



LAWS 8140/4210 Commercial Law

Assessment 1: Commercial Contract Construction Task

Resources

Methodology in interpreting commercial contracts

Step 1:

Identify what the terms of the contract are.

Step 2:

Read the whole contract: *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* (1973) 129 CLR 99 at 109.

If possible construe the contract so that all parts of the contract are harmonious with each other: *ABC; Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 552 at 529.

Apparent inconsistencies are to be resolved having regard to the object or commercial purpose of the contract: *Bank of Qld v Chartis Australia Insurance Ltd* [2013] QCA 183.

Methodology – step 2 (cont'd)

- If interpretation doubtful, there is scope (having regard to the text, context and purpose of the contract) to choose the construction which is not unreasonable or uncommercial: *Australian Casualty Co Ltd v Federico* (1985) 160 CLR 513 at 520.
- See also *Mount Bruce Mining Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [47]. Do not just read the clause that seems to be relevant because interpreting a contract involves objective consideration of –
 - (a) the text of the contractual term;
 - (b) the context within which the term exists; and
 - (c) the commercial purpose of objects intended to be secured by the contract.



Methodology – Step 3

Interpret the terms.

What does the law in Australia say about how to approach the interpretation of commercial contracts?

- In Australia we apply the objective theory of contract.**
- What does that mean?**

The objective theory of contract:

The meaning of a contract is to be decided in accordance with what the terms of the contract would convey to a **reasonable person in the position of the parties**, rather than by reference to the subjective intentions of one, or even both, parties to the contract.

Objective theory applied by the High Court:

- *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ;
- *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2009) 219 CLR 165 at [40] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ;
- *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [15] per Gleeson CJ, McHugh, Gummow and Kirby JJ.
- *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [53] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.



The process of deciding what a written contract means will ordinarily involve objective consideration of:

- (a)The **text** of the contractual term;**
- (b)The **context** within which the term exists (namely the entire text of the contract and any other contract, document or statutory provision referred to in the text); and**
- (c)The **commercial purpose** or objects evidently intended to be secured by the contract: Mount Bruce.**

- If the contract is open to 2 constructions, you should adopt the interpretation which avoids “capriciousness, unreasonableness, inconvenient or injustice”: ABC, per Gibbs J.
- First start with the language.
- Ask: what is the meaning of what the parties have said? Not: what did the parties mean to say?

- **Can you use extrinsic evidence to help construe a contract?**
- First, what *is* ‘extrinsic evidence’?
- It is evidence of the parties’ intention that is extrinsic or external to the (fully written) contract.
- Logically, if the contract is not fully written, it is not possible to determine the limits or boundary of the contract and therefore to be able to determine *all* the express terms of the contract. In a contractual dispute, reference will only be made to those express terms relevant to the dispute, not to *all* the express terms of the contract. Thus, the determination of ‘extrinsic evidence’ and the application of the *parol evidence rule*, are only ever relevant where the contract has been reduced to writing and appears, on its face, to contain all the terms of the contract. (ie the expression of the parties’ contractual intention in their entirety.)

What is the “true rule”?

In *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, Sir Anthony Mason said (at 352):

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.

Two approaches to the use of extrinsic evidence:

- 1. In England: the contextual (broader) approach:
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98 at 114-5.**
- 2. In Australia: the traditional or literal approach:
Codelfa Construction Pty Ltd v State Railway Authority of New South Wales (1982) 149 CLR 337.**

The approach in Australia:

- Under the objective theory of contract, the meaning of a contract is to be decided in accordance with what the terms of the contract would convey to a reasonable person in the position of the parties, rather than by reference to the subjective intention of one, or even both, parties to the contract: *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) HCA 37

Toll

- References to what the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement.
- The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That normally requires consideration not only of the text, but also of the **surrounding circumstances** known to the parties, and the purpose and object of the transaction.

How does this compare to Mason J 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 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.

Where does that leave evidence of prior negotiations?

Codelfa:

- It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible.

But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable.



Code/ifa (cont'd):

- **The point is that such statements and actions reveal the terms of the contract which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself. The object of the parol evidence rule is to exclude them, the prior oral agreement of the parties being inadmissible in aid of construction, though admissible in an action for rectification. (at p352)**

Codefa (cont'd)

- Consequently when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract.
(at p352)

- 1. You can only give evidence of surrounding circumstances if the terms are ambiguous or capable of more than one meaning.**
- 2. But such circumstances are limited to the factual background known to the parties at or before the date of the contract, including genesis and the aim of the transaction.**
- 3. Evidence of the parties' negotiations insofar as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations are inadmissible.**
- 4. Can only look to objective framework of facts within which contract came into existence and to parties presumed intention.**

Rationale of this approach:

The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations:

Royal Botanic Gardens, per Kirby J.

The approach in England:

The alternative view (the contextual approach) is that ambiguity is not necessary before you can look at surrounding circumstances to aid in construction:

Investors Compensation Scheme Ltd v West Bromwich Building Society [No 1] (ICS)
[1998] 1 All ER 98 at 114 to 115 per Lord Hoffman.

ICS per Lord Hoffman:

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

ICS per Lord Hoffman:

(2) Subject to the requirement that it should have been reasonably available to the parties and to the exception [that previous negotiations and declarations of subjective intent are excluded], [the background knowledge which the reasonable person is assumed to have had] includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.”

ICS per Lord Hoffman:

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are not clear...

- ***Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251*** at 269 per Lord Hoffman:

“no conceptual limit to what can be regarded as background”.



Key difference between approaches:

Under the ICS approach (in England) a finding of ambiguity is not a precondition to a consideration of the factual background.

- Did the position in Australia move away from the true rule in *Codelfa*?
- Intermediate appellate courts are divided as to whether ambiguity is necessary before you can resort to extrinsic evidence to aid in the construction of contracts

Ambiguity not necessary:

- New South Wales:

Franklins Pty Ltd v Metcash Trading Ltd (2009) 76 NSWLR 603 at [14] to [18] per Allsop P, [49] per Giles JA and [239] to [305] per Campbell JA; *Synergy Protection Agency Pty Ltd v North Sydney Leagues' Club Ltd* [2009] NSWCA 140 at [22] per Allsop P (with which Tobias and Basten JJA agreed); *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382 at [3] per Allsop P (with whom Basten JA agreed); and *Movie Network Channels Pty Ltd v Optus Vision Pty Ltd* [2010] NSWCA 111 per Macfarlan JA (with whom Young JA and Sackville AJA agreed) at [68].

- Federal Court:

Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd [2006] FCAFC 144: at [51] per Weinberg J, at [100] per Kenny J, at [238] per Lander J; and *Ralph v Diakyne Pty Ltd* [2010] FCAFC 18 at [46] per Finn, Sundberg and Jacobson JJ.
- Victoria:

MBF Investments Pty Ltd v Nolan (2011) 37 VR 116 at [197] to [203] per Neave, Redlich and Weinberg JJA.

Toll

“[40] This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.

Toll (cont'd)

References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement.

The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. **That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction. “**



Despite *Toll*- High Court says that nothing they have said departs from *Codelfa* (and the “true rule”):

***Byrnes v Kindle* (2011) 243 CLR 253**

***Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604**

***Mount Bruce Mining* (2015) 256 CLR 104**

Jireh

[2] The primary judge had referred to what he described as “the summary of principles” in *Franklin Pty Ltd v Metcash Trading Ltd*. The applicant in this court refers to that decision ... as authority rejecting the requirement that it is essential to identify ambiguity in the language of the contract before the court may have regard to the surrounding circumstances and object of the transaction. ...

[3] Acceptance of the applicant’s submission, clearly would require reconsideration by this court of what was said in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* by Mason J, with the concurrence of Stephen and Wilson JJ, 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.

***Jireh* (cont'd)**

[4] The position of *Codelfa*, as a binding authority, was made clear in the joint reasons of five justices in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* and it should not have been necessary to reiterate the point here.

[5] We do not read anything said in this court in *Pacific Carriers Ltd v BNP Paribas; Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd; Wilkie v Gordian Runoff Ltd* and *International Air Transport Association v Ansett Australia Holdings Ltd* as operating inconsistently with what was said by Mason J in the passage in *Codelfa* to which we have referred.



But then, in *Electricity Generation Corporation v Woodside* (2014) 251 CLR 640 the High Court said:

The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding “of the genesis of the transaction, the background, the context [and] the market in which the parties are operating”.



Woodside was said to be inconsistent with Jireh:

- In *Mainteck Services Pty Ltd v Stein Heurtey SA*, [2014] NSWCA 184 at [72] – [86]
- In *Stratton Finance Pty Ltd v Webb* (2014) 314 ALR 166; [2014] FCAFC 110 the Full Federal Court (Allsop CJ, Siopsis and Flick JJ) at [36] to [40] agreed with that view.
- In *Newey v Westpac Banking Corporation* [2014] NSWCA 319 at [86] to [90] court took a similar view.

And then, in *Mount Bruce* (Keifel and Keane J)

- His Honour did not say how such an ambiguity might be identified. His Honour's reasons in *Codelfa* are directed to how an ambiguity might be resolved.
- In reasons for the refusal of special leave to appeal given in *Western Export Services Inc v Jireh International Pty Ltd*, reference was made to a requirement that it is essential to identify ambiguity in the language of the contract before the court may have regard to the surrounding circumstances and the object of the transaction. There may be differences of views about whether this requirement arises from what was said in *Codelfa*. This is not the occasion to resolve that question.



Mount Bruce (Kiefel and Keane JJ):

- The question whether an ambiguity in the meaning of terms in a commercial contract may be identified by reference to matters external to the contract does not arise in this case and the issue identified in Jireh has not been the subject of submissions before this Court. To the extent that there is any possible ambiguity as to the meaning of the words "deriving title through or under", it arises from the terms of cl 24(iii) itself.

Mount Bruce (French CJ, Nettle and Gordon JJ):

[48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.

Mount Bruce (French CJ, Nettle and Gordon JJ):

[49] ...However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.

Mount Bruce (cont'd)

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



Mount Bruce (Bell and Gageler JJ):

[118] These appeals do not raise an important question on which intermediate courts of appeal are currently divided. That question is whether ambiguity must be shown before a court interpreting a written contract can have regard to background circumstances.

[119] Until that question is squarely raised in and determined by this Court, the question remains for other Australian courts to determine on the basis that *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* remains binding authority. That point, which of itself says nothing about the scope of the holding in *Codelfa*, was made in the joint reasons for judgment in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*. The point was reiterated, but taken no further, in the joint reasons for refusing special leave to appeal in *Western Export Services Inc v Jireh International Pty Ltd*. It should go without saying that reasons for refusing special leave to appeal in a civil proceeding are not themselves binding authority.



[120] The question whether ambiguity must be shown before a court interpreting a written contract may have regard to background circumstances does not arise for determination in these appeals

In summary (after *Mount Bruce*):

- **Codelfa** remains binding authority. (But for what, exactly, is it binding authority in this area?)
- The **Codelfa** “true rule” that if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning, should presently be regarded as authoritative.

- However, the High Court has not yet resolved the question whether –**
 - (i) an ambiguity in the meaning of terms in a commercial contract; or
 - (ii) the existence of a constructional choice, may be identified by reference to matters external to the contract.

- In at least these regards, the High Court has expressly removed the brake on development of the law in the courts below which had been perceived to have been imposed by the *Jireh* decision.

Exceptions to the parol evidence rule:

- **First, extrinsic evidence which tends to establish objective background facts known to both parties.**
- **Second, extrinsic evidence which assists in the identification of the subject matter of the contract.**
- **Third, where the parties have refused to include in their contract a provision which would give effect to something which is subsequently suggested to be the presumed intention of persons in their position, evidence of that refusal is admissible with a view to negativing the alleged presumed intention.**

- Fourth, the “private dictionary” principle, in which evidence is admissible that the parties habitually used words in an unconventional sense in order to support an argument that words in their contract should bear a similar unconventional meaning; and
- Finally, of course, cases which are properly to be regarded as outside the operation of the rule because they involve pursuit of extra-contractual remedies, such as estoppel or rectification (or, it would follow, remedies under statutes like the Australian Consumer Law).



If there is ambiguity, what type of extrinsic evidence can be considered?

The objective theory of contract again provides the answer in identifying the scope of what is admissible to help interpret the contract.

Permissible use of extrinsic evidence:

In *Mount Bruce* (French CJ, Nettle and Gordon JJ), admissible extrinsic evidence is evidence of objective events, circumstances and things

- (a) which are known to the parties; or**
- (b) which assist in identifying the purpose or object or genesis of the transaction,**

and which, once proved, may be used in aid of construction of the contract.

Impermissible use of extrinsic evidence:

- **It is a corollary of the objective theory of contract (disregarding as it does consideration of the subjective intention of either or both of the parties) that regard may not be had to evidence of the antecedent negotiations and expectations of the parties in order to construe the contract**
- **What is impermissible is evidence, whether of negotiations, drafts or otherwise, which is probative of, or led so as to understand, the actual intentions of the parties. Such evidence might be legitimate, however, if directed to one of the legitimate aspects of surrounding circumstances.**

- This approach is similar to that in the UK in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 where the House of Lords drew a distinction between the previous communications between the parties that established relevant background and pre-contractual negotiations between the parties.

- *Byrnes v Kindle* (2011) 243 CLR 253 – although about whether a trust had been created, useful in the context of the proper role of extrinsic evidence in establishing the parties' intention.
- Extrinsic evidence of intention of the settlor inadmissible.
- See at [132]-[134].

Byrnes v Kindle (cont'd)

- A contract means what a reasonable person having all the background knowledge of the “surrounding circumstances” available to the parties would have understood them to mean.
- But evidence of pre-contractual negotiations between the parties is inadmissible for the purpose of drawing inferences about what the contract meant unless it demonstrates knowledge of “surrounding circumstances”.



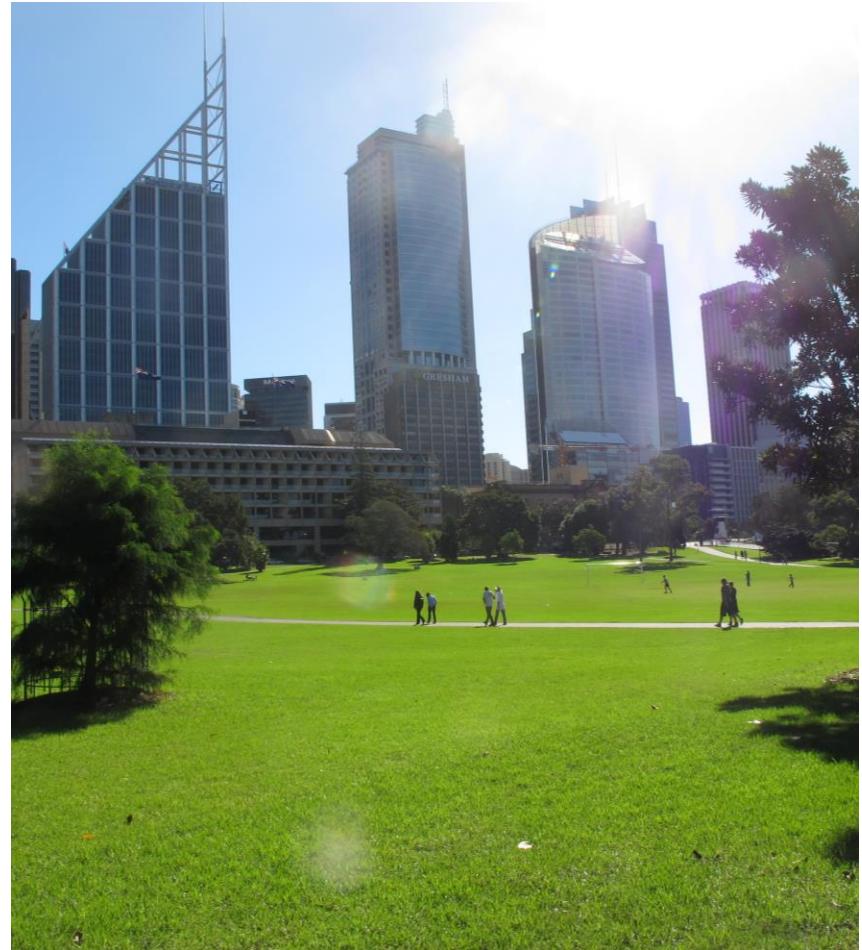
Codelfa

Prior negotiations are admissible to the extent they:

- ❑ Establish objective background facts known to both parties; and**
- ❑ The subject matter of the contract.**

Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 240 CLR 45

Clause in a lease between Royal Botanic Gardens (lessor) and the Council (lessee) which entitled the lessor to determine rent at the end of each 3 year period by having regard to **“additional costs and expenses”**.





Royal Botanic Gardens:

HCA:

- clause ambiguous because it did not indicate whether other matters could be taken into account.
- Appropriate to consider the circumstances with reference to which the words were used, and from those circumstances, to discern the objective which the parties had in view.



Royal Botanic Gardens:

HCA:

- In particular that surrounding circumstances should be taken into account where an appreciation of the commercial purpose of a contract presupposes knowledge of the genesis of the transaction, the background, the context [and] the market in which the parties are operating.



Royal Botanic Gardens:

HCA:

- When the lease was read against the background of what it identified as the principal surrounding circumstances, the clause specified exhaustively the considerations material to the determination of rent by the lessor.**

Royal Botanic Gardens:

Surrounding circumstances were:

- (a) Parties were 2 public authorities**
- (b) Primary purpose to provide a public facility not a profit**
- (c) Lessee was responsible for the substantial cost of construction of the facility**
- (d) The facility was to be constructed under the lessor's land and would not interfere with public enjoyment of that land for recreation**
- (e) Parties' concern to protect lessor from financial disadvantage**
- (f) Only financial disadvantage to lessor related to additional expense it might incur**



What type of evidence can be considered if there is ambiguity (cont'd)

- **For facts at time of the contract to be admissible, the facts must be known to both parties, whether that is proved directly to be so or because the facts are so notorious that it may be assumed.**
- **Generally, evidence of post-contractual conduct is not admissible.**

- **In summary:** remember what you are trying to do when you construe a contract. That should be to find out what the terms of the contract would convey to a reasonable person in the position of the parties, bearing in mind what that reasonable person would know about:
 - Objective background facts; and
 - The purpose and object of the transaction.
- Relevant extrinsic evidence is that which sheds light on those 2 matters.

Mount Bruce (2015) HCA 37

Involved the construction of a 1970 agreement in which MBM agreed to pay a royalty in respect of ore mined from the “**MBM area**” in the Pilbara and agreed that the royalty would be payable by “all persons or corporations deriving title **through or under MBM**”



Mount Bruce (cont'd)

- “through or under” to be read broadly and not confined to mean a chain of title analogous to that in systems of land registration was required
- Supported by reference to circumstances surrounding the meaning of the 1970 agreement and in particular the facts known to the parties.
- That regard may be had to the mutual knowledge of the parties to an agreement in the process of construing it is evident from *Code/fa* where Mason J accepted there may be a need to have regard to circumstances surrounding a commercial contract in order to construe its terms.

Mount Bruce (cont'd)

- In the passages preceding the “true rule” discussion, Mason J in *Codelfa* referred to “mutually known facts” which may assist in understanding the meaning of a descriptive term or the “genesis” or “aim” of the transaction.

Position after *Mount Bruce*

- **Codelfa** is good law
- If a term in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning, and should be regarded as authoritative.
- However, HCA has not yet resolved whether:
 - an ambiguity in the **meaning of terms** in a commercial contract; or
 - the **existence of a constructional choice/ambiguity** Can be identified by reference to matters external to the contract.

Useful summary of the principles to be applied to the construction of a contract in a commercial context in *Décor Blinds Gold Coast Pty Ltd v Décor Blinds Australia Pty Ltd [2004] QSC 55*:

- (1) the court's primary task is to construe the words used by the parties in the contract.**
- (2) the common intention of the parties is to be found in the words used in the contract.**
- (3) the court will give effect to the plain meaning of words which are unambiguous no matter how capricious, unreasonable, inconvenient or unjust the result.**

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- (4) the more unreasonable the result, the more unlikely that the construction which gives rise to that result is correct unless an intention to achieve that result is abundantly clear.**
 - (5) few words have a plain meaning and are unambiguous or not susceptible of more than one meaning. Until a word, phrase or sentence is understood in the light of the surrounding circumstances, it is rarely possible to know what it means;**
Manufacturers Mutual Insurance Ltd v Withers (1988) 5 ANZInsCas 60-853.
 - (6) if the words have more than one possible meaning, then the construction will be preferred which is not capricious, unreasonable, inconvenient or unjust.**

- - (7) the contract should be looked at as a whole to elucidate the meaning of each clause: the contract must, if possible, be construed so that each clause is consistent in meaning with the whole of the contract.
 - (8) commercial contracts should be construed so as to make commercial sense of them — a conclusion that reflects business common sense is to be preferred to one that flouts it.
 - (9) it is necessary to construe a document against the background in which it was made to determine what the words in the document mean — the meaning of words cannot be divorced from their context; *Royal Botanic Gardens*.

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- (10) the meaning given may not necessarily be the most obvious or grammatically correct.
 - (11) the purpose of a provision is part of the context in which the meaning of words is to be ascertained. A construction is preferred which gives effect to the commercial purpose of the contract; *Royal Botanic Garden*.
 - (12) a commercial contract should be construed fairly and broadly whether or not the contract was drawn with assistance of lawyers.