is still good law and that, until the High Court disapproves or revises what was said in *Codelfa*, intermediate appellate courts are bound to follow that precedent.⁴⁹ The High Court added that they did not read anything said in decisions such as *Toll* as 'operating inconsistently' with what had been said by Mason J in *Codelfa*.⁵⁰

By refusing special leave, the High Court approved the earlier decision by the Court of Appeal. In this decision, the Court held that it was not permissible to depart from the literal meaning of an unambiguous provision in order to give it what the court considers to be a commercial and business-like operation.⁵¹ The approved statement in the Court of Appeal is as follows:

So far as they are able, courts must of course give commercial agreements a commercial and business-like interpretation. However, their ability to do so is constrained by the language used by the parties. If after considering the contract as a whole and the background circumstances known to both parties, a court concludes that the language of a contract is unambiguous, the court must give effect to that language unless to do so would give the contract an absurd operation.⁵²

⁴⁶ McLauchlan and Lees, above n 45, 112–3; Joanne Cameron and Michael Tandora, 'High Court of Australia Reinforces Meaning of Actual Contractual Terms in Strict Approach to Interpretation of Contracts: *Western Export Services Inc v Jireh International Pty Ltd*' (2011) 15 *Inhouse Counsel* 178, 178.

⁴⁷ Caspersz, above n 33, 26.

⁴⁸ *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604, 605–6 [3]–[6].

⁴⁹ *Ibid* 605 [3].

⁵⁰ *Ibid* 605 [5]; Andrew Stewart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *Journal of Contract Law* 74, 83.

⁵¹ Caspersz, above n 33, 26; McLauchlan and Lees, above n 45, 114–15; Catterwell, above n 23, 223.

⁵² *Jireh International Pty Ltd v Western Export Services Inc* [2011] NSWCA 137 (1 June 2011) at [55].

Accordingly, ambiguity of a contractual term remains a precondition to the admissibility of extrinsic evidence in contract interpretation in Australia.⁵³

The refusal of the Court to adjudicate on the matter is disappointing for a number of reasons. Firstly, the High Court did not treat this case as an opportunity to reconsider how ‘ambiguity’ is to be ascertained.⁵⁴ Instead it said that ‘the result would have been no different’ if the contract had been construed in light of the surrounding circumstances.⁵⁵ *McCourt v Cranston*,⁵⁶ which has followed the dictum in *Jireh*, has put forward some assistance as to what ambiguity may mean, being ‘difficult to understand’ or ‘open to various interpretations’.⁵⁷ However, this needs to be reconsidered by the High Court.

Secondly, the High Court’s criticism of the ‘apparent enthusiasm’ of the intermediate appellate courts for the modern contextual approach to contract interpretation⁵⁸ seems duplicitous given the inconsistent statements of the High Court in *Codelfa*, *Royal Botanic*, *Pacific Carriers*, *Toll* and *Ansett*. There is a real problem for reconciling *Codelfa* and the later High Court cases and this leaves an unacceptable level of uncertainty in this area of the law.

V ENGLISH APPROACH: LORD HOFFMANN’S FIVE PRINCIPLES

England, on the other hand, has always had regard to context. Thus in *Prenn v Simmonds*,⁵⁹ the court said:

- (a) the time has long passed when agreements were isolated from the matrix of facts in which they were set and interpreted purely on ‘internal linguistic considerations’;
- (b) the background and genesis of the transaction are clearly admissible; and
- (c) evidence of mutually known facts are admissible to identify the meaning of a descriptive term but they are inadmissible insofar as they evidence the parties’ intentions.⁶⁰

*Prenn v Simmonds*⁶¹ along with another leading decision of Lord Wilberforce in *Reardon Smith Line Pty Ltd v Yngvar Hansen-Tangen*,⁶² were analysed in *Investors Compensation Scheme v West Bromwich Building Society*,⁶³ which became the leading English authority in contractual interpretation. In this case, the court said it could look at absolutely anything which could affect the way in which the language of the document could be understood by a reasonable man.

⁵³ Since *Jireh*, it has been followed by *McCourt v Cranston* [2012] WASCA 60 (19 March 2012) and *Fuji Xerox Finance Limited v CSG Limited & Ors* [2012] NSWSC 890 (6 August 2012).

⁵⁴ Walton SC, above n 38, 180.

⁵⁵ *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604, 605–6 [6].

⁵⁶ [2012] WASCA 60 (19 March 2012).

⁵⁷ *Ibid* [24].

⁵⁸ Seddon, Bigwood and Ellinghaus, above n 17, 427.

⁵⁹ [1971] 3 All ER 237.

⁶⁰ Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification*, 2nd ed, (Oxford University Press, Oxford, 2011), 63–4 [1.121]–[1.122].

⁶¹ [1971] 3 All ER 237.

⁶² [1976] 3 All ER 570.

⁶³ [1998] 1 All ER 98.

Relevantly, there was no need to identify ambiguity before taking into account surrounding circumstances.⁶⁴ Lord Hoffmann's test consists of five principles which are discussed in turn below.

First principle: Interpreter of document may use background knowledge of the parties

The first principle provides that a court is to determine the meaning that a reasonable person with knowledge of the background to the contract would give to the document. Lord Hoffman stated:

Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.⁶⁵

The first principle seems to now be accepted in Australia (refer to *Toll*, in particular),⁶⁶ subject to the question of whether ambiguity is required before the court can have regard to the background.

Second principle: Matrix of circumstances very wide

The background or matrix of fact is always admissible as an aid to interpretation. Lord Hoffman stated:

The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.⁶⁷

The matrix of circumstances described by Lord Hoffman is very wide.⁶⁸ It is still not clear whether Australia will adopt the second principle.

Third principle: Excludes evidence of prior negotiations

Evidence of prior negotiations is excluded. In *Investors Compensation Scheme*, Lord Hoffman stated:

The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an

⁶⁴ Spigelman, above n 22, 328.

⁶⁵ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98, 114.

⁶⁶ *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, 188; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 463; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179 [40]; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 174 [53].

⁶⁷ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98, 114; McLauchlan, above n 22, 11.

⁶⁸ Spigelman, above n 9, at 420; Spigelman, above n 22, 336–7.

action for rectification.⁶⁹

However, in 2009, the House of Lords held in *Chartbrook Ltd v Persimmon Homes Ltd*⁷⁰ that evidence of negotiations was admissible to establish background facts.⁷¹ The Court in *Chartbrook* made it clear that such evidence is not admissible for any other purpose.⁷² Australia has accepted the third principle as it has been altered by *Chartbrook*.⁷³

Fourth principle: Background evidence may affect the meaning of words or syntax

The background evidence may affect the meaning of words or syntax. Lord Hoffman stated:

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.⁷⁴

Subject to the question of whether it is necessary to identify an ambiguity, the fourth principle has been approved in Australia⁷⁵ in *Maggbury*,⁷⁶ *Pacific Carriers*,⁷⁷ *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*⁷⁸ and *Toll*.⁷⁹

Fifth principle: Ordinary and natural meaning too limited

The ordinary and natural meaning of the words is too limited. Lord Hoffman stated:

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.⁸⁰

⁶⁹ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98, 114.

⁷⁰ [2009] 4 All ER 677.

⁷¹ *Ibid* 691–2 [33]; McLauchlan and Lees, above n 45, 105; David McLauchlan and Matthew Lees, ‘More Construction Controversy’ (2012) 29 *Journal of Contract Law* 97, 108; N B Rao, ‘The Admission of Extrinsic Evidence of a Pre-Contractual Nature in Insurance Contracts – A Reply to Hon J J Spigelman AC QC’ (2012) 23 *Insurance Law Journal* 194, 198.

⁷² Lewison and Hughes, above n 9, 78 [3.08].

⁷³ *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 352.

⁷⁴ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98, 115.

⁷⁵ Lewison and Hughes, above n 9, 17–24 [2.01]–[2.02]; McLauchlan, above n 22, 11.

⁷⁶ *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, 188 [11].

⁷⁷ *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 461–2 [22].

⁷⁸ (2004) 218 CLR 471, 483 [34].

⁷⁹ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179 [40].

⁸⁰ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98, 115; McMeel, above n 60, 26–7 [1.42]; Lewison and Hughes, above n 9, 32 [2.06]; McLauchlan, above n 22, 11; Spigelman, above n 43, 153.

Again, subject to the question of whether it is necessary to identify an ambiguity, Australia has recognised the fifth principle.⁸¹ *Investors Compensation Scheme* was recently affirmed in the UK case of *Rainy Sky SA v Kookmin Bank*.⁸² There has been some suggestion that ambiguity is required before regard may be had to considerations of business common sense in *Rainy Sky*,⁸³ but a further discussion on this point is beyond the scope of this article.

VI ARGUMENTS FOR THE STRICT LITERALIST APPROACH

There is debate over the desirability of what some see as an excessive readiness to admit extrinsic evidence. These arguments are discussed in turn below.

A *Certainty and third parties*

The main argument for limiting the use of extrinsic evidence is the need to provide certainty as to the meaning of the contract,⁸⁴ especially where it will be relied upon by third parties. Long term relational contracts, such as leases, can be assigned and the property can be sold such that the ultimate landlord and tenant may not be the original parties. Further, contracts are often relied upon by lenders and third parties in some other capacity, such as shareholders who acquire interests in companies based on their understanding of certain contractual arrangements.⁸⁵ If there is no limit upon use, the risk is that these parties will be unfairly disadvantaged as they may have no knowledge of the bargain. These parties need to be able to rely on the text of the agreement. Uncertainty may also arise in the context of outcomes of disputes. This is because the greater the information that is available, the greater the scope is for differences between legal advices and opinion.⁸⁶

B *Cost and efficacy*

A second related argument for limiting the use of extrinsic evidence is that it will increase the cost of obtaining legal advice and the cost of litigation due to the admission of voluminous material (a small fraction being directly relevant to the point in issue).⁸⁷

⁸¹ *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 160 [8].

⁸² [2012] 1 All ER 1137; Wong and Michael, above n 24, 60.

⁸³ McLauchlan and Lees, above n 71, 110–17.

⁸⁴ *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, 188 [11]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 461–2 [22]; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471, 483 [34]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179 [40]; see also Spigelman, above n 22, 334; cf J Edward Bayley, 'Prior Negotiations and Subsequent Conduct in Contract Interpretation: Principles and Practical Concerns' (2011–2012) 28 *Journal of Contract Law* 179, 194–201.

⁸⁵ Spigelman, above n 9, 432.

⁸⁶ Spigelman, above n 43, 145.

⁸⁷ See, eg, *Wire TV Ltd v Cabletel (UK) Ltd* [1998] CLC 244, 257, cited in Lewison and Hughes, above n 9, 14 [1.05]; see also Lord Bingham of Cornhill, 'A New Thing Under the Sun? The Interpretation of Contract and the ICS decision' (2008) 12 *Edinburgh Law Review* 374, 384; Spigelman, above n 22, 334; cf Bayley, above n 84, at 181–8.

C *Rectification and estoppel by convention sufficient*

The third argument is that the remedies of rectification and estoppel by convention are sufficient to prevent any injustice between the parties.⁸⁸ Rectification allows the court to rectify a written instrument where it does not accurately record the agreement of the parties. There are different rules depending on whether there is a common or unilateral mistake but subjective intent, which may include evidence of prior negotiations and subsequent conduct, is always admissible. The application of the rules of construction based upon estoppel by convention has its own difficulties none the least being the issue of whether it is a legal or equitable remedy and the effect upon entire contract clauses.⁸⁹

VII ARGUMENTS FOR THE MODERN CONTEXTUAL APPROACH

On the flip side, the modern contextual approach is more likely to achieve outcomes giving effect to the commercial purpose of the contract or giving a business-like interpretation.⁹⁰ Proponents of this view believe that while certainty is admirable, this must be balanced against fairness in discovering the true intentions of the parties.⁹¹ Even Sir Anthony Mason has said since *Codelfa*, writing extra-judicially, that he had ‘recognised that ambiguity may not be a sufficient gateway’ and that he himself would encourage the modern Australian developments toward a more liberal contextual approach to contract interpretation.⁹² Further, on the basis that words do not have intrinsic natural meanings, there are a choice of possible meanings for ‘ambiguous’ words. This creates a level of uncertainty for contracting parties as the interpretation rules will necessarily be applied differently by different judges.⁹³

VIII RECOMMENDATIONS

A *Which approach is favourable?*

In *Jireh*, the Court did not consider that it was the appropriate case to reconsider what was said in *Codelfa*. What should the Court do, however, when the appropriate case comes before the Court? Should evidence of context be admissible in all cases?

There is a danger with the modern contextual approach. Commercial parties operating at arm’s length need to be free to negotiate and record what they believe is the agreed position. Bad bargains are sometimes struck and it is not a court’s role to adjust a contract on the basis that, in hindsight, the bargain appears to be unevenly weighted as regards the interests of the parties, or even grossly disadvantageous to one of them.

⁸⁸ Lord Bingham of Cornhill, above n 87, 384; cf Bayley, above n 84, 188–94.

⁸⁹ See Kevin E Lindgren AM, QC, ‘Estoppel against enforcing a contract according to its correct construction’ (2012) 6 *Journal of Equity* 144.

⁹⁰ *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 160 [8].

⁹¹ Wong and Michael, above n 24, 67.

⁹² Sir A Mason, ‘Opening Address’ (2009) 25 *Journal of Contract Law* 1, 3.

⁹³ Rao, above n 71, 213.

However, these contracts should be construed in light of their commercial context. This does not always mean that a different outcome will be achieved when evidence of context is considered, but at least ‘the court is alive to the possibility that what seems clear by reference only to the words on the printed page may not be so clear when one takes into account as well what was known to both parties but does not appear in the document.’⁹⁴ This is going to generate outcomes giving effect to the commercial purpose of the contract or giving a business-like interpretation.

Accordingly, the modern contextual approach should be embraced. This approach is already tempered by the traditional limits on use being: the objective theory of contract interpretation; evidence of subjective intent should continue to be inadmissible for interpretation purposes; reliance on background must be tempered by loyalty to the contractual text;⁹⁵ and the relevant background must consist of facts that were actually known to both (or all parties to the contract) or that are sufficiently notorious that it can be presumed they were so known.⁹⁶

B Contracting for ‘contextualism’

Contracts generally reveal very little of the intention of the parties in entering into the transaction.⁹⁷ Despite this, it is argued that parties may be able to indicate to the court that they wish for evidence of context to be taken into account. It is submitted that parties may do this by introducing evidence of background information within the contract itself. Accordingly, the parties do not need recourse to ‘extrinsic’ evidence of the surrounding circumstances and the rule in *Codelfa* does not apply. This argument is premised on the fact that Australian contract law accepts the proposition that a contract must be read as a whole, and that the words of a contract must be understood in the context of all the other words that form it.⁹⁸

Practical suggestions for how the parties may introduce this evidence are explored below. Relevantly, because this information is ‘internal’, that is, included in the document expressing or evidencing the contract, rather than ‘external’, this avoids the need to identify whether an ambiguity exists before regard can be had to the context.

C Main recommendations

There are two main ways the parties can influence a court to look at context.

1 Use of entire agreement clauses

Firstly, it is suggested that the parties can influence a court by changing their thinking regarding the use of entire agreement clauses. These clauses generally

⁹⁴ *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] 69 NSWLR 603, 626 [108].

⁹⁵ *Swan v Rawsthorne* (1908) 5 CLR 765, 781.

⁹⁶ Lewison and Hughes, above n 9, 116–8 [3.14.5].

⁹⁷ Ryan Catterwell, ‘The “Indirect” Use of Evidence of Prior Negotiations and the Parties’ Intentions in Contract Construction: Part of the Surrounding Circumstances’ (2012) 29 *Journal of Contract Law* 183, 195.

⁹⁸ *Metropolitan Gas Co v Federated Gas Employees Industrial Union* (1925) 35 CLR 449, 455.

allow parties to assume control over the interpretative method that the court adopts. But it is submitted that they can be used in a new way to direct a court to look at context.

Traditionally, entire agreement clauses are a means of ‘contracting out’ of the contextual approach to contract interpretation.⁹⁹ The idea is that by including an entire agreement clause, the parties are expressly stating that the written document represents the whole of their agreement. Unless the contract contains an entire agreement clause, evidence is admissible to show that the writing was not intended to be the entire contract between the parties.¹⁰⁰ This is of course one of the exceptions to the parol evidence rule.

Despite this, whether entire agreement clauses are given full and clear effect is questionable,¹⁰¹ but a further discussion on this point is beyond the scope of this article.

It is suggested that the parties could use entire agreement clauses to direct a court to look at context by:

1 Inserting the following clause into the contract:

1. Background material

This Contract is to be construed taking into account the following background:

[list the relevant background material here]; or

2 Delete the ‘traditional’ entire agreement clause in its entirety and replace it with the following:

1. Entire agreement

The parties agree evidence of the surrounding circumstances may be admissible in the interpretation of this Contract.

The clause could go further and provide:

Evidence of the surrounding circumstances:

- (a) are not intended to impose any obligation upon the parties not otherwise contained in this Contract;
- (b) are not in any way intended to create a collateral contract; and
- (c) are to be used as an aid to interpretation only.

It is not suggested that in all cases traditional entire agreement clauses should be deleted. However, the parties should keep an open mind as to whether an entire agreement clause is a necessary term of their bargain rather than a standard

⁹⁹ Spigelman, above n 22, 336.

¹⁰⁰ Lewison and Hughes, above n 9, 106–9 [3.13]; See generally Elisabeth Peden and J W Carter, ‘Entire Agreements – and Similar – Clauses’ (2006) 22 *Journal of Contract Law* 1.

¹⁰¹ Spigelman, above n 9, 424–5.

boilerplate clause. In some cases, they will continue to be necessary as they provide a degree of certainty that the negotiated document represents the entirety of the bargain. In other cases, they will be able to be used by the parties to direct a court to look at context.

2 *Use of recitals or preamble*

Secondly, the parties can include background information or details of the commercial purpose of the contract in the recitals or preamble to evidence their preference that the court look at context. But first, the legal effect of recitals and whether there is a distinction between the operative terms of a contract and the recitals, warrants attention.

Recitals are not part of the operative provisions of an agreement and are not necessary to give it legal effect. Traditionally, the function of a recital is to state facts and circumstances relevant to the making of the document or to explain or give context to its contents. As a general rule, where the operative parts of a deed are clear, the recitals have no effect upon their interpretation.¹⁰² However, it is not as clear whether regard may be had to recitals to assist in interpretation when the operative parts of a deed are unclear. Some older authority suggests that they can only be used when the operative parts are ambiguous.¹⁰³ However, in *Metcash*, Campbell JA suggests, following his review of the authority on this point, that regard may be had to recitals without a need to find ambiguity in the operative parts of the deed.¹⁰⁴ Although in *Jireh* the High Court disapproved of the approach taken in *Metcash*, *Jireh* did not consider use of recitals in contract interpretation. Therefore the comments of the Court regarding the legal effect of recitals is still good law.

D Other recommendations

In addition to these main recommendations, there are other ways that the parties can influence a court to look at context. These are listed below.

1 Clear drafting

Significant contracts are often the product of more than one draftsman. Because of this there is a risk that background facts are taken for granted or assumptions are made. Obviously this needs to be borne in mind to ensure that the document correctly records the bargain.

The parties should also give special consideration to the language and syntax used in the contract to achieve clarity of meaning as far as possible.¹⁰⁵ Coupled with this, they should make sure that the plain meaning of contractual terms reflects their intended commercial operation. The aim of these measures is to avoid the need to go to extrinsic evidence as the term is clear.

¹⁰² *O'Loughlin v Mount* (1998) 71 SASR 206, 217–9.

¹⁰³ *Milne v Municipal Council of Sydney* (1912) 14 CLR 54; *Brickworks Markets Pty Ltd v Corporation of the Town of Thebarton* (1996) 67 SASR 180.

¹⁰⁴ *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, 695–8 [379]–[391].

¹⁰⁵ Caspersz, above n 33, 30.

2 *Anticipate issues*

It is common in interpretation disputes to find that the parties did not, at the time of formation, contemplate the situation that has arisen.¹⁰⁶ While the transaction costs of articulating all contingencies are too high and the information to do so is not available,¹⁰⁷ the parties should try and anticipate the issues that may arise and include the resolution in the drafting.

3 *Changes in commercial practices or the law*

The parties should ensure that the drafting allows for or otherwise reflects any changes in commercial practices or the law.¹⁰⁸ This ensures that the drafting will continue to be relevant during the term of the contract.

4 *Risk allocation*

The parties should also give careful thought to the risk allocation sought to be achieved, as well as clear and careful drafting that properly reflects the agreed allocation.¹⁰⁹ Failing that, unintended and potentially costly results can flow.

5 *List objectives*

As it is not possible to provide for every contingency, it may also be useful to list the critical objectives, both long and short term. This ensures that the parties have a common understanding of what they want to achieve. As an example, this could read as follows:

1. Overview

1.1 Objectives

X and Y wish to establish and conduct a joint venture through the Company with the key objectives of:

- (a) operating a business of [*insert description of the joint venture's business*]; and
- (b) honouring and performing each Key Contract in accordance with this terms, while ensuring the long term sustainability and growth of profits of the Business.

The 'Key Contracts' or relevant subject matter as well as the 'Business' should be defined. This allows the parties to clarify the objectives which may lead to a more consistent interpretation.

¹⁰⁶ David McLauchlan, 'Contract Interpretation: What Is It About?' (2009) 31 *Sydney Law Review* 5, 10; Spigelman, above n 22, 323.

¹⁰⁷ Robertson, above n 2, 10.

¹⁰⁸ Cameron and Tandora, above n 46, 178–9; N B Rao, 'A Postscript: The High Court Ruling in *Western Export Services Inc v Jireh International Pty Ltd*: Implications for Contract Interpretation' (2012) 23 *Insurance Law Journal* 332, 333.

¹⁰⁹ Spigelman, above n 22, 323; Spigelman, above n 9, 430.

6 *Set out structure of contract*

It may also be worth setting out the structure of the contract. This will help the parties to navigate their way around the contract as well as providing the key terms for the commercial operation of the agreement.

1.2 Structure of agreement

This agreement regulates the relationship of the parties and sets out the arrangements between them for the ownership, governance and operation of the Business. This agreement is divided into the following key sections:

[set out the basic structure for the agreement here].

If an issue arises, this additional information may assist a court in achieving an outcome giving effect to the commercial purpose of the contract or giving a business-like interpretation.

7 *Statement of purpose*

Similarly with listing the objectives, the parties could also include any statements of purpose to detail surrounding circumstances that might be required to interpret the contract.¹¹⁰ As an example, would the judges have been more likely to intervene in *Jireh* if the Contract had said that the purpose of the clause and payment of the commission was:

- (1) To provide a reward or incentive to WES; and
- (2) that WES would be instrumental in the development of the Gloria Jean's franchise in Australia?

It seems contrary to the commercial purpose of the Contract that *Jireh* was free to avoid its arrangements with WES by changing its internal structure,¹¹¹ although there was no statement to this effect within the Contract. While this question cannot be answered until the High Court reconsiders what was said in *Codelfa*, it may be helpful to include a statement of purpose.

E Current contract law reform

1 What is the contract law review?

On 22 March 2012, the Commonwealth Attorney-General's Department released a discussion paper exploring the scope for reforming Australian contract law.¹¹² The stated drivers for reform are:

¹¹⁰ Caspersz, above n 33, 30.

¹¹¹ Khaled Metlej, 'The Modern Approach to Contract Interpretation' (2011) 49 *Law Society Journal* 48, 49.

¹¹² Australian Government Attorney-General's Department, Discussion Paper 'Improving Australia's Law and Justice Framework: A discussion paper to explore the scope for reforming Australian contract law' (2012)

- (a) greater accessibility;
- (b) improved certainty in those areas of contract law that are unsettled or unclear;
- (c) simplification and removal of technicality; and
- (d) harmonisation of the law across states and territories, particularly regarding the general property statutes, sale of goods, the legal capacity of minors to contract, frustration and third party enforcement.¹¹³

Businesses and individuals have been invited to comment on the Discussion Paper. Many submissions have been received to date and these are publically available on the Commonwealth Attorney-General's Department's website.

2 *What are the options for reform: Restatement, simplification and reform*

The Discussion Paper suggests three options for reform. These are discussed in turn below.

i Restatement

Some argue that Australian contract law is difficult to assess and understand due to the quantity and diversity of cases and statutes that comprise the law.¹¹⁴ As such, they argue that Australian contract law should be codified. However, contract law is not a self-contained subject¹¹⁵ and if contract law was re-written, there is likely to be a large surge in litigation as the new law is tested.¹¹⁶ This view is also held by the Law Council of Australia.¹¹⁷

ii Simplification or harmonisation of state and territory laws

Variations in statute law in the states and territories mean that some rules of contract law are not uniform, for example, the general property statutes, sale of goods, the legal capacity of minors to contract, frustration and third party enforcement. Harmonisation of these laws would achieve greater consistency across the Australian jurisdictions and reduce costs.¹¹⁸ This is generally accepted to be a positive measure.

<<http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImprovingAustraliaslawandjusticeframeworkAdiscussionpaperexploringthescopeforreformingAustraliancontractlaw.pdf>>.

¹¹³ Ibid 3–6.

¹¹⁴ Australian Government Attorney-General's Department, above n 112, 3.

¹¹⁵ Stewart, above n 50, 87–90.

¹¹⁶ Herbert Smith Freehills, Submission on Contract Law Discussion Paper (1 August 2012), 2 <<http://www.ag.gov.au/Consultations/Documents/SubmissiontotheReviewofAustralianContractLaw/Submission%20056%20-%20Contract%20Law%20Review%20-%20Freehills.pdf>>.

¹¹⁷ Law Council of Australia, Submission on the Review of Australian Contract Law: Response to Discussion Paper 'Improving Australia's Law and Justice Framework: A discussion paper to explore the scope for reforming Australian contract law' (20 July 2012) <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=DA9820BC-1999-B243-6ED8-CF2C8D3BBA8A&siteName=lca>.

¹¹⁸ DDan Jerker B Svantesson, 'Codifying Australia's Contract Law – Time for a Stocktake in the Common Law Factory' (2008) 20 *Bond Law Review*, 92.

iii *Reform or internationalisation*

There is also a push for the harmonisation of Australian contract law with other countries. This is called ‘internationalisation’.¹¹⁹ The aim of this kind of reform is to reduce costs associated with obtaining information about, and complying with, multiple legal systems.¹²⁰ One option is to adopt the UNIDROIT Principles of International Commercial Contracts as the law governing Australian contracts.¹²¹ However, any change poses the risk of adding new complexity and uncertainty in the law and this task should not be undertaken lightly. Whether the law should be reformed, in the context of addressing the uncertainty around what material can be used when interpreting written contracts, is discussed below.

Following *Jireh*, the High Court has been criticised for failing to clarify whether surrounding circumstances can be admitted to interpret written contracts.¹²² One author has gone so far as to say that ‘the High Court has been at its worst’ in dealing with this issue.¹²³ This comment seems harsh given the High Court has never overruled the approach taken in *Codelfa*. Despite this, something has to be done. Although contract law reform in the context of harmonisation is a good idea, in the context of addressing the uncertainty around what material can be used when interpreting written contracts, legislative reform is not appropriate. As stated by one commentator, due to the ‘polycentric nature of disputes ... a complete statement of principle is inherently complex and maybe impossible.’¹²⁴ In a similar vein, Sir Anthony Mason, writing extra-judicially, stated that:

It is exceedingly difficult, if not impossible, to formulate a comprehensive code of rules which is capable of governing the construction of commercial contracts without recognising the need to make qualifications to meet unforeseen situations.¹²⁵

The High Court is the appropriate body to provide a comprehensive and reasoned analysis and rule on the ambiguity issue.¹²⁶ After all, this is its primary role as our highest court and clarifier of the law.¹²⁷ The problem with this recommendation is that it may take time for an appropriate case to come before the Court and until this does, the uncertainty will continue.

IX CONCLUSION

It is important that parties know how their contracts will be interpreted if a dispute arises. This creates certainty and predictability in transactions. However, given

¹¹⁹ Robertson, above n 2, 3.

¹²⁰ Australian Government Attorney-General’s Department, above n 112, 17.

¹²¹ International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* (2010) <<http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>>.

¹²² Stewart, above n 50, 82–4.

¹²³ *Ibid* 82.

¹²⁴ Robertson, above n 2, 12.

¹²⁵ Mason, above n 92, 1.

¹²⁶ Robertson, above n 2, 12; McLauchlan and Lees, above n 71, 99; Stewart, above n 50, 77; Goldberger, above n 34, 9.

¹²⁷ Robertson, above n 2, 2.

the divergence in opinion in the High Court over the last 30 years, it is not clear in Australia whether courts should interpret a contract in light of the circumstances in which it was made. The main argument in *Jireh* for excluding evidence of surrounding circumstances was the potential uncertainty that this created. It is ironic how there is even more uncertainty now with different judges applying the interpretation rules differently. Despite this uncertainty, legislative reform with respect to use of surrounding circumstances as evidence in relation to the interpretation of written contracts is not appropriate. It is the role of the High Court to revisit this issue and bring about this much needed certainty.

In the meantime, and regardless of whether the requirement for ambiguity is here to stay, this article has argued that the parties can influence the interpretation method applied by the courts to the interpretation of their contracts. It has explored the different ways the parties may do this and allows contracting parties to take control at a time when the interpretation rules are very uncertain. It concludes that there are good reasons for drafting for the interpretation method to be applied that favours context.