CONSTRUCTION OF CONTRACTS: THE AMBIGUITY GATEWAY AND THE CURRENT STATE OF THE LAW

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Over time there has been some judicial confusion as to when objective surrounding circumstances may be taken into account to assist in the construction of terms. The nature of the objective approach has meant that on occasion, courts have shown a reluctance to look outside the four corners of the contract unless it is absolutely necessary to do so due to a textual ambiguity. The question is whether this reluctance is actually a necessary precondition to examining surrounding circumstances.

The paper addresses the question of whether – or more accurately, 'to what extent' – evidence of surrounding circumstances is admissible as an aid to the construction or interpretation of contracts.

The paper commences with an analysis of the true rule enunciated by Mason J in Codelfa Construction v State Rail Authority (1982) 149 CLR 337. The paper then demonstrates that by 2011, a series of construction contract appeal decisions had been handed down by the High Court that had not mentioned any need to satisfy the 'true rule'.

The paper provides an analysis of how over time, most intermediate Australian appellate courts had assumed that it was no longer necessary to demonstrate ambiguity so as to provide a basis to admit evidence of surrounding circumstances at trial in order to assist the interpretation of the contract. Case such as Franklins Pty Ltd v Metcash Trading Ltd (2009) 76 NSWLR 603 and MBF Investments Pty Ltd v Nolan [2011] VSCA 114 will be examined to show that although the matter appeared settled, the divergence of Australian judgments ignited the debate once again and disagreement boiled over.

Recent case law and the High Court's response is examined to show that although the High Court has retained the ambiguity gateway, its breadth is wide. The paper also argues for a further widening of the ambiguity gateway so as not to present an operative barrier to consideration of extrinsic material.

I INTRODUCTION

Written contracts govern all aspects of commercial life, yet differ greatly. Some contracts have emanated after various drafts that have had the painstaking attention of highly sophisticated solicitors. Some are drawn by non-lawyers. Some are short, consisting of few words, while others are lengthy, consisting of hundreds of pages. Some are in a standard form and with which the concept of 'surrounding circumstances known to both contracting parties' is uncertain.

Ordinarily, construing or interpreting contracts is possible by reference to the contract alone. However, depending on the circumstances of the case, resort to events, facts and matters external to the contract is permissible and necessary.

Since the 19th century, English courts have accepted that extrinsic evidence was admissible to identify the meaning of contracts where ambiguity exists. From the 1970s, the English courts have applied a more liberal approach, thereby permitting recourse to surrounding circumstances without any requirement of first establishing ambiguity.[1] This remains their position today.[2]

In Australia, however, there has been some divergence of views as to when objective surrounding circumstances may be taken into account to assist in the construction of terms. The nature of the objective approach has resulted at times in courts showing a reluctance to examine material outside the contract unless it is absolutely necessary to do so due to an ambiguity in the text. This then leads to the question of whether this reluctance is actually a necessary precondition to examining surrounding circumstances.

This article will commence with an examination of the 'true rule' enunciated by Sir Anthony Mason in *Codelfa Construction v State Rail Authority* (1982) 149 CLR 337 and will analyse the way in which the true rule has been applied in subsequent decisions of the High Court. The article will also consider the inconsistencies between intermediate appellant courts in the application of the ambiguity gateway, followed by a discussion of the implications such divergent views have had on interpretation of commercial contracts in Australia.

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[1] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114-115; *Reardon Smith Line Ltd v Sanko Steamship Co* [1976] 1 WLR 989 at 997; *Prenn v Simmonds* [1971] 1 WLR 1381 at 1383-4. These authorities support the wider trend known as "commercial construction" of contracts: see eg. John Carter, 'Commercial Construction and Contracts Doctrine' (2009) 25 *Journal of Contract Law* 83.

[2] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

II THE STARTING POSITION

The current Australian jurisprudence is torn between the more liberal approach adopted by the English courts and the less liberal approach of having to first identify ambiguity in the text of a contract before extrinsic evidence can be admitted into evidence. On one view, the latter approach is reflected in the leading judgment of Sir Anthony Mason in *Codelfa Construction v State Rail Authority*.[3] However, recent decisions of intermediate appellate courts have taken a broader view of Mason J's expression of principle more in line with the modern English approach. This will be addressed further on in the paper.

The crucial question of whether, or more accurately 'to what extent', evidence of surrounding circumstances is admissible to assist in the construction or interpretation of contracts is still a live issue.[4]

First, it is necessary to examine what his Honour Justice Mason (with whom justices Stephen and Wilson agreed) said at page 352 in *Codelfa*:

> 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.

This statement of the 'true rule' appears to raise two concepts: The admissibility of evidence, and the use to which that evidence may be put.[5] Importantly, the 'true rule' appears at first instance to prohibit any use of evidence of surrounding circumstances, or extrinsic evidence, when construing contracts unless there is ambiguity in the language of the contract.

Codelfa also makes clear that there are at least two other purposes for which extrinsic evidence can be admitted. First, to identify the meaning of a descriptive term and second, to explain the genesis or aim of a transaction.[6] However, what is not clear from his Honour Justice Mason's judgment is how those two admissibility purposes interact with the so-called 'ambiguity gateway', which in effect means that ambiguity is a gateway to the admission of extrinsic evidence.

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[3] (1982) 149 CLR 337.
[4] Robert McDougall, 'Construction of Contracts: The High Court's Approach' (2016) 41 *Australian Bar Review* 103, 104.
[5] McDougall, above n 4, 104.
[6] McDougall, above n 4, 105.

In addition, Justice Mason approved the following statement of principle by Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tagen* [1976] 3 All ER 570 at 574-576:

> When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was…Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.

It is evident from this statement that the parties' subjective beliefs or understandings about their rights and liabilities that govern their contractual relations are not relevant or admissible. The court will be interested with what each party by words and conduct would have led a reasonable person in the position of the other party to believe. The parties' common intention to a contract are to be regarded as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The determination of the contractual terms must be carried out by reference to what a reasonable person would have understood them to mean. That process, ordinarily, would require consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

That objective restriction, together with the 'true rule', make it clear that *Codelfa* expressly prohibits the use of extrinsic evidence:

1. To contradict the language of the contract when it has a plain meaning; or

2. To establish the subjective intentions of the parties, even when shared by both parties,

but it can be used to establish the purpose and object of the transaction.

Having said that, Justice Mason does not expressly say that **only** where ambiguity is apparent may the court admit extrinsic evidence. In fact, courts have been prepared to admit extrinsic evidence to answer the preliminary question of whether ambiguity exists.[7] If ambiguity is found, then the evidence becomes admissible to assist the court in the interpretation of that ambiguous language. Whereas if the preliminary inquiry reveals that the language is plain, the extrinsic evidence is then inadmissible and cannot be relied on.

III SUBSEQUENT HIGH COURT AUTHORITIES

[7] *McCourt v Cranston* [2012] WASCA 60 at [36] per Pulln and Newnes JJA; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) NSWLR 603.

Since 2000, a series of construction contract appeal decisions were handed down by the High Court that had not mentioned any need to satisfy the 'true rule'.[8]

A *Maggbury v Häfele Australia*

In *Maggbury v Häfele Australia*,[9] the majority of the High Court held:

> Interpretation of a written contract involves, as Lord Hoffmann has put it: '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'.[10]

It has been argued that, taken alone, this passage could suggest a departure from *Codelfa*.[11] However, the High Court then went on to cite *Codelfa* with approval.

B *Royal Botanic Gardens and Domain Trust v South Sydney City Council*

In *Royal Botanic Gardens and Domain Trust v South Sydney City Council*,[12] the High Court heard arguments asking the court to accept the broader English approach to the construction of a contract. However, the High Court rejected these arguments and stated that surrounding circumstances should be taken into account where "…an appreciation of the commercial purpose of a contract presupposes knowledge of the genesis of the transaction, the background, the context, [and] the market in which the parties are operating."[13]

Although the High Court explicitly affirmed that extrinsic evidence may be used to resolve ambiguity, it did not suggest that this is the **only** purpose for which extrinsic evidence may be used. It did ultimately affirm *Codelfa* as the binding authority in Australia.

C *Pacific Carriers Ltd v BNP Paribas*

In *Pacific Carriers Ltd v BNP Paribas*,[14] the High Court observed:

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[8] Since 2000, there have been ten High Court cases that have considered the construction of a contract. These are discussed in this paper.
[9] (2001) 210 CLR 181.
[10] *Maggbury v Häfele Australia* (2001) 210 CLR 181, 188 [11].
[11] Thomas Prince, 'Defending Orthodoxy: Codelfa and Ambiguity' (2015) 89 *Australian Law Journal* 491, 496; See also Daniel Reynolds, 'Construction of contracts after Mount Bruce Mining v Wright Prospecting' (2016) 90 *Australian Law Journal* 190, 193.
[12] (2002) 240 CLR 45.
[13] *Royal Botanic Gardens and Domain Trust* (2002) 240 CLR 45 at [10].
[14] (2004) 218 CLR 451.

> 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**.[15] (Emphasis added).

D *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*

In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,[16] the High Court unanimously held:

> This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. **The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction**.[17] (Emphasis added).

E *Wilkie v Gordian Runoff Ltd*

In *Wilkie v Gordian Runoff Ltd*,[18] Gleeson CJ, McHugh, Gummow and Kirby JJ quoted with approval Gleeson CJ's statement in *McCann v Switzerland Insurance Australia Ltd*[19] "Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure."[20]

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[15] *Pacific Carriers* (2004) 218 CLR 451, 461 [22].
[16] (2004) 219 CLR 165.
[17] *Toll* (2004) 219 CLR 165, 179 [45].
[18] (2005) 221 CLR 522.
[19] (2000) 203 CLR 529, [22].
[20] *McCann* (2005) 221 CLR 522, 529 [15].

Gleeson CJ's statement was a paraphrase of what Viscount Sumner had said in *Lake v Simmons*: "Everyone must agree that commercial contracts are to be interpreted with regard to the circumstances of commerce with which they deal, the language used by those who are parties to them, and the objects which they are intended to serve".[21]

In relation to these two excerpts, Prince argues:

> Neither statement says anything about evidence of surrounding circumstances. A contract can still be construed in a "businesslike" way, or in a "commercially sensible" manner, or by having regard to the "commercial circumstances which the document addresses", without evidence of surrounding circumstances. Often, what is businesslike or commercially sensible is a matter of submission not evidence, and the commercial circumstances which the document addresses will be obvious from the document itself. In none of these cases did the court look to evidence of surrounding circumstances to resolve the question of construction. The question of ambiguity simply never arose.[22]

F *International Air Transport Association v Ansett Australia Holdings Ltd*

In *International Air Transport Association v Ansett Australia Holdings Ltd*,[23] Gleeson CJ stated:

> In giving a commercial contract a businesslike interpretation, it is necessary to consider the language used by the parties, the circumstances addressed by the contract, and the objects which it is intended to secure. An appreciation of the commercial purpose of a contract calls for an understanding of the genesis of the transaction, the background, and the market. This is a case in which the Court's general understanding of background and purpose is supplemented by specific information as to the genesis of the transaction. The Agreement has a history; and that history is part of the context in which the contract takes its meaning.[24]

The majority cited the above passage in *Toll* and re-affirmed the principle of objectivity in contract construction.[25]

G *Byrnes v Kendle*

In *Byrnes v Kendle*,[26] the plurality held:

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[21] [1927] AC 487, 509.
[22] Prince, above n 11, 498.
[23] **(2008) 234 CLR 151.**
[24] *International Air Transport Association* (2008) 234 CLR 151, 160 [8].
[25] *International Air Transport Association* (2008) 234 CLR 151, 174 [53].

> "The approach taken to statutory construction is matched by that which is taken to contractual construction. Contractual construction depends on finding the meaning of the language of the contract – the intention which the parties expressed, not the subjective intentions which they may have had, but did not express. A contract means what a reasonable person having all the background knowledge of the "surrounding circumstances" available to the parties would have understood them to be using the language in the contract to mean. But evidence of pre-contractual negotiations between the parties is inadmissible for the purpose of drawing inferences about what the contract meant unless it demonstrates knowledge of "surrounding circumstances".[27]

This extract was described as "an orthodox restatement of the rule that extrinsic evidence may not be used … to establish subjective intentions of parties".[28]

Interestingly, a number of the High Court decisions analysed above, which concern the issue of contractual interpretation, have gone about such a task without expressing any need to satisfy the ambiguity threshold in the true rule. It is clear that these cases 'tiptoed' around the true rule but did not directly address it. They discussed at length the admission of extrinsic evidence, the objective intentions of the parties, the purpose and object of the transaction, and the like.

Many intermediate appellate courts have taken their lead from these cases to reject the ambiguity gateway.[29]

As a result, it appears that over this time most intermediate Australian appellate courts (but not in Western Australia) had assumed, by reference to these cases, that it was no longer necessary to demonstrate ambiguity so as to provide a basis to admit evidence of surrounding circumstances at trial.[30]

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[26] (2011) 243 CLR 253.
[27] *Byrnes* (2011) 243 CLR 253, 284 [98].
[28] Reynolds, above n 11, 196.
[29] See e.g. *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006) 236 ALR 561, 570 [46], 581 [98]-[100] 607 [238]; *Ryldar Pty Ltd t/as Volume Plus v Euphoric Pty Ltd* (2007) 69 NSWLR 603, 625-6 [105]–[108]; *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382, 406 [113]; *Synergy Protection Agency Pty Ltd v North Sydney Leagues' Club Ltd* [2009] NSWCA 140, [22]; *McGrath v Sturesteps; Sturesteps v HIH Overseas Holdings Ltd (in liq)* (2011) 284 ALR 196, 202 [17]; See also *Movie Network Channels Pty Ltd v Optus Vision Pty Ltd* [2010] NSWCA 111 at [68], citing *Franklins* (2009) 76 NSWLR 603, [14]-[18], [239]-[305].
[30] See e.g. *Lion Nathan Australia* (2006) 236 ALR 561, 570 [46], 581 [98]-[100] 607 [238]; *Ryldar* (2007) 69 NSWLR 603, 625-6 [105]–[108]; *Masterton Homes* (2009) 261 ALR 382, 406 [113]; *Synergy Protection Agency* [2009] NSWCA 140, [22]; *McGrath* (2011) 284 ALR 196, 202 [17]; See also *Movie Network Channels* [2010] NSWCA 111 at [68], citing *Franklins* (2009) 76 NSWLR 603, [14]-[18], [239]-[305].

It has been suggested that although these cases do not acknowledge the need for ambiguity, they still comply with the position in *Codelfa*.[31] This is because, perhaps, during those appeals, which were argued by Australia's best silks over clearly opposing contractual interpretations, the ambiguity was so obvious that it was not necessary to mention it in the judgment.[32]

Reynolds specifically rejects Prince's approach to the interpretation of the above High Court authorities. Prince advocated for the existence of an ambiguity gateway by demonstrating that all of the High Court cases have stated, in some way or another, that they affirm *Codelfa*.[33] In relation to this approach, Reynolds states that "[t]he problem with this approach is that it assumes that on each occasion that the High Court has affirmed *Codelfa*, it has had in mind the specific interpretation of *Codelfa* that Prince advocates."[34]

IV INTERMEDIATE COURTS

New South Wales has been the most proactive in expressing the view that ambiguity is no longer required to admit extrinsic evidence.[35]

In *Franklins Pty Ltd v Metcash Trading Ltd*,[36] all three members of the NSW Court of Appeal (Allsop P, Giles and Campbell JJA) held, in light of the earlier High Court authorities which did not expressly address the question of an ambiguity gateway, that ambiguity was no longer a gateway to the admissibility of evidence of surrounding circumstances.

Franklins concerned an agreement for the supply of groceries by Metcash to Franklins. Franklins complained that it had been overcharged because Metcash had not passed on to it 'confidential discounts' that Metcash had received from suppliers.

In its cross appeal, Metcash sought to construe the supply agreement by reference to surrounding circumstances known to both parties, the parties'

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[31] The Hon Justice Kenneth Martin, 'Contractual Construction: Surrounding Circumstances and the Ambiguity Gateway' (2013) 37 *Australian Bar Review* 118, 123-4.
[32] The Hon Justice Martin, above n 30.
[33] Prince, above n 11, 496-9.
[34] Reynolds, above n 11, 203.
[35] *Franklins (*2009) 76 NSWLR 603 at [14] to [18] per Allsop P, at [49] per Giles JA and at [239] to [305] per Campbell JA; *Synergy Protection Agency* [2009] NSWCA 140 at [22] per Allsop P (with whom Tobias and Basten JJA agreed); *Masterton Homes* (2009) 261 ALR 382 at [3] per Allsop P (with whom Basten JA agreed); *Movie Network Channels* [2010] NSWCA 111 at [68] per Macfarlan JA (with whom Young JA and Sackville AJA agreed).
[36] (2009) 76 NSWLR 603.

common understanding of the language in the supply agreement, the subsequent conduct of the parties, and the commerciality of the construction that the primary judge had adopted.

Campbell JA meticulously traced the judicial statements relevant to the ambiguity threshold issue. His Honour referred to decisions of courts lower in the hierarchy than the High Court, for example *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2005) 223 ALR 560, in which Justice Finn J at first instance, and on appeal Justices Weinberg, Kenny and Lander, had all said that there was no longer an ambiguity gateway.

The NSW Court of Appeal stated that:

> 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**.[37] (Emphasis added)

Similar views were expressed by the Victorian Court of Appeal in *MBF Investments Pty Ltd v Nolan* [2011] VSCA 114. In a joint judgment, the Court referred to earlier authorities, including High Court authorities such as *Pacific Carriers*,[38] *Toll*,[39] and Lion *Nathan*[40] and said that these authorities had resolved what they described as the previous 'lively debate' as to when a court could have regard to the circumstances surrounding the making of a contract for the purpose of the construction of its terms. They also said that the ambiguity gateway enunciated by Mason J in *Codelfa* in his 'true rule' had been rejected in the subsequent authorities.

V THE HIGH COURT INTERVENES

In *Western Export Services Inc v Jireh International Pty Ltd*,[41] the High Court in 2011, in joint written reasons by Gummow, Heydon and Bell JJ, whilst dismissing an application for special leave, reprimanded the Courts of Appeal of New South Wales and Victoria for unilaterally presuming that the 'true rule' of

[37] *Franklins* (2009) 76 NSWLR 603, 616 [14].
[38] *Pacific Carriers* (2004) 218 CLR 451.
[39] *Toll* (2004) 219 CLR 165.
[40] *Lion Nathan Australia* (2006) 236 ALR 561.
[41] (2011) HCA 45.

contractual construction as articulated by Mason J in *Codelfa* had been abrogated in Australia.

Jireh concerned the construction of clause 3 of a letter agreement providing for the franchising of Gloria Jeans coffee shops. The primary judge found against the need for an ambiguity threshold.

In the New South Wales Court of Appeal, the leading judgment was that of Justice Macfarlan, who held that the primary judge had erred, not with regard to rejecting the ambiguity threshold, but by:

> disregarding unambiguous language simply because the contract would have a more commercial and business-like operation if an interpretation different to that dictated by the language were adopted"[42] (emphasis added), and by having "acted on the basis that the provision would make more sense from a commercial point of view.[43]

Their honours in the High Court went further. The applicant for special leave relied on material in English authorities that were inconsistent with an ambiguity gateway, and their Honours in the High Court said that acceptance of these submissions would require reconsideration of Justice Mason's true rule. The applicant asked the High Court to reject the requirement for ambiguity in a contract before the court has regard to surrounding circumstances.

Unusually for an unsuccessful special leave application, the High Court published written reasons, stating at paragraphs [3] - [5]:

> [3] 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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> [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* and it should not have been necessary to reiterate the point here.
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> [5] 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.

[42] *Jireh International Pty Ltd v Western Export Services Inc* [2011] NSWCA 137 at [55].
[43] *Jireh International* [2011] NSWCA 137 at [56].

At the time, those statements came as something of a surprise, particularly to the Court of Appeal of New South Wales who had decided *Franklins* and to the Court of Appeal of Victoria who had decided MBF.[44]

VI 2012: POST JIREH

Staying with *Jireh* for a moment, the High Court there has created what President McLure (as her Honour then was) called "a heated controversy".[45] The difficulty with *Jireh*, as a non-binding precedent, is the limitation in its application. It was handed down after only 37 minutes of argument and 11 minutes of deliberation.

The doctrine of precedent means that a court is bound by the ratio decidendi of any decision made by a court higher in the hierarchy in which an appeal from the first court directly lies. However such a decision must resolve the dispute in a final way, which a refusal to grant special leave does not. Rather, it leaves the decision of the court below it untouched.[46] In other words, until special leave is granted, there is no proceeding before the High Court and the decision is not authority by way of a precedent.

Special leave was refused in *Jireh* on 1 June 2011. It was first cited on 4 November 2011. Between that date and the end of May 2017, it has been the subject of no less than 155 citations of various forms. This is not surprising given the number of cases that present in court involving the construction of written contracts.[47]

Further, Wong and Michael suggest that *Jireh* is not binding on Appellate courts.[48] They considered that in 2007, the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[49] stated that:

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[44] The Hon Justice Kenneth Martin, 'Surrounding Circumstances Evidence: Construing Contracts and Submissions about Proper Construction: The Return of the Jedi (sic) JUDII' (July 2015) 42(6) Brief 26-33, at 27.

[45] *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [107]. See further The Hon Kevin Lindgren, 'The ambiguity of 'ambiguity' in the construction of contracts' (2014) 38 *Australian Bar Review* 153, 161-7.

[46] The Hon Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Aust Bar Rev* 93 at 96-7, citing *Blackore v Linton* [1961] VR 374 at 380; *Mihaljevic v Longyear (Australia) Pty Ltd* (1985) 3 NSWLR 1; *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609.

[47] The Hon Lindgren, above n 40, 163.

[48] Derek Wong and Brent Michael, 'Western Export Services v Jireh International: Ambiguity as the gateway to surrounding circumstances?' (2012) 86 *Australian Law Journal* 57, 64-5. See also The Hon Lindgren, above n 40, 162. See also Oliver Jones, 'Are the High Court's reasons for refusing special leave binding?' (2013) 87(11) *Australian Law Journal* 774-783; N B Rao, 'The High Court ruling in

> intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction unless they are convinced that the decision is "plainly wrong"."[50] However, Bond J states that "Although decisions on special leave applications do not carry the weight of precedent, they may nevertheless be thought to be a strong indication of the approach of the High Court.[51]

A *WA Position*

In *McCourt v Cranston*,[52] the WA Court of Appeal in considering the effect of Jireh stated that:

> None of the statements in *Paribas*, *Toll*, *Wilkie* or *Ansett* were preceded by a qualification that a contract had to be "ambiguous or susceptible of more than one meaning" before evidence of surrounding circumstances could be received. Many judges around Australia did not appreciate that there was such a qualification. However the reasons in Jireh require courts to consider whether the statements in those cases should be read with that qualification; "until" the High Court embarks upon "a reconsideration" of *Codelfa*. In doing so, courts will have to consider whether the pronouncements in *Jireh* were ratio or "seriously considered dicta". In that respect, consideration will have to be given to whether a set of reasons of the High Court dismissing an application for special leave have anything more than persuasive value.
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> …
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> In view of the pronouncements in *Jireh*, when an issue arises about the proper construction of a contract and there is evidence of surrounding circumstances known to the parties or evidence of the purpose or object of the transaction, that evidence will not be admissible unless the court determines that the contract is:
>
> (a) "ambiguous"; or
>
> (b) "susceptible of more than one meaning"[53] (Citations omitted).

The Court then went on to discuss the ambiguity gateway arising from Mason J's true rule. It stated that the expression of "ambiguous or susceptible of

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Western Export Services v Jireh International Pty Ltd: Implications for contract interpretation' (2012) 23(3) *Insurance Law Journal* 332-333.

[49] (2007) 230 CLR 89, 151-2 [135].

[50] Wong and Michael, above n 43, 65.

[51] The Hon Justice John Bond, 'The use of extrinsic evidence in aid of construction: a plea for pragmatism', paper delivered for the Current Legal Issues Seminar Series 2016 (QSC) [2016] *QldJSchol* 9. See also *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [108], [111]-113] per Kiefel and Keane JJ in which their Honours found that *Jireh* is not a precedent binding courts below.

[52] [2012] WASCA 60.

[53] *McCourt* [2012] WASCA 60, [22]-[23].

more than one meaning" could also just mean "difficult to understand".[54] Lindgren agrees with this approach. He stated that this formulation "favour[s] a wide gateway which is the next best thing to abandoning one."[55]

Subsequently, President McLure comprehensively addressed the issue of the admissibility of surrounding circumstances evidence to aid in the construction of contracts in *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2012] WASCA 216 [76] - [79] in which her Honour 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, in the absence of some sort of identifiable ambiguity first being found in the text of a contract, evidence of surrounding circumstances must not be admissible in order to demonstrate the presence of a latent ambiguity.

With regard to showing ambiguity (or more than one meaning), the President said:

> 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…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.[56]

Generally speaking, Western Australia has been the most hesitant jurisdiction to stray from the High Court's original position. The passages above, and a number of other authorities,[57] demonstrate that reluctance.

VII A LOW THRESHOLD

[54] *McCourt* [2012] WASCA 60, [24].
[55] The Hon Lindgren, above n 40, 156.
[56] *Hancock Prospecting* [2012] WASCA 216, [77], [78].
[57] See eg. *Chu Underwriting Agencies Pty Ltd v Wise* [2012] WASCA 123.

It is evident from the above analysis, from a pragmatic sense, that imposing a threshold of first showing some level of ambiguity (or more than one meaning) as a 'gateway' to admitting surrounding circumstance evidence because the language of the text presents as doubtful could hardly be described as setting down some onerously high bar to the admissibility of such evidence, particularly where the evidence might assist in the interpretation of the contract.[58]

VIII 2014 – NEW DEVELOPMENTS?

A *The High Court Speaks*

In early 2014, the High Court had an opportunity to resolve the *Codelfa* saga once and for all when it heard an appeal dealing with a commercial contract in *Electricity Generation Corporation v Woodside Energy* (2014) 251 CLR 640. Regrettably, the decision in that case has been the subject of much criticism[59] and did not provide any clarity.[60]

In *Woodside*, 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.

As regard the 'true rule' of construction, any importance in the Court's observations in Woodside is drawn out of phrases and footnotes, primarily found in one or two sentences ALL within the same paragraph, namely paragraph 35 of the reasons, under the heading: 'The Construction Issue'.

In particular, two crucial phrases used by their Honours in that paragraph appear to have reignited a post Jireh debate over the 'true rule' and regrettably has led to a division between Australian courts. The division is over whether paragraph 35 of the decision has delivered the result of actually ending the application of the true rule of construction in Australia or not.[61]

The High Court said at paragraph 35:

> …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…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'…unless a contrary

[58] The Hon Justice Martin, above n 39. See also Brent Michael and Derek Wong, 'Recourse to Contractual Context Reaffirmed' (2015) 89 *ALJ* 181.
[59] John Carter, Wayne Courtney and Gregory Tolhurst, 'Reasonable endeavours in contract construction' (2014) 32 *JCL* 36.
[60] See eg. *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 310 ALR 113 at [71] discussed below in the paper; see also *Stratton Finance Pty Ltd v Webb* (2014) 314 ALR 166; *Newey v Westpac Banking Corporation* [2014] NSWCA 319.
[61] *Mainteck Services* (2014) 310 ALR 113 at [71] discussed below in the paper; see also *Stratton Finance* (2014) 314 ALR 166; *Newey* [2014] NSWCA 319.

> 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 (emphasis added).

It is unclear from the above passage whether the High Court was intending to disapprove or revise the 'true rule',[62] which in turn has led to a strong divergence of views – with WA,[63] Queensland[64] and Victoria[65] remaining on the status quo side of the debate, but NSW[66] and the Full Federal Court[67] seemingly aligned against that position. Moreover, by affirming that the surrounding circumstances must be considered, the High Court in *Woodside* added to the confusion by suggesting that it is not necessary to make a finding of ambiguity in the text of the agreement before a court can admit surrounding circumstances.

B *NSW Court of Appeal Reacts*

Not surprisingly, the New South Wales Court of Appeal in *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 310 ALR 113 at [71], expressed the view that paragraph 35 of *Woodside* was inconsistent with Jireh. The Court in *Mainteck* said that the High Court in *Woodside*:

> confirms that not only will the language used "require consideration" but so too will the surrounding circumstances and the commercial purpose or objects. ... 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.

In other words, the Court formed the view that *Woodside* had revised the true rule set down in *Codelfa*.

The controversy over the fate of the 'true rule' intensified dramatically from that date.[68]

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[62] This is particularly so because the High Court did not refer to either *Codelfa* or *Jireh*.
[63] See eg. *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd & Anor* [2014] WASCA 164.
[64] See eg. *Jakeman Constructions Pty Ltd v Boshoff* [2014] QCA 354 per Fraser JA (with whom Mullins and Henry JJ agreed); *Watson v Scott* [2015] QCA 267.
[65] See eg. *State of Victoria v R* [2014] VSCA 311 at [92] per Nettle, Osborn, Whelan JJA; *Leon Mancini & Sons Pty Ltd v Tallowate Pty Ltd* [2014] VSCA 306.
[66] *Mainteck Services* (2014) 310 ALR 113; see also *Stratton Finance* (2014) 314 ALR 166; *Newey* [2014] NSWCA 319 at [86] to [90].
[67] *Stratton Finance* (2014) 314 ALR 166 at [36] to [40].
[68] Namely 6 June 2014, from the date on which the reasons for decision *Mainteck* were delivered.

C *WA Court of Appeal Remains Steadfast*

The WA Court of Appeal, in the same year, namely 2014, formed a different view to NSW in its decision in *Technomin Australia Pty Ltd v Xstrata Nickel Australia Operations & Anor* [2014] WASCA 164.

The appellant, Technomin, brought an action to establish its entitlement to payment of mining royalties by Xstrata under a deed made in 1994. Technomin claimed to be entitled to a gross production royalty in the vicinity of $100 million under the terms of a 'GPR Deed' upon minerals mined at the Cosmos Nickel Mine operated by Xstrata.

By the GPR Deed, Xstrata agreed to pay to Technomin a royalty equal to 2% of gross proceeds of saleable product derived from any "Tenement" covered by the Deed.

Xstrata subsequently amalgamated the tenements covered by the GPR Deed into one tenement. The contentious issue became whether the royalty payable under the Deed was confined to production from an area covered by the original mining tenements as at the effective date, or whether the royalty extended to the mining of minerals on the new areas as well.

"Tenements" is defined very broadly in the deed as:

> Tenements' means "the Kathleen Valley Tenements and the Mount Harris Tenements and PL 36/1142 at Violet Range and any extension or variation or addition or replacement or substitution of any of them (whether or not also affecting other tenements or land outside the Area).

The dispute then turned on the construction of the definition of 'Tenements' in the GPR Deed. Technomin submitted that it had an entitlement to a royalty under the Deed on all minerals produced on the basis that the whole area fell within the definition of 'Tenements'.

1 *First Instance*

At first instance, Justice Allanson rejected Technomin's claim. His Honour determined to read into the definition of 'Tenements' a limitation that, in effect, the area of land affected by the definition could never extend beyond that which had applied at the time that the Deed was made.

The trial judge held that the definition of 'Tenements' was ambiguous; hence the context and commercial purpose of the GPR Deed were relevant in construing the meaning of the term. In determining the meaning of 'Tenements', the following surrounding circumstances were considered:

a) a letter of agreement;

b) antecedent joint venture agreements;

c) the common practice of amalgamation of mining leases and tenements; and

d) the permit holder's capacity by its election to include or exclude additional tenements from the operation of the GPR Deed.

2 *The Appeal*

On appeal, Technomin argued that the 'true rule' in *Codelfa* is the law and, as the meaning of the language of the royalty agreement was unambiguously clear, evidence of surrounding circumstances should not have been admitted. On that basis, Technomin argued that the area of any replacement or substitute tenement, such as the new amalgamated tenement, became a "Tenement" for the purpose of the GPR Deed whether or not it also affected land or tenements outside that original area.

The respondents, however, argued that the High Court decision in *Woodside* had vindicated the pre-*Jireh* position adopted by those intermediate appellate courts that had abandoned the gateway requirement.

The Court of Appeal rejected that argument. It pointed out that the majority in *Woodside* had not addressed *Jireh*, and had not identified whether the relevant contract was ambiguous. Accordingly, President McLure found that, until the High Court expressly held differently, ambiguity remains a gateway requirement before surrounding circumstances can be considered.

The Court of Appeal also found that the definition of 'Tenements' was ambiguous and susceptible of more than one meaning and therefore the trial judge was correct to rely on surrounding circumstances as an aid to construction.

The Court of Appeal went on to consider the location and history of the subject mining tenements and took the following matters into consideration in

construing the royalty deed without having to establish ambiguity, on the basis that these were contextual matters expressly referred to in the GPR Deed:

a) the terms of related agreements; and

b) the law governing the tenement interests.

Further, upon finding ambiguity, the court looked to the following surrounding circumstances:

a) the extent of the existing adjoining tenement interests in the area;

b) the nature of the tenement interests under the *Mining Act 1978* (WA); and

c) industry practice.

The court went on to provide five observations 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.[69]

In March 2015, the High Court had a further chance to provide some much needed clarity when Technomin brought a special leave application to appeal from the decision of the WA Court of Appeal. The appellant relied on the ground that an appeal would provide an opportunity for the High Court to settle the dispute between the intermediate courts as to the right approach to contractual construction. The High Court refused the application for special leave, and was quick to point out that all three appellate judges and the trial judge held that there was ambiguity, and so the true rule would not affect the outcome of the case whether or not it applied.

IX CURRENT POSITION

[69] *Technomin* [2014] WASCA 164, [215].

Some 33 years on, in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*,[70] French CJ, Nettle and Gordon JJ agreed with the position in *Codelfa* stating "[t]he rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context … and purpose."[71]

The High Court stated:

> In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.
>
> 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.[72]

Reynolds suggests that the third paragraph affirms that there are multiple purposes for which external evidence can be used. The phrases "the commercial purpose of objects of the contract" and the "genesis of the transaction, the background, the context [and] the market in which the parties are operating" suggest that external evidence can be used to explain the aim of a transaction.[73] He further opines that in stating that external evidence can be used "in determining the proper construction where there is a constructional choice" the High Court has affirmed that external evidence can be used to assist in the interpretation of ambiguous language.[74]

Five of the judges in *Mount Bruce Mining* acknowledged that whether extrinsic evidence can be used to identify ambiguity, and whether it can be used to resolve ambiguity once found, are two distinct questions (which may or may

[70] *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104.
[71] *Mount Bruce Mining* (2015) 256 CLR 104, 116 [46].
[72] *Mount Bruce Mining* (2015) 256 CLR 104, 116-117 [47]-[49].
[73] Reynolds, above n 11, 200.
[74] Reynolds, above n 11, 200.

not have different answers).[75] This is in line with uncontroversial propositions that the proper interpretation of a term of a contract is to be determined by reference to what reasonable businesspersons having all the background knowledge then reasonably available to the parties would have understood them to have meant.[76] In other words, the resolution of ambiguity, as distinct from the identification of ambiguity, is to be achieved by a consideration of all the background knowledge then reasonably available.

However, Kiefel and Keane JJ in *Mount Bruce Mining* upheld the position in *Codelfa* stating that:

> Th[e] question is whether ambiguity must be shown before a court interpreting a written contract can have regard to background circumstances. Until that question is squarely raised in and determined by this Court, the question remains for other Australian courts to determine on the basis that *Codelfa* Construction Pty Ltd v State Rail Authority of New South Wales…remains binding authority.[77]

French CJ, Nettle and Gordon JJ also concluded that:

> These observations are not intended to state any departure from the law as set out in *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) and *Electricity Generation Corporation v Woodside Energy Ltd*. We agree with the observations of Kiefel and Keane JJ with respect to *Western Export Services Inc v Jireh International Pty Ltd*.[78]

In summary, the High Court confirmed 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. However, the question of whether ambiguity must be identified in the language of a contract before a court may have regard to the circumstances surrounding the transaction has been left unanswered.

The conflicting opinions on the ramification of the High Court's decisions in Woodside and Mount Bruce Mining have left this issue in a state of confusion. Regrettably, the law in Australia on an area as critical to business as contractual construction remains to be decided.

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[75] *Mount Bruce Mining* (2015) 256 CLR 104, [49] (French CJ, Nettle and Gordon JJ), [110] (Kiefel and Keane JJ).
[76] *Mount Bruce Mining* (2015) 256 CLR 104. See also Tristan Lockwood and Hayden Dunnett, 'High Court prospects a duffer: Mount Bruce Mining v Wright Prospecting' (January 2016) *Australian Property Law Bulletin* 162.
[77] *Mount Bruce Mining* (2015) 256 CLR 104, 134 [118]-[119].
[78] *Mount Bruce Mining* (2015) 256 CLR 104, 117 [52].

X IMPLICATIONS

The implications for litigants in Australia dealing with issues about whether ambiguity must first be identified before evidence of surrounding circumstances can be adduced are important and complex.

The controversy sparked by the decision of the three justices of the High Court in *Jireh* was necessitated by the cavalier approach to contract interpretation of some intermediate appellate courts including the Full Federal Court, the Victorian Court of Appeal and the New South Wales Court of Appeal.

Even though reasons for refusal to grant special leave may not have been the best vehicle for the Court to use, the High Court deemed it necessary to remind lower courts that the true rule stated in *Codelfa* was still the law in Australia.

Despite the controversy about whether the decision in Jireh was binding or merely persuasive, it was followed by the Court of Appeal in Western Australia[79] and it was thought that it would only be a matter of time before the High Court put the position beyond argument.

The first opportunity the High Court had was in *Woodside* but that created more uncertainty with numerous decisions of strong courts in the Full Federal Court and the New South Wales Court of Appeal regarding *Woodside* as having abandoned the true rule in *Codelfa*. This was primarily due to the scant attention given to *Codelfa* in *Woodside*.

Unfortunately, the decision in *Mount Bruce Mining* does not appear to have clarified the position at least so far as New South Wales is concerned. The NSW Court of Appeal has not expressed a view by reference to *Mount Bruce Mining* as to whether ambiguity might be identified by reference to matters external to the contract.

In March 2017, the NSW Court of Appeal handed down its decision in *Walker Group Constructions Pty Ltd v Tzaneros Pty Ltd* [2017] NSWCA 27 in which the Court held:

> The meaning of the terms of a commercial contract is to be determined by what a reasonable business person would have understood those terms to mean, taking into

[79] *McCourt* [2012] WASCA 60; *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2012] WASCA 216; *Cape Lambert Resources Ltd* (2013) 298 ALR 666.

> account the language, surrounding circumstances and commercial purposes of the contract.

Although both *Woodside* and *Mount Bruce Mining* were cited as authority, these are nonetheless the words used in paragraph 35 of *Woodside*.

The Full Court of the Federal Court has confirmed in *Todd v Alterra at Lloyds Ltd*[80] by reference to *Mount Bruce Mining* that ambiguity might be identified by reference to matters external to the contract. Beach J stated that *Mount Bruce Mining* recognised that *Codelfa* may not rule out an approach which first uses context to ascertain otherwise latent ambiguity in the text. His Honour went on to affirm the approaches taken by the court in *Franklins*,[81] *Mainteck*,[82] and *Stratton Finance*.[83]

The Court of Appeal of Victoria has not considered the question of whether ambiguity might be identified by reference to matters external to the contract post *Mount Bruce Mining*. Whilst the question has been touched on in a number of cases in Victoria, the Court of Appeal has either restated the *Codelfa* exclusionary proposition[84] or acknowledged the debate about the status of the true rule,[85] but otherwise did not take the matter or the debate further.[86]

The Courts of Appeal of WA[87] and Queensland[88] have maintained their position on the issue.

Uncertainty surrounding the operation and application of the true rule also has implications for the law relating to rectification.[89] If the principles of contract interpretation are stated more broadly there will be less opportunity to seek to

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[80] [2016] FCAFC 15
[81] *Franklins* (2009) 76 NSWLR 603 at [14] to [17].
[82] *Mainteck Services* (2014) 310 ALR 113.
[83] *Stratton Finance* (2014) 314 ALR 166 at 174 [40].
[84] *Masters Home Improvement Pty Ltd (formerly Shellbelt Pty Ltd) v North East Solution Pty Ltd* [2017] VSCA 88 in which Santamaria, Ferguson and Kaye JJA recited the relevant passage from *Codelfa* and the general proposition from *Mount Bruce Mining*, but took the matter no further. *Schreuders v Grandiflora Nominees Pty Ltd* [2015] VSCA 443 in which Kyrou, Ferguson and McLeish JJA discussed *Codelfa* and the relevant passages from *Mount Bruce Mining*, but also took the matter no further. See also *Bisognin v Hera Project Pty Ltd* [2016] VSCA 322.
[85] *Regreen Asset Holdings Pty Ltd v Castricum Brothers Australia Pty Ltd* [2015] VSCA 286 at [77] in which Warren CJ, Kyrou and McLeish JA acknowledged the debate about the true rule in *Codelfa* but did not discuss it in detail.
[86] See also *Eureka Operations Pty Ltd v Viva Energy Australia Pty Ltd* [2016] VSCA 95 at [48] in which Santamaria, Ferguson and McLeish JJA acknowledged that ambiguity may still have to be shown before extrinsic evidence can be admitted, but did not find it necessary to analyse the matter further.
[87] *Black Box Control Pty Ltd v Terravision Pty Ltd* [2016] WASCA 219; *Mercanti v Mercanti* [2016] WASCA 206.
[88] *Kitchen v Vision Eye Institute Ltd & Anor* [2016] QCA 226; *Browning v ACN 149 351 413 Pty Ltd (In Liq) (Formerly Known As Enviren Constructions Pty Ltd)* [2016] QCA 169.
[89] Paul Davies, 'Rectification Versus Interpretation: The Nature and Scope of The Equitable Jurisdiction' (2016) 75(1) *The Cambridge Law Journal* 62.

rectify the words used in a contract. The parties may be held to an interpretation that is contrary to their intention. Rectification will only assist where there is mistake in expression, and that will be absent if the parties intended that the words in their contract should bear a particular meaning.[90]

One practical solution to the ongoing uncertainty regarding contract interpretation would be to follow the lead of some of Australia's most important trading partners and codify the law relating to contracts. Countries with Civil Systems of law, such as China, Japan, Republic of Korea, India and the United States of America have all codified the laws relating to contracts. The closest comparison to Australia is the USA where the Uniform Commercial Code has application in all 50 states to commercial and sales transactions and is designed to provide a uniform set of laws regarding formation of contracts, contract interpretation, implication of terms, and termination of contracts.

This subject of possible codification of the law of contract in Australia has been the subject of several discussion papers by succeeding Federal Attorney Generals since 2012 and is bound to gain more traction in the short to medium term.[91]

Another way in which certainty to contractual interpretation may be carried out is simply by disregarding ambiguity as a threshold requirement, whilst maintaining the principle that the courts ought not to override the plain meaning of the terms of a contract even where ambiguity can be raised by extrinsic evidence.[92]

XI CONCLUSION

For present purposes, and given the High Court's remarks in *Mount Bruce Minin,, Codelfa* remains binding authority. The reasons for decision in *Woodside*[93] should not be regarded as overruling *Codelfa*. However, the debate lies with the extent to which *Codelfa* is binding authority.

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[90] Donald Nicholls, 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 *Law Quarterly Review* 577, 586.

[91] Attorney-General's Department (Cth), 'Improving Australia's Law and Justice Framework: A discussion paper exploring the scope for reforming Australian contract law' (22nd March 2012) http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Review-of-Australian-Contract-Law.aspx>; Nicola Roxon, 'Time for the great contract reform', *The Australian*, 23 March 2012; see also Warren Swain, Codification of Contract Law: Some Lessons From History' (2012) 40 *University of Queensland Law Journal* 39; cf Dan Svantesson, 'Codifying Australia's Contract Law - Time for a Stocktake in the Common Law Factory' (2008) 20 *Bond Law Review* 1.

[92] See also Tiphanie Jane Acreman, 'The Long Road to a Wide Ambiguity Gateway' (2016) 42 *Australian Bar Review* 12, 30.

[93] Or for that matter, *Pacific Carriers Ltd* or *Toll.*

The High Court is yet to resolve the issue of whether an ambiguity in the meaning of a term in a commercial contract or the construction of the contract may be identified by the admissibility of evidence external to the contract. Decisions of intermediate courts of appeal that have been handed down since *Mount Bruce Mining* appear to yet resolve the application of the true rule of construction. It is arguable that similar factual scenarios in Australia could result in different decisions, depending on the jurisdiction in which litigation is commenced.

The divergence of views and the division in authority discussed above still exist. Such matters can only be resolved as part of the ratio decidendi of a High Court decision. That in itself poses practical problems. For the High Court to grant leave to hear such a case, the contract in question would need to be truly unambiguous and in respect of which courts below had disallowed the admissibility of extrinsic evidence due to the ambiguity gateway. The problem is exacerbated by reason of the fact that ambiguity carries a low threshold, and contracts which are truly unambiguous may not be worth litigating in the High Court.