THE AMBIGUITY GATEWAY

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A. Introduction

Consider a dispute regarding the interpretation of a contract. One party wishes to put into evidence certain emails between the parties as part of the contractual negotiations which ultimately led to the contract being entered into. Can these emails be used by the Court as an aid to the construction of the contract?

What if those emails disclosed that the parties had, in the course of their dealings, come to place an idiomatic meaning onto a commonly understood term? For example, the parties may have agreed in the course of their dealings that the expression "current market value" means the opinion of three known valuers.

In many ways, the approach to interpreting contracts (particularly commercial contracts) is relatively uncontroversial at Australian law. The interpretation of the contract proceeds according to the 'objective theory'. That is, "the law is concerned, not with the real intentions of the parties, but with the outward manifestations of those intentions".[1] Further:

> 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. That approach is not unfamiliar. 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. 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'. As Arden LJ observed in *Re Golden Key Ltd*, 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'."[2]

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[1] *Taylor v Johnson* [1983] HCA 5; 151 CLR 422 at [7] per Mason ACJ, Murphy & Deane JJ.

[2] *Woodside Energy Ltd v Electricity Generation Corporation* [2014] HCA 7; 251 CLR 640 at [35] (***Woodside***); see The Hon Justice Kenneth Martin, "Surrounding Circumstances Evidence: Construing Contracts and Submissions About Proper Construction" (2015) 42(6) Brief 21 for a sentence by sentence analysis of this paragraph.

Indeed, while familiarity with the 'parol evidence rule' suggests that the task of interpreting contracts is to be done solely by reference the terms of the contract itself[3], the ability to use surrounding circumstances to construe those terms has long been recognised in English law.[4]

However, an issue that remains unsettled (perhaps in some tension with the above approach) is the extent to which it is permissible to look beyond the terms of the contract itself. There can be no doubt that, as discussed below, in some circumstances it is permissible to do so. It also seems clear that evidence as to the subjective intention of the parties to the contract cannot be considered when construing its terms.

Accordingly, the questions to be considered are what 'extrinsic material' can be considered and when?

B. What is the ambiguity gateway?

One common theme is whether ambiguity as to the terms or application of the contract is necessary before extrinsic material can be considered. This has become known as the 'ambiguity gateway'. The starting point for consideration of this issue is the statement of Mason J (as he then was) in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[5]:

> "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".[6]

Despite the concise manner in which the 'true rule' was expressed, there are a number of ongoing controversies regarding its application. In particular, there is a question as to whether or not the ambiguity must be apparent on the face of the contract before regard can be had to extrinsic material, or whether the extrinsic material itself can be used to determine ambiguity.

These issues, particularly whether pre-existing ambiguity is a gateway, remain unsettled. There has not been a recent direct High Court consideration of the gateway – although even

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[3] *Goss v Lord Nugent* (1833) 5 B&D 57, 110 ER 713 per Lord Denman CJ, cited in *Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors* [2019] QSC 163 (***Aurizon***) at [75].
[4] See *Grey v Pearson* (1859) 6 HLC 61, 10 ER 2016 per Lord Blackburn, cited in *Aurizon* at [80].
[5] [1982] HCA 24; 149 CLR 337 (***Codelfa***).
[6] at [22], 352

this is a matter of some contention. Further, there is a difference in approach amongst the various State Supreme Courts, with for example, the Court of Appeal of Western Australia[7] and the Court of Appeal of Victoria taking the narrow view in contrast to the NSW Court of Appeal.

C. What is ambiguity?

A preliminary issue for consideration is what does 'ambiguous' itself mean. All words are capable of having more than one meaning such that "[a]n 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".[8]

Further, "ambiguity" is a word that is often used imprecisely[9], and:

> "is itself a word of ambiguous reference. Does it mean that one of two (or more) meanings are equally available, or does it also comprehend the commoner situation where the literal words have a likely conventional meaning but are capable of bearing a less likely one; one which, under well-accepted canons of construction can be established as the parties' common intention in an objective sense, by reference to what Lord Steyn calls "the objective contextual scene".[10]

In setting out the 'true rule', Mason J used the expressions "ambiguous" or "susceptible of more than one meaning". On one view, these expressions mean the same thing. Mason J later stated (extra-judicially):

> Ambiguity may not be a sufficient gateway: the gateway should be wide enough to admit extrinsic material which is capable of influencing the meaning of the words of the contract. The modern point of criticism [of the 'true rule'] is that one should not have been thinking in terms of gateway. At the time [of the decision in *Codelfa*], however, it was natural to do because it stressed the importance of the natural and ordinary meaning of the words used by the parties in their written instrument and it respected the difference between interpretation and rectification.[11]

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[7] See *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2012] WASCA 216; 45 WAR 29 (***Hancock***).
[8] The Hon Justice Kenneth Martin, "Contractual construction: Surrounding circumstances and the ambiguity gateway" (2013) 37 *Aust Bar Rev* 118.
[9] *Newey v Westpac Banking Corporation* [2014] NSWCA 319 at [14] per Basten JA.
[10] *Allstate Explorations NL & 2 Ors v Beaconsfield Gold NL & 2 Ors* [1999] NSWSC 832 at [42].
[11] quoted in The Hon Kevin Lindgren AM QC, "The ambiguity of 'ambiguity' in the construction of contracts" (2014) 38 *Aust Bar Rev* 153 at p.157.

In *Hancock*, McLure P stated that:

> "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. Ambiguity is not confined to lexical, grammatical or syntactical ambiguity."[12]

It has been suggested that the true rule allows the use of extrinsic material:

> "(1) where the contractual language is ambiguous or is susceptible of more than one meaning;
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> (2) to identify the meaning of a descriptive term;
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> (3) to establish the genesis of the transaction (perhaps only to show that the strict legal meaning would make the transaction futile); and
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> (4) to identify the aim of the transaction (perhaps only to show that the strict legal meaning would make the transaction futile)
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> and that it is not admissible:
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> (5) to contradict the contractual language where it has a plain meaning; or
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> (6) to establish subjective intentions or expectations, even although shared by both parties".[13]

It can also be observed that elements of this approach are similar to that adopted by s.15AB(1) of the *Acts Interpretation Act 1901* (Cth) which provides[14]:

> (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
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> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

[12] at [77] (citation omitted); see also The Hon Justice Kenneth Martin, n2 above at pp.2-3.
[13] Lindgren n11 above at pp.157 to 158; see also The Hon Justice Robert McDougall, *Construction of Contracts: the High Court's Approach* (Paper delivered at The Commercial Law Association Judges' Series, 26 June 2015) for a similar analysis.
[14] See also the consideration of the history of 'ambiguity' cases, including dealing statutory construction, in *Aurizon* at [77] to [114]; *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407; 76 NSWLR 603 (***Franklins***) at [293] to [297] per Campbell JA.

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

D. The English position

Before looking at the position in Australia, a short detour to England is appropriate.

As noted above, English law had long recognised the use of 'surrounding circumstances', and in more recent times the House of Lords has continued to adopt the broad approach that pre-existing ambiguity is not necessary before resort can to be had to extrinsic material as an aid to construction.

The House of Lords set out the principles to be used in approaching the construction of a contract in *Investors Compensation Scheme Ltd v West Bromidge Building Society*[15], being:

> "(1) 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.
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> "(2) The background may include …, [s]ubject to the requirement that it should have been reasonably available to the parties…, absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> "(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent…
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. … the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean…
>
> "(5) … if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."

[15] [1998] 1 WLR 896 at pp.912 to 913 per Lord Hoffman.

Thus, the English position is that a court can consider the context of a contract without there needing to be ambiguity on the face of the contract. However, as with Australia, the approach to interpretation remains objective.

E. Australia post-*Codelfa*

Following *Codelfa*, there were a number of High Court decisions dealing with the construction of contracts. However, they have not explicitly considered the 'ambiguity gateway' requirement.[16]

Maggbury Pty Ltd Hafele Australia Pty Ltd[17]

In *Maggbury*, the High Court stated that:

> "Interpretation of a written contract involves, as Lord Hoffmann has put it:
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> > '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'.[18]

Royal Botanic Gardens and Domain Trust v South Sydney City Council[19]

Despite an apparent move in Maggbury towards the English position, the Court reaffirmed *Codelfa* in *Royal Botanic Gardens*, stating:

> 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* and of Lord Bingham of Cornhill and Lord Hoffmann in *Bank of Credit and Commerce International SA v Ali*, 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*.[20]

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[16] See The Hon Justice McDougall n13 above for a more detailed consideration of the following and other High Court decisions.
[17] (2001) 210 CLR 181 (***Maggbury***) (citations omitted).
[18] *Ibid* at [11].
[19] (2002) 240 CLR 45 (***Royal Botanic Gardens***) (citations omitted).
[20] *ibid* at [39].

Pacific Carriers Ltd v BNP Paribas[21]

In *Pacific Carriers* the High Court again considered the role of extrinsic materials. As can been seen, the decision restates the objective approach to the construction of a contract and relevant extrinsic materials. However, it does so without explicitly considering the 'ambiguity gateway' requirement:

> What is important is not Ms Dhiri's subjective intention, or even what she might have conveyed, or attempted to convey, to NEAT about her understanding of what she was doing. The letters of indemnity were, and were intended by NEAT and BNP to be, furnished to Pacific. Pacific did not know what was going on in Ms Dhiri's mind, or what she might have communicated to NEAT as to her understanding or intention. The case provides a good example of the reason why the meaning of commercial documents is determined objectively: it was only the documents that spoke to Pacific. The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction. In *Codelfa Construction Pty Ltd v State Rail Authority of NSW*, Mason J set out with evident approval the statement by Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen*:
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> > "In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd[22]

In *Toll*, the Court appeared to continue the apparently broader approach taken in *Maggbury* and *Pacific Carriers*, stating that:

> "References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text,

[21] (2004) 218 CLR 451 (***Pacific Carriers***).
[22] (2004) 219 CLR 165 at p.179 (***Toll***).

but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction".

Western Export Services Inc and Ors v Jireh International Pty Ltd[23]

The series of cases extracted above led to a view (at least in the NSW Court of Appeal) that there was no ambiguity gateway. However, the High Court then, somewhat unusually, made comments in a special leave application which reaffirmed *Codelfa*:

> "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* 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.
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> "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.[24]

Unfortunately, while this statement re-affirmed the 'true rule' set out in *Codelfa*, it did not take the opportunity to explain or expand upon that rule in terms of when ambiguity must arise before extrinsic material can be used.

F. Post-Jireh developments

Following *Jireh*, the High Court has seemingly avoided arriving at a definitive determination of the status of the 'true rule' in *Codelfa.* In cases where the Court has touched upon the issues raised in this paper (for example, in *Woodside* and *Mount Bruce Mining v Wright Prospecting Pty Ltd*[25]), it has made statements redolent of a liberal approach without seeking to expressly overrule any earlier authority.

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[23] *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45; 85 ALJR 1 (***Jireh***).
[24] (citations omitted).
[25] [2015] HCA 37; (2015) 256 CLR 104 (***Mount Bruce Mining***).

In *Mount Bruce Mining Pty Ltd*, all members of the Court made statements to the effect that *Jireh*, because it was not a proceeding *inter partes* before the Court[26], was not a precedent binding on courts below.[27]

This has led the New South Wales Court of Appeal to continue what can be considered to be a broad reading of the ambiguity gateway, holding that extrinsic materials can be used to determine that there is ambiguity.[28]

In *Cherry v Steele-Park*[29], Leeming JA considered that "ambiguity is a conclusion" rather than a starting point[30] and that:

> "there is a deal of authority for the proposition that whether there is in truth a constructional choice available to a written contract cannot be determined without first at least considering evidence of surrounding circumstances".

His Honour considered that:

- the 'true rule' in *Codelfa* dealt with how ambiguity might be resolved and not how it might be identified[31]; and
- extrinsic evidence can be used to identify ambiguity is supported by High Court and intermediate appellate authority.[32]

Accordingly, the position (at least in NSW[33]) appears to be that extrinsic material is available to determine, first, whether there is an ambiguity and, secondly, if there is, to assist in interpreting the ambiguous provision.

That, of course, is not the end of it. The content of the extrinsic materials must also be relevant and otherwise admissible. Interestingly, in *Steele-Park*, where the admissibility and use of emails was the issue in question, Leeming JA and White JA came to different views as to the emails in question.[34] Leeming JA considered that the emails were "objective facts known to both sides of the transaction"[35] and "were the immediate objective context in which the contractual document was drafted and executed".[36] In contrast, White JA (while agreeing

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[26] *Collins v The Queen* [1975] HCA 60; (1975) 133 CLR 120 at p.122.
[27] *Mount Bruce Mining* at [52] (French CJ, Nettle & Gordon JJ); [112] (Kiefel & Keane JJ); [119] (Bell & Gageler JJ).
[28] Indeed, this has been the position of the Court of Appeal for some time, see *Franklins* at [16] per Allsop P.
[29] [2017] NSWCA 295; 96 NSWLR 548 (***Steele-Park***) per Leeming JA.
[30] at [79], Gleeson and White JJA agreeing on this point.
[31] *ibid* at [83] citing *Mount Bruce Mining Pty Ltd* at [110].
[32] ibid at [76] to [86].
[33] see also *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184; 89 NSWLR 633; *WIN Corporation Pty Ltd v Nine Network Australia Pty Ltd* [2016] NSWCA 297; 341 ALR 467.
[34] Gleeson JA agreed with Leeming JA.
[35] *Steele-Park* at [92].
[36] *ibid* at [93].

with approach of Leeming JA as to ambiguity) found that the emails were evidence of the parties' subjective intention as to the interpretation of the contract and therefore not admissible for the purpose of construing the contract.[37]

G. Other issues

The question as to the existence of the ambiguity gateway and the 'prohibition' on evidence regarding subjective intent is relevant to the task of the construction of a contract. There will be a number of situations in which extrinsic evidence can be used without the need to find ambiguity, and in which evidence of subjective intention might also be used. Such evidence will likely be relevant to issues such as rectification, *non est factum* and duress or where it is alleged that the contract is a sham.[38] It may also be relevant to the issue of whether a contract was formed at all.[39]

However, the approaches as to construction and equitable remedies such as rectification remain distinct:

> The requirements of *ex facie* absurdity or inconsistency and clarity as to what the parties must be taken to have intended ensure that rectification by construction remains an aspect of determining the objectively manifested legal meaning of contractual words, and accommodates the truth that sometimes, even in a formal legal document, the parties will make mistakes which are nonetheless readily identified and corrected. On the other hand, rectification in equity turns on the discrepancy between the written instrument and a separately proven contrary common intention, which was intended to have been incorporated into the instrument, such that it is unconscientious for a party to insist on performance in accordance with the written instrument. Rectification in equity is a departure – albeit one which is narrowly circumscribed by the insistence on cogent proof – from the objective theory of contract.[40]

While subjective intentions are clearly relevant for rectification, "rectification is granted only upon 'clear and convincing proof' or 'convincing proof'[41] and "[w]hat needs to be proved in accordance with that standard is not only that the written document does not correctly record

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[37] *ibid* at [149].
[38] *Steele-Park* at [37].
[39] *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at pp.548-51 per Gleeson CJ (with whom Hope JA and Mahoney JA agreed).
[40] *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation)* [2019] NSWCA 11; 365 ALR 345 (***Seymour***) at [15] per Leeming JA.
[41] *Franklins* at [451] per Campbell JA. Or "the court must be satisfied of those matters to a high level of conviction": *Seymour* at [10] per Leeming JA.

the common intention of the parties, but what the common intention of the parties actually was".[42]

Finally, this discussion is dealing with extrinsic materials in existence prior to the execution of the contract. It is clear that in Australia, post-contractual conduct of the parties to a contract cannot be used "in aid of construction of a contract".[43] This is in contrast to the position in New Zealand where post-contractual conduct of the parties can be used to construe a contract.[44]

However, while the issue is not completely clear, it also appears that, where contract is alleged to be oral or partly oral, post-contractual conduct of the parties may be used to determine whether a contract came into existence[45] and what are the terms of the contract[46]. It also appears that post-contractual conduct can be used as evidence of the surrounding circumstances at the time the contract was executed.[47]

H. Conclusion

The High Court has yet to resolve the issues of whether an ambiguity in the meaning of a term in a contract can be identified by the admission of extrinsic evidence, and whether extrinsic evidence can be used to resolve any ambiguity once found. These are two distinct questions.

The present state of affairs appears to be that, where a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances cannot be adduced to contradict that plain ordinary meaning.

The English courts have applied a more liberal approach, permitting recourse to surrounding circumstances without any requirement of first establishing ambiguity.[48] There is a distinct progression towards an adoption of the English approach by the courts, although that approach has yet to achieve consensus or result in the overruling of *Codelfa* itself.

As early as *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; (2008) 234 CLR 151, Gleeson CJ tended to favour a liberal approach:

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[42] *Franklins* at [451].
[43] *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 83 ALJR 196; 251 ALR 322 at [35] per Gummow, Hayne & Kiefel JJ.
[44] See *Steele-Park* at [140] per White JA.
[45] *Franklins* at [13] per Allsop P.
[46] *Franklins* at [325] per Campbell JA .See also, *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303 at [139] per Campbell JA; *Pegela Pty Ltd v Oates* [2010] NSWCA 186 at [78] per Young JA.
[47] *Franklins* at [13] per Allsop P.
[48] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at pp.114-115; *Reardon Smith Line Ltd v Sanko Steamship Co* [1976] 1 WLR 989 at p.997; *Prenn v Simmonds* [1971] 1 WLR 1381 at pp.1383-4.

> "In giving a commercial contract a business like interpretation, it is necessary to consider the language used by the parties, the circumstances addressed by the contract, and the objects which it is intended to secure. An appreciation of the commercial purpose of a contract calls for an understanding of the genesis of the transaction, the background, and the market… The agreement has a history; and that history is part of the context in which the contract takes its meaning" .[49]

In *Mount Bruce Mining Pty Ltd*, French CJ, Nettle and Gordon JJ stated[50]:

> Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.
>
> However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.

The last paragraph extracted above cited *Woodside* at [35] as authority, which in turn cited the passage in Gleeson CJ's reasons in *International Air Transport Association v Ansett Australia Holdings Ltd* extracted above.

The reference to the "genesis of the transaction, the background, the context" suggests that external evidence can be used to understand the purpose of the bargain, and that recourse can be had to extrinsic materials in order to inform a constructional choice that arises where there is ambiguous language.

It appears to be a matter of time before this position is confirmed by the Court and the liberal approach achieves ascendancy in Australian contract law.

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[49] At p.160, [8].
[50] *Mount Bruce Mining* (2015) 256 CLR 104 at [48]-[49].