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# SURROUNDING CIRCUMSTANCES EVIDENCE: CONSTRUING CONTRACTS AND SUBMISSIONS ABOUT PROPER CONSTRUCTION: THE RETURN OF THE JEDI (sic) JUDII

**By the Hon Justice Kenneth Martin**

Invoking a Star Wars unfolding saga theme, this episode's point of departure assumes a preceding familiarity with what feels like an almost timeless galactic story about contractual interpretation, ambiguity and the 1982 'true rule' stated in ***Codelfa Construction Pty Ltd v State Rail Authority (NSW)*** (1982) 149 CLR 337 at 352, then forcefully declared by three members of a High Court coram, on a refused special leave application, in October 2011: see ***Western Export Services Inc v Jireh International Pty Ltd*** [2011] HCA 45; (2011) 282 ALR 604; (2011) 86 ALJR 1.

A 'block buster' first instalment was related in my 2013 article published in the Australian Bar Review entitled 'Contractual Construction: Surrounding Circumstances and the Ambiguity Gateway' (2013) 37 Australian Bar Review 118. See also Lingren K, 'The Ambiguity of Ambiguity in the Construction of Contracts' (2014) 37 Australian Bar Review 153.

For those needing a quick refresher, by the ***Jireh*** reasons Gummow, Heydon and Bell JJ, whilst dismissing that application for special leave, admonished the Courts of Appeal of New South Wales and Victoria - for taking it upon themselves to presume that the 'true rule' of contractual construction as articulated by Sir Anthony Mason in ***Codelfa*** at 352, had been abrogated in Australia.

By 2011 most intermediate Australian appellate courts had assumed (but not in Western Australia), by reference to a series of construction contract appeal decisions by the High Court that had **not** mentioned any need to satisfy the 'true rule', that it was no longer necessary to demonstrate ambiguity in the text being interpreted - to provide a basis to admit evidence of surrounding circumstances at trial, to assist the interpretation of the contractual text.

Unusually for a refused special leave application, the three ***Jireh*** coram members provided published written reasons. It will be recalled they said [3] - [5]:

> 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.
>
> 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*** and it should not have been necessary to reiterate the point here.
>
> We do not read anything said in this court in ***Pacific Carriers Ltd v BNP Paribas***, ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd***, ***Wilkie v Gordian Runoff Ltd*** and ***International Air Transport Association v Ansett Australia Holdings Ltd*** as operating inconsistently with what was said by Mason J in the passage in ***Codelfa*** to which we have referred.

At the time, those observations came as something of a surprise, particularly to the intermediate courts which had decided ***Franklins Pty Ltd v Metcash Trading Ltd*** (2009) 76 NSWLR 603 (Allsop P, Giles and Campbell JJA) and ***MBF Investments Pty Ltd v Nolan*** [2011] VSCA 114 [195] - [204] (Neave, Redlich and Weinberg JJA).

## 2012: Western Australia: Post *Jireh*

Post ***Jireh***, McLure P comprehensively addressed the issue of the admissibility of surrounding circumstances evidence in aid of contractual

construction in ***Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd*** [2012] WASCA 216 [76] - [79]. She then said:

> 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.

In other words, absent a level of identifiable ambiguity first being shown in contractual text, evidence of surrounding circumstances ought not be admissible in order to show up the presence of a latent ambiguity: and see Edelman J's observations in ***Netglory Pty Ltd v Caratti*** [2013] WASC 364 [216].

At to what showing ambiguity (or more than one meaning) actually entails, the President addressed the issue in ***Hancock v Wright***:

> 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 of applicability of a contract is doubtful: ***Bowtell v Goldsborough, Mort & Co Ltd***. Ambiguity is not confined to lexical, grammatical or syntactical ambiguity.
>
> 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.
>
> 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.

Applying that interpretive approach to the presenting issues in ***Hancock v Wright***, McLure P at [82] then assessed the (1984) agreement under interpretation this way:

> 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.

The President returned to the topic in 2013, in ***Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd*** [2013] WASCA 66 at [107].

Concerning the 'true rule' and a need to surmount an ambiguity threshold, she said at [108]:

> 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 also the careful observations of the Victorian Court of Appeal (Warren CJ, Harper JA and Robson AJA) in ***Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria Street Doncaster Pty Ltd*** [2012] VSCA 134; (2012) 37 VR 486, 512 - 518, [84] - [96].

## A low threshold anyway

From the aforegoing it may be seen from a pragmatic sense that imposing a threshold of first showing some level of ambiguity (or more than one meaning) as a 'gateway' to admit surrounding circumstance evidence in the interpretation process, by the meaning of text presenting as being 'doubtful' - could hardly be described as setting down some onerously high bar to the reception of such evidence - where the evidence might assist in the construction process.

Even so, the intellectual challenge of grappling with a need for a 'true rule' is curially alluring to most.

## March 2014: *EGC v Woodside: Return of the Judii*

What has proven to be a new phase in the ***Codelfa*** saga arrived with little fanfare in early 2014, as five judges of the High Court (French CJ, Hayne, Crennan and Kiefel JJ, Gageler J dissenting) delivered reasons on an appeal from the West Australian Court of Appeal, ***Electricity Generation Corporation v Woodside Energy Ltd*** [2014] HCA 7; (2014) 251 CLR 640 ('***EGC***'). [It may

be seen that Western Australia has made a significant litigation platform contribution to this debate!]

In ***EGC*** four of the five justices reversed the WA Court of Appeal's unanimous interpretation of a supply clause in a take or pay gas contract.

The proper interpretation of cl 3.3(a) in that contract was at issue in ***EGC***. It had provided that those Sellers of gas 'must use **reasonable endeavours**' to make available additional quantities of gas (referred to as 'supplemental maximum daily quantity' or 'SMDQ').

The appeal is fascinating in its own rite for the divergence in interpretive approaches - as between the plurality, in contrast to that of Gageler J (and the WA Court of Appeal) over the question of the meaning of 'reasonable endeavours' used in a commercial context - arising out of the notorious (in this State) Varanus Island gas plant explosion of 3 June 2008, that led to widespread gas constraints in the State for some months after - followed, coincidentally, of course, by the October 2008 Global Financial Crisis.

But as regards the 'true rule' of construction, any significance in the plurality's observations in ***EGC*** arises out of phrases and footnotes, found largely in one or two sentences (perhaps unrecognised at the time) - all within the one paragraph [35] of the ***EGC*** reasons, under the heading: 'The Construction Issue'.

More precisely, two key phrases used by the plurality within the fourth line of par [35] in ***EGC*** look to have reignited a post ***Jireh*** debate over the 'true rule' and led eventually to a divide - as between Australian courts, over whether [35] of the ***EGC*** decision has delivered the result of actually ending the applicability of the true rule of construction in Australia or not?

In particular, the phrases 'as reaffirmed' and 'will require consideration', as used in [35] seem to have led to a strong divergence of views - with Western Australia, Victoria and Queensland remaining on the status quo side of the

debate, but New South Wales and the Full Federal Court, seemingly aligned against that position.

It is necessary to set out [35] from ***EGC***, noting but omitting for the moment footnotes 58 - 63, which appear at pages 656 - 657 of the (authorised) CLR report.

Paragraph [35] in ***EGC*** under the heading 'The construction issue' [35] said:

> Both Verve and the Sellers recognised that this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean [58]. That approach is not unfamiliar [59]. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract [60]. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating' [61]. As Arden LJ observed in ***Re Golden Key Ltd*** [62], unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties … intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience' [63].

There appears to have been no debate at all, either before the Court of Appeal of Western Australia or, for that matter, to the High Court at the ***EGC v Woodside*** appeal, over the applicability of Sir Anthony Mason's formulation of the 'true rule' in ***Codelfa***, or even about the published remarks in ***Western Export Services v Jireh*** made by the three members of the court (two of whom had since retired and Bell J not sitting on the ***EGC*** appeal). Some surrounding circumstances evidence appears to have been used, uncontroversially, in the overall interpretation exercise: see ***EGC*** par [48].

Bearing all that in mind, paragraph [35] (and its footnote 60) look, given 'the force' of what was said in ***Jireh***, to be a rather odd place to find what would

be the resolution to a long-standing Australian controversy, to be finally quelled by ***EGC v Woodside***.

But having said that, the underlying implied term or frustration of contract factual context that presented in ***Codelfa*** back in 1982 might also be thought as being a somewhat unorthodox place to find a 'true rule' of contractual construction articulated. It is necessary to look closely at par [35] of ***EGC*** line by line in the quest for enlightenment as to the fate of the 'true rule'.

### *EGC* par [35]: First sentence

I humbly submit that there is nothing much new or controversial about common law courts applying an objective approach to the process of the generic interpretation of contracts generally. The parties in the ***EGC*** appeal had certainly proceeded uncontroversially from that base.

What is slightly interesting about the first sentence, however, is the first use in [35] of the word 'reaffirmed'. What might otherwise pass unnoticed is that the word 'reaffirmed' is then used again in this key paragraph subsequently, at towards the beginning of the fourth sentence in [35]. 'Reaffirmed' therefore presents rather as the chosen word of that day.

I also note that the word 'reaffirmed' was used by the plurality at par [40] of ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165.

### *EGC* par [35]: Second sentence

Now entering the narrower terrain of the approach to ascertaining the meaning as regards 'commercial contracts', I suggest that there again presents nothing much here controversial about what is to be seen under the second sentence - by reference to applying the template of the understanding of a 'reasonable businessperson'. That gender neutral hypothecation is the very

manifestation of using an objective, rather than a subjective approach to contractual interpretation.

It is slightly interesting, however, as regards the Australian decisions collected at footnote 58, that High Court decisions, ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451and ***IATA v Ansett Australia Holdings*** [2008] HCA 35; (2008) 233 CLR 279, had been identified in ***Jireh*** as two of the four High Court decisions which it had been said by the ***Jireh*** coram to have displayed nothing inconsistent 'read' in them, standing against Sir Anthony Mason's articulation of the true rule in ***Codelfa***.

But, of course, it is not what had been written in those pre ***Jireh*** High Court appeals, about ambiguity, which was significant at the time. Rather, it was their complete omission to say anything at all about a 'true rule', the need to show any level of ambiguity in the text, or to satisfy a pre-requisite requirement to admit surrounding circumstances evidence. The silence about these matters in a series of High Court appeals over more than a decade had been negatively influential, pre ***Jireh***.

***EGC*** footnote 58's reference to an undoubtedly expansionary line of UK authority as promoted by Lord Hoffman provides more fertile ground for a rebellion : see ***Investors Compensation Scheme Ltd v West Bromwich Building Society [No 1]*** [1998] 1 WLR 896, 912. That 912 footnote reference may be explicable, however, on the basis that the very passage had earlier been approved pre ***Jireh*** by Gleeson CJ, Gummow and Hayne JJ in ***Maggbury Pty Ltd v Hafele Australia Pty Ltd*** (2001) 210 CLR 181, 188 [11] in referring to the first of Lord Hoffmann's five principles. The first principle does not mention any need to lay a foundation of ambiguity in the text. But it is Lord Hoffmann's second principle, referring to the admission of 'absolutely anything' affecting the understanding of the language used by the parties which has generated most controversy.

Footnote 58's reference to Lord Bingham of Cornhill's observations in ***Homburgh Houtimport BV v Agrosin Pte Ltd (The Starsin)*** [2004] 1 AC 715, 737 [10] is, upon examination, a confined reference to one paragraph ([10]) from that decision, explaining that 'a business sense will be given to business documents' (recalled as classically articulated by Lord Halsbury LC in ***Glynn v Margetson & Co*** [1893] AC 351 at 359).

Hence, it may be seen then that the first two sentences of par [35] in ***EGC***, on analysis, could be assessed as relatively orthodox in their content, to that point.

### *EGC* par [35]: Third sentence

This short sentence reads:

> That approach is not unfamiliar.

and then ending with footnote 59.

The 'approach' identified at this line is directed back in support of the well settled objective approach to the interpretation of commercial contracts - by reference to the position of a reasonable businessperson understanding the terms used.

Slightly curious, only perhaps to a grammatical pedant, is the plurality's use of a double negative 'not unfamiliar', rather than stating that the approach was 'familiar'.

Footnote 59 then proceeds to mention a 1895 UK Court of Appeal case authority, advocating a 'businesslike way' and a 'sensible' interpretation approach, ***Hydarnes Steamship Co v Indemnity Mutual Marine Assurance Co*** [1895] 1 QB 500, 504 (Lord Esher MR). Also noted is a 1920 decision of the High Court ***Bergl (Australia) Ltd v Moxon Lighterage Co Ltd*** (1920) 28 CLR 194, 199 (per Knox CJ, Isaacs and Gavan Duffy JJ). These footnoted cases again present on analysis as entirely orthodox in their invocation.

On the other hand, footnote 59 displays a further and more general reference to Lord Bingham's 2008 article published in the Edinburgh Law Review (2008, vol 12, 374). The article presents as a very articulate rationalisation and defence of the expansionary contractual materials interpretation approach of Lord Hoffmann from ***Investors Corporation Scheme Ltd v West Bromwich Building Society***, and his so-called 'fundamental change' to interpretation explained there.

Things get very interesting in ***EGC*** from this point.

### *EGC* par [35]: Fourth sentence

The fourth sentence and its supposedly mandatory command has emerged as the most critical in the overall critical analysis since applied to [35]. It must be read, of course, with its concluding addition of footnote 60.

Here I note at the outset a second use (in par [35]) of the word 'reaffirmed'. Presumably, this is in context the intended affirmation of the earlier decisions of the High Court, now to be mentioned in footnote 60. Footnote 60 displays references again to ***Pacific Carriers v BNP Paribas*** at [22], ***Toll v Alphapharm*** per the plurality at [40], ***IATA v Ansett***, per Gleeson CJ at [8] and the other members of the court at [53] and to ***Byrnes v Kendle*** [2011] HCA 26; (2011) 243 CLR 253 per Heydon and Crennan at [98].

Bearing in mind the antecedent history of the 2011 ***Jireh*** observations, yet again it seems to be that beyond what is actually said, it is what this fourth sentence of ***EGC*** does **not** say that has since been viewed as potentially significant to the ***Codelfa*** 'true rule' issue - namely, it was **not** said here to be necessary, in order to have recourse to surrounding circumstances evidence known (then) to the parties, to first demonstrate some doubtfulness in the text, to thereby satisfy a ***Codelfa*** 'true rule' of contractual construction.

Elsewhere within what is written in this fourth sentence in par [35] it can be observed there is nothing much otherwise that is controversial about

requiring a consideration of the language, ie, the contractual text used by the parties. Indeed, it would be bizarre were the language of a written agreement not to be at the forefront of the whole exercise.

Nor is there anything novel or controversial about considering the 'commercial purpose' or 'objects' secured by the contract, being considered - after they have been objectively identified.

Hence, beyond the omission to mention the 'true rule', it is only really the two phrases in this sentence before mentioning 'the surrounding circumstances known to them', in the context of the preceding words '**it will require**' and by reference to this principle being '**reaffirmed**', that provides the express flashpoints for what has arisen later.

But on closer examination, two English authorities mentioned under footnote 60, namely ***Charter Reinsurance Co Ltd v Fagan*** [1997] AC 313, per Mance J at 326 and 350 (citing Sir Thomas Bingham MR, Steyn LJ and Hoffmann LJ as they were then, from an unreported 1993 Court of Appeal decision, ***Arbuthnott v Fagan*** (30 July 1993) and ***Rainy Sky SA v Kookmin Bank*** [2011] 1 WLR 2900 [14]; (2012) 1 All ER 1137 at 1444, would present as difficult, particularly ***Fagan***, to reconcile with a continued application in Australia of the 'true rule'.

### *EGC* par [35]: Fifth sentence

This sentence makes only an entirely orthodox reference to a need for an appreciation of the commercial purpose or objects - in entirely unremarkable fashion.

Likewise, following references to taking account of the genesis of the transaction, background, context and the market in which the parties are operating, are hardly novel. They actually echo the language and approved analysis of Sir Anthony Mason in ***Codelfa***, following remarks of Lord Wilberforce in UK or Privy Council decisions. Interestingly, footnote 61 at the

end of this sentence expressly refers to ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales***, but only to the reasons of Sir Anthony at page 350, not the 'true rule' passages at page 352 - see at page 350 the reference to Sir Anthony's internal invocation of Lord Wilberforce's observations from ***Reardon Smith Line Ltd v Yngvar Hansen-Tangen*** [1976] 1 WLR 989, 995 - 996. So ***Codelfa*** was certainly not overlooked in the overall par [35] ***EGC*** remarks.

### *EGC* par [35]: Sixth sentence

The sixth sentence concludes with a quote taken from Lady Justice Arden's observations in ***Re Golden Key Ltd*** [2009] EWCA 636 at [28]. She observed the task of a court interpreting a commercial contract on the basis of a businesslike interpretation was appropriate, unless a contrary intention was indicated. This was because of an assumption that 'the parties … intended to produce a commercial result'. None of that presents as at all novel.

### *EGC* par [35]: Seventh sentence

The concluding sentence to paragraph [35] ends by its reference in footnote 63 with an observation that 'a commercial contract is to be construed so as to avoid "making commercial nonsense or working commercial inconvenience"'. Footnote 63 nominates in support of that proposition the High Court's earlier decisions in ***Zhu v Treasurer of New South Wales*** (2004) 218 CLR 530 by the plurality at [82] and to an earlier decision of the High Court in 1983, ***Gollin & Co Ltd v Karenlee Nominees Pty Ltd*** [1983] HCA 38; (1983) 153 CLR 455, 464.

Again, those footnoted references, upon review, present as entirely orthodox.

**Conclusion: *EGC* par [35]: Overall perspective**

So it is that a line by line examination of [35], in a context where the High Court was assessing the proper meaning of words used in a commercial context, but where there was no dispute as between the protagonists at any curial level over the applicability of the 'true rule', that four judges of the High Court are said to have settled, effectively, in one sentence, a longstanding 'true rule' of construction controversy for Australia.

## 6 June 2014: *Mainteck v Stein Heutey SA:* NSW Court of Appeal: 'D' Day for the True Rule?

It is next necessary to examine ground breaking 2014 observations in the New South Wales Court of Appeal in ***Mainteck Services Pty Ltd v Stein Heurtey SA*** [2014] NSWCA 184; (2014) 310 ALR 113, coincidentally delivered exactly 70 years after the 1944 ground breaking landings by the Allies on the shores of Normandy.

Leeming JA delivered the lead reasons of the New South Wales Court of Appeal, with Ward JA concurring and Emmett JA providing some brief additional reasons in support.

[I have been told informally, regarding ***Mainteck***, that an application for special leave to appeal had been lodged with the High Court - but has not yet been heard or determined. I have not been able to verify that information.]

In ***Caratti Holdings Co Pty Ltd v Coventry Group Ltd*** [2014] WASC 403 (delivered 31 October 2014) I noted at [54] the following key observations by Leeming JA in ***Mainteck***, particularly paragraphs [71] and [86]. I said in ***Caratti***:

> 54 There was no disagreement at the trial between the parties over the applicable principles of contractual construction. I was referred by counsel for Caratti, Mr Ryan SC, to Leeming JA's recent observations in ***Mainteck Services Pty Ltd v Stein Heurtey SA*** [2014] NSWCA 184; (2014) 310 ALR 113. I note the remarks especially at [71] and [86] by his Honour:

[71] To the extent that what was said in ***Jireh*** supports a proposition that 'ambiguity' can be evaluated without regard to surrounding circumstances and commercial purpose or objects, it is clear that it is inconsistent with what was said in ***Woodside*** at [35]. The judgment confirms that not only will the language used 'require consideration' but so too will the surrounding circumstances and the commercial purpose or objects. Although the High Court in ***Woodside*** did not expressly identify a divergence of approach, ***Jireh*** was notoriously controversial in precisely this respect. In ***Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd*** (2013) 298 ALR 666; [2013] WASCA 66 at [107] McLure P referred to the 'heated controversy' created by ***Jireh***; see further Kevin Lindgren's analysis in 'The ambiguity of "ambiguity" in the construction of contracts' (2014) 38 *Aust Bar Rev* 153, pp 161–7. It cannot be that the **mandatory words 'will require consideration'** used by four Justices of the High Court were chosen lightly, or should be 'understood as being some incautious or inaccurate use of language': compare ***Fejo v Northern Territory*** (1998) 195 CLR 96; 156 ALR 721; [1998] HCA 58 at [45]. (my emphasis in bold)

…

[86] Accordingly, I agree with Mainteck's submission that ***Woodside*** endorses and requires a contextual approach to the construction of commercial contracts. However, that falls far short from yielding success for Mainteck. First, it is quite plain that whatever view be taken of 'ambiguity' and 'susceptible of more than one meaning', Art II.1 of the second consortial agreement answered that description. Both parties were agreed that 'technical specification' did *not* mean the technical specification in the main contract. On any view of the matter, a contextual approach is required. Although the primary judge referred to ***Jireh***, it is quite plain that his Honour applied a contextual approach. Indeed, his Honour expressly identified 'the error on the part of the referee in my opinion is that he did not pay sufficient or indeed any regard to the purpose and object of the transaction against the background of the knowledge of the parties': at [119]. That approach is unexceptionable, as is his Honour's criticism at [120] of the referee's 'overly literal construction of Art II.1'. Finally, nothing in ***Woodside*** or any other decision entitles Mainteck to success based on the scope meetings; this is addressed in more detail in section (h) below, after dealing

> with other aspects of the construction of the second consortial agreement.

As observed, the New South Wales Court of Appeal's reasons for decision in ***Mainteck*** were delivered on 6 June 2014. Curial 'chatter' over the fate of the 'true rule' intensified dramatically from that date.

## 2 September 2014: *Stratton Finance v Webb*

At [55] of the reasons for decision I delivered in ***Caratti v Coventry***, I mention a Full Federal Court of Australia decision, ***Stratton Finance Pty Ltd v Webb*** [2014] FCAFC 110 at [40]. Three members of the Federal Court took the opportunity in that appeal concerning an industrial agreement's meaning to expressly agree with what had been said by Leeming JA in ***Mainteck***.

Allsop CJ, Siopis and Flick JJ said in ***Stratton***:

> Recently, in ***Mainteck Services Pty Ltd v Stein Heurtey SA*** [2014] NSWCA 183, the New South Wales Court of Appeal (Leeming JA, with whom Ward JA and Emmett JA agreed) expressed the view (at [71]) that [35] of ***Woodside*** was inconsistent with ***Jireh***. We agree with that conclusion, and with the reasons in elaboration at [72] - [86], and in particular with the comments concerning ***Codelfa*** at [78] - [80].

## 3 September 2014: Western Australian Court of Appeal: *Technomin v Xstrata*

One day after the ***Stratton*** reasons were published, the West Australian Court of Appeal (McLure P, Newnes and Murphy JJA) delivered its reasons in ***Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd*** [2014] WASCA 164, unanimously dismissing that appeal.

In ***Technomin***, some surrounding circumstances evidence had been admitted by the primary judge, to advance an understanding of the disputed meaning of the undoubtedly ambiguous word 'tenements', used in a royalty agreement. The appeal was dismissed.

Concerning the 'true rule' issue, McLure P's reasons are found at between [35] and [44]. She said:

However, in dismissing the special leave application in ***Western Export Services Inc v Jireh International Pty Ltd*** (2011) 282 ALR 604, three members of the High Court (Gummow, Heydon & Bell JJ) said that conclusion was inconsistent with binding authority. After referring to what was said by Mason J in ***Codelfa*** to be the 'true rule' as to the admission of evidence of surrounding circumstances, Gummow, Heydon and Bell JJ said:

> 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 http://www.austlii.edu.au/au/cases/cth/HCA/2011/45.html and it should not have been necessary to reiterate the point here [4].

The passage in ***Codelfa*** to which reference is made in ***Western Export Services*** is as follows:

> 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 (352).

This court has taken the view that the guidance in ***Western Export Services*** should be followed until further direction from the High Court: ***McCourt v Cranston*** [2012] WASCA 60; ***MacKinlay v Derry Dew Pty Ltd*** [2014] WASCA 24; ***Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd*** (2012) 45 WAR 29.

The controversy has raised its head again. The appellant contends that the 'true rule' in ***Codelfa*** is the law and, as the meaning of the language of the GPR Deed is unambiguously clear, evidence of surrounding circumstances is (subject to limited exceptions) inadmissible for construction purposes.

The respondents contend that the recent High Court decision in ***Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd*** [2014] HCA 7 (***EGC***), has vindicated the pre-***Western Export Services*** position adopted by those intermediate appellate courts that had abandoned the gateway requirement that the language of a contract had to be ambiguous or susceptible of more than one meaning before regard could be had to evidence of surrounding circumstances to assist in the construction of a contract. The construction issue was not raised by the ***EGC*** parties in this court.

Gummow and Heydon JJ had retired before the hearing of ***EGC*** and Bell J did not sit. ***Western Export Services*** and the response of intermediate appellate courts thereto were not directly addressed by the High Court in ***EGC***. However, the respondent points to the approach taken in the majority judgment.

> There can be no doubt that the majority in ***EGC*** took into account surrounding circumstances known to both parties in the construction of the gas supply agreement: [35], [48]. However, there is no express consideration by the majority of whether, or finding that, the language of the gas supply agreement was ambiguous or susceptible of more than one meaning.
>
> The respondent also drew this court's attention to the reliance by the majority in ***EGC*** on [14] of the English decision in ***Rainy Sky SA v Kookmin Bank*** [2011] 1 WLR 2900, 2906 - 2907. That paragraph cites with approval Lord Hoffman's first principle in ***Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)*** [1998] 1 WLR 896 which is in terms that:
>
> > 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 (912).
>
> Lord Hoffman's first principle is not consistent with the gateway requirement in Mason J's 'true rule' in ***Codelfa***.
>
> However, the appellant contends that the High Court would not impliedly repudiate the express repudiation in ***Western Export Services*** of the abandonment of the gateway requirement by some intermediate appellate courts.

At [45], the President concluded:

> The aridity of this debate at the intermediate appellate court level is manifest. Until the High Court expressly states its position on the subject, I propose to continue to apply the true rule as I explained in ***Hancock Prospecting*** at [9] and [74] - [81]. In that case the court concluded that the true rule permits regard to be had to some surrounding circumstances for construction purposes without having to satisfy the gateway requirement.

For clarity sake, what the President had earlier written at [81] in ***Hancock Prospecting*** was:

> However, in construing the 1984 agreement it is essential, even in the absence of ambiguity, to have regard to the provisions of the prior agreements expressly or impliedly referred to in the 1984 agreement. That includes the 1983 agreement and the Rhodes Ridge Joint Venture and State Agreements forming part of the partnership property listed in the Schedules. 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 ***Gardiner*** …

referring to ***Agricultural and Rural Finance Pty Ltd v Gardiner*** [2008] HCA 57; (2008) 238 CLR 570 [32] - [36] and [38]. I have already mentioned earlier her Honour's observations in ***Hancock v Wright*** as to practical limitations flowing from applying the ***Codelfa*** true rule.

Her Honour also said in the ***Technomin*** appeal at [48]:

> Moreover, the gateway requirement can have no application to background facts forming part of the factual matrix that enlivens the issue of contractual construction for determination. I would put the history and location of the Xstrata tenements in that category.

In ***Technomin***, Newnes JA agreed with McLure P [143].

Murphy JA reached the same construction conclusions in the appeal. But given extensive arguments made over the true rule in ***Technomin*** (see [170]) his Honour delivered reasons that comprehensively analysed prior Australian and English case authority in the overall arena of contractual construction, including most of the cases mentioned in the ***EGC*** par [35] footnotes.

His Honour's reasons in ***Technomin*** present, with respect, as a scholarly and comprehensive analysis of contractual construction principles, not just upon this surrounding circumstances evidence topic, but as to the history of the parol evidence rule, bearing upon contractual construction principles generally.

In my reasons in ***Caratti***, I referred to parts of Murphy JA's observations in ***Technomin v Xstrata*** concerning his Honour's obiter analysis of what had been said by Leeming JA in ***Mainteck v Stein Heurtey***. I then wrote at [58]:

> I also note the observations by Murphy JA, commencing at [171] in ***Technomin***, concerning the parol evidence rule and ***Codelfa***, ultimately culminating in his Honour's observations at [215] - [216]. At [215] his Honour said:
>
> > Also, the following observations might be made about the law post-***Codelfa***. First, the passage in ***Codelfa*** (352) does not appear to have been subject of express consideration in the High Court since ***Royal Botanic*** [39]. Secondly, it might be thought that the authorities up to the time of ***Electricity Generation*** are not necessarily inconsistent with a requirement of ambiguity. Thirdly,

> a case as significant as ***Codelfa*** in the operation of the commercial law in Australia for over 30 years is unlikely to have been impliedly overruled. Fourthly, in ***Electricity Generation***, French CJ, Hayne, Crennan and Kiefel JJ 'reaffirmed' the High Court's earlier decisions. ***Electricity Generation*** does not appear to provide a departure from them. Fifthly, the question of whether evidence of surrounding circumstances is inadmissible in the absence of ambiguity does not appear to have been canvassed in argument in ***Electricity Generation***, nor isolated for determination.

There was an application for special leave in ***Technomin v Xstrata*** argued on Friday, 13 March 2015, that was refused.

## 11 September 2014: *Maintech* reaffirmed: *Newey v Westpac Banking Corporation* [2014] NSWCA 319

By this decision, a differently constituted (to ***Mainteck***) New South Wales Court of Appeal by Gleeson JA (Basten and Meagher JJA agreeing) said at [89]:

> As subsequently observed by Leeming JA (Ward and Emmett JA agreeing) in ***Mainteck Services Pty Ltd v Heutey SA (Mainteck)*** [2014] NSWCA 184 at [71], Woodside endorses and requires a contextual approach to the construction of commercial contracts and 'ambiguity' is to be evaluated having regard to surrounding circumstances and commercial purposes or objects. To the extent that what was said in the reasons of three members of the High Court when refusing special leave in ***Western Export services Inc v Jireh International Pty Ltd (Jireh)*** [2011] HCA 45; 86 ALJR 1 supports the contrary proposition, ***Jireh*** should be regarded as inconsistent with what was said in ***Woodside*** at [35], for the reasons explained in ***Mainteck*** at [72] - [86]. See also ***Stratton Finance Pty Ltd v Webb Stratton Finance)*** [2014] FCAFC 110 at [41] where the Full Court of the Federal Court of Australia (Allsop FFJ, Siopis and Flick JJ) agreed with the conclusion in ***Mainteck*** and with the reasons given there in elaboration at [72] - [86].

Given those observations, a perceived cessation of the 'true rule' for New South Wales, could hardly have been more clearly stated.

**19 December 2014: *Gladstone Area Water Board & Gladstone Regional Council v AJ Lucas Operations Pty Ltd***

Jackson J in the Queensland Supreme Court in ***Gladstone Area Water Board & Gladstone Regional Council v AJ Lucas Operations Pty Ltd*** [2014] QSC 311, delivered his reasons in this action on 19 December 2014.

Commencing at about [153], Jackson J entered the ***Codelfa/Jireh*** debate, now referring to ***Mainteck, Stratton Finance and Technomin v Xstrata***.

At [155] Jackson J mentions the observations in ***Mainteck*** concerning the significance of ***EGC v Woodside***. I refer in particular to his remarks addressing Leeming JA's reasons from ***Mainteck*** commencing at [158] and following. See also from the Queensland Court of Appeal ***Denham Bros Ltd v W Freestone Leasing Pty Ltd*** [2004] 1 Qd R 500 and ***Bass v Hamilton Island Enterprises Ltd*** [2010] 2 Qd R 115 [64].

In ***Gladstone Area Water Board*** Jackson J wrote at [163]:

> In my view, ***Codelfa*** has not been affected by ***Woodside*** on the question of the admissibility of extrinsic evidence. There can be no doubt that ***Royal Botanic Gardens*** affirms that ***Codelfa*** must be followed until the High Court departs from or overrules it …

He concluded upon this issue at [168]:

> Accordingly, for present purposes, I proceed on the basis that I am bound by Mason J's statement of principle in ***Codelfa*** and not to follow ***Mainteck*** or cases which follow ***Mainteck*** to the extent of any inconsistency.

**Sundries**

There have been approving references to ***Mainteck Services Pty Ltd v Stein Heurtey SA*** in the New South Wales Court of Appeal's reasons on 16 September 2014 in ***Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*** [2014] NSWCA 323 at [38], by Macfarlan JA (Meagher & Barrett JJA agreeing), in ***Wright v Lendlease Building Pty Ltd*** [2014] NSWCA 463 [41], delivered 23 December 2014, then in 2015 a brief consideration by Black J in ***Re Waterfront Investments Group Pty Ltd (in liquidation)*** [2015] NSWSC 18 [34], delivered 5 February 2015. See also the decision of Sackar J in

***Campbelltown City Council v WSN Environmental Solutions Pty Ltd*** [2015] NSWSC 155, delivered 6 March 2015, at [22] - [26].

Locally, on 25 February 2015, Le Miere J delivered his reasons in ***Terravision Pty Ltd v Black Box Control Pty Ltd [No 2]*** [2015] WASC 66. He referred to ***EGC v Woodside*** at [17] and to the 'true rule' from ***Codelfa*** at [18]. He said, after mentioning ***Codelfa*** at [18]:

> However, notwithstanding that the language of the contract is ambiguous or susceptible of more than one meaning there remain limits on the use of evidence of background or surrounding circumstances. The background cannot be used to introduce by a side wind evidence of the subjective intention of the parties, since that is contrary to the objective theory of the interpretation of contracts.

Le Miere J also referred neutrally to the observations of Leeming JA in ***Mainteck Services v Stein Heurtey*** at [25].

## ***Codelfa and the True Rule: 'A New Hope'***

The surrounding circumstances admissible evidence Australian saga, I would suggest, remains to be completed …