FAREWELL CEREMONY

ADDRESS BY THE HONOURABLE J J SPIGELMAN AC

UPON THE OCCASION OF HIS RETIREMENT AS

CHIEF JUSTICE OF NEW SOUTH WALES

BANCO COURT, SYDNEY

31 MAY 2011

Your Excellency, your Honours, Attorney, fellow lawyers, ladies and gentlemen, you do me and the Court great honour by your attendance.

The welcome to country with which this ceremony began has particular significance for me. As I think most people here will be aware, association with the cause of indigenous Australians has been an important part of my personal journey. The welcome has an additional symbolic significance.

Just as the elders of the Gadigal clan of the Eora people have been the custodians of the land on which we meet, the 16 Chief Justices of New South Wales, including myself, have been the custodians of the institutional traditions of the rule of law, since this Court was established almost exactly 187 years ago.

Most people in this audience will have heard me speak, probably more than once, of the significance for our society of the longevity of our fundamental institutions of governance. It was a theme of my first address upon my swearing-in as Chief Justice. It has featured as a basic theme in the address I have given at each of the 400 ceremonies I have conducted for the admission of legal practitioners, during the course of which just over 23,000 lawyers were admitted. The point might by now seem belaboured, but it is a point worth belabouring.

Many of you would have been present on the occasion of the ceremony to mark the Court's 175th Anniversary, in May 1999. I addressed on this theme, as did the then Premier, Bob Carr. At my request, the two Presidents of the professional associations stood aside and permitted the former Prime Minister, E G Whitlam QC to speak on behalf of the Bar and the then serving Prime Minister, John Howard to speak on behalf of the solicitors. A feature of that occasion was the welcome to country.

I believe that was the first time at any official ceremony in this nation that a welcome to country had been delivered. The

then presiding officers of the two Houses in the New South Wales Parliament informed me that it was that occasion which gave them the mantle of respectability to introduce a welcome to country in Parliamentary ceremonies.

Only the speakers on that day and the President of the Court of Appeal were aware of my intention in this respect. You could have heard, to use a still serviceable cliché, a pin drop during the course of the welcome. Most of the people in the room had never heard one and had no idea what was happening. The position is different now. A welcome to country has become a familiar mode of commencing many public events. Contrary to the practice of some, I have not adopted it as universally applicable but best reserved for occasions, such as this, where it has, for the reasons I have mentioned, particular relevance.

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I wish to make it clear that I have not come here to get anything off my chest. Having once before in my career made the transition from rooster to feather duster, I do not intend to emphasise my imminent powerlessness by exploiting the presence of an audience of this size.

In my address on the occasion of my swearing-in as Chief Justice I indicated that I looked forward to the intellectually creative process of writing judgments because I regarded the judgments, of this Court as part of a broader public discourse by which our society and polity affirms its core values, applies them and adapts them to changing circumstances. My expectations in that regard were fulfilled. The process was intellectually satisfying in the way I anticipated.

What I did not then anticipate was that I would also develop a substantial body of written work in the form of speeches. During the term of my office I delivered 180 speeches that were of sufficient substance to justify recording on the Court's website. In this respect, also, I sought to make a contribution to the public discourse on a wide range of matters not limited to the law but extending, particularly, to history which, for a serving judge, is a comparatively safe haven.

Expressing my views in the form of public addresses had two distinct advantages. First, I choose the topic, rather than have the subject matter determined by the issues about which litigants

chose to appeal. Secondly, the High Court cannot do much damage to a speech.

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In my speeches I developed a number of themes. One theme was the significance for the legal profession and the nation of global engagement by the Australian profession, particularly engagement with our region, culminating in my address to the Law Society's annual Opening of Law Term Dinner this year. The skills of our lawyers and judges, together with their reputation for professionalism, competence and impartiality, is a significant national asset. It is what the economists call a sphere of comparative advantage.

The initiatives I undertook in this respect included reinforcing our traditional ties with the judiciary of England, with the result that English senior judges have attended each annual Supreme Court judges conference. In the Asian region I negotiated, with the support of Chief Justice Gleeson, with three successive Chief Justices of India leading to the first, now regular, exchange between the judiciaries of our two nations; I organised the first judicial exchange with the Supreme Court of Japan; I initiated the

Asian/Pacific Judicial Seminar on Commercial Litigation, the third such seminar having been held in Sydney two months ago, jointly organised by the Supreme Court of New South Wales, the High Court of Hong Kong and the Supreme Court of Singapore, attended by high level delegations from virtually all the major nations of the region.

Perhaps the relationship I have worked hardest to establish is the exchange with the judiciary of the People's Republic of China. I have led several delegations to China and judges of the Court have participated in the judicial training of the National Judges College of China, virtually every year for the last seven years.

There was always a prospect that this relationship was personal rather than institutional. I am very pleased, therefore, that, after my most recent visit to Beijing, I was able to negotiate a number of Memoranda of Understanding on Judicial Exchange which will ensure that this relationship continues. It is necessary in a nation as large as China to select particular regions and, with the support of the Supreme People's Court, I approached three provinces and the National Judges College. In the last week I

have signed Memoranda of Understanding with the Presidents of the High Courts of Hubei Province, Guangdong Province and Shanghai and anticipate that a Memorandum with the National Judges College will be finalised soon.

From the point of view of our nation this is one of our most important relationships. The significance of developing our understanding of China, including its culture and institutions, cannot be underestimated.

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An occasion such as this gives me a public opportunity to thank all those many people with whom I have engaged in the course of serving on this Court. My first, and most significant, recognition is to all of the judges, including those who have retired.

Without exception these are men and women of considerable capacity and dedication with many of whom I have had the closest of interchanges of a jurisprudential character, whilst sitting on the Court of Appeal and the Court of Criminal Appeal. All of those judges made substantial contributions to my own understanding of the law during the course of that interaction.

I have interacted with every member of the Court when organising the affairs of the Court, whether it be in the context of legislative proposals, drafting rules and practice notices, developing case management, attending conferences, seminars and involvement in the full range of committees through which the Court maintains and improves its capacity to serve the people of the State. As a collective and collegial body of men and women I could not have asked for a richer or more satisfactory experience.

It is invidious to single out particular people, however, I should acknowledge the particular role of the heads of the three Divisions of the Court with whom I have served: Keith Mason and James Allsop as Presidents of the Court of Appeal; James Wood and Peter McClellan as Chief Judges at Common Law; David Hodgson, Peter Young and Paddy Bergin as Chief Judges of the Equity Division. Their contribution to the jurisprudence of the Court is of the highest order. However, I, more than others, am aware of the contribution that they have made to ensure the effective and efficient operation of the Court in the day-to-day administration of their respective Divisions, particularly the performance of the pastoral functions that inevitably arise with

respect to individual judges. They bear the principal burden of much of the task of running an effective and efficient Court and the success of the Court during my term of office is in large measure due to their dedication and competence.

The Court operates through a structure of committees. It is not possible to list on an occasion like this all of the names of those who chaired these committees, let alone served on them. Critical areas of the Court's activities – education, rules, information technology, the building – are dealt with either completely, or at first, by these committees.

I also express my appreciation to the staff of the library and to the registrars and staff of the court, led for most of my term of office with great skill by Megan Greenwood, now a magistrate. Their dedication, sometimes under great stress, has been of the highest order.

In consultations about legal policy and appointments to the Court I have had the benefit of a close relationship with four Attorneys General who held office during my period. The late Jeff Shaw, whose personal tragedy affected all members of the Court,

was a fine lawyer and a fine Attorney. It was a pleasure to deal with him. With both Bob Debus and John Hatzistergos this close relationship continued and, albeit briefly, has also been manifest in my relationship with Greg Smith.

Of particular significance has been the consultation that has always occurred between each of the four Attorneys and myself on the issue of appointments to the bench. There was never an occasion on which I had any doubt that each of these Attorneys was determined to ensure that the appointment was of a person of whom the Court would be proud.

Perhaps the most significant change during my term of office in this respect is the progress made to remedy the gender imbalance on the Court. When I was appointed there were two women judges and one woman master. There are now ten women judges, one an associate judge, and we allowed one woman to go to the High Court.

I have had fruitful dealings with a number of public servants. I cannot name them all. However, Laurie Glanfield has been head of the Attorney General's Department throughout my 13 years of

office. He was first appointed head of a government department under the Greiner government and his survival skills are comparable to those of Talleyrand. My dealings with him were always positive and purposeful. He also performed a very useful function for me. I could blame him for everything I did not want to do.

I also wish to acknowledge the contribution of those with whom I have served on the Judicial Commission of New South Wales, an organisation which makes an outstanding and internationally recognised contribution to judicial education, to criminal justice particularly sentencing statistics and by the handling of complaints against judges. It is the forum in which I have met and worked closely with each of the heads of jurisdiction of the other courts in New South Wales, together with the non-judicial representatives on the Commission. We have been served exceptionally well by the dedicated staff of the Commission, led ably by its Chief Executive, Ernie Schmatt.

Throughout my term of office I have had a first class staff. My first Associate, Sue Pearson, who began in the Chief Justice's office during the term of Sir John Kerr, served throughout the

Street and Gleeson courts and for about half of my term. Her institutional knowledge was invaluable. Throughout she served with competence, tact and discretion. I very much regret that she left on somewhat unhappy terms.

Her successor, Susie Packham, has performed her duties with the highest level of competence and wisdom and consummate organisational skills. She is a woman with a wide range of interests, with whom it has been a pleasure to work.

Christine Leondis has served in the Chief Justice's Office since 1985. Her accumulated knowledge of legal terminology and the personalities of the law has ensured that she carried out her responsibilities with accuracy and speed. My driver, Sean Doherty, has been as delightful as a Tigers supporter could be. He has saved me enormous amounts of time, which I could devote to my principal functions.

I have had the intellectual joy of having as staff members an array of young legal talent, almost all of whom were with me for two years, during which they served principally as researchers for my judgments and speeches. There are too many to name. They

were all intelligent young men and women, each of considerable accomplishment both in their studies and in extracurricular activities. I have thrived on the stimulus of interaction with the younger generation in a daily exchange of views. Collectively their contribution to my judgments and speeches has been of the highest order. I have watched with pride as their careers have developed since they left me and I look forward to their future success.

In conclusion, I want to publicly express my debt to my wife Alice. Our marriage and family life has been, and remains, the most important bond of my life. To some degree my role as Chief Justice and Lieutenant Governor has expanded our horizons. In other respects it has narrowed them. We have enjoyed many functions and events together. Some not quite as fascinating as others. You attended all with your grace and charm in tact.

I have always admired and received inspiration from your dedication and competence as a companion, as a mother, as a psychologist, as a writer and in the wide range of public activities to which you have contributed. Your work at the Benevolent Society and on the Boards of the Bundanon Trust, the Australian

Institute of Music, the National Institute of Dramatic Art, the UN High Commission for Refugees, the UNSW Faculty of Architecture and Sculpture by the Sea have ensured that I remained engaged in a world beyond the confines of the law.

I have relied on your counsel on numerous occasions, particularly in any context involving a human dimension, where your wisdom and instinct is unsurpassed.

You are my life partner and the prospect of spending more time with you is my sole consolation about leaving this Court and the people I have come to know so well and whom I will miss.

For a final time, I can say:

"The Court will now adjourn."

IN THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

ALLSOP P
AND JUDGES OF THE
SUPREME COURT

Tuesday 31 May 2011

FAREWELL CEREMONY FOR
THE HONOURABLE JAMES JACOB SPIGELMAN AC
UPON THE OCCASION OF HIS RESIGNATION
AS CHIEF JUSTICE OF NEW SOUTH WALES

1 **MR MICHAEL WEST:** Good morning Justice Spigelman, brothers and sisters, my fellow members of humanity.

2 We have gathered here today on the land of the Gadigal People of the Eora Nation, one of the twenty-nine clans of the Eora Nation, the Eora meaning "here". Other clans across this beautiful harbour we have are Cameragal where the suburb of Cammeray has taken their name from. We also have Burramattagal out where the City of Parramatta resides. In Aboriginal culture we believe everything is connected from the particle of dust to the drop of water to the dugong, the whale, the kangaroo, the wombat, to me, to you, the person sitting next to you. We are all connected in this Universe.

3 It is also very important that we do pay our respects to the elders and custodians and not only this land, the Gadigal of the Eora, but to all Aboriginal Torres Strait Islanders elders and custodians, for they have looked after this land, spirit of country and culture for more than 50,000 years. We should also pay our respects to the elders, those who have passed before us, back to our Mother Earth. In Aboriginal culture we respect our mother, Mother Earth. We all come from her. We will all return to her. That is a fact. We have her in us every day, in the water we

drink, the air we breathe, the food we eat, in our hearts and in our minds, in our very souls of beings, we respect our Mother Earth.

4 It is also very important to think that we do live on a living planet. Recently that has been demonstrated in New Zealand and Japan so we should also consider our brothers and sisters over there, the struggles they have had and what has happened recently. And also to our journey in this point in time in the continuum, where we are here right now, paying our respects to a very respectful individual, a man who decided to take that bus, the Freedom Bus, saw similar what happened in America, he took the steps, he climbed up the steps on that bus with Charles Perkins going around New South Wales. He understood that, I guess with his background, what happened to people of Jewish faith in World War II, that you do have to stand up, you do have to take the opportunities you have and make change, make a difference.

5 It is also very important, as I said, that we do pay our respects to this gentleman. He is taking a different path now, but I am sure he will continue using his heart as a compass for what he is going to do. If we just pause for one moment, silence, just to pay our respects to the elders, the custodians, reflect our journey here and to pay our respects to those who have passed back to our Mother Earth, just for a moment. Thank you.

6 To the north we have the Hawkesbury River. To the south, the Georges River. To the east, the Pacific Ocean and to the west, the Nepean River. Within these four aquatic boundaries lies the mighty Eora Nation. To my Aboriginal and Torres Strait Islander brothers and sisters I welcome you from the land, clan, tribe, nation you come from. To my non-Aboriginal Torres Strait Islander brothers and sisters, my fellow Australian brothers and sisters, I warmly welcome you from the land, family, neighbourhood and community you come from to Gadigal land, Eora land, Aboriginal land, always was, is and will be Aboriginal land. Whether you, and this is in the context of the individuals I see sitting in front of me and your family tree, where you have made your way across this beautiful old city town, across

this Waratah State of New South Wales, this sunburnt country Australia we share with beautiful jewels like Uluru, The Kimberleys, outback, red centre. Or your journey or your family's journey may have been further afar, across the seas and oceans around this wonderful world, this blue planet as we do share, as humanity from the other islands and continents, coming here to this land, the largest island and the smallest continent, the place we call Australia, we share as Australians.

7 To this land right here underneath the land of Gadigal People of the Eora Nation, Aboriginal land, I welcome all my brothers and sisters to this land on behalf of the Metropolitan Local Aboriginal Land Council, we wish that you have a safe stay, a safe journey on this land, respect the land, respect the history, respect each other and for Justice Spigelman, continue a journey as I said and use your heart as your guide. Thank you.

8 **ALLSOP P:** Your Excellency, this sitting of the Supreme Court marks the end of 13 years and 13 days of James Jacob Spigelman in the office of Chief Justice of the Supreme Court of New South Wales.

9 I have been asked to tender the apologies of Justices Heydon, Bell, Beazley, Campbell, Whealy, Handley, Hall, Brereton and Rein and the Hon Simon Sheller.

10 The privilege and honour fall to me to speak about you, Chief Justice, on this occasion. The fulfilment of that task is made difficult by the shortness of time permitted to me. There is so much that should be said. Most people here know of your extraordinary achievements and service in your life since coming to Australia with your parents from war-torn Europe in 1949 as small child of 3 before coming to the Court as its Chief Justice in 1998. Reference should be made to the speech of the then Attorney, the late J W Shaw for an insight up to 1998. My principal task is to speak of your work on the Court.

11 That undertaking, however, cannot be done adequately without appreciating the features and characteristics which, up to 1998, had marked your life as a brilliant student (double honours in one year in Arts, the Medal in Law, with only a passing acquaintance with the lecture rooms), nascent politician, author, brilliant lawyer and advocate and participant and administrator in so many aspects of this society's cultural and intellectual life and which continued to mark your work as a judge, a leader of this Court and a colleague, these features being:

- courage and boldness of approach;
- a huge intelligence and an enormous capacity to express yourself with clarity and pungency;
- a deep sense of justice and a strong antipathy to any form of meanness or bigotry;
- a strong belief in the capacity of our legal system based on the rule of law, rigorous judicial technique and parliamentary democracy to provide a just framework for a healthy, fair and diverse society;
- an international and not provincial outlook, based on a deep appreciation of the widest range of cultural, artistic and social life in society, but an outlook that never lost sight of the essential task of those in public life of serving the people of Australia or of the fact that it is the lives of ordinary people that matter; and
- a consummate political skill (using that phrase in the broadest sense) based on all the above characteristics, made effective by a calm decency and fairness with which you treat everyone.

12 Your work on the Court has been remarkable. I propose to finish, not start, with the judgments you have written in both criminal and civil law. Let me say, however, at the outset, that your work as a jurist in the primary task of crafting judgments has produced one of the finest bodies of judicial work in Australia's legal history. You stand as one of the best judges ever to have served this nation. I use no hyperbole here.

13 It is first necessary to say something of your work as an administrator of the Court. You have managed the Court during an important period of change. The *Civil Procedure Act 2005* has brought about important modernisation and reform of procedure in this State. Your energy and perception of the need for cost and time reduction in litigation was instrumental in bringing forward statutory, professional and cultural change. The process had begun in this Court in the late 1970s. The *Civil Procedure Act* took those changes to the level of written law. There remains work to be done, but it was never a one-person task and you played more than one person's role.

14 Though you have a well-known suspicion of statistics, you have in fact marshalled them to be used wisely in the management of the two divisions and two appeal courts that comprise this Court. Your skilled and careful management has been marked by calmness and an intimate grasp of detail. You also have a remarkable skill of perceiving conflict emerging amongst people, defusing it and solving the problem, never letting it lie to fester and arise on a later and more bitter occasion. You do not impose your will, but your choices, always wise, usually prevail.

15 Underlying this skilful management of the Court has been your perception of the need to develop collegiality and congeniality within the Court. The carrying on of judicial education and judges' conferences, the latter involving partners of judges attending, has been feature of this. May I take this opportunity at this point to pay tribute to your wife Alice, who has played such an important part in this process. This has created a happy court in which mutual respect is the pervading social and working ethos. And as you no doubt appreciate, such a milieu tends to promote productivity in judges and to provide a more civil and civilised experience for litigants and the profession than perhaps was the case during some periods in the preceding forty years.

16 Secondly, this managerial skill has been matched by your skill and acumen in dealing with government and Attorneys-General. Your ability to

work with them, but maintaining independence from the executive, has led to the healthy working relationship between the Courts and the other branches of government, consistent with judicial independence, to the great advantage of the people of New South Wales.

17 Thirdly, and I exclude myself from this comment, you have been able to influence critically the appointment of a remarkably talented body judges. This is a court of international stature and reputation. That is based on that judicial talent. This was a legacy you inherited, which you pass on enhanced.

18 Fourthly, you have been instrumental in taking the Australian legal system, through this Court and its judges, into the Asia Pacific region and the wider world. You understand the importance of the Australian judiciary being recognised around the world for its quality and taking its place in the training of, and engagement with, the judiciary in other countries. This is not an exercise in legal jingoism or judicial hubris or the promotion of judicial holidays. Rather, you recognise that if the Australian legal system does not embrace and engage with counterparts in Asia and the wider world, it, its judges and its practitioners will be left to their life of tranquil provincialism, over time eroding the quality of justice administered by them.

19 To this end, you have been active in developing and strengthening the relationships between the Supreme Court and Chinese courts and judges. Judges from the Court have, on an annual basis, taught at the National Judicial College in Beijing. You have recently effected memoranda of understanding with the courts of Hubei and Shanghai to co-operate on judicial exchange. Similar memoranda of understanding are likely with Guangdong courts and the Chinese National Judicial College.

20 Together with the present Chief Justice of Hong Kong you began and developed a regional conference of commercial law judges every eighteen months to two years. These meeting have involved commercial judges

from China, Japan, Korea, Hong Kong, Singapore, Malaysia, Thailand, India, Pakistan, Bangladesh, Australia and New Zealand. The next conference is in Singapore. This is a now a standing forum for commercial law in the region.

21 You have put in place memoranda of understanding with Singapore and New York courts regarding the proof of foreign law by judicial declaration rather than the use of expert evidence.

22 As President of the Judicial Commission you have supervised and guided the important work of that body in particular in encouraging and fostering its role as a judicial educator in New South Wales and in many other places in the region and in fostering greater awareness of the issues affecting indigenous people in this State and the legal system.

23 You have fostered a regular exchange of judges between the United Kingdom and this country to maintain and broaden the bonds that lie between our two systems.

24 All this, and I have yet to mention your work as a public intellectual through your many speeches and publications as Chief Justice since 1998 and as a commandingly great judge.

25 You have in thirteen years delivered dozens of speeches. All have been of the highest intellectual quality. They range over many topics – history and historical reflections, the rule of law, judicial administration, the legal profession, criminal and civil law, public law, human rights and other issues important to our society. Some, such as your speeches on construction and interpretation of contracts and statutes, have been influential in affecting the law's direction. All have been influential on the profession in this country and wherever jurisprudence in the English language is read.

26 Your historical works on Beckett and Henry, Bacon and Coke are not only significant historical interpretations in themselves, but they also speak to modern society and those interested in its development. When I read the book on Beckett and Henry some years ago the only comparison I thought appropriate to draw was with the work of the great medievalist Professor Richard Southern. The comparisons were clear – his work and yours revealed a simply-expressed grasp of power, law, government, history and humanity. It awaits a further occasion to explore the extent to which these works of history illuminate your work as a great Chief Justice.

27 Your judgments have been outstanding. All crafted with great intellect and remarkable speed. They reveal the strongest possible attachment to precedent and legal principle. Never, however, did that see them take the form of gnarled shapes of weather beaten rules determined by the ratio decidendi of past cases. Rather, your sense of principle and insightful intelligence always produced a clearly written and elegantly formed piece of work reflecting the common law as it stood by reference to precedent or with incremental change born of contemporary legal policy. Your judicial technique was founded on a respect for the intellectual labour of others, including colleagues and predecessors and was directed to the creation of coherent legal principle, not merely to the destruction of contrary views or the expungement of error.

28 Within months of your swearing in you initiated a series of important criminal sentencing judgments. Over the years, this body of work (*Jurisic, Henry, Ponfield, Wong and Leung, Whyte, Attorney-General's Applications No 1, 2 and 3 of 2002*) has had a lasting significance on the law of sentencing.

29 Numerous other notable decisions on the criminal law reflect your important work on the Court. Perhaps your decisions on open justice (*John Fairfax Publications v District Court* as an example) best illustrate your capacity to write commanding and comprehensive judgments that state the field. Other cases, such as *JW*, reveal not only a consummate

command of legal technique, but your humanity towards those unfortunate enough to be the necessary subject of legal technique in criminal law.

30 You also took the Court of Criminal Appeal to regional centres of New South Wales bringing the work of the Court to the people it affected.

31 Your work in civil law in the Court of Appeal has been similarly influential. You sat over the full range of the Court's jurisdiction and have contributed to the jurisprudence of this country in many subjects, administrative law, constitutional law, corporations law, contracts, equity, environment and planning law, evidence, industrial law, contractual and statutory interpretation, private and public international law, real property, torts and workers compensation.

32 The important series of cases concerning the Industrial Commission and Industrial Court and its jurisdictional relationship with this Court, ultimately endorsed by the High Court, are of immense importance to the administration of justice and the resolution, in particular, of commercial disputes in this State.

33 Your judgments and other writing on statutory interpretation have given penetrating and sure guidance to the principles, as well as explaining the, at times, less than clear expressions of others in the legal firmament on the subject.

34 Your command of principle and logic allowed you to write the great judgments of *O'Halloran* and *Seltsam* in the fields of equity and common law, both dealing with the questions of causation, now made less intractable by your work, and the illuminating expression of equitable principle in *Rob Evans* on equitable remedies.

35 This is an entirely inadequate expression of the breadth and quality of your judgment writing.

36 Your decision to have a welcome to country at the beginning of this sitting reveals that you still recognise, just as you did in 1965, the year of the Freedom Ride, the existence of a foundational issue confronting this society: the just reconciliation of those who have come to this ancient land in the past 223 years, and their descendants, with the original inhabitants who lived here for tens of thousands of years, and their descendants. This is a profound and difficult issue, involving, in part, the recognition that a legal system founded on the rule of law and constitutional traditions of centuries must provide a framework of justice, fairness and human dignity for all, so that all may commit their loyalty to the legal system out of respect and consent, not imposition of will of others. These notions, together with those aspects to which I referred earlier, have attended your work and time on the bench.

37 Australia is an immeasurably better place for your work as a judge, as a leader of this Court and as a public intellectual.

38 On behalf of all judicial officers in this State and those who play their part in the administration of justice, I thank you for your work and time as Chief Justice of this State.

39 On behalf of the Judges of this Court and their partners, I thank you and Alice for all that you have both done in and for the life and well-being of this Court.

40 **THE HONOURABLE GREG SMITH SC MP, ATTORNEY GENERAL OF NEW SOUTH WALES:** May it please the Court, it is my privilege to speak not only as Attorney General but on behalf of the New South Wales Bar Association.

41 Today we gather to farewell your Honour as Chief Justice of New South Wales and to thank you for thirteen years of energy, commitment and leadership, both on and off the Bench.

42 Your Honour's journey to this place was extraordinary. You were born on New Year's Day 1946 in Sosnowitz, a coal mining and steel city in Poland. At age three you came to Australia with your parents and two brothers and settled in the beachside suburb of Maroubra in Sydney's east. You were educated at Maroubra Public and then Sydney Boys High where you showed the first hints of your passion for justice. You formed the Asia Society to counter prejudices against Chinese students and in the school magazine you condemned the White Australia Policy. Then at Sydney University you were one of thirty members of student action for Aborigines who went on the Freedom Rides through some of New South Wales most notoriously racist country towns in 1965.

43 In 1971 you were awarded the University Medal for Law despite what a former Attorney General, the late Jeff Shaw described as frenetic activity in extra curricular matters and very sporadic attendance at lectures. Your first years out of University were indeed frenetic. You published your first book, "Secrecy, Political Censorship in Australia" and became a senior advisor then principal private secretary to Prime Minister Gough Whitlam. You also served as head of the Department of Media before deciding to try your luck at the Bar in 1976. You soon had a busy practice and took only ten years to be appointed a Queen's Counsel. It showed the quality of your work had won the respect of your peers.

44 One suspects the case which gave you the most satisfaction was acting for the National Rugby League in the Super League litigation, that is because you admit being a long-time fan of the South Sydney Rabbitohs Rugby League Club. Indeed you remarked at your swearing in that it takes a lot for a Souths supporter to willingly wear rabbit fur. With your successor also declaring his allegiance, some might be wondering whether support for the bunnies is a prerequisite for Chief Justice.

45 There is a tale perpetuated in the New South Wales Parliament that David Williamson was attracted to the idea of writing his play Top Silk on your Honour's days at the Bar. A check with Mr Williamson led to the

following response, “I’m not sure that I wrote Top Silk as a result of Jim’s stories but I certainly used one of his lines in the play”. The line was “the cab rank rule was”, and I quote the play and Jim, “a rule devised to maximise a barrister’s income and minimise his conscience”. Mr Williamson said it always got a big laugh.

46 Away from the law you also served on numerous cultural boards including the Film Finance Corporation, the New South Wales Art Gallery, Powerhouse Museum, Brett Whitely Foundation and the National Gallery.

47 When you took your oath of office thirteen years ago you said you would be dedicating your life to the law to a degree that you had hitherto managed to avoid. The State is grateful that you did. You have been instrumental in creating links with legal and judicial bodies in Asia and the Pacific region including the Asian Judicial Seminars. Because of you, there are now bilateral judicial cooperation arrangements with Singapore and New York which allow a question of foreign law to be referred to a foreign court for determination.

48 Your push for reform of domestic commercial arbitration legislation based on United Nations model laws have been vital in promoting Sydney as the venue for commercial dispute resolution in the Asian Pacific. You have overseen changes to case load management including the introduction of the *Civil Procedure Act* 2005. You reminded all of the importance of litigation being just, quick and cheap and the importance of the comma. The results have been impressive. The New South Wales Supreme Court has had a civil clearance rate of more than 100% every year for the past five years. The Court has the second lowest costs per matter in the country and it leads the nation in resolving commercial disputes.

49 In the field of criminal law you were the driving force, in fact the creator of guideline judgments on sentencing. The first of which was *The Queen v Jurisic* on dangerous driving. This led to greater consistency in sentencing. Your judgments on negligence law, revenue law and

constitutional issues were rarely challenged and often adopted by other courts.

50 Though you ran a busy and productive Court you also ran a happy Court. Morale was high, due in part to initiative such as the Annual Supreme Court Conference, concerts produced by Justice George Palmer with young opera singers and the much lauded Bar choir led by Justice Peter Hidden and other bonding sessions. And your reputation as a scholar with a penchant for challenging conventional wisdoms grew. Your McPherson Lecture series on statutory interpretation and human rights received deserved acclaim. Your lectures on Thomas a Becket and Henry II to the St Thomas More Society became a book that was lauded as fascinating and precise.

51 In your Australia Day lecture of 2008 you suggested the overthrow of Governor William Bligh in 1808 was not a result of too little rum but the first attempts at town planning in Sydney. So your Honour has helpfully pointed to us the origins of the city's preoccupation with real estate. There have been many other times when you have stirred public debate. It might have been about matters in society or the obligations of the legal profession or reminder about the importance of judicial independence and the rule of law. You have undoubtedly been a leader who has justified the public's confidence in the judiciary.

52 Your Honour still had seven years before you would have been forced to retire. But one suspects this State's loss will be the nation's gain. After all you are still a young man. Last year you were appointed as Chair of the National Library Council, then there are your preferred pastimes as listed in Who's Who of tennis, swimming and recumbency. There might also be many more chances to show off your liking and knowledge of Buddy Holly tunes.

53 Chief Justice we are all in your debt and it is a large debt, yet I am sure that debt will be repaid with interest as future generations acknowledge

your contribution for the political, legal, cultural and intellectual life of New South Wales and Australia. All that is left is to wish you, your wife Alice, and your family well for the future. The Court pleases.

54 **MR STUART WESTGARTH, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court. The Court has conferred on the solicitors of this State a signal honour by inviting me as President of the Law Society to speak on behalf of the 24,000 solicitors who practice in New South Wales. I acknowledge that this is an historic occasion and not one that I imagined would occur when I became President in January. For your Honour has retired voluntarily at the peak of your powers, years before the statutory age of senility.

55 I am of course honoured to be afforded this opportunity to pay tribute to your Honour for your work, your service to the people of New South Wales, to the judiciary and the legal profession generally. As only the sixteenth Chief Justice in 187 years, an occasion like this rarely occurs.

56 The position of Chief Justice is one of the oldest and most important positions in our State. It dates back to 1823 with the signing of the third "Charter of Justice" and the appointment of the first Chief Justice, Sir Francis Forbes. Your Honour came to the position with the challenge of having to fill some very large shoes, those of your predecessor the Honourable Murray Gleeson AC, former Chief Justice of the High Court of Australia. But filled them you did. On the occasion of your swearing in May 1998 your Honour said of your immediate predecessor, Chief Justice Gleeson, "No successor could wish for a better inheritance. The Court is in good shape". May I say that all who have familiarity with this Court would agree that the Court has continued under your Honour's leadership to be in good shape.

57 As the State's chief judicial officer, your Honour has proved to be an outstanding servant of the fair administration of justice, a defender of the

profession and the judiciary and steadfastly committed to the maintenance and enhancement of our system of justice. The hallmarks of your Honour's stewardship of the Court's timeliness, efficiency, good management, encouragement of alternative dispute resolution processes and most critically reasoned judgments of the highest order. From the outset your Honour has actively sought to engage the solicitor arm of the profession. This has occurred in countless occasions of consultation with Law Society representatives and by your annual addresses at the Law Society's opening of Law Term Dinners.

58 One of your Honour's early tasks was to consult with the representatives of the Law Society as well as the Bar with the aim of ensuring clarity in terms of the duties of the parties to the courts, the objective being to ensure greater cooperation, efficiency and expeditious resolution of cases. However your Honour was always been cognisant of the fact that "justice takes time", to use your Honour's words, and a focus on processing cases must never be at the expense of compromising the quality of justice. From your appointment in 1998 your Honour worked on reducing the Court backlog. By close of law term 2000 you were able to report that in every division of the court virtually every case ready for hearing had been given a date for hearing and your Honour said that for the foreseeable future there will be no holding list in any division of the Court.

59 Changes to court rules have been duly backed up by the issuance and revised detail practice notes to "facilitate the just, quick and cheap resolution of the real issues". The *Civil Procedure Act* of 2005 and the Uniform Civil Procedure Rules brought uniformity to practice across the Supreme, District and Local Courts and assisted in the effective management of case loads.

60 In 2008 on the occasion of your Honour's tenth anniversary as Chief Justice, the Law Society was honoured to launch a book edited by lawyer, Tim Castle, comprising a collection of your Honour's speeches over the preceding ten years. Mr Castle noted that underpinning all of

your Honour's public speeches was the fundamental message of the continuity of institutions in an era of rapid and revolutionary change. Last year the Law Society was equally proud to publish your Honour's Opening of Law Term speeches from 1999 to 2010. As the former Chief Justice of the High Court of Australia, Sir Anthony Mason, AC KBE wrote in the Foreword, the speeches reinforce the impression of your Honour, "as a commentator who has a clear appreciation of the place of the legal system in society" and "who has always been careful to take account of the interests of all of the stakeholders in the system while at the same time encouraging International linkages".

61 Your Honour's most recent Law Term address focussed on harnessing the strength of our legal system and quality of our lawyers to proactively and strategically expand our global engagement and to build our International reputation. Reflecting the need to look beyond our own borders your Honour has put in place, by way of Memoranda of Understanding, with both New York and Singapore, mechanisms to resolve cross border legal issues and determine questions of foreign law.

62 Of significant importance are your Honour's views on the national reform of the legal profession, and in particular the paramount need to ensure the "independence" of the justice system and their judiciary. Your Honour steadfastly defended the profession from regulation by a National Legal Services Board where its members would be appointed by the executive arm of government. In respect of the National Legal Reform Project, your Honour has said "my principal concern in this matter has been the institutional integrity of the legal profession. Legal practice is a profession. It is not simply the provision of services to consumers. The consumer/service provider model of economic activity has become a feral metaphor". Your Honour's views on the national legal reform project coincided with those of the Law Society and our stance was strengthened by knowing that the Chief Justice held the views just quoted. For that alone we express our gratitude.

63 Your Honour has ruled without fear or favour and displayed great leadership in ensuring that the court system has run well. In fact such is the quality of the bench and the administration of the Court that New South Wales is regarded by some as perhaps the vortex of litigation and where people prefer to commence proceedings. By all reports the Court is a very happy and collegial court. This situation has come about through your Honour's leadership and genuine interest in your judicial colleagues. Your Honour has described this collegial atmosphere as "the glue that makes this Court function more than anything else".

64 Notably under your Honour's stewardship the number of women and the number of solicitors elevated to the bench have also increased. With Justice Julie Ward's appointment in 2008 (27/09/08) we hit the jackpot. One of the appointments during your Honour's stewardship went on to the High Court, the Honourable Justice Bell. On her final day on the Supreme Court Bench, Justice Bell paid tribute to your Honour. Her Honour said "I must thank the Chief Justice for the privilege of working with him. As a dilettante medievalist it is a pleasure to have been in his outer orbit. That he can write the judgments of the quality that he writes, while completing a scholarly history of Becket among his many intellectual pursuits, can dazzle lesser mortals. His move into the 17th century with Lord Ellesmere and Coke is a lapse into modernity with which I have come to terms".

65 It is well known that your Honour has had a keen interest in Thomas Beckett and Henry II and indeed you have described it as an "obsession" akin to "a secret drinking problem". It was an obsession that attracted your Honour because of the then institutional conflicts and their possible relevance to contemporary times. That is aside from your constant need to challenge yourself, as your Honour explained to students at the University of New South Wales in 2005. Your Honour said, "My technique for adapting to the pressures of information overload was to choose one area of intellectual inquiry about which I could read in-depth, preferably an area not directly connected to my daily activities".

66 In the 1960s when your Honour was a student at Sydney University, rumour has it that you dared to argue with your lecturer over issues relating to company law and subsequently incurred his wrath. In later years that lecturer reputedly said he did not recall the incident but it was possibly true. He added that he was more surprised that your Honour would have even been at a lecture in the first place. Perhaps this was an unstated reference to your Honour's activities at the time, as secretary of student action for Aborigines and the well documented Freedom Rides through rural New South Wales. The lecturer was of course the former Chief Justice and your predecessor, the Honourable Murray Gleeson. Any perceived or indeed validated failure to attend lectures obviously did not hold your Honour back. In 1971 you graduated with first class honours and the University Medal.

67 The late Charlie Perkins and fellow activist Freedom Rider, when interviewed for the Australian biography projects said "Jimmy was a brilliant mind, a brilliant intellect". Not long after your Honour was appointed as Chief Justice, your Honour addressed students at your old stomping ground, Sydney Boys High and remarked that what you did at nineteen years of age in championing Aboriginal rights, "may well be the most important thing I have ever done".

68 The enthusiasm with which you Honour embraces every aspect of your life and your voracious appetite for learning underpins a deep and abiding commitment to social justice. So too is your Honour's strong belief in the virtue of the rule of law, the importance of traditions an the continuity of institutions in our ever-changing times.

69 Nineteenth century politician Henry Ward Beecher once said that "Laws and institutions, like clocks, must occasionally be cleaned, wound up, and set to true time". This, your Honour has done. You leave the court in a strong and healthy condition; a Court that has witnessed great efficiencies and improvements.

70 One of your Honour's contemporary interests is the affairs of the mighty Rabbitohs who in the year of their centenary were awarded the National Trust's first ever "community icon" title. If the National Trust were to consider conferring such a title upon a member of the legal profession your Honour would be a worthy candidate.

71 The Law Society and the solicitors wish your Honour well in your future endeavours and reminiscent of the Freedom Fighters' farewell song to the Aboriginal members of Walgett community in February 1965, I conclude with the following lyrics from the song written by Woody Guthrie "So long, it's been good to know you". As the Court pleases.

72 **SPIGELMAN CJ**: Your Excellency, your Honours, Attorney, fellow lawyers, ladies and gentlemen, you do me and the Court great honour by your attendance. Thank you for the observations of the three speakers. I am reminded of the comment by one person that "to praise a man for qualities he does not possess is to insult him with absolute impunity".

73 The welcome to country which this ceremony began, has a particular significance for me. As each of the speakers has mentioned, association with the cause of indigenous Australians was an important part of my personal journey. However the welcome has an additional symbolic significance. Just as the elders of the Gadigal clan of the Eora people have been the custodians of the land on which we meet, the sixteen Chief Justices of New South Wales including myself, have been the custodians of the institutional traditions of the rule of law since this Court was established almost exactly 187 years ago.

74 Most people in this audience will have heard me speak, probably more than once, of the significance for our society of the longevity of our fundamental institutions of governance. It was a theme of my first address upon my swearing in as Chief Justice. It has featured as a basic theme in the address I have given at each of the 400 ceremonies I've conducted for the admission of legal practitioners during the course of which just over

23,000 lawyers were admitted, half of whom you will be pleased to know do not have practising certificates. The point might by now seem belaboured but it is a point worth belabouring.

75 Many of you would have been present on the occasion of the ceremony to mark the Court's 175th Anniversary in May 1999. I addressed on this theme as did the then Premier Bob Carr. At my request the two Presidents of the professional associations stood aside and permitted the former Prime Minister, E G Whitlam QC to speak on behalf of the Bar and the then serving Prime Minister. John Howard to speak on behalf of the solicitors. A feature of that occasion was a welcome to country.

76 I believe that that was the first time at any official ceremony in this nation that a welcome to country had been delivered. The then presiding officers of the two Houses in the New South Wales Parliament informed me that it was that occasion which gave them the mantle of respectability to introduce a welcome to country in some Parliamentary ceremonies.

77 Only the speakers on that day and the then President of the Court of Appeal were aware of my intention in this respect. You could have heard, to use still serviceable cliché, a pin dropped during the course of that welcome. Most of the people in the room had never heard one and had no idea what was happening. The position is different now. A welcome to country has become a familiar mode of commencing many public events. Contrary to the practice of some I have not adopted it as universally applicable but best reserved for occasions such as this where it has for the reasons I have mentioned, particular relevance.

78 I wish to make it clear early in this address that I have not come here to get anything off my chest. Having once before in my career made the transition from rooster to feather duster, I do not intend to emphasise my imminent powerlessness by exploiting the presence of an audience of this size. In my address on the occasion of my swearing in as Chief Justice, I indicated that I looked forward to the intellectually creative process of

writing judgments because I regarded the judgments of this Court as part of a broader public discourse by which our society and polity affirms its core values, applies them and adapts them to changing circumstances. My expectations in that regard were fulfilled. The process was intellectually satisfying in the way I anticipated.

79 What I did not then anticipate was that I would also develop a substantial body of written work in the form of speeches to which reference has been made. During the term of my office I delivered 180 speeches before this one, that were of sufficient substance to justify a recording on the Court's website. In this respect also I sought to make a contribution of the public discourse on a wide range of matters, not limited to the law but extending particularly to history which, for a serving judge is a comparatively safe haven.

80 Expressing my views in the form of public addresses had two distinct advantages. First I choose the topic rather than have the subject matter determined by the issues about which litigants choose to appeal. Secondly, the High Court cannot do much damage to a speech.

81 In my speeches I developed a number of themes. One theme was the significance for the legal profession and the nation of global engagement by the Australian profession, particularly engagement with our region, culminating in my address that has been mentioned to the Law Society's Annual Opening of Law Term Dinner this year.

82 The skills that our lawyers and judges, together with their reputation for professionalism, competence and impartiality is a significant national asset. It is what the economist call a sphere of comparative advantage.

83 The initiatives I undertook in this respect included reinforcing our traditional ties with the judiciary of England with the result that English senior judges have attended each annual Supreme Court Judges Conference during my term of office. In the Asian region I negotiated, with the support of Chief

Justice Gleeson, with three successive Chief Justices of India leading to the first now regular exchange between the judiciaries of our two nations. I organised the first judicial exchange with the Supreme Court of Japan. I initiated the Asian/Pacific Judicial Seminar on Commercial Litigation to which reference has been made, the third such seminar having been held in Sydney two months ago, jointly organised by this Court, the High Court of Hong Kong and the Supreme Court of Singapore.

84 Perhaps the relationship I have worked hardest to establish is the exchange with the judiciary of the People's Republic of China. I have led several delegations to China and judges of the Court have participated in a judicial training at the National Judges College of China, virtually every year for the last seven years.

85 There was always a prospect that this relationship was personal rather than institutional. I am very pleased therefore that after my most recent visit to Beijing I was able to negotiate a number of Memoranda of Understanding on Judicial Exchange which will ensure that this relationship continues. It is necessary in a nation as large as China to select particular regions and with the support of the Supreme People's Court of Beijing, I approached three provinces and the National Judges College. In the last week I have signed Memoranda of Understanding with the Presidents of the High Courts of Hubei Province, Guangdong Province and Shanghai and anticipate that a Memorandum with the National Judges College will be finalised soon.

86 From the point of view of our nation, this is one of our most important relationships. The significance of developing our understanding of China, including its culture and institutions cannot be underestimated.

87 An occasion such as this gives me a public opportunity to thank all of those many people with whom I have engaged in the course of serving on this Court. My first and most significant recognition is to all of the judges including those who have retired. Without exception these are men and

women of considerable capacity and dedication, many of whom I have had the closest of interchanges of a jurisprudential character while sitting on the Court of Appeal and the Court of Criminal Appeal. All of those judges made substantial contributions to my own understanding of the law during the course of that interaction.

88 I have interacted with every member of the Court when organising the affairs of the Court, whether it be in a context of legislative proposals, drafting rules and practice notes, developing case management, attending conferences, seminars and involvement in the full range of committees through which the Court maintains and improves its capacity to serve the people of the State. As a collective and collegial body of men and women, I could not have asked for a richer or more satisfactory experience.

89 It is invidious to single particular people, however I should acknowledge the particular role of the heads of the three Divisions of the Court with whom I have served. Keith Mason and James Allsop as Presidents of the Court of Appeal. James Wood and Peter McClellan as Chief Judges at Common Law: David Hodgson, Peter Young and Paddy Bergin as Chief Judges of the Equity Division. Their contribution to the jurisprudence of the Court is of the highest order. However I more than others am aware of the contribution that they have made to ensure the effective and efficient operation of the Court in the day-to-day administration of their respective Divisions, particularly the performance of the pastoral functions that inevitably arise with respect to individual judges. They bear, and have borne the principal burden of much of the task of running an effective and efficient Court and the success of the Court during my term of office is in large measure due to their dedication and competence.

90 The Court operates through a structure of committees. It is not possible to list on this occasion all of the names of those who chaired these committees let alone all who served on them. Critical areas of the Court's activities – education, rules, information technology, the building – are dealt with either completely or at first by these committees.

91 I also express my appreciation to the staff of the library and to the registrars and staff of the Court, led for my most of my term of office with great skill by Megan Greenwood, now a magistrate. Their dedication, sometimes under great stress, has been of the highest order.

92 In consultations about legal policy and appointments to the Court, I have had the benefit of a close relationship with four Attorneys General who held office during my period. The late Jeff Shaw whose personal tragedy affected all members of the Court, was a fine lawyer and a fine Attorney. It was a pleasure to deal with him. Similarly with both Bob Debus and John Hatzistergos this close relationship continued and albeit briefly has also been manifest in my relationship with Greg Smith.

93 Of particular significance has been the consultation that has always occurred between each of the four Attorneys and myself on the issue of appointments to the bench. There was never an occasion on which I had any doubt that each of these Attorneys was determined to ensure that the appointment was of a person of whom the Court would be proud, and so it has proved to be.

94 Perhaps the most significant change during my term of office in this respect is the progress made to remedy the gender imbalance on the Court. When I was appointed there were two women judges and one woman master. There are now ten women judges, one an associate judge and we allowed one woman to go to the High Court.

95 I had fruitful dealings with a number of public servants. I cannot name them all. However Laurie Glanfield has been head of the Attorney General's Department throughout my thirteen years of office. He was first appointed head of a government department under the Greiner government and his survival skills are comparable to those of Talleyrand. My dealings with him were always positive and purposeful. He also

performed a very useful function for me. I could blame him for everything I did not want to do.

96 I also wish to acknowledge the contribution of those with whom I have served on the Judicial Commission of New South Wales, an organisation which makes an outstanding and Internationally recognised contribution to judicial education, to criminal justice particularly sentencing statistics and by the handling of complaints against judges. It is the forum in which I have met and worked closely with each of the heads of jurisdiction of the other courts in New South Wales, together with the non-judicial representatives on the Commission. We have been served exceptionally well by the dedicated staff of the Commission, led ably by its Chief Executive, Ernie Schmatt.

97 Throughout my term of office, I have had a first class staff. My first associate Sue Pearson who began in the Chief Justice's office during the term of Sir John Kerr served throughout the Street and Gleeson courts and for about half of my term. Her institution knowledge was invaluable. Throughout she served with competence, tact and discretion. I very much regret that she left on somewhat unhappy terms.

98 Her successor, Susie Packham has performed her duties with the highest level of competence and wisdom and consummate organisational skills. She is a woman with a wide range of interests with whom it has been a pleasure to work.

99 Christine Leondis has served in the Chief Justice's office since 1985. Her accumulated knowledge of legal terminology and the personalities of the law has ensured that she carried out her responsibilities with accuracy and speed. My driver Sean Doherty has been as delightful as a Tigers supporter could be, he has saved me enormous amounts of time which I could devote to my principal functions.

100 I have had the intellectual joy of having as staff members an array of legal talent almost all of whom were with me for two years during which they served principally as researchers for my judgments and speeches. There are too many to name, they were all intelligent young men and women, each of considerable accomplishment both in their studies and in extracurricular activities. I have thrived on the stimulus of interaction with the younger generation in a daily exchange of views. Collectively their contribution to my judgments and speeches has been of the highest order. I have watched with pride as their careers have developed since they left me and I look forward to their future success.

101 In conclusion I want to publicly express my debt to my wife Alice. Our marriage and family life has been, and remains the most important bond of my life. To some degree my role as Chief Justice and Lieutenant Governor has expanded our horizons. In other respects it has narrowed them. We have enjoyed many functions and events together, some not quite as fascinating as others. You attended all with grace and charm intact. I have always admired and received inspiration from your dedication and competence as a companion, as a mother, as a psychologist, as a writer and in the wide range of public activities to which you have contributed. Your work at the Benevolent Society and on the Boards of the Bundanoon Trust, the Australian Institute of Music, the National Institute of Dramatic Art, UN High Commission for Refugees, University of New South Wales Faculty of Architecture and Sculpture by the Sea, all these have ensured that I remained engaged in the world beyond the confines of the law. I have relied on your counsel on numerous occasions, particularly in any context involving a human dimension where your wisdom and instinct is unsurpassed.

102 You are my life partner and the prospect of spending time with you is my sole consolation about leaving this Court and the people I have come to know so well and whom I will miss.

103 For a final time I can now say:

“The Court will now adjourn.”

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TRUTH AND THE LAW

THE SIR MAURICE BYERS LECTURE

NEW SOUTH WALES BAR ASSOCIATION

ADDRESS BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

SYDNEY, 26 MAY 2011

One of the great delights of my practice at the bar was the virtually daily interaction I had with Sir Maurice Byers over a period of some 14 years, when we were members of the same floor with chambers only a few metres apart. He was, as everyone who remembers him will attest, the consummate barrister's barrister.

This personal contact occurred in the years after he retired as Solicitor-General but still concentrated on appellate work. However, he could and did do it all. He had the full range of skills. Nevertheless, his capacity for careful analysis and the fashioning of a compelling argument, without wasted words but with unerring accuracy for the issues at hand, was unsurpassed.

Amongst his many attributes he was, without question, the foremost constitutional counsel of his era. His success in the High

Court in constitutional cases when appearing as Solicitor-General for the Commonwealth was extraordinary. That success was not only measured in the outcome of particular cases. Those were tactical victories, representing stages in a broader Commonwealth strategy, which he pursued with unerring consistency.

In terms of his personal relationships, perhaps the most extraordinary aspect of meeting Sir Maurice was that a man of such consummate ability would, without affected humility, invariably treat others with courtesy, even kindness. He exuded an entirely disarming charm. He was one of the few people I have ever met who apologised to me whenever I interrupted him.

His wit was sharp, but never descended to personal derogation. I remember a night in Canberra, at a then new restaurant called, I think, *The Republic,* which prided itself on its avant garde cuisine. Someone suggested that he may wish to select emu or kangaroo meat from the modish menu. Sir Maurice growled in reply: "I refuse to eat the Coat of Arms". I well recall the short, one sentence, handwritten note I received from Sir Maurice upon my appointment as Chief Justice. It read: "Congratulations on starting at the top".

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I have taken as my theme for this address the relationship of truth and the law. I do this in recognition of the fact that the overwhelming majority, well over 90 percent, of all litigation is determined by findings of fact. I have done this consciously at the end of a judicial life when I sat only as an appellate judge, for whom it is all too easy to succumb to that intellectual snobbery of legal practice which accords highest status to the capacity for technical analysis of legal points. In the practical operation of the law in our society, such points are of comparatively minor significance. What matters most are the facts.

Dixon and Jesting Pilate

As an appellate judge, I am reminded of the riposte that Sir Owen Dixon once made to a woman at a dinner party, in response to her observation about how wonderful it was to dispense justice. Either cynically or in exasperation, Dixon said:

> "I do not have anything to do with justice, madam. I sit on a court of appeal, where none of the facts are known. One third of the facts are excluded by normal frailty and memory; one third by the negligence of the profession;

> and the remaining third by the archaic laws of evidence."[1]

In this address I will be particularly concerned with the first and third of Sir Owen's examples, ie, "normal frailty and memory" and "the archaic laws of evidence". It would be churlish, indeed ungrateful, in this, my final address to the New South Wales Bar Association, with whose officers I have had a close and fruitful relationship throughout my period as Chief Justice, to canvass a subject such as "negligence of the profession".

When not subject to the intolerable burden of having to be polite at dinner, Sir Owen Dixon expressed the view that truth seeking was the objective pursued by the courts. In one address he said:

> "For some eighteen years I played my part as counsel at the Bar, that is to say I was a humble auxiliary in the courts that seek day by day in case after case to come at the truth both of the law and the facts in the faith which we are all taught that that is justice."[2]

This passage occurred in the midst of a long, rather rambling set of reminiscences which Dixon delivered to the Royal Australian College of Surgeons and which he entitled “Jesting Pilate”. He adopted that characterisation of Pontius Pilate’s conduct from the opening sentence of Francis Bacon’s essay “Of Truth”, being the first in Bacon’s collection of *Essays*, one of those rare works of the human hand that is of enduring significance, even after four centuries.

Dixon concluded this address by quoting Bacon’s first sentence:

> “ ‘What is truth? said jesting Pilate, and would not stay for an answer’.”

To which Dixon added an observation:

> “I have not forgotten that when Pilate said this he was about to leave the judgment hall.”

This is a rather enigmatic remark and, I say with considerable regret in view of my admiration of Sir Owen Dixon’s intellect which I have expressed on earlier occasions,[3] he was quite wrong. So, probably, was Bacon.

As reported in the Gospel of John, Pilate's question "What is truth?" was in response to an assertion by Jesus that he had come into the world "to testify to the truth". It is by no means clear to me that Bacon was correct to say that Pilate was "jesting". I prefer the interpretation by the author of an innovative and inventive biography of Pilate, innovative and inventive because virtually nothing is known about the man, that:

> "Most probably Pilate thought Jesus was out of his depth and was simply tossing the subject back to him, as confident men do."[4]

With respect to Owen Dixon's additional remark, it was incorrect for him to state that this observation was made as Pilate "was about to leave the judgment hall". He did leave, but only to consult the people gathered outside, who in our legal terms constituted, in effect, the jury for the occasion. According to John, this occurred during the period that Pilate was asserting that he could "find no case against" Jesus and was asking whether he should be released. After the consultation Pilate returned to the "judgment hall" and, to use our terminology again, continued the trial.

For purposes of the topic of this address, the intriguing issue is what Dixon meant by his reference to time. Did he mean that the trial which, according to his version, had just concluded was not concerned with the identification of truth? Or, did he mean that the search for truth in the trial had concluded, but that there was always the possibility of doubt about the adequacy of the process by which the truth had been found? Both these quite distinct questions must be addressed by those of us engaged in the common law process of determining facts. They are the focus of this address.

Truth and the Adversarial System

The common law adversarial system of legal procedure is not, in terms, directed to the establishment of truth. There are three views about the relationship between truth and the adversarial system. They are:

1. The adversarial system is not concerned with truth, but with "procedural truth" or "legal truth", as distinct from substantive fact.[5]

2. The adversarial system is the most effective mechanism for the discovery of truth by the application of the Socratic dialogue.
3. The adversarial system seeks truth, but that search is qualified when the pursuit of truth conflicts with other values.

The first position was cogently stated by Sir Frederick Pollock who said:

> "Perhaps the greatest of all the fallacies entertained by lay people about the law … is that the business of a court of justice is to discover the truth. Its real business is to pronounce upon the justice of particular claims, and incidentally to test the truth of the assertions of fact made in support of the claim in law, provided that those assertions are relevant in law to the establishment of the desired conclusion; and this is by no means the same thing."[6]

To similar effect is the comment by Viscount Simon LC that:

> "A court of law … is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper

result to be arrived at, having regard to the evidence before it."[7]

The relationship between this first position and the adversary system arose directly for decision by the House of Lords in a case involving a claim for public interest immunity. The trial judge, the late Lord Bingham sitting at first instance, determined that he would inspect documents involving deliberations by Ministers and civil servants at the highest level with respect to a Cabinet decision that was under challenge on the grounds of improper purpose. He did so on the basis that such inspection was necessary in the interests of the administration of justice, because those documents could give "substantial assistance to the court in determining the facts upon which the decision in the cause will depend".[8]

The proposition upon which Lord Bingham based this conclusion was:

"The concern of the court must surely be to ensure that the truth is elicited, not caring whether the truth favours one party or the other but anxious that its final decision should be grounded on a sure foundation of fact.

> Justice is as greatly affronted where a plaintiff is wrongly awarded relief as where he is wrongly denied it."[9]

On appeal, the Court of Appeal said that this was the wrong test. The question was not whether the documents would assist the court in determining the facts but whether there was a likelihood that the documents would support the case of the party seeking discovery. The House of Lords agreed with the Court of Appeal.

Lord Wilberforce identified the relevant distinction in the following way:

> "In a contest purely between one litigant and another, such as the present, the task of the court is to do, and be seen to be doing, justice between the parties – a duty reflected by the word 'fairly' in the rule. There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if the

decision has been in accordance with the available evidence and with the law, justice will have been fairly done. It is in aid of justice in this sense that discovery may be ordered, and it is so ordered upon the application of one of the parties who must make out his case for it. If he is not able to do so, that is an end of the matter. There is no independent power in the court to say that, nevertheless, it would like to inspect the documents, with a view to possible production, for its own assistance."[10]

The second position is often expressed in the succinct statement of Lord Eldon in 1822 that: "Truth is best discovered by powerful statements on both sides of the question".[11] This frequently cited[12] quotation, however, is taken out of context. Lord Eldon's full judgment is revealing.

He said, in relation to a barrister appearing for a client:

"The result of the cause is to him a matter of indifference. It is for the court to decide. It is for him to argue. He is … merely an officer assisting in the administration of justice and acting under the

impression, that truth is best discovered by powerful statements of both sides of the question."[13]

The adversarial system was comparatively new in 1822. It is by no means clear that, as that system has developed in the course of the century, barristers remained 'indifferent' to the result of the cause. However, as Sir Gerard Brennan pointed out with reference to the full quotation from Lord Eldon: "Counsel's duty is to assist the court in the doing of justice according to law".[14]

In the address I gave on the occasion of my swearing-in as Chief Justice on 25 May 1998, I propounded this second position. I noted that the adversary system, as a manifestation of the power of Socratic dialogue, was one of the greatest mechanisms for identification of truth that had ever been devised.[15] This perspective reflected my then experience as a member of the bar. Judicial experience has provided a different perspective.[16]

I have come to realise that the Socratic dialogue works when both disputants are, as Lord Eldon understood, indifferent to the result. Seeking victory does not necessarily have the same salutary consequence of attaining the truth.[17]

The third and intermediate position reflects the recognition that the untrammelled search for truth may impinge upon other public values. It is sometimes referred to in terms of a tension between "truth" and "justice".[18]

As long ago as 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this court",[19] Vice Chancellor Knight Bruce said:

> "The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still for obtaining of those objects, which however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination … Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much."[20]

The Vice Chancellor went on to refer to paying "too great a price … for truth". This is the formulation which has subsequently been frequently invoked.[21]

I have become a supporter of the third position. It should now be accepted that the task of fact finding for the courts is to identify the truth, subject to the principles of a fair trial and to specific rules of law and discretions designed to protect other public values which, on occasions, are entitled to recognition in a way which constrains the fact finding process.

The Significance of Truth Seeking

The recognition that the principal purpose of legal proceedings is to identify the true factual circumstances of any matter in dispute is of fundamental significance for the administration of justice and the maintenance of public confidence in that system. If this recognition constitutes a modification of the adversary system, it is a modification that should be made. The search for truth is a fundamental cultural value which, at least in Western civilisation, is a necessary component of social cohesion

and of progress. The law must reflect that fundamental value and do so at the core of its processes.

The public will never accept that “justice” can be attained by a forensic game. The public require a system dedicated to the search for truth, subject only to the fairness of the process and consistency with other public values.

We seem now to have passed through the convulsion in the humanities and social sciences academy of that conglomeration of doctrines often referred to as “post modernism”. The only thing that was ever interesting about “post modernism” was what it was “pre”. The “post modernist” form of relativism that drew on the difficulties of proving truth and the distortions that can arise in the truth finding process to conclude that the search for truth should be abandoned would, in the end, have destroyed the cloistered academy which generated this perversion.

It was, of course, comforting for such members of the academy to know that “post modernism” implied that an external observer, such as an academic, was always in a better position to understand what was going on than any practitioner in the field

under consideration. Such doctrines, for example, necessarily led to the conclusion, first identified by Gore Vidal, that works of literature were not written for the purpose of being read, but for the purpose of being taught. Insofar as the strand in our legal tradition which denied that fact finding in litigation was directed to the identification of true facts gave comfort to this transient ideology in other contexts, any such contribution, is no longer operative.

Once the central significance of truth in fact finding is acknowledged, certain corollary principles follow. First, any exception or qualification to achieving that goal must be clearly defined and narrowly confined. Secondly, those principles, rules and practices which have such an effect must be subject to regular review, in order to determine whether their original justification is still valid and valid to the full extent of the qualification. Only if that is done, and done on a regular basis, can we confidently assert that the commitment to the pursuit of truth remains a core value.

The approach that should guide reform in this context to matters of this character is that expressed by the Supreme Court of the United States, in the case which overturned the

longstanding principle that a wife was not a competent witness on behalf of her husband who was an accused in a criminal trial.

In *Funk v United States,* the Court said:

> "The fundamental basis upon which all rules of evidence must rest – if they are to rest upon reason – is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule."[22]

Restrictions on Truth Finding

I turn to what Sir Owen Dixon called "the archaic law of evidence." The rules of practice and procedure and exclusionary rules of evidence which result in potentially relevant evidence not being taken into account as a matter of law are multifarious. In a lecture of this character I can only list them without pretending to be comprehensive.[23] They include:

- Legal professional privilege.
- Public interest immunity.
- Confessional privilege, where recognised.
- Journalists' privilege, where recognised.
- Exclusion of illegally obtained evidence.
- The privilege against self-incrimination.
- Limited (or, in criminal cases, the absence of) inferences from failure to testify or call evidence.
- The principle of finality, preventing the reopening of a trial.[24]
- The related double jeopardy principle in a criminal context.
- Restrictions on the admissibility of fresh evidence on appeal.
- The exclusion of involuntary or unknowing confessions.
- Restrictions on the use of tendency or coincidence evidence.
- The exclusion of hearsay evidence.
- The exclusion of lay opinion evidence.
- The exclusion of evidence after balancing prejudice and probative value.
- The parol evidence rule.
- The rule against splitting a case.
- Exclusion of evidence of settlement offers.

In addition to these evidentiary rules, there is a range of principles and practices that are designed to ensure a fair trial, particularly in criminal proceedings. The principle of a fair trial is manifest in numerous rules of evidence and aspects of practice and procedure. I have addressed this matter elsewhere.[25]

Many of these evidentiary rules and principles of a fair trial were developed at a time when a jury was the tribunal of fact in both civil and criminal cases. Some were adopted because of the susceptibility of juries to improper influence. Others because juries gave no reasons and it was not possible to detect or correct errors of fact.

Many of these rules remain applicable, long after the civil jury has disappeared and judge alone trials occur even with respect to indictable offences. There have been significant statutory modifications. The law of evidence has often been reviewed. Many of the changes contained in the *Evidence Acts* can be seen as adapting to this change in the constitution of the tribunal of fact.[26]

There remains a reluctance to systematically review longstanding rules that are in fact anachronisms. Issues of unreliability of evidence are the basis for a number of these rules and principles, eg, the exclusion of involuntary confessions, of hearsay evidence, of evidence of general bad character, of coincidence or tendency evidence, once called similar fact and propensity evidence. Each of these exclusionary rules has accumulated exceptions and subrules, at common law and under statute. Insofar as they turn on questions of unreliability, as distinct from conflict with other public values, it may be that they are no longer appropriate outside the context of a jury trial.[27]

As a matter of practice in civil litigation, such exclusionary rules are often not invoked when they could be. Longstanding business records provisions removed the hearsay rule in most civil cases. It is now rare for documents not to be admitted subject to relevance. As a matter of practical reality, the system may have adapted informally to the change in the identity of the fact finder.

As the United States Supreme Court said in *Funk,* as quoted above, experience suggests that a systematic review of many practices and rules by reason of the demise of the civil jury would

be justified. In this regard I would add it was the jury that determined a fundamental aspect of our civil procedure. A single continuous trial, at which all matters were to be determined at the same time is a product of the jury system. It may still be appropriate on cost and efficiency grounds, but not necessarily always.

Civil law jurisdictions have not had juries and, accordingly, have generally adopted an episodic procedure. Other principles and practices have developed differently. Many of the basic differences between the two systems have, convincingly, been attributed to the common law tradition of fact finding by juries.[28]

Common Law and Civil Law

It is customary to distinguish between the adversarial or accusatory system of common law jurisdictions and the inquisitorial system of civil law jurisdictions. Although always an oversimplification, the distinction retains some utility in criminal proceedings. It has long since lost such utility as it may ever have had in civil proceedings.[29]

Relevantly, for present purposes, it is often asserted that the critical difference is that an adversary system does not expressly dedicate itself to the search for truth, whereas an inquisitorial system does. This, in my opinion, is false.

The proposition is based in large measure on the differing roles in the two systems of the parties to a dispute and the judicial decision-maker. In common law jurisdictions the parties have carriage of the proceedings and determine what evidence will be called. Accordingly, the process will be determined by the interests of the parties, who do not, at least in civil proceedings, necessarily seek a finding of truth. In civil law jurisdictions the judicial officer has greater control of the proceedings and, at least in crime, determines what evidence will be called. S/he has no interests which may conflict with truth finding.

It is the case that Criminal and Civil Codes in civil law jurisdictions often impose obligations to find the truth.[30] There are no similar express requirements in common law jurisdictions. However, absent a “code” there is no need to set out such an objective. The adoption by statute in various jurisdictions of an

“overriding purpose” of civil litigation in recent years has been driven by cost and delay issues, not truth seeking.

The origins of the different approaches between the two kinds of systems are to be found in the different traditions about the relationship between the State and its citizens.[31] Common law jurisdictions reflect a narrower conception of permissible State activity. The adversary system and, perhaps even more clearly the use of the jury as the tribunal of fact, manifest the significance long attached in such jurisdictions to the autonomy of the individual and to the maintenance of personal freedoms, so that no arm of the State, not even the judiciary, controls and directs how they conduct their affairs, including legal affairs. In civil law jurisdictions, the authority of the State was more dominant and not traditionally restricted in such ways. However, in most such nations the balance changed in this respect, particularly after World War II.

The falsity of the proposition that is sometimes advanced, that investigatory or inquisitorial systems seek truth and adversary or accusatory systems do not, is well illustrated by the existence of rules and practices that exclude potentially relevant evidence. I

have set out above a list of principles and practices of the common law tradition which have this consequence. Although not stated in the same jurisprudential language, eg, as an exclusionary rule of evidence, specific practices and rules in most civil law jurisdictions also lead to the consequence that certain information is not made available to the judicial decision-maker.

Some of these practices are of long standing. Others have been adopted and elaborated in the second half of the last century as constitutional, statutory and treaty provisions for human rights protections, including the right to a fair trial, have been adopted and elaborated in almost all civil law jurisdictions.

As far as I have been able to determine, all such nations now restrict the use of potentially relevant evidence on the basis of a similar range of public policy considerations as has long been the case in common law jurisdictions, eg, illegally obtained evidence, encompassing illegal searches and seizures; wire taps; involuntary confessions; the failure to warn of the right to silence; and a range of due process violations, reflecting the principle of a fair trial.[32] Various provisions prevent use of evidence acquired in breach of these principles. Indeed, in Germany rules restricting

illegally obtained evidence date back to the late 19th century, long before any such principle was adopted in common law jurisdictions.[33]

The consistency and extent of the application of these rules varies considerably from one jurisdiction to another. Some commentators suggest that they are not applied with the same rigour as in common law systems.[34] Indeed, one observer concludes that these exclusionary rules have been systematically ignored or undermined in certain jurisdictions, namely Italy and Spain.[35] However, the rules are also capable of enforcement at a supranational level, eg, by the European Court of Human Rights.

Civil law jurisdictions also recognise, in a somewhat different jurisprudential manner, what common law nations would call legal professional privilege. In France, avocats enjoy such protection by the doctrine of *secret professionnel*, which cannot be waived, even by the client, and which privilege is not lost even if the material becomes known to third parties.[36] Similarly, German and Italian lawyers have an obligation of professional secrecy, breach of which is a criminal offence, although clients can waive the privilege.[37] In Switzerland violation of professional secrecy is also

a criminal offence and lawyers cannot be compelled to give evidence or produce documents, even if the client waives the privilege. However, a lawyer can seek a judicial order for release from the obligation.[38]

One practice which inhibits truth seeking in the criminal justice system is plea or charge bargaining. Long regarded as an anathema in civil law jurisdictions, the practical needs of the system, of the same kind as operate in common law jurisdictions, have led to the adoption of such practices at least *sub silentio*.[39]

One of the most debated rules for exclusion of evidence in common law jurisdictions is the application of the hearsay rule. There is no equivalent rule in civil law jurisdictions. Nevertheless, there are other legal principles in those jurisdictions which have similar, albeit not identical, consequences.

What is referred to as “derivative evidence” has traditionally been regarded in civil law jurisdictions as inferior to primary evidence. Of particular relevance for the circumstances in which the hearsay principle would apply in a common law jurisdiction is the doctrine of “immediacy”, which requires direct contact between

the judicial decision-maker and the source of the proof. The practice of requiring the presentation of primary evidence where that is possible varies considerably from one civil law jurisdiction to another.[40] Perhaps more significantly, appellate review of fact finding, which shows little deference to factual findings at first instance, often recognises the use of derivative evidence as a source of relevant error.[41]

In some significant respects, civil law jurisdictions have rules and practices which impede truth seeking where a common law jurisdiction has no restriction. Many civil law jurisdictions contain forms of privilege which are not known to the common law. For example, in some jurisdictions a witness may refuse to testify if the testimony could dishonour him or a relative, or even if it is likely to cause direct pecuniary damage. Of particular significance for commercial litigation is that confidential business information is protected from production, not merely subject to non-disclosure orders.[42]

Lawyers in common law jurisdictions would be particularly sceptical about the claim of truth seeking in civil cases because of the absence of a right to discovery in civil law jurisdictions.

Although general discovery is now often confined, for reasons of cost and efficiency, even discovery limited to issues or categories has no direct equivalent in civil law jurisdictions. Practitioners and clients in such nations, however, clearly regard common law discovery, particularly on the American model, as a case of the truth costing too much, in this respect, literally.

Civil law jurisdictions, of course, give the court powers to obtain documents. However, the system does not involve the right to detailed inquiry by a party in order to ensure that documents, no matter how damaging to that party's case, are in fact revealed. A lawyer of the common law tradition would regard a right of access to the internal documents of the other party, enforced by the professional obligations of lawyers for that other party, as essential to determining the true facts. However, that is not, generally, available in the practical operation of most civil law systems.

As one civil lawyer put it:

"We feel that the principle *onus probadi incum bat allegandi* excludes the possibility of obtaining the help of the court to extract evidence from the other side. We react to the notion of discovery, be it English or, worse,

American style, as an invasion of privacy by the court, which is only acceptable in criminal cases, where the public interest is involved."[43]

As an English academic correctly observed:

"The 'inquisitorial' civil law does more to protect a party's privacy and to insist that the parties must prepare their own cases for themselves, than does the 'adversarial' common law. The latter, in effect, requires the parties to open their files by revealing what documents they possess and, in the absence of compelling reasons to the contrary, to lay them open for inspections."[44]

In Germany, where civil proceedings, other than in family law, proceed on an adversary basis, the judge may order the production of additional evidentiary material. Parties can request that documents from the other side be produced. However, the judge must be convinced that the efficacy of the trial and interference with the privacy of others is justified. S/he will apply a test of materiality in both the sense of relevance and a requirement of substantiation, a party must be able to generally describe the facts that the evidence is intended to prove and

establish their relevance. This is a much higher standard of relevance than that which applies in many common law jurisdictions.[45]

In France the ability of a party to obtain evidence from the other side is also significantly limited.[46] The documents available to the ultimate decision-maker tend to be those which have been exchanged between the parties, not extending to internal communications which may reveal attitudes or record oral statements.[47] The Code of Civil Procedure does make provision for disclosure of documents by third parties and parties.[48] However, as in Germany, the conditions are restrictive. The applicant must identify the document and establish why she has been unable to obtain it himself.[49]

In most civil law systems, although parties have the right to suggest lines of inquiry, including an order for the production of documents, it appears that this right is not exercised as robustly as a common lawyer would do.[50] There must be tactical doubt about asking for evidence without knowing whether it will harm or help one's case. Most of the internal documents of the other side are likely to support its case. Only a brave lawyer would insist on the

judge seeing such documents in the hope that there may be a smoking gun. Unlike a common lawyer, the option of not tendering all the documents is not open.[51]

Civil law jurisdictions do not accept that the "maximum access to facts" approach will necessarily lead to better outcomes. As one observer put it, with respect to the German system:

> "There is no assumption that justice is likely to be directly proportional to the access of a party to fact. Indeed, it is the ability of the system to focus on determining those facts which are relevant to the legal issues that is considered critically important.
>
> …
>
> The central notion is that procedural justice is primarily secured by the informed professionalism of the judiciary. It is the judge's skill and experience in evaluating evidentiary material which is considered likely to lead to the 'truth', not the gathering of immense quantities of factual information by attorneys who are then free to present or not present such information and to manipulate its presentation to serve their own ends."[52]

This passage does highlight the different approaches between the two systems in a manner which is not based on the simple proposition that one is concerned with discovering truth and the other is not.[53]

Proponents of the adversary system contend that the professionalism, skill and, most significantly, the incentive to be complete and rigorous on the part of the lawyers for a party to proceedings, will ensure that the true facts are more likely to be uncovered. That, it is said, is preferable to taking a risk about the competence and enthusiasm of a judge, from a judicial tradition that is more bureaucratic than that which exists in common law jurisdictions.

Furthermore, where the decision-maker of fact operates as an umpire without responsibility for the discovery of facts, there is limited, if any, risk that the decision-maker will not have an open mind, but proceed on the basis of assumptions which were formed early in the process with the consequence that the fact finding is pursued with a view to proving a working hypothesis. That is particularly true when the judge has access to a police report or an earlier investigating magistrate's report prior to commencing the

proceedings. As Justice Emmett has put it, in an adversarial system " … the art of suspended judgment can be practised for a much longer period by the judge".[54]

Lawyers in the civil law tradition would emphasise the possibility that a lawyer for a party will not put evidence before the judicial decision-maker because the true facts, or other facts to which a particular witness could attest, are not in the interests of his or her client. Judges in common law jurisdictions must still decide the facts on the basis of the evidence which the parties allow them to see or hear. Even in cases in which it appears that a witness can give direct evidence, the judge is not, as a general rule, entitled to call the witness. Statutory modifications to this principle have been few and common law exceptions remain narrowly defined.[55]

The judge may ask questions during the course of a witness's testimony but traditionally there have been strict restrictions on the scope, nature and intensity of such questioning. Theoretically, judges are not able to pursue the truth where, for tactical reasons or incompetence, lawyers do not do so. That is no longer how it works in civil litigation.

Commencing in commercial cases, but now applying more generally, judges seek to discover the true facts by asking questions of witnesses. This does not happen in criminal cases or in civil cases with significant consequences, eg, civil penalty proceedings. Nor does it tend to happen where both parties are competently represented. However, to a degree which would not have occurred in the past, trial judges now intervene to ensure that a witness gives the evidence that he or she appears capable of giving.

This is a significant change in civil litigation practice and has happened gradually. It commenced two or so decades ago and was clearly motivated by truth seeking.[56] Within the bounds of procedural fairness, it is almost inconceivable today that an appellate court would intervene with a trial judge's pursuit of the truth.

In civil procedure there has been a significant degree of convergence between the two systems. Differences still remain. It is not useful to seek to resolve the arguments in support of each approach. One thing that is certain is that attempting to transpose

principles and practices from one system to the other system is fraught with the possibility of the creation of perverse effects, in the same way as a body may reject foreign tissue. The education, skill set and work culture is quite different in the two kinds of jurisdictions. The process of convergence has been, and will continue to be, pragmatically slow.

Perception and Memory

I return to Sir Owen Dixon's statement that many facts are lost by reason of "normal frailty and memory". As I indicated, perhaps that is what he thought Pontius Pilate meant by his question. The process of fact finding raises a wide range of issues. In this address I can touch on only a few. I commend for your careful consideration a longer discussion by the late Lord Bingham which, like everything his Lordship wrote, is incisive and insightful.[57]

Legal practitioners and judges must approach the task of establishing the truth with humility. We must always be prepared to reassess our assumptions and practices in the light of experience, as we traditionally have done, but also in the light of scientific research, which we have not traditionally done.

Sometimes our experience leads us astray. Notoriously, directions to juries in sexual assault cases and legal principles requiring corroboration were based on assumptions about human behaviour, thought to be well founded. For example, that a woman who had been sexually assaulted would necessarily complain at the first opportunity. We now know that that assumption was derived from the fact that, until comparatively recently, almost all judges were male and, frankly, had no idea as to how a person who had been sexually assaulted would behave.[58]

Five years ago two judges of the Supreme Court of New South Wales, Peter McClellan and David Ipp, coincidentally and without knowledge of each other's intention, considered such issues in addresses delivered within a few weeks of each other.[59] The two papers appear in Volume 80 of the *Australian Law* Journal. I commend them to anyone who wishes to understand the problems of determining the validity of oral evidence in the light of the considerable body of psychological research, to which both of the papers refer. They are more detailed than I can be on

this occasion. I will deal generally with two matters at the heart of the fact finding process: perception and memory.

There are well known limitations on the capacity to perceive or hear events at the time that they occur. I refer to matters such as lighting, duration of the event, and the location, age, stress, fear, expectations and biases of particularly observers. Such difficulties of perception are reasonably well understood by lawyers.

The classic case, which is featured in numerous law school demonstrations of this problem was, I believe, first deployed by a professor of criminal law at the University of Berlin in 1901. Persons enter a lecture room arguing, after a struggle one pulls a gun and a blank shot is fired and the protagonists quickly leave the room. All of the students in the lecture hall are then asked to write down various details of the persons and the events. On every occasion that this experiment has been staged there has been an extraordinary range of different responses about such matters as the colour of their hair, their height and about the sequence of events.

Many studies by psychologists conclude that a significant proportion of people get the sequence of events wrong. This, of course, has been known for some time.[60] Further research suggests that there may be some systematic distortions resulting in an inability to accurately judge distance, speed, duration or sequence of events. For example, there appears to be a propensity to systematically overestimate the time that an event takes. Psychological research suggests that the greater the amount of violence involved, the greater the degree of overestimation.[61]

It is well established that the victim of a crime will focus on the central aspects of the traumatic event, such as the weapon, to the exclusion of details at the periphery.[62] Much of cross-examination focuses on peripheral details, in order to lay the groundwork for the suggestion that the witness cannot be believed on the central facts. Psychological research suggests that this entire approach to cross-examination is wrong if truth, rather than victory, were the object of the exercise.

Nevertheless, issues of perception are reasonably well understood. I will spend a little more time on memory. The plasticity of memory is not so widely accepted.

Witnesses can, without any dissimulation or propensity to lie, confidently assert the truth of conversations, observations and events which did not happen. The plasticity of memory impedes the truth finding process. This is not an uncommon phenomenon

One prominent author in the field has set out seven distinct problems with memory.[63] His list is as follows:

- "Transience, refers to the weakening or loss of memory over time".
- "Absentmindedness, involves a breakdown of the interface between attention and memory" because a person may not have focused upon a particular matter which is later sought to be recovered.
- "Blocking", involves a search for information which, for some reason, cannot be retrieved, as in a failure to be able to put a name to a face.
- "Misattribution, involves a complex process of assigning memory to a wrong source". This trick of memory is, "much

more common than most people realise".[64] I will discuss misattribution further with respect to eyewitness testimony.

- "Suggestibility, refers to memories that are implanted as a result of leading questions, comments or suggestions". This is a matter of considerable significance for the legal system and is described by the author as "the most dangerous".[65] I will discuss this further.
- "Persistence", involves remembering a subject, not necessarily of a traumatic character, which the person would prefer to forget.
- "Bias reflects the influences of current knowledge and beliefs upon how we remember the past". It is more common than anyone would like to admit. It involves "editing or rewriting previous experiences in the light of what a person now knows or believes". I will discuss bias further with respect to eyewitness testimony.

There is a small library of research on eyewitness testimony. The phenomena of misattribution, suggestibility and bias are encountered more often than lawyers care to admit.

A clear example of misattribution is the case of a woman who watched an interview on television and shortly afterwards was subjected to a rape. She gave a complete description of the rapist. It was in fact a description of the person who appeared on television. Luckily it was a live interview and he had a good alibi.[66]

Eyewitness testimony is particularly susceptible to that form of bias referred to as “confirmation bias”. A person will remember being more sure about certain facts than s/he was at the outset. That is to say what started off as a suspicion, becomes knowledge and is asserted to be such. This will result in the person giving evidence with a sense of confidence that may be convincing.

The difficulties involved with eyewitness testimony are frequently encountered in the course of litigation. Many of the matters that are considered in the psychological research have been the subject of legal decisions on the admissibility of evidence and on directions to juries about the use to which evidence could be put and its reliability. The context in which this issue has been faced in considerable detail is that of identification evidence. There is a considerable body of case law on the range of difficulties associated with both perception and memory issues.

For example the defect of “suggestibility” is well understood to arise with respect to the use of photo identification.[67] Trial experience has led over many years to well understood defects and appropriate changes of practice.

Perhaps persons are more than usually prone to refuse to accept that they could have made a mistake about a matter such as identification. However, the distortions that affect identification evidence similarly affect other forms of eyewitness evidence. It is important to realise that the psychological research is also applicable to a much broader range of matters than identification and about which direct evidence is usually given. I refer to such matters as the content of conversations, the sequence of events and the surrounding circumstances which are observed or heard.

It appears to me that suggestibility gives rise to the most frequent distortions of memory. This occurs because of the mechanisms of inquiry adopted for purposes of legal proceedings by the police and by lawyers, both before and during a trial. The author of the sevenfold categories of problems states, correctly in my view, that suggestibility “can wreak havoc within the legal system”.[68]

My favourite example of the ability of questioning to implant false memories is an experiment in which people were shown a picture referring to Disneyland and Bugs Bunny shaking hands with children. They were later asked if they had shaken hands with Bugs Bunny when they had visited Disneyland as children. A significant proportion said they had. This was quite unlikely, as Bugs Bunny is a Warners Bros character.[69]

Numerous psychological studies show how leading questions which assume or assert a certain element of an event, which did not in fact happen, were in fact recalled on no other basis than the question assumed or asserted that they were present or that some statement or photograph or film had contained or referred to this element.

The common law rejection of leading questions is well supported by psychological research, which clearly establishes that answers to such questions are less likely to be believed. There is, however, no control of leading questions in the procedures for police investigations or by lawyers preparing the

written statements of evidence that have become ubiquitous in legal proceedings.

The stilted legal drafting, in words which the witness would never use, too often using the same formulation for all relevant witnesses, is an impediment to truth finding. The process props up a false witness, but a truthful witness will more readily concede a discrepancy in cross-examination and look the worse for the honest concession.

An observation, variously attributed to Lord Buckmaster or Lord Justices Bowen and Chitty, is that “truth may sometimes leak out from an affidavit, like water from the bottom of a well”. Even if ethical restraints on witness coaching are complied with, the conduct of a lawyer taking a statement or preparing a witness may give clues on what evidence may be useful.

The issue of implanted memory came into dramatic prominence in the legal system a decade or two ago. I refer to the convictions based on allegedly repressed memories of sexual abuse, including the most bizarre recollections of satanic rituals. There are numerous studies which establish the falseness of such

repressed memories.[70] That is not to say it never happens. It is that on too many occasions the memories were implanted by well meaning or ideologically motivated therapists.

This body of psychological research, together with a substantial body of confirmatory case law, emphasises the care with which lawyers and judges should approach oral testimony and the restraint that ought to be displayed before making allegations that a witness is intentionally misleading the court. I am not sufficiently familiar with the detail of advocacy training to know whether this research is taught in a systematic way. If it is not, it should be.

Judicial education has focused on such issues in recent years. However, more could be done. As Justices Ipp and McClellan emphasised in the two papers I have mentioned, an appreciation of the psychological research, which is constantly being updated, is a necessary part of truth seeking for all of us involved in litigation.

Perhaps one of the reasons why we have all avoided doing this in the past is that it may lead us into a morass from which

there is no principled escape. One of the pioneer researchers in the field, Elizabeth Loftus, concluded:

> "Judges and jurors need to appreciate a point that can't be stressed enough: True memories cannot be distinguished from false without corroboration."[71]

In the courts we have to make decisions which scientists may avoid. The fact finding process will, however, be improved if we have a better understanding of the difficulties with which we must struggle. Fact finding is at the heart of legal craft. Public confidence in the administration of justice requires that the system must be directed to discovering the truth of the facts.

Conclusion

In conclusion let me return to the Gospel of St John and his version of the trial of Jesus. I trust the religious amongst you will forgive me for considering the text in a secular spirit.

I approach these passages with some diffidence as they, together with the parallel version in the Gospel of Matthew, have been the source of Christian anti-Semitism for many centuries. It was, to say the least, convenient for the relationship between the

early church and Roman authority to paint Pilate in a favourable light. Setting aside the possibility of divine authorship, these texts were either based on eyewitness testimony or reflect a collective folk tradition that was progressively edited for communal purposes.[72]

These eyewitnesses would have been subject to the full range of inadequacies of such testimony.[73] The process of editing folk tradition would have potentially involved systematic distortion. All this does is to confirm that fact finding is hard work.

Whether the words “What is Truth?” and the sequence of events were accurately recorded by John cannot be determined with finality. However, like other facts, they can be determined with sufficient certainty for the task at hand, the degree of certainty varying with the seriousness of the purpose. Pilate’s question, as Francis Bacon clearly acknowledged, is too good to check, even if we could.

All we toilers in the courts are required to do the best we can. I make no apology for so trite a conclusion. I advance it in

the belief that we must do our best, with the determination that we always strive to do it better.

Traditionally, justice has been represented by a blindfolded woman holding equally balanced set of scales. That is no longer an appropriate symbol. The appropriate symbol for justice today is that which Gulliver discovered in Lilliput. There, justice was represented by a statue which had no blindfold and which, significantly, had eyes in the back of her head.

Blind justice is not an appropriate symbol of impartiality in a justice system dedicated to truth in fact finding. The balanced set of scales is sufficient for that purpose. The pursuit of justice cannot allow itself to be deceived. It may be constrained by other public values or by natural human failings, but it cannot allow itself to be deceived.

[1] Philip Ayres, "Owen Dixon's Causation Lecture: Radical Scepticism" (2003) 77 *Australian Law Journal* 682 at 693.

[2] Sir Owen Dixon, "Jesting Pilate" in Judge Woinarski (ed) *Jesting Pilate and Other Papers and Addresses by the Right Honourable Sir Owen Dixon* The Law Book Company, Melbourne, 1965, at 4.

[3] See J J Spigelman, "Book Launch: Sydney*"* (2003) 77 *Australian Law Journal* 682 at 686-690; J J Spigelman, "Foreword", in Philip Ayres (ed) *Owen Dixon* The Miegunyah Press, Melbourne, (2nd ed) 2007.

[4] Ann Wroe, *Pilate: The Biography of an Invented Man* Vintage, London, 2000, at 41.

[5] On "procedural truth", see G L Certoma, "The Accusatory System v the Inquisitorial System: Procedural Truth v Fact?" (1982) 56 *Australian Law Journal* 288; Thomas Weigend, "Is the Criminal Process About Truth? A German Perspective" (2003) 26 *Harvard Journal of Law & Public Policy* 157 at 160, 170-173. On "legal truth", see Robert S Summers, "Formal Legal Truth and Substantive Truth in Judicial Fact-Finding" (1999) 18 *Law and Philosophy* 497; Joseph M Fernandez, "An Exploration of the Meaning of Truth in Philosophy and Law" (2009) 11 *University of Notre Dame Australia Law Review* 53 at 79-80.

[6] Sir Frederick Pollock, *Essays in the Law* Macmillan and Co, Oxford, 1922, at 275.

[7] *Hickman v Peacey* [1945] AC 304 at 318.

[8] *Air Canada v Secretary of State for Trade (No 2)* [1983] 1 All ER 161 at 167.

[9] See *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 442.

[10] Ibid, at 438-439 per Lord Wilberforce.

[11] *Ex parte Lloyd* (1822) Mont 70 at 72, reported as a note to *Ex parte Elsee* (1832) Mont 69. For a fuller statement of the position, see Franklin Strier, "Making Jury Trials More Truthful" (1996) 30 *University of California Davis Law Review* 95 at 100-104.

[12] See, eg, *United States v Cronic* 466 US 648 (1984) at 655; *Jones v National Coal Board* [1957] 2 QB 55 at 63 per Denning LJ; *Sharp v Rangott* (2008) 167 FCR 225 at 239-240 [53].

[13] *Ex parte Lloyd* supra at 72.

[14] *Giannarelli v Wraith* (1988) 165 CLR 543 at 578-579.

[15] 'Swearing-In Ceremony of the Hon J J Spigelman QC as Chief Justice of the Supreme Court of New South Wales' (1998) 44 NSWLR xxvii at xxxvi.

[16] The effect of judicial experience is well expressed by an American judge, see Marvin E Frankel, "The Search for Truth: An Umpireal View" (1975) 123 *University of Pennsylvania Law Review* 1031 esp at 1032-1034.

[17] See, eg, Strier (1996) supra at 116-123.

[18] See, eg, Viscount Kilmuir, "The Migration of the Common Law" (1960) 76 *Law Quarterly Revier* 41 at 43; *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 411.

[19] *Minet v Morgan* (1873) 8 LR Ch App 361 at 368.

[20] *Pearse v Pearse* (1846) 1 De G Sm 12 at 28-29; 63 ER 950 at 957.

[21] See, eg, *The Queen v Ireland* (1970) 126 CLR 321 at 335 per Barwick CJ; *Ridgeway v The Queen* (1994) 184 CLR 19 at 52 per Brennan J; *Nicholas v The Queen* (1998) 193 CLR 173 at [34] per Brennan CJ. See also *The Queen v Swaffield* (1998) 192 CLR 159 at [91] per Toohey, Gaudron and Gummow JJ; *Whitehorn v The Queen* (1983) 152 CLR 657 at 682.

[22] See *Funk v United States* 290 US 371 (1933) at 381.

[23] For a detailed review of the position in United States criminal procedure, see Larry Laudan, *Truth, Error and Criminal Law: An Essay in Legal Epistemology* Cambridge University Press, Cambridge, 2008.

[24] For an eloquent statement of the conflicting values, see *The Ampthill Peerage* [1997] AC 547 at 569 per Lord Wilberforce.

[25] See J J Spigelman, "The Truth Can Cost Too Much: The Principle of a Fair Trial" (2004) 78 *Australian Law Journal* 29.

[26] For example, the differentiation between the tests applicable in civil and criminal proceedings, where the court is asked to balance unfair prejudice and probative value by s 135 and s 137 of the *Evidence Acts* 1995.

[27] For example, the abolition of requirements for corroboration, save in a jury trial, by s 164 and s 165 of the *Evidence Acts* 1995.

[28] See, eg, J A Jolowicz, "Civil Procedure in the Common and Civil Law" in Guenther Doeker-Mach and Klaus A Ziegert (eds) *Law, Legal Culture and Politics in the Twenty First Century* Franz Steiner Verlag, Stuttgart, 2004; Guenther Doeker-Mach and Klaus A Ziegert (eds) *The Festschrift for Alice Erh-Soon Tay*: *Lawyer, Scholar, Civil Servant* Franz Steiner Verlag, Stuttgart, 2004 at 59-60.

[29] See, eg, French Civil Code Article 16; L Cadet, "The New French Code of Civil Procedure" in C H Van Rhee, *European Traditions in Civil Procedure* Intersentia, Antwerp, 2005 esp at [4.1.1]; Harold Koch and Frank Diedrich, *Civil Procedure in Germany* Kluwer, The Hague 1998 esp at [23]-[26].

[30] See, eg, German Criminal Procedure Code s 244(2); French Code of Civil Procedure, ss 10 and 11.

[31] See, eg, Matthew T King, "Security, Scale, Form and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems" (2001) 12 *International Legal Perspectives* 185 esp at 193-207.

[32] See Walter Paktar, "The Exclusionary Rules in France, Germany and Italy" (1985) 9 *Hastings International & Comparative Law Review* 1; Y Ma, "Comparative Analysis of Exclusionary Rules in the United States, England, France, Germany and Italy" (1999) 22 *Policing: An International Journal of Police Strategies & Management* 280; Stephen C Thaman, "*Miranda* in Comparative Law" (2001) 45 *St Louis University Law Journal* 581; Kuk Cho, "'Procedural Weakness' of German Criminal Justice and its Unique Exclusionary Rules Based on the Right of Personality" (2001) 15 *Temple International and Comparative Law Journal* 1; See M King, "Security, Scale, Form and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems" (2002) 12 *International Legal Perspectives* 185 at 218; Yue Ma, "A Comparative View of the Law of Interrogation" (2007) 17 *International Criminal Justice Review* 5; Stephen C Thaman, "'Fruits of the Poisonous Tree' in Comparative Law" (2010) 16 *Southwestern Journal of International Law* 333.

[33] See Richard S Frase, "The Search for the Whole Truth about American and European Criminal Justice" (2000) 3 *Buffalo Criminal Law Review* 785 at 821.

[34] See, eg, King (2001) supra at 218.

[35] See Thaman (2010) supra at 303.

[36] See J McComish "Foreign Legal Privilege: A New Problem for Australian International Law" (2006) 28 *Sydney Law Review* 297 at 303-304.

[37] Ibid at 304-305.

[38] Ibid at 306-308.

[39] See Thomas Weigend, "Is the Criminal Process About Truth? A German Perspective" (2003) 26 *Harvard Journal of Law & Public Policy* 157 at 171.

[40] See Jeremy A Bloomenthal, "Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective" (2001) 13 *Pace International Law Review* 93 at 100; Howard L Krongold, "A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions" (2003) 12 *Dalhousie Legal Studies* 97 at 109-110.

[41] See Krongold (2003) supra at 110.

[42] See Mirjan Damaska, "The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments" (1997) 45 *American Journal of Comparative Law* 839 at 842; David J Gerber, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States" (1986) 34 *American Journal of Comparative Law* 745 at 764-766; B Kaplan, A von Mehren and R Schaefer, "Phases of German Civil Procedure" (1958) 71 *Harvard Law Review* 1199 at 1237-1238.

[43] Claude Reymond, "Civil Law and Common Law Procedures: Which is the More Inquisitorial" (1989) 5 *Arbitration International* 357 at 360-361; quoted in Rolf Trittman and Boris Kasowlosky, "Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions – the Development of a European Hybrid Standard for Arbitration Proceedings" (2008) 31 *University of New South Wales Law Journal* 330 at 336.

[44] Jolowicz (2004) supra at 69.

[45] See David J Gerber, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States" (1986) 34 *American Journal of Comparative Law* 745.

[46] See James Beardsley, "Proof of Fact in French Civil Procedure" (1986) 34 *American Journal of Comparative Law* 459 esp at 461, 464 and 474.

[47] Ibid, esp at 475.

[48] Code of Civil Procedure, Articles 138-142.

[49] See Jolowicz (2004) supra at 68-69.

[50] See, eg, Beardsley (1986) supra at 474, 485.

[51] See Beardsley (1986) supra at pp 474, 475.

[52] Gerber (1986) supra 768-769.

[53] For a balanced comparison with respect to the conduct of criminal trials see Sandra Nehlep, "A Glance at the Far Side: A Comparative Analysis of the Role and Powers of Judges in German and English Criminal Trials" (2005) 7 *The Judicial Review* 181.

[54] Arthur R Emmett, "Towards the Civil Law: The Loss of 'Orality' in Civil Litigation in Australia" (2003) 26 *University of New South Wales Law Journal* 447 at 457.

[55] See Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* LexisNexis, Butterworths, Australia (5th ed, 2010) at paras [648]-[653].

[56] See the analysis of the development by David Ipp, "Judicial Intervention in the Trial Process" (1995) 69 *Australian Law Journal* 365 esp at 367-373; "Reforms to the Adversarial Process in Civil Litigation" Parts I and II (1995) 69 *Australian Law Journal* 705, 790 esp at 712-715, 802-805.

[57] T Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" in *The Business of Judging: Selected Essays and Speeches* Oxford University Press, Oxford, 2000.

[58] This became clear to me early in my judicial career. See *R v Johnston* (1998) 45 NSWLR 362 at 367.

[59] See Peter McClellan, "Who is Telling the Truth? Psychology, Common Sense and the Law" (2006) 80 *Australian Law Journal* 655; David Ipp, "Problems with Fact Finding" (2006) 80 *Australian Law Journal* 667.

[60] See, eg, Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial* Stephens & Sons, London, (3rd ed) 1963 at 87-88.

[61] See, eg, Elizabeth Loftus and James M Doyle, *Eyewitness Testimony: Civil and Criminal* Cluer Law Book, New York, 1987 esp at 38-39.

[62] Ibid at 51.

[63] Daniel L Schacter, *The Seven Sins of Memory: How the Mind Forgets and Remembers* Houghton Miflan, New York, 2001.

[64] Ibid at 5.

[65] Ibid at 9.

[66] Ibid at 114.

[67] For an outline of these issues see Ligertwood (2010) supra at [4.54]-[4.75]. See especially the significant range of empirical psychological research on identification evidence referred to at [4.59]. The classic text is Elizabeth Loftus, J M Doyle and J Dysert, *Eyewitness Testimony: Civil and Criminal* (4th ed) LexisNexis Charlottesville, 2008. This most recent edition is not to be found in any Australian library. For a brief overview see A Daniel Yarmey, "Eyewitness Identification: Guidelines and Recommendations for Identification Procedures in the United States and in Canada" (2003) 44 *Canadian Psychology* 181 or Steven E Clark and Ryan D Godfrey, "Eyewitness Identification and Innocence Risk" (2009) 16 *Psychonomic Bulletin and Review* 22.

[68] Schacter (2001) supra at 5.

[69] Kathryn Braun, Rhiannon Ellis and Elizabeth Loftus, "Make My Memory: How Advertising Can Change our Memories of the Past" (2002) 19 *Psychology and Marketing* 1 esp at 13-14, 17-18.

[70] For a detailed survey see Richard J McNally, *Remembering Trauma* Harvard University Press, Cambridge, 2003.

[71] Elizabeth F Loftus, "Memory Faults and Fixes: Research Has Revealed the Limits of Human Memory; Now the Courts Need to Incorporate These Findings into their Procedures" (2002) 18 *Issues in Science and Technology* 41.

[72] The thesis that the New Testament is based on eyewitnesses is advanced in Richard Bauckham, *Jesus and the Eyewitnesses: The Gospels as Eyewitness Testimony* Eerdmans, Grand Rapids, 2006.

[73] Judith C S Redman "How Accurate are Eyewitnesses? Bauckham and the Eyewitnesses in the Light of Psychological Research" (2010) 129 *Journal of Biblical Literature* 177. This article is a good short overview of the psychological research and provides a checklist for advocacy training.

CONTRACTUAL INTERPRETATION: A COMPARATIVE PERSPECTIVE

PAPER BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

TO THE THIRD JUDICIAL SEMINAR ON COMMERCIAL LITIGATION

SYDNEY, 23 MARCH 2011

In my experience the majority of commercial disputes involve questions of contractual interpretation. Often such questions are at the heart of the dispute. In this paper I will be concerned with contracts between commercial parties – not with consumers – being parties who, despite inevitable differences in bargaining power are not constrained by anything in the nature of coercion.

For virtually all such contemporary commercial arrangements of any significance, lawyers and judges have before them a text, often a long and detailed text or, at the very least, an exchange of correspondence.

Analysis must always begin with the words used. The focus of this paper is how far and in what respects one can or should

travel beyond the text for the purposes of contractual interpretation.

From Text to Context

In the common law jurisdictions with which I am most familiar there has been a clear development over the last two or three decades in both statutory and contractual interpretation from a literal approach to a purposive approach. The movement has been from text to context.[1] A comparative analysis shows that there are significant differences between jurisdictions as to the extent of the movement. Such differences also appear in internal debates within jurisdictions.

Although it is useful to distinguish between textualists and contextualists, to identify alternative basic approaches to contractual interpretation, it must be remembered that what is involved is a spectrum of opinion, rather than a simple duality.

I have significant reservations about the substantial expansion of the scope and nature of evidence now available for the purposes of interpreting a written contract. What started out in life as an application of the perfectly acceptable principle that

words in a written contract must be understood in their commercial context, has turned into a mechanism for creating a high level of uncertainty in commercial relationships. This was not originally intended.

In my opinion, in most jurisdictions the balance between certainty and accuracy favours the latter more than it should. My disagreement is based on a difference of approach that is fundamental.

As will appear below, a restatement of the principles of contractual interpretation by Lord Hoffmann has been very influential. Lord Hoffmann's starting point is that "legal interpretation" should not differ from the way "any serious utterance would be interpreted in ordinary life".[2] I respectfully disagree. There are, in my opinion, significant differences between legal words and the utterances of everyday life. I acknowledge that this is an unfashionable perspective.

Legal words whether in a contract or in a statute, are not the same as words uttered in the course of ordinary life. That is because legal words create and impose obligations. Specifically,

in the commercial context, those words, unlike many “ordinary life utterances”, are imbued with a desire, from the outset, on the part of all parties to a contract that there be a high level of certainty as to how their written agreement will be understood in the future, both in any disputes between the parties and by reason of the involvement, in many spheres of commerce, of third parties who will rely on the written text without knowing the full context.

The first requirement for interpreting any text is to understand and give full weight to the nature of the document. That is why a national constitution cannot be interpreted as if it was a will or a trust deed.[3] That is why a statute must be interpreted in accordance with the public values of the system of government, such as the presumptions appropriately grouped under the principle of legality.[4] That is also why a written commercial contract must be interpreted so as to provide as much commercial certainty as the words permit.

Like many other aspects of contract law, interpretation requires the resolution of a tension between certainty or efficiency on the one hand and accuracy or fairness on the other. There exists a broad spectrum of permissible opinion as to where the

balance between these often conflicting considerations should be drawn.

"Certainty" in this context refers to the proposition that the extent to which lawyers giving advice on contractual obligations, and practitioners, arbitrators and judges involved in dispute resolution refer to matters beyond the document constituting the contractual arrangement between the parties, the certainty of advice or of the outcome of the dispute resolution process, is lessened. Furthermore, the length and cost of the process is increased.

"Accuracy" or "fairness" in this context refers to the central significance of determining what the *actual* intention of the parties was with respect to the meaning of particular words used in a written agreement. Justice requires that they be held to the bargain upon which they truly agreed. This has been called "a more principled and fairer result"[5] or one that will meet "the reasonable expectations of the parties"[6] or supported on the basis that "fairness should trump convenience".[7]

A restrictive approach to evidence for purposes of interpretation may sometimes mean that "justice" is not done.[8] However, as Chief Justice Gleeson forcefully pointed out, the "holy grail of individualised justice" is frequently in conflict with the need for predictability and certainty in areas of the law, including commercial transactions.[9]

As is so often the case, reasonable people can differ about where the balance between practical considerations and principle should be drawn. Practical considerations which are concerned with commercial certainty and the cost of contract writing, advice and adjudication, are regarded by some as an unprincipled constraint upon the true object of contract law and by others as a valid factor entitled to weight in the balance.

Furthermore, in terms of the justice of the situation, distinct issues arise in that significant range of commercial relationships in which third party interests become involved on the basis of the contractual text. Insofar as the true intentions of the parties is to be determined by extrinsic materials, they invoke matters of which such third parties have no knowledge.

I will concentrate upon jurisdictions of the common law tradition. Relevantly for the purpose of contractual interpretation, the rules of evidence which have traditionally restricted the range of material available for purposes of interpreting a written contract, include:

- the parol evidence rule;
- the rule that extrinsic materials could only be referred to if the words used are ambiguous;
- restrictions on the scope of extrinsic materials to which it is permissible to have regard;
- the rule against the admissibility of pre-contractual negotiations;
- the rule against the admissibility of post-contractual conduct.

In various degrees, these exclusionary rules have been modified over recent decades. A comparative analysis reveals considerable divergence in these respects.

Parol Evidence Rule

The traditional approach to the interpretation of a written contract in common law nations turned, in larger measure, on the application of the parol evidence rule. The rule has been stated in

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

The rule excluded extrinsic evidence for the purpose of interpretation. However, the rule applied only if the parties had, as a matter of fact, determined that the whole of their contract would be in writing. Extrinsic material could be considered to determine whether that was or was not the case.

What the Americans call a “hard parol evidence rule” includes a strong presumption that a contract which appears to be final and complete on its face will be accepted as such, whereas a “soft parol evidence rule” permits this presumption to be more readily overridden by extrinsic evidence. Questions of fact and degree arise. Different jurisdictions, indeed different judges within a jurisdiction, will balance the trade off between certainty and accuracy in different ways in this respect.

Over recent decades English courts became more willing to look beyond an apparently complete contract. This deprived the

traditional form of the rule of much of its force, as the Law Commission eventually acknowledged.[10]

The transition in English practice was highlighted in a report of the Law Commission on the Parol Evidence Rule. There are three passages of significance in its report.

First, is the conclusion that:

> "…there is no rule of law that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete contract. Whether it is a complete contract depends upon the intention of the parties, objectively judged, and not on any rule of law."[11]

A passage that is also often quoted is:

> "We have now concluded that a parol evidence rule … which on occasions may have been applied to exclude or deny effect to relevant evidence, no longer has either the width or the effect once attributed to it. In particular, no parol evidence rule today requires a court to exclude or ignore evidence which should be admitted or acted

upon if the true contractual intention of the parties is to be ascertained and effect given to it."[12]

Also of significance is the reasoning in the following passage:

"We have now concluded that although a proposition of law can be stated which can be described as the 'parol evidence rule' it is not a rule of law which, correctly applied, could lead to evidence being unjustly excluded. Rather, it is a proposition of law which is no more than a circular statement: when it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract."[13]

The process of emasculating the traditional effect of the parol evidence rule appears to have arisen by reason of the emphasis which began to be given to the factual matrix of a contract, commencing with the judgments of Lord Wilberforce to which I will refer.[14] The Law Commission's Report has been

adopted by some text writers, who treat the parol evidence rule as a historical footnote.[15] Others are not prepared to dispense with the rule, not least because no court has said it has gone, but acknowledge that it is subject to so many exceptions that, as a matter of substance, it appears to have been emasculated.[16]

The Court of Appeal has, on occasions, endorsed the Law Commission's approach to the parol evidence rule.[17] However, one Law Lord has affirmed and restated the rule, emphasising its role in promoting certainty.[18] It does appear that English judges are no longer willing to proceed on the basis of a strong presumption that a written contract which appears complete on its face, should be treated as embodying the whole agreement. Although not overruled, the rule appears to have been superseded by Lord Hoffmann's restatement, to which I will refer below.

The position seems to be the same in Hong Kong, at least at a Court of Appeal level.[19] I am not aware that the Court of Final Appeal has addressed the question.[20]

The position is, in my opinion, different in Australia. Here the rule is not regarded as a historical curiosity. The parol evidence

rule has long been accepted as fundamental.[21] It has been affirmed in quite recent times, with traditional justification.

In the *Equuscorp* case[22], a joint judgment of five judges of the High Court emphasised:

- a person executing a written agreement is bound by it;
- the parol evidence rule accords with the objective theory of contract;
- oral agreements often give rise to "difficult, time consuming expensive and problematic" disputation;
- the rule should be maintained, recognising that it allows for exceptions in "established categories";
- the growth of international trade with parties for different legal systems reinforces the role of the rule.

It is noteworthy that even Australia's most reform minded judge, Justice Kirby, formerly of the High Court, has strongly reaffirmed the rule and its core justification.[23] His Honour emphasised:

- the "practical utility" of the parol evidence rule including a "desire to uphold the more formal bargains" and "to

discourage expensive and time consuming litigations about peripheral and disputable questions";

- if the language is clear no extrinsic material "authorises a refusal to give the clear words their legal effect";
- the growth of international trade supports the policy for "adhering to a general principle that holds parties to their written bargain".

The *Indian Evidence Act* of 1872 compiled by Sir James Stephens, is one of the most successful acts of codification in the common law world. It remains the basis of the law of evidence in the Republic of India (other than Jammu and Kashmir), Pakistan, Bangladesh, Sri Lanka, Burma, Malaysia and Singapore, as well as a number of nations in Africa and the West Indies. That Act gave statutory force to the parol evidence rule.

The basic principles contained in the *Indian Evidence Act,* as generally adopted are:

- No evidence is admissible of the terms of any written contract, nor any secondary evidence of its contents (s 91).

- The parol evidence rule is enacted, so that for a written contract, evidence is not admissible to add to, vary or contradict its terms (s 92).
- When the language in a document is on its face "ambiguous or defective" evidence may *not* be given of facts which may supply the defect (s 93).
- When "plain" language in a document applies to existing facts, evidence may *not* be given to show that it was not meant to apply to such facts (s 94).
- There are several express provisions for when the language of a written contract may be supplemented (ss 95-98).

Of particular significance for present purposes is the sixth proviso to s 92 which states:

> "Any fact may be proved which shows in what manner the language of a document is related to existing facts."

In view of these express provisions it is not surprising that the traditional approach to interpretation of contracts in India was as strict as the original approach in England. Originally the principles were that clear words have to be applied and

surrounding circumstances could be referred to only if there is an ambiguity in the actual language.[24]

The primacy of the text has frequently been asserted in Indian authorities. For example, in one case the Supreme Court said:

> " … In construing a contract, the Court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the Court can do about it."[25]

As the Supreme Court put it more recently:

> "When persons express their agreements in writing, it is for the express purpose of getting rid of any indefiniteness, and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements."[26]

The Indian courts frequently state that extrinsic evidence is not admissible if the meaning is clear. The courts also frequently state that surrounding circumstances can be referred to.[27]

However, it seems to me that these references to “extrinsic evidence”, in their context, are directed to statements of subjective intention, as such. Statements of that character are not admissible in any of the jurisdictions to which I will refer. However, it does appear to me, on the limited research I have been able to conduct of the Indian case law that Indian courts are less likely to go behind a written text.

Furthermore, the scope of surrounding circumstances to which regard may be had also appears to be more restrictive than in some other jurisdictions, although this is an impression based on limited research. Such would be a natural result of the parol evidence rule having statutory force. It cannot be relegated to a historical footnote.

The approach to contractual interpretation in Singapore has been set out authoritatively in a detailed judgment delivered on behalf of the Court of Appeal by V K Rajah JA in *Zurich Insurance*.[28] The judgment contains a detailed exposition of the issues that arise in this context. It has been supplemented by Justice Rajah writing extra-judicially.[29]

Of particular significance for other nations which have adopted Sir James Fitzjames Stephens Evidence Act, is the careful analysis in *Zurich Insurance* of the application of those provisions to the process of interpretation. I will discuss below the analysis of the sixth proviso to s 92 (which is s 94 of the Singapore Act).

The judgment accepts that the traditional parol evidence rule applies, but that it excludes reference to extrinsic evidence only for the purpose of varying a written contract. The Court distinguishes such use from reference to extrinsic evidence for the purpose of interpretation.[30]

However, the Court emphasised that, although the law of Singapore had moved from textualism to contextualism, because of its statutory enactment, the parol evidence rule remained robust. Extrinsic evidence can be used for the purpose of interpretation, but cannot be used "as a pretext to contradict or vary it".[31]

Although, as in India, the statute precludes relegating the rule to a historical footnote, the process of emasculation that has

occurred in England has clearly been influential. The balance between certainty and accuracy has been redrawn in jurisdictions like Singapore, in which the English influence remains significant.

Surrounding Circumstances

In all jurisdictions the words of a written agreement are the primary focus of attention in the sense that, subject to collateral doctrines such as rectification and estoppel, it is those words that fall to be interpreted. However, the surrounding circumstances in which a text was drafted can be of assistance in its interpretation and that fact may not have received sufficient emphasis until recently.

Words never stand by themselves. They do not exist in limbo. Justice Learned Hand put the proposition well when he said:

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing; be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of

the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[32]

The same, of course, is true of the commercial purposes of a contractual relationship. No-one doubts the importance of surrounding circumstances or the "factual matrix", as it is often called, for purposes of interpretation. However, reasonable minds can differ about how readily and how far such background should be taken into account for that purpose. Questions of fact and degree are involved.

In common law nations the practice of modifying the parol evidence rule by taking account of surrounding circumstances and the commercial purpose of contract accelerated in the 1970's and has continued to expand.

In England this movement from text to context commenced under the influence of Lord Wilberforce, who in 1971, with the agreement of other members of the House of Lords, re-emphasised the relevance to interpretation of the factual matrix

known to both contracting parties, including the genesis and the aim or commercial purpose of the transaction.[33]

I do not believe that Lord Wilberforce intended any dramatic change from past practice. The "factual matrix" which he had in mind encompassed a limited range of basically uncontested commercial factors understood by both parties, even in a context where, almost by definition, their interests were in conflict.

> As Lord Wilberforce himself said, in the basal authority:
>
> "As to the circumstance, and the object of the parties, there is no controversy in the present case. The agreement, on its face, almost supplies enough, without the necessity to supplement it by outside evidence. But some expansion, from undisputed facts, makes for clearer understanding …"

The history of commercial litigation until this time would suggest that the typical case would be like this one, ie, involving "undisputed facts". It ought to be the case, as Lord Hoffmann has put it more recently, that:

" … surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial".[34]

However, this is not how this change has developed in the legal systems with which I have some familiarity. This is due to civil procedure, especially with respect to discovery, in a context where the adversarial system creates perverse incentives, which are not always adequately controlled by case management.

The expanded reliance on context for interpretation of written documents was influential throughout the common law world including Australia,[35] Hong Kong,[36] New Zealand,[37] Singapore,[38] Malaysia[39] and India.[40]

The following statement by the High Court of Australia is representative of this first stage of the movement from text to context:

"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."[41]

The next stage of development was stimulated by Lord Hoffmann's restatement in the *Investors Compensation Scheme* case. He set out a five point scheme for contractual interpretation, which has proven very influential.[42]

His first point has been widely adopted. It is:

"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

The robustness of this principle has been affirmed by the Supreme Court of the United Kingdom which has held that even without prejudice communications must be available as part of the background available for purposes of interpretation.[43]

In Australia, the High Court has frequently accepted that commercial contracts must be given a business like interpretation and this first proposition of Lord Hoffmann's restatement has expressly been accepted.[44]

English decisions on contract law are highly influential in Hong Kong. As the authors of one text on contract law put it:

> "It could be said that, in terms of Hong Kong contract law, it is as if 1997 never happened."[45]

The Hong Kong Court of Final Appeal had the benefit of Lord Hoffmann's own participation in that Court, sitting as a non-permanent judge. The case which is most frequently cited in subsequent Hong Kong authorities is Lord Hoffmann's own judgment in *Jumbo King Ltd v Faithful Property Ltd.* His Lordship said, relevantly:

> "[59] … The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. And this involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background

against which it was concluded and the practical objects which it was intended to achieve."[46]

The cycle is complete. Subsequently, in *Chartbrook* his Lordship referred to the judgment in *Jumbo King*.[47]

In one case the Court of Final Appeal went beyond the reference to *Jumbo King* and expressly adopted the cognate first proposition from *Investors Compensation Scheme*.[48] I am not aware that the Court of Final Appeal has endorsed the five point scheme, in terms, but lower courts apply it.

New Zealand courts enthusiastically adopted Lord Hoffmann's restatement.[49] This was, of course, understandable at a time when appeals to the Privy Council still existed from the Court of Appeal of New Zealand. More significantly, the Supreme Court of New Zealand has not only reaffirmed the approach, but probably gone further. I will discuss the decisions below.

One author suggested that the Supreme Court of India has rejected the Lord Hoffmann restatement.[50] However, the case upon which he relied recites a submission which was more wide

ranging than that advanced by Lord Hoffmann.[51] So far as I am aware the Supreme Court of India has not otherwise addressed the Hoffmann restatement in terms.

Notwithstanding the frequent reassertion of the proposition that effect must be given to unambiguous language, the Supreme Court of India has indicated in more recent judgments that it is legitimate to take into account surrounding circumstances for purposes of ascertaining the intention of the parties.[52]

In Malaysia, the Federal Court has also expressly adopted and applied the first of Lord Hoffmann's principles.[53] At a Court of Appeal level, the whole of Lord Hoffmann's five point restatement has been referred to with approval.[54]

The *Zurich Insurance* judgment, to which I have referred, indicates that in Singapore, in substance, the Hoffmann restatement has been adopted, subject only to the express restriction arising from s 95 in the case of a patent ambiguity.

In the *Investors Compensation* case, as subsequently modified, Lord Hoffmann expanded the concept of the "factual

matrix", which he retitled "background knowledge", to include "absolutely anything" known to both parties which a reasonable man could have regarded as relevant to an understanding of the way in which the language should be understood.[55] This was the second of his five points. It has not been so enthusiastically received as the first.

Writhing extra-judicially, Justice Rajah concluded:

> "The courts ought to embrace a consistently commonsensical approach in relation to the admissibility of evidence in contractual disputes. All relevant material which assists in revealing the parties objective intentions should be considered. It can be forcefully said that it is the legal entitlement of the parties to have their objective intentions and the 'goal of a genuine consensus' ascertained through such a process. Fairness should trump convenience. Such an intuitive approach better coheres with the idea that a contract law is a facilitative body of principles."[56]

In substance, his Honour supports the "absolute anything" element in the Hoffmann Restatement.

It has not been adopted in Australia. Nor has it been adopted by the Federal Court of Malaysia or by the Indian Supreme Court. It has been accepted, in substance, in Singapore. It is not repeated, in terms, in his Lordship's own judgment in *Jumbo King*. Nor, has it subsequently been adopted by the Court of Final Appeal in Hong Kong. However, it appears to be applied by the lower courts in Hong Kong.

The Ambiguity Requirement

Traditionally, it was thought that extrinsic evidence could only be taken into account if there was ambiguity in the written text. However, it was implicit in the adoption of Lord Wilberforce's "factual matrix" approach that, to some degree, surrounding circumstances would be taken into account from the outset of the interpretative process, not only after ambiguity was identified. In 1998, when Lord Hoffmann restated the principles of contractual interpretation in the *Investors Compensation Scheme* case, the necessity to find "ambiguity" before having regard to "background" was clearly rejected.[57]

In Australia, there is uncertainty as to whether ambiguity is still required before reference to surrounding circumstances is permissible. The basic authority remains *Codelfa* which contains the following formulation:

> "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 where it has a plain meaning."[58]

There is no authoritative decision on the distinction in *Codelfa* between the word "ambiguous" and the subsequent phrase "or susceptible of more than one meaning". I have expressed the view that the latter should be distinguished from the former, so that reference to extrinsic materials is permissible not only on the basis or a lexical or verbal ambiguity and/or a grammatical or syntactical ambiguity, but extends to any situation in which the interpretation is for any reason doubtful.[59] What his Honour had in mind, in my opinion, was something along the lines of the traditional distinction between patent and latent ambiguity, which is of continued significance, as I will discuss below, in those nations which have adopted the *Indian Evidence Act.*

More recent High Court decisions have stated the relevant principles without referring to the need for ambiguity. On that basis, the view has been taken that the ambiguity requirement has been dispensed with.[60] However, *Codelfa* has never been overruled by the High Court.

The traditional rule that extrinsic evidence can be looked at in the case of ambiguity was affirmed by the Privy Council in a New Zealand appeal shortly before *Investors Compensation Scheme.*[61] The subsequent adoption by New Zealand courts of Lord Hoffman's restatement posed some difficulties in this respect.[62] However the issue now appears to be resolved and ambiguity is not required.[63]

In the *Zurich Insurance* case, the Court of Appeal of Singapore concluded that it was no longer necessary to identify an ambiguity before referring to extrinsic evidence.[64] In his extra-judicial writing Justice V K Rajah reaffirmed the proposition in the *Zurich Insurance* case that it is unnecessary to identify ambiguity prior to relying on extrinsic evidence.[65]

In Singapore, as in other jurisdictions that have adopted the *Indian Evidence Act*, the position is complicated by the express statement in s 95 (s 93 in India) that extrinsic evidence is NOT admissible in the case of ambiguity.

The Singapore Court of Appeal in *Zurich Insurance* concluded that extrinsic evidence could not be used to interpret language in the case of patent ambiguity, but could be used if there is a latent ambiguity, in the sense that the ambiguity only becomes apparent when the language is applied to a factual situation.[66] The Court relied on the sixth proviso to s 94 of the Singapore Act for this approach. This appears to me to be the same result as I understand the Indian Courts to have reached. Indeed, one Indian court has invoked the sixth proviso the same way.[67]

In India, s 93 has been interpreted to require the rejection of extrinsic evidence only in the case of a patent ambiguity. If there is latent ambiguity, however, then extrinsic evidence is admissible, eg, to identify the subject matter of the contract.[68] The Indian authorities do not suggest that once latent ambiguity is identified, the full scope of surrounding circumstances – "absolutely anything"

in Lord Hoffmann's terminology – becomes admissible. The cases and texts I have consulted suggest a more circumspect approach is adopted.

The Malaysian position appears to be similar to the Indian position, in that surrounding circumstances can be taken into account pursuant to the sixth proviso, but only in the case of latent ambiguity. However, it appears that the scope of surrounding circumstances to which it is permissible to have regard is also more restrictive than that adopted in Singapore.

As the Federal Court put it:

> "It is evidence admissible under proviso (f) to section 92 Evidence Act, to show in what manner the language of a document is related to existing facts. It is admissible evidence *being confined strictly to surrounding facts so intimately connected with the instruments* that they afford reliable material for ascertaining the nature and extent of the subject-matter referred to. See also *Oriental Bank of Malaya Ltd v Subramaniam* [1958] 1 MLJ 35."[69] (Emphasis added.)

To similar effect are the observations of the Court of Appeal, Kuala Lumpur:

> "[S]uch evidence must *be restricted only to what is necessary* for the purpose so that the record will not be bulky."[70] (Emphasis added.)

The italicised passages use language that does not appear in the English, New Zealand, Hong Kong or Singapore case law.

The statutory restriction in s 93 of the Indian and Malaysian Acts (s 95 in Singapore) does differentiate the position from those nations that have not adopted the *Indian Evidence Act*. Ambiguity, including patent ambiguity on the face of the document, is one context in which extrinsic evidence is, perhaps, relevant.

It does appear that, in a number of respects, the Australian approach to interpretation of contracts remains more circumspect than in England and in most other jurisdictions. The scope in Australia for what academics like to call "modern" or "commercial" construction is not clear. Most other common law jurisdictions have followed the English lead, with the possible exception of

India and Malaysia. I say “possible” because of the limitations of my research in the Indian and Malaysian authorities.

Pre-Contractual Negotiations

Lord Hoffmann accepted, albeit without enthusiasm, that it was too late for the English courts to change the principle of English law that pre-contractual negotiations were not admissible for the purpose of interpreting the contract, save in the case of ambiguity or insofar as they demonstrated knowledge of the relevant factual matrix. His Lordship was clearly uncomfortable with the distinction, but saw practical reasons for distinguishing prior negotiations from other aspects of background.

The rule against the admissibility of pre-contractual negotiations has been affirmed in England,[71] Australia,[72] Hong Kong[73] and India.[74]

Although mere declarations of subjective intent, as such, remain inadmissible in Singapore, in *Zurich Insurance*, the Court of Appeal said that “there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct,

although in a normal case such evidence is likely to be inadmissible".[75]

In *Chartbrook* the House of Lords definitively upheld the proposition that it was too late to change the principle that pre-contractual negotiations were not admissible. *Chartbrook* was delivered after *Zurich Insurance*. The indication in *Zurich Insurance* that Singapore would not follow that aspect of Lord Hoffmann's restatement appears to be confirmed by the analysis in Justice Rajah's subsequent article, although his Honour acknowledged that the Court had not judicially considered *Chartbrook*.[76]

In New Zealand, the Supreme Court has addressed the question of pre-contractual negotiations in a case without a clear ratio.[77] However, a majority expressed the view that ambiguity was no longer required.

One of the judges appeared to start from the traditional position that, where relevant ambiguity was established, evidence of pre-contractual negotiations is admissible but that process should be subject to previously accepted restrictions.[78] Two of the

judges indicated that ambiguity was not required prior to examining background material but, on the facts of the case, their Honours invoked the widely accepted exception[79] that negotiations are admissible to identify the subject of a matter of a contract. In doing so, however, they adopted a wide concept of "subject matter".[80] Another judge said that it was no longer the case that ambiguity was required before taking into account background material, but saw no reason in that case to look at the background material.[81]

The fifth judge said that the same underlying principles should be applied to both pre-contractual and post-contractual evidence, concluding that the evidence is admissible if it is "capable of demonstrating objectively what meaning both or all parties intended their words to bear".[82] This appears to be similar to the position in Singapore.

Subsequent Conduct

The position in England is that, subject to certain exceptions, subsequent conduct is not admissible.[83] As it was put:

"it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made".[84]

These decisions have not, or at least not yet, been revisited since Lord Hoffmann's restatement.

The principle that subsequent conduct is not available as an aid to interpretation has been affirmed in Australia.[85] However, the reaffirmation did not involve detailed consideration of the various issues that arise in this respect.[86]

This position has also been affirmed in Hong Kong[87] and in Malaysia.[88] However, in Singapore, subsequent conduct is probably admissible. It was placed in the same position as pre-contractual negotiations, as discussed above.[89]

In India, evidence of subsequent conduct is admissible in certain circumstances for purposes of construing a written agreement. There must, however, be some ambiguity in the contract and particular weight appears to be given to conduct done shortly after the date of a contract.[90]

In *Gibbons Holdings,* a majority of judges in the Supreme Court of New Zealand accepted that subsequent conduct can be referred to for purposes of interpretation. However, the doctrinal basis of this acceptance is unclear.

Two of the judges would limit such evidence to a situation in which the conduct was engaged in by both parties, another judge said that even unilateral conduct was admissible, a further judge accepted that subsequent conduct could be admissible, without adverting to this distinction and the fifth judge reserved upon the admissibility of all subsequent conduct.[91]

I am generally critical of the expanded use of extrinsic material for purposes of interpretation. However, the adverse commercial effects which concern me are unlikely to arise if reference to conduct is limited along the lines adopted by the Indian courts. Where there is ambiguity in the written contract, conduct shortly after it came into effect can be revealing.

International Influences

The process of globalisation gives rise to issues of contractual interpretation of a character with which national courts are only now beginning to grapple. There are multilateral arrangements which change the domestic law of contractual interpretation.

Of particular significance is the *Vienna Convention on Contracts for the International Sale of Goods* ("the CISG") which has been adopted widely, including in Asia. The nations who have acceded to the Convention include Australia, China, Japan, New Zealand, Republic of Korea and Singapore, as well as major trading partners throughout Europe and North America. India and Indonesia are important exceptions. Also, the United Kingdom has never acceded and, because the treaty came into force prior to 1997, Hong Kong has maintained the position that existed at the time that the United Kingdom exercised sovereignty over the city, at which stage China was already a CISG member. There are, however, views expressed that the CISG does apply there.[92]

The CISG is an important international initiative to promote the harmonisation of sales law and, thereby, to reduce uncertainty and transaction costs. It has been ratified by 74 nations. As with other international conventions and model laws, the CISG manifests the capacity of international negotiations to evolve a compromise between the civil law and the common law traditions. Nevertheless, the compromise does require adjustment to a new form of discourse.

The CISG provides in Article 8 that statements made by a party are to be interpreted on a subjective basis where the other party knew, or could not have been unaware of, the intent of the person making the statement. This is the primary position. However, in a situation in which this subjective approach does not apply, by reason of a lack of knowledge or lack of obviousness, then statements are to be interpreted according to the understanding of a reasonable person in the same circumstances. The CISG, accordingly, adopts as the default position, the subjective theory of contract of the civil law.

For the purposes of interpretation, it is of particular significance that, also in accordance with the civil law tradition, the

scope of relevant circumstances is as widely stated as it could be. Article 38 provides:

> "In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case, including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

Clearly, where the CISG applies the restrictions I have been discussing about the permissible scope of surrounding circumstances at common law are overridden. An important aspect of the CISG is that the parties are entitled to opt out of its provisions. This occurs often in Australia and, it appears, in other nations.

As a result of the exercise of the opt out clause and, probably, because of widespread ignorance about the applicability of the CISG within the Australian legal profession, there have been comparatively few Australian cases applying the CISG.[93] A similar situation appears to exist in Singapore.[94] Indeed, it has been

observed that one of the largest bodies of case law with respect to the application of the CISG is from China.[95]

One Australian jurist, a judge with the highest academic qualifications who is closely associated with international developments in contract law, has criticised the isolationist attitude which Australia manifests in this respect. He, like UK observers who do not believe Lord Hoffmann went far enough,[96] invokes the example of CISG, and the similar approach to harmonisation of contract law in the privately generated Model Laws, namely the UNIDROIT "Principles of International Commercial Contract" and the "Principles of European Contract Law".[97]

These are important influences, particularly in England, where they represent part of its progressive integration with Europe. English common law is more susceptible to a process of harmonisation with European civil law systems than other nations in the common law tradition.

Common Law and Civil Law

With respect to contractual interpretation there are significant differences between the common law and civil law traditions. At

this seminar the former tradition is represented by India, Hong Kong SAR, Malaysia, New Zealand, Papua New Guinea, Singapore, Sri Lanka and Australia. The civil law tradition is represented by China, Macau SAR, Japan and the Republic of Korea. We will also be considering issues of Islamic finance, but I will not refer in any way to sharia law.

There are, of course, and always have been major differences within each of the two traditions, eg, between the English and American common law or between the French and German civil law traditions. Nevertheless there remain broad distinctions between the two systems which continue to influence both substantive and procedural law including with respect to contractual interpretation.

Over recent decades the relationship between the common law and civil law traditions has altered. A process of convergence has been emphasised in the comparative law literature. The focus of attention in international contexts has increasingly been to identify common elements and to seek to resolve differences between the systems. Both in multilateral and regional arrangements, and in nations where legal systems are still being

developed or modernised, there is a tendency to draw on both traditions, with a view to identifying the best system. I have referred to such developments when discussing the development by the Peoples Republic of China of a legal system adapted to its contemporary conditions.[98]

Adversarial procedure differs from inquisitorial procedure as a starting point. That remains true even though contemporary case management, particularly in the commercial area, means that judges in the common law tradition now perform an activist role, closer to that traditionally associated with a civil law system. On the other hand, many civil law jurisdictions have adopted some aspects of an adversarial system, particularly by expanding the involvement of practitioners. Furthermore, the oral tradition of common law has been substantially attenuated by the general use of affidavit evidence or statements. However, the introduction of an oral dimension, even cross-examination, in some civil law jurisdictions represents the reverse movement.

For purposes of contractual interpretation several matters distinguish the two systems. One substantive and two procedural differences are of particular significance.

The substantive difference is fundamental. The civil law tradition focuses on the subjective intention of the parties. The common law tradition focuses on the objective intention of the parties, ie, what a reasonable person would conclude their intention was.[99] Accordingly, the basal question about the nature of a contractual agreement is posed in quite different ways. In the civil law tradition the basal question is, "What was the intention of the parties?". In the common law tradition the basal question is, "What is the meaning of the words used?".[100]

Nevertheless, the civil law tradition, in its actual operation, appears to accept something analogous to the parol evidence rule. As one commentator said:

> " … Civilian systems are acutely aware of the need to strike a balance between the desire to achieve a materially 'right' outcome on the one hand, and the struggle for legal certainty on the other. As a consequence, they are extremely reluctant to admit that the wording of a contract concluded in writing might be overridden by other factors. They have devised different techniques to achieve this balance."[101]

It does appear that in its practical operation, the approach to contractual interpretation is not as different as the theoretical divergence between a subjective and an objective approach, suggests. This practical dimension may not have been given sufficient weight in the process of drafting the UNIDROIT principles or the Principles of European Contract Law.[102]

As is the case with statutory interpretation, there is a fictional element about determining a legal issue by reference to the "intention of the parties", not least in the usual case where neither party adverted to the circumstances of the dispute that has arisen. Nevertheless, the terminology of "intention of the parties" is more than a polite form. It represents a recognition by the law of the autonomy of the parties to a contractual relationship, autonomy which is entitled to respect.

One distinguishing procedural aspect of the common law tradition is that it permits wide-ranging discovery and inspection of documents on the part of the opposing party in civil disputes, including commercial disputes. As a general rule, there is no such practice in civil law systems. The collection of relevant documents

and their inspection is, traditionally, primarily a matter for the judge.

A second procedural matter arises from the existence of exclusionary rules of evidence which have no equivalent in the civil law tradition. Admissible evidence in the latter tradition is generally bounded by relevance alone. The common law has developed a number of principles which exclude relevant evidence on the basis of other considerations. To a substantial degree these exclusionary principles emerged as a matter of judge-made law in a context where findings of fact were made by juries. Many of the principles were designed to maintain the integrity of the process by removing evidence which judicial experience suggested may distort jury decision-making. Notwithstanding the fact that the origins of the rule in the jury system now have virtually no relevance for commercial dispute resolution, save in the United States, the rules persist. They often take statutory form.

I have discussed the parol evidence rule, the rules relating to exclusion of pre-contractual negotiations and of subsequent conduct above. These particular examples are not, as far as I am aware, matters that arose because of the heritage of the jury

system. They are, however, manifestations of the proclivity of the common law tradition to restrict the admissibility of possibly relevant evidence.

The process of convergence, particularly the special influence of European law in England, explains to some degree, in my opinion, the expansion of admissible evidence of surrounding circumstances. Lord Hoffmann's "absolutely anything" test could serve as a description of the civil law approach.

China

The contract law of the Peoples Republic of China of 1999 is a synthesis of a variety of sources including both common law and civil law sources, as well as the CISG and the American Uniform Commercial Code. Relevantly Article 125 of that law refers to contract interpretation and provides:

> "In case of any dispute between the parties concerning the construction of a contract term, the true meaning thereof shall be determined according to the words and sentences used in the contract, the relevant provisions and the purpose of the contract, and in accordance with the relevant usage and the principle of good faith."

The last words are a reference back to Article 6 which provides:

> "The parties shall abide by the principle of good faith in exercising their rights and performing their obligations."

Article 41 also makes provision for interpretation. It states:

> "In case of any dispute concerning the construction of a standard term, such term shall be interpreted in accordance with commonsense. If the standard term is subject to two or more interpretations, it shall be interpreted against the party supplying it. If a discrepancy exists between the standard term and a non-standard term, the non-standard term prevails."

There is some dispute amongst commentators on the Chinese contract law as to whether these provisions constitute a subjective or an objective approach to contractual interpretation. It appears to be of the same character as that contained in the CISG, that I have discussed above.

As the author of one text on Chinese contract law states, what has been adopted is a third, "eclectic approach" to the following effect:

> "Under the eclectic theory, the contract interpretation shall first try to ascertain the true intention of the parties because of the paramount significance of the parties' intention to the contract. If however, the parties' true intention could not be determined or there is a lack of common intention of the parties, the interpretation shall be made with recourse to the common understanding of reasonable persons under the same or similar situation."[103]

Article 125 makes it clear that the relevant context extends to the whole of the terms of the contract. Article 125 makes no reference to surrounding circumstances, but the text writers suggest that they are taken into account[104] and that this is so even if the words of the contract are clear and unambiguous.[105]

There is some dispute amongst scholars as to whether or not pre-contractual negotiations are authorised by Article 125. The better view appears to be that they are.[106] It is suggested that

they can be taken into account under the provision that “the purpose of the contract has to be considered” or, that they come within the application of the principle of good faith referred to in Article 125 or within reference to commercial usages and customs also referred to in the Article.[107]

It does appear that, in accordance with the civil law tradition, Chinese contract law adopts an expansive approach to the scope of materials available for purposes of interpretation. As one of the authors says:

> “Thus it is discernible that in practice, the Chines courts are open to all relevant evidences when making the interpretation of the contract. Consequently, an important question the courts may have to face is how to identify the truthfulness of each of the evidences that are introduced.”

One of the authors refers to a book written by judges of the Supreme Peoples Court which states that a course of interpretation:

> "All other materials related to the contract, such as previous drafts, negotiation records, letters, telegraphs, telex, shall all be used."[108]

Certainty

Lord Hoffmann who, as I have indicated, advanced an expansive view of the relevant background, nevertheless stated the alternative view with accuracy, when he said:

> "There is a certain view in the profession that the less one has resort to any form of background in aid of interpretation, the better … These opinions … reflect[s] what may be a sound practical intuition that the law of contract is an institution designed to enforce promises with a high degree of predictability and that the more one allows conventional meanings or syntax to be displaced by inferences drawn from background, the less predictable that the outcome is likely to be."[109]

As Lord Hoffmann suggested in this passage, it is revealing that those who resist the expansion of the use of extrinsic material for purposes of interpretation, including its extension to pre-contractual negotiations, tend to be active practitioners with an

understanding of the implications for both advice and litigation of this extension.[110] However, in accordance with much current academic discourse, the question often posed is not whether something works in practice, but whether it works in theory. There is a strong contingent of academic legal writing, indeed near unanimity in the academy, in favour of the admissibility of pre-contractual negotiations.[111]

Once one is talking about admissibility in evidence, the adverse effects on commercial life are complete. A fundamental commercial objective for all parties is to know where they stand without undergoing the risks and uncertainties of litigation.

As one practitioner, critical of the failure of Lord Hoffmann's restatement to appreciate the practical implications of this approach, including the position of third parties, put it:

> " … for a commercial contract, the correct approach is to ask what methods of interpretation the parties, as businessmen and not as jurists, may realistically be taken to have intended should be used, having regard to two assumptions: (i) the parties cannot have intended that their contract would mean one thing to a court and

something else to a lawyer asked to advise about it; and (ii) the parties must have had in mind the possible need, at some future point, to obtain legal advice without delay. On that approach, the parties may reasonably be taken to have intended that the admissible background should be limited to the sort of facts likely to be readily available to a lawyer asked to advise in circumstances in which a decision has to be taken without delay as to the course of action to be taken under the contract."[112]

It is clear that certainty is a significant value for commercial parties at the time of contracting. That their interests may well diverge subsequently, and lead to disputation, is understood, so that some mechanism for determining such disputes is required. Nevertheless, the idea that an arbitrator or a judge would be called upon to determine the *true* intention of the parties by going beyond the written contract to encompass anything which disputing parties can relevantly imagine, would be regarded by the parties, at the time of formation of the contract, to constitute a commercial disaster.

It is for that reason that so many written commercial contracts include an entire agreement clause asserting that the written form, as executed, constitutes the whole agreement between the parties and replaces all previous representations and drafts. Similarly, it explains why so many commercial contracts adopt arbitration clauses. Although they do have the additional advantage of secrecy and, in the context of international commercial arbitration, the advantage of enforceability, there is little doubt that, originally, it was believed that arbitration was likely to be a more cost efficient mode of dispute resolution. That this expectation has often not been realised does not detract from the commercial desire to ensure that this objective is attained.

A principal purpose of the detail found in commercial agreements, as well as a significant purpose of contract law, is to allocate risks between the parties, not least with respect to contingencies that cannot be, or were not, anticipated. Interpretation is the means by which the court determines how those risks were in fact allocated. Anything which increases the level of uncertainty about how the chosen words have performed that task, creates a new kind of risk. That is why, in my opinion, commercial decision-makers would generally, or at least often,

agree that certainty is more important to them than accurately reflecting their “true” intentions. Of course, with the benefit of hindsight, when the commercial situation has changed, or the risks have come home, the position is quite different and is said to have always been so, often on oath.

I realise these are empirical statements, based on my own, necessarily limited, experience. I know of no empirical research that supports my conclusion. However, the United States experience is suggestive.

Generalisation about the American approach to these matters is difficult because there is a significant variety of approaches. The Restatement (Second) Contracts adopts a broad approach to access to extrinsic materials. The Uniform Commercial Code, applicable to the sale of goods, also adopts such an approach. However, the general law of contractual interpretation is administered in Federal and State courts and there is no single common law for the United States.

It is useful to categorise the various State jurisdictions as falling towards the textual end of the spectrum or the contextual

end of the spectrum. The textualist end involves a strict application of the parol evidence rule, application of the plain meaning where it can be discerned and enforcement of whole agreement clauses, which Americans call “merger clauses”. On one recent computation a significant majority of the United States courts follow this traditionalist, textualist approach. Some 38 states are said to do so compared with nine who do not.[113]

The authors note that the leader of the textualist approach is the New York court system and the leader of the contextualist approach, perhaps not surprisingly, is the Californian court system. Indeed, as another author put it, the New York courts adopt a “intensely objective approach”.[114]

An instructive feature of the American debate in this respect is the apparent preference of commercial parties for a textual approach. American empirical evidence strongly suggests that commercial parties are attracted to a textualist jurisdiction, in order to provide the certainty that such a jurisdiction gives. They do not prefer jurisdictions which try to determine what the true bargain was.

In a survey of almost 3,000 contracts, New York law was chosen in 46% of them. Delaware, also a jurisdiction at the textualist end of the spectrum, was chosen in 15% of the contracts, the second most popular choice. In about 39% of the contracts, an exclusive jurisdiction clause was included. Of that 39%, New York accounted for 41% and Delaware accounted for 11%.[115]

Obviously the choice of New York and Delaware is based on a range of considerations, including the former's history as a financial centre and the latter's development of specific expertise in corporate law. However, the fact that each has a traditional approach to contractual interpretation is clearly understood by the practitioners and judges of such jurisdictions to be a relevant factor.

Cost and Efficiency

The expanded scope for introducing evidence of the factual matrix happened to coincide with technological developments which reduced the cost of multiple photocopying and, soon thereafter, the introduction of word processing, which multiplied

the number of drafts, followed by the adoption of email which multiplied the number of written communications.

The combined effect of these developments led to an explosion in the documentation involved in litigation, so that, in Australia, barristers, who even in 1980 would receive commercial briefs wrapped in pink ribbon, were soon presented with multiple spring back folders and, subsequently, trolley loads of documents. The costs of litigation escalated accordingly, to a degree which, in my opinion, is not sustainable.

There are limits to the proportion of the gross national product which any nation can afford to spent on dispute resolution. More immediately, commercial corporations which have aggressively cut costs in all respects over recent years, as competitive pressures have increased, will not exempt legal costs from this process.

The principal argument against the view that extrinsic material adds to cost and delay, is that issues of contractual interpretation are often accompanied by other issues which would permit reference to a wide range of documentation, eg, collateral

contracts, rectification or conventional estoppel. I include in that observation the similar effect in those jurisdictions which imply a good faith obligation into contracts[116] and statutory provisions protecting contractual parties from the effect of misrepresentations whether pre or post-contractual.[117]

Of all the arguments against maintaining a restrictive approach to the extrinsic material available for contractual interpretation on practical grounds of cost and delay and certainty, it is the proliferation of these alternative means for altering the effect of a written contract that I find the most compelling.[118]

Most of the jurisdictions I have discussed in this paper, now seek to identify the *actual* intentions of the parties, excluding only statements of actual intention, unless they reveal relevant background, which they often do. Accordingly, a party is permitted almost complete access to the documentation of the other party to litigation for purposes of determining the "true" contractual intention of the parties. In my opinion, this system in its practical application is indistinguishable from the subjective approach to contracts of the civil law tradition, notwithstanding the lip service paid to the objective theory.

However, as a matter of civil justice practice the potentially adverse effects of the civil law subjection intention theory, together with the adoption of good faith as a term of all contracts, is substantially mitigated in civil law jurisdictions by two considerations. First, in practice civil law courts appear to be reluctant to go behind a written contract, as discussed above. Secondly, a party to a dispute resolution process is generally confined to its own documents, including anything exchanged with the other party. General discovery is not available, let alone the intrusive interrogation of hard drives in the search for deleted drafts and emails which has become common practice in Australian commercial dispute resolution.

In view of the fact that I am of the opinion that this development is not sustainable in an economic sense, I continue to hold the position I have hitherto advocated. Unless courts, and arbitrators, restrict the documentation which commercial disputation now generates, they will be bypassed as a mode of dispute resolution. Furthermore, far from “justice” emerging by the recognition of the “true” intentions of the parties, *only* the strong

will prevail. I do not believe that discovery in the extensive form that is usual in major commercial litigation, can survive.

I have no difficulty with a contextual approach to interpretation which restricts the relevant background to what was in the mutual contemplation of the parties as evidenced by communications between them or by what must have been obvious to both of them. The practical difficulties that have emerged arise primarily from adversarial litigation attempting to prove what was in such mutual contemplation by evidence of the knowledge of each, even if uncommunicated. Discovery is used, relevantly, to reveal the internal communications of the other side and thereby establish parallel, albeit uncommunicated, knowledge. Contemporary practice, at least in Australia, has rendered that process too expensive. In this, as so often, the perfect is the enemy of the good.

Those jurisdictions which have moved close to the civil law subjective intention theory should carefully consider adopting the related aspects of civil law practice. This may not be limited to abolition of a right to discovery but extend to other aspects of the adversarial system.

Entire Agreement Clauses

Matters of fact and degree arise on the spectrum between a "hard" parol evidence rule approach and a "soft" or "non-existent" parol evidence rule approach. One matter on which the line can still be held is the effect given to entire agreement clauses.

For major contractual relationships a detailed document is usually prepared. It is rare to find one that does not include an entire agreement clause. Where the parties have expressly stated that the written document represents the whole of their agreement then, short of rectification or the application of some other collateral doctrine, that clause should, in my opinion, be given full and clear effect. If reference to extrinsic evidence is admissible in some circumstances to determine the true agreement between the parties, surely the assertion that the true agreement is contained entirely in the document is entitled to at least substantial, and usually determinative, weight in this very respect. In any event, such a clause resolves the preliminary question for the application of the parol evidence rule. This is a contract wholly in writing.

However, judges in jurisdictions which have embraced the Hoffmann restatement, and academics who support the development, have suggested that, notwithstanding an entire agreement clause, extrinsic evidence is still admissible for purposes of interpretation.[119] Indeed, one academic author, whilst acknowledging the difficult issues involved, suggested that not to do so "would resuscitate the now discredited parol evidence rule".[120] It is not clear to me why consenting adults cannot do that. A more detailed analysis of the reasons for parties adopting an entire agreement clause supports the conclusion that such a clause is a perfectly rational way of "contracting out of contextualism".[121]

While a number of judges have indicated that an entire agreement clause does not prevent reference to extrinsic evidence for the purpose of contractual interpretation, even in the absence of ambiguity, I am not aware of any court of final appeal that has adopted the proposition. Perhaps more clearly than other aspects of the issues that arise in this context, this matter remains open in a number of jurisdictions. Its resolution will depend very much on where the balance between certainty and accuracy, to which I have referred at the outset of this paper, ought be drawn.

I accept that sometimes certainty should give way to accuracy or fairness. Whilst the prima facie position should be that such a clause excludes reference to extrinsic circumstances, that could be subject to a qualification of substantial injustice.

Third Parties

One of the significant defects of contract law is that it operates on the assumption that only the interests of the parties to the contract are involved. That has never been true. However, with respect to any contract of significant size, it is now rarely true. Third parties, particularly financiers, have always relied on the contractual rights of their borrowers. Loan agreements are often closely interrelated with underlying basic contracts and, in contemporary circumstances, most contracting parties would assume that the other party would, or may, in the future use the contract in support of fund raising.

As I pointed out in my article “From Text to Context”, third party involvement appears to be of a considerable different order to what it has been in the past. There is a difference of scale between traditional forms, such as dealing with book debts by way

of factoring, and contemporary securitisation mechanisms, upon which a range of derivative products have been based.[122]

In a judgment after *Investors Compensation Scheme,* Lord Hoffmann elaborated on an unstated assumption in his original five point scheme for contractual interpretation, when he repeated the first proposition and added to it the observation: "A written contract is addressed to the parties …".[123] In my opinion, this assumption does not apply to a significant range of commercial contractual relationships. The interests of third parties can be accommodated in Lord Hoffmann's scheme, but it requires an express exclusion of the same character as his Lordship accepted for pre-contractual negotiation.

Lord Hoffmann has accepted that there are situations in which contractual documents may not be addressed only to the parties to the contract. For example, a bill of lading addressed to a merchant or a banker should be interpreted only on the basis of what appeared on the front of the bill because material, known only to the parties, on the back of the bill would not have been read by a merchant or banker.[124] In my original article I pointed out a similar exception based on case law to the effect that

investors were entitled to rely solely on the statutory contract constituted by the memorandum and articles of association.[125] Lord Hoffmann has also accepted this as an exception. Another clear exception is an interest in land recorded on a public register.[126]

However, Lord Hoffmann clearly regarded such matters as individual exceptions to a general rule. His reasoning suggests that that exclusion of reliance on background known only to the parties has to be determined on a case by case basis. He said:

> "Ordinarily … a contract is treated as addressed to the parties alone and an assignee must either enquire as to any relevant background or take his chance on how that might affect the meaning a court will give to the document. The law has sometimes to compromise between protecting the interests of a contracting parties and those of third parties. But an extension of the admissible background will, at any rate in theory, increase the risk that a third party will find that the contract does not mean what he thought. How often this is likely to be a practical problem is hard to say."[127]

I take issue with the first word in this quotation: "Ordinarily". In my opinion, and in the opinion of practitioners who have commented on this issue, third party reliance on written contracts is common. It is not something unusual, nor limited to specific kinds of contracts.[128] It should be dealt with by a broad exclusion, rather than treated on a case by case basis.

Conclusion

In my opinion, there is nothing "commercial" about what has come to be called "commercial construction". The effect of emasculating the parol evidence rule has introduced a degree of uncertainty into commercial relationships that is undesirable.

I do not doubt that surrounding circumstances, in the sense of the commercial context of a contractual relationship, are relevant to the task of interpretation. However, the expansion of material now relied upon in this respect has gone too far. I identify a number of desirable changes to recent practice in many jurisdictions.

(1) Affirm the parol evidence rule as a rule of interpretation and require clear evidence that a written agreement, which appears complete on its face, was not.

(2) Prima facie, restrict the scope of admissible surrounding circumstances to undisputed objective facts about the commercial context.

(3) Reaffirm the principle that ambiguity is required before other background facts, known to both parties, are admissible.

(4) Apply a strict approach to the kind of latent ambiguity that is accepted for purposes of (3).

(5) Affirm the principle that pre-contractual negotiations are not admissible.

(6) Restrict the admissibility of post-contractual conduct to a contract which is ambiguous and to conduct engaged in shortly after the contract came into operation.

(7) Establish a general exclusion to the admissibility of extrinsic evidence, including post-contractual conduct, in any case in which a third party will (or even might) rely on the written contract.

(8) Restrict the right to discovery of documents and the right to subpoena third party documents in litigation, so that

each is available only with the leave of the court after the identification of issues is dispute.

(9) Affirm the proposition that an entire agreement clause does restrict the use of extrinsic material for purposes of interpretation, unless significant injustice would arise from so doing.

[1] See J J Spigelman "From Text to Context: Contemporary Contractual Interpretation" (2007) 81 *Australian Law Journal* 322, also accessible at www.lawlink.nsw.gov.au/sc under "Speeches".

[2] See *Investors Compensation Scheme Ltd v West Bromwich Building* Society [1997] UKHL 28; [1998] 1 WLR 896; see also Lord Hoffmann "The Intolerable Wrestle with Words and Meanings" (1997) 114 *South African Law Journal* 656 passim.

[3] As Professor Paul Freund once put it: "We ought not read the Constitution like a last will and testament lest it become one", quoted by Paul Brest "The Intentions of the Adopter are in the Eyes of the Beholder" in Eugene W Hickok Jr *The Bill of Rights: Original Meaning and Current Understanding* University Press Virginia, Charlottesville (1991) p 21.

[4] See J J Spigelman "The Principle of Legality and the Clear Statement Principle" (2005) 79 *Australian Law Journal* 769 esp at 774-775; James Spigelman *Statutory Interpretation and Human Rights: The McPherson Lecture Series Vol 3* University of Queensland Press, Brisbane (2008) esp at 22-29 on "The Common Law Bill of Rights".

[5] *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392; [2004] 2 Lloyd's Rep 429 at [29] per Arden LJ.

[6] See J Steyn "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 *Law Quarterly Review* 433 esp at 441-442.

[7] V K Rajah "Redrawing the Boundaries of Contractual Interpretation" (2010) 22 *Singapore Academy of Law Journal* 513 at 538.

[8] D J Nicholls "My Kingdom for a Horse: The Meaning of Words" (2005) 121 *Law Quarterly Review* 577 at 586.

[9] A M Gleeson "Individualised Justice – The Holy Grail" (1995) 69 *Australian Law Journal* 421 at 431-432; applied in this context in J J Spigelman "From Text to Context" supra at pp 333-334.

[10] See Law Commission *Law of Contract: The Parol Evidence Rule* HMSD, London (1986).

[11] Ibid at [2.17].

[12] Ibid at [1.7].

[13] Ibid at [2.7].

[14] See, eg, *Youell v Bland Welch & Co (No 1)* [1992] 2 Lloyd's Rep 127 at 133 per Staughton LJ.

[15] For example, see H G Beale (ed) *Chitty on Contracts* (13th ed) Sweet & Maxwell, London (2008) at 12-099; Gerard McMeel, *The Construction of Contracts* Oxford University Press, Oxford (2007) at 5.60-5.621; J Beatson, A Burrows & J Cartwright *Anson's Law of Contract* (29th ed) Oxford University Press, Oxford (2010) esp at 139.

[16] Sir Kim Lewison *The Interpretation of Contracts* (4th ed) Sweet & Maxwell, London (2007) pp 85-91; Edwin Peel (ed) *Tritle's Law of Contract* (12th ed) Sweet & Maxwell, London (2007) at pp 214-215.

[17] See, eg, *Wild v Civil Aviation Authority,* English Court of Appeal, unreported, 25 September 1987; *Youell v Bland Welch & Co (No 1)* supra at 140 per Beldam LJ; *Rosseel v Oriental*

Commercial & Shipping Co (UK) Ltd [1991] 2 Lloyd's Rep 625 at 628; *Ocarina Marine Ltd & Ors v Marcard Stein & Co* [1999] EWCA Civ 2003; [1998] All ER 55.

18 See *AIB Group (UK) Ltd v Martin* [2001] UKHL 63; [2001] 1 WLR 94 at [4] per Lord Hutton and see also Lord Millett at [7].

19 See *HBS Marketing Ltd v Applied Electronics (OEM) Ltd* [1994] HKCA 415 esp at [11]; *Paul Management Ltd v Eternal Unity Development Ltd* [2008] HKCA 315 esp at [41]; and cf *Tam Che Ming v Yeung Kam Lam* [2003] HKCA 280 at [9]; *Nataman Protpakorn v Citibank NA* [2008] HKCA 354 at [33]; *Wai Kam Chin v Chim Siu Fan* [2008] HKCA 250 at [7].

20 See *Bank of China Ltd v Fung Chin Kan* [2002] HKFA 35; (2005) 1 HKLRD 181 at [59].

21 See *Hoyts Pty Ltd v Spencer* (1919) 27 CLR 133.

22 See *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; (2004) 218 CLR 471 at [33]-[36]. See also *Ratfland Pty Ltd v Commissioner of Taxation* [2008] HCA 21; (2008) 238 CLR 516 at [33]. For a summary of the principles and case law see *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234; (2009) 261 ALR 382 at [90].

23 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 CLR 45 at [99]-[103].

24 See *Chunchun Jha v Ebadat Ali* All India Rep 1954 SC 345 at [6].

25 *ONGC Limited v SAW Pipes Limited* All India Rep 2003 SC 2629 at [4].

26 *Roop Kumar v Mohom Thadani* [2003] INSC 212.

27 See, eg, Nilima Bhadbhade *Contract Law in India* Wolters Klauer, Netherlands (2010) at [334].

28 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design and Construction Pte Ltd* [2008] SGCA 27; (2008) 3 SLR 1029.

29 See V K Rajah "Redrawing the Boundaries of Contractual Interpretation" supra at 513.

30 See *Zurich Insurance* supra esp at [43]-[46], [70]-[73], [108].

31 Ibid at [122].

32 *Cabell v Markham* 148 F2d 737 at 739 (1945).

33 See *Prenn v Simmonds* [1971] 1 WLR 1381 at 1385; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 987.

34 *Chartbrook Ltd v Persimmon Houses Ltd* [2009] UKHL 38; [2009] 1 AC 1101 at [38].

35 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337 at 352.

36 See, eg, *River Trade Terminal Co Ltd v Secretary for Justice* [2005] HKCFA 29 at [21]-[22].

37 See *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74.

38 *Zurich Insurance* supra at [81].

39 *Berjaya Times Square San Bhd v M Concept San Bhd* [2010] 1 MLJ 597 at [42]-[43].

[40] Bhadbhade, supra at [334].

[41] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 at 179 [40].

[42] See *Investors Compensation Scheme Ltd* supra at 912-913; *Bank of Credit & Commerce International SA v Ali* [2001] UKHL 8; [2002] 1 AC 251 at [39] et seq; *Chartbrook* supra at [14].

[43] *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2010] 3 WLR 1424 at [17]-[41].

[44] See *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 210 CLR 181 at [11], [43]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 at 461-462 [20]-[26]; *Toll (FGCT) Pty Ltd* supra at 179 [40].

[45] Michael J Fischer & Desmond G Greenwood, *Contract Law in Hong Kong* Hong Kong University Press, Hong Kong (2007) p 34.

[46] *Jumbo King Ltd v Faithful Property Ltd & Ors* [1999] HKCFA 38; (1999) 2 HKCFAR 279.

[47] See *Chartbrook* supra at [14].

[48] See *Leung Ja Lau v The Hospital Authority* [2009] HKCFA 91 at [37].

[49] Commencing with *Boat Park Ltd v Hutchinson* supra at 81.

[50] See Mark Beeley, "A Rose by Any Other Name? A Comparative Examination of the English and Indian Approaches to Contractual Interpretation" (2005) 6 *Business Law International* 630.

[51] See *Citi Bank N.A. v Standard Chartered Bank* [2003] INSC 511.

[52] See *Modi Co v Union of India* All India Rep 1969 SC 9 at [8]; *Syed Abdul Khader v Rami Reddy* 16 All India Rep 1979 SC 553 at [12].

[53] See *Berjaya Times Square* supra at [42]-[43].

[54] See *Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd* [2006] 6 MLJ 544 at [23] and see [26]; *Peter Tang Swee Guan Subramaniam a/l A v Sanka* [2008] 6 MLJ 376 at [14].

[55] See *Investors Compensation & Commerce International SA v Ali* supra at [39].

[56] Ibid at [53].

[57] *Investors Compensation Scheme* supra at 912-913. See also *Westminster City Council v National Asylum Support Service* [2002] UKHL 38; [2002] 1 WLR 2956 at [5], affirmed in *Oceanbulk Shipping and Trading SA* supra at [36].

[58] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352.

[59] See *South Sydney Council v Royal Botanic Gardens* [1999] NSWCA 478; (1999) 10 BPR 18, 961 at [35]; *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235 at [12]-[13]; J J Spigelman "From Text to Context" supra at pp 326, 329-330; See also *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2005] FCA 1812; (2005) 223 ALR 560 esp at [78]-[79] and on appeal (2006) 59 ACSR 444 esp at [45]-[52], [98], [101] and [254].

60 *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234; (2009) 261 ALR 382 at [112]-[113].

61 See *Melanesian Mission Trust Board v AMP Society* [1997] 1 NZLR 391 at 394-395.

62 See e.g. *Potter v Potter* [2003] 3 NZLR 145 at [32] also *Vector Gas* supra at [64].

63 See *Ansley Prospectus Nominees Unlimited* [2004] 2 NZLR 590 at [36]. See also *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444 discussed below where, although there was no clear ratio, there was a majority against the requirement of ambiguity at [4], [23], [64], with a dissent at [119].

64 See *Zurich Insurance* supra at [62].

65 V K Rajah, "Redrawing the Boundaries of Contractual Interpretation" supra 521, [16].

66 *Zurich Insurance* supra at [50] and [108].

67 *M Prasad* supra.

68 See *Godhra Electricity Co Ltd v State of Gujarat* All India Rep 1975 SC 32; (1975) 1 SCC 149 at 50-51; and the summary in *M Prasad, Nampally, Hyderabad v T Bhavan Trust* [2002] INAPHC 329; Bhadbhade supra at [193], [334], [333], [337]; cf the earlier position referred to at fn 16 above.

69 *Alee Wah Bank Ltd v Ng Kim Lehr* [1979] 1 MLJ 21 at p 22.

70 *Petroleum Nasional Bhd v Kerajaan Negeri Terengann* [2004] 1 MLJ 8 at [28]. See also the narrow definition of surrounding circumstances adopted in *Oriental Bank of Malaysia Ltd v Subramaniam* [1958] 1 MLJ 35.

71 *Investors Compensation Scheme* supra at 913; *Chartbrook* supra.

72 *Codelfa* supra at 352.

73 *Marble Holding Ltd v Yatin* [2008] HKCFA 29 at [21]-[22].

74 See R G Padia (ed) *Pollock & Mulla's Indian Contract and Specific Reliefs Acts* (13th ed), vol 1, LexisNexis, Butterworths (2006) at p 277.

75 *Zurich Insurance* supra [132(d)].

76 V K Rajah "Redrawing Boundaries of Contractual Interpretation" supra at [20] and subsequent analysis.

77 See *Vector Gas Ltd* supra. In the course of one of the judgments obiter remarks were made at [122] supporting the observations of the one judge in *Wholesale Distributors v Gibbons Holdings* [2007] NZSC 37; [2008] 1 NZLR 277 to reject any requirement about mutual conduct.

78 See at [122].

79 For example per Mason J in *Codelfa* at 31.

80 See *Vector Gas* supra at [14], [13]-[14] and [151]. See also the authorities discussed in the context of a contract not wholly in writing in *County Securities P/L v Challenger Group Holdings P/L* [2008] NSWCA 193.

81 See at [62], [66], [76]-[78] and [83].

82 See [29]-[32].

83 *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 538 at 603, 606, 611 and 614-615; and, *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 252, 260, 265-70, and 272-3.

84 *James Miller* supra at 603.

85 *Agricultural & Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570 at [35].

86 See, eg, the range of authorities referred to in *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 315-316; *FAI Insurance Co Ltd v Savoy Plaza Pty Ltd* [1993] 2 VR 343 at 346-351.

87 *Marble Holding* supra at [21]-[22].

88 *Petroleum Nasional Bhd* supra at [31]-[33].

89 See *Zurich Insurance* supra at [132(d)]; V K Rajah "Redrawing Boundaries of Contractual Interpretation" supra at [48].

90 See *Abdulla Ahmeda v Animerndra Kissen Mitter* All India Rep (1950) SC 15 at [23]; R G Padia (ed) supra at 267-278 and Beeley supra at 137-138.

91 *Wholesale Distributors Ltd* supra at [52]-[53], [73] and cf [134]-[136], see also [7] and [27].

92 See Lutz-Christian Wolff "Hong Kong's Conflict of Contract Law: Quo Vardis?" (2010) 6 *Journal of Private International Law* 465 at 478-480.

93 See Lisa Spagnolo "The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring Vienna Sales Convention for Australian Lawyers" (2009) 10 *Melbourne Journal of International Law* 141.

94 See Howard Hunter "Singapore Contract Law in an Interdependent World of Commerce: The Example of the Convention on the International Sale of Goods", paper presented at the Singapore Academy of Law Quinquennial Conference, Singapore, February 2011.

95 See Spagnolo supra at 146.

96 Eg, Lord Nicholls, see D J Nicholls, "My Kingdom for a Horse: The Meaning of Words" supra.

97 See Paul Finn "International or Isolation: The Australian *Cul de Sac*? The Case of Contract Law" in Elise Bant & Matthew Harding (eds) *Law in Private Law* Cambridge University Press, Cambridge (2010) esp at 58-61.

98 See James Spigelman "Convergence and the Judicial Role: Recent Developments in China" (2003) *Revue Internationale de Droit Comparé* 57; also accessible at www.lawlink.nsw.gov.au/sc under "Speeches".

99 The objective theory of contract has been affirmed throughout the common law world. See, eg, *Investors Compensation Scheme Ltd* supra at 912; *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 76; *Taylor v Johnson* [1983] HCA 5; (1983) 151 CLR 422 at 429; *Zurich Insurance* supra at [125]-[127] and [132(c)]; *Vector Gas* supra; *Berjaya Times Square* supra at [42]-[43].

[100] See *Monypenny v Monypenny* (1861) 9 HLC 114; 11 ER 671 at 684; *Smith v Lucas* (1881) 18 ChD 531 at 542; *Rickman v Carstairs* (1833) 5 B & Ad 651; 110 ER 931; *Deacon Life & Fire v Gibb* (1962) 15 ER 630; *Drughan v Moore* [1924] AC 53 at 57; *Life Insurance Co of Australia v Phillips* (1925) 36 CLR 60 at 77.

[101] Stefan Vogenauer, "Interpretation of Contracts: Concluding Comparative Observations" in Andrew Burrows and Edwin Peel (eds) *Contract Terms* OUB, Oxford (2007).

[102] See the analysis of Judge Richard Posner in *Bodum USA Inc v La Cafetiére Inc* 621 F.3d 624 (7th Cir, 2010).

[103] Mo Zhang *Chinese Contract Law: Theory and Practice* Martinus Nijhoff, Leiden (2006) p 130. Bing Ling agrees: see Bing Ling *Contract Law in China* Sweet & Maxwell, Hong Kong (2002) pp 226-227.

[104] See Zhang supra p 127 and Ling supra p 226.

[105] See Ling supra p 228 and cf 227.

[106] Zhang supra p 137 and Ling supra p 227.

[107] See Zhang supra pp 127, 130-131 and Ling supra p 229-231.

[108] Zhang supra at p 137.

[109] See *Chartbrook* supra at [36]-[37].

[110] See, eg, A Berg "Thrashing Through the Undergrowth" (2006) 122 *Law Quarterly Review* 354; R Calnan "Construction of Commercial Contracts: A Practitioner's Perspective" in A Burrows & E Peel (eds) *Contract Terms,* Oxford University Press, Oxford (2007) esp p 17. See also my consideration of matters in "From Text to Context" supra pp 336-337.

[111] See, eg, A Kramer "Commonsense Principles of Contract Interpretation (and how we've been using them all along)" (2003) 23 *Oxford Journal of Legal Studies* 173; D McLauchlan "Plain Meaning and Commercial Construction: has Australia adopted the ICS principles?" (2009) 25 *Journal of Contract Law* 7; D McLauchlan "Common Assumptions and Contract Interpretation" (1997) 113 *Law Quarterly Review* 237; D McLauchlan "Contract Interpretation: What is it About?" (2009) 31 *Sydney Law Review* 5; D McLauchlan "Interpretation and Rectification: Lord Hoffmann's Last Stand" [2009] *New Zealand Law Review* 431; D McLauchlan "Deleted Words, Prior Negotiations and Contract Interpretation" (2010) 24 *New Zealand University Law Review* 277; G McMeel "Prior Negotiations and Subsequent Conduct – The Next Step Forward for Contractual Interpretation?" (2003) 119 *Law Quarterly Review* 272; C Mitchell "Contract Interpretation: Pragmatism, Principle and the Prior Negotiations Rule" (2010) 26 *Journal of Contract Law* 134.

[112] A Berg, "Thrashing Through the Undergrowth" supra at 362.

[113] Alan Schwartz & Robert E Scott "Contract Interpretation Redux" (2010) 119 *Yale Law Journal* 926 esp fn 1.

[114] Joseph M Perillo "The Origins of Objective Theory of Contract Formation and Interpretation" (2000) 69 *Fordham Law Review* 427 at 466.

[115] Theodore Eisenberg & Geoffrey P Miller "The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts" (31 March 2008) *New York University Law & Economics Research Paper No 08-13* accessible at papers.ssrn.com/sol3/papers.cfn?abstract_id=1114808 esp at pp 3-5; see also Schwartz & Scott "Contract Interpetation Redux" supra at 956.

[116] For the Australian context see James Allsop "Good Faith and Australian Contract Law. The 2010 Sir Frank Kitto Lecture" *Australian Law Journal* (forthcoming) accessible at www.lawlink.nsw.gov.au/sc under "Speeches".

[117] In the Australian context s 18 of Schedule 2 to the *Competition and Consumer Act* 2010 (Cth) (formerly s 52 of the *Trade Practices Act* 1974 (Cth)) and its progeny.

[118] See, eg, *Chartbrook* supra at [38].

[119] See, eg, *John v PriceWaterhouseCoopers* [2002] EWCA Civ 899; [2002] 1 WLR 953 at [67]; *ProForce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69 at [40]-[41]; *MacDonald Estates PLC v Regenesis (2005) Dunfermline Ltd* [2007] CSOH 123 at [131]; *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] 1 NZLR 218 at 224; *Lee Fu Wing v Yan Po Ting Paul* [2009] 5 HKLRD 513 at [103].

[120] Gerard McMeel, "Prior Negotiations and Subsequent Conduct: The Next Step Forward for Contractual Interpretation" supra fn 97.

[121] See Catherine Mitchell, "Entire Agreement Clauses: Contracting out of Contextualism" (2006) 22 *Journal of Contract Law* 222 esp at 237-245.

[122] See Spigelman, "From Text to Context" supra at p 335.

[123] See *Homburg Houtimport BV v Agrosin Private Limited* [2003] UKHL 12; [2004] 1 AC 715 at [73].

[124] Ibid at [74]-[77].

[125] See Spigelman, "From Text to Context" supra at p 336.

[126] *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2007] HCA 45; (2007) 233 R 528 at [37]-[38].

[127] *Chartbrook* supra at [40].

[128] See, eg, A Berg "Thrashing Through the Undergrowth" supra at 359.

JUDICIAL MEDIATION IN AUSTRALIA

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TOPIC 1: Introduction to Judicial Mediation in Australia

In order to understand the involvement of judges in the mediation of civil disputes in Australia it is necessary to identify two features of the judicial role in our legal system. The first distinctive characteristic of the judicial role in Australia, when compared with that in China, is our adversarial system of litigation. The second distinctive aspect of our system is that all steps in proceedings are directed towards a single continuous trial, at which the whole evidence is to be given without interruption.

The traditional common law adversarial system means that the basic operating assumption of legal proceedings in Australia is that it is controlled and conducted by the litigants. The parties alone determine what evidence will be called. In our system, it is not a function of the judge to investigate the facts, whether by way of interrogating witnesses or discovering documents or obtaining

expert reports. Each party determines what evidence it will call. The opposing party determines whether or not any of that evidence will be objected to or tested by way of cross-examination in court.

The adversarial system puts the parties, rather than the court, in charge of the conduct of legal proceedings. There have been significant modifications of this adversarial system over recent decades. The court has assumed greater control of the progress and conduct of litigation than it once had. In particular, widespread adoption of case management principles, at first in the context of commercial litigation but now more widely adopted, represents a significant modification of the adversarial system. Nevertheless, the basic nature of the system remains adversarial.

In this respect the legal system reflects Western cultural assumptions that may be quite different from the cultural assumptions underlying the Chinese legal system. Putting the disputing parties in the centre of the process reflects a belief in the primacy and autonomy of the individual. The interests of the individual parties are given priority, not the interests of society.

Furthermore, litigation reflects a belief in the value of open debate, express statements of opinion and confrontation. Such conduct, subject to restraints of courtesy, is expected and acceptable. It is even permitted in litigation involving close relationships, such as between father and son, husband and wife, elder brother or sister and younger brother or sister. Conflict and competition between persons in society, or between official and citizen, are acceptable forms of social disputation.

Although value is given to the preservation of harmonious social relationships, in our legal tradition, which focuses on individual autonomy, the preservation of order and harmony in society is not treated as an overriding value. As a result, the willingness to compromise and to sacrifice interests, even in the context of close relationships, is given less weight than may be the case in other societies.

Mediation, whether by judges or by private mediators, occurs in a cultural context in which the principal focus of attention is on the legal rights and the economic or social interests of the contending parties. There is less recognition than in Asian legal systems of the social context of the relationship between the

parties to a dispute. This cultural background creates a quite different dynamic for mediation than may exist in a different cultural background, such as that of China.

The second aspect of the judicial system to which I have referred also affects the role of the mediator and the timing of the mediation. The management of cases by the court is primarily directed to ensuring that the parties are ready for a single, continuous, uninterrupted trial. The court manages preparations for trial by making decisions about the identification of issues, the availability of evidence, the exchange of documents and evidence, until such time as the court is satisfied that the case is ready to proceed to trial. When a case is set down for hearing, it will be heard by the judge until completion, almost always without interruption.

The concept of a single continuous trial originated in the jury system which, until comparatively recently, was the principal mode of determining most civil disputes. It was not feasible to bring the same jurors back on numerous occasions to hear evidence from time to time. The practice has always been to keep the jurors together for a discrete period of continuous time.

Even though in most jurisdictions the jury no longer plays a significant role in civil disputes, unlike in criminal cases, the practices that developed over centuries have continued and are now justified on cost and efficiency grounds. It is the generally held view that lawyers and judges will take less time to hear a case in this manner, rather than to have to remind themselves of the nature of the issues involved by rereading the relevant materials from time to time, often after many months and many other proceedings have intervened.

One result of this system is that, save in special situations, the officer of the court who is responsible for the supervision of the preparatory phase leading to trial is not always the same person and is only rarely the judge who will actually conduct a hearing. Some courts do attempt to have the same judge do all the preparatory work as well as the trial, although the extent to which that can be achieved varies from one area to another and one court to another.

Kinds of Mediation

In Australian practice there are different kinds of mediation – or "conciliation", as equivalent processes are sometimes called. There is a range of mediation techniques which involve different degrees of intervention by the mediator. It is common to identify a spectrum from a "facilitative" model, at one end, to an "evaluative" model, at the other.

At both ends of the spectrum the mediator's objective is to assist the parties to understand the strengths and weaknesses of their positions and to appreciate the full range of their interests which may be enjoyed. However, the facilitative mediator does this by asking questions and offering assistance, whereas the evaluative mediator does this by making proposals, assessments and predictions.

The facilitative model, as the name suggests, involves the mediator facilitating or assisting the parties to reach an agreement without any involvement which may urge or pressure the parties to settle. At the far end of the spectrum of the facilitative model:

- The mediator does not propose outcomes.

- The mediator does not make predictions about the outcome of litigation or otherwise express opinions about the strengths or weaknesses of either case.
- The mediator may not have separate meetings with the parties.
- The mediator may not have private communications with the parties.

A facilitative model, with some modification of these features, is the common form of what is taught in Australian mediation courses and is put forward as the basic form of mediation in the private sector. It has generally been adopted in court-annexed mediation. The most common modification is that mediators will often have separate meetings and private communications.

The process involved in the facilitative model is for the parties themselves to be assisted by an impartial mediator to identify the issues in dispute, to develop options and consider alternatives and to endeavour to reach an agreement. The mediator does not advise about, let alone determine, any aspect of the content of the dispute.

In the facilitative model the principal technique of a mediator is to ask questions to direct the parties to consider the implications of litigation if the matter does not settle and goes to hearing. The task is to ensure that the parties give close consideration to the personal costs of not settling. The personal costs for parties do not merely involve paying legal costs. The costs also involve the impact that prolonging and possibly losing the case will have on the parties' lives, and the impact that continued conflict will have on the relationship between the parties.

The mediator will often emphasise that the prospect of frequently imminent legal proceedings constitutes the best opportunity to resolve a dispute on terms on which both parties agree. S/he will help the parties develop proposals for settlement and exchange such proposals without directing or pressuring the parties as to the content.

Of particular significance in relationships where there are connections and interests of the parties that are more broadly based than the specific matter in dispute, the mediator may direct attention to the possibility of making arrangements with respect to

a broader range of issues. Such an arrangement may benefit *both* parties, in a manner that could not occur in the court.

Because of the fact that this form of mediation does not involve a detailed investigation by the mediator of the issues involved in the trial and the strengths and weaknesses of each case, the cost and time of the mediation is considerably less than would be the case if the mediator had to evaluate the positions and strengths of the parties.

At the other end of the spectrum, under the evaluative model:

- The mediator will assess the strengths and weaknesses of the rival cases.
- The mediator may propose outcomes or make predictions about the outcome of litigation.
- The mediator will have private communications with the parties including separate meetings.
- The mediator will advance reasons for the parties accepting particular options.
- The mediator may express a view as to the likely outcome if the matter goes to litigation.

An evaluative mediator will spend considerable time in studying relevant documents including the pleadings and evidence and reports prepared for litigation. This is done with a view to enabling the mediator to express his or her own opinions about the prospects of litigation and to assess the strengths and weaknesses of each side's case. With varying degrees of pressure or directness a mediator may suggest resolution of particular matters in dispute or of the whole of the proceedings. An evaluative mediator may give advice as to whether or not a party should or should not accept the particular offer or otherwise pressure the parties to reach settlement.

I repeat that the features of the two models I have listed are at each end of a spectrum. Mediators may adopt varying degrees of involvement in between the two models, eg, suggesting outcomes, but not evaluating the strength of the case, or meeting separately even in a facilitative model.

Developments in Mediation

Over the course of the last two decades mediation has become an established mechanism for resolving civil disputes in

all Australian jurisdictions. A range of non-governmental institutions have been established to provide, or to co-ordinate the provision of, mediation services, either generally, or in particular industries. There has emerged a significant number of mediators, many of whom are former judges, who offer their services on a commercial basis. There is a well-established regime for training and accrediting mediators, although accreditation is not necessary for a person to practice as a mediator. Formal codes of conduct have been adopted. Mediation has been institutionalised and professionalised.

As a result of developments over the last two decades, mediation by means of provision of assistance to resolve a dispute through the services of an independent third party is now well established in numerous areas of the law. The majority of mediations are performed by private mediators who are remunerated on a commercial basis for their services. The involvement of court officers in mediating disputes, for which no charge is made by the court, is of lesser significance and varies from one sphere of disputation to another. Nevertheless, mediation is an essential part of the process of dispute resolution including a full range of commercial disputes.

A range of industry specific or subject matter schemes also exist, including separate schemes for mediating disputes between landlord and tenant in commercial leases, a statutory scheme for the resolution of disputes about debts of small farmers, a tribunal or court-annexed system for resolving disputes in the building and construction industry, legislative based consumer tribunals for dealing with small consumer disputes, as well as industry organised schemes for customer dispute resolution in a wide range of industries including banking, insurance, telecommunications and disputes between franchisors and franchisees.

Mediation is almost universal in claims of personal injury, especially in claims of medical negligence. In almost all such cases the defendant who allegedly caused the injury is supported by an insurance company or government backed insurance scheme. The latter is of particular significance in the area of workers compensation and mediation is employed as standard practice in this context. Statutory provision for mediation by government appointed or industry appointed tribunals is also widespread in disputes over healthcare issues, residential tenancy

issues and in a number of fields of business regulation in industry and agriculture.

One of the defects of our well-established system of private mediation is, of course, that it may be expensive and not all litigants can afford to take advantage of it. There are alternative specific mechanisms for providing mediation services. In New South Wales, for example, there is a network of Community Justice Centres that assist persons in a wide range of smaller disputes free of charge. Court-annexed mediation is important in this respect because court-annexed mediation services are also provided free of charge.

The culture of legal disputation in Australia has changed. In most civic disputes some attempt is now made to mediate the dispute, either before legal proceedings are instituted or before trial. The courts actively encourage parties to engage in mediation. Courts have been granted statutory powers to compel parties to mediate and frequently exercise those powers.

At first there was some scepticism as to whether or not forcing someone to negotiate a settlement by court order would

work. However, it has proven very effective. A formal court order has frequently overcome the negotiating posture of a party who pretends, and may believe, that his or her case cannot fail. The experience of the courts is that reluctant starters have often become active participants in negotiations, leading to significant success rates for mediation in civil disputes.

In our adversarial system, the principal motive for persons to engage in mediation is to reduce the substantial legal costs to which they will be subject if full scale legal proceedings occur. The courts encourage, and to some degree participate, in mediation for two reasons. First, in order to serve the public interest by reducing the cost to litigants. Secondly, the courts encourage settlement of disputes in order to reduce the court caseload. This decreases the delays for other cases and reduces the resources needed to be made available to the courts.

As I have said above, the courts in our legal system regard their primary function as determining the legal rights of parties. However, there is recognition that, in certain areas of disputation the court performs an important role in the resolution of disputes of a character which can be described as maintaining social

harmony. In a number of contexts, the courts focus on this objective, rather than determining questions of legal right. This is particularly significant in Australian history in the context of industrial disputes. It is also of great significance in the context of family disputes and disputes about land use. Such issues also arise in other contexts.

In such contexts it is difficult, perhaps impossible, to identify any legal right which can be stated with clarity. There is a legal right to make a claim and, accordingly, to invoke the processes of the court. There is, however, no legal right to a particular result, eg, a court order to perform or cease conduct, or to pay money. What the court must do is to make a broad based evaluative judgment about what, in the circumstances, is fair and reasonable.

In the industrial context it cannot be said that a worker is entitled to any particular level of wage or other entitlement. In the case of a family dispute, it can rarely be said that one spouse has a right to the custody of or access to the children of the marriage or any specific share of the property of the marriage. In the town planning or environmental context it cannot be said that a property

owner has a legal right to develop or that an objector has a legal right to stop any conduct which has any effect on the environment.

In such cases what is involved is a judgment as to how the respective interests should be balanced against each other. Where the law does not provide a discrete and clear answer, the role of the courts in resolving the dispute, for its own sake, is given more weight than when the dispute is about a matter with, potentially, a single correct answer. In the context of such indeterminate outcomes, mediation usually requires more active involvement on the part of the mediator.

Court-Annexed Mediation

In Australia we speak of “court-annexed mediation” rather than “judicial mediation”. This is because of the status of the court officers who usually perform the role. Most Australian courts provide some form of court-annexed mediation services, but in only a few courts are those services provided by persons whom we call judges. Generally, and this is the case in the Supreme Court of New South Wales, persons who are called Registrars are the mediators. In other courts in New South Wales, persons who are called Commissioners provide such a service. These persons

are not treated as judges in our system and, accordingly do not have the salary or terms of conditions of employment, or the security of office which judges have. Nevertheless, these persons would be regarded as judges in the Chinese judicial system.

In the New South Wales Supreme Court the Registrars are lawyers employed by the Court. They undertake important steps in the administration of the caseload of the Court and in the management of individual cases. They sit in court and make decisions which are binding upon the parties as to the various steps required to prepare for trial. Other courts have Commissioners who, generally, are also legally qualified. Those Commissioners have powers to exercise some parts of the court's jurisdiction in a formal way. They make decisions that are equivalent to a judicial decision, even though they are not called judges.

There is some reluctance in Australia to allow judges, as distinct from non-judicial officers of the court, to conduct mediations. The reasons for this include:

- Many courts do not have a sufficient number of judges in relation to their caseload and, accordingly, judges should be

reserved for the functions that they alone can perform, ie, finally deciding a dispute that cannot be settled. This reluctance is reinforced by the availability of a substantial body of experienced private mediators and a significant number of trained mediators within the courts.

- Australian judges are uncomfortable about meeting with litigants in the absence of the other party to the dispute or, indeed, meeting with litigants in any way other than in an open court, to which the public has access. There is a widely held view that, even if it is done with the consent of the parties, such separate and private meetings may undermine the perception of impartiality and integrity of judges in the eyes of the public and, therefore, affect the institutional integrity of the court.
- The selection and training of judges is based on the skills required to identify the relevant law and apply that law to the facts. The skills that are required for a successful mediation include such matters as face-to-face communication and facilitating interaction amongst contending parties. These are quite distinct from the skills required for final determination of a dispute. Few judges have any training in mediation skills.

We attach great weight to the perception of impartiality, both for an individual judge in the context of a particular case and of the court as a whole. This is reflected in a general practice in those few courts in which judges, as distinct from other officers of the court, do conduct court-annexed mediation.

Almost invariably a judge who has been a mediator in a dispute is prohibited, if the matter does not settle, from playing any further role in the case. This is based on the belief that the perception of impartiality on the part of the judge has been compromised by reason of the private and confidential communications which a mediator often undertakes in the course of a mediation. There are, however, some legislative schemes which permit a conciliator or mediator to proceed to arbitration, or even to hear the dispute as a judge, albeit with the consent of the parties. These, however, are exceptional.

Workplace Disputes

For about 120 years there have been institutions for the mediation of workplace disputes in Australia. This process has traditionally been called “conciliation”, which reflects the fact that

the judicial or quasi-judicial decision-maker does much more than "facilitate" negotiations. The systems have traditionally employed the "evaluation" model.

At both State and national level, over more than a century, a variety of tribunals and courts have performed such functions. In most of these schemes there has been provision for judges to act as mediators. In many cases legally qualified persons have acted as members of a relevant tribunal – usually called "Commissioners" – who, although not given the status of judges in Australia, would, as I have said, be regarded as judges in the legal system of the People's Republic of China. In these various schemes the only difference in the roles performed by the judicial and non-judicial members of the tribunals involved the significance of the case and, in some cases, the subject matter of the dispute.

The Australian system of compulsory conciliation and arbitration, until its significant amendment at a national level in quite recent years, was designed to prevent the social and economic disruption of industrial disputation involved in strikes or lockouts. The principal objective of the industrial tribunals was to ensure the smooth functioning of the economy by mitigating

tension between employers and employees. These industrial tribunals had jurisdiction to determine wages, hours of work, the full range of working conditions as well as occupational health and safety issues and the treatment of individual employees, including jurisdiction over unfair dismissals and, particularly in more recent years, issues of discrimination and harassment.

Insofar as these tribunals were courts, as was generally the case until quite recently, there was never the same inhibition upon judges acting as mediators which is apparent in other civil disputes. A judge, or other tribunal member, attempting to resolve a dispute would exercise the powers of conciliation and, often, revert to arbitration on the whole or a part of the dispute if conciliation did not appear to be succeeding. Consent of the parties may have been required for procedural fairness reasons. It was rarely refused.

Conciliation in the industrial context was undertaken by persons with a detailed knowledge of industrial relations and often of the particular industry. Indeed, in the larger tribunals specific judges were allocated to deal with particular industries and, thereby, acquired familiarity with both the personalities involved on

the employer and employee side, as well as knowledge of the economics of the industry.

There was no inhibition on the involvement of the judicial officer or other tribunal member from using his or her knowledge of the industry to resolve a dispute. This often involved suggestions that specific concessions should be made in one context, so that claims in another context could be granted. For example, a trade union's demand for a wage increase could be met if the union would agree to changes in work practices that would allow the particular corporation or industry to achieve productivity improvements.

Such a system continues to exist in my own State of New South Wales. However, it has been superseded at a national level and no longer applies to the majority of Australian industrial disputes. In recent years compulsory conciliation and arbitration has been replaced by workplace agreements. The new system does, however, involve a private dispute resolution process including mediation of disputes about workplace rights.

The emphasis has, however, shifted from industrial disputes which affect a group of workers, to individual disputes affecting particular workers. The focus of attention has shifted from the collective rights of workers to the individual rights of particular workers. At the national level a system of compulsory conciliation and arbitration exists now only in the context of unfair dismissal. It is administered by a non-judicial body.

Although reinstatement is often sought in such cases, it is not often granted. The result of unfair dismissal proceedings whether mediated, or finally determined in litigation, is usually variation of the payment to be made to the worker.

In unfair dismissal cases, the tribunal can both mediate and arbitrate. However, where a dispute is not settled at mediation, the tribunal member who mediated the dispute cannot be the same member who arbitrates the dispute unless the parties consent to that arrangement. The same tribunal may also deal with human rights protections, eg, allegations of discrimination or harassment, not involving dismissal, by a process of mediation. If that does not resolve the dispute then an application must be lodged in a court.

Family Disputes

In the context of family disputes, the need to maintain a civil and co-operative relationship between separating parents has long been recognised. Where a married couple separate, court orders may be made with respect to custody of and access to children of the marriage and for the division of marital property. The Family Court of Australia, which is a national court with jurisdiction over such disputes, has long encouraged, and for almost a decade has required, that genuine efforts be made to resolve any dispute with respect to parental orders or property settlement prior to its proceedings. Second only to the industrial conciliation, family disputes have led the field in judicial mediation in Australia.

Mediation services are available in advance of the institution of proceedings in the Family Court. This is provided by a network of community based Family Relationship Centres established throughout Australia which are designed as a single entry point into mediation and other processes for family dispute resolution. They are designed to avoid the dissolution of a marriage by restoring family relationships.

The Family Court has determined that the adversarial model of litigation is not appropriate, particularly for the resolution of disputes over children. The Court has developed various programmes to mitigate the effects of the adversarial system on children. It has investigated overseas practices. It chose to adopt a modified version of the way in which children's cases are dealt with in Germany. The Court has now adopted a civil law approach, rather than a common law approach, to the determination of family disputes, extending beyond parental orders to encompass property settlements.

What the Family Court calls its system of the "Less Adversarial Trial" has the following characteristics:

- The judge controls the hearing process and the nature of the inquiry. The judge, rather than the parties (as was previously the case), decides how the trial is run, what issues are to be explored and what evidence is required.
- A family consultant is involved as an expert adviser, who can provide a mediation input and a social science perspective to add to the judge's legal perspective and to help the judge and parties to identify the issues in dispute.

- The traditional technical rules of evidence and detailed procedural requirements of a common law adversarial trial are dispensed with. The emphasis is on oral evidence for all but expert witnesses.
- The trial is treated as a continuing process from the day of the first meeting between the judge, the family consultant and the parties and continues at different times with evidence being taken from time to time until resolution. The same judge and family consultant hear the matter from its beginning until its end.

There is a different form of family dispute that is heard and determined by State Supreme courts, including the Supreme Court of New South Wales. I refer to disputes over what happens to the estate of a spouse or parent after death. In Australia it is common for a family to have several children and it is increasingly the case, as a result of divorce, that a person is survived by a former spouse, a second spouse or de facto and two sets of children. Under Australian statutes all these people can make a claim on the estate of the deceased. The Supreme Courts of the States have to determine what is a fair and reasonable distribution. They have power to override the terms of a will made by the deceased parent

or spouse. Regrettably we have a substantial number of cases of such disputes within families.

It has long been recognised that it is highly desirable in such cases to avoid the degree of conflict involved in litigation in court. This is one area where, as a matter of court practice rather than legislation, mediation by an independent third party is mandatory before steps are taken towards a trial.

As I have indicated, in Australia there is now a well established group of mediators, who have undertaken a process of education and certification. In addition, the courts provide court-annexed mediation particularly focused on such family disputes.

In most courts which provide this service the parties have a choice as to whether to engage a private mediator or to take advantage of the publicly funded service available through the registrars of the court. The form of mediation used in such case is that discussed above as “facilitative”, ie, it does not involve the mediator proposing the outcomes or evaluating the competing cases. However, separate meetings and private communications

may be conducted. I note that, should mediation fail, registrars do not have the authority to decide the dispute.

The success rate in my court of such mediations is very high (about 60%). Even in cases where mediation does not settle the dispute, it often leads to a reduction in the number of contested issues. Quite a number of such cases settle before trial, probably assisted by the mediation, even though it was not successful on the day.

Local Planning and Governmental Issues

Another specialist area in which a detailed regime of mediation has been developed is the resolution of disputes about land use, including environmental planning and protection. This involves disputes between neighbours and also between citizens and local government authorities. Such disputes involve matters such as building or rebuilding on a person's land, about the removal of trees or the protection of various aspects of the environment. At least in the case of disputes between neighbours, there is a public interest in retaining civil and co-operative relationships.

In New South Wales there is a separate court called the Land and Environment Court that deals with these matters. It has a detailed system for dispute resolution by means other than litigation. In a process referred to in that court as mediation, which can be ordered with or without the consent of parties, issues can be referred to an external mediator (paid for by the parties) or conducted by legally trained Registrars of the court as a publicly funded service. The process adopted is the facilitative model of mediation to which I have referred.

However, the Land and Environment Court also undertakes a process of what it calls conciliation which is undertaken by Commissioners of the court. Commissioners are superior in status and powers to a Registrar but are not called judges. The distinction between what is in this context called mediation and "conciliation" is that the conciliation involves an evaluative model, where the Commissioners can propose possible outcomes. Most of the Commissioners are legally trained, although there are some who have particular expertise in planning and environment matters. They would be regarded as judges in the Chinese legal system.

Topic 1.2: What is the Effect and Consequence of Judicial Mediation

A successful mediation has numerous benefits. These include:

- The parties save a significant amount in legal costs that would otherwise be incurred.
- The parties have certainty with respect to the outcome and acquire such certainty at a much earlier time.
- The parties have a sense of making a significant input into the resolution of the dispute, rather than having had their affairs determined by another person.
- Settlement of each case allows more efficient use of limited judicial resources and reduces the waiting time for hearing of other cases. Early resolution of a case enables the court to more efficiently manage its caseload.

One of the principal advantages of mediation from the point of view of the parties is that it enables them to focus on their broader interests in the particular relationship, which often goes well beyond the particular subject matter of the dispute. What is sometimes referred to as the “interests based model” of mediation, seeks to focus the parties’ attention on the full range of factors

involved in the relationship. It is sometimes contrasted with a "rights based model", where the focus of attention is on the particular legal rights involved in the specific dispute.

A rights based mediation involves a zero sum game. That is to say, the gain to one party is offset by a corresponding and equal loss to the other. An interest based mediation focuses on the full range of "interests" of both parties to the relationship. This focus enables the parties to transcend the zero sum game and, therefore, to negotiate an arrangement by which both parties receive benefits. This is sometimes referred to as a win-win scenario. I have given the example above of workers receiving increased wages in exchange for productivity improvements.

In this respect mediation is distinctively different from litigation in courts. Litigation is necessarily rights based. Accordingly, mediation provides more flexibility and enables the parties to arrive at solutions that would not be possible after a trial.

If judicial mediation proves unsuccessful then the legal costs and the court's resources have in one sense been wasted. Nevertheless, the experience of mediation in our courts is that,

even if the overall case is not settled, the course of the mediation usually leads to a narrowing of the issues that remain in dispute. Accordingly, there are cost advantages, to both the parties and the court, which frequently arise from the conduct of even an unsuccessful mediation.

Another consequence of an unsuccessful mediation is that the judge cannot hear and determine the final dispute. However, the usual practice in Australia is that court-annexed mediation is conducted by officers of the court who could not in any event hear the final case. This effect is, accordingly, of limited significance.

Topic 4: Conciliation or Mediation in a Criminal Case

In Australia there is no mediation in a criminal case. There is something of that character, however, in other common law jurisdictions.

In Australia there is no formal system of plea bargaining of the kind which exists in the United States, where defence counsel will negotiate a detailed agreement with prosecutors. The agreement specifies the particular charges to which an accused will plead guilty. It also specifies the precise penalties the

prosecution has agreed to seek from the court. These agreements are carried into effect by courts, which impose the agreed penalty.

Something similar exists in Canada, although not quite as certain as the United States system. In Canada, when the prosecution and defence have agreed on a particular sentence, in the context of discussions leading to a plea of guilty, the sentencing judge will not deviate from the sentence jointly recommended by counsel, unless there are cogent and compelling reasons to do so. Accordingly, unlike most United States' jurisdictions, the court retains a discretion to accept or reject the agreed sentence. However, the test for rejection is difficult to meet and in practice the recommendation is rarely rejected. Sentencing judges who do reject the joint submission must express their reasons for doing so.

In the United States or Canadian contexts mediation of criminal cases is feasible because of these practices. However, nothing like that occurs in Australia.

In our criminal justice practice the courts are never bound by an agreement on sentence. Indeed, the prosecution does not

recommend a sentence to the court, although it will make available statistics on sentencing for the particular offence and refer to specific precedents, of a comparable character, which may assist the court in determining the appropriate sentence.

In Australia, the court will not interfere with a prosecution decision about what charges to bring. Accordingly, charge bargaining, as distinct from plea bargaining, can occur between the prosecution and defence. This often leads to the prosecution withdrawing a charge in favour of a less serious charge. That decision has a clear effect on sentence, but there is nothing in the nature of an agreement as to what the sentence should be. That is how charge bargaining differs from plea bargaining.

In all Australian jurisdictions, a discount for a guilty plea is almost always given. The court usually imposes a sentence less than the sentence that would be imposed after a not guilty plea leading to a trial. The existence of such a discount, which is often expressly quantified, is widely known to the defence bar when advising an accused person as to whether or not to plead guilty. However, subject only to correction on appeal, the court

determines the sentence without restraint from the conduct of the parties.

In view of this different structure in the process of determining guilty pleas and sentence recommendations, there is little scope for conciliation or mediation on criminal matters in the Australian criminal justice system.

THE 90TH RAAF BIRTHDAY COMMEMORATION

ADDRESS BY THE HONOURABLE J J SPIGELMAN AC

LIEUTENANT GOVERNOR OF NEW SOUTH WALES

CENOTAPH, SYDNEY, 31 MARCH 2011

On 31 March 1921 when the Australian Air Force was formed, approval to use the "Royal" prefix being granted in August of that year, the Force comprised 21 officers, 128 airmen and 153 aircraft. It was probably the only time in the RAAF's distinguished 90 year history that it had more aircraft than people.

Only three years before on 1 April 1918, the Royal Air Force was created, being the first Air Force to become institutionally independent of Army or Navy control. The United States Air Force did not become a separate military service until 18 September 1947. This 90th year anniversary, which we mark today, highlights the fact that the RAAF is the second oldest air force in the world.

Many of the original RAAF personnel served in its predecessor organisation, the Australian Flying Corps, which was a branch of the army. This was the origin of a proud tradition.

During World War I, AFC squadrons served in the Middle East and on the Western Front, other airmen served in Iraq and with the Royal Flying Corps and the Royal Naval Air Service. Some 460 Australian pilots served in Europe and the Middle East between 1915 and 1918.

The first, and for many years the only, base of the AFC and of the RAAF was at Point Cook, which has appropriately been described as the RAAF's spiritual home It is one of the world's oldest airfields in continuous use.

When World War II broke out Great Britain, Canada, Australia and New Zealand entered into an agreement to train aircrew for service with the Royal Air Force. During that war almost 16,000 RAAF pilots and airmen served in British squadrons and almost 12,000 served in Australian based squadrons. They participated in virtually every major campaign of the war to save Western civilisation including the Battle of France, the Battle of Britain, the Battle of the Atlantic, in the Middle East, over Germany, the defence of Malta, the liberation of Italy, the Battles of the Coral and Bismarck Seas, the Defence of Australia and in India, Burma,

China, Singapore, Hong Kong, the Philippines, Papua New Guinea and the Pacific.

When the Armistice with Japan was signed on 15 August 1945, the RAAF in the Pacific had a total strength of more than 130,000 personnel with over 3,000 front line aircraft. The contribution the RAAF made to the protection of our national sovereignty and the preservation of our way of life in this titanic struggle cannot be, and is not, forgotten.

In the years since World War II, when Australia's territorial integrity was not subject to any direct threat, our RAAF continued to serve the national interest at the direction of successive governments. It was called into service to promote world peace, protect our friends and cement our alliances. This included participation in the occupation force in Japan until 1950; participation in the Berlin Airlift of 1949; involvement as part of the United Nations Force during the Korean War; conduct of anti-guerrilla operations in Malaya during the 1950's; the provision of an essential element of the national security of the new nation of Malaysia from Butterworth airbase from 1957 for some 30 years; a broad-based involvement in the Australian participation in the

Vietnam War between 1964 and 1971; participation in the multi-national force after the Iraq invasion of Kuwait in 1990, including delivery of humanitarian aid to Kurds living in the UN declared exclusion zone in Northern Iraq; support for the Australian combat forces in Afghanistan after the terrorist attacks of 11 September 2001; support for the Regional Assistance Mission to the Solomon Islands after 2003; participation in numerous humanitarian operations in Australia and overseas, including after the two terrorist bombings in Bali in 2002 and 2005, natural disaster relief after the Pakistan earthquake of 2005, the Iran earthquake of 2003, the Boxing Day tsunami in 2004, Cyclone Larry in 2006 and the Victorian bushfires of 2009 and, this year, the Queensland floods and cyclone. For many years the Force has flown almost daily surveillance flights over waters surrounding Australia, to detect people and drug smuggling, illegal fishing and marine pollution.

The skill, dedication and patriotism with which the Force has performed all of these essential roles in the national interest has attracted the admiration and thanks of generations of Australians over the entire 90 year period of its history. On behalf of the people of this State, I thank you for your service, in the firm

expectation that it will continue to be delivered in accordance with the high standards of duty and personal sacrifice that the RAAF has always manifested.

In the customary, poignantly appropriate, felicitation, I wish the RAAF many happy returns.

ADDRESS ON THE RETIREMENT OF THE HONOURABLE

MURRAY TOBIAS AM

BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

BANCO COURT, SUPREME COURT OF NEW SOUTH WALES

SYDNEY, 25 MARCH 2011

I take as my text a poem by the late Peter Porter, one of Australia's greatest contemporary poets. The poem bears the title which some might regard as incongruous: "Tobias and the Angel". It is based on the visit of the Angel Raphael to the righteous Tobias. The Book of Tobias is part of the Catholic and Orthodox biblical canon, albeit not accepted in the Hebrew Old Testament. Appropriately, however, Porter's poem is about departure.

The first two lines are:

"When I play the sad music my conscience urges,

I hear through the great summary of our loss

…"

The penultimate stanza of the poem is:

"I shall get home one day or if I die instead,

An Insurance Angel will tell my waiting wife,

His grave is furnished by his good upbringing,

His habits were proper, his doubt all to the good;

From his warm orthodoxy melancholy shrinks,

He did what he was told, obedient and sane."

But for the reference to obedience, these are words that can be applied to Justice Murray Tobias: "good upbringing", "proper habits", 'purposeful doubt', "warm orthodoxy" and, underlying it all a fundamental 'sanity'.[1]

I know I speak on behalf of all of the judges of this Court, when I highlight at the outset, the contribution you have made to the collegial atmosphere of the Court. We have all been the beneficiary on a personal basis of your generosity of spirit, your intelligence, your thoughtfulness and your compassion. These personal characteristics are also reflected in your conduct during hearings and in your judgments.

Your principal professional characteristic, which I wish to emphasise is your rigour. As many of your judicial colleagues

experienced at the bar, often to their cost, and on the bench, always to their benefit, your Honour approached every legal task in a meticulous, conscientious and complete manner. There were no gaps in your preparation, nor in your judgments.

You brought to the Court the wealth of experience acquired by a silk who had been at the top of the profession for over two decades. This Court has had the benefit of that experience across the entirety of its civil and criminal appellate jurisdiction. There are two particular features of your contribution which I will highlight.

First, your Honour has an extraordinary capacity to deal with complex fact situations and to ensure that all of the varied elements of a case were properly assessed and placed in their correct sequence and relationship. These skills explain in large measure your Honour's extraordinary success in planning and environment law at the bar. It is a field which always involves multiple interrelated variables. This was a skill set that you successfully deployed in the full range of civil appeals in this Court. Your colleagues who sat with you in complex fact cases always appreciated the thoroughness of your preparation and of your judgments.

Secondly, although your legal learning was broadly based, your depth of knowledge and understanding of every aspect of planning and environment law and of administrative law, was simply unsurpassed.

Your Honour has delivered influential judgments which will continue to be relied upon in the future on a wide-range of areas of the law. This includes native title,[2] estoppel,[3] rectification,[4] indefeasibility,[5] easements,[6] jurisdictional facts,[7] procedural fairness,[8] legal professional privilege,[9] delay in proceedings under the *Corporations Act*,[10] indemnity costs in untenable appeals,[11] directors and officers insurance,[12] workers compensation,[13] exemplary damages,[14] unconscionability in contracts,[15] the application of development standards,[16] and the validity of local environmental plans,[17] development consents,[18] local government notices,[19] conditions on a development consent,[20] and of a purported delegation of council powers.[21]

Your Honour brought to the Court of Criminal Appeal relevant experience acquired in criminal trials in the Navy, where you appeared as prosecutor and defence counsel whilst head of

the New South Wales Reserve Legal Panel and later presided over such trials as Judge Advocate. In the Court of Criminal Appeal you presided over conviction appeals raising complex issues of evidence law,[22] conduct by the Crown,[23] inconsistent verdicts,[24] and a wide range of sentencing issues.

In addition to this formidable output of judgments, your Honour has made further contributions to the administration of justice and to the legal profession.

You have always manifested a concern with maintenance of professional standards. This was a product of your strong belief in the traditional professionalism of the bar. You brought with you to the bench a firm intention to maintain the symbiotic relationship that has always existed between the bar and the bench, requiring mutual respect. The strength of your commitment to the fundamental ethical principles of the profession was manifest throughout your judicial service.

Your sense of courtesy, particularly to counsel, has ensured that the atmosphere in the courtroom was proper and appropriate. On one occasion, when you were presiding in the Court of

Criminal Appeal, and a judge, now a former judge, of this Court was engaged in a somewhat vigorous exchange with counsel, you adjourned the Court for a few moments and, during the adjournment, informed that judge that you were not prepared to preside in a case in which counsel was treated so rudely. On return, the conduct stopped.

You have served for four years as Deputy and then Presiding Member of the Legal Profession Admission Board. To this role you brought your deep commitment to the profession as an institution and to the importance of maintaining its ethical standards, promoting its competence, preserving its independence and reinforcing its integrity.

There were two developments of particular significance for the future of the legal profession to which you made a fundamental contribution during your tenure of this office.

During this period, a national set of Uniform Principles was adopted with respect to the admission of overseas lawyers to practice in Australia. In many respects these Principles were over-engineered. They reminded me of an earlier time when the

Commonwealth government was seeking to corral all of the States to adopt a system of uniform censorship, so that material then regarded as salacious by some, which was permitted to be imported into Australia, would not be banned in some States. The then Attorney General of the State of Victoria, Sir Arthur Rylah, sought to protect the morals of, as he put it, his teenage daughters. I recollect a cartoon in *The Bulletin* which depicted Sir Arthur sitting in chair encased in a straightjacket. The caption read: "Of course I believe in uniform censorship and I will supply the uniform".

The Uniform Principles for admission of overseas practitioners had a somewhat similar quality. They would have been applied so as, in substance, to exclude overseas practitioners of considerable experience and skill. Under your Honour's leadership, the Board ensured that this straightjacket was removed, leading to a change in the Uniform Principles, to the great advantage of the administration of the law throughout this nation.

The second matter I wish to acknowledge in this respect is the critical contribution your Honour has made in the deliberations

to establish a uniform regulatory system in Australia and, thereby, to create a national legal profession. With your Honour's usual thoroughness and attention to detail you served as a member of the National Legal Profession Consultative Group. Your efforts were always directed to ensuring that the reality of an independent profession would be maintained by this new regime. In some respects this was a reprise of your Honour's significant contribution, when you were President of the New South Wales Bar Association, in an earlier period of legislative change.

I relied on your advice in these respects for my own involvement in this matter, including in the deliberations of the Council of Chief Justices. I am particularly grateful for your assistance in this respect. The legal profession owes a great deal to your diligence during this period.

The strength of your commitment to the profession is a product of your personal history both as a barrister, as a silk, as an elected member of the Bar Council, with some interruptions, from 1976 until your election as President in 1993, of your family background as the son of one of the most esteemed solicitors in this city, who worked as a solicitor for 58 years, and of your

education at the University of Sydney and at Oxford. You are a great example of the tradition of the common law and of the bar, which traces its roots to England, as you have always understood, maintaining to this day your connection to Oxford and with your fellow students in the BCL course.

For that reason, it is appropriate for me to end, as I began, with a poem from Peter Porter, who lived most of his adult life in England, but still reflected his Australian roots in his poetry.

Porter's poem *The Last of England* concludes:

"Sailing away from ourselves, we feel
The gentle tug of water at the quay –
Language of the liberal dead speaks
From the soil of Highgate, tears
Show a great water table is intact.
You cannot leave England, it turns
A planet majestically in the mind."[25]

So it has been with your Honour. England has turned majestically in your mind, to the great advantage of the legal profession of this State and of this Court.

[1] Peter Porter *The Rest on the Flight: Selected Poems* Allen & Unwin, Sydney 2010.

[2] See *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* [2009] NSWCA 138; (2009) 166 LGERA.

[3] See *Galaxidis v Galaxidis* [2004] NSWCA 111; *Hypeck Electronics Pty Ltd (In Liq) v Mead* [2004] NSWCA 221.

[4] See *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65; (2007) 69 NSWLR 603.

[5] See *Kogarah Municipal Council v Golden Paradise Corporation* [2005] NSWCA 230; (2005) 12 VPR 23,651; *Canada Bay Council v FND Bonaccorso Pty Ltd* [2007] NSWCA 351; (2007) 71 NSWLR 424.

[6] *McGrath v Campbell* [2006] NSWCA 180; (2006) 68 NSWLR 229.

[7] See *Lesnewski v Mosman Municipal Council* [2005] NSWCA 99; (2005) 138 LGERA 207.

[8] See *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWCA 164; (2007) 155 LGERA 52.

[9] See *Westpac Banking Corporation v 7 8 9 TEN Pty Ltd* [2005] NSWCA 321; (2005) 55 ACSR 519; *Bayley v Director General, Department of Land & Water Conservation* [2009] NSWCA 100; (2009) 74 NSWLR 333.

[10] *Colcher v Gordon* [2005] NSWCA 135; (2005) 53 ACSR 442.

[11] *Bon Appetit Family Restaurant Pty Ltd v Mongey* [2009] NSWCA 14.

[12] See *Vero Insurance Limited v Bankcorp Advantage Limited* [2004] NSWCA 390; (2004) 13 ANZ Insurance Cases 61-630.

[13] *Raniere Nominees Pty Ltd v Daley* [2005] NSWCA 121; (2005) 66 NSWLR 594; *Wollongong Fabricating Pty Ltd v Ramsbottom* [2006] NSWCA 279; (2006) 68 NSWLR 387.

[14] *Varmedja v Varmedja* [2006] NSWCA 117.

[15] *Crowe v Commonwealth Bank of Australia* [2005] NSWCA 41.

[16] *Residents Against Improper Development v Chase Property Investments Pty Ltd* [2006] NSWCA 323; (2006) 149 LGERA 360.

[17] See, eg, *Gails Holdings Pty Ltd v Minister for Infrastructure and Planning* [2006] NSWCA 388; (2006) 69 NSWLR 156.

[18] *Notaras v Waverly Council* [2007] NSWCA 33; (2007) 161 LGERA 230.

[19] *Kyogle Shire Council v Muli Muli Local Aboriginal Land Council* [2005] NSWCA 4; (2005) 62 NSWLR 361.

[20] *Maitland City Council v Anambah Homes Pty Ltd* [2005] NSWCA 455; (2005) 64 NSWLR 695.

[21] *Bell Morgan Property Development Pty Ltd v GPT Re Limited* [2007] NSWCA 171; (2007) 153 LGERA 450.

[22] *R v Collison* [2003] NSWCCA 212; *R v Rima* [2003] NSWCCA 405; *R v El-Kheir* [2004] NSWCCA 401; *Chow v R* [2007] NSWCCA 225; *Tran v R* [2008] NSWCCA 332.

[23] *R v Teasdale* [2004] NSWCCA 91.

[24] *R v Tolmie* [2004] NSWCCA 396; *Thornton v R* [2007] NSWCCA 104.

[25] Peter Porter op cit p 77.

CONTRACTUAL INTERPRETATION: A COMPARATIVE PERSPECTIVE

PAPER BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

TO THE THIRD JUDICIAL SEMINAR ON COMMERCIAL LITIGATION

SYDNEY, 23 MARCH 2011

In my experience the majority of commercial disputes involve questions of contractual interpretation. Often such questions are at the heart of the dispute. In this paper I will be concerned with contracts between commercial parties – not with consumers – being parties who, despite inevitable differences in bargaining power, are not constrained by anything in the nature of coercion.

For virtually all such contemporary commercial arrangements of any significance, lawyers and judges have before them a text, often a long and detailed text or, at the very least, an exchange of correspondence. Analysis must always begin with the words used. The focus of this paper is how far and in what respects one can or should travel beyond the text for the purposes of contractual interpretation.

From Text to Context

In the common law jurisdictions with which I am most familiar there has been a clear development over the last two or three decades in both statutory and contractual interpretation from a literal approach to a purposive approach. The movement has been from text to context.[1] A comparative analysis shows that there are significant differences between jurisdictions as to the extent of the movement. Such differences also appear in internal debates within jurisdictions.

Although it is useful to distinguish between textualists and contextualists, to identify alternative basic approaches to contractual interpretation, it must be remembered that what is involved is a spectrum of opinion, rather than a simple duality.

I have significant reservations about the substantial expansion of the scope and nature of evidence now available for the purposes of interpreting a written contract. What started out in life as an application of the perfectly acceptable principle that words in a written contract must be understood in their commercial context, has turned into a mechanism for creating a high level of

uncertainty in commercial relationships. This was not originally intended.

In my opinion, in most jurisdictions the balance between certainty and accuracy favours the latter more than it should. My disagreement is based on a difference of approach that is fundamental.

As will appear below, a restatement of the principles of contractual interpretation by Lord Hoffmann has been very influential. Lord Hoffmann's starting point is that "legal interpretation" should be assimilated to the way "any serious utterance would be interpreted in ordinary life".[2] I respectfully disagree. There are, in my opinion, significant differences between legal words and the utterances of everyday life.

Legal words whether in a contract or in a statute, are not the same as words uttered in the course of ordinary life. That is because legal words create and impose obligations. Specifically, in the commercial context, those words, unlike many "ordinary life utterances", are imbued with a desire, from the outset, on the part of all parties to a contract that there be a high level of certainty as

to how their written agreement will be understood in the future, both in any disputes between the parties and by reason of the involvement, in many spheres of commerce, of third parties who will rely on the written text without knowing the full context.

The first requirement for interpreting any text is to understand and give full weight to the nature of the document. That is why a national constitution cannot be interpreted as if it was a will or a trust deed.[3] That is why a statute must be interpreted in accordance with the public values of the system of government, such as the presumptions appropriately grouped under the principle of legality.[4] That is also why a written commercial contract must be interpreted so as to provide as much commercial certainty as the words permit.

Like many other aspects of contract law, interpretation requires the resolution of a tension between certainty or efficiency on the one hand and accuracy or fairness on the other. There exists a broad spectrum of permissible opinion as to where the balance between these often conflicting considerations should be drawn.

"Certainty" in this context refers to the proposition that the extent to which lawyers giving advice on contractual obligations, and practitioners, arbitrators and judges involved in dispute resolution, refer to matters beyond the contractual document, the certainty of advice or of the outcome of the dispute resolution process, is lessened. Furthermore, the length and cost of the process is increased.

"Accuracy" or "fairness" in this context refers to the significance of determining what the *actual* intention of the parties was with respect to the meaning of particular words used in a written agreement. Justice requires that they be held to the bargain upon which they truly agreed. This has been called "a more principled and fairer result"[5] or one that will meet "the reasonable expectations of the parties".[6] It is supported on the basis that "fairness should trump convenience".[7] Further, a restrictive approach to evidence for purposes of interpretation may sometimes mean that "justice" is not done.[8] However, as Chief Justice Gleeson forcefully pointed out, the "holy grail of individualised justice" is frequently in conflict with the need for predictability, and certainty in the law, including commercial law.[9]

As is so often the case, reasonable people can differ about where the balance between pragmatism and principle should be drawn. Practical considerations, which are concerned with commercial certainty and the cost of contract writing, advice and adjudication, are regarded by some as an unprincipled constraint upon the true object of contract law, but by others as a valid factor entitled to weight in the balance.

Furthermore, in terms of the justice of the situation, distinct issues arise in that significant range of commercial relationships in which third party interests become involved on the basis of the contractual text. Insofar as the true intentions of the parties is to be determined by extrinsic materials, they invoke matters of which such third parties have no knowledge.

I will concentrate upon jurisdictions of the common law tradition. Relevantly for the purpose of contractual interpretation, the rules which have traditionally restricted the range of material available for purposes of interpreting a written contract, include:

- the parol evidence rule;
- the rule that extrinsic materials could only be referred to if the words used are ambiguous;

- restrictions on the scope of extrinsic materials to which it is permissible to have regard;
- the rule against the admissibility of pre-contractual negotiations;
- the rule against the admissibility of post-contractual conduct.

In various degrees, these exclusionary rules have been modified over recent decades. A comparative analysis reveals considerable divergence in these respects.

Parol Evidence Rule

The traditional approach to the interpretation of a written contract in common law nations turned, in large measure, on the application of the parol evidence rule. The rule has been stated in different ways, but the core principle is that, when parties have reduced their contract to writing, a court should only look to the writing to determine any issue of interpretation.

The rule excluded extrinsic evidence for the purpose of interpretation. However, the rule applied only if the parties had, as a matter of fact, determined that the whole of their contract would

be in writing. Extrinsic material could be considered to determine whether that was or was not the case.

What the Americans call a “hard parol evidence rule” includes a strong presumption that a contract which appears to be final and complete on its face will be accepted as such, whereas a “soft parol evidence rule” permits this presumption to be more readily overridden by extrinsic evidence. Questions of fact and degree arise. Different jurisdictions, indeed different judges within a jurisdiction, will balance the trade off between certainty and accuracy in different ways in this respect.

Over recent decades English courts became more willing to look beyond an apparently complete contract. This deprived the traditional form of the rule of much of its force, as the Law Commission eventually acknowledged,[10] in a report on the Parol Evidence Rule. There are three passages of significance in its report.

First, is the conclusion that:

“…there is no rule of law that evidence is rendered inadmissible or is to be ignored solely because a

document exists which looks like a complete contract. Whether it is a complete contract depends upon the intention of the parties, objectively judged, and not on any rule of law."[11]

A passage that is also often quoted is:

"We have now concluded that a parol evidence rule … which on occasions may have been applied to exclude or deny effect to relevant evidence, no longer has either the width or the effect once attributed to it. In particular, no parol evidence rule today requires a court to exclude or ignore evidence which should be admitted or acted upon if the true contractual intention of the parties is to be ascertained and effect given to it."[12]

Also of significance is the reasoning in the following passage:

"We have now concluded that although a proposition of law can be stated which can be described as the 'parol evidence rule' it is not a rule of law which, correctly applied, could lead to evidence being unjustly excluded. Rather, it is a proposition of law which is no more than a circular statement: when it is proved or admitted that

> the parties to a contract intended that all the express terms of their agreement should be recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract."[13]

The process of emasculating the traditional effect of the parol evidence rule appears to have arisen by reason of the emphasis which began to be given to the factual matrix of a contract, commencing with the judgments of Lord Wilberforce to which I will refer.[14] The Law Commission's Report has been adopted by some text writers, who treat the parol evidence rule as a historical footnote.[15] Others are not prepared to dispense with the rule, not least because no court has said it has gone, but acknowledge that it is subject to so many exceptions that, as a matter of substance, it appears to be of little significance.[16]

The Court of Appeal has, on occasions, endorsed the Law Commission's approach to the parol evidence rule.[17] On the other hand, one Law Lord has affirmed and restated the rule, emphasising its role in promoting certainty.[18] However, it does

appear that English judges are no longer willing to proceed on the basis of a strong presumption that a written contract, which appears complete on its face, should be treated as embodying the whole agreement. Although not overruled, the rule appears to have been superseded by Lord Hoffmann's restatement, to which I will refer below.

The position seems to be the same in Hong Kong, at least at a Court of Appeal level.[19] I am not aware that the Court of Final Appeal has addressed the question.[20]

The position is, in my opinion, different in Australia. Here the rule is not regarded as a historical curiosity. The parol evidence rule has long been accepted as fundamental.[21] It has been affirmed in quite recent times, with traditional justification.

In the *Equuscorp* case[22], a joint judgment of five judges of the High Court emphasised:

- a person executing a written agreement is bound by it;
- the parol evidence rule accords with the objective theory of contract;

- oral agreements often give rise to “difficult, time consuming expensive and problematic” disputation;
- the rule should be maintained, recognising that it allows for exceptions in “established categories”;
- the growth of international trade with parties for different legal systems reinforces the role of the rule.

It is noteworthy that even Australia’s most reform minded judge, Justice Kirby, formerly of the High Court, has strongly reaffirmed the rule and its core justification.[23] His Honour emphasised:

- the “practical utility” of the parol evidence rule including a “desire to uphold the more formal bargains” and “to discourage expensive and time consuming litigations about peripheral and disputable questions”;
- if the language is clear no extrinsic material “authorises a refusal to give the clear words their legal effect”;
- the growth of international trade supports the policy for “adhering to a general principle that holds parties to their written bargain”.

The *Indian Evidence Act* of 1872 compiled by Sir James Stephens, is one of the most successful acts of codification in the common law world. It remains the basis of the law of evidence in the Republic of India (other than Jammu and Kashmir), Pakistan, Bangladesh, Sri Lanka, Burma, Malaysia and Singapore, as well as a number of nations in Africa and the West Indies. That Act gave statutory force to the parol evidence rule.

The basic principles contained in the *Indian Evidence Act,* as generally adopted are:

- No evidence is admissible of the terms of any written contract, nor any secondary evidence of its contents (s 91).
- For a written contract, evidence is not admissible to add to, vary or contradict its terms (s 92).
- When the language in a document is on its face "ambiguous or defective" evidence may *not* be given of facts which may supply the defect (s 93).
- When "plain" language in a document applies to existing facts, evidence may *not* be given to show that it was not meant to apply to such facts (s 94).
- There are several express provisions for when the language of a written contract may be supplemented (ss 95-98).

Of particular significance for present purposes is the sixth proviso to s 92 which states:

> "Any fact may be proved which shows in what manner the language of a document is related to existing facts."

In view of these express provisions it is not surprising that the traditional approach to interpretation of contracts in India was as strict as the original approach in England. Clear words have to be applied and surrounding circumstances could be referred to only if there is an ambiguity in the actual language.[24]

The primacy of the text has frequently been asserted in Indian authorities. For example, in one case the Supreme Court said:

> " … In construing a contract, the Court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the Court can do about it."[25]

As the Supreme Court put it more recently:

> "When persons express their agreements in writing, it is for the express purpose of getting rid of any indefiniteness, and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements."[26]

The Indian courts frequently state that extrinsic evidence is not admissible if the meaning is clear. The courts also frequently state that surrounding circumstances can be referred to.[27] It seems to me that such references to "extrinsic evidence", in their context, are directed to statements of subjective intention, as such. Statements of that character are not admissible in any of the jurisdictions to which I will refer.

However, it does appear to me, on the limited research I have been able to conduct of the Indian case law, that Indian courts are less likely to go behind a written text. Furthermore, the scope of surrounding circumstances to which regard may be had also appears to be more restrictive than in some other jurisdictions.

This is a natural result of the parol evidence rule having statutory force. It cannot be relegated to a historical footnote.

The approach to contractual interpretation in Singapore has been set out authoritatively in a detailed judgment in *Zurich Insurance*.[28] The judgment contains a comprehensive exposition of the issues that arise in this context. It has been supplemented extra-judicially.[29]

Of particular significance for other nations which have adopted Sir James Fitzjames Stephens Evidence Act, is the careful analysis in *Zurich Insurance* of the application of those provisions to the process of interpretation. I will discuss below the analysis of the sixth proviso to s 92 (which is s 94 of the Singapore Act).

The Court emphasised that, although the law of Singapore had moved from textualism to contextualism, because of its statutory enactment, the parol evidence rule remained robust. The rule applies, but that it excludes reference to extrinsic evidence only for the purpose of varying a written contract. The Court distinguished such use from reference to extrinsic evidence for the

purpose of interpretation.[30] Extrinsic evidence can be used for the purpose of interpretation, but cannot be used "as a pretext to contradict or vary it".[31]

Although, as in India, the statute precludes relegating the rule to a historical footnote, the process of emasculation that has occurred in England has clearly been influential. The balance between certainty and accuracy has been redrawn in jurisdiction, like Singapore, in which the English influence remains significant.

Surrounding Circumstances

In all jurisdictions, the words of a written agreement are the primary focus of attention in the sense that, subject to collateral doctrines such as rectification and estoppel, it is those words that fall to be interpreted. However, the surrounding circumstances in which a text was drafted can be of assistance in its interpretation and that proposition may not have received sufficient emphasis until recently.

Words never stand by themselves. They do not exist in limbo. Justice Learned Hand put the proposition well when he said:

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing; be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[32]

The same, of course, is true of the commercial purposes of a contractual relationship. I do not doubt the importance of surrounding circumstances or the "factual matrix", as it is often called, for purposes of interpretation. However, reasonable minds can differ about how readily and how far such background should be taken into account for that purpose. Questions of fact and degree are involved.

In common law nations the preparedness to take account of surrounding circumstances, and the commercial purpose of contract, accelerated in the 1970's and has continued to expand.

In England this movement, from text to context, commenced under the influence of Lord Wilberforce. In an influential judgment in 1971, his Lordship re-emphasised the relevance to interpretation of the factual matrix known to both contracting parties, including the genesis and the aim or commercial purpose of the transaction.[33]

I do not believe that Lord Wilberforce intended any dramatic change from past practice. The "factual matrix" which he had in mind encompassed a limited range of basically uncontested commercial facts understood by both parties, even in a context where, almost by definition, their interests were in conflict.

> As Lord Wilberforce himself said, in the basal authority:
>
> "As to the circumstance, and the object of the parties, there is no controversy in the present case. The agreement, on its face, almost supplies enough, without the necessity to supplement it by outside evidence. But some expansion, from undisputed facts, makes for clearer understanding …"

The history of commercial litigation until this time would suggest that the typical case would be like this one, ie, involving "undisputed facts". Indeed, it ought to be the case, as Lord Hoffmann has put it more recently, that:

> " … surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial".[34]

However, this is not how this change has developed in the legal systems with which I have some familiarity. This is due to civil procedure, especially with respect to discovery, in a context where the adversarial system creates perverse incentives, which are not always adequately controlled by case management.

The expanded reliance on context for interpretation of written documents was influential throughout the common law world including Australia,[35] Hong Kong,[36] New Zealand,[37] Singapore,[38] Malaysia[39] and India.[40]

The following statement by the High Court of Australia is representative of this first stage of the movement from text to context:

> "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."[41]

The next stage of development was Lord Hoffmann's restatement in the *Investors Compensation Scheme* case. He set out a five point scheme for contractual interpretation, which has proven very influential.[42]

His first point has been widely adopted. It is:

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

The robustness of this principle has been affirmed by the Supreme Court of the United Kingdom which has held that even

without prejudice communications must be available as part of the background available for purposes of interpretation.[43]

In Australia, the High Court has frequently accepted that commercial contracts must be given a business like interpretation and this first proposition of Lord Hoffmann's restatement has expressly been accepted.[44]

English decisions on contract law are highly influential in Hong Kong. As the authors of one text on contract law put it:

> "It could be said that, in terms of Hong Kong contract law, it is as if 1997 never happened."[45]

The Hong Kong Court of Final Appeal had the benefit of Lord Hoffmann's own participation in that Court, sitting as a non-permanent judge. The case which is most frequently cited in subsequent Hong Kong authorities is Lord Hoffmann's own judgment in *Jumbo King Ltd v Faithful Property Ltd.* His Lordship said, relevantly:

> "[59] … The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to

> mean. And this involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve."[46]

The cycle is complete. Subsequently, in *Chartbrook* his Lordship referred to the judgment in *Jumbo King*.[47]

In one case the Court of Final Appeal went beyond the reference to *Jumbo King* and expressly adopted the cognate first proposition from *Investors Compensation Scheme*.[48] I am not aware that the Court of Final Appeal has endorsed the five point scheme, in terms, but lower courts in Hong Kong apply it.

New Zealand courts enthusiastically adopted Lord Hoffmann's restatement.[49] This was, of course, understandable at a time when appeals to the Privy Council still existed from the Court of Appeal of New Zealand. More significantly, the Supreme Court of New Zealand has not only reaffirmed the approach, but probably gone further. I will discuss the decisions below.

One author suggested that the Supreme Court of India has rejected the Lord Hoffmann restatement.[50] However, the case upon which he relied recites a submission which was more wide ranging than that advanced by Lord Hoffmann.[51] So far as I am aware the Supreme Court of India has not otherwise addressed Lord Hoffmann's restatement in terms.

Notwithstanding the frequent reassertion of the proposition that effect must be given to unambiguous language, the Supreme Court of India has indicated in more recent judgments that it is legitimate to take into account surrounding circumstances for purposes of ascertaining the intention of the parties.[52]

In Malaysia, the Federal Court has also expressly adopted and applied the first of Lord Hoffmann's principles.[53] At a Court of Appeal level, the whole of Lord Hoffmann's five point restatement has been referred to with approval.[54]

The *Zurich Insurance* judgment, to which I have referred, indicates that in Singapore, in substance, the Hoffmann restatement has been adopted, subject only to the express restriction arising from s 95 in the case of a patent ambiguity.

In the *Investors Compensation* case, as subsequently modified, Lord Hoffmann expanded the concept of the "factual matrix", which he retitled "background knowledge", to include "absolutely anything" known to both parties which a reasonable man could have regarded as relevant to an understanding of the way in which the language should be understood.[55] This was the second of his five points. It has not been so enthusiastically received as the first.

Writhing extra-judicially, Justice Rajah of the Singapore Court of Appeal concluded:

> "The courts ought to embrace a consistently commonsensical approach in relation to the admissibility of evidence in contractual disputes. All relevant material which assists in revealing the parties objective intentions should be considered. It can be forcefully said that it is the legal entitlement of the parties to have their objective intentions and the 'goal of a genuine consensus' ascertained through such a process. Fairness should trump convenience. Such an intuitive approach better

coheres with the idea that a contract law is a facilitative body of principles."[56]

In substance, his Honour accepts the "absolute anything" element in the Hoffmann Restatement.

However, the "absolutely anything" extension has not been adopted in Australia. Nor has it been adopted by the Federal Court of Malaysia or by the Indian Supreme Court. It is not repeated, in terms, in his Lordship's own judgment in *Jumbo King*. Nor, has it subsequently been adopted by the Court of Final Appeal in Hong Kong. However, it appears to be applied by the lower courts in Hong Kong.

The Ambiguity Requirement

Traditionally, it was thought that extrinsic evidence could only be taken into account if there was ambiguity in the written text. However, it was implicit in the adoption of Lord Wilberforce's "factual matrix" approach that, to some degree, surrounding circumstances would be taken into account from the outset of the interpretative process, not only after ambiguity was identified. In 1998, when Lord Hoffmann restated the principles of contractual

interpretation in the *Investors Compensation Scheme* case, the necessity to find "ambiguity" before having regard to "background" was clearly rejected.[57]

In Australia, there is uncertainty as to whether ambiguity is still required before reference to surrounding circumstances is permissible. The basic authority remains *Codelfa* which contains the following formulation:

> "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 where it has a plain meaning."[58]

There is no authoritative decision on the distinction in *Codelfa* between the word "ambiguous" and the subsequent phrase "or susceptible of more than one meaning". I have expressed the view that the latter should be distinguished from the former, so that reference to extrinsic materials is permissible not only on the basis or a lexical or verbal ambiguity and/or a grammatical or syntactical ambiguity, but extends to any situation in which the interpretation is for any reason doubtful.[59] What his

Honour had in mind, in my opinion, was something along the lines of the traditional distinction between patent and latent ambiguity, which is of continued significance, as I will discuss below, in those nations which have adopted the *Indian Evidence Act.*

More recent High Court decisions have stated the relevant principles without referring to the need for ambiguity. On that basis, the view has been taken that the ambiguity requirement has been dispensed with.[60] However, *Codelfa* has never been overruled by the High Court.

The traditional rule that extrinsic evidence can be looked at in the case of ambiguity was affirmed by the Privy Council in a New Zealand appeal shortly before *Investors Compensation Scheme.*[61] The subsequent adoption by New Zealand courts of Lord Hoffman's restatement posed some difficulties in this respect.[62] However the issue now appears to be resolved and ambiguity is not required.[63]

In the *Zurich Insurance* case, the Court of Appeal of Singapore concluded that it was no longer necessary to identify an ambiguity before referring to extrinsic evidence.[64] In his extra-

judicial writing Justice V K Rajah reaffirmed the proposition in the *Zurich Insurance* case that it is unnecessary to identify ambiguity prior to relying on extrinsic evidence.[65]

In Singapore, as in other jurisdictions that have adopted the *Indian Evidence Act*, the position is complicated by the express statement in s 95 (s 93 in India) that extrinsic evidence is NOT admissible in the case of ambiguity.

The Singapore Court of Appeal in *Zurich Insurance* concluded that extrinsic evidence could not be used to interpret language in the case of patent ambiguity, but could be used if there is a latent ambiguity, in the sense that the ambiguity only becomes apparent when the language is applied to a factual situation.[66] The Court relied on the sixth proviso to s 94 of the Singapore Act for this approach. This appears to me to be the same result as I understand the Indian Courts to have reached.

In India, s 93 has also been interpreted to require the rejection of extrinsic evidence only in the case of a patent ambiguity. If there is latent ambiguity, however, then extrinsic evidence is admissible, eg, to identify the subject matter of the

contract.[67] Indeed, at least one Indian court has invoked the sixth proviso the same way as in Singapore.[68] However, the Indian authorities do not suggest that once latent ambiguity is identified, the full scope of surrounding circumstances – "absolutely anything" in Lord Hoffmann's terminology – becomes admissible. The cases and texts I have consulted suggest a more circumspect approach is adopted.

The Malaysian position appears to be the same as in India and Singapore, in that surrounding circumstances can be taken into account pursuant to the sixth proviso, but only in the case of latent ambiguity. However, it appears that the scope of surrounding circumstances to which it is permissible to have regard is, like that of India, also more restrictive than that adopted in Singapore.

As the Federal Court put it:

"It is evidence admissible under proviso (f) to section 92 Evidence Act, to show in what manner the language of a document is related to existing facts. It is admissible evidence *being confined strictly to surrounding facts so intimately connected with the instruments* that they

afford reliable material for ascertaining the nature and extent of the subject-matter referred to. See also *Oriental Bank of Malaya Ltd v Subramaniam* [1958] 1 MLJ 35."[69] (Emphasis added.)

To similar effect are the observations of the Court of Appeal, Kuala Lumpur:

"[S]uch evidence must *be restricted only to what is necessary* for the purpose so that the record will not be bulky."[70] (Emphasis added.)

The italicised passages use language that does not appear in the English, New Zealand, Hong Kong or Singapore case law.

The statutory restriction in s 93 of the Indian and Malaysian Acts (s 95 in Singapore) does differentiate the position from those nations that have not adopted the *Indian Evidence Act*. Ambiguity, including patent ambiguity on the face of the document, is one context in which extrinsic evidence is, one might have thought, particularly relevant.

It does appear that, in a number of respects, the Australian approach to interpretation of contracts by reliance on extrinsic evidence remains more circumspect than in England and in most other jurisdictions. The scope in Australia for what academics like to call “modern” or “commercial” construction is not clear. Most other common law jurisdictions have followed the English lead, with the possible exception of India and Malaysia. I say “possible” because of the limitations of my research in the Indian and Malaysian authorities.

Pre-Contractual Negotiations

Lord Hoffmann accepted, albeit without enthusiasm, that it was too late for the English courts to change the principle of English law that pre-contractual negotiations were not admissible for the purpose of interpreting the contract, save in the case of ambiguity, or insofar as they demonstrated knowledge of the relevant factual matrix. His Lordship was clearly uncomfortable with the distinction, but saw practical reasons for distinguishing prior negotiations from other aspects of background.

The rule against the admissibility of pre-contractual negotiations has been affirmed in England,[71] Australia,[72] Hong Kong[73] and India.[74]

Although mere declarations of subjective intent, as such, remain inadmissible in Singapore, in *Zurich Insurance*, the Court of Appeal said that "there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although in a normal case such evidence is likely to be inadmissible".[75]

In *Chartbrook* the House of Lords definitively upheld the proposition that it was too late to change the principle that pre-contractual negotiations were not admissible. *Chartbrook* was delivered after *Zurich Insurance*. The indication in *Zurich Insurance* that Singapore would not follow that aspect of Lord Hoffmann's restatement appears to be confirmed by the analysis in Justice Rajah's subsequent article, although his Honour acknowledged that the Court had not judicially considered *Chartbrook*.[76]

In New Zealand, the Supreme Court has addressed the question of pre-contractual negotiations in a case without a clear ratio.[77] One of the judges appeared to start from the traditional position that, where relevant ambiguity was established, evidence of pre-contractual negotiations is admissible but that process should not be subject to previously accepted restrictions.[78] Two of the judges indicated that ambiguity was not required prior to examining background material but, on the facts of the case, their Honours invoked the widely accepted exception[79] that negotiations are admissible to identify the subject of a matter of a contract. In doing so, however, they adopted a wide concept of "subject matter".[80] A fourth judge said that it was no longer the case that ambiguity was required before taking into account background material, but saw no reason in that case to look at the background material.[81] The fifth judge said that the same underlying principles should be applied to both pre-contractual and post-contractual evidence, concluding that the evidence is admissible if it is "capable of demonstrating objectively what meaning both or all parties intended their words to bear".[82] This appears to adopt the "absolutely anything" approach.

Subsequent Conduct

The position in England is that, subject to certain exceptions, subsequent conduct is not admissible.[83] As it was put:

> "it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made".[84]

These decisions have not, or at least not yet, been revisited since Lord Hoffmann's restatement.

The principle that subsequent conduct is not available as an aid to interpretation has been affirmed in Australia.[85] However, the reaffirmation did not involve detailed consideration of the various issues that arise in this respect.[86]

This position has also been affirmed in Hong Kong[87] and in Malaysia.[88] However, in Singapore, subsequent conduct is probably admissible. It was placed in the same position as pre-contractual negotiations, discussed above.[89]

In India, evidence of subsequent conduct is admissible in certain circumstances for purposes of construing a written agreement. There must, however, be some ambiguity in the contract and particular weight appears to be given to conduct done shortly after the date of a contract.[90]

In *Gibbons Holdings,* a majority of judges in the Supreme Court of New Zealand accepted that subsequent conduct can be referred to for purposes of interpretation. However, the doctrinal basis of this acceptance is unclear.

Two of the judges would limit such evidence to a situation in which the conduct was engaged in by both parties, another judge said that even unilateral conduct was admissible, a further judge accepted that subsequent conduct could be admissible, without adverting to this distinction and the fifth judge reserved upon the admissibility of all subsequent conduct.[91]

I am generally critical of the expanded use of extrinsic material for purposes of interpretation. However, the adverse commercial effects which concern me are unlikely to arise if reference to conduct is limited along the lines adopted by the

Indian courts. Where there is ambiguity in the written contract, conduct shortly after it came into effect can be revealing.

Entire Agreement Clauses

Matters of fact and degree arise on the spectrum between a "hard" parol evidence rule approach and a "soft" or "non-existent" parol evidence rule approach. One matter on which the line can still be held is the effect given to entire agreement clauses.

For major contractual relationships a detailed document is usually prepared. It is rare to find one that does not include an entire agreement clause. Where the parties have expressly stated that the written document represents the whole of their agreement then, short of rectification or the application of some other collateral doctrine, that clause should, in my opinion, be given full and clear effect. If reference to extrinsic evidence is admissible in some circumstances to determine the true agreement between the parties, surely the assertion that the true agreement is contained entirely in the document is entitled to at least substantial, and usually determinative, weight in this very respect. In any event, such a clause resolves the preliminary question for the application of the parol evidence rule. This is a contract wholly in writing.

However, judges in jurisdictions which have embraced the Hoffmann restatement, and academics who support the development, have suggested that, notwithstanding an entire agreement clause, extrinsic evidence is still admissible for purposes of interpretation.[92] Indeed, one academic author, whilst acknowledging the difficult issues involved, suggested that not to do so "would resuscitate the now discredited parol evidence rule".[93] It is not clear to me why consenting adults cannot do that. A more detailed analysis of the reasons for parties adopting an entire agreement clause supports the conclusion that such a clause is a perfectly rational way of "contracting out of contextualism".[94]

While a number of judges have indicated that an entire agreement clause does not prevent reference to extrinsic evidence for the purpose of contractual interpretation, even in the absence of ambiguity, I am not aware of any court of final appeal that has adopted the proposition. Perhaps more clearly than other aspects of the issues that arise in this context, this matter remains open in a number of jurisdictions. Its resolution will depend very much on

where the balance between certainty and accuracy, to which I have referred at the outset of this paper, ought be drawn.

I accept that sometimes certainty should give way to accuracy or fairness. Whilst the prima facie position should be that such a clause excludes reference to extrinsic circumstances, that could be subject to a qualification of substantial injustice.

Common Law and Civil Law

With respect to contractual interpretation there are significant differences between the common law and civil law traditions. At this seminar the former tradition is represented by India, Hong Kong SAR, Malaysia, New Zealand, Papua New Guinea, Singapore, Sri Lanka and Australia. The civil law tradition is represented by China, Macau SAR, Japan and the Republic of Korea. We will also be considering issues of Islamic finance, but I will not refer in any way to sharia law.

There are, of course, and always have been major differences within each of the two traditions, eg, between the English and American common law or between the French and German civil law traditions. Nevertheless there remain broad

distinctions between the two systems which continue to influence both substantive and procedural law, including with respect to contractual interpretation.

Over recent decades the relationship between the common law and civil law traditions has altered. A process of convergence has been emphasised in the comparative law literature. The focus of attention in international contexts has increasingly been to identify common elements and to seek to resolve differences between the systems. Both in multilateral and regional arrangements, and in nations where legal systems are still being developed or modernised, there is a tendency to draw on both traditions, with a view to identifying the best system. I have referred to such developments when discussing the development by the Peoples Republic of China of a legal system adapted to its contemporary conditions.[95]

Adversarial procedure differs from inquisitorial procedure and that remains true even though contemporary case management, particularly in the commercial area, means that judges in the common law tradition now perform an activist role, closer to that traditionally associated with a civil law system. On

the other hand, many civil law jurisdictions have adopted some aspects of an adversarial system, particularly by expanding the involvement of practitioners. Furthermore, the oral tradition of common law has been substantially attenuated by the general use of affidavit evidence or statements. However, the introduction of an oral dimension, even cross-examination, in some civil law jurisdictions represents the reverse movement.

For purposes of contractual interpretation several matters distinguish the two systems. One substantive and two procedural differences are of particular significance.

The substantive difference is fundamental. The civil law tradition focuses on the subjective intention of the parties. The common law tradition focuses on the objective intention of the parties, ie, what a reasonable person would conclude their intention was.[96] Accordingly, the basal question about the nature of a contractual agreement is posed in quite different ways. In the civil law tradition the basal question is, “What was the intention of the parties?”. In the common law tradition the basal question is, “What is the meaning of the words used?”.[97]

Nevertheless, the civil law tradition, in its actual operation, appears to accept something analogous to the parol evidence rule. One commentator observed:

> " … Civilian systems are acutely aware of the need to strike a balance between the desire to achieve a materially 'right' outcome on the one hand, and the struggle for legal certainty on the other. As a consequence, they are extremely reluctant to admit that the wording of a contract concluded in writing might be overridden by other factors. They have devised different techniques to achieve this balance."[98]

It does appear that in its practical operation, the approach to contractual interpretation is not as different as the theoretical divergence between a subjective and an objective approach, suggests. This practical dimension may not have been given sufficient weight in the process of drafting the UNIDROIT Principles of International Commercial Contracts or the Principles of European Contract Law.[99]

As is the case with statutory interpretation, there is a fictional element about determining a legal issue by reference to the

“intention of the parties”, not least in the usual case where neither party adverted to the circumstances of the dispute that has arisen. Nevertheless, the terminology of “intention of the parties” is more than a polite form. It represents a recognition by the law of the autonomy of the parties to a contractual relationship, autonomy which is entitled to respect.

One distinguishing procedural aspect of the common law tradition is that it permits wide-ranging discovery and inspection of documents on the part of the opposing party in civil disputes, including commercial disputes. As a general rule, there is no such practice in civil law systems. The collection of relevant documents and their inspection is, traditionally, primarily a matter for the judge.

A second procedural matter arises from the existence of exclusionary rules of evidence which have no equivalent in the civil law tradition. Admissible evidence in the latter tradition is generally bounded by relevance alone. The common law has developed a number of principles which exclude relevant evidence on the basis of other considerations. To a substantial degree these exclusionary principles emerged as a matter of judge-made

law in a context where findings of fact were made by juries. Many of the principles were designed to maintain the integrity of the process by removing evidence which judicial experience suggested may distort jury decision-making. Notwithstanding the fact that the origins of the rule in the jury system now have virtually no relevance for commercial dispute resolution, save in the United States, the rules persist. They often take statutory form.

I have discussed the parol evidence rule, the rules relating to exclusion of pre-contractual negotiations and of subsequent conduct above. These particular examples are not, as far as I am aware, matters that arose because of the heritage of the jury system. They are, however, manifestations of the proclivity of the common law tradition to restrict the admissibility of possibly relevant evidence.

The process of convergence, particularly the special influence of European law in England, explains to some degree, in my opinion, the expansion of admissible evidence of surrounding circumstances. Lord Hoffmann's "absolutely anything" test could serve as a description of the civil law approach.

The CISG

The process of globalisation gives rise to issues of contractual interpretation of a character with which national courts are only now beginning to grapple. There are multilateral arrangements which change the domestic law of contractual interpretation.

Of particular significance is the *Vienna Convention on Contracts for the International Sale of Goods* ("the CISG") which has been adopted widely, including in Asia. It has been ratified by 74 nations including Australia, China, Japan, New Zealand, Republic of Korea and Singapore, as well as major trading partners throughout Europe and North America. India and Indonesia are important exceptions. Also, the United Kingdom has never acceded and, because the CISG came into force prior to 1997, Hong Kong has maintained that its position is as it existed at the time that the United Kingdom exercised sovereignty over the city, at which stage China, but not the UK, had already ratified the CISG. There are, however, views expressed that the CISG does apply there.[100]

The CISG is an important international initiative to promote the harmonisation of sales law and, thereby, to reduce uncertainty and transaction costs. As with other international conventions and model laws, the CISG manifests the capacity of international negotiations to evolve a compromise between the civil law and the common law traditions. Nevertheless, the compromise does require adjustment to a new form of discourse.

The CISG provides in Article 8 that statements made by a party are to be interpreted on a subjective basis where the other party knew, or could not have been unaware of, the intent of the person making the statement. This is the primary position. However, in a situation in which this subjective approach does not apply, by reason of a lack of knowledge or lack of obviousness, then statements are to be interpreted according to the understanding of a reasonable person in the same circumstances. The CISG, accordingly, adopts as the default position, the subjective theory of contract of the civil law.

For the purposes of interpretation, also in accordance with the civil law tradition, the scope of relevant circumstances is as widely stated as it could be. Article 38 provides:

> "In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case, including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

Clearly, where the CISG applies the restrictions I have been discussing about the permissible scope of surrounding circumstances at common law are overridden. An important aspect of the CISG is that the parties are entitled to opt out of its provisions. This occurs often in Australia and, it appears, in other nations.

As a result of the exercise of the opt out clause and, probably, because of widespread ignorance within the Australian legal profession about the applicability of the CISG, there have been comparatively few Australian cases applying the CISG.[101] A similar situation appears to exist in Singapore.[102] Indeed, it has been observed that one of the largest bodies of case law with respect to the application of the CISG is from China.[103]

One Australian jurist, a judge with the highest academic qualifications who is closely associated with international developments in contract law, has criticised the isolationist attitude which Australia manifests in this respect. He, like UK observers who do not believe Lord Hoffmann went far enough,[104] invokes the example of CISG, and the similar approach to harmonisation of contract law in the privately generated model laws, namely the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law'.[105]

These are important influences, particularly in England, where they represent part of its progressive integration with Europe. English common law is more susceptible to a process of harmonisation with European civil law systems than other nations in the common law tradition.

China

The contract law of the Peoples Republic of China of 1999 is a synthesis of a variety of sources including both common law and civil law sources, as well as the CISG and the American Uniform Commercial Code. Relevantly Article 125 of that law refers to contract interpretation and provides:

> "In case of any dispute between the parties concerning the construction of a contract term, the true meaning thereof shall be determined according to the words and sentences used in the contract, the relevant provisions and the purpose of the contract, and in accordance with the relevant usage and the principle of good faith."

The last words are a reference back to Article 6 which provides:

> "The parties shall abide by the principle of good faith in exercising their rights and performing their obligations."

Article 41 also makes provision for interpretation. It states:

> "In case of any dispute concerning the construction of a standard term, such term shall be interpreted in accordance with commonsense. If the standard term is subject to two or more interpretations, it shall be interpreted against the party supplying it. If a discrepancy exists between the standard term and a non-standard term, the non-standard term prevails."

There is some dispute amongst commentators on the Chinese contract law as to whether these provisions constitute a

subjective or an objective approach to contractual interpretation. It appears to be of the same character as that contained in the CISG, that I have discussed above.

As the author of one text on Chinese contract law states, what has been adopted is a third, "eclectic approach" to the following effect:

> "Under the eclectic theory, the contract interpretation shall first try to ascertain the true intention of the parties because of the paramount significance of the parties' intention to the contract. If however, the parties' true intention could not be determined or there is a lack of common intention of the parties, the interpretation shall be made with recourse to the common understanding of reasonable persons under the same or similar situation."[106]

Article 125 makes it clear that the relevant context extends to the whole of the terms of the contract. Article 125 makes no reference to surrounding circumstances, but the text writers suggest that they are taken into account[107] and that this is so even if the words of the contract are clear and unambiguous.[108]

There is some dispute amongst scholars as to whether or not pre-contractual negotiations are authorised by Article 125. The better view appears to be that they are.[109] It is suggested that they can be taken into account under the provision that "the purpose of the contract has to be considered" or, that they come within the application of the principle of good faith referred to in Article 125 or within reference to commercial usages and customs also referred to in the Article.[110]

It does appear that, in accordance with the civil law tradition, Chinese contract law adopts an expansive approach to the scope of materials available for purposes of interpretation. As one author said:

> "Thus it is discernible that in practice, the Chinese courts are open to all relevant evidences when making the interpretation of the contract. Consequently, an important question the courts may have to face is how to identify the truthfulness of each of the evidences that are introduced."[111]

The author refers to a book written by judges of the Supreme Peoples Court which states that a course of interpretation:

> "All other materials related to the contract, such as previous drafts, negotiation records, letters, telegraphs, telex, shall all be used."[112]

Certainty

Lord Hoffmann who, as I have indicated, advanced an expansive view of the relevant background, nevertheless stated the alternative view with accuracy, when he said:

> "There is a certain view in the profession that the less one has resort to any form of background in aid of interpretation, the better … These opinions … reflect[s] what may be a sound practical intuition that the law of contract is an institution designed to enforce promises with a high degree of predictability and that the more one allows conventional meanings or syntax to be displaced by inferences drawn from background, the less predictable that the outcome is likely to be."[113]

As Lord Hoffmann suggested in this passage, it is revealing that those who resist the expansion of the use of extrinsic material

for purposes of interpretation, including its extension to pre-contractual negotiations, tend to be active practitioners with an understanding of the implications for both advice and litigation of this extension.[114] However, in accordance with much current academic discourse, the question often posed in the academy is not whether something works in practice, but whether it works in theory. There is a strong contingent of academic legal writing, indeed near unanimity, in favour of the admissibility of pre-contractual negotiations.[115]

Once one is talking about admissibility in evidence, the adverse effects on commercial life are complete. A fundamental commercial objective for all parties is to know where they stand without undergoing the risks and uncertainties of litigation.

As one practitioner, critical of the failure of Lord Hoffmann's restatement to appreciate the practical implications of this approach, including the position of third parties, put it:

> " … for a commercial contract, the correct approach is to ask what methods of interpretation the parties, as businessmen and not as jurists, may realistically be taken to have intended should be used, having regard to

two assumptions: (i) the parties cannot have intended that their contract would mean one thing to a court and something else to a lawyer asked to advise about it; and (ii) the parties must have had in mind the possible need, at some future point, to obtain legal advice without delay. On that approach, the parties may reasonably be taken to have intended that the admissible background should be limited to the sort of facts likely to be readily available to a lawyer asked to advise in circumstances in which a decision has to be taken without delay as to the course of action to be taken under the contract."[116]

It is clear that certainty is a significant value for commercial parties at the time of contracting. That their interests may well diverge subsequently, and lead to disputation, is understood, so that some mechanism for determining such disputes is required. Nevertheless, the idea that an arbitrator or a judge would be called upon to determine the *true* intention of the parties by going beyond the written contract to encompass anything which disputing parties can relevantly imagine, would be regarded by most parties, at the time of formation of the contract, to constitute a commercial disaster.

It is for that reason that so many written commercial contracts include an entire agreement clause asserting that the written form, as executed, constitutes the whole agreement between the parties and replaces all previous representations and drafts. Similarly, it explains why so many commercial contracts adopt arbitration clauses. Although they do have the additional advantage of secrecy and, in the context of international commercial arbitration, the advantage of enforceability, there is little doubt that, originally, it was believed that arbitration was likely to be a more cost efficient mode of dispute resolution. That this expectation has often not been realised does not detract from the commercial desire to ensure that this objective is attained.

A principal purpose of the detail found in commercial agreements, as well as a significant purpose of contract law, is to allocate risks between the parties, not least with respect to contingencies that cannot be, or were not, anticipated. Interpretation is the means by which the court determines how those risks were in fact allocated. Anything which increases the level of uncertainty about how the chosen words have performed that task, creates a new kind of risk. That is why, in my opinion,

commercial decision-makers would generally agree that certainty is more important to them than accurately reflecting their "true" intentions. Of course, with the benefit of hindsight, when the commercial situation has changed or the risks have come home, the position is quite different and is said to have always been so, often on oath.

I realise these are empirical statements, based on my own, necessarily limited, experience. I know of no empirical research that supports my belief that certainty would be given overriding weight at the time of contracting. However, the United States experience is suggestive.

Generalisation about the American approach to these matters is difficult because there is a significant variety of approaches. The Restatement (Second) Contracts adopts a broad approach to access to extrinsic materials. The Uniform Commercial Code, applicable to the sale of goods, also adopts such an approach. However, the general law of contractual interpretation is administered in Federal and State courts and there is no single common law for the United States.

It is useful to categorise the various State jurisdictions as falling towards the textual end of the spectrum or the contextual end of the spectrum. The textualist end involves a strict application of the parol evidence rule, adoption of the plain meaning where it can be discerned and enforcement of whole agreement clauses, which Americans call “merger clauses”. On one recent computation a significant majority of the United States courts follow this traditionalist, textualist approach. Some 38 states are said to do so compared with nine who do not.[117]

The authors note that the leader of the textualist approach is the New York court system and the leader of the contextualist approach, perhaps not surprisingly, is the Californian court system. Indeed, as another author put it, the New York courts adopt a “intensely objective approach”.[118]

An instructive feature of the American debate in this respect is the apparent preference of commercial parties for a textual approach. American empirical evidence strongly suggests that commercial parties are attracted to a textualist jurisdiction, in order to provide the certainty that such a jurisdiction gives. They do not

prefer jurisdictions which try to determine what the true bargain was.

In a survey of almost 3,000 contracts, New York law was chosen in 46% of them. Delaware, also a jurisdiction at the textualist end of the spectrum, was chosen in 15% of the contracts, the second most popular choice. In about 39% of the contracts, an exclusive jurisdiction clause was included. Of that 39%, New York accounted for 41% and Delaware accounted for 11%.[119]

Obviously the choice of New York and Delaware is based on a range of considerations, including the former's history as a financial centre and the latter's development of specific expertise in corporate law. However, the fact that each has a traditional approach to contractual interpretation is clearly understood by the practitioners and judges of such jurisdictions to be a relevant factor.

Cost and Efficiency

The expanded scope for introducing evidence of the factual matrix happened to coincide with technological developments

which reduced the cost of multiple photocopying and, soon thereafter, the introduction of word processing, which multiplied the number of drafts, followed by the adoption of email which multiplied the number of written communications and the comparative indestructibility of hard drives which meant that no draft or communication was ever lost. Lord Wilberforce could not have anticipated this.

The combined effect of these developments led to an explosion in the documentation involved in litigation, so that, in Australia, barristers, who even in 1980 would receive commercial briefs wrapped in pink ribbon, were soon presented with multiple spring back folders and, subsequently, trolley loads of documents. The costs of litigation escalated accordingly, to a degree which, in my opinion, is not sustainable.

There are limits to the proportion of the gross national product which any nation can afford to spent on dispute resolution. More immediately, commercial corporations which have aggressively cut costs in all respects over recent years, as competitive pressures have increased, will not exempt legal costs from this process.

The principal argument against the view that extrinsic material adds to cost and delay, is that issues of contractual interpretation are often accompanied by other issues which would permit reference to a wide range of documentation, eg, collateral contracts, rectification or conventional estoppel. I include in that observation the similar effect in those jurisdictions which imply a good faith obligation into contracts[120] and statutory provisions protecting contractual parties from the effect of misrepresentations whether pre or post-contractual.[121]

Of all the arguments against maintaining a restrictive approach to the extrinsic material available for contractual interpretation on practical grounds of cost and delay, it is the proliferation of these alternative means for altering the effect of a written contract that I find the most compelling.[122]

Most of the jurisdictions I have discussed in this paper, now seek to identify the *actual* intentions of the parties, excluding only statements of actual intention, unless they reveal relevant background. Accordingly, a party is permitted almost complete access to the documentation of the other party to litigation for

purposes of determining the “true” contractual intention of the parties. In my opinion, this system in its practical application is indistinguishable from the subjective approach to contracts of the civil law tradition, notwithstanding the lip service paid to the objective theory.

However, as a matter of civil justice practice the potentially adverse effects of the civil law subjection intention theory, together with the adoption of good faith as a term of all contracts, is substantially mitigated in civil law jurisdictions by two considerations. First, in practice civil law courts appear to be reluctant to go behind a written contract, as discussed above. Secondly, a party to a dispute resolution process is generally confined to its own documents, including anything exchanged with the other party. General discovery is not available, let alone the intrusive interrogation of hard drives in the search for deleted drafts and emails, which has become common practice in Australian commercial dispute resolution.

In view of the fact that I am of the opinion that this development is not sustainable in an economic sense, I continue to hold the position I have hitherto advocated. Unless courts, and

arbitrators, restrict the documentation which commercial disputation now generates, they will be bypassed as a mode of dispute resolution. Furthermore, far from “justice” emerging by the recognition of the “true” intentions of the parties, *only* the strong will prevail. I do not believe that discovery in the extensive form that is usual in major commercial litigation, can survive.

I have no difficulty with a contextual approach to interpretation which restricts the relevant background to what was in the mutual contemplation of the parties as evidenced by communications between them or by what must have been obvious to both of them. The practical difficulties that have emerged arise primarily from adversarial litigation attempting to prove what was in such mutual contemplation by evidence of the knowledge of each, even if uncommunicated. Discovery is used, relevantly, to reveal the internal communications of the other side and thereby establish parallel, albeit uncommunicated, knowledge. Contemporary practice, at least in Australia, has rendered that process too expensive. In this, as so often, the perfect is the enemy of the good.

Those jurisdictions which have moved close to the civil law subjective intention theory should carefully consider adopting the related aspects of civil law practice. This may not be limited to abolition of a right to discovery but extend to other aspects of the adversarial system.

Third Parties

One of the significant defects of contract law is that it operates on the assumption that only the interests of the parties to the contract are involved. That has never been true. However, with respect to any contract of significant size, it is now rarely true. Third parties, particularly financiers, have always relied on the contractual rights of their borrowers. Loan agreements are often closely interrelated with underlying basic contracts and, in contemporary circumstances, many, perhaps most, contracting parties would assume that the other party would, or may, in the future use the contract in support of fund raising.

As I pointed out in my article “From Text to Context”, third party involvement appears to be of a considerable different order to what it has been in the past. There is a difference of scale between traditional forms, such as dealing with book debts by way

of factoring, and contemporary securitisation mechanisms, upon which a range of derivative products have been based.[123]

In a judgment after *Investors Compensation Scheme,* Lord Hoffmann elaborated on an unstated assumption in his original five point scheme for contractual interpretation, when he repeated the first proposition and added to it the observation: "A written contract is addressed to the parties …".[124] In my opinion, this assumption does not apply to a significant range of commercial contractual relationships. The interests of third parties can be accommodated in Lord Hoffmann's scheme, but it requires an express exclusion of the same character as his Lordship accepted for pre-contractual negotiation.

Lord Hoffmann has accepted that there are situations in which contractual documents may not be addressed only to the parties to the contract. In one case he held that a bill of lading addressed to a merchant or a banker should be interpreted only on the basis of what appeared on the front of the bill because material, known only to the parties, on the back of the bill would not have been read by a merchant or banker.[125] In my previous article I pointed out a similar exception based on case law to the

effect that investors were entitled to rely solely on the statutory contract constituted by the memorandum and articles of association.[126] Lord Hoffmann has also accepted this as an exception. Another exception is an interest in land recorded on a public register.[127]

However, Lord Hoffmann clearly regarded such matters as individual exceptions to a general rule. His reasoning suggests that that exclusion of reliance on background known only to the parties has to be determined on a case by case basis. He said:

> "Ordinarily … a contract is treated as addressed to the parties alone and an assignee must either enquire as to any relevant background or take his chance on how that might affect the meaning a court will give to the document. The law has sometimes to compromise between protecting the interests of a contracting parties and those of third parties. But an extension of the admissible background will, at any rate in theory, increase the risk that a third party will find that the contract does not mean what he thought. How often this is likely to be a practical problem is hard to say."[128]

I take issue with the first word in this quotation: "Ordinarily". In my opinion, and in the opinion of practitioners who have commented on this issue, third party reliance on written contracts is common. It is not something unusual, nor limited to specific kinds of contracts.[129] It should be dealt with by a broad exclusion, rather than treated on a case by case basis.

Conclusion

There is nothing "commercial" about what has come to be called "commercial construction". The effect of emasculating the parol evidence rule has introduced a degree of uncertainty into contractual relationships that commercial parties would reject.

I do not doubt that surrounding circumstances, in the sense of the commercial context of a contractual relationship, are relevant to the task of interpretation. However, the expansion of the material now commonly relied upon in this respect has gone too far. I identify a number of desirable changes to recent practice in many jurisdictions.

(1) Affirm the parol evidence rule as a rule of interpretation and require clear evidence that a written agreement, which appears complete on its face, was not.

(2) Prima facie, restrict the scope of admissible surrounding circumstances to undisputed objective facts about the commercial context.

(3) Reaffirm the principle that ambiguity is required before other background facts, known to both parties, are admissible.

(4) Apply a strict approach to the kind of latent ambiguity that is accepted for purposes of (3).

(5) Affirm the principle that pre-contractual negotiations are not admissible.

(6) Restrict the admissibility of post-contractual conduct to a contract which is ambiguous and to conduct engaged in shortly after the contract came into operation.

(7) Establish a general exclusion of extrinsic evidence, including post-contractual conduct, in any case in which a third party will (or even might) rely on the written contract.

(8) Affirm the proposition that an entire agreement clause does restrict the use of extrinsic material for purposes of

interpretation, unless significant injustice would arise from so doing.

(9) Restrict the right to discovery of documents and the right to subpoena third party documents in litigation, so that each is available only with the leave of the court after the identification of issues is dispute.

(10) Establish a principle that leave under (9) will only be given if it is established on the balance of probabilities that documents of the character sought are both likely to exist and likely to assist in the resolution of issues in dispute.

[1] See J J Spigelman "From Text to Context: Contemporary Contractual Interpretation" (2007) 81 *Australian Law Journal* 322, also accessible at www.lawlink.nsw.gov.au/sc under "Speeches".

[2] See *Investors Compensation Scheme Ltd v West Bromwich Building* Society [1997] UKHL 28; [1998] 1 WLR 896 at 912G; see also Lord Hoffmann "The Intolerable Wrestle with Words and Meanings" (1997) 114 *South African Law Journal* 656 passim.

[3] As Professor Paul Freund once put it: "We ought not read the Constitution like a last will and testament lest it become one", quoted by Paul Brest "The Intentions of the Adopter are in the Eyes of the Beholder" in Eugene W Hickok Jr *The Bill of Rights: Original Meaning and Current Understanding* University Press Virginia, Charlottesville (1991) p 21.

[4] See J J Spigelman "The Principle of Legality and the Clear Statement Principle" (2005) 79 *Australian Law Journal* 769 esp at 774-775; James Spigelman *Statutory Interpretation and Human Rights: The McPherson Lecture Series Vol 3* University of Queensland Press, Brisbane (2008) esp at 22-29 on "The Common Law Bill of Rights".

[5] *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392; [2004] 2 Lloyd's Rep 429 at [29] per Arden LJ.

[6] See J Steyn "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 *Law Quarterly Review* 433 esp at 441-442.

[7] V K Rajah "Redrawing the Boundaries of Contractual Interpretation" (2010) 22 *Singapore Academy of Law Journal* 513 at 538.

[8] D J Nicholls "My Kingdom for a Horse: The Meaning of Words" (2005) 121 *Law Quarterly Review* 577 at 586.

[9] A M Gleeson "Individualised Justice – The Holy Grail" (1995) 69 *Australian Law Journal* 421 at 431-432; applied in this context in J J Spigelman "From Text to Context" supra at pp 333-334.

[10] See Law Commission *Law of Contract: The Parol Evidence Rule* HMSD, London (1986).

[11] Ibid at [2.17].

[12] Ibid at [1.7].

[13] Ibid at [2.7].

[14] See, eg, *Youell v Bland Welch & Co (No 1)* [1992] 2 Lloyd's Rep 127 at 133 per Staughton LJ.

[15] For example, see H G Beale (ed) *Chitty on Contracts* (13th ed) Sweet & Maxwell, London (2008) at 12-099; Gerard McMeel, *The Construction of Contracts* Oxford University Press, Oxford (2007) at 5.60-5.621; J Beatson, A Burrows & J Cartwright *Anson's Law of Contract* (29th ed) Oxford University Press, Oxford (2010) esp at 139.

[16] Sir Kim Lewison *The Interpretation of Contracts* (4th ed) Sweet & Maxwell, London (2007) pp 85-91; Edwin Peel (ed) *Treitle's Law of Contract* (12th ed) Sweet & Maxwell, London (2007) at pp 214-215.

[17] See, eg, *Wild v Civil Aviation Authority,* English Court of Appeal, unreported, 25 September 1987; *Youell v Bland Welch & Co (No 1)* supra at 140 per Beldam LJ; *Rosseel v Oriental*

Commercial & Shipping Co (UK) Ltd [1991] 2 Lloyd's Rep 625 at 628; *Ocarina Marine Ltd & Ors v Marcard Stein & Co* [1999] EWCA Civ 2003; [1998] All ER 55.

18 See *AIB Group (UK) Ltd v Martin* [2001] UKHL 63; [2001] 1 WLR 94 at [4] per Lord Hutton and see also Lord Millett at [7].

19 See *HBS Marketing Ltd v Applied Electronics (OEM) Ltd* [1994] HKCA 415 esp at [11]; *Paul Management Ltd v Eternal Unity Development Ltd* [2008] HKCA 315 esp at [41]; and cf *Tam Che Ming v Yeung Kam Lam* [2003] HKCA 280 at [9]; *Nataman Protpakorn v Citibank NA* [2008] HKCA 354 at [33]; *Wai Kam Chin v Chim Siu Fan* [2008] HKCA 250 at [7].

20 See *Bank of China Ltd v Fung Chin Kan* [2002] HKFA 35; (2005) 1 HKLRD 181 at [59].

21 See *Hoyts Pty Ltd v Spencer* (1919) 27 CLR 133.

22 See *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; (2004) 218 CLR 471 at [33]-[36]. See also *Ratfland Pty Ltd v Commissioner of Taxation* [2008] HCA 21; (2008) 238 CLR 516 at [33]. For a summary of the principles and case law see *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234; (2009) 261 ALR 382 at [90].

23 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 CLR 45 at [99]-[103].

24 See *Chunchun Jha v Ebadat Ali* All India Rep 1954 SC 345 at [6].

25 *ONGC Limited v SAW Pipes Limited* All India Rep 2003 SC 2629 at [4].

26 *Roop Kumar v Mohom Thadani* [2003] INSC 212.

27 See, eg, Nilima Bhadbhade *Contract Law in India* Wolters Klauer, Netherlands (2010) at [334].

28 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design and Construction Pte Ltd* [2008] SGCA 27; (2008) 3 SLR 1029.

29 See V K Rajah "Redrawing the Boundaries of Contractual Interpretation" supra.

30 See *Zurich Insurance* supra esp at [43]-[46], [70]-[73], [108].

31 Ibid at [122].

32 *Cabell v Markham* 148 F2d 737 at 739 (1945).

33 See *Prenn v Simmonds* [1971] 1 WLR 1381 at 1385; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 987.

34 *Chartbrook Ltd v Persimmon Houses Ltd* [2009] UKHL 38; [2009] 1 AC 1101 at [38].

35 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337 at 352.

36 See, eg, *River Trade Terminal Co Ltd v Secretary for Justice* [2005] HKCFA 29 at [21]-[22].

37 See *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74.

38 *Zurich Insurance* supra at [81].

39 *Berjaya Times Square San Bhd v M Concept San Bhd* [2010] 1 MLJ 597 at [42]-[43].

[40] Bhadbhade, supra at [334].

[41] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 at 179 [40].

[42] See *Investors Compensation Scheme Ltd* supra at 912-913; *Bank of Credit & Commerce International SA v Ali* [2001] UKHL 8; [2002] 1 AC 251 at [39] et seq; *Chartbrook* supra at [14].

[43] *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2010] 3 WLR 1424 at [17]-[41].

[44] See *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 210 CLR 181 at [11], [43]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 at 461-462 [20]-[26]; *Toll (FGCT) Pty Ltd* supra at 179 [40].

[45] Michael J Fischer & Desmond G Greenwood, *Contract Law in Hong Kong* Hong Kong University Press, Hong Kong (2007) p 34.

[46] *Jumbo King Ltd v Faithful Property Ltd & Ors* [1999] HKCFA 38; (1999) 2 HKCFAR 279.

[47] See *Chartbrook* supra at [14].

[48] See *Leung Ja Lau v The Hospital Authority* [2009] HKCFA 91 at [37].

[49] Commencing with *Boat Park Ltd v Hutchinson* supra at 81.

[50] See Mark Beeley, "A Rose by Any Other Name? A Comparative Examination of the English and Indian Approaches to Contractual Interpretation" (2005) 6 *Business Law International* 630.

[51] See *Citi Bank N.A. v Standard Chartered Bank* [2003] INSC 511.

[52] See *Modi Co v Union of India* All India Rep 1969 SC 9 at [8]; *Syed Abdul Khader v Rami Reddy* 16 All India Rep 1979 SC 553 at [12].

[53] See *Berjaya Times Square* supra at [42]-[43].

[54] See *Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd* [2006] 6 MLJ 544 at [23] and see [26]; *Peter Tang Swee Guan Subramaniam a/l A v Sanka* [2008] 6 MLJ 376 at [14].

[55] See *Investors Compensation & Commerce International SA v Ali* supra at [39].

[56] Ibid at [53].

[57] *Investors Compensation Scheme* supra at 912-913. See also *Westminster City Council v National Asylum Support Service* [2002] UKHL 38; [2002] 1 WLR 2956 at [5], affirmed in *Oceanbulk Shipping and Trading SA* supra at [36].

[58] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352.

[59] See *South Sydney Council v Royal Botanic Gardens* [1999] NSWCA 478; (1999) 10 BPR 18, 961 at [35]; *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235 at [12]-[13]; J J Spigelman "From Text to Context" supra at pp 326, 329-330; See also *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2005] FCA 1812; (2005) 223 ALR 560 esp at [78]-[79] and on appeal (2006) 59 ACSR 444 esp at [45]-[52], [98], [101] and [254].

60 *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234; (2009) 261 ALR 382 at [112]-[113].

61 See *Melanesian Mission Trust Board v AMP Society* [1997] 1 NZLR 391 at 394-395.

62 See e.g. *Potter v Potter* [2003] 3 NZLR 145 at [32] also *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5 at [64].

63 See *Ansley Prospectus Nominees Unlimited* [2004] 2 NZLR 590 at [36]. See also *Vector Gas* supra; [2010] 2 NZLR 444 discussed below where, although there was no clear ratio, there was a majority against the requirement of ambiguity at [4], [23], [64], with a dissent at [119].

64 See *Zurich Insurance* supra at [62].

65 V K Rajah, "Redrawing the Boundaries of Contractual Interpretation" supra 521, [16].

66 *Zurich Insurance* supra at [50] and [108].

67 See *Godhra Electricity Co Ltd v State of Gujarat* All India Rep 1975 SC 32; (1975) 1 SCC 149 at 50-51; and the summary in *M Prasad, Nampally, Hyderabad v T Bhavan Trust* [2002] INAPHC 329; Bhadbhade supra at [193], [334], [333], [337]; cf the earlier position referred to at fn 16 above.

68 *M Prasad* supra.

69 *Alee Wah Bank Ltd v Ng Kim Lehr* [1979] 1 MLJ 21 at p 22.

70 *Petroleum Nasional Bhd v Kerajaan Negeri Terengann* [2004] 1 MLJ 8 at [28]. See also the narrow definition of surrounding circumstances adopted in *Oriental Bank of Malaysia Ltd v Subramaniam* [1958] 1 MLJ 35.

71 *Investors Compensation Scheme* supra at 913; *Chartbrook* supra at [28]-[42].

72 *Codelfa* supra at 352.

73 *Marble Holding Ltd v Yatin* [2008] HKCFA 29 at [21]-[22].

74 See R G Padia (ed) *Pollock & Mulla's Indian Contract and Specific Reliefs Acts* (13th ed), vol 1, LexisNexis, Butterworths (2006) at p 277.

75 *Zurich Insurance* supra [132(d)].

76 V K Rajah "Redrawing Boundaries of Contractual Interpretation" supra at [20] and subsequent analysis.

77 See *Vector Gas Ltd* supra.

78 See at [122].

79 For example per Mason J in *Codelfa* at 31. See also the authorities discussed in the context of a contract not wholly in writing in *County Securities P/L v Challenger Group Holdings P/L* [2008] NSWCA 193.

80 See *Vector Gas* supra at [14], [13]-[14] and [151].

81 See ibid at [62], [66], [76]-[78] and [83].

82 See ibid at [29]-[32].

[83] *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 538 at 603, 606, 611 and 614-615; and, *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 252, 260, 265-70, and 272-3.

[84] *James Miller* supra at 603.

[85] *Agricultural & Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570 at [35].

[86] See, eg, the range of authorities referred to in *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 315-316; *FAI Insurance Co Ltd v Savoy Plaza Pty Ltd* [1993] 2 VR 343 at 346-351.

[87] *Marble Holding* supra at [21]-[22].

[88] *Petroleum Nasional Bhd* supra at [31]-[33].

[89] See *Zurich Insurance* supra at [132(d)]; V K Rajah "Redrawing Boundaries of Contractual Interpretation" supra at [48].

[90] See *Abdulla Ahmeda v Animerndra Kissen Mitter* All India Rep (1950) SC 15 at [23]; R G Padia (ed) supra at 267-278 and Beeley supra at 137-138.

[91] *Wholesale Distributors Ltd* supra at [52]-[53], [73] and cf [134]-[136], see also [7] and [27].

[92] See, eg, *John v PriceWaterhouseCoopers* [2002] EWCA Civ 899; [2002] 1 WLR 953 at [67]; *ProForce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69 at [40]-[41]; *MacDonald Estates PLC v Regenesis (2005) Dunfermline Ltd* [2007] CSOH 123 at [131]; *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] 1 NZLR 218 at 224; *Lee Fu Wing v Yan Po Ting Paul* [2009] 5 HKLRD 513 at [103].

[93] Gerard McMeel, "Prior Negotiations and Subsequent Conduct: The Next Step Forward for Contractual Interpretation" supra fn 97.

[94] See Catherine Mitchell, "Entire Agreement Clauses: Contracting out of Contextualism" (2006) 22 *Journal of Contract Law* 222 esp at 237-245.

[95] See James Spigelman "Convergence and the Judicial Role: Recent Developments in China" (2003) *Revue Internationale de Droit Comparé* 57; also accessible at www.lawlink.nsw.gov.au/sc under "Speeches".

[96] The objective theory of contract has been affirmed throughout the common law world. See, eg, *Investors Compensation Scheme Ltd* supra at 912; *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 76; *Taylor v Johnson* [1983] HCA 5; (1983) 151 CLR 422 at 429; *Zurich Insurance* supra at [125]-[127] and [132(c)]; *Vector Gas* supra; *Berjaya Times Square* supra at [42]-[43].

[97] See *Monypenny v Monypenny* (1861) 9 HLC 114; 11 ER 671 at 684; *Smith v Lucas* (1881) 18 ChD 531 at 542; *Rickman v Carstairs* (1833) 5 B & Ad 651; 110 ER 931; *Deacon Life & Fire v Gibb* (1962) 15 ER 630; *Drughan v Moore* [1924] AC 53 at 57; *Life Insurance Co of Australia v Phillips* (1925) 36 CLR 60 at 77.

[98] Stefan Vogenauer, "Interpretation of Contracts: Concluding Comparative Observations" in Andrew Burrows and Edwin Peel (eds) *Contract Terms* OUB, Oxford (2007).

[99] See the analysis of Judge Richard Posner in *Bodum USA Inc v La Cafetiére Inc* 621 F.3d 624 (7th Cir, 2010) esp at 635-639.

[100] See Lutz-Christian Wolff "Hong Kong's Conflict of Contract Law: Quo Vardis?" (2010) 6 *Journal of Private International Law* 465 at 478-480.

[101] See Lisa Spagnolo "The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring Vienna Sales Convention for Australian Lawyers" (2009) 10 *Melbourne Journal of International Law* 141.

[102] See Howard Hunter "Singapore Contract Law in an Interdependent World of Commerce: The Example of the Convention on the International Sale of Goods", paper presented at the Singapore Academy of Law Quinquennial Conference, Singapore, February 2011.

[103] See Spagnolo supra at 146.

[104] Eg, Lord Nicholls, see D J Nicholls, "My Kingdom for a Horse: The Meaning of Words" supra.

[105] See Paul Finn "International or Isolation: The Australian *Cul de Sac*? The Case of Contract Law" in Elise Bant & Matthew Harding (eds) *Exploring Private Law* Cambridge University Press, Cambridge (2010) esp at 58-61.

[106] Mo Zhang *Chinese Contract Law: Theory and Practice* Martinus Nijhoff, Leiden (2006) p 130. Bing Ling agrees: see Bing Ling *Contract Law in China* Sweet & Maxwell, Hong Kong (2002) pp 226-227.

[107] See Zhang supra p 127 and Ling supra p 226.

[108] See Ling supra p 228 and cf 227.

[109] Zhang supra p 137 and Ling supra p 227.

[110] See Zhang supra pp 127, 130-131 and Ling supra p 229-231.

[111] *Zhang* supra at p 137.

[112] Zhang supra at p 137.

[113] See *Chartbrook* supra at [36]-[37].

[114] See, eg, A Berg "Thrashing Through the Undergrowth" (2006) 122 *Law Quarterly Review* 354; R Calnan "Construction of Commercial Contracts: A Practitioner's Perspective" in A Burrows & E Peel (eds) *Contract Terms,* Oxford University Press, Oxford (2007) esp p 17. See also my consideration of matters in "From Text to Context" supra pp 336-337.

[115] See, eg, A Kramer "Commonsense Principles of Contract Interpretation (and how we've been using them all along)" (2003) 23 *Oxford Journal of Legal Studies* 173; D McLauchlan "Plain Meaning and Commercial Construction: has Australia adopted the ICS principles?" (2009) 25 *Journal of Contract Law* 7; D McLauchlan "Common Assumptions and Contract Interpretation" (1997) 113 *Law Quarterly Review* 237; D McLauchlan "Contract Interpretation: What is it About?" (2009) 31 *Sydney Law Review* 5; D McLauchlan "Interpretation and Rectification: Lord Hoffmann's Last Stand" [2009] *New Zealand Law Review* 431; D McLauchlan "Deleted Words, Prior Negotiations and Contract Interpretation" (2010) 24 *New Zealand University Law Review* 277; G McMeel "Prior Negotiations and Subsequent Conduct – The Next Step Forward for Contractual Interpretation?" (2003) 119 *Law Quarterly Review* 272; C Mitchell "Contract Interpretation: Pragmatism, Principle and the Prior Negotiations Rule" (2010) 26 *Journal of Contract Law* 134.

[116] A Berg, "Thrashing Through the Undergrowth" supra at 362.

[117] Alan Schwartz & Robert E Scott "Contract Interpretation Redux" (2010) 119 *Yale Law Journal* 926 esp fn 1.

[118] Joseph M Perillo "The Origins of Objective Theory of Contract Formation and Interpretation" (2000) 69 *Fordham Law Review* 427 at 466.

[119] Theodore Eisenberg & Geoffrey P Miller "The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts" (31 March 2008) *New York University Law & Economics Research Paper No 08-13* accessible at papers.ssrn.com/sol3/papers.cfn?abstract_id=1114808 esp at pp 3-5; see also Schwartz & Scott "Contract Interpetation Redux" supra at 956.

[120] For the Australian context see James Allsop "Good Faith and Australian Contract Law. The 2010 Sir Frank Kitto Lecture" *Australian Law Journal* (forthcoming) accessible at www.lawlink.nsw.gov.au/sc under "Speeches".

[121] In the Australian context s 18 of Schedule 2 to the *Competition and Consumer Act* 2010 (Cth) (formerly s 52 of the *Trade Practices Act* 1974 (Cth)) and its progeny.

[122] See, eg, *Chartbrook* supra at [38].

[123] See Spigelman, "From Text to Context" supra at p 335.

[124] See *Homburg Houtimport BV v Agrosin Private Limited* [2003] UKHL 12; [2004] 1 AC 715 at [73].

[125] Ibid at [74]-[77].

[126] See Spigelman, "From Text to Context" supra at p 336.

[127] *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2007] HCA 45; (2007) 233 R 528 at [37]-[38].

[128] *Chartbrook* supra at [40].

[129] See, eg, A Berg "Thrashing Through the Undergrowth" supra at 359.

D S Jones, *Commercial Arbitration in Australia*,
Pyrmont, Thomson Reuters, 2011

FOREWORD

BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

This publication requires no recommendation from a person who has made no contribution to its contents. Even on a cursory examination it bears its quality on its face. It is a comprehensive and detailed analysis of the statutory provisions, case law and practice for domestic commercial arbitration. Its focus is the new, hopefully uniform, Australian legislation, the model for which has already been enacted in New South Wales. This legislation is placed in its historical context, which will assist in its future interpretation and in determining the applicability of prior case law.

The author refers in the first chapter to the address I made at the Opening of Law Term dinner of the Law Society of New South Wales in February 2009[1] in which I advocated the adoption of the UNCITRAL Model Law as the domestic Australian arbitration law. It is appropriate for me to outline some of the background to that address.

It had been clear for some time that the 1984 *Uniform Commercial Arbitration Acts* had become embarrassingly out of date. The significant advances in arbitration practice, that had been heralded by the Arbitration Act 1996 (UK) and further developments, had not been adopted in Australia until now. In March 2002 the Standing Committee of Attorneys General decided that a fundamental review of the uniform legislation should be undertaken. The New South Wales Attorney General's Department undertook this task.

In 2008 I made inquiries as to why nothing had emerged from this process and was given access to the files. It became clear to me that the process had become bogged down, primarily by reason of the fact that because of the significant divergence of views in the arbitral community, a consensus on reform could not be reached.

Seven drafts of an Amendment Bill had been developed between May 2003 and May 2004. An Expert Working Group, comprising a number of senior arbitration and ADR practitioners, was convened to review the drafts. The Expert Working Group met seven times between August 2005 and November 2006 and made a number of

recommendations. Reform did not proceed due to the differing views of the stakeholders.

It became clear to me that the only way to achieve a breakthrough in this context was to stop using the existing legislative scheme as a base line and adopt the UNCITRAL Model Law as the core of the new Australian scheme. It would be subject to appropriate modifications, but the scope for differences of view was considerably reduced.

I raised this proposal with the Attorney General of New South Wales, John Hatzistergos, who in turn raised it with the Commonwealth Attorney-General, Robert McClelland. They both indicated support for the proposition. I raised the issue publicly in the February 2009 Opening of Law Term address. I am very pleased with how this initiative has developed. The creation of a seamless regime between domestic and international commercial law will, I am sure, enhance Australian practice in both.

As a serving judge, it is appropriate that I refer to the criticism that is often directed to the judiciary to the effect that judges are too prone to interfere with the arbitral process and thereby fail to respect the autonomy of the parties reflected in the contract. Sometimes, but not always, those criticisms are valid.

The confidence of the commercial community in arbitration depends, in large measure, on the belief that the process will work as intended. That can only occur if both the personal integrity of the individuals conducting arbitrations and the institutional integrity of the process are assured. The primary role in this respect is served by the process of selecting arbitrators and agreeing on the rules.

Sometimes, however, the exercise of a supervisory jurisdiction by a court is required. Indeed, the very existence of a supervisory jurisdiction assists in maintaining confidence in the system. So long as they restrict intervention to matters of integrity, judges serve the fundamental objectives of the system.

Arbitrations do go wrong, sometimes fundamentally so. Arbitrators can manifest bias. Arbitrators have been known to commit errors of so fundamental a kind as, on any view, to justify intervention by a court. The fundamental commercial concept underlying arbitration agreements is respect for the autonomy of the parties. The parties' choice was not, however, to select arbitration per se. It was to select arbitration by persons and by procedures that manifest a high degree of integrity. Recognition that any system is fallible, and may need to be corrected in retrospect, is not an insight unique to arbitration.

In the jurisdictions with which I am most familiar, the longstanding tension between judges and arbitrators has disappeared. Most judges no longer consider arbitration as some kind of trade rival. Courts now generally exercise their statutory powers with respect to commercial arbitration by a light touch, supervisory jurisdiction directed to maintaining the integrity of the system. Insofar as arbitrators sometimes express dissatisfaction in this respect, such commentary is, or at least should be, diminishing in frequency. This book will play a significant role in ensuring that this development in judicial attitudes is reinforced.

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[1] Now published as "The Challenge of the Global Financial Crisis" *Opening Law Term: Opening of Law Term Speeches Chief Justice James Spigelman AC 1999-2010*, Law Society of New South Wales, Sydney, 2010.

GLOBAL ENGAGEMENT BY AUSTRALIAN LAWYERS

OPENING OF LAW TERM DINNER, 2011

LAW SOCIETY OF NEW SOUTH WALES

ADDRESS BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

SYDNEY, 31 JANUARY 2011

This is the thirteenth Opening of Law Address I have delivered on the first day of the new Law Term. I commence by thanking the Law Society of New South Wales for publishing a book of my first twelve addresses, Sir Anthony Mason for his generosity in writing the Foreword and Sir Gerard Brennan for launching the publication last year. It is, of course, flattering that anyone should think it pertinent to transform one's periodic remarks into so permanent a form. I am honoured by the Law Society complimenting me in this way.

One of the themes of a number of these addresses has been the significance of global engagement by Australian lawyers, including judges. It is that theme which I wish to further develop on this occasion.

During the period of almost thirteen years that I have occupied the office of Chief Justice I have had numerous occasions to witness the expansion of international contact on the part of Australian lawyers, particularly judges but also practitioners and academics. It is clear to me that the process has personally enriched the individuals who have been so involved. More significantly the process has served the broader Australian national interest including, not least, our economic interest.

Our legal system and the quality of our lawyers is one of our national strengths or, to use economist's terminology, a sphere of comparative advantage. Recognition of this strength has been affirmed to me in literally hundreds of conversations that I have had over my period of office with judges and lawyers from many different nations.

Over recent years a month has not gone by in which I was not engaged in some manner or another in this process of global engagement: arranging for judges of the Supreme Court to travel overseas; receiving judicial delegations; attending governmental launches or announcements on international matters; speaking at international legal conferences; launching books with an

international focus at universities; attending the announcement of alliances or mergers between an Australian law firm and an overseas firm; engaging in discussions and decisions about the admission of overseas lawyers in Australia or of Australian lawyers in overseas jurisdictions; negotiating formal memoranda of understanding between the Supreme Court of New South Wales and two overseas courts; writing letters to Attorneys-General and giving speeches to a variety of audiences, both in Australia and overseas, notably in Asia, about dispute resolution involving cross border issues, the promotion of co-operation between courts and the need to develop international arrangements and domestic legislation to reflect the requirements of globalisation.

Tonight is the most recent of more than a dozen speeches in which I have discussed such themes. There are a number of distinct bodies of law that now must be understood in a global context. In this address I will focus on transnational commercial law. I will also focus on our relationships in the Asia/Pacific region.

We have the good fortune to live in the most economically dynamic region in the contemporary world. What used to be referred to as “The Tyranny of Distance” should now probably be

referred to as “The Pleasures of Proximity”, although in certain respects there may be reason to categorise particular matters as “The Perils of Proximity”. No one now doubts the fundamental significance of our engagement with our region. This is as much true of the law as it is of other sectors of our society and of our economy.

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There has been a liberalisation of international trade in services, including legal services, over recent decades and a number of Australian legal institutions are playing a significant role in this respect. I refer, for example, to the International Legal Services Advisory Council (“ILSAC”) which, while focused on the export of Australian legal services, recognises that the process of liberalisation of trade is based on the principle of reciprocity. The benefits of global engagement must be shared or they will not materialise at all.

In Australia a number of our law firms have expanded into international legal services provision, either by means of strategic alliances with overseas firms or by establishing a presence in an overseas market to service a number of jurisdictions on a “hub and

spokes" model. Last year we witnessed two English firms setting up an Australian hub to provide services into Asia. These are welcome and important developments in the process of our global engagement.

I am well aware that many young Australian lawyers find the international dimension of legal work particularly appealing. Many work in such fields overseas, including former staff members of mine employed by global firms in London and Paris. Increasingly, by reason of the visa regimes for young Australians available under the USA Australia Free Trade Agreement, many work in New York.

In London the major law firms enjoy employing Australians for three reasons. One, they are very well trained. Two, they work very hard. And three, they go home. Not all do so. Some develop an international practice that cannot be replicated here. The Australian legal diaspora constitutes an international network from which many other Australians will benefit. However, most return home with a higher level of skill and a global orientation, which will reinforce Australia's global engagement. We are building skills of future strategic significance in this respect.

I witnessed this process at first hand last year at a conference on international investment treaty law held at the University of Sydney Law School. The conference attracted the major academics and practitioners from many nations who work in this specialised area of international arbitration. As one person observed in my presence: "Everyone who matters is here". He wasn't referring to me. It was noticeable that young Australian lawyers have important jobs in key international institutions in this field.

Of particular significance from a long term strategic point of view has been the involvement of Australian lawyers in creating regional institutions which bring together lawyers from throughout Asia. I refer, for example, to LawAsia, which is now well established as a focus for interaction amongst lawyers throughout Asia and which has an Australian based secretariat. As an Australian initiative many years ago, a Judicial Committee was formed under the banner of LawAsia. It has now become the forum where all the Chief Justices of Asia and the Pacific meet, again organised from Australia.

Another example is the development of the Asia Pacific Judicial Reform Network, which has emerged as an important forum for exchange of views amongst judges of the region. Again its secretariat is in Australia.

Similarly, it was the Australian Centre for International Commercial Arbitration ("ACICA") which instigated a regional grouping of all arbitration centres in the region as the Asia-Pacific Regional Arbitration Group ("APRAG").

Three years ago I reported in this address on the NSW Supreme Court's initiation of the first Judicial Seminar on Commercial Litigation which we organised together with the High Court in Hong Kong. The first Seminar was held in Sydney the second in Hong Kong and in March this year the third Seminar will be held in Sydney, again with high-level judicial representation from the major commercial nations of Asia.

These forums for mutually beneficial exchanges of legal expertise thicken Australia's relations in the region and do so, not in a manner involving an arrogant assertion of superiority on our part, which has so often marred our exchanges with our

neighbours in the past, but in a collaborative manner, with full recognition that the traditions, practices and interests of other nations are not only entitled to respect, but have much to teach us and about which, in the national interest as much as in private interests, we need to be much better informed.

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International trade in legal services is not a one-way street. Such services will be provided by lawyers in our regional neighbours to Australian clients. In this respect, solicitors who are members of this Society may not all welcome the process of liberalisation of the market in legal services. You will, however, need to adapt to that development. Our legal system produces lawyers of high quality. There is, however, another relevant factor in commercial decision-making.

One of the themes that I have mentioned in many of these Opening of Law Term addresses has been the need to control the cost of provision of legal services. I have indicated, probably more frequently than many of you wanted to hear, that the legal profession in Australia is in danger of killing the goose. I warned personal injury lawyers about this before the Civil Liability Acts and

the abolition of the Workers Compensation Court. I have warned commercial lawyers more than once.

There is no area of commercial life that has not been subject to significant change with a view to minimising the cost of inputs. The law will not be insulated from such changes. Those responsible for purchasing legal services in commercial corporations are subject to pressure to reduce costs, in the same way as those responsible for any other cost centre.

The outsourcing of legal services through the use of electronic communications is now well established. One source I have consulted lists dozens of websites offering various forms of legal services by electronic means. Many of them are in India, a low cost jurisdiction – with hourly billing rates about one tenth of those in the USA – and with a high level of legal expertise and high level English language capacity.

United States law firms now advertise their capacity to reduce costs by the use of Indian based outsourcing centres. Some US attorneys have said that the reduced costs arising from outsourcing have meant that they can defend unmeritorious claims

on their merits, rather than surrender to what is, in substance, commercial blackmail. I appreciate that their cost structure is higher than ours. It does not appear to me, although I accept that I am not totally in touch with this matter, that Australian law firms make as much use of this form of outsourcing as American lawyers have come to do in recent years. The commercial pressures to follow the Americans in this respect will increase.

I repeat what I said a few years ago when I was informed that for any significant commercial dispute the flagfall for the discovery process was something of the order of $2 million. That level of expenditure is not sustainable. Outsourcing through the use of Indian based support services – such as digital dictation transcription and document management for discovery and due diligence – is an available way of containing such costs.

However, overseas legal services are not limited to administrative matters of this kind. Amongst the web based legal service providers, one of the most successful has been the Indian based firm Pangea3, which offers on line legal services by US and UK lawyers, as well as Indian lawyers, extending beyond legal processes to research, advice and drafting. Late last year

Pangea3 was taken over by Thomson Reuters, one of the world's major financial and legal information providers.

A clear indication of the future in this respect occurred about a year ago when Rio Tinto moved a major part of its contract writing and review team from London to New Delhi, by engaging an outsourcing company. This is high-end legal work, not merely legal process outsourcing.

Whilst such high level legal services have been particularly effective in truly international contexts, such as intellectual property work, they are not now limited to such matters. They will extend to advice on drafting of commercial contracts, even for medium size businesses. Indian lawyers will come to constitute on line competition for all commercial lawyers, not just for the major law firms. Just as outsourcing has changed many other spheres of commerce, legal outsourcing will change the way law is practiced.

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The shift in the global balance of economic power from Europe to Asia, opens opportunities for lawyers throughout the region. In some respects we will be competitors – for example,

Sydney, Hong Kong and Singapore in commercial arbitration. However, we also have common interests. It is difficult for a large federation to match the focus and speed of decision-making of a city state. However, we can do so and we must try.

It is appropriate to acknowledge important policy developments with respect to global engagement. Of particular significance last year was the establishment of a more effective foundation for international commercial arbitration in Australia. The widespread adoption of the interlocked provisions of the UNCITRAL Model Law, the New York Convention on Recognition of Arbitral Awards and the Washington Convention on Investment Disputes is a coherent and successful international regime.

After a process in which the Commonwealth Attorney-General, Robert McClelland, and the New South Wales Attorney General, John Hatzistergos, were co-operatively involved, important steps were taken to extend Australian involvement in this regime by updating the Commonwealth's *International Arbitration Act*, adopting the *UNCITRAL Model Law* as the law for domestic commercial arbitration law in substitution for the out-of-date

uniform *Commercial Arbitration Acts* and the establishment of the Australian International Disputes Centre.

There are formidable difficulties in ensuring that Australia becomes the seat of arbitrations in the Asian region, but at least now we have a fighting chance to maximise our participation in this respect. Australian based practitioners are active participants in this global system. This is significant, even if our local hotels and restaurants are not amongst the commercial beneficiaries of such involvement.

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Over the years I have given a number of addresses on cross border legal dispute resolution, encompassing various aspects of international commercial litigation such as cross border insolvency, choice of court agreements, international commercial arbitration, freezing orders, comparative civil procedure, venue disputation and forum shopping, assistance with evidence and service and the enforcement of judgments. In each of these contexts there are international treaties or model laws, most of which we have adopted, but many of which our neighbours have not adopted. I

have written to Attorneys on these matters advocating various strategies in this respect.

The development of an international reputation that Australian lawyers, including practitioners, judges and academics, are actively engaged with transnational commercial law, and bring to it a cosmopolitan, not a parochial, perspective, is a worthwhile objective. It can only be attained if we adopt a broad based, integrated approach across a wide range of legal and legal institutional issues.

It is now fifteen years since the Australian Law Reform Commission produced its Report No 80 on the subject of "Legal Risk in International Transactions". That Report identified a large number of distinct aspects of our substantive law and procedure which warranted further investigation with a view to enhancing Australia's involvement in international legal transactions. Few of them have been acted upon. Some have only been acted upon recently. More significantly, since that Report, there has been no attempt, at any level, to approach these matters in a coherent and integrated manner, with the exception of the issues which fall within the remit of ILSAC.

A worthwhile comparison is with the work of the Australian Financial Centre Forum, chaired by Mark Johnson, which made a series of recommendations last year in a Report entitled "*Australia as a Financial Centre: Building on our Strengths*". That Report indicated the interrelationship of a multitude of disparate issues which must be acted upon if the government decides to develop a financial centre in this nation. The process of internationalisation, analysed from a financial perspective in that Report, finds ready parallels in the legal system.

Indeed, there is a close connection between a financial centre and the provision of legal services to financial institutions. For example, one of the matters raised in the Johnson Report was the recognition of the significance of Islamic finance as a source of international capital. The focus of attention in the Report is on the taxation treatment of such products. However, there are important legal issues that arise, and changes that are required, if Islamic finance was to emerge as a source of international capital for Australia. The Johnson Report can serve as a model for a similar analysis of global engagement by Australian lawyers in transnational commercial law.

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On a number of occasions, I have advocated the inclusion of commercial dispute resolution issues into negotiations for bilateral free trade agreements. When making this suggestion, I was not concerned with reducing barriers to trade in legal services – important as that issue is. My focus was on broader issues affecting all forms of cross border trade and investment. There are additional and unique risks of, and burdens on, international trade commerce and investment, which do not operate, or operate to a lesser degree, on intra-national trade, commerce and investment.

Such additional transaction costs impede mutually beneficial exchange. Business lawyers have been described as “transaction cost engineers” who add value to commercial relationships by facilitating the resolution of the disputes that inevitably arise in commercial relationships. Other than by means of support for the international commercial arbitration regime, Australian lawyers and policy makers have not, in my opinion, been sufficiently engaged in these respects. There are many matters to which the international arbitration regime does not and cannot apply.

As is the case with all bilateral free trade agreements, such agreements on legal issues are a second best to multilateral or regional arrangements. However, where multilateral arrangements have been attempted over long periods of time, but failed – as in the recognition and enforcement of judgments – bilateral or regional arrangements are the only practical route.

Progress on multilateral discussions – such as updating the processes of communication under the Hague Conventions – is highly desirable and is under consideration. Agreements with regional institutions – such as the European Commission, which is under negotiation or ASEAN, where our free trade agreement was concluded without legal content – can overcome the complexities and inefficiencies of dealing with multiple nations.

It appears that, historically, the Attorney General's Department has never had a seat at the table in the negotiation of bilateral free trade agreements. I think this is regrettable. However, many of these agreements are now set in stone and the negotiation process for others is too well advanced. It now seems that the only way of pursuing these issues now is in the form of bilateral arrangements limited to co-operation for legal

proceedings. Australia does have two such treaties, with Thailand and Korea, but they do not cover many specific issues that require attention.

There are a range of matters where Australia has adopted a cosmopolitan, rather than a parochial, approach, either at common law or by enacting multilateral treaties or model laws, several of which have not been adopted by many nations in Asia. On the basis of the widely accepted principle of reciprocity, such matters could be incorporated in bilateral agreements.

I refer to matters such as:

- Service of legal process;
- Collection of evidence;
- Recognition of and assistance for insolvency regimes including preservation of assets, automatic freezing provisions and recognition of rules for unwinding antecedent transactions;
- Implementation of the Convention on Contracts for the International Sale of Goods;
- Protecting the integrity of legal proceedings by freezing and search orders;

- Proof of foreign law by reference to the foreign court.

The most detailed Australian bilateral arrangement on such matters, and of course the most practically significant relationship, is with New Zealand, reflected in the Treaty on Court Proceedings and Regulatory Enforcement. In terms of comparability of our systems and the sense of mutual trust and understanding, no two nations have as much in common as Australia and New Zealand. The list of matters upon which arrangements have successfully been made between us, could very well serve as a checklist for the purpose of promoting other bilateral arrangements, although by reason of differences in culture and legal systems, such agreement is unlikely to be as comprehensive as that between Australia and New Zealand.

On the other hand, there are rules of Australian common law that are more parochial than those developed in other legal systems, eg, our *forum non conveniens* test. As I have said before, attention must also be given to legislation, such as the *Trade Practices Act* and the *Insurance Contracts Act*, which stand in the way of any international commercial agreement adopting

Australian law as the applicable law or choosing an Australian court as the court to resolve disputes.

If we are to develop a reputation for global engagement, we need to play a proactive role in international issues. In my opinion, high priority should be given to international co-operation to prevent commercial misconduct, especially international commercial fraud. The ease with which funds and documents can be hidden from national enforcement agencies and courts constitutes a major challenge for all commercial nations.

Decades of negotiation for a treaty on enforcement of civil judgments resulted in only limited agreement for enforcement of choice of court agreements. This has the same core justification as the New York Convention on Enforcement of Arbitral Awards and it is worth pursuing in bilateral agreements, even before it comes to be adopted as a multilateral treaty.

Support for domestic legislation on commercial misconduct, particularly fraud, can be pursued on a bilateral or regional basis. Co-operation between police and regulatory agencies has developed. The OECD Financial Action Taskforce system for

control of money laundering has been widely adopted, particularly because of terrorist financing. Much has to be done, however, in support of enforcement by proceedings in court. In this respect, I do not exclude co-operation on criminal as well as civil proceedings, although I recognise that special considerations arise in criminal prosecutions.

A range of desirable reforms can be identified: mutual enforcement of proceeds of crime and assets preservation laws, including judicial co-operation in asset tracing, freezing, search and seizure laws; the collection and admissibility of evidence, including data collected under anti-money laundering laws; the development of extra-territorial arrest warrants and international surveillance orders; international enforcement of confiscation orders.

Australian lawyers can also play a proactive role in the development of the principles of international commercial contract law, including recognition of the international character of the lex mercatoria. This could extend to consideration of co-operative regional arrangements in maritime law, as proposed by Justice Allsop.

Progress on many of these matters will require some degree of harmonisation of domestic legislation by negotiation or implementation of a treaty or model law. That this is possible has already been manifest in a number of contexts, such as cross border insolvency or international sale of goods and, historically, in maritime law.

There are numerous bilateral, regional and multilateral contexts in which Australian lawyers – academics, practitioners, public servants and judges – have been involved on issues of this character. This involvement has, however, been issue specific, without recognition of a broader context. The principal object that I seek to achieve by this address, is to create an awareness of the interconnectedness of our involvement in the full range of matters that impinge on transnational commercial law. Only by active involvement on a broad front can we change the global reputation of the Australian legal system and of Australian lawyers.

The development of an international reputation in these respects is of particular significance for resolving third party disputes. There is an understandable suspicion in transnational

commercial dispute resolution that a party may receive a home town advantage. As the profession in London has found for over a century, both in its Commercial Court and in commercial arbitration, parties who have nothing to do with England will agree to be subject to English law and to submit their disputes to an English court or arbitral body. The reputation for quality and impartiality of Australian lawyers and judges is already high in our region. Our reputation for engagement is what needs work.

The various matters I have discussed may appear disparate and unconnected. Indeed, there are many other such issues which I have not mentioned. All should be understood as having a synergistic relationship. Progress in one context will establish personal connections and expand cross-cultural understanding which become applicable in other contexts. Significantly, such involvement in any context will help alter the reputation of Australian lawyers on the parochial/cosmopolitan spectrum. If we are to achieve the benefits of global engagement, and establish a reputation of being in the forefront of transnational commercial legal development, we have to proceed on multiple tracks, some of which will prove more successful than others.

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We must proceed gradually and pragmatically in a manner well described by the person who played a key role in my personal journey of engagement with our region. In 1974 I was part of Prime Minister Whitlam's delegation to Beijing. This was towards the end of the Cultural Revolution, when the Gang of Four was still in control.

Before our arrival the Chinese Premier, Zhou Enlai, warmly greeted Deng Xiaoping on the reception line at Beijing airport. In hindsight, this was a decisive turning point in Chinese, indeed world, history. Deng had not been seen in public for several years. He was to accompany the Australian delegation throughout our visit.

Deng Xiaoping said, when he started China on its remarkable journey of the last three decades, that the best way to achieve fundamental reform in a multifaceted context was by "crossing the stream feeling for the rocks with your feet". This is the way to negotiate the multiple rocks we will encounter as we attempt to expand Australia's global engagement in legal matters, as in other spheres. If we are to have a future as something more

than a quarry, we must cross that stream, and do so by feeling each of the many rocks along the way.