The Interpretation of Written Contracts*

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I. Introduction

'Interpretation' is used in different ways. Sometimes it is used, interchangeably with construction, to describe at least two interrelated phenomena: the meaning of words and sentences, and their legal effect when applied to facts.[1] Although in straightforward cases the application of meaning to facts will be simple, this will not always be the case. On some occasions, 'interpretation' is used to describe only the latter of those phenomena.[2] More commonly today, and in the approach taken in this essay, it is used to describe only the former, namely the meaning of words in legal instruments.

This essay explores the interpretation of written contracts. It begins by illustrating the history of interpretation, which Wigmore described as 'the history of a progress from a stiff

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* This essay was first published in C Mitchell and S Watterson (eds), *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (Oxford, Hart Publishing, 2020) 243. It is based on a speech delivered for the Mr Justice Russell Brown Law Lecture Series, University of Alberta, 9 January 2020.

[1] *Chatenay v Brazilian Submarine Telegraph Co Ltd* [1891] 1 QB 79 (CA) 85.

[2] *Life Insurance Co of Australia Ltd v Phillips* [1925] HCA 18, (1925) 36 CLR 60, 78.

and superstitious formalism to a flexible rationalism'.[3] A remnant of that history is a debate about the role of ambiguity as a gateway to the admissibility of extrinsic evidence of context. The essay then turns to the underlying principle without which that issue cannot be resolved, namely the role of the 'intention of the parties', and considers two further modern debates that require consideration of that underlying principle: implication of terms and rectification.

II. Interpretation as Initially a Type of Translation

In ordinary discourse, such as conversation, interpretation involves an attempt to understand the intended meaning of the speaker. This involves a flexible rationalism that depends upon both words and context. When parties seek to bind themselves to written contracts they use the same essential techniques of communication as ordinary discourse. The core principles of interpretation of their meaning ought, therefore, not to be essentially different. But, historically, the exercise of interpreting the words of a written contract was often different. In many cases, the interpretation of contractual words was primarily a matter of law, in an exercise akin to translating the words into a different language.

A thought experiment by John Searle illustrates the difference between interpretation and what might be described as translation.[4] Searle supposed that he was locked in a room with a batch of paper with Chinese writing on it. Pieces of paper were passed into the room with different Chinese writing on them which, unknown to him, contained questions. Although Searle did not know a single Chinese character, he imagined that he possessed an English-language set of rules (a 'program') that he could manually follow, inputting the characters he received and following instructions about the paper to pass back through the door containing the answers. He imagined that he could eventually follow the program so accurately that his answers to the questions were indistinguishable from those of a native Chinese speaker. Searle was engaging in translation, but not in interpretation. He had no ability to ask himself what the person writing the message intended and therefore no concern for the context in which the words were used.

The historical approach to interpretation of many words of written contacts attempted to confine interpretation, as far as possible, to a type of legal translation. Conveyancers knew that many words had defined legal meanings that applied irrespective of context and independently of any meaning that those words might reasonably have been understood to have by the parties. Legal rules would define the meaning of those words. The best conveyancers and drafters attempted to confine themselves to those words. There would be considerable certainty of application of those words because their meaning would not be determined by context or pragmatics.

As an exercise akin to translation, the meaning of these words was a matter of law and a matter for lawyers. The legal monopoly on interpretation was justified by pointing to an asserted need for certainty and a need to preserve the legal rules. In 1555, in *Throckmerton v*

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[3] JH Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (Boston, Little, Brown, & Co, 1905) vol 4, 3476, §2462.
[4] JR Searle, 'Minds, Brains and Programs' (1980) 3 *The Behavioral and Brain Sciences* 417, 417–24.

Tracy,[5] Brook CJ said that 'if a man should bend the law to the intent of the party, rather than the intent of the party to the law, this would be the way to introduce barbarousness and ignorance, and to destroy all learning and diligence'. In 1702, Holt CJ said that 'if we once travel into the affairs of the testator and leave the will we shall not know the mind of the testator by his words, but by his circumstances; so that if you go to a lawyer he shall not know how to expound it'.[6] In 1756, Gilbert wrote that 'the Sense and Signification of the Words must be expounded by the Law' and determined by 'the Rules of Law' otherwise 'no Man could be certain of any Property'.[7] This was echoed in 1821 by Lord Redesdale, who said that, if a different approach were taken, 'all property must be in hazard'.[8]

III. Relaxation of the Translation Approach Subject to an Ambiguity Constraint

The translation type approach to interpretation was not, and could never have been, universal. Many words had no defined legal meaning and therefore their meaning had to be their ordinary, non-legal meaning. But there might be several options for that meaning. Where this was so, there needed to be a technique for identifying the ordinary meaning that would be attributed to those words. In these cases of 'ambiguity', the technique was to identify the ordinary meaning by reference to what would reasonably be understood to have been intended. That reasonable understanding required reference to be had to context which, in turn, included circumstances extrinsic to the contract.

In the sixteenth century, Bacon explained that ambiguities could be either latent or patent.[9] An example of a patent ambiguity is a transfer 'to James and Paul and heirs' without clarity about whose heirs are being described. An example of a latent ambiguity is a transfer to 'my aunt Molly', where the transferor has two aunts called Molly. Unfortunately, as Phipson observed, a misunderstanding of Bacon's discussion led to extrinsic evidence being seen to be admissible for latent, but (subject to exceptions) not for patent, ambiguities.[10] The exceptions included partial blanks in the written instrument, a legatee being referred to by a term of endearment, and an instrument beginning 'I, A' and signed 'B'.[11]

Despite this misunderstanding, both Phillipps and Thayer observed that patent ambiguity should not, and often in practice was not, treated any differently from a latent

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[5] *Throckmerton v Tracy* (1555) 1 Plow 145, 162; 75 ER 222, 251.
[6] *Cole v Rawlinson* (1702) 1 Salk 234, 235; 91 ER 207, 208.
[7] G Gilbert, *The Law of Evidence* (London, Lintot, 1756) 81. See also *Countess of Rutland's Case* (1604) 5 Co Rep 25b, 26a–b; 77 ER 89, 90; WM Best, *A Treatise on the Principles of Evidence and Practice as to Proofs in Courts of Common Law* (London, S Sweet, 1849) 246, § 204; R Cross, *Evidence* (London, Butterworth & Co, 1958) 495.
[8] *Smith v Doe d Jersey* (1821) 2 Brod & B 473, 612; 129 ER 1048, 1102.
[9] F Bacon, *A Collection of Some Principle Rules and Maximes of the Common Lawes of England* (London, J More, 1639) 82–84.
[10] SL Phipson, *The Law of Evidence*, 5th edn (London, Stevens & Haynes, 1911) 579. See, eg *Colpoys v Colpoys* (1822) Jac 451, 463; 37 ER 921, 925; *Doe d Gord v Needs* (1836) 2 M & W 129, 139–40; 150 ER 698, 702–03.
[11] Phipson (n 10) 579. See, eg *Doe d Gord* (n 10) 139–40; 702–03.

ambiguity.[12] Nevertheless, there remained the difficult question of when words would be ambiguous so as to permit the reception of extrinsic evidence.

A powerful attempt at definitive explication came in *Shore v Wilson*,[13] where the House of Lords received the advice of the common law judges in 1842 concerning the meaning of 'godly preachers of Christ's holy Gospel' where a woman who executed a deed containing those words was a member of a religious group that used them in a particular way. In a famous passage, the Lord Chief Justice, Tindal CJ, advised that words should be given their common meaning without resort to evidence of context outside the agreement other than in various categories of ambiguity:

> The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it …
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> The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which in many instances use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life.
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> … I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed.[14]

In this exposition, Tindal CJ made two important points which were in tension with each other. One point was that the meaning of the contractual words was that which gave effect to the reasonably understood intention of the parties at the time the agreement was made. Ordinary techniques of language would lead to the expectation that all context would be relevant to determining that intention. But the second point was that, in order to increase

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[12] SM Phillipps, *A Treatise on the Law of Evidence*, 10th edn (London, William Benning & Co, 1852) vol 2, 389–90; JB Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston, Little, Brown, & Co, 1898) 424–25.

[13] *Shore v Wilson* (1842) 9 Cl & Fin 355, 8 ER 450.

[14] ibid 565–67; 532–33.

certainty, context outside the agreement was inadmissible to ascertain that reasonably understood intention other than in the various specified categories where 'doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances'.

It was not long before there was pressure upon the categories. Eventually, the categories became generalised, so that resort to extrinsic evidence began to be seen as legitimate in every case of ambiguity.[15] With this process of liberalisation, the general ambiguity threshold itself came under pressure. In 1905, Wigmore described the ambiguity gateway as a relic of 'the old formalism, namely, the rule that you cannot disturb a plain meaning'.[16]

IV. Relaxation of the Ambiguity Constraint

The existence of an ambiguity gateway to extrinsic evidence in interpretation is today subject to serious doubt. In 2002, Lord Steyn said that it is 'crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account'.[17] In Australia, it has been held, at least in some intermediate appellate courts, that no ambiguity gateway exists.[18] But there remains controversy about whether the 'true rule' in Australia is that extrinsic evidence of surrounding circumstances is only admissible 'if the language is ambiguous or susceptible of more than one meaning'.[19]

Those who support the ambiguity gateway might, however, point to its existence in other areas of interpretation of legal instruments. First, in relation to interpretation of wills, in the UK and in every Australian state and territory except South Australia, legislation allows the admission of extrinsic evidence to construe a will where the language makes the will or any part of it meaningless, ambiguous on its face or ambiguous in light of surrounding circumstances,[20] or, in the case of the Australian Capital Territory and Victoria, if the will is uncertain.[21] Secondly, in relation to interpretation of statutes, in the UK extrinsic material can only be admitted to construe a legislative instrument when it is ambiguous, obscure or leads

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[15] E Cockle, *Leading Cases and Statutes on the Law of Evidence*, 2nd edn (London, Sweet & Maxwell, 1911) 300; *Great Western Rly and Midland Rly Co v Bristol Corp* (1918) 87 LJ Ch 414 (HL) 418–19, 424–25.
[16] Wigmore (n 3) vol 4, 3479, § 2462.
[17] *R (Westminster City Council) v National Asylum Support Services* [2002] UKHL 38, [2002] 1 WLR 2956 [5]; approved in *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662 [36].
[18] *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407, (2009) 76 NSWLR 603 [14]–[18]; *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184, (2014) 89 NSWLR 633 [71]–[86]; *Stratton Finance Pty Ltd v Webb* [2014] FCAFC 110, (2014) 314 ALR 166 [36]–[41]. Compare *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45, (2011) 282 ALR 604; *McCourt v Cranston* [2012] WASCA 60, [2012] ANZ Conv R 12-0006 [23]; *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66, (2013) 298 ALR 666 [107].
[19] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24, (1982) 149 CLR 337, 352. See the comprehensive discussion in JD Heydon, *Heydon on Contract* (Sydney, Lawbook Co, 2019) 329–425.
[20] Wills Act 1968 (ACT), s 12B; Wills Act 1970 (WA), s 28A; Succession Act 1981 (Qld), s 33C; Administration of Justice Act 1982 (UK), s 21; Wills Act 1997 (Vic), s 36; Succession Act 2006 (NSW), s 32; Wills Act 2008 (Tas), s 46; Wills Act (NT), s 31. See also B Häcker, 'Thy Will Be Done' (2014) 130 *LQR* 360, 363.
[21] Wills Act 1968 (ACT), s 12B(b)–(c); Wills Act 1997 (Vic), s 36(1)(b)–(c).

to an absurdity.[22] In Australia, as late as 1977, the High Court held that common law parliamentary materials were inadmissible as an aid to interpretation,[23] although an exception developed where the materials could show the purpose of the statute.[24] Only Murphy J dissented from this approach, arguing that regard could generally be had to it in cases of ambiguity; he reasoned that a reasonable reader of a statute should be able to accept unambiguous words without reference to parliamentary materials, but that such reference could be made in cases of ambiguity.[25] Ultimately, legislative change in Australia permitted recourse to these materials generally, although in some circumstances there are remnants of the ambiguity gateway first opened by Murphy J.[26] One might have thought that the same approach would apply to ascertaining the purpose of a legislative provision since the purpose is not independent of the words used. Curiously, however, neither common law nor legislation requires any ambiguity before reference can be made to extrinsic materials to ascertain the purpose of the legislation.[27]

Ultimately, in order to decide whether, or the extent to which, the ambiguity gateway should be relaxed, it is necessary to ask what the exercise of interpretation involves and what principles underlie the exercise. Only then would it be possible to consider the extent to which functional concerns of certainty should be permitted to intrude upon those underlying principles. The ambiguity gateway is not the only issue affected by the underlying approach that is taken to interpretation. Others include the following. Is extrinsic evidence admissible for the purpose of interpretation if it was not reasonably available to both parties? Is extrinsic evidence admissible for the purpose of interpretation if it post-dates entry into the contract? What rules should govern the implication of terms? And what rules should govern the rectification of terms?

V. 'The Intention of the Parties' as the Underlying Interpretative Principle

In the process of interpretation, words will sometimes have a range of different potential meanings, including, in some cases, meanings which are not within the range of literal

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[22] *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL) 620, 640.
[23] *Commissioner for Prices and Consumer Affairs (SA) v Charles Moore (Aust) Ltd* [1977] HCA 38, (1977) 139 CLR 449, 461–62, 470, 476–78. See also *Victoria v The Commonwealth* [1975] HCA 39, (1975) 134 CLR 81, 152.
[24] *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* [1982] HCA 8, (1982) 150 CLR 355, 373–75; *Gerhardy v Brown* [1985] HCA 11, (1985) 159 CLR 70, 104, 111; *Hoare v The Queen* [1989] HCA 33, (1989) 167 CLR 348, 360.
[25] *Commissioner for Prices and Consumer Affairs* (n 23) 480.
[26] Acts Interpretation Act 1901 (Cth), ss 15AA–15AB; Acts Interpretation Act 1931 (Tas), ss 8A–8B; Acts Interpretation Act 1954 (Qld), ss 14A–14B; Interpretation of Legislation Act 1984 (Vic), ss 35(a)–35(b); Interpretation Act 1984 (WA), ss 18–19; Interpretation Act 1987 (NSW), ss 33–34; Interpretation Act 1987 (NT), ss 62A–62B; Legislation Act 2001 (ACT), ss 139, 141–43. Compare South Australia: *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3, (2012) 248 CLR 1 [33].
[27] *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2, (1997) 187 CLR 384, 408; *Newcastle City Council v GIO General Ltd* [1997] HCA 53, (1997) 191 CLR 85, 99, 112–13.

meanings of the words. How, then, should the best meaning be chosen? It is often said that the chosen meaning, in a commercial contract, should be found by considerations of commercial convenience or commercial sense.[28] In other contexts, it is said that the chosen meaning, whether construing a statute or a contract, should be determined by reference to common sense.[29] But there must be a yardstick against which the choice, including considerations of 'convenience' and 'common sense', can be made. After all, one party's commercial convenience or commercial sense may often be the other's commercial inconvenience and commercial nonsense.

The answer, given on so many occasions it does not bear citation, is that the touchstone is the 'intention of the parties'. In hindsight, this shorthand expression, with its connotations of subjectivity, may have been better avoided in English law. The concern is not with the subjective intention of the parties, or the subjective intention of either of them. The 'intention of the parties' is a shorthand description of an objective approach that is concerned with what a reasonable person would understand to have been intended by the words if written by a notional reasonable person in the position of both of the parties. This is usually described as the objective theory of contract.

There are some who dispute the objective theory. They believe that the underlying principle in contract law is a concern to enforce subjective intentions. On that view, an objective approach to the 'intention of the parties' is very difficult to justify. Why should the law be concerned with the intention of a notional reasonable person in the position of both of the parties when the underlying focus is really on the extent of subjective agreement of the

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[28] *Miramar Maritime Corp v Holborn Oil Trading Ltd (The Miramar)* [1984] AC 676 (HL) 682; *Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191 (HL) 201; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (HL) 770–71; *Society of Lloyd's v Robinson* [1999] 1 WLR 756 (HL) 763; *Zhu v Treasurer of New South Wales* [2004] HCA 56, (2004) 218 CLR 530 [82]; *Barclays Bank plc v HHY Luxembourg SARL* [2010] EWCA Civ 1248, [2011] 1 BCLC 336 [25]–[26]; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 [21]–[30], [39]–[40]; *Electricity Generation Corp v Woodside Energy Ltd* [2014] HCA 7, (2014) 251 CLR 640 [35], citing *Re Golden Key Ltd* [2009] EWCA Civ 636 [28]; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 [15]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37, (2015) 256 CLR 104 [51]; *Simic v New South Wales Land and Housing Corp* [2016] HCA 47, (2016) 260 CLR 85 [78]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12, (2017) 261 CLR 544 [17]; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 [11]. See also *Hydarnes Steamship Co v Indemnity Mutual Marine Assurance Co* [1895] 1 QB 500 (CA) 504; *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65, (2000) 203 CLR 579 [22]; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] Bus LR 1719 [8]; *International Air Transport Assoc v Ansett Australia Holdings Ltd* [2008] HCA 3, (2008) 234 CLR 151 [8]. *cf Mitsubishi Heavy Industries Ltd v Gulf Bank KSC* [1997] 1 Lloyd's Rep 343 (CA) 350; *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1998] 1 WLR 461 (CA) 468; *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732 [22].

[29] *Barnes v Jarvis* [1953] 1 WLR 649 (Div Ct) 652; *Richardson v Austin* [1911] HCA 28 (1911) 12 CLR 463, 477–78, citing *Dyke v Elliott (The Gauntlet)* (1874) LR 4 PC 184, 191; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26, (1981) 147 CLR 297, 320; *Rayware Ltd v Transport and General Workers' Union* [1989] 1 WLR 675 (CA) 681–82; *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389, 400; *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 (HL) 356; *Mannai Investment Co* (n 28) 782; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) 912; *Cadogan Estates Ltd v McMahon* [2001] 1 AC 378 (HL) 388; DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, 8th edn (Sydney, LexisNexis Butterworths, 2014) para 4.1.

two actual parties? An example of a subjective approach to contract law can be seen in French law. Ordonnance nº 2016-131 of 10 February 2016, Article 1188 provides:

> A contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms.
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> Where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it.[30]

In French law, this reference to the common intention of the parties appears to be a reference to their subjective intentions. Only where their subjective intentions are not clear does the objective rule apply. One driver of modern French law was Pothier's treatise on the law of obligations.[31] His first rule of contractual interpretation was to 'examine what was the common intention of the contracting parties rather than the grammatical sense of the terms'.[32] Pothier's will theory of contract had powerful supporters. A version of it was adopted by von Savigny, strongly influenced by Kant. But although Pothier's treatise was translated by Sir William Evans in 1806, the subjective French theory was never accepted by the English. Bentham was highly critical of the English for this reason. He described the refusal to admit oral evidence of intention 'an enormity, an act of barefaced injustice, unknown everywhere but in English jurisprudence'.[33]

English and Australian law do not accept the subjective theory of contract. The entrenchment of the objective approach is clearly seen in Australian law. In 1983,[34] Mason ACJ, Murphy and Deane JJ said that the objective approach had 'command of the field'. Since then, the High Court of Australia has reiterated that '[t]he legal rights and obligations of the parties turn upon what their words and conduct would be reasonably understood to convey, not upon actual beliefs or intentions'.[35] As Gummow and Hayne JJ observed in *Byrnes v Kendle*,[36] 'the "objective theory" of contract formation … is concerned not with "the real intentions of the parties, but with the outward manifestations of those intentions"'. Similarly, Heydon and Crennan JJ, quoting from Oliver Wendell Holmes, said that 'parties may be bound by a contract to things which neither of them intended'.[37]

It is no coincidence that this is the same approach that people use every day to understand ordinary discourse. The objective theory recognises that contracts are an attempt by people to bind themselves and others to obligations using the same techniques of everyday language. Suppose that a parent promises a child that he will attend her swimming

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[30] J Cartwright, B Fauvarque-Cosson and S Whittaker (trans), *The Law of Contract, The General Regime of Obligations, and Proof of Obligations: The New Provisions of the Code Civil Created by Ordonnance nº 2016-131 of 10 February 2016*, 17. (This officially authorised English translation of the text is published online at www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf.)

[31] RJ Pothier, *Traité des Obligations* (Paris, Chez Debure, 1761).

[32] RJ Pothier, *A Treatise on the Law of Obligations, or Contracts*, WD Evans (trans) (London, J Butterworth, 1806) vol 1, paras 90–91.

[33] J Bentham, 'Rationale of Judicial Evidence' in J Bowring (ed), *The Works of Jeremy Bentham* (Edinburgh, Tait, 1843) vol 7, 556–57. See also S Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal* (London, J Butterworth, 1807) vol 2, 533–34.

[34] *Taylor v Johnson* [1983] HCA 5, (1983) 151 CLR 422, 428–29.

[35] *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55, (2004) 218 CLR 471 [34].

[36] *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253 [59].

[37] ibid [100], quoting OW Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 463.

competition on the weekend but that the parent arrives in the final 10 minutes, after all the child's races have been swum. It will not avail the parent to say that he only intended to arrive for some part of the event. The words of the promise meant what the child would reasonably understand them to mean that the parent would arrive in time to watch the child.

As in ordinary discourse, the 'reasonably understood intention' approach also has the effect that when we interpret the meaning of a written contract, we are not limited to the range of literal meanings of the words used. The range of meaning of words is important, but it is not conclusive. In *Fitzgerald v Masters*,[38] the concluding clause in a written contract purported to embody a set of conditions for sale 'so far as they are inconsistent'. The word 'inconsistent' might have been capable of a number of different literal meanings, but one literal meaning that it did not have was 'consistent'. Nevertheless, as Dixon CJ and Fullagar J said, 'consistent' was the meaning that the parties 'must clearly have intended'.[39] No reasonable person in the position of the parties would understand the parties to have set out carefully all of the terms of their contract only then to provide for incorporation of other terms only so far as they are inconsistent. Examples of words bearing the opposite of their literal meaning illustrate what Lord Hoffmann said in *Chartbrook Ltd v Persimmon Homes Ltd*:

> [T]here is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.[40]

Although the process of interpretation contains no limit on the departure from the literal meaning of words, the more that an interpretation departs from the range of the literal meanings of the words, the more the departure will need to be justified by the context. One matter of context is if the written contract was drafted by professionals who might be expected to choose their words with care, albeit that this is a context which is an extrinsic circumstance usually considered even if the words are not ambiguous. An example of the role of that context is *Wood v Capita Insurance Services Ltd*.[41] In that case, the UK Supreme Court considered a clause by which a seller agreed to indemnify a buyer against losses 'following and arising out of claims or complaints registered with the FSA [Financial Services Authority]'. The court held that the indemnity was limited to losses arising out of claims or complaints. It did not extend to losses arising from a compensation scheme for misled customers that was set up after consultation with the FSA. Lord Hodge, giving the judgment of the court, emphasised that the contract was 'detailed and professionally drafted',[42] and that the parties were 'commercially sophisticated'.[43] His Lordship said: 'Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals.'[44]

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[38] *Fitzgerald v Masters* [1956] HCA 53, (1956) 95 CLR 420.
[39] ibid 427.
[40] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 [25].
[41] *Wood* (n 28) [18].
[42] ibid [16].
[43] ibid [28].
[44] ibid [13].

It might seem strange that the clause in *Wood* meant that a scheme set up after an FSA complaint from a single customer would be covered by the indemnity, but that one set up after voluntary reporting or notice from a whistleblower to the FSA would not. This, counsel for the buyer had argued, was especially odd because an interpretation that covered both circumstances was possible with only slight modifications to the grammar of the clause. But one key point of the case is that the further that one departs from the range of literal or interpretative meanings of the words, the more justification is required, particularly in professionally drafted contracts.

As an underlying interpretative principle, the intention of the parties, when understood in this objective manner, provides the means by which these long-standing issues of interpretation can be resolved. In relation to the admissibility of extrinsic evidence as to context, this principle suggests that almost all evidence of context should be admissible in the interpretation of a contract. The qualification 'almost' includes that context, and therefore extrinsic evidence, which is not reasonably available at the time of contracting might not be imputed to the reasonable person in the position of both of the parties, just as matters known to one party but not reasonably available to the other would not be imputed to the notional reasonable person.[45]

VI. 'Intention of the Parties' and Ambiguity

The constraint of an ambiguity gateway cannot be justified by the underlying interpretative principle. However, one justification given for the ambiguity gateway is an assertion that it would lead to greater certainty in the process of interpretation of written contracts. As we have seen, such assertions of a need for certainty were also used to justify an approach akin to translation, in addition to the limited categories of ambiguity approach. But, long after the translation approach was abandoned, certainty retained a grip in relation to extrinsic circumstances. In the mid-twentieth century, Rupert Cross even argued that the need for certainty was a 'basic reason' for the existence of a law of interpretation and one that warranted 'a literal standard of interpretation'.[46] Arguments of certainty need, however, to be more nuanced. For instance, if extrinsic materials are admissible for the purpose of ascertaining whether an ambiguity exists, including in cases of latent ambiguity, then how far would certainty be advanced by an ambiguity gateway? Moreover, '[t]he term "ambiguity" is itself not inflexible':[47] it is capable of both broader and narrower interpretations. As the most powerful defender of the ambiguity gateway acknowledges, if 'ambiguity' is given a broad meaning, the controversy becomes 'empty and illusory'.[48]

VII. 'Intention of the Parties' and Rectification

If the view of those who believe that the underlying principle in contract law is to enforce subjective intention were correct, the law of contract would not be a law of agreement; it

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[45] *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70, (2002) 210 CLR 181, 188.
[46] Cross (n 7) 495.
[47] *Life Insurance Co of Australia* (n 2) 78.
[48] *Heydon on Contract* (n 19) para 9.680.

would be a law of common subjective intentions. Suppose two parties enter into a contract. The agreement records the term as one year. In prior negotiations, one party had mentioned the possibility of a ten-year term. Both parties subjectively thought that this had been accepted but, in fact, the other party had not replied and the formal agreement had not been amended. There is an agreement in form providing for a term of one year, which both parties had thought that they agreed to be for 10 years, but no agreement had been communicated. Towards the end of the year, one party, who wishes to terminate, notices the written one-year term and refuses to renew. English and Australian law, following the objective approach, would treat the agreement as being one for a year, not 10 years. The objectivity of the underlying principle of interpretation means that an agreement is something separate from the subjective intentions of either or both parties. Hence, in *Re Atkinson's Will Trusts*,[49] Megarry V-C said that if a testator, when signing a will, said '"[w]here the will say X, I intend X to mean Y", I cannot see that evidence of this statement would be admissible'.

One of the most significant challenges for the objective approach to agreement in contract law are the rules of rectification. Although an understanding of rectification depends upon the fundamental principle of the intention of the parties, the role of rectification and its relationship with interpretation is deeply unsettled. In recent years, English judges have been writing prolifically on the subject.[50] I put to one side in this essay the different rules of so-called unilateral mistake rectification. In unilateral mistake rectification, 'one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it'.[51] The unilateral mistake known to the other party may be grounds for the mistaken party to rescind the contract.[52] However, in some English cases, it has been held sufficient to rectify the agreement even without any prior agreement or accord between the parties.[53] Allowing rectification in these cases, rather than rescission, is an exceptional principle perhaps justifiable only by a principle that the unilateral mistake that is known to the other party removes the objective basis for the other party to retain the benefit of those contractual

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[49] *Re Atkinson's Will Trusts* [1978] 1 WLR 586 (Ch) 590.

[50] K Lewison, 'If It Ain't Broke Don't Fix It: Rectification and the Boundaries of Interpretation' in K Lewison, *The Interpretation of Contracts: First Supplement to the Fourth Edition* (London, Sweet & Maxwell, 2010) 127; R Buxton, '"Construction" and Rectification after *Chartbrook*' (2010) 69 *CLJ* 253; C Nugee, 'Rectification after *Chartbrook v Persimmon*: Where Are We Now?' (2012) 26 *Trust Law International* 76; P Morgan, 'Rectification: Is it Broken? Common Mistake After *Daventry*' (2013) 21 *Restitution Law Review* 1; N Patten, 'Does the Law Need to be Rectified? *Chartbrook* Revisited' (Chancery Bar Association Annual Lecture, 29 April 2013), www.chba.org.uk/for-members/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisited; R Toulson, 'Does Rectification Require Rectifying?' (TECBAR Annual Lecture, 31 October 2013), www.supremecourt.uk/docs/speech-131031.pdf; T Etherton, 'Contract Formation and the Fog of Rectification' (2015) 68 *Current Legal Problems* 367; L Hoffmann, 'Rectification and other Mistakes' (Commercial Bar Lecture https://app.pelorous.com/media_manager/public/260/Lord%20Hoffmann%20Lecture%203.11.15.pdf).

[51] *Maralinga Pty Ltd v Major Enterprises Pty Ltd* [1973] HCA 23, (1973) 128 CLR 336, 351, citing *Whiteley v Delaney* [1914] AC 132 (HL); *Monaghan CC v Vaughan* [1948] IR 306 (HC); *George Cohen, Sons & Co Ltd v Docks and Inland Waterways Executive* (1950) 84 Ll L Rep 97 (CA).

[52] *Taylor* (n 34) 432.

[53] See *A Roberts & Co Ltd v Leicestershire CC* [1961] Ch 555 (Ch) 570; *Riverlate Properties Ltd v Paul* [1975] Ch 133 (CA) 145; *Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 (CA) 514–16.

rights that would otherwise exist without rectification. In Canada, the principle has been confined to cases of fraud or the 'equivalent of fraud'.[54]

The more common area of rectification is what is described as common mistake rectification. Those who support the view of contract as a law of common subjective intention argue that it is 'quite unjust to allow a party to hold the other party to a contract that the evidence irrefutably establishes that neither party intended'.[55] The notion that the terms of a contract can be rectified where the parties are both subjectively mistaken about the meaning initially seems to provide substantial support for this view. The references in many cases to common 'intention', without clarification that the common intention is to be objectively ascertained as an intention of a person in the position of both contracting parties, provides some support to the view that common mistake rectification is concerned with enforcing common subjective intentions.

There is a strong argument against understanding intention in this subjective manner, and hence permitting a subjective approach to rectification. Contracts can change the duties that people owe. If the duties of people, *inter se*, are to change then they should only do so by communication. The power of your unspoken thoughts should not be sufficient to put me under a duty to you that I did not otherwise owe. That is why an intention to create legal relations is not a subjective intention but is only one that a reasonable person would ascertain from the way in which the right-holder has behaved. Hence, in that area, 'intention' describes 'what it is that would objectively be conveyed by what was said or done'.[56] The approach to the existence of the agreement should also apply to the contents of the agreement.

There is a view of common mistake rectification that is wholly consistent with the objective theory of contract. On this view, the doctrine applies where the meaning of the words used to a reasonable person in the position of the parties is different from the meaning which existed in a different consensus between the parties. The extrinsic evidence of the latter is not sufficient for a reasonable person in the position of the parties to conclude that the words of the written agreement have a different meaning. Rectification has the effect that the words of the written contract have their meaning, as interpreted, but there is an equitable power, subject to the usual bars to relief, for either party to apply for the court to amend the words of the document so that they will have a different, but previously agreed, meaning.

The court's power to amend the words of the document, and therefore to give them a different meaning, arises to make the written document conform with the earlier agreement. On this traditional approach, rectification is simply equity's response to a common mistake

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[54] *Canada (Attorney-General) v Fairmont Hotels Inc* [2016] SCC 56, [2016] 2 SCR 720 [15].

[55] D McLauchlan, 'The Many Versions of Rectification for Common Mistake' in S Degeling, J Edelman and J Goudkamp (eds), *Contract in Commercial Law* (Sydney, Lawbook Co, 2016) 203.

[56] *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8, (2002) 209 CLR 95 [25]. See also, generally, *Masters v Cameron* [1954] HCA 72, (1954) 91 CLR 353, 362; *Gissing v Gissing* [1971] AC 886 (HL) 906; *Australian Broadcasting Corp v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540, 549; *Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580 (HL) 1587; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35, (2004) 218 CLR 451 [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52, (2004) 219 CLR 165 [38], [40]; *Equuscorp* (n 35) [34]; *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2004] 1 WLR 3251 [18]; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123, (2015) 235 FCR 305 [103].

by correcting the words, and therefore the meaning, of the later written agreement to make it conform with the earlier agreement. This is so even if the earlier agreement in its entirety was not itself a contract that would have been enforced, for instance, because it was expressed to be subject to contract.[57] But rectification might loosely be seen as specific performance of an implied undertaking in the earlier agreement by the parties that any later written version of the agreement would take a form that reflected the meaning of their earlier agreement.

This view of common mistake rectification was clearly explained by Lord Hoffmann in a judgment with which the other Justices agreed in the Hong Kong Final Court of Appeal in *Kowloon Development Finance Ltd v Pendex Industries Ltd*.[58] Lord Hoffmann explained that common mistake rectification arises where the parties have a common mistake 'about whether a written document correctly reflects what the parties had, on an objective assessment, agreed it should contain'.[59] Referring to his judgment in the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd*,[60] Lord Hoffmann said:

> it is true to say that the concept of rectification for common mistake involves carrying into effect what the parties appear to have actually agreed that the document should say. And in deciding what the parties have agreed, the common law adopts its usual objective stance, looking at what a reasonable observer would have understood the parties to mean and not concerning itself with their uncommunicated states of mind.[61]

In *Chartbrook*,[62] Lord Hoffmann approved the approach of Denning LJ in *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd*.[63] That case involved the sale of Moroccan horsebeans. Both the buyer and the seller had mistakenly believed that all horsebeans were feveroles. They had discussed this. But the Court of Appeal did not accept that a reasonable person in the position of the parties would have understood the word 'horsebeans' to mean 'feveroles'. The buyer specifically needed feveroles for a resale. The horsebeans that were supplied were not feveroles. The buyer sought to have the contract rectified. He failed. Denning LJ said:

> Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties – into their intentions – any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice.[64]

The most recent consideration of rectification in England came in the comprehensive judgment of the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*.[65] That case was a useful test of the objective approach to common mistake rectification. Two

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[57] *Joscelyne v Nissen* [1970] 2 QB 86 (CA). See also *Simic* (n 28) [117].
[58] *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, (2013) 16 HKCFAR 336.
[59] ibid [19].
[60] *Chartbrook* (n 40).
[61] *Kowloon Development Finance* (n 58) [19].
[62] *Chartbrook* (n 40).
[63] *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450 (CA) 461.
[64] ibid 461.
[65] *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1363.

deeds of security were subjectively intended by both parties to include only the provision of an additional security which had previously been omitted from a complex transaction. However, on the remarkable facts of the case, including the failure of the solicitors involved to review the terms of the deeds, the terms of the agreement included additional onerous obligations. The trial judge found, and the Court of Appeal accepted, that there had been no prior objective consensus between the parties that the deeds of security would be limited only to the provision of additional security. After a cogent and exhaustive treatment of the difficult history of rectification in English law, the Court of Appeal concluded that, contrary to Lord Hoffmann's approach in *Chartbrook* and the approach of Denning LJ in *Frederick E Rose (London) Ltd*, it was not necessary to show a prior objective accord between the parties in order for common mistake rectification of a written agreement.[66] However, earlier in the joint reasons, the Court of Appeal affirmed as 'sound in principle' the requirement of 'an outwardly expressed accord of minds': a test 'based on mutual assent which the parties have manifested to each other and not on uncommunicated intentions which happen, without the parties knowing it, to coincide'.[67] Ultimately, the different approaches led to no different result because there was both a common subjective intention as well as a prior objective accord that the written agreement would contain only the additional security.[68]

One decision that the Court of Appeal cited in support of the subjective approach was the decision of the High Court of Australia in *Simic v New South Wales Land and Housing Corp*.[69] But that case does not obviously depart from the objective approach requiring a prior accord. In the joint judgment of Gageler, Nettle and Gordon JJ, their Honours said that the purpose of rectification was to make the 'written instrument conform to the "true agreement" of the parties'.[70] They said that the true agreement between the parties required a common intention. Although their Honours said that there was no requirement for communication of the common intention by an *express* statement between the parties, they also said that there was a requirement that the common intention be viewed objectively from the parties' words or actions.[71]

The need for a prior objective accord was also emphasised in the Supreme Court of Canada in an impeccable passage by Brown J, giving reasons with which McLachlin CJ and Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ concurred. Importantly, his Honour spoke of the parties' true *agreement*, not of the parties' true subjective intentions:[72]

> If by mistake a legal instrument does not accord with the true agreement it was intended to record – because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement – a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the

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[66] ibid [155]–[156].
[67] ibid [76]–[77].
[68] ibid [183].
[69] ibid [169]. See *Simic* (n 28) [103].
[70] ibid [103].
[71] ibid [104]. See also *JIS (1974) Ltd v MCP Investment Nominees I Ltd* [2003] EWCA Civ 721 [33]–[34]; *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1363 [80].
[72] *Canada (Attorney-General)* (n 54) [12].

> substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two.

There remains the question of why a common mistake, continuing to the date of the written contract,[73] is needed in order to rectify. One answer, given by Professor Stevens, is that the common mistake permits partial rescission of an express or implied term of the contract that the written terms of the agreement are the entirety of the contractual obligations.[74] As Longmore LJ said in *Barclays Bank plc v Unicredit Bank AG*,[75] an entire agreement clause 'is intended to exclude any evidence or argument to the effect that the terms of the contract are to include any mutual understanding that is not recorded in the contract'. A common mistake of the parties effectively operates to permit recourse to evidence of a term beyond the 'entire written agreement' by permitting rescission of an express or implied entire agreement clause.

The need for a common mistake should not apply to rectification of a unilateral instrument, such as a will. Unlike a contract, implementing the intention of a testator does not impose duties upon other parties. It is a unilateral act that confers rights upon them. Hence, unlike a contract, where some prior consensus is required to allow rectification, a will should be capable of rectification without any prior act consensus. Although it had been assumed for many years that equity does not have the power to rectify a will,[76] this approach might have been based only upon a concern not to undermine the legislative formality in section 9 of the Wills Act 1837. Independently of these statutory formality concerns, there may have been a power for equity to rectify a will to make it conform with the unilateral objective intention of the testator before death, as revealed by extrinsic materials.[77]

VIII. 'Intention of the Parties' and Implication of Terms

Another issue to which the underlying principle of the intention of the parties is relevant is in the implication of terms. An unexpressed term that is sought to be drawn from the words of a written contract must be based upon the meaning which is reasonably thought to be intended by the parties. In *Attorney-General of Belize v Belize Telecom Ltd*,[78] Lord Hoffmann (delivering the judgment of the Board comprising Lord Rodger, Lady Hale, Lord Carswell and Lord Brown) said that implication is an exercise of interpretation. He gave several reasons in logic and authority for this. First, as a matter of logic, implication must be an exercise in interpretation 'since a court has no power to alter what the instrument means'. Secondly, as a matter of authority, in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*,[79] Lord Pearson, with whom Lord Guest and Lord Diplock agreed,

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[73] *Fowler v Fowler* (1859) 4 De G & J 250, 265; 45 ER 97, 103.
[74] R Stevens, 'The Meaning of Words and the Intentions of Persons' in Degeling et al (n 55) 182.
[75] *Barclays Bank plc v Unicredit Bank AG* [2014] EWCA Civ 302, [2014] 2 All ER (Comm) 115 [27]. See also *NHS Commissioning Board v Vasant* [2019] EWCA Civ 1245 [47].
[76] *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129 [27]–[28].
[77] See the comprehensive discussion in B Häcker, 'What's in a Will' in B Häcker and C Mitchell (eds), *Current Issues in Succession Law* (Oxford, Hart Publishing, 2016) 158–61.
[78] *A-G of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 [19].
[79] *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 (HL) 609.

had said that '[a]n unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract'. Lord Hoffmann therefore concluded that

> in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.[80]

He emphasised that the five 'criteria' enunciated by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[81] should not detract from the ultimate question, which is what the instrument is reasonably understood to mean.[82]

In the High Court of Australia in 2014, in *Commonwealth Bank of Australia v Barker*,[83] French CJ, Bell and Keane JJ referred to Lord Hoffmann's approach in *Belize* and reiterated the words of Mason J[84] (with whom Stephen J[85] and Wilson J[86] had agreed), who had said that implication is not 'an orthodox exercise in the interpretation of the language of a contract, that is, assigning a meaning to a particular provision'; it is an 'exercise in interpretation, though not an orthodox instance'.

More recently, doubt has been cast upon this approach in England. In 2015, in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd*,[87] the Supreme Court considered the issue in the context of a lease that had been granted with rent payable quarterly in advance. The tenant exercised its right under a break clause to terminate the lease. The tenant had paid the full quarter's rent in advance the month earlier, and so it argued that there was an implied term that it could recover from the landlords the advance payment of rent for the remainder of the quarter. The Supreme Court unanimously held that it could not. One reason was that non-apportionability of such rent had been long and clearly established by authority, and the lease was

> a very full and carefully considered contract, which includes express obligations of the same nature as the proposed implied term, namely, financial liabilities in connection with the tenant's right to break, and that term would lie somewhat uneasily with some of those provisions.[88]

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[80] *A-G of Belize* (n 78) [21].
[81] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* [1977] UKPC 13, (1977) 180 CLR 266, 283: for a term to be implied, the following conditions (which may overlap) must be satisfied: (i) it must be reasonable and equitable; (ii) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (iii) it must be so obvious that 'it goes without saying'; (iv) it must be capable of clear expression; and (v) it must not contradict any express term of the contract.
[82] *A-G of Belize* (n 78) [27].
[83] *Commonwealth Bank of Australia v Barker* [2014] HCA 32, (2014) 253 CLR 169 [22].
[84] *Codelfa Construction* (n 19) 345.
[85] ibid 344.
[86] ibid 392.
[87] *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742.
[88] ibid [49].

That approach, with respect, is an entirely orthodox approach to interpretation which gives significant weight to the literal meaning of the words used in an instrument drafted by professionals.

The broader significance of the decision came in the discussion by Lord Neuberger (with whom Lords Sumption and Hodge agreed) concerning implied terms and the *Belize* decision. Lord Neuberger disagreed with the approach of the Privy Council in *Belize*. His Lordship said that 'construing the words used and implying additional words are different processes governed by different rules'.[89] Quoting from Sir Thomas Bingham,[90] he described interpretation as concerned with resolving ambiguities or reconciling apparent inconsistencies to attribute the true meaning to the language used by the parties. In contrast, implication was said to 'deal with matters for which, ex hypothesi, the parties themselves have made no provision'.[91] Lord Neuberger then refined the five *BP* criteria effectively to three: (i) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (ii) it must be capable of clear expression; and (iii) it must not contradict any express term of the contract.

It is not entirely clear what Lord Neuberger meant by his remark that implication is not an exercise in construction. It can be immediately accepted that implication arises where the parties have not made express provision concerning that subject matter. But this does not mean that implication is unconcerned with ascertaining the meaning that a reasonable person would understand the parties to have intended. It might best be understood as an insistence that, since implication involves a clear departure from the formal words of the contract, the meaning reasonably intended by the parties should only contain an implication where the implication is clear and necessary to make the contract effective.

IX. Conclusion

The historical development of the interpretation of written contracts has not been rapid. The reason for this is that strict and literal approaches were thought to carry greater certainty. A remnant of the historical approach, to the extent to which it still exists, is the ambiguity gateway to admissibility of extrinsic materials for interpretation of written contracts. Whether or not that remnant can be justified by reference to concerns of certainty or other arguments, it is essential to consider those concerns and arguments in light of a proper understanding of the guiding principle of the intention of the parties.

As the interpretation of written contracts progressed from a stiff and superstitious form of literalism to a flexible rationalism, it did so by reference to the guiding principle of the intention of the parties. Fundamental to an understanding of the flexible rationalism of interpretation, and to the resolution of disputed issues, such as the approach to be taken to an ambiguity gateway, rectification or implication, is an appreciation that references to the 'intention of the parties' describe the intention of a notional reasonable person in the position of both of the parties. Interpretation of written contracts follows the same pattern as ordinary

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[89] ibid [26].
[90] ibid [29], quoting from *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 (CA) 481.
[91] *Philips Electronique* (n 90) 481.

discourse in the rest of life. There remain, of course, further and related issues concerning how interpreted meaning should be applied to the facts of a case. But, even in a essay for Frank Rose, those issues must be left for another day.