Accuracy, Utility and Gateways: Justifications(?) for Controlling the Use of Surrounding Circumstances in Contractual Interpretation

NA Tiverios*

Abstract

The status of the principle of contractual interpretation enunciated by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 is uncertain. That principle being that ambiguity is first required when interpreting a contract before recourse can be had to evidence of the particular 'surrounding circumstances' known to the parties at the time of entering into the agreement. In this article, I assess from first principles the desirability of this so-called 'ambiguity gateway'. I draw on developments in the philosophy of language and mind to illustrate how the ambiguity gateway detracts from the interpretive process. I then consider to what extent the ambiguity gateway is justifiable on the basis of making contractual disputes more efficient *in globo* (that is, on the basis of traditional rule-based utilitarianism). I conclude that it is incumbent on those making this utilitarian claim to justify their conclusion that the ambiguity gateway performs an efficiency enhancing function. Given the sceptical arguments presented in this article, it is doubtful that the ambiguity gateway will ever be justified on the basis of rule-based utilitarianism. In the absence of such a justification, the principle should be abolished.

* Senior Lecturer, Law School, University of Western Australia, Australia; Barrister and Solicitor, Supreme Court of the Australian Capital Territory and High Court of Australia. Email: nicholas.tiverios@uwa.edu.au; ORCID iD: https://orcid.org/0000-0002-9067-0686

This article benefited from comments from participants at the University College London New Work in Obligations Conference, presenting at the Faculty of Law, University of New South Wales ('UNSW') and from the students in my Advanced Contract Law course at UNSW (2020). I would like to thank the anonymous reviewers and editors for their comments. All errors are my own.

Please cite this article as:

NA Tiverios, 'Accuracy, Utility and Gateways: Justifications(?) for Controlling the Use of Surrounding Circumstances in Contractual Interpretation' (2021) 43(4) *Sydney Law Review* 547.

I Introduction

My purpose in this article is to consider to what extent the principle of contractual interpretation set out by the High Court of Australia in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[1] is justifiable. That principle being that ambiguity is first required when interpreting a contract before recourse can be had to evidence of the particular 'surrounding circumstances' known to the parties at the time of entering into the agreement. This principle has become known colloquially by Australian lawyers as the 'ambiguity gateway'.[2] I will adopt this moniker here. The status of the ambiguity gateway remains contentious. A significant amount of ink has been spilt on this issue by academics,[3] practitioners,[4] and within the growing corpus of case law itself.[5] The principles applicable remain uncertain and they seemingly differ between the various intermediate appellate courts in Australia.

---

1 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 352 (Mason J, Stephen J agreeing at 344, Wilson J agreeing at 392).

2 See, eg, Justice Kenneth Martin, 'Contractual Construction: Surrounding Circumstances and the Ambiguity Gateway' (2013) 37(2) *Australian Bar Review* 118; Justice Robert McDougall, 'Construction of Contracts: The High Court's Approach' (2016) 41(2) *Australian Bar Review* 103.

3 See, eg, David McLauchlan, 'Contractual Interpretation: What Is It About?' (2009) 31(1) *Sydney Law Review* 5 ('Contractual Interpretation: What Is It About?'); David McLauchlan, 'Plain Meaning and Commercial Construction: Has Australia Adopted the *ICS* Principles?' (2009) 25(1) *Journal of Contract Law* 7; John Carter, 'Context and Literalism in Construction' (2014) 31(2) *Journal of Contract Law* 100; Robert Stevens, 'The Meaning of Words and the Intentions of Persons' in James Edelman, Simone Degeling and James Goudkamp (eds), *Contract in Commercial Law* (Lawbook Co, 2016) 167; John Eldridge, 'Surrounding Circumstances in Contractual Interpretation: Where Are We Now?' (2018) 32(3) *Commercial Law Quarterly* 3.

4 See, eg, Martin (n 2); McDougall (n 2); Chief Justice James Spigelman, 'From Text to Context: Contemporary Contractual Interpretation' (2007) 81(5) *Australian Law Journal* 322; Sir Anthony Mason, 'Opening Address' (2009) 25(1) *Journal of Contract Law* 1; Derek Wong and Brent Michael, '*Western Export Services v Jireh International*: Ambiguity as the Gateway to Surrounding Circumstances?' (2012) 86(1) *Australian Law Journal* 57; Kevin Lindgren, 'The Ambiguity of Ambiguity in the Construction of Contracts' (2014) 38(2) *Australian Bar Review* 153; Thomas Prince, 'Defending Orthodoxy: *Codelfa* and Ambiguity' (2015) 89(7) *Australian Law Journal* 491 ('Defending Orthodoxy: *Codelfa* and Ambiguity'); Daniel Reynolds, 'Construction of Contracts after *Mount Bruce Mining v Wright Prospecting*' (2016) 90(3) *Australian Law Journal* 190; Thomas Prince, 'Still Defending Orthodoxy: The New Front in the War on *Codelfa*' (2018) 46(1–2) *Australian Bar Review* 156.

5 A useful summary of this controversy and a more than sufficient collection of authorities are provided in *Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd* (2019) 1 QR 392, 427–9 [118]–[121] (Jackson J) ('*Aurizon Network*').

The purpose of this article is, however, somewhat distinct from others. It is to set out an underlying framework for assessing whether the ambiguity gateway is justifiable from first principles. This is achieved in two steps. The first step is to identify the most persuasive arguments in favour of maintaining the ambiguity gateway. I argue that the most common argument in favour of the gateway in Anglo-Australian jurisdictions is derived from traditional rule-based utilitarianism: that limiting the prescribed contextual indicators in contractual interpretation cases creates more 'benefits' than 'costs' by making the resolution of disputes more efficient *in globo* albeit at the expense of contextual interpretive accuracy in *particular* cases. This argument is pitched primarily at a level that transcends a particular interpretive dispute between A and B and considers the legal system as a whole and the consequences of the ambiguity gateway.[6] On the other hand, those in favour of removing the ambiguity gateway correctly point out that any utterance or communication can have a fundamentally different meaning when isolated from the context in which it was made. As such, those who wish to remove the ambiguity gateway are more concerned with imbuing the contractual rights, duties, powers, liabilities, privileges and immunities between A and B with the greatest level of interpretive accuracy. After all, such jural relations are what the parties to the contract assented to. The important point is that the arguments for retaining and abolishing the ambiguity gateway do not operate at the same conceptual level. It is for this reason that it is all too easy for those starting from such different premises to 'talk past' each other when debating this issue.

The second step is to consider to what extent the ambiguity gateway is 'fit for purpose'. That is, although the gateway has a clear justification, is the rule nonetheless *designed* in a manner that is consistent with its underlying rationale? Given that there is often more than one way that a more abstract and general moral principle can be translated into a directly applicable legal rule, it is possible that the ambiguity gateway is not designed in a manner that properly achieves the efficiency gains sought. Indeed, as I seek to demonstrate in this article, if the purpose of the gateway is to make the resolution of contractual interpretation disputes more efficient, then it can be seriously questioned whether the rule is fit for such a purpose. As such, in this article I do not provide a conclusive view on the ambiguity gateway controversy. Rather, I provide a framework for assessing the desirability of the principle and, in doing so, draw heavily from the experience of other Commonwealth jurisdictions. This is done in three parts. In Part II of this article I set out the current state of the law in Australia. In Part III I set out the normative arguments in favour of both abolishing and maintaining the ambiguity gateway (that is, 'step one' and some of 'step two' above). Then in Part IV I consider potential alternative approaches to the ambiguity gateway — that is, the rest of step two above: what other approaches could be adopted in Australia in order adequately to balance the competing considerations of interpretive accuracy and economic efficiency.

---

[6] This is because an economic analysis of a particular legal issue takes an *ex-ante* perspective. From this perspective desirability of a rule will be evaluated on the basis of the consequences of having the rule for future actors. This stands in contrast to non-consequentialist theories that are concerned with the existence of a priori rights.

II Principles — Where is Australia Now?

The principle set out in *Codelfa* is that ambiguity is required when interpreting a contract *before* recourse can be had to extrinsic evidence as to the particular surrounding circumstances known to the parties at the time of entry into the agreement (being the 'ambiguity gateway' introduced above).[7] These surrounding circumstances are understood here as those objective facts that: (i) were reasonably known to both contracting parties at the time the contract was entered into; and (ii) provide relevant evidence of the background and context against which the parties formed the contract. Such evidence could feasibly be used to assist in the interpretative processes of identifying a meaning of a descriptive term, explaining the purpose of the transaction,[8] or otherwise shedding light on the most likely meaning of an otherwise ambiguous term.[9] As Mason J (with whom Stephen and Wilson JJ agreed) said in *Codelfa*:

> The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is *ambiguous or susceptible of more than one meaning*. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, *if the facts are notorious knowledge of them will be presumed*.[10]

The approach espoused by Mason J has since been reaffirmed by the High Court of Australia on several occasions,[11] most notably in *Western Export Services Inc v Jireh International Pty Ltd*.[12] In *Jireh*, the Special Leave Panel of Gummow, Heydon and Bell JJ took the unusual step, when refusing special leave to appeal, to state that:

> Acceptance of the applicant's submission, clearly would require reconsideration by this Court of what was said in *Codelfa Construction Pty*

---

7 For what constitutes ambiguity see below n 95 and accompanying text. The position I take here is that *Codelfa* (n 1) should not be understood as an extension of the parol evidence rule. Rather, the parol evidence rule is concerned with what documents constitutes the parties' agreement and *not* what evidence could be relevant and probative in discerning the meaning of that agreement. In this connection, compare: Nick Seddon and Rick Bigwood, *Cheshire and Fifoot Law of Contract* (LexisNexis, 11th ed, 2017) 424–5 [10.4] with Edwin Peel and Guenter Treitel, *The Law of Contract* (Sweet & Maxwell, 14th ed, 2015) 233–4 [6-014].

8 Such evidence may include the genesis of the transaction, the background, the context and the market in which the parties are operating: *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 160 [8] (Gleeson CJ) ('*International Air Transport Association*').

9 See, eg, *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423, 429 (Stephen, Mason and Jacobs JJ). See also McDougall (n 2) 105.

10 *Codelfa* (n 1) 352 (emphasis added). For a historical overview of this approach see Prince, 'Defending Orthodoxy: *Codelfa* and Ambiguity' (n 4), which tracks this approach from the decision in *Shore v Wilson* (1842) 9 Cl & F 355; 8 ER 450.

11 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, 62–3 [39] ('*Royal Botanic Gardens and Domain Trust*'); *International Air Transport Association* (n 8) 160 [8]; *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1, 2 [2], 3 [6] ('*Jireh*'); *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [48]. See also *Rinehart v Welker* (2012) 95 NSWLR 221, 246 [115]–[116]; *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184, [52].

12 *Jireh* (n 11). Although reasons for the resolution of a special leave to appeal application are not binding on lower courts.

> *Ltd v State Rail Authority of NSW* [(1982) 149 CLR 337] by Mason J, with the concurrence of Stephen J and Wilson J, to be the 'true rule' as to the admission of evidence of surrounding circumstances. Until this Court embarks upon that exercise and disapproves or revises what was said in *Codelfa*, intermediate appellate courts are bound to follow that precedent. The same is true of primary judges, notwithstanding what may appear to have been said by intermediate appellate courts.
>
> The position of *Codelfa*, as a binding authority, was made clear in the joint reasons of five Justices in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [(2002) 240 CLR 45] and it should not have been necessary to reiterate the point here.[13]

Notwithstanding the resolute statement in *Jireh* concerning the correctness of the ambiguity gateway, the controversy concerning the extent to which contextual surrounding circumstances are available, in the absence of ambiguity, to assist in the process of contractual interpretation remains alive. This is because intermediate appellate courts[14] have read certain decisions of the High Court of Australia[15] as implicitly overruling the ambiguity gateway. The principal reason for this reading of High Court authorities is that the High Court appears willing to consider non-notorious background facts to resolve contractual interpretation disputes absent a finding of ambiguity. For example, the High Court has used the contextual clue that a promisee under a long-term commodity supply agreement knew that the promisor had other customers when interpreting a 'best endeavours' clause.[16] On this view there is no 'ambiguity gateway' rule where justices of the High Court implicitly say, 'ambiguity gateway for thee but not for me'. This is because the ratio decidendi of any decision where the High Court fails to apply such a rule will also bind lower courts. However, not all legal commentators,[17] nor all intermediate appellate courts share the view that the High Court has implicitly overruled the ambiguity gateway.[18] The controversy in this area remains alive, with differently constituted intermediate

---

13 *Jireh* (n 11) 2–3 [4]–[5].

14 *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633, 653 [71]–[73] ('*Mainteck*'); *Stratton Finance Pty Ltd v Webb* (2014) 314 ALR 166, 173–4 [36]–[41] ('*Stratton Finance*'); *Newey v Westpac Banking Corporation* [2014] NSWCA 319, [89] ('*Newey*'); *WIN Corporation Pty Ltd v Nine Network Australia Pty Ltd* (2016) 341 ALR 467, 478 [59]; *Cherry v Steele-Park* (2017) 96 NSWLR 548, 566 [76] ('*Cherry*'); *Promoseven Pty Ltd v Markey* (2015) 104 ACSR 384, 408–9 [98]–[99].

15 See especially *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656–7 [35] ('*Woodside*'). See also the authorities collected in *Stratton Finance* (n 14) 173 [37] and *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006) 156 FCR 1, 10–13 [45]–[56]; 28 [122]; 48 [238]; and the discussion in Richard Calnan, *Principles of Contractual Interpretation* (Oxford University Press, 2013) 47.

16 *Woodside* (n 15) 656–7 [35].

17 See Prince, 'Defending Orthodoxy: *Codelfa* and Ambiguity' (n 4) 499; JD Heydon, 'Comment on Lord Hoffmann's "Interpretation of Contracts"' in John Sackar and Thomas Prince (eds), *Heydon: Selected Speeches and Papers* (Federation Press, 2018) 710, 718.

18 For authorities that are less sanguine that the ambiguity gateway has been abolished, see, eg, *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* (2014) 48 WAR 261, 271 [45]; 298–9 [212]–[217] ('*Technomin Australia*'); *Watson v Scott* [2016] 2 Qd R 484, 495 [30]; *Apple and Pear Australia Ltd v Pink Lady America LLC* (2016) 343 ALR 112, 155 [137]–[138], 178–9 [231]–[232]; *Siemens Gamesa Renewable Energy Pty Ltd v Bulgana Wind Farm Pty Ltd* [2020] VSC 126, [99] ('*Siemens Gamesa*').

appellate courts taking different views on the issue.[19] It is important to observe that the issue of the desirability of the ambiguity gateway ultimately will not be resolved by narrow arguments as to whether the High Court has implicitly overruled itself. Rather, the issue will need to be resolved by squarely addressing the potential justifications for the ambiguity gateway and, in turn, assessing to what extent the gateway detracts from the process of contractual interpretation.[20]

Removing the ambiguity gateway would align Australian law closely with the more liberal approach adopted in England and Wales as enunciated by Lord Hoffmann in the 'celebrated'[21] decision in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.[22] That approach being that contractual language should be read in the first instance against its full set of background facts (absent ambiguity). Provided the facts are reasonably available to the parties and are relevant to establishing how a reasonable person would understand what the parties intended by the language used. Although commentators and judges have noted a recent emerging judicial trend in England and Wales away from the principles enunciated in *Investors Compensation Scheme* and towards a greater focus on contractual text,[23] that trend should not be overstated, as Lord Hoffmann's principles are yet to be overruled.[24] A similar approach to that enunciated by Lord Hoffmann in *Investors Compensation Scheme* has been adopted in many other Commonwealth jurisdictions.[25] For example, an equivalent principle has been endorsed by the Supreme Court of Canada,[26] the Supreme Court of New Zealand,[27] the Court of

---

19 See *Aurizon Network* (n 5).

20 See also James Edelman, 'The Interpretation of Written Contracts' in Charles Mitchell and Stephen Watterson (eds), *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (Hart Publishing, 2020) 243.

21 See, eg, Gerard McMeel, 'Foucault's Pendulum: Text, Context and Good Faith in Contract Law' (2017) 70(1) *Current Legal Problems* 365, 368. See also Stevens (n 3) 167, 174–8; Calnan (n 15) 45.

22 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–13 ('*Investors Compensation Scheme*').

23 See McMeel (n 21); and Lord Jonathan Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' (2017) 17(2) *Oxford University Commonwealth Law Journal* 301, for example, noting decisions such as *Arnold v Britton* [2016] AC 1619; *Krys v KBC Partners* [2015] UKPC 46; *Marks & Spencer plc v BNP Paribas Securities Services Trust Co* [2016] AC 742. A useful summary of many of these authorities can be found in Ryan Catterwell 'Striking a Balance in Contract Interpretation: The Primacy of the Text' (2019) 23(1) *Edinburgh Law Review* 52.

24 Sumption (n 23). For a discussion of the disagreement between Lord Sumption and Lord Hoffmann, see Ewan McKendrick, 'Interpretation' in William Day and Sarah Worthington (eds) *Challenging Private Law: Lord Sumption on the Supreme Court* (Hart Publishing, 2020) 3.

25 On Australia becoming out of step with the rest of the common law world, see *Mainteck* (n 14) 655–6 [84].

26 See, eg, *Sattva Capital Corp v Creston Moly Corp* [2014] 2 SCR 633, 656–8 [46]–[48]; *Uniprix inc v Gestion Gosselin et Bérubé inc* [2017] 2 SCR 59, 79–82 [35]–[41].

27 See, eg, *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444, 457–9 [19]–[22]; *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2015] 1 NZLR 432, 453–5 [60]–[63]. Although note subsequent pronouncements of the same Court, which place somewhat more emphasis on the plain meaning of the communicative act creating the contract: *Lakes International Golf Management Ltd v Vincent* [2017] 1 NZLR 935, 944–6 [23]–[30].

Appeal of the Republic of Singapore[28] and the Hong Kong Court of Final Appeal.[29] Of course, being an outlier does not, in and of itself, demonstrate that the law in Australia has taken a wrong turn. After all, the group can all too often get something wrong and a minority of one can be right. Indeed, whether Australia is in a minority depends upon the sample selected. If the eye is cast beyond Commonwealth jurisdictions, for example, it will be observed that most states in the United States of America ('US') have maintained a rule similar to the ambiguity gateway.[30] The salient point to take from the discussion above provides the relevant context for a point of law that is ripe soon to be considered by the High Court of Australia:[31] whether recourse to the surrounding circumstances accessible to the parties at the time of entry into the contract should be permissible absent ambiguity.

III Justifications — Do You Prefer Accuracy or Utility?

A *Sentence Meaning, Speaker Meaning and Objectivity in Interpretation*

The central reason why ambiguity should not be required before having recourse to relevant and probative contractual context is that it detracts from the interpretive process. To understand why this is so, some space needs to be dedicated to painting a brief picture of how language and communication operate. During the 20th century, developments in the philosophy of language and mind resulted in an understanding of human communication that depends on external 'rules' to divine the intentions of an author of an utterance. This understanding of human communication draws a

---

[28] See, eg, *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029, 1087–92 [114]–[124]; *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193, 224–6 [72]–[74] ('*Sembcorp Marine*'). The decision in *Sembcorp Marine* is discussed in more detail in the text accompanying n 119 below.

[29] See, eg, *Fully Profit (Asia) Ltd v Secretary for Justice* (2013) 16 HKCFAR 351, 361 [15].

[30] Those US states favouring the ambiguity gateway being often termed 'Willistonian' after Samuel Williston and those favouring a wider approach to context often termed 'Corbinian' after Arthur Corbin: see Brian H Bix, *Contract Law: Rules, Theory, and Context* (Cambridge University Press, 2012) 61. See also Schwartz and Scott, who note '[n]ine states, joined by the Uniform Commercial Code for sales cases (UCC) and the Restatement (Second) of Contracts, have adopted a contextualist [ie, one with no ambiguity gateway] … interpretative regime': Alan Schwartz and Robert E Scott, *Contract Interpretation Redux* (2010) 119(5) *Yale Law Journal* 926, 928. New York is the most significant commercial jurisdiction that preserves the ambiguity gateway, whereas California is the most significant commercial jurisdiction to abolish the gateway.

[31] Being a standard reason why special leave to appeal to the High Court of Australia is granted: see, eg, *Judiciary Act 1903* (Cth), s 35A; Justice Michael Kirby, 'Maximising Special Leave Performance in the High Court of Australia' (2007) 30(3) *University of New South Wales Law Journal* 731, 743.

formal distinction between the 'speaker'[32] and the 'sentence or conventional'[33] meaning of an utterance.[34]

Consider the following infamous newspaper extract: 'Yoko Ono will talk about her husband John Lennon who was killed in an interview with Barbara Walters'.[35] The communication is capable of bearing at least two meanings: (i) a narrow 'sentence meaning' whereby the text informs the reader that Barbara killed John (or at the very least John was killed whilst Barbara was interviewing him); or (ii) a more contextual 'speaker' meaning whereby the journalist is 'most likely' intending to inform the reader that Yoko will be discussing the murder of John in an interview with Barbara. Thus, what is immediately evident is that the recognition of notorious background context (for example, that Barbara is a high profile broadcast journalist) and the recipients' powers of rationality in the interpretive process give the text a meaning different from its sentence meaning. This is because human beings do not communicate merely by virtue of the 'sentence meaning' of an utterance alone: that is, by a process solely of decoding a message in light of specific narrow customary rules.

Rather, communication involves a process that is inferential; it involves inductive and not deductive reasoning.[36] The central point of interpretation is to infer

---

[32] While the speaker meaning and sentence meaning of words will often coincide, they can come apart. For example, I am at a café and order a Vienna coffee. I am, however, unaware that a Vienna coffee contains cream. I mistakenly believe that I am ordering a coffee without cream. In this example, I have misused a word, I intended Vienna coffee to mean a coffee without cream and I also intended to be taken by the barista to have intended so (although my usage of the word Vienna coffee will not, without more, be understood as such by the barista as my usage was unconventional). In this example, my mistaken reference to Vienna coffee can be termed the 'speaker meaning' to be ascribed to the word. On speaker meaning, see David Goddard, 'The Myth of Subjectivity' (1987) 7(3) *Legal Studies* 263, 265–6; Richard Ekins and Jeffery Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39, 47; Robin Kar and Margaret Radin, 'Pseudo-Contract and Shared Meaning Analysis' (2019) 132(4) *Harvard Law Review* 1135, 1145–6.

[33] The sentence meaning being the meaning ascribed to an utterance by use of a conventional standard. Searle notes that it is 'the creation of conventional devices for performing acts of speaker meaning, which gives us something approaching sentence meaning, where sentence meaning is the standing possibility of speaker meaning. Sentence meaning is conventionalized.': John R Searle, 'What is Language? Some Preliminary Remarks' (2009) 11(1) *Ethics & Politics* 173, 193 ('What is Language?').

[34] In this article, I use the term 'utterance' to mean 'communicative act', for example, writing also constitutes an 'utterance'.

[35] The example is taken from Steven Pinker, *The Language Instinct: How the Mind Creates Language* (Penguin Science, 1994) 102.

[36] Ludwig Wittgenstein, *Philosophical Investigations* (Wiley-Blackwell, 4th ed, 2009) 86–111 [198]–[315]; John L Austin, *How To Do Things with Words* (Clarendon Press, 1962); John L Austin, 'Performative Utterances' in John L Austin, *Philosophical Papers* (Oxford University Press, 2nd ed, 1970) 233; Saul Kripke, 'Speaker's Reference and Semantic Reference' (1977) 2(1) *Midwest Studies in Philosophy* 255; John R Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge University Press, 1979); Saul Kripke, *Wittgenstein on Rules and Private Language* (Blackwell Publishing, 1982); Paul Grice, *Studies in the Way of Words* (Harvard University Press, 1989); Michael Dummett, *The Seas of Language* (Clarendon University Press, 1993) 97–105; John R Searle, *Mind, Language and Society: Philosophy in the Real World* (Basic Books, 1999) 139–45, especially at 144–5:

> Grice saw correctly that when we communicate to people, we succeed in producing understanding in them by getting them to recognize our intention to produce that understanding. Communication is peculiar among human actions in that we succeed in producing an intended effect on the hearer by getting the hearer to recognize the intention to produce that very effect.

the author's most probable intention from the communicative act. As such, intentionality provides a guide in this process.[37] A recipient of an utterance will consider what it means by inductively balancing the competing rules and principles through which intentionality has been funnelled; namely, the public meaning of the specific words the author has deployed and a range of contextual factors — for example, the assumed existence of shared background information, a recipient's general powers of reasoning and rationality, and that parties to a conversation intend to communicate meaningfully. Kripke has made this point in the following terms:

> The notion of what words can mean, in the language, is semantical: it is given by the conventions of our language. What they mean, on a given occasion, is determined, on a given occasion, by these conventions, *together with the intentions of the speaker and various contextual features.* Finally what the speaker meant, on a given occasion, in saying certain words, derives from various *further special intentions of the speaker, together with various general principles, applicable to all human languages regardless of their special conventions*.[38]

Consider an example where Dixon asks Frankfurter to go to the 'Eagle & Child Public House tonight for a meal at 6pm'. Frankfurter responds: 'I have a train to catch'. Frankfurter's response is generally understood to mean that he is rejecting Dixon's proposal, but this cannot be explained by virtue of the narrow sentence meaning of the text or utterance alone. The reasoning deployed to take Frankfurter's utterance as a rejection of Dixon's proposal appears to be that:

> (i) it is a rule of interpretation that, unless there is evidence to the contrary, the recipient (Dixon) assumes that the author (Frankfurter) is attempting to communicate meaningfully and cooperate in the conversation (that is, a starting rule that Frankfurter is not speaking nonsense);[39]
>
> (ii) from Dixon's perspective it appears that Frankfurter must have meant something more than the literal meaning of what he said as the literal meaning of the words neither expressly reject nor accept the proposal to go to the pub;
>
> (iii) Dixon (and the average person for that matter) understands certain notorious background 'contextual' information (such as that one cannot be in two places at once, a train will run on limited schedules and tickets can be non-refundable etc);
>
> (iv) given the content of (iii), then the rational person[40] in Dixon's position will realise that it is unlikely that Frankfurter can both: (a) attend the pub; and (b) catch his train;

> … I am trying to tell someone that it is raining, I succeed in telling them as soon as they recognize that I am trying to tell them.

37 I will put to one side the issue of how corporate bodies have intentions. Others have grappled aptly with this issue. On the collective intentions of non-natural persons (eg corporations and legislatures) and collective intentionality in general, see Ekins and Goldsworthy (n 32) 47; Ryan Catterwell, *A Unified Approach to Contract Interpretation* (Hart Publishing, 2020) 92 [4-20].

38 Kripke, 'Speaker's Reference and Semantic Reference' (n 36) 263 (emphasis added).

39 See also Kar and Radin (n 32) 1147–50.

40 Thus, Lord Hoffmann was correct to observe in *Investors Compensation Scheme* (n 22) 913: 'Many people, including politicians, celebrities and Mrs Malaprop, mangle meanings and syntax but

> (v) given that to accept a proposal one must be able to perform his side of whatever the proposal is, as a matter of basic inductive reasoning[41] it appears to be most probable that Frankfurter is rejecting (politely, by saying so indirectly) Dixon's proposal as he has limited capacity to attend the pub and his communication, which was made in direct response to a proposal, likely has a purpose.[42]
>
> Contextual and purposive reasoning is standard in both Australian and English contractual interpretation jurisprudence.[43]

The critical reader at this point may respond along these lines: 'it is fine that you have identified a particular development in the philosophy of language and mind between sentence meaning and speaker meaning, but how does this impact on what lawyers do'? This is a fair critique; it can often be doubted whether specialised philosophical arguments reflect the messy way in which the judge-made law develops in both a diffuse and incremental manner.[44] My response, however, is that the distinction drawn above between the sentence and speaker meaning of an utterance is crucial for understanding Lord Hoffmann's speech in *Investors Compensation Scheme*. As his Lordship said:

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words [that is, the sentence meaning in the sense used above] is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.[45]

The point is that the general law does not fix upon the sentence meaning of a contract (that is, the narrow meaning of the words read in artificial isolation). Rather, it asks

---

nevertheless communicate tolerably clearly what they are using the words to mean. If anyone is doing violence to natural meanings, it is they rather than their listener.'

41 Dummett (n 36) 104 (emphasis in original): 'Any adequate philosophical account of language must describe it as a rational activity on the part of creatures to whom can be ascribed *intention* and *purpose*.'

42 This idea has been expanded on by relevance theory, which argues that the meaning of express linguistic expressions is generally underdetermined such that there is a significant gap between the intentions of the speaker and narrow literal meaning of an utterance. See, eg, Deirdre Wilson, 'Relevance Theory' in Yan Huang (ed) *The Oxford Handbook of Pragmatics* (Oxford University Press, 2017) 79, 85–9; Robyn Carston, *Thoughts and Utterances: The Pragmatics of Explicit Communication* (Blackwell Publishing, 2002) 83.

43 There are plenty of examples, but four illustrative examples are *Royal Botanic Gardens and Domain Trust* (n 11) 62 [36]; *Woodside* (n 15) 660–2 [44]–[50]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544, 551 [16], 555 [27]; *Thorney Park Golf v Myers Catering Ltd* [2015] EWCA Civ 19, [26] ('*Thorney Park Golf*').

44 See, eg, Nicholas J McBride, *The Humanity of Private Law: Part I: Explanation* (Hart Publishing, 2018) 27–28, 261, 264–5.

45 *Investors Compensation Scheme* (n 22) 913. See also *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, 689 [64] (Lord Hoffmann). On Lord Hoffmann's use of philosophy of language, see Paul S Davies, 'The Meaning of Commercial Contracts' in Paul S Davies and Justine Pila (eds) *The Jurisprudence of Lord Hoffmann* (Hart Publishing, 2017) 215.

the following question: what the reasonable recipient of a legally significant communicative act would infer to be the author's most probable intention from that communicative act. As such, intentionality provides a guide in this process. The court arrives at the 'best answer' to this question by inductively balancing competing principles through which intentionality has been funnelled; namely, the public meaning of the specific words the author has deployed and a range of permissible contextual factors.[46] Context can, at its broadest, include: notorious background facts; prior negotiations and preparatory works; the purpose and internal logic of a written instrument; common industry and institutional practice; the parties' powers of rationality; and even shared normative understandings.[47] Although, there is a legitimate debate to be had concerning when context should yield to considerations of legal certainty and efficiency.[48]

On this approach, the general law still cares about speaker intentionality, but it does so only objectively. The fact that the principles of contractual interpretation care about intentionality is evident in the following basal principles:

> (i) courts care about more than the literal meaning of the words of a contract read in artificial isolation (that is, sentence meaning in the sense used in this article does not govern the modern approach to contractual interpretation);
>
> (ii) courts will consider the purpose and object of the transaction (that is, the words of a contract do not have an abstract purpose, rather only parties to the contract have such a purpose);
>
> (iii) contracts are to be interpreted in light of the local context within the document (that is, the words of a contract do not have a context in and of themselves, rather the local context within the contract is relevant as the parties are taken to have intended to create, where possible, an internally logical and coherent agreement);
>
> (iv) contracts are to be interpreted in light of commercial common sense (that is, again there is nothing 'commercial' about the sentence meaning of words, rather a commercial interpretation is given to a contract where possible because viability is more likely to reflect what the author(s) intended); and
>
> (v) a large number of maxims of contractual interpretation (and interpretation more generally) can be understood only on the basis of intentionality.

Consider the following three maxims of contractual interpretation. First, the maxim *ejusdem generis* (of the same kind) turns on an author's most likely intention. If I say at the end of a lecture that my next lecture will be on 'the sun, the moon, the planets in our solar system, and other tremendous bodies' you infer that I do not intend 'other tremendous bodies' to include, for example, a detailed analysis of

---

[46] For good lists of contextual factors and related rules of interpretation see, eg, Stephen Smith, *Contract Theory* (Oxford University Press, 2004) 274; Sir George Leggatt, 'Making Sense of Contracts: the Rational Choice Theory' (2015) 131 (July) *Law Quarterly Review* 454, 468–70; Catterwell (n 37) 123–32 [5-31]–[5-59].

[47] Perhaps best reflected in a principle such as the *contra proferentem* rule.

[48] In this connection, see Schwartz and Scott arguing in favour of a more *Codelfa*-style approach to contractual interpretation that limits the use of extrinsic material in the United States of America ('US') on the basis of utility *albeit at the expense of interpretive accuracy*: Schwartz and Scott (n 30) 930.

catwalk models.[49] This is because you infer that I most likely intend to refer to *celestial* bodies given the context in which I chose to use the words and that my lecture is more likely than not to have a coherent theme. Second, the maxim *noscitur a sociis* (it is known by its associates) is explained by an author's most likely intention. If I say you should use a 'case or a steel canister to carry explosives', you will infer that my general reference to 'case' needs to be read in light of my specific reference to 'steel canister'. You reach this conclusion by inferring that I do not mean 'case' to, for example, include a carrying case made of cardboard but rather a 'case' with similar characteristics to the steel canister given the purpose of my communication is to convey safety advice.[50] Third, the maxim *expressio unius est exclusio alterius* (the expression of one is the exclusion of others) is based on an author's presumed intentions. That is, an express inclusion of one or more things of a particular type in a communicative act necessarily implies an intention to exclude other things of that type. For example, if I agree to wash your windows this weekend and provide a detailed list of the services that I will render, then it can be inferred that I intended the services *not* on the list (say, for example, washing the windows of your car) to be excluded from our contract. This is for a simple reason based on presumed intentionality: why else would I have gone to such effort to list the particular services in the first place.[51]

The next fair critique of the argument that I have presented thus far would be: if the principles of contractual interpretation took intentionality seriously why is the process of interpretation objective and not subjective? That is, legal interpretation differs from day-to-day interpretation in that the former is objective and the latter subjective. My response would be as follows: where a party to a contract uses conventional standards (that is, the sentence meaning of an utterance taken with the standard contextual 'rules' or 'clues' to discern speaker meaning) to effect a promise with a counterparty, the promisor cannot now resile from the objective meaning attributed to her utterance by application of those conventions without damaging the shared legal institutions that those standards create. In short, there exist public conventions as to how the promisor can express her intentions.[52] The use of such conventions creates expectations in others.[53] If one is to take the benefits of such conventions in order to enhance one's own autonomy to create contracts, then one

---

49 See, eg, *Powell v Kempton Park Racecourse Co Ltd* [1899] AC 143.

50 See, eg, *Foster v Diphwys Casson Slate Co* (1887) 18 QBD 428.

51 See, eg, *North Stafford Steel, Iron and Coal Co (Burslem) Ltd v Ward* (1868) LR 3 Exch 172.

52 See Goddard (n 32) 268–71.

53 I have defended this position in more detail elsewhere: NA Tiverios, 'A Uniform Hermeneutic Thesis: Objectivity and the High Court of Australia's Approach to Interpretation across the Private Law' (2021) 40(2) *University of Queensland Law Journal* 181. See also Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981) 12–13, 87–8; Searle, 'What is Language?' (n 33) 199–201, especially 199 (emphasis added):

> We have to assume that [homo sapiens or some equivalent hypothetical species] are capable of evolving procedures for representing [internal] states of affairs; where the representations have speaker meaning … . They can represent states of affairs that they believe exist, states of affairs they desire to exist, states of affairs they intend to bring about, etc. … These procedures, or at least some of them, become conventionalized. What does that mean exactly? It means that given collective intentionality, if anyone intentionally engages in one of these procedures, then other members of the group have a right to expect that the procedures are being followed correctly. This, I take it, is the essential thing about conventions. *Conventions are arbitrary, but once they are settled they give the participants a right to expectations*.

must also take the burden that, as a matter of parity, others are entitled to those same benefits. The conventions of language and communication will break if employed disingenuously or incorrectly such that it is wholly justifiable to hold a promisor to the objective meaning attributed to her utterance.[54] This argument, however, is not intended to provide an indefeasible argument for a promisor always to do what was promised. There are rules of law and equity that recognise that there are other events of greater normative pull that can, in limited circumstances, justify releasing a promisor from the objective meaning attributed to her promise.[55]

So understood, the background context to which the ambiguity gateway prevents recourse is an additional clue that *may* prove useful in inferring the objective intentions of the author(s) of a contract. As Edelman J observed in *Rinehart v Hancock Prospecting Pty Ltd*: 'Every clause in a contract, no less arbitration clauses, must be construed in context. No meaningful words, whether in a contract, a statute, a will, a trust, or a conversation, are ever acontextual.'[56] Grice expressed the same point as follows:

> [I]n cases where there is doubt, say, about which of two or more things an utterer intends to convey, we tend to refer to the context (linguistic or otherwise) of the utterance and ask which of the alternatives would be relevant to other things he is saying or doing, or which intention in a particular situation would fit in with some purpose he obviously has (e.g., a man who calls for a 'pump' at a fire would not want a bicycle pump). Nonlinguistic parallels are obvious: context is a criterion in settling the question of why a man who has just put a cigarette in his mouth has put his hand in his pocket; relevance to an obvious end is a criterion in settling why a man is running away from a bull.[57]

If this is the case, depriving the court of otherwise probative and relevant surrounding circumstances as a means to understand language used in a contract detracts from this interpretive process. The ambiguity gateway disables the court from having available all the relevant context to reach the 'best possible' interpretation of a legally significant communicative act.[58] The best possible interpretation being that inferred by the reasonable recipient as the author's most probable intention from that communicative act. Indeed, on my argument in this article, there is much force in arguments that courts should, in general, be more

---

54 This argument mirrors Kant's famous example that in a society where the truth of an expression can no longer be taken at face value, the conventional standard of promising would be swiftly abolished: Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 2017 rev ed) 17–19 [4:402]–[4:403]. Note that other normative theories come to a conclusion not dissimilar to that I adopt in this article: see Joseph Raz, 'Review: Promises, Morals, and Law' (1982) 95(4) *Harvard Law Review* 916, 936–8 (justifying objectivity based on utilitarianism on the grounds that it protects the institution of promising from harm); John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 303 (justifying objectivity based on the stability and cooperation required to build the 'common good' from the perspective of natural law). For a view of natural law like Finnis, see McBride (n 44) 165: 'Contract law would fail in its mission to facilitate the orderly workings of the marketplace were it *not* to give effect to the objective principle'.

55 Obvious examples include the doctrine of restraint of trade, relief against penalties, relief against forfeiture, and vitiating factors.

56 *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, 548 [83]. See also below n 91.

57 Paul Grice, 'Meaning' (1957) 66(3) *Philosophical Review* 377, 387.

58 See also Carter (n 3) 118; McLauchlan, 'Contractual Interpretation: What Is It About?' (n 3) 31–5, where McLauchlan notes further arguments based on: (i) coherence in the law; (ii) transparency; and (iii) coherence with international law.

sanguine as to the use of evidence of prior negotiations[59] as providing further context to discern the meaning that the reasonable recipient of the communication would attribute to the contract.[60] The State should only enforce contractual rights, duties, powers, liabilities, privileges and immunities between A and B that those parties have objectively intended to have assented to. Accuracy in contractual interpretation helps to facilitate this goal.

B *Justifications(?) for the Ambiguity Gateway*

Given the above conclusion, what could be said in defence of the ambiguity gateway? The most common explanation is that it is potentially justifiable on the basis of classic rule-based utilitarianism, where both (i) the interests of parties in enforcing and drafting contracts as *an entire class*; and (ii) the State's role (and limited resources) as an umpire in the enforcement of voluntary exchanges, are protected.[61] That is, the principle exists to make the resolution of contractual disputes by the State more efficient[62] *in globo*.[63] Put simply, the basic arithmetic is that where a contract is unambiguous, the marginal gains in accuracy in the interpretive process by considering the full set of relevant surrounding circumstances in the first instance are outweighed by the burdens associated with having such evidence relevant by default. This is particularly the case if, in any event: (i) the evidence of the surrounding circumstances is unlikely to change the meaning of the contract where the contractual language is unambiguous; or (ii) enough contextual information has been included within the contract itself or supplied by the notorious background facts in order to reach the correct interpretation.[64]

As an alternative to this classical approach to utilitarianism as a moral philosophy, a more modern form of utilitarian reasoning has been adopted in US scholarship to justify the ambiguity gateway. This approach derives utility not by

---

59 For limits on the use of prior negotiations in contractual interpretation, see *Byrnes v Kendle* (2011) 243 CLR 253, 285 [99] (Heydon and Crennan JJ); *Investors Compensation Scheme* (n 22) 912–13.

60 See the forceful argument made in David McLauchlan, 'The Continuing Confusion and Uncertainty over the Relevance of Actual Mutual Intention in Contract Interpretation' (2021) 37(1–2) *Journal of Contract Law* 25. See also *Cherry* (n 14) 569 [91]–[92].

61 Smith (n 46) 275; Catherine Mitchell, *Interpretation of Contracts* (Routledge-Cavendish, 2nd ed, 2007) 79. See also the discussion in Leggatt (n 46) 465.

62 By this I mean Kaldor-Hicks efficient (the rule produces more benefits than costs *in globo*), rather than Pareto efficient (the rule makes *everyone* better off). Law and economics scholarship typically uses Kaldor-Hicks efficiency: Smith (n 46) 110–11.

63 See, eg, Spigelman (n 4) 334; Prince, 'Defending Orthodoxy: *Codelfa* and Ambiguity' (n 4) 503–9. See also Jonathan Morgan, *Contract Law Minimalism* (Cambridge University Press, 2013) 233: 'Rules in commercial matters should be as clear as possible to enable decisions to be made swiftly and confidently'. Although, in making this point Morgan is cognisant of the insights from philosophy of language and the mind noted in this article.

64 Sumption (n 23). Lord Sumption criticised the principles enunciated in *Investors Compensation Scheme* (n 22) 912–13, on the basis that rather than being used to *interpret* the language, the principles are often deployed by judges to consider the *reasonableness* of the contract: Sumption (n 23). See also the authorities collected in Kim Lewison, *The Interpretation of Contracts* (Sweet and Maxwell, 6th ed, 2015) 14 [1.04]; Prince, 'Defending Orthodoxy: *Codelfa* and Ambiguity' (n 4) 501. See further Schwartz and Scott, who note that 'parties will include contextual bits until the marginal gain-the increased expected contractual payoff [in interpretative accuracy] from further bits equals the marginal cost of writing them': Schwartz and Scott (n 30) 954.

virtue of the traditional Benthamic weighing up of costs and benefits, but by assessing utility from consistent individual choices.[65] Such scholars argue that sophisticated commercial parties prefer the ambiguity gateway[66] and that the default rules of contractual interpretation should reflect the choices such individuals would typically make for themselves (albeit leaving specific parties free to choose whether or not to contract around the default rule).[67] More will be said about these arguments below.[68] I will initially address the classical rule-based utilitarian reasoning as that is the type of analysis typically found in Anglo-Australian contract law literature and jurisprudence.

Arguing in favour of a more textual (that is, *Codelfa*-style) approach to contractual interpretation in the US, Schwartz and Scott have said:

> although accurate judicial interpretations are desirable, accurate interpretations are costly for parties and courts to obtain. If contract writing were free, parties could minimize interpretive error by exhaustively detailing their intentions. And if adjudication were costless, courts could minimize interpretive error by hearing all relevant and material evidence. Contract writing and litigation are costly, however. Since no interpretive theory can justify devoting infinite resources to achieving interpretive accuracy, any socially desirable interpretive rule would trade off accuracy against contract-writing and adjudication costs. Such a rule, we argue, tells courts in some cases to exclude relevant evidence.[69]

Such concerns are perfectly understandable given that any commercial lawyer is well aware that examples of an overabundance of voluminous trial bundles in the course of litigation are legion.[70] In one illustrative case, Simon Bryan QC (sitting as a Deputy High Court Judge) noted the regrettable inclusion in the trial bundles of 'no less than eight lever arch files full of what were described, somewhat unpromisingly, as "Draft Contractual Documents"'.[71] This is a scene repeated often throughout the common law world. Indeed, I suspect there will be some practitioners reading this who will consider eight lever arch files of 'context' to be an example of virtuous restraint.

There is much force in the idea that legal practitioners and judges should be slow to decry the problems pertaining to access to justice and the rising costs of litigation one day and then incrementally, and for what may prove to be a limited benefit in the name of an elusive search for perfect individualised justice, proceed to make the law a little more complex the next day. In every contractual dispute, having

---

65 Ken Binmore, 'Interpersonal Comparison of Utility' in Don Ross and Harold Kincaid (eds), *The Oxford Handbook of Philosophy of Economics* (Oxford University Press, 2009) 540, 542–9; Doug Bernheim, 'Behavioral Welfare Economics' (2009) 7(2–3) *Journal of the European Economic Association* 267; Hanoch Dagan and Roy Kreitner, 'Economic Analysis *in* Law' (2021) 38(2) *Yale Journal on Regulation* 566, who note at 572 that '[s]tandard works in normative law and economics study the incentive effects of legal rules and doctrines and examine how they fare vis-à-vis the normative criterion of maximizing aggregate preference satisfaction'.

66 Schwartz and Scott (n 30) 931.

67 Bernheim (n 65) 291–2.

68 See below text accompanying nn 96–116.

69 Schwartz and Scott (n 30) 930.

70 See also the similar concerns noted in Heydon (n 17) 720–1.

71 *BP Gas Marketing Ltd v La Societe Sonatrach* [2016] EWHC 2461 (Comm) [103].

recourse to the full set of surrounding circumstances in the first instance during the interpretive process would mean extra work and time devoted to providing legal advice, preparing a case for trial, advocacy, and writing a judgment. Moreover, I am yet to note the disbursements for producing bundles of trial documents. As cautioned in *Aon Risk Services Australia Ltd v Australian National University*:

> While in general it is now seen as desirable that most types of litigation be dealt with expeditiously, it is commonly seen as especially desirable for commercial litigation. Its claims to expedition may be less than those of proceedings involving, for example, extraordinary prejudice to children; or the abduction of children; or a risk that a party will lose livelihood, business or home, or otherwise suffer irreparable loss or extraordinary hardship, unless there is a speedy trial. But commercial litigation does have significant claims to expedition. Those claims rest on the idea that a failure to resolve commercial disputes speedily is injurious to commerce, and hence injurious to the public interest. …
>
> The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.[72]

What, then, should we make of arguments pertaining to legal efficiency (and we can include the closely related arguments regarding legal certainty)[73]? Neither economic efficiency nor legal certainty alone is persuasive as a justification for a particular legal rule. This is because such arguments prove too much: arguments with a narrow focus on efficiency or certainty do not attempt to justify their claim solely to control the law.[74] They 'beg the question' in the proper sense of that phrase (that is, such analysis assumes the correctness of its underlying arguments without proving it). The position I take here is that a legal rule that is morally indefensible cannot be saved by recourse to arguments centring exclusively on either efficiency or certainty.[75] Let us look at two historical examples:

***Example 1*:** A owes B a debt of $5,000 payable on date X. Both A and B live in Darwin. A fails to pay B by date X. Indeed, A never pays B. Instead, A swears under oath that he paid B the $5,000 and, in turn, 11 'witnesses' situated in Sydney swear on oath as to A's character. Imagine if the common law considers A's oath as

---

72 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 223 [137], citing *Collins v Mead* (Supreme Court of New South Wales, Rogers J, 7 March 1990) 220.

73 See, eg, *Siemens Gamesa* (n 18) [99]. Brevity is the main reason why I have dealt with certainty and efficiency together. While some may quibble with me raising them together, I nonetheless appreciate that these are distinct (but related) concepts. As von Hayek notes in FA Hayek, *The Constitution of Liberty* (Routledge & Kegan Paul, 1960) 208:

> The importance which the certainty of the law has for the smooth and efficient running of a free society can hardly be exaggerated. There is probably no single factor which has contributed more to the prosperity of the West than the relative certainty of the law which has prevailed here. This is not altered by the fact that complete certainty of the law is an ideal which we must try to approach but which we can never perfectly attain ... .

74 '[T]he vast majority of law and economics scholarship assumes without hesitation that the goal of the law should be efficiency': Jon Hanson, Kathleen Hanson and Melissa Hart, 'Law and Economics' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2nd ed, 2010) 300; see also at 322–4. Further, the theory of efficient breach has drawn some criticism from the High Court of Australia, see *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 285–90 [13]–[20].

75 Stevens (n 3) 170.

supported by his 'character witnesses' as being good discharge of the debt. Readers familiar with English legal history will know that we do not have to imagine. Indeed, debt cases worked this way for some time. My example is no more than a modern take on the common law practice of wager of law or compurgation used by defendants in a simple debt case. Naturally, this approach is both a certain and efficient way of resolving a debt case. However, I doubt many readers would consider the oaths of 11 'witnesses'[76] with no local nexus to, or knowledge regarding, the dispute attesting to A's credibility that he has paid B a debt is a sound way of resolving the substantive merits of a debt claim.[77]

Example 2: B executes a deed saying that he will pay A the sum of $5,000 on date X. B pays A the sum of $5,000 on date X. A nonetheless remains in custody of the 'physical' deed. Imagine if the common law allowed A to enforce the deed against B and required B to pay to A a further $5,000. Again, readers familiar with English legal history will know that we do not have to imagine. This is because common law procedure enabled an obligee holding a simple bond to enforce the bond multiple times.[78] Curiously, the justification for this rule is that the common law procedure favoured the universal benefits of simplicity, efficiency and certainty in making the mere production of the bond to the common law court constitute non-traversable proof of an obligation to pay a debt as stipulated in the bond. Serjeants Staunford and Bromley captured the utilitarian justification for double recovery:

> it is nevertheless better to suffer mischief to one man than inconvenience to many, which would subvert the law. For if matter in writing could be so easily defeated and avoided by such a surmise, by naked breath, a matter in writing would be of no greater authority than a matter of fact.[79]

Making the production of a bond in court non-traversable proof of a debt evidenced in that bond is a very certain and efficient way of resolving a debt case. However,

---

[76] Often paid witnesses based in London.

[77] See Sir John Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 81; Theodore FT Plucknett, *A Concise History of the Common Law* (Lawbook Exchange, 5th ed, 2010) 115–6. The process was fully abolished in 1833 by statute: see *Civil Procedure Act 1833*, 3 & 4 Will. IV, c. 42, s 13. On the history of bonds, see further, Nicholas A Tiverios, *Contractual Penalties in Australia and the United Kingdom: History, Theory and Practice* (Federation Press, 2019) 10–39.

[78] Indeed, in *Donne v Cornwall* (1486) YB Pass 1 Henry VII, Fo 14v, Pl 2 (CP), extracted in Sir John Baker, *Baker and Milsom Sources of English Legal History: Private Law to 1750* (Oxford University Press, 2nd ed, 2010) 283, A successfully sued in the Common Pleas and then on appeal to the non-statutory Exchequer Chamber on a simple bond that he stole back from B's wife, after B had already paid to A the sum of £10 owing under the bond. Relief became available in equity during the reign of Edward IV (1442–83): Alfred WB Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 (July) *Law Quarterly Review* 392, 416–18; DEC Yale (ed), *Lord Nottingham's Chancery Cases (Vol 2)* (Bernard Quaritch, 1957–61) 9; DEC Yale (ed) *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (Cambridge University Press, 1965) 213; WT Barbour, *The History of Contract in Early English Equity* (Clarendon Press, 1914) 85–9; Theodore FT Plucknett and John L Barton (eds), *St Germain's Doctor and Student* (Selden Society, 1974) 77–8. The label 'utilitarian' could be used to justify this approach, notwithstanding that term was not in use in the 15th century. Utilitarianism would only become an identifiable moral and political philosophy after the 1780s, with the publication (1789) of Jeremy Bentham's *An Introduction to the Principles of Morals and Legislation* (although the nomenclature of 'utility' was borrowed by Bentham from the earlier works of David Hume and had been used by Bentham in *A Fragment on Government* in 1776).

[79] *Waberley v Cockerel* (1541) 20 Henry VI, Fo 28, Pl 21 in Baker (n 78) 285.

where we have clear and accessible evidence that B has discharged his obligation to A, is there any merit in allowing A to double recover? I tend to think not. A debt is not owed twice.

Given the analysis above, a question remains concerning the potential relevance of economic efficiency and legal certainty to the creation and form of a legal rule. Starting with economic efficiency: the position I take here is that while economic efficiency should not be the exclusive goal of the law, it remains an important and desirable goal for any legal system. In this connection, economic efficiency operates as an important supplementary (or second order) criterion for deciding on one approach over another. To draw an imperfect analogy, economic efficiency has a tiebreaker function (or perhaps more accurately a tiebreaker-like function).[80] A decision-making analogy might be something like this: A firm agrees to use the ranking of the universities at which two otherwise fairly evenly matched and excellent job candidates applying for the same job studied in order to make a final hiring decision. As applied here, economic analysis can be useful, and of great importance, when choosing between two (or more) different forms that a legal rule may take in the process of translating an abstract and non-consequentialist moral principle into a directly applicable legal rule. For example, the law takes the view that it is morally right to keep a promise, but the doctrine of consideration nonetheless keeps my gratuitous promise to mow my neighbour's lawn out of the courts.[81] Provided a legal rule remains substantively justifiable for non-consequentialist reasons, then one should not ignore law and economics.[82]

I can make a similar argument with respect to the use of bare appeals to legal certainty in judicial reasoning. It is true that a lack of certainty in the law can be a friend of tyranny. It is a point well made that the law should define its rules in advance and give subjects stable expectations as to how such rules will be deployed.[83] It is antithetical to the rule of law for a rule to be made ex post and applied to ex ante facts. As such, I do not wish to be taken as suggesting that certainty is not important to the general law. Rather, I am making the modest claim that certainty, in and of itself, does not exclusively provide a positive justification for a particular legal rule. Let us assume that a state parliament enacts a statute that you

---

80 See further, Dagan and Kreitner (n 65) 575–6. For a critique of the type of reasoning I have deployed, see Robert E Scott and Jody S Kraus, *Contract Law and Theory* (Carolina Academic Press, 5th ed, 2013) 29.

81 See Hanson, Hanson and Hart (n 74) 324. For examples of balancing interests, see Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 89 (writing from a rights-based perspective, but nonetheless defending torts that are not actionable per se on the basis of the law needing a floodgate of 'proof of consequential loss' in order to circumscribe a defendant's liability); McBride (n 44) 124 (writing from a natural law perspective).

82 While this approach will not lend itself to a logically perfect balance between normativity and efficiency, it nonetheless treats efficiency in the law as an ideal that a legal system (which is otherwise morally justifiable for non-consequentialist reasons) must try to approach even if it can never be perfectly attained.

83 Francis Lieber, *Legal and Political Hermeneutics* (Charles C Little and James Brown, 1839) 88; FA Hayek, *The Road to Serfdom* (Routledge & Kegan Paul Ltd, 1944) 62; Hayek (n 73) 208–9. See also JD Heydon, 'The "Objective" Approach to Statutory Construction' in John Sackar and Thomas Prince (eds), *Heydon: Selected Speeches and Papers* (Federation Press, 2018) 332, 335–6; John Dinwiddy, 'Bentham' in William Twining (ed), *Bentham: Selected Writings of John Dinwiddy* (Stanford University Press, 2004) 54.

pay to me $100,000 under certain future conditions (for example, if you fail to run 130 km each week for the rest of the calendar year). Even if you happen to be an avid marathon runner, I doubt that you think this rule has much going for it notwithstanding my enthusiasm for the clarity in which the enactment is finally expressed. It is for this reason that there is much wisdom in Williams' observation that 'it is to the interest of legal certainty that, other things being equal, the rules of law should be as clear of application as possible'.[84] The important point for present purposes, however, is that such a position still raises the ultimate question of whether the 'other things' are indeed equal.

With my caveats on appealing to efficiency and certainty clearly set out, it should be kept in mind that the ambiguity gateway only has a limited effect on the general approach to interpretation. This is because even with the ambiguity gateway, recourse can be had in the first instance to: (i) the text; (ii) the local context within the contractual document (that is, the organising logic and internal structure of the contract — let's call this the 'narrow context'); (iii) the notorious background facts that can be reasonably supposed to be known by both parties; and (iv) commercial common sense. That is, the court already has a fairly expansive set of clues from which to infer what the reasonable recipient of a communication would consider the most probable intention of the author(s).[85] That is, the ambiguity gateway does not change fundamentally the approach of the court as a matter of the philosophy of language in determining an objective meaning. All it does is remove one set of clues from this process: the relevant background facts and circumstances reasonably known by A and B at the point of entry into the contract (let's call this the 'wide context').

On this view, the interpretive clues available to the court absent ambiguity are likely to be enough to resolve correctly most contractual interpretation disputes without recourse to the wide context. Further, the ambiguity gateway still leaves the parties free to include more contextual information within their contract if they so choose (for example, recitals, definitions and appendices can be used to convert the narrow context into something approaching the wide context).[86] Accordingly, if the ambiguity gateway does deliver efficiency gains (or can be reformed to deliver efficiency gains), then there is a sound traditional utilitarian basis for the rule. Likewise, a similar argument could be made concerning legal certainty and reducing the potential number of meanings that a contractual text can possibly bear prior to the exercise of judicial power.

While I accept that the efficiency and certainty concerns regarding the resolution of contract disputes are real, there are three brief observations that I wish to make in response. The first is the fact that Australia is an outlier in maintaining the ambiguity gateway throughout the common law world, which should immediately raise questions for those who claim that the gateway is efficient. This is because, as Posner has observed, '[g]lobal consensus (to exaggerate a bit) is further evidence — of course not conclusive — for the optimality of our existing

---

84 Glanville Williams, 'Law and Language — II' (1945) 61 (July) *Law Quarterly Review* 179, 185.

85 See also McDougall (n 2) 104: 'contract cases in real life do not often hinge on the distinction between ambiguous and plain language'.

86 Schwartz and Scott (n 30) 931, 961–2.

law.'[87] One does not wish to make too much out of Posner's point. But those who make efficiency arguments should consider whether the final level appellate courts in the United Kingdom, Singapore, New Zealand, Hong Kong and Canada (to name a few) are behaving irrationally in creating inefficient rules.[88]

The second observation is that any efficiency benefits derived from the ambiguity gateway may be questioned. As McLauchlan has observed:

> The increased costs argument also ignores the reality that many interpretation disputes will be accompanied by alternative claims for rectification of the written contract and possibly also misrepresentation or estoppel, under which evidence of all the negotiations and surrounding circumstances must be received. Accordingly, excluding such evidence for the purpose of interpretation disputes will not have the effect of reducing the length and cost of civil trials.[89]

Likewise, Justice McDougall has noted extra-judicially that in Australia, 'extrinsic evidence is always admissible in the evidentiary sense; that is, courts may always allow its reception … [i]t is then admissible in the usage sense' if it nevertheless passes the ambiguity gateway.[90] Indeed, it has become common practice in Australia for cautious trial judges to allow all pre-contractual wide context materials to be adduced as evidence.[91] This is for the principal reason that if the trial judge errs in applying the ambiguity gateway, then the appeal court can interpret the contract in light of the full set of prescribed clues.

Finally, the ambiguity gateway means that efficiency gains are lost as the parties simply tailor a new set of arguments focusing on convincing the court that the text of the contract is ambiguous and that use of the wide context will quell that ambiguity. Indeed, as noted above, this issue could also be used as an appeal point by savvy counsel. Given that large amounts of factual material are nonetheless tendered in contractual disputes and that the ambiguity gateway results in a new species of legal argument centring on ambiguity, it is arguable that the rule is not fully fit for purpose if it is truly concerned with making the resolution of contractual disputes more efficient *in globo*. One partial answer to this argument would be for the High Court of Australia to clarify what is meant by 'ambiguity', by placing a high hurdle for the parties to clear before allowing consideration of the wide context evidence in the interpretive process. In this connection, one commentator has observed that the test for ambiguity set out by the Court of Appeal of New South Wales in *Burns Philp Hardware Ltd v Howard Chia Pty Ltd*,[92] could serve this function.[93] That relatively restrictive approach to ambiguity was set out by Priestley JA (with whom Glass JA agreed) in the following terms:

---

87 Richard A Posner, 'Let Us Never Blame a Contract Breaker' (2009) 107(8) *Michigan Law Review* 1349, 1363.

88 I do not wish to make too much of the point, as common law jurisdictions in the US, for example, tend to favour the ambiguity gateway: see above n 30.

89 McLauchlan, 'Contractual Interpretation: What Is It About?' (n 3) 37. See also Lindgren (n 4) 166.

90 McDougall (n 2) 107.

91 *McCourt v Cranston* [2012] ANZ Conv R ¶12-006, [24]–[25]. See also Lindgren (n 4) 166.

92 *Burns Philp Hardware Ltd v Howard Chia Pty Ltd* (1987) 8 NSWLR 642.

93 Prince, 'Defending Orthodoxy: *Codelfa* and Ambiguity' (n 4) 508.

> What I mean by 'not ambiguous' for present purposes is not having two or more plausible meanings when the context of the words in the document is taken into account in light of the knowledge any ordinarily intelligent reader of the document would bring to the reading of it.[94]

A similar approach is currently applied in Western Australia, where the court must consider whether there are two or more possible meanings of the impugned provision having regard to: (i) the language of the contract as a whole; (ii) what can be gleaned from the contract itself as to the contractual purpose; and (iii) whether the proffered competing interpretation(s) is/are reasonable.[95]

As noted above,[96] a more contemporary form of utilitarian reasoning can be deployed to justify the ambiguity gateway (at least in circumstances where sophisticated firms or parties are contracting). In brief, Schwartz and Scott have set out the following three key premises as a justification for the ambiguity gateway in the US.[97] First, no rule of contractual interpretation can justify devoting infinite resources in order to achieve perfect individualised justice between the parties (that is, something approaching a perfectly accurate interpretation).[98] It follows that any socially desirable rule of contractual interpretation needs, at some point, to trade-off between, on the one hand, the time taken to draft a contract and litigate contract disputes and, on the other, interpretive accuracy. Second, courts should make this assessment by deferring to actual party preferences and choices regarding interpretation in setting default rules, albeit allowing specific parties to contract out of such rules.[99] That is, if the majority of contracting parties have an actual unambiguous preference in favour of an ambiguity gateway that fact should create a strong initial presumption in favour of such a rule. This is because the parties themselves are best placed to weigh up the benefits of accuracy, drafting costs and adjudication costs given they directly bear such costs.[100] Third, sophisticated firms and parties have a revealed preference for formal[101] rules of interpretation such that the ambiguity gateway (or a similar more textualist approach to interpretation) should be retained, at least in the context of commercial contracting.[102]

---

94 Ibid 657.

95 *Technomin Australia* (n 18) 274 [73]–[74]. See also *Siemens Gamesa* (n 18) [99]. In contrast, see the liberal approach in New South Wales adopted in *Newey* (n 14) [89].

96 See above nn 65–7 and accompanying text.

97 Schwartz and Scott (n 30) 930–5.

98 Ibid. Allowing for preference satisfaction enables commercial parties to maximise the profitability of their contractual arrangements (or their contractual 'surplus').

99 See also Steven Shavell, 'On the Writing and the Interpretation of Contracts' (2006) 22(2) *The Journal of Law, Economics & Organisation* 289, 292. Shavell concludes that 'decisions about the use of [wide context] evidence should be made by the parties, not the courts': at 307, as reflected in 'Proposition 6'.

100 See further Bernheim (n 65) 291–2:

> unambiguous choice may nevertheless create a strong presumption concerning well-being …. the principle of self-determination arguably implies that those involved in governance should judge the impact of interventions on individuals according to the choices those individuals would have made for themselves.

101 On the growth of formalism in US academic writing on contract law, see Avery Wiener Katz, 'The Economics of Form and Substance in Contract Interpretation' (2004) 104(2) *Columbia Law Review* 496, 506–12.

102 Schwartz and Scott (n 30) 930–5, 955–7.

There is not space to do full justice to the arguments presented by Schwartz and Scott. It is a more elegant form of utilitarian reasoning than that typically deployed in Anglo-Australian contract law scholarship.[103] This is for the simple reason that it eschews the weighing up of costs and benefits in favour of relying on majoritarian choice preferences to ascertain utility (albeit having the benefit of leaving the minority who do not share such preferences a choice or liberty to contract around the proposed ambiguity gateway).[104] I do not intend the use of the word 'simple' in the previous sentence to be taken as disrespectful. Quite the opposite, any reader of Bentham's *Introduction to the Principles of Morals and Legislation*[105] is quickly overwhelmed by the ponderous lists and sub-lists detailing the specific factors that must be weighed up in calculating utility on the classical approach. The use of choice to inform a calculation of utility is an elegant solution that overcomes the difficulty inherent in classical utilitarian balancing exercises. I will endeavour, however, to make a few brief points in response to whether such arguments should, at present, be adopted in Australian jurisprudence.

The first is to make the obvious point that it remains to be seen what actual preferences Australian contracting parties have. More work would need to be undertaken in this regard to sustain a similar argument, but it seems possible that preferences would not change meaningfully between the two sides of the Pacific Ocean. One important difference affecting preferences might be that in the US, limiting admissible evidence and the need to find facts allows a party to apply for summary judgment thereby avoiding a civil jury trial.[106] Concerns regarding keeping a civil jury from affecting[107] the interpretation of a commercial contract or the outcome of a commercial dispute are not a concern in Australia, where such trials are not a relevant feature of the Australian legal landscape.[108] Second, the more

---

[103] See further Binmore (n 65) 542–3.

[104] This rationale rests on another economic explanation of the law, game theory or rational choice theory, see Hanson, Hanson and Hart (n 74) 306:

> often described as 'the science of strategic thinking,' is a branch of economics concerned with modeling and predicting behavior. Strategic behavior arises when two or more individuals interact and each individual's decision turns on what that individual expects others to do. Game theoretic models have been used to help predict or make sense of everything from chess to childrearing, from evolutionary dynamics to corporate takeovers, and from advertising to arms control.

[105] The best versions of Bentham's works are those produced by the Bentham project at University College London: JH Burns and HLA Hart (eds) *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation*, (Athlone Press, 1970 ed) 38–50.

[106] Schwartz and Scott (n 30) 932, 943, 960–3; Bix (n 30) 59.

[107] See, eg, Richard A Posner, 'The Law and Economics of Contract Interpretation' (2005) 83(6) *Texas Law Review* 1581, 1603; Edwin W Patterson, 'The Interpretation and Construction of Contracts' (1964) 64(5) *Columbia Law Review* 833, 836–7 (emphasis added):

> Even in a case in which a jury is the trier of issues of fact, the interpretation and construction of a written contract is within the exclusive province of the judge. …. Where the contract is partly oral and partly written, the judge may instruct the jury as to the meaning of the written part, and, with other instructions, leave the remaining issues of interpretation to be determined by the jury. If the jury is directed to bring a general verdict…. It may so doing exercise its views of jury equity and thus impair the reliability of written instruments. *This possibility may account for the reluctance of courts to admit parol evidence and other extrinsic aids to interpretation, and for their adherence to the "plain meaning" of the contract*.

[108] See, eg, *Supreme Court Act 1970* (NSW) s 85. On the decline of the civil jury in New South Wales, see, eg, *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387, 394–7. See also Law Reform

fundamental objection would be to query why the law needs to, or should, reflect majoritarian party preferences and choices. This is because majoritarian preferences will not count for much where such preferences are morally indefensible such that they infringe upon some other normative commitment that the general law should support.[109] At most, it could be said that majoritarian preferences 'create a strong *presumption* concerning well-being',[110] but that such a presumption is not irrebuttable.

The third point to note is that those who advocate the removal of the ambiguity gateway are not in favour of devoting infinite resources to interpretative disputes. The issue needs to be framed in a way that does not potentially create a false dichotomy whereby the ambiguity gateway is offered as the only potential solution to limit evidence in contractual interpretation disputes. This is because the rules of evidence will still apply to the wide context material, such that the material in question would still need to be relevant and probative in order to be utilised. This point has been emphasised by the Court of Appeal of the Republic of Singapore, which has abolished the ambiguity gateway but nonetheless created specific rules of pleading to ensure that wide contextual evidence is utilised transparently, narrowly and only for legitimate purposes.[111] Fourth, it is open to question whether the rules of contractual interpretation should apply differing legal standards between sophisticated and unsophisticated parties as a result of the majoritarian preferences of the former but not the latter. Why treat a subset of contracting parties in a differing and unequal (or preferred) way? Further still, at what point will the differing standards apply?[112] That is, is the criterion of a sophisticated or a commercial contract precise enough for application? In the local context, it would appear unlikely that the High Court of Australia would be willing to adopt a standard of unequal treatment and create two sets of parallel rules concerning the same activity (that is, abolish the ambiguity gateway for unsophisticated parties, but retain it for sophisticated parties). Of course, the argument I have made does not prevent the High Court maintaining the ambiguity

---

Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Discussion Paper No 99, September 2009) 11. At the time this Discussion Paper was written, there had been approximately 12 civil jury trials in Western Australia in the preceding four decades. Costs implications are another potential point of difference. Under the American Rule, each party is typically responsible for their own costs: *Alyeska Pipeline Service Co v Wilderness Society*, 421 US 240, 247 (1975). In Australia, on the other hand, party–party costs is the typical order. However, there are exceptions in both jurisdictions, which are not material for present purposes.

109 See above n 80 and accompanying text. In this connection, one of the strongest points that Schwartz and Scott make is that the ambiguity gateway does not change fundamentally the approach of the court as a matter of the philosophy of language in determining an objective meaning: Schwartz and Scott (n 30) 952, 961. See also the discussion above on this point at n 85 above and accompanying text.

110 Bernheim (n 65) 291 (emphasis added).

111 *Sembcorp Marine* (n 28) 225 [73]. See further the text accompanying n 119 below.

112 For a general discussion about not changing default legal rules given the context, see Nicholas Tiverios and Clare McKay, 'Orthodoxy Lost: The (Ir)relevance of Causation in Quantifying Breach of Trust Claims' (2016) 90(4) *Australian Law Journal* 231, 240–3; Nicholas Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' (2011) 31(2) *Legal Studies* 175. For examples of where the creation of two sets of parallel rules was resisted, see, eg: *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 365–6 (rejecting the argument that limits on the availability of non-pecuniary loss for breach of contract should be abolished for non-commercial (cf commercial) contracts; *Cavendish Square Holding BV v Makdessi* [2016] AC 1172, 1251 [162] (rejecting the argument that the penalties doctrine should be abolished for commercial (cf non-commercial) contracts).

gateway for all contracting parties — arguments regarding coherence and equal treatment in the law, after all, do not ultimately tell the decision-maker which of two potential forms of a legal rule to select.

As a final point, it should not be overlooked that the context between the parties might nonetheless suggest that a court should give interpretative primacy to textual clues over contextual and purposive clues. For example, think of the common rule that a formal and professionally drafted instrument is to be interpreted more precisely than a communicative act of a lay person.[113] This rule, favouring text over certain aspects of context, is itself a contextual assumption that certain parties generally wish to be taken more literally.[114] Sometimes the context may itself point to the parties intending a text to have a narrow or formal meaning. Or, as Morgan has said,

> [s]ensitivity to context may actually require the exclusion of broad, contextual interpretation. We have argued above that the detailed drafting of commercial contracts requires a formal, textual interpretive approach. Such contracts are addressed primarily to other lawyers, to be understood in a technical sense (not the 'ordinary understanding' championed by Lord Hoffmann). The relevant context is formalism! The characteristic detailed English drafting style demands textual interpretation.[115]

On this view, one can arrive at a not dissimilar end point to Schwartz and Scott that allows parties to limit context. This conclusion is reached, however, from a contextualist route — applying the common stock contextual clue that the author of a more formal legal document generally intends it to be read in a formal manner, rather than needing to apply an altogether different legal rule as a result of the majoritarian preferences of sophisticated and unsophisticated parties. If Anglo-Australian courts are willing to apply a common stock contextual clue or assumption that parties behaving formally intend to be taken more literally, then there appears to be no reason in principle why the parties cannot expressly stipulate such an intention for themselves (as I outline in this article, the argument for context in contractual interpretation is, after all, based itself on intentionality). Put another way, the parties' express intentions regarding how their language is to be interpreted[116] should matter just as much as their assumed intentions.

---

113 For a simple example of this common principle in action, see *Thorney Park Golf* (n 43) [24] (McCombe LJ).

114 A point made in Morgan (n 63) 233.

115 Ibid.

116 Making a similar point, but not from a contextualist perspective, see Katz (n 101) 514, 521–2. See also Posner, who notes that arguments in favour of a wide approach to context often do not consider that contracting parties can also have intentions regarding how a contract (ie, the manifestation of their intentions) is to be interpreted: Eric A Posner 'The Parol Evidence Rule, The Plain Meaning Rule, and The Principles of Contractual Interpretation' (1998) 146(2) *University of Pennsylvania Law Review* 533, 569–71.

IV Other Options — If Not an Ambiguity Gateway then What?

It is important to observe that the ambiguity gateway is not the only option when it comes to attempts to make the resolution of contractual disputes more efficient. There are two other obvious solutions — although it should be conceded that such approaches could nonetheless work in concert with an ambiguity gateway or a revised version of that principle. First, the principles concerning active case management and costs orders could inform more effective mechanisms for improving the dispute resolution process.[117] In this connection, Arden LJ observed the potential relevance of case management principles in *Static Control Components (Europe) Ltd v Egan*:

> When the principles in the *ICS* case were first enunciated, there were fears that the courts would on simple questions of the construction of deeds and documents be inundated with background material. Lord Hoffmann recognised this risk by emphasising in *BCCI v Ali* [2002] 1 AC 251 at 269 that his reference to 'absolutely anything' in his second proposition was to anything that a reasonable man would have regarded as relevant. Speaking for myself, I am not aware that the fears expressed as to the opening of floodgates have been realised. The powers of case management in the CPR could obviously be used to keep evidence within its proper bounds. The important point is that the principles in the *ICS* case lead to a more principled and fairer result by focussing on the meaning which the relevant background objectively assessed indicates that the parties intended.[118]

Second, like the use of active case management, the rules of pleading in contractual disputes can seek to limit the breadth of the more contextual *Investors Compensation Scheme* principles and the impact of those principles on the efficiency of contractual disputes. In Singapore, for example, the creation of new rules of pleading have sought to achieve this by limiting the need for a judge to wade through the potentially voluminous thicket of pre-contractual evidence in order to find the contextual 'needle in a haystack'. Rather, the burden has been placed on the party bringing the haystack into court to point to the needle. Menon CJ set out these principles of pleading in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*:

> to buttress the evidentiary qualifications to the contextual [*Investors Compensation Scheme*] approach to the construction of a contract, the imposition of four requirements of civil procedure are, in our view, timely and essential:
>
> (a) first, parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the

---

[117] See McLauchlan, 'Contractual Interpretation: What Is It About?' (n 3) 11. Although note Schwartz and Scott, who argue that judges do not bear the costs of litigation themselves and may thus tend to prefer individualised justice and contextual interpretive accuracy in comparison to the parties (if this is true, then such a preference for contextual material could colour how judges ultimately use case management principles): see Schwartz and Scott (n 30) 943.

[118] *Static Control Components (Europe) Ltd v Egan* [2004] 2 Lloyd's Rep 429, 435–6 [29]. See also Donald Nicholls, 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 (October) *Law Quarterly Review* 577, 588.

factual matrix that they wish to rely on in support of their construction of the contract;

(b) second, the factual circumstances in which the facts in (a) were known to both or all the relevant parties must also be pleaded with sufficient particularity;

(c) third, parties should in their pleadings specify the effect which such facts will have on their contended construction; and

(d) fourth, the obligation of parties to disclose evidence would be limited by the extent to which the evidence are relevant to the facts pleaded in (a) and (b).[119]

Ultimately, any sound utilitarian analysis requires the analyst to get her sums right.[120] It is difficult to state with any certainty which approach best maximises efficiency gains (at least in the traditional sense) without a detailed empirical analysis of the costs of, and benefits to, the efficient resolution of contractual disputes associated with the application of the ambiguity gateway, the potential use of case management principles and potential changes to rules of pleading. Rather, the goal here has been modest: to raise some tenable alternatives to the ambiguity gateway principle in order to make the resolution of contractual disputes more efficient given the benefits that the *Investors Compensation Scheme* approach otherwise provides to the interpretive process.

V Conclusion

In *Sirius International Insurance Co v FAI General Insurance Ltd*, Lord Steyn quoted the words of the famous Christian apologist William Paley: 'the tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered to him. He shed no blood. He buried them all alive'.[121] The principal reason why the reader of this quotation knows that Temures committed an injustice is that we all intuitively know the difference between, on the one hand, the sentence meaning of an utterance and what, on the other hand, a reasonable recipient of an utterance would believe the speaker meant. As I have illustrated in this article, the objective intention that the court searches for in a contractual interpretation dispute is distinct from the sentence meaning of a text. If legal interpretation only cared about sentence meaning, then the task of the court would be mercifully narrow: to decode the literal meaning of a text. This is not the modern law of interpretation. It is a basal principle that a contract is to be interpreted by the reasonable recipient of the communication read contextually and purposively. The surrounding circumstances form part of that context such that the ambiguity gateway deprives the court of otherwise probative and relevant evidence in the interpretative process. While the response to this argument is that the ambiguity gateway assists in the efficient resolution of disputes, it is incumbent on those

---

119 *Sembcorp Marine* (n 28) 225 [73].

120 See generally Burns and Hart (n 105) ch 4.

121 *Sirius International Insurance Co v FAI General Insurance Ltd* [2005] 1 WLR 3251, 3258, quoting (with minor formatting differences) William Paley, *The Works of William Paley* (Longman and Co, 1838) vol III, 60. Also cited in Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25(1) *Sydney Law Review* 5, 7.

making this utilitarian claim to get their sums right and to justify their conclusions as to the desirability of efficiency as an end goal of the law. I am willing, at least at present, to remain open minded. If such justifications remain wanting, then the ambiguity gateway should be abolished.