

**Contractual Construction: Surrounding Circumstances and
the
Ambiguity Gateway**

by

The Hon Justice Kenneth Martin
Supreme Court of Western Australia*

1 Introduction

In *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352, Sir Anthony Mason (with whom Stephen and Wilson JJ agreed upon the issue of ad hoc implied terms) stated (for Australia) his now famous 'true rule' governing the admission of evidence of surrounding circumstances in an exercise of contractual interpretation for a written instrument. At 149 CLR 352 Sir Anthony observed:

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, as we have seen, if the facts are notorious knowledge of them will be presumed.

(my emphasis in bold)

These words celebrated their 31st anniversary on 11 May 2013 and retain their vitality.

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2 Overview

As preliminary remarks, may I observe about *Codelfa* that:

- 2.1 This was a dual-aspect appeal. *Codelfa* was a construction company that attempted to show the existence in its favour of an implied term as a matter of business efficacy; but *Codelfa* also contended, in the alternative, that the inner-city construction contract it had entered into with the State Rail Authority of New South Wales had been frustrated by supervening events limiting permissible working shift hours, hence the contract was ended. Upon the appeal the ad hoc implied term arguments failed. The frustration argument, however, succeeded.
- 2.2 Sir Anthony Mason's classical observations upon contractual construction in *Codelfa* emerged in the course of his evaluating the ultimately unsuccessful implied term argument. In assessing the existence of the alleged implied term, said to be necessary to give business efficacy for that particular construction contract (called an ad hoc implied term) Sir Anthony said the court was again embarking upon an exercise in interpretation of the language of a contract, '... though not an orthodox instance': *Codelfa* at pages 345 and 353.
- 2.3 A very careful terminological distinction was used by Mason J in *Codelfa*, as between 'extrinsic evidence' and 'surrounding circumstances'. The term 'surrounding circumstances' appears only to embrace facts. The term 'extrinsic evidence' (see 2.7 below) obviously was of a wider import, capable of embracing concepts beyond mere facts, such as the parties' subjective intentions, or their communicated verbal negotiations.
- 2.4 A universally accepted principle of contract law in Australia offers something of a safe harbour in what is otherwise an 'ocean of litigious controversy', to re-use Sir Anthony's metaphor from *Codelfa*. This is the objective theory of contract. The objective theory applies in assessing

both the existence and formation of, and then the interpretation of, a contract under Australian law. In *Wilson v Anderson* (2002) 213 CLR 401 at 418 [8], Gleeson CJ explained this objectivity principle in reference to commercial contracts:

The law of contract seeks to give effect to the common intention of the parties to a contract. But the test is objective and impersonal. The common intention is to be ascertained by reference to what a reasonable person would understand by the language used by the parties to express their agreement. If the contract is in the form of a document, then it is the meaning that the document would convey to a reasonable person that matters. The reason for this appears most clearly in the case of commercial contracts. Many such contracts pass through a succession of hands in the course of trade, and the rights and liabilities of parties other than the original contracting parties are governed by them ... It is only the document that can speak to the third person.

Affirming the objective theory of contract applied under Australian law, see, amongst others, *Taylor v Johnson* (1983) 151 CLR 422 at 428 - 432; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at 105 [25]; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at 483 [34]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461 [22] and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40] - [46].

2.5 In *Codelfa*, Sir Anthony Mason, in that exercise of contractual construction as regards finding implied terms, applied the objective theory. At CLR 352 he referred to an 'objective framework of facts within which the contract came into existence, and the parties' presumed intentions in this setting'. He explained the objective theory of contract in the following terms:

We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract.

2.6 *Codelfa* displays the use of an objective approach to contractual construction. The presumed common intention of parties is ascertained objectively by reference to what 'reasonable persons' in the parties' situations would have intended to convey by the words used. The objective approach is applicable not only in the orthodox task of contractual interpretation, but also to situations (like *Codelfa*) where the assessment to be made is as to the existence or otherwise of asserted ad hoc implied terms.

2.7 As of 1982, a delimiting 'parol evidence rule', applicable to written contracts, was apparently in a better state of health. In *Codelfa* at CLR 347, Mason J (before stating the 'true rule' of construction five pages later at CLR 352), said:

The broad purpose of the parol evidence rule is to **exclude extrinsic evidence (except as to surrounding circumstances)**, including direct statements of intention (except in cases of latent ambiguity) and antecedent negotiations, to subtract from, add to, vary or contradict the language of a written instrument (*Goss v Lord Nugent* (1833) 5 B & Ad 58 at 64-5; 110 ER 713 at 716). Although the traditional expositions of the rule did not in terms deny resort to extrinsic evidence for the purpose of interpreting the written instrument, it has often been regarded as prohibiting the use of extrinsic evidence for this purpose. **No doubt this was due to the theory which came to prevail in English legal thinking in the first half of [the 20th] century that the words of a contract are ordinarily to be given their plain and ordinary meaning. Recourse to extrinsic evidence is then superfluous.** At best it confirms what has been definitely established by other means; at worst it tends ineffectively to modify what has been so established.

(my emphasis in bold)

2.8 In a recent scholarly article, 'Contractual interpretation: A comparative perspective' (2011) 85 *Australian Law Journal* 412, the Hon J J Spigelman AC, former Chief Justice of New South Wales, explained the parol evidence rule (at pages 414 and 417), in a contemporary context. He noted that a number of academic commentators now suggested the parol evidence rule was dead.

Expressed views as to the rule's morbidity seemed to be based on a premise that in going about the work of contractual interpretation, modern courts had moved their emphasis from 'text to context', now favouring 'accuracy and fairness' over 'certainty', and that today a more 'liberal' or enlightened 'modern approach' to contractual interpretation is applied.

2.9 Spigelman explained the parol evidence rule at page 414 in this article in the following way:

The rule has been stated in different ways, but the core principle is that, when parties have reduced their contract to writing, a court should only look to the writing to determine any issue of interpretation.

2.10 What remains intriguing about Sir Anthony Mason's 'true rule' as stated in *Codelfa* at 149 CLR 352, is that there manifests in his reasons something of an irresistible internal inconsistency, as between this rule and his earlier embrace of a number of House of Lords or Privy Council decisions, in which Lord Wilberforce had participated. Yet in none of the Wilberforce reasons is there any discernible reference by him to the true rule's stated pre-requisite of ambiguity - in order for a court to have regard to 'relevant' surrounding circumstances which may bear upon the exercise in contractual construction. Nevertheless, Sir Anthony's formulation of the 'true rule' at 352 clearly stipulates that pre-requisite. How he reached that point as to the need for ambiguity is not really made apparent, at least explicitly, prior to page 352.

2.11 We now know, of course, from Sir Anthony's writings after he retired from the High Court, that he regarded his *Codelfa* 'true rule' formulation as having been expressed somewhat 'imperfectly'. My colleague Justice James Edelman in recent reasons in *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2013] WASC 194, quotes Sir Anthony's address found in 2009 (25 JCL 1 at page 3), at [121]:

Although the meaning of the words used by Mason J in *Codelfa* is a matter for posterity, it is noteworthy that Sir Anthony Mason subsequently said that the 'idea I was endeavouring to express in *Codelfa*, albeit imperfectly' was that 'the extrinsic materials are receivable as an aid to construction, even if, as may well be the case, the extrinsic materials are not enough to displace the clear and strong words of the contract. Sir Anthony considered that subsequent decisions of the High Court of Australia, including the decision of *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165, 179 [40], had taken this broad approach ...

3 The uncertainty in Australia

Following Sir Anthony's 1982 delivery in *Codelfa* of a 'true rule' of construction, there have been three decades of tension in Australia - concerning whether or not there really is an 'ambiguity threshold' that must be first surmounted before admitting evidence of surrounding circumstances at a trial concerning the construction of a written instrument. Is it or is it not necessary, in order to have admitted evidence of surrounding circumstances, to first identify some ambiguous language or some contractual text susceptible of more than one meaning? That is the question.

The cynic might opine that most words in the English language are capable of bearing more than one meaning. Hence such a threshold would not usually present as a difficult one to surmount in most cases . An incorrigible cynic may opine that the greater the amount of money at stake in a commercial contract dispute, the easier it is to find ambiguity or conflicting meanings.

By early 2011, many commentators (and judges) thought that a long period of unease over the need for an ambiguity threshold had been resolved in the negative. A succession of High Court decisions appear to have gone about the task of contractual interpretation on appeal without expressing any need to first satisfy, or even to acknowledge, an existence of an ambiguity threshold under a 'true rule': see *Pacific Carriers Ltd v BNP Paribas* at 461 - 462 [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* at 179 [40]; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at 528 - 529 [15]; and *International Air*

Transport Association v Ansett Australia Holdings Ltd (2008) 234 CLR 151 at 160 [8] and 174 [53]. Perhaps on those appeals the requisite degree of ambiguity, or the showing of more than one potential meaning from the text at issue, was always implicit, given the contested appeals were over clearly differing contractual interpretations of words in written instruments and were argued by Australia's leading silks.

4 **Ambiguity Threshold: A deeper scrutiny of Sir Anthony's reasons in *Codelfa***

Uncertainty or 'internal tension', as Campbell JA called it, concerning an ambiguity threshold, arose out of the earlier passages in Sir Anthony's reasons in *Codelfa*, before his delivery of the 'true rule' at CLR 352.

These early passages in Sir Anthony's *Codelfa* reasons can only fairly and sensibly be read as endorsing a series of high-tier construction decisions in the House of Lords or Privy Council, in all of which Lord Wilberforce participated. However, none of Lord Wilberforce's reasoned formulations as to contractual construction mentions ambiguity as a necessary prerequisite, before admitting evidence as to surrounding circumstances: see *Prenn v Simmonds* [1971] 1 WLR 1381; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235; *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989; *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266; and *Liverpool City Council v Irwin* [1977] AC 239.

Earlier, I mentioned at 2.7 Sir Anthony's *Codelfa* observations at CLR 347 as to a usual **exclusion** of extrinsic evidence (albeit noting his words in parenthesis, '**except** as to surrounding circumstances') on a construction exercise. At CLR 348 (four pages before stating the 'true rule'), Sir Anthony again mentions 'surrounding circumstances' as an '**exception**' to the usual exclusion of parol evidence. He there cited Lord Wilberforce's (1974) observations in *L Schuler AG v Wickman*, noting:

His Lordship noted that evidence of **surrounding circumstances** is an **exception** to the rule, but he had no occasion to **discuss its scope** for there it was not, **as it is here, a critical question**.

(my emphasis in bold)

Sir Anthony proceeded in *Codelfa* to consider Lord Wilberforce's earlier (1971) observations in *Prenn v Simmonds*. Unlike in *L Schuler*, in *Prenn* Lord Wilberforce did discuss the scope of what fell under the term 'surrounding circumstances'. This led Mason J to observe with evident approval (at CLR 348):

It was held that, although evidence of prior negotiations and the parties' intentions, and *a fortiori* the intentions of one of the parties, ought not to be received, **evidence restricted to the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively of the 'aim' of the transaction, was admissible**. Considered in the light of this evidence 'profits' meant 'consolidated profits'.

(my emphasis in bold)

Neither Lord Wilberforce in *Prenn*, nor Mason J in apparently endorsing the *Prenn* reasons at CLR 348, mentions ambiguity as a necessary prerequisite to the admissibility of 'surrounding circumstances' evidence.

At CLR 351, Sir Anthony discusses an earlier decision of the High Court, *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423, in which he participated. In *Codelfa* Sir Anthony introduced an extract from *DTR*'s joint reasons (of himself, with Stephen and Jacobs JJ) with his own observation as to these *DTR* reasons. He said at 351:

In *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* Stephen and Jacobs JJ and I, following *Prenn*, in a joint judgment said ...

The extract from Lord Wilberforce's (1971) reasons in *Prenn* that Sir Anthony identifies in *Codelfa* as being 'followed' by three Judges of the High Court of Australia in *DTR*, was:

A court may admit evidence of surrounding circumstances in the form of 'mutually known facts' 'to identify the meaning of a descriptive term' and may admit evidence of the 'genesis' and objectively the 'aim' of a

transaction to show that the attribution of a strict legal meaning would 'make the transaction futile' ...

There is no mention of an ambiguity prerequisite by Lord Wilberforce in this passage from *Prenn*, as approved and followed in *DTR* by Stephen, Mason and Jacobs JJ.

Sir Anthony continued on in the *Codelfa* reasons to discuss his (majority) reasons in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, which in turn refer back to Lord Wilberforce's (1977) speech in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, particularly as regards the five (now) equally classic preconditions there stated as being needed to support the finding of an ad hoc implication of a term.

In *Codelfa* Sir Anthony moved to observe that in *Secured Income* he had not only accepted and applied Lord Wilberforce's reasons about preconditions concerning implied terms from *BP Refinery (Westernport)*, but that he had also (at CLR 351):

... accepted and applied Lord Wilberforce's different treatment, for the purpose of construing a contract, of **evidence of surrounding circumstances** on the one hand and **of the parties' intentions** on the other hand.

(my emphasis in bold)

Sir Anthony then added in *Codelfa*, at 351:

Having considered the topic in more detail on this occasion I see no reason to qualify what I then said.

The reference in *Codelfa* at 351 to what Sir Anthony had written three years earlier in *Secured Income* at pages 605 - 606, was the immediate precursor to his declaration in *Codelfa* of the 'true rule' of construction, as seen at CLR 352.

This close analysis would suggest that what is found in Mason J's reasons in *Codelfa* before CLR 352 does not at all endorse (especially at CLR

pages 347 and 348) an ambiguity threshold conditioning the receipt of admissible evidence of surrounding circumstances in an exercise of contractual construction. In fact, what is written prior to CLR 352 can be read much to the contrary.

5 The 'true rule' itself

The formulation of the 'true rule' at CLR 352, by reference to a threshold of ambiguity (or susceptibility to more than one meaning) cannot be rationalised as unintended. This is verified in at least two places in the *Codelfa* reasons of Sir Anthony. First, in the penultimate paragraph of CLR 352, having just stated the true rule, Sir Anthony immediately reiterates, in effect, a need to show ambiguity or at least more than one meaning:

Consequently, **when** the issue is **which of two or more possible meanings** is to be given to a contractual provision we look ...

(my emphasis in bold)

Second, on analysis, the language used in his formulation of the 'true rule' at CLR 352 resonates with what Sir Anthony observed at CLR 350 whilst considering some older UK case authorities that Lord Wilberforce in turn had referred to during his (1971) observations in *Prenn*. At CLR 350, Sir Anthony, in reference to the Privy Council decision of *Bank of New Zealand v Simpson* [1900] AC 182 (with its own internal application of earlier views from Lord Campbell in *Macdonald v Longbottom* (1859) 120 ER 1177, concerning mutually known facts being permissibly admitted to identify a descriptive term), then observed as regards 'extrinsic evidence':

It is apparent that the principle on which the Judicial Committee acted in *Simpson* is that **where** words in a contract are **susceptible of more than one meaning** extrinsic evidence is admissible to show the facts which the negotiating parties had in mind.

(my emphasis in bold)

The *Codelfa* CLR 350 reference to the words 'susceptible of more than one meaning' in *Simpson* resonates closely with the second limb of the 'true rule', as it emerged only two pages later at CLR 352.

At CLR 350, Sir Anthony mentions another early decision of the House of Lords, *Great Western Railway and Midland Railway v Bristol Corporation* (1918) 87 LJ Ch 414, and the apparent clash of constructional approaches therein as between, on the one hand, Lords Atkinson and Shaw, in contrast to Lord Wrenbury, upon the admissibility of evidence of surrounding circumstances. As explained in *Codelfa* by Mason J at CLR 350, Lords Atkinson and Shaw in *Great Western Railway*, had:

... stated that evidence of surrounding circumstances was inadmissible **except to resolve an ambiguity**, that is, **where the words are susceptible of more than one meaning**, and that Lord Blackburn was dealing with just such a case in *River Wear Commissioners*.

(my emphasis in bold)

River Wear Commissioners v Adamson (1877) 2 App Cas 743 was referred to by Lord Wilberforce in *Prenn* at pages 1383 - 1384 as an illustration for there being 'ample warrant for a liberal approach' to the admission of evidence.

Sir Anthony continued in *Codelfa* at CLR 350, referring to the contrast of views within *Great Western Railway*:

Their Lordships took the view that **evidence of surrounding circumstances was not admissible to raise an ambiguity** for in their opinion that would be to contradict or vary the words of the written document, the assumption being that in the overwhelming majority of cases the written words will have a fixed meaning. Lord Wrenbury thought otherwise, stating that in every case of construction extrinsic evidence is receivable **to raise and resolve an ambiguity**.

(my emphasis in bold)

Sir Anthony acknowledged that the 1918 House of Lords clash of views over evidence which actually raises the (latent) ambiguity as between Lords Atkinson and Shaw, against Lord Wrenbury in *Great Western Railway*. He

observed (at CLR 350) that Lord Wilberforce did not discuss those 1918 competing views in his (1971) speech in *Prenn v Simmonds*. Sir Anthony suggests in *Codelfa* that this omission was 'perhaps because the difference between them is more apparent than real'.

It is not clear whether Sir Anthony himself was of that postulated view, although that conclusion is certainly open. It is crystal clear, however, Sir Anthony was very much alive by CLR 350 to the 1918 clash of judicial views in the House of Lords over the permissibility of actually raising (latent) ambiguity by adducing evidence of surrounding circumstances in a contractual construction case. He was aware that Lord Wilberforce had not addressed this issue in *Prenn*.

Sir Anthony does manifestly address ambiguity or plural meanings by his eventual statement of the 'true rule' at CLR 352.

Before CLR 352, however, Sir Anthony discussed Lord Wilberforce's 1976 speech, concurred in by a majority of the House of Lords, in *Reardon Smith Line v Hansen-Tangen* [1996] 3 All ER 570; [1996] 1 WLR 989. Again, nothing emerged here concerning the need to identify an existence of, or the significance of, any ambiguity threshold that would condition the receipt of surrounding circumstances evidence in a construction exercise.

But from *Secured Income v St Martins Investments* at CLR 606, it is apparent that Mason J's implementation of Lord Wilberforce's *Prenn* approach to surrounding circumstances was, in its end consequence of rendering much evidence non-admissible, somewhat more restrictive than might otherwise appear on the surface.

The relevant argument in *Secured Income* was over the evidentiary admissibility of what was said during negotiations leading to the parties' eventual written contract. Evidence was sought to be adduced on a basis that the negotiations were evidence of (mutually known) surrounding circumstances.

Sir Anthony rejected that proffered negotiation evidence in *Secured Income*, observing (at page 606):

In truth the evidence is not evidence of surrounding circumstances; it is evidence of the antecedent oral **negotiations and expectations** of the parties and as such it cannot be used for the purpose of construing the words of a written contract intended by the parties to comprehensively record the terms of the agreement which they have made.

(my emphasis in bold)

A passage Sir Anthony cited in *Secured Income* from Lord Wilberforce in *Prenn* concluded:

As to the circumstances, and the object of the parties, there is no controversy in the present case. The agreement itself, on its face, almost supplies enough, without the necessity to supplement it by outside evidence.

Rejecting the proffered surrounding circumstances evidence in *Secured Income*, Sir Anthony had regard first to the text of the written instrument. As to that, he noted the observations of Lord Wilberforce in *Prenn* about that agreement itself supplying almost 'enough'. Sir Anthony thought observations from *Prenn* had an 'equal application'. He went on to observe:

The provisions of the contract itself so amply demonstrate that the purpose of the parties was to provide against the possibility that the respondent's investment return on the purchase price was less than the figure stipulated.

6 The general decline of the ambiguity threshold in Australia until October 2011

In *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, a strong New South Wales Court of Appeal, comprising Allsop P, Giles JA and Campbell JA, expressed the unanimous view that there was no longer any requirement for ambiguity to be shown before surrounding circumstances could be admitted in a construction exercise. At [14] of Allsop P's reasons, after referring to the High Court's observations in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11], *Pacific Carriers, Toll (FGCT)* and *International Air Transport Association* (together with *Maggbury*

and *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530 at 559 [82]), he observed:

These cases are clear. The construction and interpretation of written contracts is to be undertaken by an examination of the text of the document in the context of the surrounding circumstances known to the parties including the purpose and object of the transaction and by assessing how a reasonable person would have understood the language in that context. **There is no place in that structure, so expressed, for a requirement to discern textual, or any other, ambiguity in the words of the document before any resort can be made to such evidence of surrounding circumstances.**

(my emphasis in bold)

At [17], Allsop P identified four considerations supporting his view. I mention only two. First was an assumed acceptance by the High Court of Spigelman CJ's views in *South Sydney Council v Royal Botanic Gardens* [1999] NSWCA 478 at [35], and then in *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235 at [7] to [13]. Those views were said to be unaffected by appeals in both matters to the High Court (see *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 and *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570).

A further point raised by Allsop P concerned the second of the components in Sir Anthony's formulation of the 'true rule'. That is: 'if the language is ... susceptible of more than one meaning'. Allsop P observed this did not inhibit admitting evidence to identify a latent ambiguity. In other words, Allsop P effectively read the 'true rule' as Mason J's assumed endorsement (with any difficulty 'perhaps' being 'more apparent than real') of the (minority) view of Lord Wrenbury in 1918 in *Great Western Railway* (contrasting to a more restrictive majority construction approach of Lords Atkinson and Shaw, as discussed by Sir Anthony in *Codelfa* at CLR 350).

To the same end, in *Franklins v Metcash* [2009] NSWCA 407, Campbell JA observed at [305]:

It follows that I accept (counsel's) submission that the contract should be construed bearing in mind those facts that the parties knew, or that it can reasonably be assumed they knew, that can impact upon the meaning of the words of the contract. I also accept his submission that **it is not necessary to find ambiguity in the words of a written contract**, the meaning of which is disputed, **before the court can look at surrounding circumstances as an aid to construction**.

(my emphasis in bold)

Less fulsomely, Giles JA in *Franklins v Metcash* at [49] said:

I agree that, as the law has developed, it is **not necessary to find ambiguity** in the words of a written contract before going to context and purpose in the construction of the contract.

(my emphasis in bold)

But Giles JA at [50] also observed:

In *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at 62 [39], the High Court said that *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, rather than the arguably broader view of the admissible 'background' taken in decisions of the House of Lords to which reference was made, should be followed. **There is, with respect, good reason for caution in equating the material to which regard may be had with all that in ordinary communication a reasonable person would see as relevant, as is the thrust of the House of Lords decisions.** A formal contract is not a conversation, or a letter, between persons who understand it to accord with some prior course of communications and seek the subjective intention of the speaker or writer. **It is a legal act, to be approached according to the objective theory of contract, with its meaning transcending the immediate parties in the event of assignability and assignment, and even absent assignment, commonly a written contract will fall to be understood and obeyed through persons other than those engaged in its negotiation and privy to all that passed between the negotiators ...**

(my emphasis in bold)

Likewise, the Court of Appeal of Victoria in *MBF Investments Pty Ltd v Nolan* [2011] VSCA 114 at [195] - [204] viewed the *Codelfa* ambiguity threshold as, in effect, ancient history. Neave, Redlich and Weinberg JJA referred at [197] to a 'lively debate' that had endured for years over when a court could have regard to circumstances surrounding the making of a contract in the exercise of construction, as effectively quelled. They went on to refer to the

reasons of the High Court in *Pacific Carriers*, and *Toll*, and by Finn J in the Federal Court in *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2005) 223 ALR 560, Finn J's reasons being approved on appeal by the Full Federal Court by Weinberg J, and then followed and approved by the New South Wales Court of Appeal in *Gardiner v Agricultural and Rural Finance Pty Ltd*. They said the 'lively debate' appears to have been resolved.

As events later unfolded in 2011, these intermediate level observations, like the erroneous first reporting in 1897 of Mark Twain's death, were somewhat of 'an exaggeration'.

7 October 2011, *Jireh*: Debate over the ambiguity threshold is still lively

On 28 October 2011 in *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45, three members of the High Court (Gummow, Heydon and Bell JJ - two of whom have since retired) in refusing an application for special leave to appeal from the New South Wales Court of Appeal, took a somewhat unusual step of publishing written reasons.

The *Jireh* special leave application sought to advance before the High Court a point of contractual construction concerning a letter of agreement involving the franchising of Gloria Jean's coffee stores. The New South Wales Court of Appeal, in which Macfarlan JA delivered the lead reasons, identified an error of principle in the construction approach of the primary judge. The trial judge had thought the literal meaning of the words of a letter agreement generated an uncommercial outcome, and so had taken a different view of the text.

Macfarlan JA said on the appeal:

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

Surprisingly, at least to those who earlier proclaimed the demise of any ambiguity threshold by a *Codelfa* 'true rule' of construction, Gummow, Heydon and Bell JJ, now said [2] - [6]:

- [2] The primary judge had referred to what he described as 'the summary of principles' in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at 618 [19] and following. The applicant in this Court refers to that decision and to *MBF Investments Pty Ltd v Nolan* [2011] VSCA 114 at [195]-[204] as authority rejecting the requirement that it is essential to identify ambiguity in the language of the contract before the court may have regard to the surrounding circumstances and object of the transaction. The applicant also refers to statements in England said to be to the same effect, including that by Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 at 2958-2959 [4]-[5]; [2002] 4 All ER 654 at 656-657.
- [3] Acceptance of the applicant's submission, clearly would require reconsideration by this Court of what was said in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337 at 352 by Mason J, with the concurrence of Stephen J and Wilson J, to be the 'true rule' as to the admission of evidence of surrounding circumstances. Until this Court embarks upon that exercise and disapproves or revises what was said in *Codelfa*, intermediate appellate courts are bound to follow that precedent. The same is true of primary judges, notwithstanding what may appear to have been said by intermediate appellate courts.
- [4] The position of *Codelfa*, as a binding authority, was made clear in the joint reasons of five Justices in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 CLR 45 at 62-63 [39] and it should not have been necessary to reiterate the point here.
- [5] We do not read anything said in this Court in *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 at 461-462 [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 at 179 [40]; *Wilkie v Gordian Runoff Ltd* [2005] HCA 17; (2005) 221 CLR 522 at 528-529 [15] and *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; (2008) 234 CLR 151 at 160 [8], 174 [53] as operating inconsistently with what was said by Mason J in the passage in *Codelfa* to which we have referred.
- [6] However, the result reached by the Court of Appeal in this case was correct. Further, even if, as the applicant contends, cl 3 in the

Letter of Agreement should be construed as understood by a reasonable person in the position of the parties, with knowledge of the surrounding circumstances and the object of the transaction, the result would have been no different. Accordingly, special leave is refused with costs.

Those October 2011 reasons, delivered in rejecting the special leave application, rapidly reverberated around the nation's legal communities. According to my research, by the close of May 2013, *Western Export Services v Jireh International* had been applied, referred to or cited in no less than 80 subsequent Australian decisions.

8 *Royal Botanic Gardens* [2002] HCA 5

Jireh suggests guidance can be found in examining what five justices of the High Court said in 2002 in *Royal Botanic Gardens* at par 39, as to the position of *Codelfa* as a binding authority being 'made clear in the joint reasons of five justices in that decision'.

But I would humbly venture to suggest that a close examination of the plurality reasons in *Royal Botanic Gardens*, particularly at [39], raises a number of significant unanswered questions about *Codelfa*.

In *Royal Botanic Gardens* the plurality (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) said at [39]:

Two further matters should be noticed. First, reference was made in argument to several decisions of the House of Lords, delivered since *Codelfa* but without reference to it. Particular reference was made to passages in the speeches of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society [No 1]* [1998] 1 All ER 98 at 114 - 115 and of Lord Bingham of Cornhill and Lord Hoffmann in *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 259 at 269, in which the principles of contractual construction are discussed. **It is unnecessary to determine whether their Lordships there took a broader view of the admissible 'background' than was taken in *Codelfa*** or, if so, whether those views should be preferred to those of this Court. Until that determination is made by this Court, other Australian courts, if they discern any inconsistency with *Codelfa*, should continue to follow *Codelfa*.

I offer four comments about that passage from 2002. First, regarding *Codelfa*, there ought to be acknowledged the internal inconsistency, in Sir Anthony's reasons (of 149 CLR pages 348 with 352) between his apparently fulsome endorsement of Lord Wilberforce's liberal construction approach with his subsequent formulation of a 'true rule' at CLR 352. How that internal inconsistency with *Codelfa* is resolved would bear on the interpretation of this passage in *Royal Botanic Gardens* which endorses *Codelfa* in a generic fashion.

Jireh, in 2011, assumes this internal inconsistency in *Codelfa* is clearly resolved at the statement of the 'true rule' at 352. Yet *Royal Botanic Gardens* does not explicitly endorse the 'true rule'. It only endorses *Codelfa*.

Second, the plurality in *Royal Botanic Gardens* refer to admissible 'background', not to 'surrounding circumstances' or 'extrinsic evidence'. The divergent terminology (extrinsic evidence, surrounding circumstances, background, and even factual matrix) does not advance a clarity of meaning.

Third, assuming *Royal Botanic Gardens* endorsed the 'true rule', then the House of Lords' approach to construction in the two decisions mentioned in *Royal Botanic Gardens*, namely *Investors Compensation Scheme v West Bromwich Building Society* and observations (by Lord Bingham and Lord Hoffmann) in *BCCI (SA) v Ali*, is manifestly broader than the 'true rule'. Reference in *Royal Botanic Gardens* to what other Australian courts should do 'if they discern any inconsistency with *Codelfa*' carries a tantalising obscurity, if the endorsed position in *Codelfa* equates to Mason J's CLR 352 'true rule'. If, on the other hand, *Codelfa* is assessed as an endorsement of Lord Wilberforce's approach to construction then the discernment of an inconsistency with the two cases is not so easy, making the comment in *Royal Botanic Gardens* look more appropriate.

Fourth, Lord Hoffmann's 'five-point scheme' for contractual interpretation from *Investors Compensation Scheme v West Bromwich*

Building Society [1998] 1 All ER 98 presents as going beyond simply dealing with 'surrounding circumstances'.

In the United Kingdom, the reasons of Lord Hoffmann in *Investors Compensation Scheme Ltd* are widely assessed by commentators to have advanced Lord Wilberforce's 'liberal' approach to the reception of extrinsic evidence. In *Investors Compensation Scheme* Lord Hoffmann observed as the first point of his 'five point scheme' for contractual interpretation:

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.

(my emphasis in bold)

Lord Hoffmann's second point was:

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

(my emphasis in bold)

Spigelman observed at 419 in his 2011 article 'Contractual interpretation: A Comparative Perspective', that:

Lord Hoffmann's reference to 'background knowledge that would reasonably have been available to the parties' has been held not to extend further than Lord Wilberforce's reference to 'extrinsic facts ... within the knowledge of both parties' and that what is 'reasonably available' has not been extended beyond what was known to encompass what should or could have been known.

The first *Investors Compensation* point by Lord Hoffmann, as to 'all the background knowledge' that was reasonably available to the parties, is wide, but may be relatively less controversial for Australia, once an ambiguity or plurality of meanings threshold has been met.

But Lord Hoffmann's second point expands Lord Wilberforce's 'understated' concept of the 'factual matrix' outwards to what now is retitled as 'background knowledge'. Lord Hoffmann says this includes '**absolutely anything**' known to both parties which a reasonable person 'could have' regarded as relevant to an understanding of the way in which the language should be assessed.

From a policy perspective, that approach of Lord Hoffmann sees a significant elevation of context over text in the United Kingdom. It is the manifestation of the unresolved international academic policy war, being fought out between textualists versus those who advocate a 'community morality' or 'spirit-of-the-law' approach to the construction of agreements or statutes.

For a pure textualist perspective, see the recent book by Scalia and Garner: *'Reading Law': The Interpretation of Legal Texts* (2012) Thomson West, especially chapter 67 entitled 'The false notion that the purpose of interpretation is to discover intent' (pages 391 - 396).

For the perspective of originalists, purposivists or consequentialists, as they are sometime called, see articles mentioned at footnote 45 in Edelman J's recent decision in *Mineralogy* at [124]. See also R Dworkin, 'Law as Interpretation' (1982) 60 *Texas Law Review* 527 at 541 - 543.

Spigelman observed at page 420 in his 2011 article that the 'absolutely anything' extension has not been embraced in Australia.

Essentially, my fourth point is that in *Royal Botanic Gardens* the observations at [39] could easily be read as directed to just shutting the 'absolutely anything' gate rather than necessarily reaffirming the CLR 352 'true rule' in *Codelfa*.

What was said in *Royal Botanic Gardens* at [39] does suggest a firm 'brake' against the 'absolutely anything' approach of Lord Hoffmann in determining the scope of evidence admissible in a construction exercise in

Australia. But this is a somewhat different to endorsing a *Codelfa* 'true rule' ambiguity threshold.

However, it must be said that Lord Hoffmann's approach of receiving all available evidence as to context seems to rest in a comfortable conceptual parallel to the approach of removing all prerequisites (such as ambiguity) to allowing evidence of surrounding circumstances into a contractual interpretation exercise.

9 Is the 'true rule' gateway a 'true obstacle' given that ambiguity is a 'broad concept'?

To recapitulate, the 'true rule' stated by Sir Anthony Mason in *Codelfa* at CLR 352 as:

... 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 ...

Sir Anthony then referred at CLR 352, one paragraph later, to '... when the issue is which of two or more possible meanings is to be given to a contractual provision ...'.

In *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 my colleague, Beech J, of the Supreme Court of Western Australia, at [119] as to the breadth of the concept of ambiguity, recently observed:

It should be noticed that a broad concept of ambiguity may apply in this context. See, for example, *South Sydney Council v Royal Botanic Gardens* [35]; *Acorn Consolidated Pty Ltd v Hawkslade Investments Pty Ltd* [1999] WASC 218; (1999) 21 WAR 425 [43] - [45]; *Manufacturers' Mutual Insurance Ltd v Withers* (1988) 5 ANZ Ins Cases 60-853; 75,342. Moreover, as Pullin JA pointed out in *McCourt v Cranston* [23] it is enough if the instrument is 'susceptible of more than one meaning'. See in this regard Spigelman JJ, *From text to context: Contemporary contractual interpretation* (2007) 81 *Australian Law Journal* 322 - 337.

In *Red Hill*, Beech J assessed the language of a 'farm-in' agreement and joint venture, when read together, as being ambiguous or susceptible of more than one meaning (see reasons [120]). His Honour then observed at [121]:

The reference to context is not a licence to ignore the text, or to rewrite the contract to include provisions reflecting what the court infers from the background facts to have been intended by the parties: (citation of authority omitted). As is said in Lewison & Hughes, *The Interpretation of Contracts in Australia* (2012) [3.14.5] 'reliance on background must be tempered by loyalty to the contractual text'.

So it is important to remember the 'true rule' will be met not just by ambiguity, but also by any text that is susceptible of more than one meaning. Most contractual interpretation disputes reaching a Supreme Court or higher would seem inherently likely to be grounded on a clash of views about different meanings of language in a contract. That is particularly likely as it is widely acknowledged that few words in the English language are unambiguous, or not susceptible of carrying more than one meaning: see McHugh JA (as he then was) in *Manufacturers Mutual Insurance v Withers* (1988) BC 8801918.

Shortly after Beech J's decision in *Red Hill* the Western Australian Court of Appeal delivered *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2012] WASCA 216. McLure P delivered the lead reasons. Newnes JA and Le Miere J agreed. Her Honour's reasons at between [74] and [81] contain like observations concerning the scope of the 'true rule' in application. She said at [76]:

The practical limitation flowing from the *Codelfa* true rule is that surrounding circumstances cannot be relied on to give rise to an ambiguity that does not otherwise emerge from a consideration of the text of the document as a whole, including whatever can be gleaned from that source as to the purpose or object of the contract.

If that is so, then I would humbly suggest evidence of surrounding circumstances ought not be admissible to show a latent ambiguity. This position effectively endorses the 1918 views of Lords Atkinson and Shaw, who prevailed then as the majority over Lord Wrenbury in *Great Western Railway and Midland Railway v Bristol Corporation* (1918) 87 LJ Ch 414.

McLure P in *Hancock v Wright* continued:

- [77] The word 'ambiguous', when juxtaposed by Mason J with the expression 'or susceptible of more than one meaning', means any situation in which the scope or applicability of a contract is doubtful: *Bowtell v Goldsbrough, Mort & Co Ltd* (1905) 3 CLR 444, 456 - 457. Ambiguity is not confined to lexical, grammatical or syntactical ambiguity.
- [78] Moreover, the extent to which admissible evidence of surrounding circumstances can influence the interpretation of a contract depends, in the final analysis, on how far the language of the contract is legitimately capable of stretching. Generally, the language can never be construed as having a meaning it cannot reasonably bear. There are exceptions (absurdity or a special meaning as the result of trade, custom or usage) that are of no relevance in this context.
- [79] Further, on my reading of *Codelfa*, pre-contractual surrounding circumstances are admissible for the purpose of determining whether a term is implied in fact. That may be because the stringent test for the implication of a term in fact excludes any possibility of an implied term contradicting the express terms.

In implementing of the 'true rule' at [82] in *Hancock v Wright*, as seen under the heading 'The Proper Construction Of The 1984 Agreement', McLure P then said:

The intention and purpose of the 1984 Agreement is unambiguously clear. If evidence of surrounding circumstances is admissible, **it confirms** what is evident from the text.

(my emphasis in bold)

Confirmation of meaning by evidence of surrounding circumstances applied to text which is 'unambiguously clear', is an interesting approach. It is reflective of something of a fall-back approach, akin to using parliamentary extrinsic materials to confirm a 'statutory interpretation'. This is useful perhaps in the event that others take a polar view that the text is not 'unambiguously clear'. It reflects a certain pragmatism in implementing the contractual rule of background fact admissibility, and is harmonious with observations in an earlier decision of the Western Australian Court of Appeal: *McCourt v Cranston* [20120] WASCA 60 [13] - [26] (Pullin JA).

I mention, as well, Beech J's observations in *Vincent Nominees Pty Ltd v Western Australian Planning Commission* [2012] WASC 28 [54], referring again to the broad concept of ambiguity. Those observations as to the breadth of the gateway were then referred to with approval by Edelman J in *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2013] WASC 194 [127]. Edelman J said, having concluded the relevant clause 8.1 in that case was, indeed, ambiguous, or susceptible of more than one interpretation:

... it has been held on a number of occasions that the concept of ambiguity may involve a situation 'whenever the [manifested] intention of the parties is, for whatever reason, doubtful'.

(See his Honour's citation of authority in *Mineralogy* at footnote 49).

The formulation as to the meaning of ambiguity, arising out of a doubtful manifested intention, accords with even more recent observations by McLure P in *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66. There her Honour, as regards the ambiguity threshold, at [108] said:

All of the issues of contractual construction that figure prominently in this case stem from ambiguity in the contractual text for *Codelfa* purposes, if ambiguity means any situation in which the scope or applicability of a contract is, for whatever reason, doubtful. See *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2012] WASCA 216.

Her Honour also referred back to her observations in *Hancock Prospecting* to which I have referred concerning ambiguity at [77], invoking the 1905 observations of O'Connor J in the very early High Court decision of *Bowtell v Goldsborough, Mort & Co* (1906) 3 CLR 444 and also her own statement in *Hancock* that ambiguity is not confined to lexical, grammatical or syntactical ambiguity.

The breadth in scope of the 'true rule' in its implementation is augmented by the 'true rule's' second limb of textual susceptibility to 'more than one meaning'.

In practice this all looks to deliver a rather expansive gateway to a reception of surrounding factual circumstances known at the time of contracting. However, it is important to remember that there arises a point beyond which the text's meaning cannot be stretched, no matter how much background evidence is raised. At that point the interpretation exercise effectively ends - what follows resembles, in reality, an exercise in rectification, rather than interpretation. This conceptual distinction between interpretation and rectification needs to be both remembered and honoured.

10 An aside: The admissibility of drafts and of other agreements mentioned in the text being interpreted

There arises a discretely interesting conceptual issue concerning the admissibility of prior drafts of subsequently executed agreements or deeds, assuming the 'true rule' threshold has been met. Clearly, to the extent the exchanged draft carried in it evidence of a relevant mutually known surrounding fact or circumstance, then the admissibility of the fact can follow. But that is not the draft itself. What is admissible is the mutually known fact or circumstance at the time of the parties contracting.

To that end, see Sir Anthony's observations in *Codelfa* at CLR 352.

In a recent decision of the Victorian Court of Appeal: *Pepe v Platypus Asset Management Pty Ltd* [2013] VSCA 38 (delivered 5 March 2013), a majority of justices, Neave JA and Hollingworth AJA, observed at [23] that there was no dispute in that appeal that the court was entitled to 'have regard to any changes made to the language of the clauses during the drafting process'. That approach appears wider than that usually followed in Western Australia. In contrast, see the more orthodox recent observations as to the use of exchanged drafts by Beech J in *Red Hill Iron Ltd v API Management Pty Ltd* [126]:

Red Hill relies on the statement in Lewison & Hughes that in *Royal Botanic Gardens and Domain Trust* [26] - [30], the High Court had regard to the various drafts of a deed that passed between the parties in

order to construe the concluded deed of lease. In my respectful view, the matters to which the court had regard in *Royal Botanic Gardens and Domain Trust* [26] - [30] are not properly characterised as mere drafts. The instrument to be construed was a deed of lease entered into in 1976, and expressed to take effect from 1958. The negotiations prior to the execution of the instrument in 1976 had resulted in an agreement under which rent was paid at £1,000 per annum. That agreement was, as the court observed in *Royal Botanic Gardens and Domain Trust* [27], within the second category in *Masters v Cameron* [1954] HCA 72; (1954) 91 CLR 353, 360. The court had regard to that agreement in construing the deed of lease.

As part of the process of construing the full text of the whole document it is permissible to refer to instruments which have been internally mentioned within the text of the instrument under construction. As to that, see McLure P's observations in *Hancock Prospecting Pty Ltd v Wright Prospecting* [2012] WASCA 216 at [81]. Her Honour observed:

The 1984 Agreement is part of an inter-connected series of agreements which must be construed as a whole. They cannot, in my view, fall within Mason J's 'true rule' in *Codelfa*. That is consistent with the approach to contractual construction taken by the High Court in *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570 [32] - [36], [38].

(As regards descriptive terms, see also *Government Employees Superannuation Board v Martin* (1997 - 98) 19 WAR 224, 236B - D, per Ipp J.)

11 Where does this leave Australian commercial courts in their daily task of interpreting the words in written contracts?

First, in 2011 three members (Gummow & Heydon JJ, now being former members) of the High Court in *Western Export Services v Jireh* issued a strong rebuke to anyone other than the High Court sounding the death knell of the prerequisite requirement for ambiguity to be shown before evidence of surrounding circumstances may be admitted. Mason J's 1982 *Codelfa* formulation of a 'true rule' as to admissibility of surrounding circumstances

evidence was strongly reaffirmed by the special leave panel, at least for the present, for Australia.

Second, it looks doubtful Australia will move to adopt the open-ended background fact admissibility position, akin to that sanctioned in the United Kingdom where 'absolutely everything' is allowed in. A liberal approach to interpretation began with Lord Wilberforce (or much earlier, as he would have seen it) and now stretches to the 'absolutely anything' approach of Lord Hoffmann, essentially making the role of 'context' indispensable in any construction exercise.

Third, in Western Australia there was some helpful day-to-day guidance provided by the decision of the Court of Appeal in *McCourt v Cranston* [2012] WASCA 60. Pullin JA there observed as a matter of good trial practice at [25] - [26], that:

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

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

Obviously, untenable arguments advocating 'dodgy' evidence of surrounding circumstances, such as the subjective opinions of the parties or passing negotiation remarks, will not satisfy the criterion of being 'relevant'

surrounding circumstance evidence (see *McCourt* at [24]). I followed that cautionary approach of *McCourt* in *Perth Airport Pty Ltd v Ridgepoint Corp Pty Ltd* [2013] WASC 33, although in the end I assessed the text of the provision under construction, in context, as unambiguous.

As things stand, the application of the 'true rule', as I see it, will not allow in evidence of surrounding circumstances - even if they concern the object or aim (ie, 'genesis', to use Lord Wilberforce's terminology) of the transaction - until the threshold of ambiguity, or more than one meaning arising from the text, is first surmounted. In practice, however, this may not be that hard.

12 Is the battle over?

In *Schwartz v Habid* [2013] NSWCA 89, delivered 3 May 2013, a New South Wales Court of Appeal, Macfarlane JA and Meagher JA, at [37] and [85] respectively, left open the effects of what was said in *Western Export Services v Jireh* as special leave was refused, upon the ongoing authority of the New South Wales Court of Appeal decision in *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407; 76 NSWLR 603. What *Jireh* said about that decision was express. But there is some doubt about whether what was said in *Jireh* on a failed special leave application is any sort of binding judicial precedent. Strictly speaking, the High Court's jurisdiction is not engaged until an appeal is begun.

It appears that at some point a final battle will be waged over this issue in the High Court. For the present, Australia, as I see it, follows a conceptually narrower approach to the admissibility of surrounding circumstance evidence (although as a matter of pragmatism this is debatable by reason of the width in implementation of the 'gateway' itself) than Lord Hoffmann's approach to interpretation in the United Kingdom. See also the Court of Appeal's observations in *BGC Residential Pty Ltd v Fairwater Pty Ltd* [2012] WASCA 268, applying *McCourt v Cranston*, and thereby excluding the evidence of

negotiations between individuals representing companies at trial on the basis all that negotiation evidence was 'irrelevant'.

13 Some Conclusions

As a trial judge running a busy commercial list which includes many contractual interpretation cases, I have to say that I sometimes detect a rather clear-felling approach by advisers who, in embarking on pre-trial discovery quests, seek supposedly helpful documents relating to surrounding circumstances. These pre-trial quests are usually pursued on the basis that a hopeful rummage through every employee's corporate email box, or in metadata repositories, may possibly bring to light a document revealing a mutually known circumstance prior to contracting that may, somehow, howsoever slightly, advance the construction argument they are seeking to run over the disputed meaning of words in a document.

Frequently that interlocutory searcher, like Christopher Columbus, seems not to know what they hope to find, how they will get there, or indeed what they have found when they find it. But a trawling exercise, however long, costly or burdensome, must, it is put, always be undertaken. At the end of the day, someone is paying for all this and a real question arises as to whether such expense is warranted.

After the dust of a search has settled in the wake of these expensive quests there is, I humbly suggest, an essential need for the party who wants to argue there is a significant mutually known surrounding fact(s) or circumstance(s) that existed at the time of contracting, to do at least two things. First, it should explicitly plead out the fact to openly identify it. It needs to do this so the opposition can be both:

- (i) apprised of what that alleged fact or circumstance is before trial; and
- (ii) have a fair opportunity to indicate whether or not it accepts the existence of the fact or circumstance.

Identification can avoid diverting excursions into side issues over facts which, at the end of the day, may either be uncontested or even accepted.

The second requirement is for the party advancing a supposedly relevant surrounding fact or circumstance, having identified it, to then go on to clearly explain at some point in the trial process how and why the fact or circumstance assists in advancing its construction position.

In my experience, the second requirement, which I call the 'causative impact' of the supposedly helpful surrounding fact or circumstance, is usually either globally glossed over, or just ignored. A typical glossing scenario as to causative impact is like an overflowing potpourri of multiple diverse alleged surrounding facts and circumstances. These are then addressed in a closing submission delivered in a style akin to the advocacy of shabby solicitor Dennis Denuto during his desperate, now infamous invocation of 'the Vibe' in the movie 'The Castle'.

Each different surrounding fact may indeed carry some unique causative impact in the interpolation process that should be explained. But I would humbly both suggest and request that the causative impact of each background fact relied on be clearly spelled out.