Jumping off the page

The use of extrinsic material in the interpretation of contracts and statutes

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(The full seminar, including video and slides, is available on the ADLS website)

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1. Introduction

1.1. The late Justice Antonin Scalia once quipped that "the main business of a lawyer is to take the romance, the mystery, the irony and the ambiguity out of everything [s]he touches". Many of us do so with some success, in and out of the office.

1.2. A large part of this exacting business is the task of interpretation. It is the bedrock of our legal work. Very many disputes turn on the meaning of a written contract, or a statute, or both. Lawyers (and judges) constantly face the question: "what on earth do these words mean?". The answer, often knife-edge, can have enormous consequences. In a recent case, *Bathurst v L&M Coal Holdings Ltd*,[1] some US$40 million turned largely on whether the word "shipped" meant exported by ship or merely "transported" in a generic sense.

1.3. The "modern" approach to contractual interpretation has involved wider use of extrinsic material, sometimes losing sight of the language used. It arguably reached its pinnacle in New Zealand in the Supreme Court judgment in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[2]. However, the courts have recently been tightening up their approach, re-emphasizing the primacy of the text. This is a shift of emphasis, not a reversion to literalism.[3] The shift is more pronounced in contract cases, but is also discernible in statutory interpretation.

1.4. What does this mean in practical terms for the use of extrinsic material? External context remains important, as it should, but it is not a free-for-all. There are signs of a hardening up. Parties have been rebuked for excessive reliance on external material that is inadmissible, only remotely relevant, or "startlingly unhelpful".

1.5. A more rigorous approach has obvious practical advantages. In particular, it promotes certainty. And by narrowing the scope of the hearing, and reducing costs, it also promotes access to justice -- one of the foremost issues of the day.

1.6. In this paper I explore what may properly be put before the court. How far beyond the written page should you look when giving advice or running a proceeding involving an issue of interpretation? I address the question under four main topics, with a focus on recent cases and practical application.

In relation to contracts:

(a) What are the core principles governing the interpretation of written contracts? Courts and commentators have theorised endlessly on this topic. Where exactly have we got to?

(b) What kind of evidence is admissible (or not) under the "factual matrix", prior negotiations, and subsequent conduct. How can a more restrained and disciplined approach be encouraged?

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1 *Bathurst v L&M Coal Holdings Ltd* [2020] NZCA 113 (***Bathurst***).
2 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 (***Vector***).
3 Lord Sumption described it as a shift of "judicial mood" in "A Question of Taste: The Supreme Court and the Interpretation of Contracts", Harris Society Annual Lecture, Keble College, Oxford, 8 May 2017.

In relation to statutes:

(c) What are the similarities -- and differences -- between the interpretation of statutes and contracts?

(d) What kinds of extrinsic interpretive aids may be used? As legislative history is the most common one I will concentrate on that.

1.7. The Supreme Court heard the appeal in the *Bathurst* case on 7 and 8 October 2020. This is likely to be an important judgment. Hopefully it will finally clarify the admissibility of prior negotiations and subsequent conduct in interpreting written contracts.[4] I will provide an addendum to this paper (or if necessary a rewrite…) after delivery of the judgment.

2. Contract interpretation: core principles

Where are we now?

2.1. During the last decades (some would say centuries) courts, commentators and practitioners have luxuriated in debates about this. That indulgence is coming to an end. The Supreme Court has clearly signalled that the core principles, as set out by the majority in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*,[5] must now be regarded as settled.[6] And in its recent judgment in *Savvy Vineyards 4334 Ltd v Weta Estate Ltd* the Supreme Court emphasised that there was "no dispute as to the interpretation applicable…this being the approach set out in [*Firm PI*]".[7] These principles, as far as they go, are as follows.

The approach is objective

2.2. The ultimate approach to the interpretation exercise is a conventional objective one. The Supreme Court expressed this important governing principle in *Firm PI,* as follows:[8]

> It is sufficient to say that the proper approach is an objective one, the aim being to ascertain "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." This objective meaning is taken to be that which the parties intended.

2.3. The United Kingdom Supreme Court has just last month affirmed this principle in similar terms:[9]

> There is no doubt or dispute about the principles of English law that apply in interpreting the policies. ....The core principle is that an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge

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4 The Supreme Court in the leave judgment invited the parties to address these issues: *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZSC 73 (***Bathurst SC***), at [1](b) per Winkelmann CJ, Glazebrook and Ellen France JJ.

5 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 (***Firm PI***) at [60]-[63] per McGrath, Glazebrook and Arnold JJ.

6 In *Bathurst SC,* above n 4, the Supreme Court stated, at [1](a), that "The principles of interpretation have been set out by this Court in…[*Firm PI*]. We will not revisit those principles on this appeal."

7 *Savvy Vineyards 4334 Ltd v Weta Estate Ltd* [2020] NZSC 115 (***Savvy Vineyards***), at [24] per Winkelmann CJ, Glazebrook, O'Regan and Ellen France JJ. See also *New Zealand Air Line Pilots' Association Inc* v *Air New Zealand Ltd* [2017] NZSC 111 (***NZALPA***), at [71] per Arnold, O'Regan and Ellen France JJ.

8 *Firm PI*, above n 5, at [60] per Arnold, O'Regan and Ellen France JJ.

9 *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] 2 WLR 123 (***Arch Insurance***), at [47] per Lord Hamblem and Lord Leggatt (with whom Lord Reed agreed).

> which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.

2.4. This objective meaning is the parties' *presumed* intention. The reference to "intention" is somewhat unhelpful. The focus is on what the *words in the document* mean not what the *parties* meant. Put another way, it is about expressed meaning, not intended meaning.[10]

2.5. The objective approach to the interpretation of written contracts excludes a purely subjective inquiry into the individual (and uncommunicated) intentions of each party. No one would argue otherwise -- although, as will be discussed later, this basic rule is often flouted in practice. Parties frequently seek to rely on self-serving evidence of what they intended or meant.

2.6. Controversy lingers, however, over whether the objective approach is so 'pure' that it rules out all evidence of the parties' actual intention. Tipping J in *Vector* favoured the admissibility of evidence of the actual common intention of the parties, where objectively proven by an apparent consensus during prior negotiations, or by mutual subsequent conduct.[11] He thought that this was "not inconsistent" with the ultimate objective approach to interpretation.

2.7. In a strongly worded judgment, the Court of Appeal in *Bathurst* has recently jumped in and disclaimed the relevance of actual intention, mutual or otherwise. Kós P stated:[12]

> In mediating the tension between intention and objectivity, gallons of ink have been spilt. "Intention" implies an inquiry into the common subjective state of mind of the contracting parties (or those who represent them). The objectivity principle immediately swerves from that course.

2.8. The Court's inquiry he said is "not to probe [the parties'] actual intended meaning". Rather, the task is to ascertain the contextual meaning of the relevant contractual language. Kós P considered that the "safety net" of rectification would enable parties to give effect to their subjectively intended bargain if the written contract fell short. No doubt the Supreme Court will soon make known its views on this important issue.

The interpretive task is "contextual"

2.9. Although the interpretive exercise is described as "contextual", it encompasses text, context and purpose. The process, in terms of what may be looked at, can be summarised as follows:

- an examination of the language used (text),
- in the immediate contractual clause(s) and in the contract document as a whole (internal context),
- informed by the surrounding circumstances (external context) known or reasonably available to both parties, which may include:
    - the factual matrix, and

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[10] Sometimes the objective test has been stated in terms of what a reasonable person would consider the *parties intended their words to mean*, rather than what a reasonable person would consider *the words mean*: for example, *Arnold v Britton* [2015] UKSC 36, [2015] 2 WLR 1593 at [15] per Lord Neuberger. However, I doubt that any real difference was intended.

[11] *Vector*, above n 2, at [30]-[32], [37] and [47] per Tipping J.

[12] *Bathurst*, above n 1, at [35] per Kós P (giving the reasons of the Court). Also at [36]-[44].

- to an extent yet to be settled, prior negotiations and subsequent conduct, but

- excluding evidence of a party's individual subjective intentions.

The text is paramount

2.10. The Supreme Court in *Firm PI* also reasserted the primacy of the language used by the parties. If the words used have an ordinary and natural meaning, that will normally prevail:[13]

> While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be "a powerful, albeit not conclusive", indicator of what the parties meant.

2.11. The Court stated that the "ordinary and natural meaning" of the text should not be challenged on the basis of commercial absurdity except in the "most obvious and extreme of cases".[14] This high threshold recognises that:

(a) The courts are not always the best arbiters of commerciality. As was said in *Firm PI*, "commercial absurdity" tends to lie in the eye of the beholder.[15] There have been numerous cases where an interpretation viewed by one judge as commercially sensible has been described by another as completely devoid of business common sense, if not of all reason.

(b) The mere fact that a contract appears to be unduly favourable to one party does not justify a conclusion that the contract does not mean what it seems to say. The parties' final bargain may reflect accommodations reached during 'every man for himself' negotiations.[16]

(c) Parties may in fact enter bad or foolish bargains, and it is not for the court to rewrite their deal for them.

(d) Commerciality is to be judged at the time the contract is entered into. But the court approaches the task with perfect hindsight and knowledge of the disaster that has occurred.

2.12. However, the principle still holds that where, after the exercise in paragraph 2.9 above, there remains a real ambiguity, the court will generally prefer the interpretation that does not flout business common sense -- or indeed common sense generally.[17]

There is no ambiguity threshold

2.13. It used to be necessary to identify an ambiguity in the text before looking at the surrounding circumstances. The Supreme Court said in *Vector* that this is no longer required, and reaffirmed this in *Firm PI.*[18]

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13 *Firm PI*, above n 5, at [63] per McGrath, Glazebrook and Arnold JJ. Recently in *Bathurst*, above n 1, Kós P also stressed the "textual primacy principle" at [45]-[46], stating that the common law "places a premium on the words used", the words being "the best objective evidence of what was intended".

14 At [93] per McGrath, Glazebrook and Arnold JJ.

15 At [90] per McGrath, Glazebrook and Arnold JJ.

16 At [91] per McGrath, Glazebrook and Arnold JJ.

17 As Glazebrook J said in *NZALPA* above n 7, at [210], "It is unlikely that the parties would intend a clause to be unworkable".

18 *Firm PI*, above n 5, at [61] per McGrath, Glazebrook and Arnold JJ.

2.14. The relationship between the text and background has been described as "symbiotic".[19] The relevant background may point to an interpretation other than the most obvious one. However, external context should not be allowed to overwhelm the text, and where the wording has an ordinary and natural meaning it will be more difficult to displace. The external context may also confirm a provisional interpretation, or help resolve a real ambiguity.

2.15. Interestingly, however, in several recent cases, the Supreme Court has in fact seen no need to refer to the external context – even as a cross-check -- where the meaning is "crystal clear",[20] or "clear" with "no ambiguity".[21]

What is not yet settled?

Prior negotiations and subsequent conduct

2.16. It is surprising that, this late in the day, some fundamental issues of contract interpretation remain unsettled in New Zealand. Notably, this includes the extent to which prior negotiations and subsequent conduct can be looked at as an aid to meaning. No consistent rulings on this emerged from *Vector* or *Gibbons*, and these issues were not addressed in *Firm PI.* In *Bathurst* the Court of Appeal seized the initiative and said that that prior negotiations are not admissible, and that subsequent conduct should be limited to common or mutual conduct. The Supreme Court in *Bathurst* will shortly have the final word. I discuss these issues further in paragraphs 3.53-3.69 below.

Implication of terms

2.17. Also apparently yet to be settled (due to another 'Hoffmann offensive') is the basic question whether the implication of 'terms in fact' is part of interpretation or is a separate exercise.[22] Traditionally it has been regarded in New Zealand as a distinct process governed by different rules. I cannot see any good reason for that to change, at least where there are true gaps in the written contract.[23] The process of construction works well with its three 'limbs' of (a) interpretation, (b) implication and (c) rectification. There is no need for interpretation to become a 'one-stop-shop' absorbing the other two. Implication is also to be addressed by the Supreme Court in *Bathurst.*[24] It is not a subject covered in this paper.

The shift in emphasis in recent years

2.18. The "traditional" approach to contract interpretation turned on the plain meaning of the language, and extrinsic evidence was relegated to more of a bit part. The shift to the modern contextual

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19 *NZALPA*, above n 7, at [190] per Glazebrook J.

20 *Lakes International Golf Management Ltd v Vincent* [2017] NZSC 99 (***Lakes International***) at [28] per William Young J (giving the reasons of the Court). See also the recent decision of the Court of Appeal in *Kaimai Properties Ltd v Queen Elizabeth the Second National Trust* [2021] (***Kaimai Properties***), at [46] per Kós P (giving the reasons of the Court).

21 *Savvy Vineyards* above n 7 at [26]-[29] per Winkelmann CJ, Glazebrook, O'Regan and Ellen France JJ.

22 This issue is discussed in detail in Winkelmann, Glazebrook and France "Contractual Interpretation", Asia Pacific Judicial Colloquium Paper, Singapore, 28-30 May 2019 at [81]-[102].

23 See the comments of French and Winkelmann JJ in *Ward Equipment v Preston* [2017] NZCA 444 at [46]-[47], and Kós J at [84]-[95]. Kós J said he did not consider that the correct approach in New Zealand need be viewed as uncertain.

24 The leave judgment, above n 4, states at [1](c) that "We will hear argument on the distinction between interpretation and implication and the appropriate test for the latter".

approach gained impetus with the House of Lords' judgment in *Prenn v Simmonds*,[25] where Lord Wilberforce made his famous "matrix of facts" statement:

> The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on linguistic considerations….We must…inquire beyond the language and see what the circumstances are with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view.

In the United Kingdom

2.19. The contextual approach arguably reached its high point with the Lord Hoffmann's judgments in *Investors Compensation Scheme v West Bromwich Building Society*[26] and *Chartbrook Ltd v Persimmon Homes Ltd*.[27] A notable feature of these cases was the focus on surrounding circumstances and commercial common sense, and a readiness by the Court to depart from the wording of the contract to achieve a fair or reasonable result.

2.20. A shift back was evident by 2015, with the 'disruptor' judgment of the United Kingdom Supreme Court in *Arnold v Britton.* [28] The case involved the now-infamous Oxwich Leisure Park near Swansea on the Welsh coast. Certain leases of holiday chalets provided, on their natural wording, for an annual service charge of £90 increasing every year by10% on a compound basis. Each lessee's service charges stood to rise to over £1 million by the end of the 99 year lease term. Although describing this outcome as "alarming" in its absurdity (at least in hindsight), Lord Neuberger stressed that the Court could not, under the "guise of interpretation", rewrite the parties' bargain.[29]

2.21. In *Wood v Capita Insurance Services Ltd*[30] the UK Supreme Court dismissed counsel's suggestion that the Court had "rowed back" from *ICS*, asserting that there had been no "recalibration of approach" to interpretation. Rather, the different approaches were to be attributed to the particular circumstances of the cases. The Court seemed concerned to dispel any suggestion of lack of stability and continuity in English law. This appears to have been effective in shutting down debate in subsequent UK judgments.

2.22. However, whilst the fundamental principles may remain the same, the shift in emphasis back towards text is undeniable. The decision in *Wood* itself exemplifies this shift. It concerned the interpretation of an "opaque" indemnity clause in an agreement for sale and purchase of the share capital of a company specialising in insuring classic cars. The Supreme Court considered that that the scope of the indemnity was "to be found in a careful examination of the language". This led to a harsh result for Capita. The Court accepted that the agreement had become a poor bargain for Capita, but stressed that it was "not the function of the Court" to improve it.[31]

2.23. This harder line has continued, and is evident in a number of subsequent cases. One example is *Joseph v Deloitte*.[32] An equity partner at Deloitte was expelled because of his alleged bullying

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25 *Prenn v Simmonds* [1971] 1WLR 1381 (HL).
26 *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28, [1998] 1 All ER 98, [1998] 1 WLR 896 (HL) (***ICS***).
27 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 3 WLR 267, [2009] 4 All ER 677 (HL) (***Chartbrook***).
28 *Arnold v Britton* [2015] UKSC 36, [2015] 2 WLR 1593. See also *Arnold v Britton* [2013] EWCA Civ 902.
29 At [20] per Lord Neuberger (with whom Lord Sumption and Lord Hughes agreed).
30 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, Lord Hodge (giving the judgment of the Court).
31 At [41] per Lord Hodge.
32 *Joseph v Deloitte NSE LLP* [2020] EWCA Civ 1457; *Joseph v Deloitte NSE LLP* [2019] EWHC 3354 (QB) (***Deloitte***).

and other misconduct. Under the partnership agreement he could request the Board to reconsider. He could then request a meeting of the full partnership "within seven (7) days of the date of such Board meeting". This deadline passed before Mr Joseph was even told of the Board's decision, and so he attempted to give notice one day late. The High Court and Court of Appeal held that although Mr Joseph had been "harshly treated", Deloitte had acted within its strict legal rights. It was "tempting but wrong" to try and fashion a remedy for Mr Joseph, whether in interpretation, implied term, or estoppel.

2.24. Most recently, in *Arch Insurance*,[33] where the issue was whether certain insurance policies covered the policy holders for business interruption relating to the Covid-19 pandemic, the UK Supreme Court adopted a narrow interpretation of the insured peril, described in the policy as "any occurrence of a Notifiable Disease within a radius of 25 miles …". The Court of Appeal had attached significance to the potential for a notifiable disease to spread rapidly and widely. However, a majority in the Supreme Court said that that could not justify extending the geographical scope of the cover beyond the area clearly specified in the policy. To interpret the words as including any occurrence of a notifiable disease outside a 25 mile radius would be to "stand the clause on its head".[34] It went "beyond interpretation" and "involved rewriting the clause".[35]

2.25. The majority did, however, have regard to the spreading potential of Covid-19 when considering causation and the covered loss. Lord Briggs (who would have preferred a "less circuitous" approach) saw a need to emphasise that the majority had not overstretched in order to save the policy holders from an illusory cover:[36]

> They have, in effect, rescued the policyholders from the at first sight sombre consequences of a narrow definition of the insured peril by a principled application of the doctrine of concurrent cause….
> That is not to say that the majority have insulated policyholders from the unfortunate consequences of a bad bargain (properly construed) by the healing balm of purely legal rules of causation. On the contrary, and again rightly in my view, the majority ground their treatment of concurrent causation firmly within the process of construction…..Both the insured peril and the covered loss lie at the very heart of the contract of insurance, and the process of construction requires that they be addressed together.

In New Zealand

2.26. In New Zealand the relative emphasis on text and external context has followed a similar trajectory. Our courts initially embraced the Hoffman approach,[37] and it arguably reached its high point here in 2010 in *Vector*. In that case the interpretation question was whether or not the words "the difference between the price set out in the Agreement and $6.50 per GJ" for gas supply included the cost of transmission. On its ordinary and natural meaning it was plainly included.[38] However, a majority of the Supreme Court relied heavily on considerations of

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33 *Arch Insurance*, above n 9.
34 At [61] per Lord Hamblen and Lord Leggatt (with whom Lord Reed agreed).
35 At [[73].
36 At [319], [320].
37 *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA), pp 81-82 per Thomas J (delivering the judgment of the Court).
38 *Vector*, above n 2, McGrath J at [56] (agreeing with the Court of Appeal at [92]).

commercial common sense (assessed mainly from the perspective of NGC) and the parties' prior negotiations, to read in the additional words "exclusive of the cost of transmission".[39]

2.27. Subsequently the Supreme Court in *Firm PI* re-emphasised the primacy of the text, and issued cautions about invoking commercial absurdity just because a contract is unduly favourable to one party, as described in paragraphs 2.10 and 2.11 above.

2.28. A number of recent decisions have continued this 'de-Hoffmannisation' trend, including those of the Court of Appeal in *The Malthouse Ltd v Rangatira Ltd,*[40] *Forsgren NZ Ltd v Restaurant Brands Ltd,*[41] and *Bathurst*[42]. In each case the Court reasserted the central importance of the text, and the need for a very clear case before it will depart from the natural meaning of the words in order to avoid a commercially adverse outcome. In several further cases, where the meaning of the text was "clear" or "crystal clear", the Supreme Court did not have regard to external evidence at all: *Savvy Vineyards,*[43] *Lakes International*[44] and *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust*.[45] These cases will all be discussed in more detail below.

3. The surrounding circumstances

The factual matrix

3.1. There are two basic threshold requirements for evidence adduced as part of the "factual matrix". The circumstances in question must be (a) relevant, and (b) known by, or reasonably available to, both or all the contracting parties at the time of the contract.

Relevance

3.2. Lord Hoffmann famously said in *ICS* that the admissible background included "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man". He subsequently qualified this extravagant statement, saying that he meant "anything which a reasonable person would regard as relevant".[46]

3.3. In *Firm PI* the Supreme Court agreed that while there is no *conceptual* limit on what can be regarded as background, it has to be relevant background.[47] This means relevant to the interpretation task. The facts and circumstances should be objective and "usually uncontroversial."[48]

Known by, or reasonably available to, both parties

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39 The majority decided the case on the basis of estoppel by convention, but views were also expressed on the interpretation issue.
40 *The Malthouse Ltd v Rangatira Ltd* [2018] NZCA 621 (***The Malthouse***).
41 *Forsgren NZ Ltd v Restaurant Brands Ltd* [2020] NZCA 254 (***Forsgren***).
42 Above n 1, Kós J (giving the reasons of the Court).
43 Above n 7.
44 Above n 20.
45 *Green Growth no. 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75; [2019] 1 NZLR 161 (***Green Growth***). An application for partial recall of this judgment was dismissed in [2018] NZSC 115.
46 *Bank of Credit and Commerce International SA v Munawar Ali* [2001] 1 All ER 961, [2001] 2 WLR 735, at [39] per Lord Hoffmann.
47 *Firm PI*, above n 5, at [60] per Arnold, O'Regan and Ellen France JJ.
48 *Chartbrook*, above n 27 at [38] per Lord Hoffmann.

3.4. There is an obvious need for caution in attributing to a contracting party knowledge that they in fact did not have but which the court considers was "reasonably available" to them. The England and Wales High Court recently considered the scope of the phrase "reasonably available" in *Lehman Brothers International (Europe) v Exotix Partners* LLP.[49] This was an unusual case. The parties had entered into a trade of Global Depository Notes on the (uncontroverted) common understanding that they were low value assets. Lehman, the vendor, due to a "regrettable lapse" thought its holding of GDNs amounted to "small scraps" with a value of only US$7,000. The purchaser, Exofix, paid US$7,438. In fact, as Exofix realized a few weeks after the trade, the market value of the holding was over US$7 million. Exofix onsold the assets and pocketed a huge windfall, which it chose to keep quiet about and not disclose to Lehman.

3.5. A key issue in the ensuing dispute was what knowledge the parties should be taken to have had at the time of the trade. Hildyard J observed that the test of "reasonably available" is "a particularly difficult one" to apply and "requires restraint", all the more so given the almost unlimited information and knowledge now available online. The question (at least in the absence of direct evidence about what the parties did or did not know) is "what knowledge a reasonable observer would have believed and expected both contracting parties to have had, and each to have assumed the other to have had, at the time of their contract."[50]

3.6. However, if (as in that case) it is demonstrated positively that a particular fact or circumstance *was not known* to either or one party, "that is as much a part of the factual matrix as anything else". Thus, where ignorance is positively demonstrated knowledge is not to be imputed, and nor is the test what reasonable diligence might have revealed.[51] Hildyard J noted that the more readily available a fact the more difficult it will be to establish ignorance, but that is an evidential issue.

What does it cover in practice?

3.7. The factual matrix used to be described in fairly limited terms. In *Reardon Smith Line Ltd v Hansen Tangen*[52] Lord Wilberforce said: [53]

> In a commercial context it is certainly right that the Court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties were operating.

3.8. There is no exhaustive list of what the factual matrix may comprise; it will depend on the circumstances. Recent cases indicate that it will usually include such things as the genesis and object/purpose of the transaction or of a particular clause, the structure of the bargain, the nature of the relevant market or industry, practice and usage in the market or industry (which may be the subject of expert evidence), the history of dealings between the parties, the relative states of knowledge and experience of the parties, other connected contract documents or sub-contracts, and legal background including any Acts of Parliament and case law precedents. The term

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[49] *Lehman Brothers International (Europe) v Exotix Partners LLP* [2019] EWHC 2380 (Ch) (***Lehman Brothers***). The trade was an oral one, but the principles as to "reasonable availability" apply equally to a written contract.

[50] At [111] per Hildyard J.

[51] At [112] to [114], per Hildyard J. The exception is that a person cannot be assumed to be in ignorance of the law (at [112]). In the end Lehman succeeded on the basis of an implied term or, alternatively restitution.

[52] [1976] 1 WLR 989.

[53] At pp 995-996.

"factual matrix" has become an understatement. It is not confined to the factual background but can include the state of the law.

3.9. Considerations of commercial absurdity and business common sense may overlap with the factual matrix – as where they involve, for example, expert evidence.[54]

3.10. In some cases the parties presented only limited evidence of the factual matrix. In *Arnold v Britton*, for example, the only extrinsic evidence was the table of historic inflation figures. In other cases no relevant factual or commercial context was relied on.[55]

3.11. In addition, as the Supreme Court has observed, "the extent of the context the courts have regard to is…in itself contextual".[56] The following factors, which are themselves contextual, may lead the Court to adopt a more restrictive approach to the use of external material:

(a) *Complex agreement prepared by an experienced lawyer.* Where there is a complex and sophisticated agreement, negotiated and prepared with the help of skilled legal advisers, the interpretation exercise may be principally by textual analysis. The approach in *Forsgren* reflects this.

In *Deloitte*[57] the England and Wales High Court emphasised that Deloittes's equity partners were "a sophisticated user group" who could be expected to have entered into the well crafted partnership agreement "with their eyes open".[58] However, the Court of Appeal disagreed with reliance on that factor. Although the agreement was a long and detailed document, over 95 pages, it was not clear whether it had been drafted by lawyers or carefully negotiated. Nor did it appear to be "well thought through". Moreover, it may have been presented by Deloitte to the bulk of the equity partners on a take it or leave it basis.[59]

(b) *Standard form commercial contracts.* As explained by Hildyard J in *Lehmans*, "a standard form is not context specific and evidence of the particular factual background or matrix has a much more limited, if any, part to play" in the process of interpretation and "[more] than ever, the focus is ultimately on the words used, which should be taken to have been selected after considerable thought and with the benefit of the input and the continuing review of users of the standard forms and the knowledge of the market".[60]

(c) *Standard form consumer contracts.* In *IAG* Glazebrook J considered that there was a "very strong argument" that that when interpreting standard form consumer contracts (particularly those written in plain English) the context should be restricted and not include matters of which the average consumer would be unaware.[61] Her Honour stated:

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54 Sundaresh Menon, Chief Justice, Supreme Court of Singapore, "The Interpretation of Documents: Saying What they Mean or Meaning What They Say", 25th Singapore Law Review Lecture, 23 September 2013, at [52].

55 For example, *Apache North Sea Ltd v Euroil Exploration Ltd* [2020] EWCA Civ 1397. Such a case may involve a "pure" question of interpretation: *Taylor v Rhino Overseas Inc* [2020] EWCA 353, at [31] per Arnold LJ.

56 *Xu v IAG New Zealand Ltd* [2019] NZSC 68 (***AIG***), at [129] per Glazebrook and Arnold JJ. Similarly in *Firm PI*, above n 5, Arnold J stated at [62] that "to some extent then, the scope for resort to context is itself contextual".

57 Above n 32.

58 At [27](v) per Whipple J.

59 At [28] per Arnold LJ. This did not change the outcome however.

60 See also *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821. It involved a facility agreement which contained a standard form *clause* which appeared in many credit-linked notes and financing agreement. The origin and inclusion of a standard term was relevant context. But the Court also looked at other aspects of admissible context.

61 Above n 56, at [130].

> The ordinary insurer of residential insurance would not be expected to be familiar with s 13 of the Insurance Law Reform Act and so we do not take it into account in interpreting condition 2.

(d) *Long term contracts.* The fact that a contract has been of long duration may also limit reliance on the factual matrix. As Kós P said in *Bathurst* (at [43]) "the negotiating personnel may well have moved on and access to the factual matrix will become increasingly ephemeral to those persons charged with management of a contract in later years".

(e) *Reliance by third parties*. Extrinsic material may also have a limited role to play where a contract is likely to be relied on by a third party such as a financier, creditor, investor, future shareholder, or assignee, who may be unaware of the surrounding circumstances. Examples include loan agreements, bills of lading, and public documents like company constitutions[62] and registered interests in land.[63] This was given some emphasis by the Supreme Court in *Firm PI.*[64] Similarly, in the Court of Appeal in *Bathurst* Kós P said that it is a relevant contextual inquiry to ask "to whom the contract was to be addressed, or by whom it was to be relied on. The wider the audience, the more restrictive the approach to receipt of extrinsic evidence may be".[65]

(f) *Rules of a society*. The rules of an incorporated society, and an industrial and provident society, constitute a contract between the society and its members. The principles of contractual interpretation therefore apply. The rules are also a 'living document' in that new contracts are constantly made with new members who join the society from time to time. The rules are not normally negotiated with each new member. Rather new members adopt the rules as they stand at the time. It has therefore been suggested that recourse to the factual matrix -- especially the circumstances at the time the original rules were made, or when the member first joined -- may "not be so helpful".

In a recent case, involving a "passionate controversy" within the Auckland Co-operative Taxi Society Ltd about the meaning of its rules for the election of officers, Palmer J agreed with the above approach as a general principle, but added that reliance on context *itself* depends on the context.[66] The Society's rules were unclear, and evidence of the circumstances and purpose of an amendment to the rules in 2011 did assist the interpretation task.

Putting it all together – some recent examples

3.12. I discuss next some recent New Zealand cases that illustrate how in practice the various factual matrix factors and commerciality considerations are drawn together, as well as the balancing of text and background. As mentioned, they mostly indicate a renewed focus on the text, and an increasing reluctance to 'rewrite' a bad bargain.

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62 *Gough v Gough Holdings* [2015] NZSC 115, at [14] per Glazebrook, Arnold and O'Regan JJ.
63 *Green Growth*, above n 45.
64 *Firm PI*, above n 5, at [62] per McGrath, Glazebrook and Arnold JJ.
65 *Bathurst*, above n 1, at [48] per Kós J.
66 *Singh v Auckland Co-operative Taxi Society Ltd* [2019] NZHC 1759, at [10, [12]. [26], [27] per Palmer J. See also *Reay v Attorney-General* [2019] NZCA 475, at [35]-[37] per Miller J (giving the reasons of the Court).

Trouble brewing: the Malthouse case

3.13. In *The Malthouse Ltd v Rangatira Ltd*[67] Rangatira had purchased a 35% shareholding in The Malthouse Ltd, the owner of Tuatara Brewing Company Ltd, a successful brewer of craft beer. The parties could not agree on value and did not specify a price. Instead they agreed (presumably over a pint) that Rangatira would pay $3.5 million on settlement and a further contingent payment of $1 million should either of two triggering events occur. The first event was Tuatara achieving an EBITDA of $12 million, on or before the sunset date of 30 December 2015 specified in cl 9.1. The second event, in cl 9.8, was the sale of Tuatara for a price exceeding $12 million. Clause 9.8 was not expressed to be subject to the sunset date. The question in dispute was whether, nevertheless, on a proper interpretation, the sale also had to occur before the sunset date. Tuatara was in fact sold in January 2017, over a year after the sunset date.

3.14. In the High Court Churchman J held that the sale *did* have to occur before the sunset date. Churchman J referred to a lot of external material said to be part of the matrix of fact, including conflicting evidence of prior negotiations. Churchman J found that the parties had discussed the possibility of a sale occurring before the EBITDA hurdle had been achieved, and both intended that a sale would also be subject to the sunset time limit. The Judge concluded that the commercial objective of the transaction was to facilitate a sale that reflected the actual value of those shares at the time, not at some unspecified date potentially in the distant future. Any other interpretation would not be "commercially sensible".

3.15. The Court of Appeal disagreed that there was evidence of a discussion about a temporal limit. The parties' conversations provided "no relevant evidence on the interpretation issue." Nor did any other background evidence shed any real light on the meaning of cl 9.8. Miller J said:[68]

> …even if we are wrong in those findings, we would have expected clear explicit objective evidence on this timing issue to balance the natural, well-drafted meaning we have attributed to cl 9.8 above. We have not been directed to such evidence.

3.16. Miller J emphasised that a time limit could not just be "read in". The natural meaning of the words in cl 9.8 was that the second event, the sale, was *not* temporally limited. And when considered in the context of the "carefully negotiated" agreement, the absence of any express reference to the sunset date appeared deliberate. Miller J also stressed, referring to *Firm PI*, that "only in a very clear case should a court depart from the plain meaning of a closely negotiated commercial contract to achieve a commercial purpose".[69] Thus, the Court of Appeal judgment placed much more emphasis on the wording and internal context of the agreement.

A fast-food takeaway: the Forsgren case

3.17. The second example is *Forsgren NZ Ltd v Restaurant Brands Ltd*[70] There Restaurant Brands Ltd (RBL) had agreed to buy from Forsgren (by assignments of leases) seven Carl's Junior fast food restaurants. There was a possibility that a roading realignment by the New Zealand Transport Agency (NZTA) would strand one of the restaurants in a cul-de-sac and force its closure. The parties therefore agreed that Forsgren would remain as lessee of that store and sublease the site to RBL, and that $400,000 of the purchase price would be held in escrow for a four year period.

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67 *The Malthouse*, above n 40. The High Court decision of Churchman J is at [2018] NZHC 816.
68 *The Malthouse*, above n 40, at [47].
69 At [50].
70 *Forsgren*, above n 41.

As it turned out, the restaurant was forced to close, but not in the way the parties anticipated. The Crown chose to take the entire site under the Public Works Act 1981, and paid RBL compensation on a going concern basis. RBL therefore suffered no loss from the closure, but sought payment of the $400,000.

3.18. The parties' agreement about the escrow sum was recorded in a side letter forming part of the contract. Clause 3(f) stated that if the sublease "is terminated or lapses for any reason" then the purchaser would be entitled to the full escrow amount. The issue was whether cl 3(f) applied to the circumstances which occurred. It was not disputed that RBL would receive an unexpected windfall if, in addition to the full compensation from the Crown, it was also entitled to the $400,000. This, Fosgren argued, resulted in commercial absurdity or at least defied common sense.

3.19. In the High Court[71] Muir J found that the ordinary and natural meaning of the words "terminated for any reason" was "obvious" and clearly covered what had occurred. "Any reason" could not "without doing violence to the language", be read as including some reasons but not others. The factual matrix included the following factors:

(a) The genesis of the side letter was RBL's discovery, during due diligence, of the possibility of the street where the restaurant was located being reduced to a "quiet cul-de-sac".

(b) The parties anticipated the risk that the restaurant might be stranded, but not that roading authorities might acquire the restaurant on payment of compensation.

(c) The commercial rationale of the side letter was clear. It was agreed to overcome an obstacle to the overall transaction, namely Forsgren's refusal to reduce the purchase price. To get the deal across the line, the parties adopted a "blunt mechanism" that bore no direct relationship to the losses, if any, that RBL might incur if the restaurant had to close.

(d) The side letter was a commercial agreement between experienced parties advised by expert commercial property lawyers.

(e) The agreement was not commercially absurd at the time it was entered into.

3.20. There was nothing in the above context to point to a different meaning, even though this resulted in RBL receiving a windfall. Moreover, Forsgren had also benefitted to a degree by being relieved of the head lease. Muir J said that "the Court is not justified in concluding that a contract does not mean what it seems to say simply because it considers that the contract, so interpreted, is unduly favourable to one party".[72] The language and context supported RBL's entitlement to the money, a conclusion the Court reached "with some reluctance".

3.21. The Court of Appeal unanimously agreed.[73] The language used clearly covered the risk that the sublease would be "terminated" for reasons other than those the parties had in mind at the time.

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71 *Forsgren NZ Ltd v Restaurant Brands Ltd* [2019] NZHC 2375.
72 At [58].
73 *Forsgren*, above n 41.

And there was nothing in the external context to supply a "contrary answer".[74] There was no commercial absurdity. As Miller J stated:[75]

> The outcome may not be one that Forsgren would have negotiated had it foreseen what NZTA would do. It has resulted in RBL being compensated for a loss that was never suffered. But it was not commercially absurd at the time and hindsight cannot be permitted to make it so.

Undermined -- the Bathurst case

3.22. I have discussed this case in some detail given the pending Supreme Court judgment. The facts are fully set out in the High Court judgment of Dobson J.[76] On 10 June 2010 Bathurst entered into an agreement to purchase the shares in an L&M subsidiary which owned coal mining rights for the open cast Escarpment Mine on the Denniston Plateau. Bathurst paid a purchase price comprising a US$5 million deposit, and US$35 million on settlement. Once certain levels of mining were reached Bathurst was required to make two performance payments of US$40 million each. In addition, Bathurst had to pay royalties on amounts received for sales of coal, in accordance with a tier of rates specified in a separate deed of royalty.[77] It was common ground that the predominant destination of the coal was expected to be the export market for high quality coking coal.

3.23. Clause 3.4 of the agreement required Bathurst to make the first performance payment of US40 million:

> within 30 days of the date on which the first 25,000 tonnes of coal has been shipped from the permit area.

3.24. Subsequently, in 2012, the parties amended the agreement to insert a new cl 3.10 which stated that "For the avoidance of doubt" a failure to pay the performance payment was "not an actionable breach of or default under" the agreement:

> for so long as the relevant royalty payments continue to be made under the Royalty Deed.

3.25. By March 2016 Bathurst had extracted some 50,000 tonnes of coal. This was all, however, inferior thermal coal. Most was trucked out and sold to a local cement works. The rest was stockpiled within the permit area. Bathurst then announced that it was 'mothballing" the mine, which was placed in "care and maintenance". Mining ceased. Bathurst did not pay the initial performance payment (and instead bought a number of coal mining interests in other mines from Solid Energy). Bathurst continued to pay only nominal royalties on occasional sales of stockpiled coal. L&M brought proceedings to recover US$40 million from Bathurst. Two key issues of interpretation arose:

- First, what was the meaning of the words "shipped from the permit area" in cl 3.4? Did they simply mean transported from the boundaries of the site (by truck), which had occurred. Or, as Bathurst contended, did they mean exported by ship?

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74 At [24] per Miller J.
75 At [24].
76 *L&M Coal Holdings Ltd v Bathurst Resources Ltd* [2018] NZHC 2127.
77 The initial rate was 10%, but after the first performance payment was made would drop to 5% until the second performance payment was made, and would then drop to 1.75%.

- Secondly, what was the true effect of the new cl 3.10? Bathurst argued that even if the US$40 million *was* due, the effect of cl 3.9 was to postpone L&M's entitlement to that payment provided Bathurst paid the higher 10% royalty rate on whatever level of mining Bathurst might undertake. As Bathurst had stopped mining, this was effectively 10% of nothing.

3.26. To resolve these interpretation issues a startling amount of evidence was produced, over a 2½ week trial. There were 15 witnesses in total, including five independent experts. Bathurst argued that the Court's focus should be on the *external context* of cl 3.4 but the *wording* of cl 3.10. L&M argued the reverse. Both "wanted to have it both ways".[78]

The first interpretation issue – meaning of "shipped from the permit areas"

3.27. In relation to the first issue, the natural meaning clearly favours "transported". The permit areas are inland, at a high altitude. Coal cannot be moved from the site on a ship, but only by truck. However, a lot of extensive extrinsic evidence was presented, including the following:

- A so-called common view held by the chief negotiators for Bathurst and L&M respectively that "shipped" was intended to mean "transported";

- Various email exchanges between the parties during negotiations. Dobson J did not consider these to be helpful;

- Bathurst's subsequent conduct, from the time of the contract until the start of the proceeding, which recognized, consistently with L&M's understanding, that the US$40 million was due. Notably this included comments in its annual financial statements, and in public announcements. Dobson J had regard to this but placed little reliance on it.

- Expert evidence on usage. Bathurst's expert gave evidence that those in the coal industry in New Zealand speak "specifically or literally", and when they say "shipped" they mean carriage of coal by ship, implicitly for export. Dobson J did not think this evidence was materially helpful in interpreting the expression as used in the agreement.

- The coal extracted was thermal coal for domestic use. Bathurst relied on other documents (such as a feasibility study) and the contemporaneous record of negotiations to argue that the first 25,000 tonnes was only to include coking coal for export. Dobson J did not think this material made any such distinction between the two types of coal.

3.28. Dobson J concluded, on a textual analysis, and having regard to relevant context, that "shipped" was used in a generic sense of "transported". The US$40 was therefore due. On appeal the Court of Appeal agreed.[79] While the focus of the project was export coking coal it was not the project's exclusive focus. An objective observer, "cognisant of context", would not conclude that the contractual words were "merely a mangled description of export tonnages".[80] The Court of Appeal reached its conclusion without regard to the so-called common view held by the

[78] As observed by Glazebrook J in the *Bathurst* Transcript, [2020] NZSC Trans 25.
[79] *Bathurst*, above n 1.
[80] At [60] per Kós P (giving the reasons of the Court).

negotiators, or Bathurst's subsequent conduct, as is discussed in paragraphs 3.64-3.65 and 3.74-3.76 below.

The second issue – the effect of cl 3.10

3.29. In relation to the second issue, Dobson J relied heavily on the factual matrix. He looked at the detailed background to the 2012 amendment. The genesis of the amendment. was the fact that the parties were working co-operatively to optimise the chances of Bathurst raising the capital necessary to bring the mine into production and make the first performance payment. If the first performance obligation were triggered before Bathurst had the necessary financing in place, Bathurst would have had to announce to the ASX that it had defaulted under the agreement. That would then make it harder to raise the finance. It was in both parties' interests for mining to proceed. Although the agreement was not claimed to be a joint venture it was a form of joint operation.

3.30. The words "for the avoidance of doubt" in cl 3.10 recorded a change to the agreement to reflect a concession by L&M that it would work co-operatively with Bathurst to make it easier for it to complete its contractual obligations, and would not treat non-payment as a default "for so long as the relevant Royalty payments continue to be made under the Royalty Deed". The meaning of those words was key. The Judge found that neither party had addressed the contingency that Bathurst might cease mining after the first performance payment had been triggered.

3.31. Dobson J held that, having regard the agreement as originally struck, and the surrounding circumstances of the 2012 amendment to that agreement, the wording contemplated an alternative money flow to the payment of the performance payment. Zero or minimal royalty payments made no commercial sense from L&M's perspective. The words were reasonably to be interpreted as "the level of royalties calculated in accordance with the royalty deed that become payable on a reasonable level of production from the permit areas".[81]

3.32. In the Court of Appeal Kós P focused on these aspects of external context:

(a) The circumstances of the amendment showed that it was a concession by L&M, without any counter-consideration from Bathurst. It was a temporary indulgence to help Bathurst successfully undertake the mining, which was in both parties' interests. It was not intended to "fundamentally alter the economic balance of the sale agreement".

(b) The amendment proceeded on a shared assumption that the continuing payment of royalties would have to compensate L&M for the delay in receiving the US$40m.

3.33. Kós P considered that L&M had "limited levers" to require Bathurst to continue mining, despite a clause in the main contract (cl 8.1(b)) that obliged Bathurst to "conduct mining operations in accordance with good mining practice and with a view to maximization of Coal sales at the best available price". This clause assumed some mining would take place.

3.34. Kós P agreed with the High Court that Bathurst's position "was devoid of commercial sense". An objective observer would not have thought that the amendment entitled Bathurst effectively to "place a US$40 million debt on ice, indefinitely"[82] while mining ceased and merely nominal

[81] *Bathurst HC*, above n 76, at [30] per Dobson J.
[82] *Bathurst*, above n 1, at [93].

royalties were paid in respect of sales from a stockpile. Kós P held that the words "for so long as the relevant royalty payments continue to be made" meant the debt would not be payable so long as L&M continued to receive royalties from "*continuing* mining and at a level not materially less than had resulted in the US$40 million payment being triggered in the first place".[83]

3.35. As discussed in paragraphs 2.7-2.8 and 2.10 above, the Court of Appeal judgment is especially notable for its re-emphasis, in strong terms, of the objectivity of the interpretation process (to the exclusion of any inquiry into the parties' actual intentions) and the primacy of the text (itself "an expression of the objectivity principle"). Kós P was of the view that contract interpretation had been allowed to expand beyond its proper task, "crowding out" equitable doctrines like rectification.

3.36. Interestingly, however, the actual outcome in *Bathurst*, especially in relation to cl 3.10, does reflect heavy reliance on external context and commercial absurdity. It could be considered quite a step effectively to read in a qualification that cl 3.10 applied only while mining continued at a level "not materially less" than that which triggered the performance payment in the first place. These words were not in the agreement or amendment. There does seem to be an element of rewriting. It also imposes an unquantifiable obligation, as the Court of Appeal acknowledged.

3.37. So we await the Supreme Court's judgment. I would be surprised if the Court of Appeal's ruling on the meaning of "shipped from the permit area" in cl 3.4 were overturned. But the ruling on cl 3.10 may be open to more possibilities. Will the Supreme Court agree that Bathurst's argued interpretation involves commercial absurdity, or instead conclude that L&M made a bad bargain (by not expressly making cl 3.10 subject to ongoing mining) which it is not the Court's role to fix? Shades of the unfortunate deal in *Arnold v Britton?* Or will the Court decide that the answer lies in a simpler interpretation than was postulated, consistent with the overall commercial purpose and structure of both the agreement and the 2012 amendment, or in a simpler implied term.[84] For example, that the cl 3.10 "indulgence" (deferral of the performance payment for the purpose of enabling Bathurst to get on with mining) did not apply if Bathurst ceased mining,

3.38. L&M also relied on a third ground of claim, namely that cl 3.10 gave Bathurst a unilateral contractual discretion which it had not exercised for a proper purpose (effectively bad faith). Dobson J held that cl 3.10 conferred a contractual right, not a discretion of the kind that the courts will constrain in that way, and so made no factual findings. The argument was not addressed by the Court of Appeal. It does not seem particularly apt.

Clubbed –the Lakes International case

3.39. *Lakes International Golf Management Ltd v Vincent*[85] is an example of a case where the Supreme Court did not look at extrinsic evidence in its interpretation. Mr Vincent's family trust owned one of the residential houses centred around the golf course at Lakes Resort near Pauanui. A restrictive covenant registered in 2003 against this land required the owner to join, remain a member of, and meet all levies imposed by the "Golf Club". The "Golf Club" was defined in the

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83 At [96].

84 Dobson J would have implied a term that to rely on cl 3.10 Bathurst would have to continue paying royalties on a "substantive volume of coal sales". That, he said, would not oblige Bathurst to continue mining. It could cease mining and pay the first performance payment, or continue mining and pay royalties. But it could not do neither (at 158]). Otherwise Bathurst would have a "free option to defer any further payment indefinitely". The Court of Appeal said that given its interpretation of cl 3.10 the implication of a term was unnecessary.

85 *Lakes International*, above n 20.

covenant as "the golf club to be incorporated as an incorporated society to provide for playing rights on the golf course". In fact no incorporated society was ever formed. Instead the golf course was run through a proprietary club set up and controlled by the respondent companies. Mr Vincent did not join the club and resisted payment of levies, arguing that the covenant was not enforceable by the respondents.

3.40. In the High Court Heath J was content to treat the "Golf Club" as being the respondent companies, and held that the covenant was enforceable by them. The Court of Appeal disagreed, holding that the starting point must be to…er…construe the actual words of the covenant. Those words were clear and "permitted only one meaning". The Court had some sympathy for the respondents' position. Mr Vincent was enjoying the benefits of living alongside the golf course but not sharing the burden. But that was not relevant, and to depart from the clear words would be "to rewrite" the covenant. The Court also had regard to extrinsic evidence relating to the evolution of the planning of the golf course, which it saw as rebutting arguments about the alleged unimportance and commercial absurdity of the incorporated society requirement, but that did not affect the outcome.[86]

3.41. The Supreme Court considered that the meaning of the definition of "Golf Club" was, in itself, "crystal clear" in showing that the club was to be an incorporated society, not a company. The words "incorporated society" apparently mean "incorporated society". Further, there was "no genuine interpretation issue" to which the extrinsic evidence might be relevant.[87] But in any event, the Court said that the extrinsic evidence relied on by Mr Vincent went too far. It was "inadmissible on any conceivable approach to the principles of interpretation".[88] In particular:

(a) The extrinsic evidence was confined to the reasons why the original developer, Pauanui Lakes Property, wanted the golf course to be an incorporated society -- in other words, its subjective intentions. Those reasons were of "no practical moment" to the Vincent family trust;

(b) The companies were not original parties to the covenant, had no involvement in the interactions which produced the extrinsic material, and were unaware of the material;

(c) When the companies took interests in the affected land they had no means of obtaining access to the material;

(d) The material did not relate to the physical layout of the land in question or to particular patterns of use or infrastructure to which the covenant related;

(e) There was nothing in the covenant to alert later parties of the need to make inquiry.

3.42. For a case with, in the end, no genuine interpretation issue, it involved multiple hearings and judgments, including an earlier summary judgment application and appeal.[89] The Supreme

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86 *Vincent v Lakes International Golf Management Ltd* [2016] NZCA 382, at [35] fn 13 per French J (giving the reasons of the Court).

87 At [28] per William Young J (giving the judgment of the Court).

88 At [25], [29] and [30] per William Young J

89 The summary judgment decisions were *Lakes International Golf Management Ltd v Vincent* [2013] NZHC 2901, and *Vincent v Lakes International Golf Management Ltd* [2014] NZCA 323.

Court's focus on the clear wording of the contract hopefully will encourage an earlier resolution of similar cases.

Empty spaces—the Green Growth case

3.43. The Supreme Court again considered the use of extrinsic evidence to interpret a registered covenant in *Green Growth No 2 Ltd v Queen Elizabeth Second National Trust*.[90] A registered open space covenant been granted in favour of the respondent Trust over a 404 hectare block of land near Tairua by its former owner, a Mr Russell. The covenant had protected the private commercial property from development since 1997. It prohibited activities such as felling native trees and constructing new buildings. The covenant was incomplete as it referred to an aerial photograph which was not attached. The current owner of the land, Green Growth, challenged the validity of the covenant, and also the extent of the undefined protected area.

3.44. A majority of the Supreme Court accepted that if the dispute had involved an ordinary contract, the contract would be interpreted on conventional *Firm PI* principles, having regard to the background knowledge known or reasonably available to the parties, including the earlier iterations of the covenant signed by Mr Russell and the aerial photograph. However, the covenant was a public document, on a public register open to inspection and potentially to be relied on by third parties. They postulated that, generally, registered documents should be construed without any regard to extrinsic evidence which is particular to the original parties and is not apparent on the face of the register.[91] That was subject to this qualification (echoing *Lakes International*): that "facts which a reasonable future reader of the document could be expected to be aware of and which they have access to such as the configuration of land, any physical features to which the document relates or refers and any material referred to in the document" would be admissible.

3.45. None of those exceptions applied. But in any event a different majority of the Court held that the meaning of the covenant was "clear in its terms as a whole", and so there was no need to look at any extrinsic evidence.[92] The protected area was held to encompass all the land subject to the covenant.

Digging deeper –the Kaimai Properties case

3.46. Hot off the press is the Court of Appeal's judgment last week in *Kaimai Properties.*[93] Kaimai, a landowner, sought a declaration that the terms of two open space covenants (entered into by the former owner) permitted expansion of its quarry into the covenanted areas. Kós P referred to the Supreme Court's judgment in *Green Growth* and the majority's approach to admissibility of extrinsic evidence in cases involving a registered covenant. However, His Honour considered that the meaning of the relevant clauses, assessed objectively, was "crystal clear" and nothing in the extrinsic evidence advanced (which went beyond the exceptions mentioned in *Green Growth*) justified departure from that clear meaning.[94] Kós P said: "At the end of the day it is simply a bargain that Mr Diprose repents making." A claim for rectification was also dismissed.

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90 *Green Growth*, above n 45.
91 At [60], [73] and [74] per William Young and O'Regan JJ. Glazebrook J, agreed with them at [15] and fn 100.
92 Elias CJ at [130]-[137], Gazebrook J at [152]-[153]and Ellen France J at [161].
93 Above n 20.
94 At [46].

Sour grapes – the Savvy Vineyards case

3.47. This case concerned the interpretation of grape supply agreements, and in particular two clauses, 2.2 and 2.4, which gave Savvy rights of first refusal to purchase grapes from vineyards owned by Weta. Clause 2.2 provided that the option to purchase was "deemed to be effective on [1 May 2009] and to be repeated on each third anniversary of [that date]", with the proviso that if Savvy did not "exercise that option for 2 consecutive periods of 3 years" the option would lapse. Savvy contended that it could exercise the options any time *prior to* the commencement date, prior to the third anniversary, or prior to the sixth anniversary. Weta said the option could only be exercised twice, *on* the commencement date or on the third anniversary. Thus when Savvy first attempted to exercise the option on 17 November 2014 Weta asserted that the option had already lapsed, and refused to supply.

3.48. In the High Court the parties relied on the words of the agreement, the factual matrix, the history of negotiations and the subsequent conduct. Gordon J accepted that the natural and ordinary meaning of the words was consistent with Savvy's interpretation.[95] She found that the evidence relied on by Savvy, which was disputed, did not properly form part of the factual matrix. But in any event, the wider context "did not point to an interpretation other than the most obvious one".[96] Gordon J considered that the words in the clauses had a clear meaning and there was no ambiguity or uncertainty. She did not take into account the evidence of prior negotiations and subsequent conduct.

3.49. On appeal the Court of Appeal thought that the fact that the agreements were based on a standard form template, which was used for other investors on other vineyard developments, formed part of the relevant context (factual matrix). Gilbert J undertook a detailed comparison of the clauses in the original template and the parties' deletions and additions (made during negotiations) as they appeared in the final form of the clauses. Gilbert J said it was not appropriate to "accord primacy to the legacy and ill-fitting wording at the expense of focusing on the wording of the specifically agreed amendments".[97] The Court upheld Weta's interpretation and allowed the appeal.

3.50. The Supreme Court, by contrast, placed no reliance on changes to the original template, other than mentioning the Court of Appeal's approach to them. The Supreme Court undertook a close textual analysis, and agreed with the High Court that the meaning of the clauses was clear.[98] They did not see the wording as reflecting remnants of a standard template. There was no ambiguity. They added:[99]

> Whether or not the Court of Appeal could consider the previous drafts and the relevance of pre-contractual negotiations are not matters before us but whatever the position ultimately reached on that topic, it does not seem correct to take into account just two versions of the agreement (the original template and the contract in its final form).

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95 *Savvy Vineyards 4334 Ltd v Weta Estate Ltd* [2018] NZHC 989.

96 At [172] per Gordon J.

97 *Weta Estate Ltd v Savvy Vineyards 4334 Ltd* [2019] NZCA 437, at [48]-[51] per Gilbert J (giving the judgment of the Court). There is a fuller discussion of the Court of Appeal judgment in Paul David's NZLS seminar paper "Update on Contract" March 2020, pp 15-18. This preceded the Supreme Court's judgment.

98 *Savvy Vineyards*, above n 7, at [24]-[30] per Winkelmann CJ, Glazebrook, O'Regan and Ellen France JJ. William Young J concurred.

99 At [26] and fn 23 per Winkelmann CJ, Glazebrook, O'Regan and Ellen France J.

3.51. Thus, the Supreme Court was again able to defer clarifying the admissibility of prior negotiations. There was no need in that case to go further than the text of the agreement.

Overall comment

3.52. What really stands out in the discussion of the above seven cases is the fact that in six of them – *The Malthouse, Forsgren, Lakes International, Green Growth, Kaimai Properties* and *Savvy Vineyards* – the contract wording was ultimately held to have a clear "ordinary and natural" meaning, and that meaning was not displaced by background or commercial absurdity even though in some the outcome was pretty harsh for one of the parties. An overdue hardening of approach is apparent, in the sense that parties will be held to their written bargain. It remains to be seen how the final outcome in *Bathurst* will compare.

Prior negotiations

3.53. The 'exclusionary rule' that limits the use of prior negotiations as an aid to interpretation of written contracts is long standing. It was reaffirmed by the House of Lords in *Prenn v Simmonds*[100] and again in *Chartbrook*. It is still the position in England, and in Australia. In *Vector* the New Zealand Supreme Court revisited the issue. A majority thought (obiter) that prior negotiations could be looked at, but on differing grounds. There was no common rationale. The issue remains unsettled.

3.54. Currently, and pending clarification from the Supreme Court, prior negotiations may be looked at for the following purposes:

(a) To assist in establishing the relevant *factual matrix*. There are two aspects to this. First, it is well established that evidence of prior negotiations may be relevant to proving objective background facts.[101] Secondly, such evidence may establish whether or not particular facts were known to one or both parties, where that is disputed.[102] The line between referring to previous communications to identify the factual matrix, for example the genesis or object of the contract, and (impermissibly) relying on such evidence to show what the parties intended a clause in the contract to mean may be hard to draw.[103] Some examples include:

(i) In *Bathurst* the High Court and Court of Appeal had regard to negotiations between the parties as establishing the critical context of the 2012 amendment to the main contract.

(ii) In *Savvy Vineyards* the Court of Appeal placed some reliance on bespoke amendments to a standard form contract during negotiations, and seems to have regarded that as part of the factual matrix. Gilbert J stated "the fact that the parties were working from a standard form template forms part of the relevant context in which the agreement is to be interpreted".[104] The Supreme Court had no regard at

[100] Above n 25, at p 1384 per Lord Wilberforce.
[101] *Chartbrook*, above n 27, at [27] per Lord Hoffmann.
[102] *Lehman Brothers*, above n 49.
[103] As illustrated by *Merthyr (South Wales) Ltd v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526. See also Winkelmann, Glazebrook and France, above n 22, at 23.
[104] Above n 97, at [48].

all to prior negotiations, taking the view that it was not necessary to address those aspects.

(b) To demonstrate that the parties have adopted an agreed *private dictionary* definition. This may be a meaning which is "linguistically impossible (for example, black means white), or represents a specialised or generally unfamiliar usage".[105] The exception does not apply where the negotiations do not evidence an unconventional usage but just, for example, a choice between two competing meanings.

(c) To identify the *subject matter of the contract*. Blanchard J (with whom Gault J agreed) recognised this exception in *Vector*, although his use of it in that case was questionable. He considered that a letter sent during prior negotiations showed that the contract's subject matter was gas only, not gas plus transmission costs.[106] However, as McGrath J rightly pointed out, the subject matter was plainly the supply of gas, and this needed no further clarification. The letter went directly to the meaning of the disputed words and the price payable under the contract.[107]

(d) To demonstrate a *prior common consensus*? In *Vector* Tipping J proposed a further, broad category of exception to the exclusionary rule, namely where parties have reached "an objectively apparent prior consensus or understanding as to meaning".[108] As the view of just one member of the Court in *Vector* it cannot be regarded as settled law. It is however Tipping J's approach in *Vector* that has been most often adopted by the High Court since then.

3.55. Prior negotiations, including evidence of actual intention, are of course admissible in support of rectification and estoppel by convention. These are not, however, exceptions to the exclusionary rule, but rather sit outside it.

3.56. It is (d) above that remains controversial. The Supreme Court in *NZALPA*[109] may have (almost as an aside) approved Tipping J's approach. William Young J disputed the admissibility of negotiations in that case which merely reflected the subjective intentions of the parties. He stated: "There was no finding that the parties had agreed in negotiations on the meaning of the clause", and referred with approval to Tipping J's statement in *Vector.*[110] The majority of the Court stressed "the need to maintain the key distinction between the parties' objectively apparent consensus and subjective individual intentions" and then referred to the passage in William Young J's judgment that included the above statement.[111] This requires some tortuous 'dot-joining' between the various judgments, and a more definitive statement of the Supreme Court's view is clearly still needed.

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[105] *Vector*, above n 2, at [33] per Tipping J. In my view the House of Lords in *Chartbrook* (at [43]-[47]) was right to hold that the *Karen Oltmann* was an "illegitimate extension" of the "private dictionary" principle.

[106] *Vector*, above n 2, at [14] and [15].

[107] At [83] per McGrath J.

[108] *Vector*, above n 2, at [26]-[28], [31], [32], [36], [37] and [45]-[47] per Tipping J. The limits of what Tipping J was proposing are unclear. He suggested (at [29]) that relevance should be the "touchstone" of admissibility, and referred to s 7 of the Evidence Act 2006. It is for the Court, however, to first prescribe how a contract should be interpreted and construed. Relevance (or irrelevance) then follows from the 'rules' of construction.

[109] Above n 7.

[110] Above n 2, at [140] and fn 150 per William Young J.

[111] *NZALPA*, above n 7 at [86] and fn 122 per Arnold, O'Regan and Ellen France JJ.

3.57. The Court of Appeal in *Bathurst* has now jumped in and stated its own position on this question. Kós P said that although prior negotiations are "perhaps the best evidence of actual intention", they are "inadmissible in interpretation."[112] This builds on a previous statement by Kós P in *Wilaci Pty Ltd v Torchlight Fund No 1 LP*:[113]

> In cases where the issue is construction of a contract, evidence of wider background and circumstances may be considered, but not where it does no more than prove what the individual parties intended or understood their words to mean or what a party's negotiating stance might have been at a particular time. To the extent necessary, and no more than that, evidence of pre-contractual negotiations is admissible to establish facts relevant as background known to both parties or to establish their knowledge of circumstances relevant to their choice and use of words in the contract.

3.58. The Court of Appeal's judgment in *Bathurst* therefore suggests that it would not allow in material from prior negotiations which provides objective evidence of a prior consensus.[114] The arguments for and against such a position have been exhaustively debated. Suffice it to say that the availability of rectification and estoppel by convention, and the interests of certainty, would favour the Court of Appeal's view.

3.59. However, more recently, in *Kaimai Properties*[115] the Court of Appeal seems to have shifted. The Court held that the objective meaning of the words of the registered covenant in that case was "crystal clear" and nothing in the extrinsic evidence put forward by the parties justified a departure from that meaning. Specifically, Kós P commented that there was nothing in that evidence to suggest "an objective common intention" between the former landowner and the Trust to qualify the covenant boundaries.[116] This seems implicitly to accept that such evidence might be admissible, but there is no further comment on the issue.

3.60. The Supreme Court will surely need to clarify this question in the *Bathurst* appeal, given the Court of Appeal's pronouncements.

Subsequent conduct

3.61. Is evidence of subsequent conduct admissible to interpret the meaning of a written contract? Unfortunately this question also remains controversial and unsettled in New Zealand. Formerly such evidence was not allowed in. That remains the position in England and Australia. However, in *Gibbons Holdings v Wholesale Distributors Ltd*[117] a majority of the Supreme Court favoured admissibility. Their observations were obiter, as all agreed that the same interpretation was reached without such evidence. Furthermore (and as in *Vector*) there was an unhelpful divergence of views. Two members of the Court thought the conduct had to be mutual. Thomas J, however, considered that the conduct of one party could be relevant, if the party had acted inconsistently with the interpretation they were advancing in court.

3.62. This lack of a clear position from the Supreme Court has resulted in inconsistencies of approach in the courts below. In *Savvy Vineyards* Gordon J in the High Court seems to have preferred the

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[112] At [41]. The Court of Appeal presumably did not mean to doubt the exceptions in paragraphs 3.54(a) to (d) above.
[113] [2017] NZCA 152; [2017] 3 NZLR 293; [2017] NZCCLR 9,at [7] per Kós P (delivering the reasons of the Court).
[114] See the comments of David McLauchlin "A new conservatism in contract interpretation" [2020] NZLJ 273 (Part 1) and [2020] NZLJ 312 (Part 2).
[115] Above n 20.
[116] At [46]. In *Kaimai* Kós P also suggested that some aspects of the doctrine of rectification may need to be reconsidered (at [56] and [57]).
[117] *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, 2008 1 NZLR 277.

view that the subsequent conduct be "shared conduct in the performance of the contract".[118] As the evidence relied on was not of that kind she disregarded it.

3.63. In *Forsgren*, however, Muir J had regard to unilateral subsequent conduct, namely a letter from Forsgren's solicitors to NZTA (a non-party) acknowledging that the termination of the head lease and sublease "negated [their] clients' right to receive the Escrow Sum". Muir J considered that this provided "strong support for the conclusion that a reasonable person with all the relevant background knowledge would come to the same conclusion."[119] Muir J had already reached a firm view on interpretation before referring to this correspondence so it was not decisive. The Court of Appeal in *Forsgren* did not refer to subsequent conduct in dismissing the appeal.

3.64. In *Bathurst* evidence of subsequent unilateral conduct was also adduced in the High Court. Dobson J noted that after entry into the contract Bathurst's financial statements in 2014, 2015 and 2016 acknowledged that the first performance payment had been triggered by production at the Escarpment Mine. The contrary position was not taken until after L&M issued its proceeding.

3.65. Dobson J placed only limited reliance on this evidence however. And the Court of Appeal in *Bathurst* disregarded it altogether, describing the evidence as "simply of very little assistance to us". Kós P acknowledged that the Supreme Court in *Vector* had left open the question whether the conduct had to be mutual, but said that even if unilateral conduct was admissible, it "may well command little weight", for these reasons:[120]

- it may show only that party's subjective understanding at the time the contract was entered into;
- it may also be indicative of a merely mistaken perspective of obligation;
- a party ought to be able to renounce a mistaken perspective (unless their conduct created an estoppel by convention, which had not been suggested).

3.66. Another concern in my view is that the unilateral conduct referred to in *Forsgren* and *Bathurst* was merely conduct consistent with a certain interpretation, not conduct undertaken in performance of the contract. It was arguably too far removed from the contract.

3.67. I think there is little reason to admit subsequent conduct for the purpose of interpretation. It is too removed from the parties' agreement, seldom actually influences the court's decision (as the cases discussed above show), and adds to costs, delay and uncertainty by expanding the scope of evidence. It also encourages parties to seek excessive discovery in the hope of ferreting out something damaging. In the *Forsgren* case, for example, Forsgren sought discovery of all negotiations between NZTA and/or the Crown (or their agents) and RBL leading up to the execution of the compensation agreement. This was not even the agreement in issue between the parties.[121]

3.68. Rectification and estoppel by convention allow subsequent conduct (evidencing the parties' actual intentions or assumptions) to be looked at where the requirements of those doctrines are

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118 *Savvy Vineyards*, above n 95, at [179]-[181].
119 *Forsgren*, above n 71, at [63].
120 *Bathurst*, above n 1, at [63].
121 *Restaurant Brands Ltd v Forsgren NZ Ltd* [2019] NZHC 602. Associate Judge Smith declined to make quite such a wide order, and so qualified it by the words "which include breakdowns, explanations, evidence or support for any of the figures making up the compensation payment…".

met. The interpretation of written contracts should not be treated as akin to a remedial off-shoot of equity when there are existing doctrines for that job.

3.69. However, if the Supreme Court in *Bathurst* does rule that subsequent conduct is admissible, then hopefully the Court will limit it to conduct which is deliberate, mutual, proximate to the time the contract is entered into, and undertaken in performance of the contract.

Inadmissible subjective evidence

What do we mean by evidence of subjective intent?

3.70. Evidence of subjective intent about the meaning of a written contract is never admissible in aid of interpretation, whether under the matrix of fact, prior negotiations, or subsequent conduct.

3.71. Few judgments explain what this means in practice. Essentially a party cannot give direct or indirect testimony about what they personally intended or understood the contract to mean. The question was considered recently by the Alberta Court of Appeal in *Alberta Union of Provincial Employees v Alberta Health Services*,[122] where the Court stated:[123]

> The phrase "subjective intention" is often mentioned, but few cases explain its meaning. At the very least, it refers to a contract party giving direct evidence at a trial or arbitration to the effect: "I think that the phrase means X" or "at the time we entered into the contract , I thought that the provision meant Y"…That type of evidence is always inadmissible to help interpret a contract. The concept of "subjective intention" also includes indirect evidence about what a party thought the language in a contract meant, for example, a party testifying that he or she proposed language in a draft agreement to resolve a specific problem – which it would only resolve if the language had a certain meaning.

3.72. That case involved a collective agreement between the Union and the AHS. The central issue was the meaning of the phrase "Operational Restructuring". The labour arbitrator had treated evidence of certain communications as being part of the surrounding circumstances when the agreement was entered into, and therefore relevant to the issue. However, the Court considered that the evidence had been adduced primarily to show what the parties subjectively understood by the disputed phrase. It was not direct evidence that "I thought that 'Operational Restructuring' meant X", but it was indirect evidence of what the parties intended the phrase to mean. To take one example, the evidence that Union representatives said that they would not enter into a letter of understanding limited to the AHS's Operational Best Practices Program "was indirect evidence that they did not intend 'Operational Restructuring' to mean [that] program."

Some recent examples

3.73. The Supreme Court in *NZALPA* said that the Employment Court had wrongly taken into account prior negotiations evidencing subjective intent. That case also involved the interpretation of a collective agreement. Clause 24.2 provided that "any agreement" entered into by Air New Zealand with any other pilot group which was "more favourable" that provided for in the agreement with NZALPA would be passed on. The issue was whether "any agreement" meant the whole of the other agreement, or just any more favourable terms and conditions within it. Evidence of NZALPA's objectives in initiating cl 24.2, and of Air New Zealand's possible

[122] *Alberta Union of Provincial Employees v Alberta Health Services* 2020 ABCA 4.
[123] At [31] per O'Ferrall, Khullar, and Feehan JJ.

motives in accepting the clause, was held to be inadmissible. So too was the evidence of a captain that he intended a "benefits only" interpretation.[124]

3.74. In *Bathurst* the briefs of L&M's factual witnesses contained numerous statements about what those witnesses intended when negotiating the terms of the agreement, and their beliefs as to what the contract terms meant. Bathurst had objected to this evidence at the start of the trial, but Dobson J ruled that the challenged passages could be admitted de bene esse, on the basis that he would revisit their admissibility in light of the totality of the evidence. Ultimately Dobson J was satisfied that much of the evidence was "no more than subjective recollections of a participant with some involvement in the contractual process, or matters of subjective understanding by individuals".[125] He ruled the evidence inadmissible and disregarded it.

3.75. However, Dobson J viewed in a different light the evidence given by a Mr Geoff Loudon, former managing director of L&M, and a Mr Hamish Bohannon, former chief executive and director of Bathurst. They had been the chief negotiators of the agreement on behalf of L&M and Bathurst respectively. Unusually, both witnesses gave evidence for L&M. Their oral testimonies were "*ad idem* as to what they had intended the [agreement] to record". This included a "common view" that "shipped" simply meant "transported". Dobson J thought that to the extent the evidence established mutual intentions, it was admissible.[126] Alternatively, he considered that such evidence of shared intention was within the concept of "background".[127]

3.76. However, neither the views of Mr Loudon nor of Mr Bohannan were actually recorded or communicated to the other at the time. In light of that, the evidence was clearly no more than the individual subjective intent of two different witnesses, and therefore inadmissible. As counsel for Bathurst submitted, "repetition by a number of witnesses of the same subjective recollections did not change their character."[128] The Court of Appeal appears to have accepted that submission, and was critical of the extent of subjective evidence that had been adduced:[129]

> …*ex post* evidence of intent, and of the course of negotiations, was advanced before the Judge without due heed to limits germane to objective interpretation.

3.77. In addition, parties may not give testimony about how they themselves interpret the contract, as that would amount to legal submission, and would also be inadmissible on that ground. An expert witness may be asked relevant questions based on assumptions or hypotheses put by counsel as to the meaning of a document. However, the witness may not be asked what the document means to him or her. The witness may not be cross-examined on the meaning of the document or the validity of the hypothesis about its meaning. The problem of experts purporting to interpret a legal document is discussed in more detail in relation to statutory provisions in paragraphs 5.49-5.53 below.

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[124] *NZALPA*, above n 7, at [81] and [82] per Arnold, O'Regan and Ellen France JJ, and at [139]-[140] per William Young J. Glazebrook J (at [203]) agreed on inadmissibility, but thought the errors were not operative, as the same inferences could be drawn from facts that could be legitimately taken into account.

[125] *Bathurst HC*, above n 76, at [39].

[126] *Bathurst HC*, above n 76, at [40] and [58]-[61].

[127] At [40], "Ruling 1-admissibility of evidence", annexed to the judgment, at [13], [14].

[128] Ruling 1, at [12]. It is also difficult to see how this subjective evidence could have been part of the factual matrix.

[129] *Bathurst*, above n 1, at [44].

Controlling the excessive use of extrinsic materials

3.78. In addition to costs awards there are two obvious ways of controlling excessive and self-serving use of extrinsic material: The first is to insist on greater particularisation in pleadings. The second is to challenge admissibility at an early stage, preferably before trial.

Pleadings and particulars

3.79. In *Arnold v Britton* Lord Hodge endorsed the practice that he said had been encouraged by judges in Scotland.[130] This required parties to give notice in their written pleadings of (a) the nature of the surrounding circumstances on which they rely, and (b) their assertions as to the effect of those facts on the construction of the disputed words. The England and Wales Commercial Court Guide[131] has adopted Rule C1.3(h) which states:

> Where proceedings involve issues of construction of a document in relation to which a party wishes to contend that there is a relevant factual matrix that party should specifically set out in its statement of case each feature of the matrix which is alleged to be of relevance. The "factual matrix" means the background knowledge which would reasonably have been available to the parties in the situation in which they found themselves at the time of the contract/document.

3.80. Rule C1.3(h) was recently applied in *TKC London Ltd v Allianz Insurance PLC.*[132] The England and Wales High Court stressed that if a party relies on particular facts as being relevant to the interpretation of a contract, those facts must be pleaded, for these reasons:[133]

> That is so that they can be specifically responded to, whether by admission or denial, and can (where necessary) be established and/or challenged by evidence. It is also so that the court can know with certainty what each party relies on as the relevant elements of 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.

3.81. The claimant TKC operated a London café called the Kensington Creperie. The café was forced to close under new Covid regulations. TKC's insurer, Allianz, declined liability and applied for summary judgment on the grounds that, correctly interpreted, Covid-related losses were not within the business interruption cover. TKC submitted that the case was not suited for summary determination because further evidence would be led at trial. However, TKC had not complied with rule C1.3(h), despite having had "ample" time to do so (three months). TKC had not identified any additional "fact, industry custom or understanding" that it might wish to rely on at trial. It had simply asserted that expert evidence was required, but with no indication of what that evidence would say. Nor was the Court persuaded that any expert evidence was needed to interpret the policy.[134] The Deputy Judge was therefore confident that he had available to him all the evidence necessary for a proper determination. Allianz was granted summary judgment.

3.82. Similarly, the Singapore Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Ltd*[135] laid down four "timely and essential" procedural requirements for the admission of extrinsic

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130 *MRS Distribution Ltd v DS Smith (UK) Ltd* 2004 SLT 631.
131 The England and Wales Commercial Court Guide (incorporating The Admiralty Court Guide) 10th ed (2017).
132 *TKC London Ltd v Allianz Insurance PLC (TKC)* [2020] EWHC 2710 (Comm).
133 At [90] per Mr Richard Salter QC (sitting as a Deputy Judge of the High Court).
134 At [92] and [93].
135 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43, at [73] per Sundaresh Menon CJ (delivering the judgment of the Court). This list is referred to by Winkelmann, Glazebrook and France, above n 22 at [74].

evidence, intended to alleviate concerns about the court being overwhelmed with irrelevant material:

(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 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 intended 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).

3.83. The Court considered that this would introduce more discipline and rigour. It would also "synchronise" their rules of pleading and evidence with their requirement that extrinsic evidence, to be admissible, must be "relevant, reasonably available to all the contracting parties and [must relate] to a clear and obvious context".[136]

3.84. Similar procedural requirements could usefully be adopted in New Zealand. But they should not be limited to the factual matrix. Any purported reliance on pre-contractual negotiations or subsequent conduct should be pleaded with the same granularity. This should also apply where an implied term, estoppel by convention, or rectification is pleaded.

3.85. Any evidence introduced should then be limited to the pleaded facts. In *Vector* the appellant NGC had (surprisingly) pleaded neither rectification nor estoppel by convention. Despite that, NGC was permitted to rely on estoppel in the Supreme Court, as there was said to be no prejudice to BoPE. It was far too late however to rely on rectification.

Advance admissibility rulings

3.86. If a party's witness briefs contain inadmissible evidence then objection can be made before the trial in accordance with rule 9.11 of the High Court Rules. Without a ruling counsel may be reluctant simply to disregard the offending material and leave it unanswered. The advantage of applying in advance is that it will determine whether evidence in response or cross-examination will be needed. In the past judges preferred to reserve such rulings until trial (or later), but they are now much more receptive to excluding inadmissible evidence in advance, where that can be done fairly.[137]

4. Statutory interpretation: core principles

4.1. The interpretation of statutes, like contracts, is now an all-pervading aspect of the practice of law. There is no escaping it. All branches of the law are regulated by statute to some degree -- employment law, trusts, securities, relationship property, competition law, and so on. Despite its

[136] At [74]. That test was formulated by the same Court in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, at [132(d)].

[137] I discuss this topic in detail in my seminar paper "Witness statements in civil cases: show me the evidence", Litigation Masterclass seminar, Auckland, 25 November 2015. This is available on my website at www.gilliancoumbe.co.nz

aura of impenetrability most of tax law, including tax avoidance, also largely boils down to statutory interpretation.[138]

Comparison with contractual interpretation

4.2. A contract and a statute are both legal texts, but they have a fundamentally different character. A contract is a negotiated agreement between private parties, who voluntarily submit to their agreed legal obligations. A statute is the product of a democratic legislative process, usually following public consultation, and binding on all members of the public affected. It is part of the general law. It normally has a longer life than a contract, and is enforced in a more coercive way. And yet there are also important conceptual similarities in the way these two legal instruments are interpreted.[139]

The approach is objective

4.3. As in the case of written contracts, the approach to interpreting statutes is objective. The question is: what would a reasonable person understand the words of the text to mean? This is taken or presumed to be the intent or "will" of Parliament. But this has nothing to do with the actual or subjective intentions of those drafting and voting on a Bill. The focus is on what the words of the *statute* mean.[140] Indeed Justice Michael Kirby said in 2003, after three decades of judging, that he no longer used the expression "intention of Parliament" as it is "potentially misleading".[141] Sir Kenneth Keith also said that he had "not found it useful as a Judge to refer to intention."[142]

4.4. The same can be said about references to the intention of the parties in contract interpretation. Removing the word "intention" when describing the interpretative process avoids this fiction. Notably, there is no mention of "intention" in s 5(1) of the Interpretation Act 1999, discussed below.

The interpretive task is "purposive"

4.5. As with contracts the interpretive task calls for consideration of text, purpose and context. Although usually labelled the "contextual" approach in contract interpretation, it is commonly called the "purposive" approach in statutory interpretation. They are essentially one and the same. The purposive approach is enshrined in s 5(1):

> The meaning of an enactment must be ascertained from its text and in the light of its purpose.

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138 Justice Susan Glazebrook "Statutory interpretation, tax avoidance and the Supreme Court: reconciling the specific and the general", paper prepared for the New Zealand Institute of Chartered Accountants 2013 Tax Conference held in Auckland from 7-9 November 2013.

139 Menon, above n 54; Michael Kirby "Towards a Grand Theory of Interpretation: The case of Statutes and Contracts" (2003) 24 Stat L R 95; K J Keith "Interpreting Treaties, Statutes and Contracts", New Zealand Centre for Public Law, Occasional Paper No 19, May 2009; Andrew Burrows "Lecture 1: Statutory Interpretation" in Andrew Burrows *The Hamlyn Lectures: Thinking about Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, United Kingdom, 2018) 1 at 34-30; and Jacinta Dharmananda and Leon Firios "Interpreting statutes and contracts: A distinction without differences?" (2015) 89 ALJ 580.

140 I have referred throughout to statutes but my comments generally also apply to other legislation.

141 Kirby, above n 139.

142 Keith, above n 139, p 5.

4.6. The omission of any express reference to context in s 5(1) has made no difference in practice.[143] The courts continue to be informed by internal and external context, including relevant legislative history and other extrinsic material. As the Supreme Court said in 2015:[144]

> The Court's task is to ascertain the meaning of the provisions from their language, read in context, and the statute's purpose informed by any relevant background material.

4.7. However, there is now an express reference to context in s 10 of the new Legislation Act 2019, which is not yet in force.[145] Sections 10(1) and (2) provide:

> (1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.
> (2) Subsection (1) applies whether or not the legislation's purpose is stated in the legislation.

4.8. The Explanatory Note to the Legislation Bill (275-1) states that the addition of the reference to context "is intended only to align this general interpretation direction with existing law and practice, and not to alter significantly its substance". It also says that the earlier omission stemmed from a concern that "including context might result in a 'more liberal interpretation' that departs from Parliament's words and aims". Perhaps there is lingering concern about 'judicial activism' because the Explanatory Note also warns:

> Clause 10 requires interpretation to be informed by context, but it does not allow it to be distorted by context.

4.9. The purposive approach applies to all statutes. Although taxation statutes were once regarded as being in a special category, and were strictly construed in favour of the taxpayer, it is now well established in New Zealand that they also are to be interpreted purposively.[146]

4.10. The interpretation process follows a similar path to that for contract interpretation (set out in paragraph 2.9 above) in terms of what may be looked at:

- an analysis of the language used (text),
- in the immediate and surrounding statutory provision(s) and the Act as a whole (internal context),
- informed by any relevant background (external context), which may include legislative history and other extrinsic material.

4.11. A statute may itself specify a different approach to interpretation. For example, the New Zealand International Convention Centre (**NZICC**) Act 2013, which among other things gave legislative effect to the NZICC Agreement between the Crown and SkyCity, s 4(2) states that "It is the intention of Parliament that the provisions of this Act are interpreted in a manner that best furthers

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143 Keith, above n 139, P 36; *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36; [2007] 3 NZLR 767, at [22]-[24] per Tipping J (giving the judgment of the Court).

144 *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [55] per McGrath, Glazebrook and Arnold JJ. See also *NZALPA* above n 7 at [65] per Arnold J.

145 The Legislation Act 2019 will be brought into force after the enactment of the Secondary Legislation Bill, expected to be in the first half of 2021.

146 *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139; [2014] 1 NZLR 121, at [35]-[39] per Glazebrook J (giving the reasons of the Court); *New Zealand Fire Service Commission v Insurance Brokers Association of NZ Inc* [2015] NZSC 59, [2015] 1 NZLR 672 O'Regan J (giving the reasons of the Court) at [12]-[13].

the agreements expressed in the Agreements." A real overlap of statutory and contractual interpretation.

The text is paramount

4.12. The starting point, as with contracts, is the language used. As in contractual interpretation the initial search is for the "natural" or "ordinary" meaning of the words.[147] The current move towards simpler, more 'everyday' language in statutory drafting makes this approach easier.

There is no ambiguity threshold

4.13. As in the case of contract interpretation, an ambiguity in the text need not be demonstrated before external context can be looked at. External material may be essential to resolve an ambiguity if there is one. But it can also be used as a cross-check and to bolster a provisional interpretation.[148] Almost routinely there is now a section in judgments dealing with the "legislative history" of the provision under consideration.

What are the differences?

4.14. There are also some significant differences between the way we interpret contracts and statutes. For example:

(a) A contract, as we have seen, is interpreted at the time it is entered into (unless it provides otherwise). A statute by contrast is "always speaking". Section 6 of the Interpretation Act 1999 states that "An enactment applies to circumstances as they arise".[149] As Andrew Burrows has pointed out,[150] a contract may be frustrated if circumstances have significantly changed and this is not provided for in the contract, but there is no doctrine of frustration in statute law.

(b) The interpretation of statutes in New Zealand is supported by the Interpretation Act 1999, soon to be replaced by the Legislation Act 2019. These define commonly used terms, and state principles and rules for commencement, amendment and repeal, time and distance, and so on. While these provisions are generally subject to a "contrary intention" in the Act, this default position provides a useful starting point. Apart from some limited exceptions, the interpretation of written contracts is normally governed by common law rules (and any contractual definitions) rather than statute.

(c) Where the language has clearly gone wrong in a contract, there are 'safety nets' outside of interpretation to afford relief, including the doctrines of estoppel by convention and rectification. These are not available in the case of statutes, so unless a court can properly interpret a statute to overcome the perceived drafting deficiency, the only solution may be the repeal or amendment of the statute. In fact judges quite often signal that a review of the legislation may be needed in light of their conclusions.

(d) Some well-known canons of construction, for example: *noscitur a sociis, ejusdem generis* and *generalia specialibus non derogant*, still play a supporting role in the interpretation of

147 *Holler v Osaki* [2016] NZCA 130; [2016] 2 NZLR 811, at [19]and [34] per Winkelmann J (giving the reasons of the Court). The statutory language in that case was far from clear.
148 *Fonterra*, above, n 143, at [22] and [24], per Tipping J;
149 Similarly, s 11 of the Legislation Act 2019, states that "Legislation applies to circumstances as they arise".
150 A Burrows, "Interpretation: thinking about statutes", above n 139, pp 39-40.

both contracts and statutes. However, there are some important rebuttable presumptions which apply only to the interpretation of a statute. They reflect the public values of the system of a democratic Parliament.[151] These include the presumptions that, in the absence of a clear contrary intention, Parliament did not intend to legislate retrospectively, to affect fundamental rights and freedoms, to restrict access to the courts, to remove legal professional privilege or the privilege against self-incrimination, or to interfere with vested property rights. These principles do not currently apply to written contracts.

(e) It has been suggested that the "boundary line" for the court is significantly different. If the court oversteps in contractual interpretation that may deprive the parties of their bargaining autonomy. When interpreting statutes the court must be mindful of overreaching and usurping the legislative function.[152]

(f) The use of extrinsic material in interpreting statutes is less controversial that its use in interpreting contracts, as I discuss in paragraph 5.8 below.

5. Extrinsic aids to statutory interpretation

5.1. As with contracts, extrinsic material is anything outside the four corners of the statute. It may, for example, include social and economic context (both at the time the statute was passed and currently), prior legislation, case law precedents, other current Acts including the Bill of Rights Act 1990, the principles of the Treaty of Waitangi, international treaties, customary international law, legislative and judicial developments in overseas jurisdictions, and of course parliamentary history.[153] There are some obvious parallels with the factual matrix and surrounding circumstances in contract interpretation.

Out of the ordinary: the *Ng* case

5.2. In an interesting and unusual recent judgment of the Court of Appeal, *Accident Compensation Corporation v Ng*,[154] affidavit evidence from various medical specialists was held relevant to the interpretation exercise. This was a test case about who should get accident compensation cover after medical treatment goes wrong. The issue was the meaning of the phrase "an ordinary consequence" in s 32 of the Accident Compensation Act 2001. Cover for medical treatment injury excludes personal injury which is an "ordinary consequence" of the treatment. In the High Court Churchman J had held that "ordinary consequence" meant more probable than not -- a consequence with a greater than 50% chance of occurring.

5.3. On appeal ACC sought leave to introduce affidavit evidence from four medical experts identifying the things that could go wrong with treatment in their respective specialties, the incidence rates of those outcomes, and their practices in assessing those risks before embarking on the procedure. A common theme of the affidavits was that only very rarely (if at all) would a procedure with a greater than 50% risk of an adverse outcome ever be undertaken. The respondents opposed leave being granted on the grounds that the extrinsic evidence was not relevant to the statutory interpretation exercise.

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151 The Hon J J Spigelman AC QC "Extrinsic Material and the Interpretation of Commercial Contracts", p 3.
152 A Burrows, above n 139, p 40.
153 Burrows and Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015), pp 267-278.
154 *Accident Compensation Corporation v Ng* [2020] NZCA 274.

5.4. The Court of Appeal French J disagreed, ruling that the evidence provided the Court with "a substantially helpful insight into the social and medical context in which s 32 has to be construed".[155] The Court therefore also allowed in an affidavit from a general practitioner responding to the ACC expert evidence.[156] As could be expected, the meaning of "ordinary consequence" in the end turned largely on the ordinary meaning of those words, namely " an outcome outside the normal range of outcomes, something out of the ordinary which occasions a measure of surprise."[157] This did not entail a statistical assessment of risk. French J stated:[158]

> …Parliament has chosen to use an imprecise test and in our view the Court would be straying beyond its proper function to disregard that and superimpose a structure of its own creation…

5.5. French J did say that caution is needed in having regard to affidavit evidence of this kind solely in support of an argued interpretation. However she thought that the affidavits provided useful background context by demonstrating that to set the statutory exclusion at 50%, a threshold that would almost never be met in practice. That would make the exclusion "meaningless".[159] The tendering of evidence relating to social context is under-utilised, this case providing some (appropriately cautious) encouragement.

Legislative history

5.6. The most commonly used extrinsic aid to interpretation of statutes is legislative history, so my focus will be on that. Legislative history is material created in the course of developing and passing legislation.

Comparison with use of extrinsic material in contractual interpretation

5.7. As with contracts, statutory interpretation once had its own exclusionary rule. This largely precluded reference to legislative history material. The rule is generally regarded as having been abolished in 1986 in *Marac Life Assurance v Commissioner of Inland Revenue*,[160] where the Court of Appeal referred to a Ministerial statement recorded in Hansard. Now the New Zealand courts refer regularly to legislative history in their judgments, and plainly find it useful. I have had cases where the court specifically asked the parties to search for any legislative history on a particular provision. It has become an expectation.

5.8. The use of this material is not mired in controversy like external context relating to contracts. There are a number of reasons for this:

(a) First, legislative history is more accessible. It usually exists as official, publicly available records. Most records are now available online. Material relating to older statutes is more difficult to obtain, but access will improve over time as those statutes are amended. The Official Information Act 1982 (OIA) can be used to obtain once-public but now archived material relating to historic or repealed statutes.

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155 At [41] per French J (giving the reasons of the Court).
156 Although her evidence was excluded to the extent that it contained an inadmissible critique of the High Court decision. That was more in the nature of a submission than expert evidence. See the discussion in paragraphs 5.49-5.53 below.
157 At [68]. French J noted that if the result was a problem then it was for Parliament to resolve.
158 At [72].
159 At [66].
160 [1986] 1 NZLR 694 (CA) at 701-702 per Cooke J, and at 713 per McMullin J.

(b) Secondly, documents relating to legislative history are not generally produced through witnesses. The usual practice is for counsel to include the documents in their bundle of authorities, and present it in their submissions. The courts have confirmed that this is the appropriate practice.[161] The use of this material does not therefore involve the costs and delays associated with discovery, preparation of witness briefs, and cross-examination. Initial concerns that resort to parliamentary material would lead to great stacks of largely unhelpful documents being hauled into the courtroom have largely not been borne out. Although inevitably there are some cases where counsel has been less than discerning.

(c) Thirdly, legislative history materials, especially Hansard and law reform reports, are "generally more reliable and accurate than records relating to contracts, which are often subjective or self-serving".[162]

What is it used for?

5.9. The legislative history may reveal the social and historical context, identify the "mischief" the provision or Act is aimed at addressing, assist in identifying purpose or policy, and of course assist in determining meaning. This material should, however, only play a supporting role. It cannot displace or trump the textual analysis. In *Holler v Osaki*, for example, Winkelmann J stated that the Court had considered the legislative history of ss 268 and 269 in part 4 of the Property Law Act 2007 as a useful "cross check" on its textual interpretation "as it can shed light upon the purpose of the legislation and the intent behind the language used".[163]

What may be looked at?

5.10. What *types* of documents may be looked at as part of the legislative history? In Australia, use of extrinsic aids is expressly authorised by statute, and there is a (non-exhaustive) list of categories.[164] In New Zealand the issue is not governed by legislation. Nor have the New Zealand courts (unlike the UK courts) developed rigid threshold rules about what extrinsic material may be used in statutory interpretation. The New Zealand approach has been aptly described as the "just do it" approach.[165] However, some guiding principles can be discerned from the cases. Burrows and Carter have suggested the following "tentative criteria" for admission of extrinsic materials:[166]

(i) It must be relevant to the question in issue, and thus be material that is capable of tending to help the interpreter ascertain meaning;

(ii) It must be reliable, in that it is a considered statement by a minister or other proponent of the legislation;

(iii) It should be publicly accessible;

(iv) It should normally have been available before the passing of the legislation and known to those engaged in the law making process.

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[161] In *Commissioner of Inland Revenue v BNZ Investments Ltd* (2009) NZCA 47, (2009) 19 PRNZ 553, O'Regan J observed, at [29], that extrinsic aids as are usually presented as part of legal submissions.

[162] Menon, above n 54, at [64].

[163] At [34]. The legislative history in fact played an important role in that judgment.

[164] Section 15AB, Acts Interpretation Act 1901 (Cth). Permissible extrinsic material may also include any document "declared by the Act to be relevant".

[165] Catherine J Iorns Magallanes "The 'Just Do It' Approach to Using Parliamentary History Materials in Statutory Interpretation", paper presented at a University of Canterbury Law Faculty Seminar on 13 May 2009.

[166] Burrows and Carter, *Statute Law in New Zealand*, above n 153, pp 298-299.

5.11. These criteria are very useful, and largely reflect the approach taken by the courts. In relation to (i), relevance, this is a primary consideration. If it is relevant the courts tend to allow it in, then decide what weight to give it. Criteria (ii) may be a bit strict, given that submissions and departmental reports to parliamentary select committees are quite often looked at. The identity of the maker of the statement may go to weight, and how the document is able to be used. As to (iii) this will also cover documents which were public at the relevant time, but which may now be archived. Access may therefore require an OIA request. As to (iv), the Court of Appeal recently confirmed this, in relation to subsequent amendments:[167]

> …the general rule is that subsequent statutes are irrelevant as an interpretive aid. Nothing that happens after an Act has been passed can affect the intention of the Parliament that enacted it. This reasoning applies with more force here as the proposed amendments were not enacted. To conclude, our task is to interpret legislation enacted by Parliament in 2007. Amendments proposed in later years, but not enacted, do not assist with this.

5.12. The rationale for accepting extrinsic material has been expressed by the Court of Appeal in broadly similar terms to the Burrows and Carter criteria: are the documents in the "public domain"; are they part of the "Parliamentary processes"; and can they be regarded as "revealing the intention of Parliament at the time a Bill is passed" as opposed to the "intention of the executive" at an earlier stage?[168]

Commonly used categories

5.13. The use of material such as Bills, explanatory notes to Bills, changes to Bills during their passage through the House, explanatory notes to SOPs, as well as regulatory impact reports, disclosure statements,[169] any report under s 7 of the Bill of Rights Act 1990, is uncontroversial. Other commonly used extrinsic aids include:

(a) *Law reform reports prior to the introduction of a Bill.* These have long been looked at, although initially only to ascertain the background circumstances or mischief aimed at, Now that distinction is regarded as artificial, so they are also now looked as an aid to construction,.[170] This category includes public reports of the Law Commission, law reform committees, and government White Papers recommending the specific legislative changes.[171] It may also include public discussion papers (such as Green Papers) on the proposed legislation issued for consultation prior to the introduction of a Bill.[172]

A law reform discussion paper made a big difference to the outcome in *E v Chief Executive, Ministry of Business, Innovation and Employment*.[173] The refugee claimant, E, was

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[167] *Holler v Osaki*, above n 147, at [55] per Winkelmann J (giving the reasons of the Court).

[168] *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407 ,[2008] 2 NZLR 182, at [40]-[41] per O'Regan J (giving the reasons of the Court).

[169] Disclosure statements have been prepared since 2013 for government Bills and SOPs, and are proposed also to be extended to certain secondary legislation. They identify the Bill's policy objective or unusual features: Burrows and Carter *Statute Law in New Zealand*, above n 153, pp 278 and 283. Ross Carter has kindly drawn my attention to a new initiative, "legislative statements" which are formal remarks on the details of a Bill, presented to the House by the Minister in charge of a Bill. The first one was presented on 1 December 2020, for the Drug and Substance checking Legislation Bill.

[170] *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, at 635C-E per Lord Browne-Wilkinson.

[171] In *Holler v Osaki*, above n 147, for example, this Court referred to a Law Commission discussion paper and report on reform of the Property Law Act 1952.

[172] For example, *Commissioner of Inland Revenue v BNZ Investments Ltd*, above n 161, at [29] per O'Regan J (giving the Court's judgment), ("discussion papers which were publicly circulated").

[173] *E v Chief Executive, Ministry of Business, Innovation and Employment* [2019] NZCA 658. I was counsel assisting the Court of Appeal, tasked with advancing arguments for E.

challenging a Refugee Protection Officer's refusal of his "subsequent" claim for refugee status. Subsequent claims are subject to the threshold restrictions in s 140 of the Immigration Act 2009. A key issue in the case was the meaning of the words "significant change in circumstances material to the claim" in s 140(1). Were they wide enough to cover the becoming available of new evidence? E said he had been tortured in Uganda, and this was also the main basis of his prior claims. The new evidence comprised a medical report, prepared in accordance with the Istanbul Protocol,[174] by two internationally recognised experts in assessing alleged torture injuries. The report had only become available (due to no fault of E's) after the rejection of his earlier claim. It provided corroboration of his story of what had happened to him.

In the High Court Gilbert J took a narrow, literal approach to interpretation, and held that the report was not "a change in circumstances", just more evidence in support of the same ground. The Court of Appeal placed significant weight on an Immigration Act Review Discussion Paper that had preceded the passage of the Immigration Act in 2009.[175] The new Act had expanded the wording of s 140 to its present formulation.[176] The discussion paper had referred to the need for a wider approach in New Zealand's domestic law, to ensure that "genuine refugees" were not denied asylum in breach of New Zealand's international obligations under the Refugee Convention. Interpreting s 140(1) against that background, the Court of Appeal held that the wording did encompass claims such as E's, founded upon newly available evidence.[177]

(b) *Hansard debates.* The use of Hansard was approved by the Court of Appeal in the mid-1980s.[178] Although Hansard is now frequently referred to, occasional notes of caution are still sounded. In *Holler v Osaki*[179] Winkelmann J said:[180]

> Although the best source of deducing Parliament's intent is the words of the statute itself, where those words are difficult or unclear, as here, assistance may be sought in Law Commission reports and with a little more trepidation in the pages of Hansard. We say with a little more trepidation, as in Parliament there is often more than one voice. Those who speak do so within a political context, and not solely to elucidate the purpose of the legislation

The appellants, Mr Holler and Ms Rouse, owned a house insured by AMI. A tenant, Mrs Osaki, left a pot of oil heating unattended on a stove, and a fire broke out, burning down much of the house. AMI indemnified Mr Holler and Ms Rouse for the repair costs, but then, exercising subrogation rights, issued a proceeding in their names against the Osakis.

A key issue was whether ss 268 and 269 in part 4 of the Property Law Act 2007 (PLA), which largely exonerated a lessee from responsibility for the cost of destruction or damage to the leased premises, applied to residential tenancies under the Residential Tenancies Act 1986 (RTA) or just to commercial tenancies. Also key was the meaning and effect of s

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174 A manual on the effective investigation and documentation of torture and other cruel , inhuman or degrading treatment or punishment: Istanbul Protocol UN Doc AR/P/PT/8/Rev.1(2004).

175 At [56]-[58], [65], [66] per Clifford J (giving the reasons of the Court).

176 It was previously s 129J(1) of the Immigration Act 1987 and had applied only to changed circumstances in the claimant's home country.

177 At [56]-[60].

178 *Marac Life Assurance Ltd v Commissioner of Inland Revenue*, above n 160.

179 *Holler v Osaki*, above n 147.

180 At [34] per Winkelmann J (giving the reasons of the Court).

142 of the RTA. Section 142(1) provided that nothing in part 4 of the PLA applied to residential tenancies, yet s 142(2) contradicted that absolute statement. It provided, somewhat obliquely, that the Tenancy Tribunal could look to Part 4 of the PLA as a "source of the general principles of law relating to any matter provided for in that Part".

The Court of Appeal concluded that, despite the lack of clear wording, the exoneration provisions applied equally to commercial and residential tenancies. The legislative history was described as a useful "cross-check" on the initial textual analysis. It could "shed light on the purpose of the legislation and the intent behind the language used." The Court referred to a 1991 Law Commission discussion paper which had proposed amendments to the PLA to protect residential tenants from liability, as well as to a 1994 Law Commission report. When those documents were read together, the Court considered that it was clear that the Law Commission's proposed reforms had remained unchanged from 1991. The Law Commission had not backed away from them.

The Court also referred to the 2006 Property Law Bill which closely followed the text of the draft provisions proposed by the Law Commission in 1994. The appellants sought to rely on a specific statement by the Associate Minister for Justice on the introduction of the Bill. He referred only to commercial lessees. Winkelmann J regarded that as equivocal – the Minister did not say whether the reforms did or did not apply to residential tenancies. Winkelmann J added that:[181]

> In any case, and more fundamentally, what is relevant to the interpretation exercise is Parliament's intention, not that of individual members of Parliament, even if they are ministers.

However, Winkelmann J also noted that it was apparent from Hansard that the Bill had cross-party support, and that there was repeated reference in the course of debate to the fact the Bill "followed Commission recommendations closely and that it was intended to give effect to them". There was no evidence in the debates that Parliament did not intend to extend the reforms to residential tenancies. Thus, despite initial "trepidation", the Court of Appeal did place quite a lot of weight on Hansard (and the Law Commission reports).[182] The Court concluded that the text, policy and legislative history supported an interpretation that the exoneration provisions applied equally to residential tenancies.

(c) *Departmental reports and submissions to select committees considering a Bill*. These materials are publicly available and are linked to the parliamentary processes. Whilst, as Burrows and Carter have noted, the courts have not uniformly approved the use of departmental reports,[183] they are in practice often looked at.

Because they are statements of officials, departmental reports will only be relevant to interpretation if the statements are not themselves unclear,[184] influenced the Select Committee, and reflect the legislation as finally enacted.

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[181] At [52].

[182] At [52]. In *New Zealand Animal Law Association v Attorney-General* [2020] NZHC 3009 the High Court placed considerable emphasis on Hansard as evidencing the purpose of a 2015 amendment to the Animal Welfare Act 1999, at [82], [83], [85] and [86] per Cull J.

[183] Burrows and Carter, *Statute Law in New Zealand*, above n 153 p 297.

[184] In *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v Witney* [2007] NZCA 599; [2008] 2 NZLR 228] the Departmental report to the select committee was looked at, along with other legislative history material (at [105]),

I frequently read the Departmental reports to select committees when giving advice or writing submissions on the meaning of a statutory provision. They often provide a lot of insight into the policy behind the provision. With older statutes you may need to visit the Parliamentary Library in Wellington to find these reports, but more recent reports are online. In a judicial review case challenging the prison smoking ban I spent a morning trawling through dusty boxes of old records at the Parliamentary Library. I struck gold, in the form of a Department of Corrections submission to a select committee considering an amendment to the Smoke-free Environments legislation. The report stated that "during their imprisonment prison cells become the inmate's residence", where he should be able to smoke. As well as boosting my interpretation argument, the theme of "a prisoner's cell is his home" was a powerful one to develop in written submissions, and this was picked up in the judgment.[185]

(d) *Subsequent departmental publications*. These are documents such as pamphlets, information bulletins and guidelines published by the relevant department or public body. At one stage the courts considered these to be relevant as interpretive aids,[186] but later the Supreme Court took a different view. In *Allen v Commissioner of Inland Revenue*[187] a taxpayer had relied on (incorrect) information given by the Department in various pamphlets regarding the procedural requirements for contesting a tax assessment under the Tax Administration Act 1994. The Supreme Court acknowledged that that was regrettable but said:

> we are not persuaded that the Department publications bear on the question of interpretation.

It is difficult to see why these documents, even if made public, should influence the interpretation of a statutory provision. They are created *after* the statute or amendment has been enacted, are usually written by officials, and are not sufficiently connected with the parliamentary process. It is for the courts to determine the meaning of legislation, not the executive. Why should such documents carry more weight than, say, the submissions that are advanced on behalf of government departments (and not always accepted by the court) in litigation?

Providing context -- examples

5.14. The legislative history can be especially useful in identifying the evolution of policy, as these recent examples illustrate.

Stumped: the Northland Environmental Protection Society case

5.15. The Supreme Court's decision in *Northland Environmental Protection Society Inc v Chief Executive of the Ministry for Primary Industries (Northland)*[188] was about the export of ancient

but was said to be unhelpful because it "provoked the same interpretation dispute" as the point the Court had to decide" (at [72] per Glazebrook J (giving the reasons of the Court)).

185 *Taylor v The Manager of Auckland Prison* [2012] NZHC 3591, at [160] and fn 5, per Gilbert J.

186 For example, *Marac Life Assurance Ltd v Commissioner of Inland Revenue* above n 160, at 699 per Cooke J and 713 per McMullin J.

187 *Allen v Commissioner of Inland Revenue* [2006] NZSC 19, [2006] NZLR 1, (2006) 22 NZTC 19,827, at [21] per Anderson J (giving the reasons of the Court). See also *R v Steigrad* [2011] NZCA 304, (2011) NZCLC 264,862, at [91], [92] per Glazebrook J (giving the reasons of the Court).

188 *Northland Environmental Protection Society Inc v Chief Executive of the Ministry for Primary Industries* [2018] NZSC 105; [2019] 1 NZLR 257.

swamp kauri dug up on privately owned scrub or farm land in the Far North. Swamp kauri is kauri that has been buried and preserved in swamps for anywhere between 800 and 60,000 years. The appellant Society challenged the lawfulness of exports of what were, in reality, just large slabs and logs with only minimal processing. The Society had publicly expressed concern that MPI officials were allowing this "rort" to continue.

5.16. Under s 67C of the Forests Act 1949 swamp kauri can only be exported if it is (among other things) a "finished or manufactured indigenous product", or a whole or sawn "stump" or roots which are not from indigenous forest land. A "finished or manufactured finished product" is defined in s 2(1) as follows:

> (a) means any indigenous wood product that has been manufactured into its final shape and form and is ready to be installed or used for its intended purpose without the need for any further machining or other modification
> (b) includes a complete item or a component of an item (whether assembled or in ketset form) such as joinery, furniture, toys, tools…;
> (c) does not include dressed or rough sawn timber, mouldings, panellings, furniture blanks, joinery blanks, building blanks or similar items.

5.17. The judgment records that exports of swamp kauri had increased significantly between 2010 and 2015. There is a real irony in that because it reflects a significant reversal in official government oversight of these exports. Back in 1994 I acted for an exporter of large (unprocessed) swamp kauri remnants. He was denied export approval for the product on the grounds that, because of their size, the remnants were trees or logs, not "stumps". This was successfully challenged in declaration proceedings in *Ancient Trees of New Zealand v Attorney-General.*[189] McGechan J, after hearing expert evidence about what constituted a "stump" (which was not then defined in the Forests Act) confirmed that they were indeed stumps. His Honour apparently thought it was all pretty obvious, stating that "a stump is a stump, just as a cow is a cow". However, following McGechan J's decision the Forests Act was amended to define a stump by reference to much smaller dimensions, defeating the judgment and ruining the exporter's business.

5.18. The Supreme Court judgment in *Northland Environmental Protection Society* mainly focused on the interpretation of the above s 2(1) definition. Glazebrook J, delivering the majority judgment, reviewed the legislative history of s 67C, including the introduction of the current export restrictions in 1993, the subsequent amendment in 1995 in response to the *Ancient Trees* judgment, and a further amendment in 2004 removing the need for the Ministry to approve each export consignment. In respect of each of those three events, the Court referred to the relevant Bill and explanatory notes, select committee reports and the Hansard speeches.

5.19. Glazebrook J stated that it was "clear from the legislative history" that one of the statutory purposes was to ensure that indigenous timber was not exported in unprocessed raw form (logs or wood chips), and to ensure that value was added to indigenous timber here in New Zealand before it could be exported: [190]

> What is clear from the legislative history is that one of the purposes of Part 3A when it was first introduced in 1993 was to curtail the export of indigenous timber logs and woodchips and encourage sustainable management of indigenous forests. Another aim was to encourage the industry to ensure that value was added before indigenous timber products were exported, creating job opportunities in New Zealand. A question had arisen during the Select Committee

[189] *Ancient Trees of New Zealand Ltd v Attorney-General* HC Wellington CP483/93, 29 April 1994.
[190] Above n 188, at [24] per Glazebrook, O'Regan, Ellen France and Arnold JJ.

> process as to whether export restrictions were necessary to achieve these aims or whether the felling and milling restrictions would suffice. It was decided that the export restrictions should remain. A conscious decision to maintain the export controls was made again in 2004 for similar reasons to those behind the earlier amendments.

5.20. This reinforced the purposes also apparent from the legislative scheme and statutory wording. Applying the words of the definition[191] in light of those purposes, the Court held that it only covered items that were stand alone products ready to be used or installed without any further refining or modification.

5.21. The definition did not therefore cover the swamp kauri items. They needed to have effectively lost their identity as swamp kauri before they could be exported as a "finished or manufactured indigenous product". A so-called "totem or temple pole", with only minimal surface carving or decoration, was still a log. A so-called unfinished "table top" in the form of a rough sawn or dressed timber slab was still just a timber slab. They were not within paragraphs (a) or (b) of the definition, and were also excluded by the "carve out" in paragraph (c). That was enough to allow the appeal.[192]

Outvoted: the Ngaronoa case

5.22. *Ngaronoa v Attorney-General*[193] was another significant case brought by "jailhouse lawyer" Arthur Taylor, who was one of the appellants. The issue before the Court was the proper interpretation of s 268(1)(e) of the Electoral Act 1993, which entrenched the certain provisions of the Act so that they could only be passed by a 75% majority in the House of Representatives or a carried by majority of electors at a referendum. Section 268(1)(e) described the reserved provisions as follows:

> section 74, and the definition of the term adult in section 3(1), and section 60(f), so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:

5.23. The issue arose because a 2010 amendment to the 1993 Act had disqualified all sentenced prisoners from voting. Before the amendment only those sentenced to life imprisonment, preventative detention, or a term of three years or more were disqualified. The amendment was passed with an ordinary majority. The appellants, all prisoners, contended that the amendment was invalid as it should have been passed by a 75% majority.

5.24. Did s 268(1)(e) operate as a general entrenchment of the right to vote, or did it just protect the minimum voting age? Starting with a close analysis of the language of the provision, a majority of the Court held that the meaning was plain. The "only possible interpretation of the text is that s 268(1)(e) entrenches only the minimum voting age".[194] This approach was also "consistent with" the legislative history and the purpose of entrenchment.

5.25. The majority looked in detail at the legislative history, from the time of the introduction of the Electoral Act 1956, including statements in Hansard in 1956, 1973 and 1993. This showed, from

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[191] Glazebrook J emphasized a few times that the words "mean what they say".

[192] A further (but not decisive) interpretation issue was whether the some or all of the swamp kauri was a "protected New Zealand object" as defined in s 2(1) of the Protected Objects Act 1975. That was decided against the appellant.

[193] *Ngaronoa v Attorney-General* [2018] NZSC 123, [2019] 1 NZLR 289.

[194] At [48] per William Young, Glazebrook, O'Regan and Ellen France JJ.

the outset, a "clear" intention to entrench only the minimum voting age.[195] The "overall purpose" of s 268 was "captured by the statement of the Hon John Marshall on the introduction of the predecessor to s 268 found in the 1956 Act". A Royal Commission on the Electoral System report in 1986-1987 had said that there was some uncertainty about the scope of s 286, and recommended a more expansive protection of the qualifications to vote. However, no attempt was made in the 1993 Act to clarify the position, or to adopt the Commission's recommendation. The same formulation was used. This all "supported" the majority's view that the "natural and only meaning" was that s 268(1)(e) only protected the minimum voting age.

5.26. Elias CJ, who dissented, interpreted s 286(e) as entrenching the whole of s 74. The 2010 amendment therefore wrongly, by a simple majority, imposed a new disqualification on electors otherwise qualified under s 74. Interestingly, Elias CJ relied on the same legislative history as the rest of the Court, but did not find it to be inconsistent with her opposite interpretation.[196]

Pushing the boundaries

5.27. I discuss below some examples of recent cases where the parties pushed the use of legislative history material too far – by seeking to rely on (i) documents well outside orthodox categories of extrinsic aids, (ii) statements by officials that did not reflect the statutory wording, or (iii) subjective evidence of the intent and meaning of legislation.

A taxing discovery -- the Cullen Group case

5.28. In *Cullen Group Ltd v Commissioner of Inland Revenue*[197] the main dispute was about tax avoidance. Mr Eric Watson had moved from New Zealand to the United Kingdom in 2002. He restructured his business affairs so that his shares in Cullen Investments Ltd were replaced by loans owed by Cullen Group Ltd to conduit companies in the Cayman Islands, a tax haven. The Commissioner said the arrangement exploited the concessionary Approved Issuer Levy (AIL) tax regime so that Cullen Group paid AIL at 2% rather than Non-Resident Withholding Tax (NRWT) at 15%, resulting in a tax saving of $51.5m.[198]

5.29. In the High Court Palmer J found that Mr Watson retained a "high degree of control" over the "web" of inter-related entities, and was on both sides of the loans. The arrangement was held to be tax avoidance under s BG 1 of the relevant Income Tax Acts as it was not within the "contemplation" of Parliament in enacting the AIL regime.[199]

5.30. Cullen Group had sought discovery in a pre-trial interlocutory application.[200] The application was very unusual:

- First, all of the documents related to *legislative history* rather than issues of disputed fact. As mentioned above, such documents are not normally discoverable.

[195] At [56]-[64] per William Young, Glazebrook, O'Regan and Ellen France JJ.
[196] At [156] per Elias CJ. She also described the legislative history as not "compelling on the question of interpretation".
[197] *Cullen Group Ltd v Commissioner of Inland Revenue* [2019] NZHC 404. I was counsel for the Commissioner.
[198] The total tax found to be owing was $112m, which included use of money interest of $60.5m.
[199] The "parliamentary contemplation" stage of the s BG 1 tax avoidance inquiry is wider than simply a purposive interpretation of the text of specific provisions.
[200] *Cullen Group Ltd v Commissioner of Inland Revenue* [2017] NZHC 3260.

- Secondly, the application was startlingly wide in scope– the requested documents related to *22 different statutes*, many long since repealed.

- Thirdly, the *categories* sought in relation to each statute went far beyond orthodox categories of legislative history, and extended into the depths of Inland Revenue's archives. They related mainly to internal views of officials. They included, for example, "all documents created by IRD officials", "all internal documents prepared by IRD officials" (including (i) "any final reports and internal recommendations" or (ii) any other consideration given to the legislation"), "all documents created by any special purpose committee or working group established to consider tax policy" and "any other documents provided to or obtained by IRD officials".

5.31. This vast trove of documents was purportedly sought as extrinsic aids to ascertain Parliament's purpose when it enacted the AIL regime in 1991, and why it selected the particular definition of "associated persons" used in that legislation. Woolford J – perhaps looking for an escape route – considered that it would be enough to limit the order to three statutes only, but declined to reduce the categories of documents, preferring to leave it to the Commissioner to challenge admissibility at trial. The Judge acknowledged the lack of orthodoxy, saying that it could be argued that "the views of IRD officials who have made internal recommendations or who have given 'consideration' to the legislation" were not relevant.[201]

5.32. However, Woolford J was not prepared to rule on it in advance of trial, taking the view that his order was sufficiently limited to enable a more targeted search. Well that did not prove to be the case, and a search just for the core conventional categories (which the Commissioner agreed to look for, whilst disputing their discoverability)[202] took over 300 hours and yielded few documents.

5.33. In the meantime the Commissioner appealed on the grounds that (a) legislative history documents were (in principle) not discoverable, (b) the internal views of officials fell well outside conventional categories of legislative history, and (c) it would involve an oppressive and fruitless search. Ultimately, after the Commissioner's submissions had been filed, the appeal was allowed by consent, and the High Court order was set aside.[203] French J stated:[204]

> …the discovery order made goes far beyond the orthodox categories of extrinsic aids that the courts are willing to consider. It would require the Commissioner to discover as relevant documents that have never been made public, that are far removed from Parliamentary processes, and that record the subjective views of officials working in the Inland Revenue Department. Those are not permissible extrinsic aids, as they cannot assist the court to determine Parliament's intention.

5.34. This same issue had arisen previously in 2007 in *BNZ v Commissioner of Inland Revenue*.[205] The BNZ had sought discovery of internal documents created by IR officials relating to the purpose and policy of the conduit and foreign tax credit rules prior to their inclusion in the Income Tax

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[201] At [27],

[202] At [28]. These were law reform reports recommending the legislation, public discussion papers issued for consultation before introduction of the Bills, and submissions and Departmental reports to the select committee considering the Bills.

[203] *Commissioner of Inland Revenue v Cullen Group Ltd* [2018] NZCA 166.

[204] At [7](a) per French J (giving the reasons of the Court).

[205] *BNZ Investments Ltd v Commissioner of Inland Revenue* HC Wellington CIV-2004-485-1059, 22 June 2007, Wild J.

Act. Wild J did not accept that the documents had any relevance to the issues in the proceeding, saying:[206]

> …I am not aware of any authority that the views of public servants are relevant to the interpretation of legislation, or to the intention of Parliament in enacting it.

5.35. Wild J also emphasised that the documents were not publicly accessible but were internal to the Department, a further reason why they could not assist the Court in interpreting the legislation.[207]

5.36. Returning to the *Cullen* case, in his substantive judgment Palmer J placed some reliance on the legislative history of the 1991 Bill which first introduced the AIL regime. However, he relied on only a small number of orthodox categories of documents. These included (a) the explanatory note to the Bill, (b) two policy documents issued by the Ministers of Finance and Revenue on the same date that the Bill was amended to introduce the AIL regime (one of which was expressly referred to by the Minister of Revenue in introducing the Bill), and (c) statements of the Associate Minister of Finance in Hansard.[208]

5.37. Palmer J considered that these documents disclosed that the purpose of the AIL regime was to encourage investment in New Zealand. He concluded that Parliament did not "contemplate" that AIL, rather than NRWT, would be payable when, viewed in a commercially and economically realistic way, the loan was between such "highly related parties".

Not very 'cash money': the Roberts case

5.38. In *Commissioner of Inland Revenue v Roberts*[209] the issue was whether the forgiveness of a debt owed to the donor, Mrs Roberts, by a charitable trust was a "charitable or other public benefit gift" as defined in s LD 3(1) of the Income Tax Act 2007, and so qualified for a tax credit. This in turn depended on the meaning of the key words "monetary" (and "money"). The Commissioner contended that they applied only to a cash payment and the like. It was argued for Mrs Roberts that "monetary" was a broader concept and also included a credit of a specific amount, such as forgiveness of a debt.

5.39. After analysing the words used, Stevens J in the Court of Appeal was satisfied that they were not limited to cash and the like. He observed that the Commissioner had placed "considerable emphasis" on what counsel described as "compelling" extrinsic interpretive aids in the form of legislative history documents. These included two government discussion papers in 2001 and 2006, and a 2007 government commentary on a taxation amendment bill. In each document officials stated that the donations had to be in cash in order to qualify for a tax credit.

5.40. In the High Court Cull J had also rejected the Commissioner's interpretation.[210] She did not place much weight on the discussion papers. However, after the High Court's judgment Inland Revenue promoted a "remedial amendment" to the Act to overturn Cull J's interpretation. The amendment was retrospective, but due to a 'carve out' did not apply to Mrs Roberts. The appeal to the Court of Appeal was heard about seven months after the amendment was enacted.

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206 At [17]. See also at [23]-[27].
207 At [21].
208 At [66].
209 [2019] NZCA 654.
210 *Roberts v Commissioner of Inland Revenue* [2018] NZHC 2153, Cull J.

5.41. In dismissing the appeal, Stevens J agreed with Cull J that the legislative history was "at best unhelpful". The officials' language in the discussion papers and commentary differed from the statutory language. It made no attempt to analyse the terms "money" or "monetary", and did not address the boundary between cash and non-cash donations. There had "for a number of years been somewhat of a disconnect between the actual wording of the legislation and the commentary or discussion generated by officials".[211] Stevens J added:[212]

> Comments in reports by officials about "cash" do not assist the Commissioner when that is not the wording of the statute, and the term appears to have been used in a broad sense and by way of contrast with gifts of goods and services. The task of the court is to interpret the words used in the statute, not paraphrases, used in discussion papers and officials' reports. We should add that comments by officials, unless they form part of the parliamentary records, are not an especially reliable , or orthodox, form of legislative history.

5.42. It gets worse. Counsel for the Commissioner also sought to rely on a November 2018 officials' report to the Finance and Expenditure Committee commenting on the "remedial" amendment bill which had followed the High Court judgment. Officials stated that the High Court decision was "contrary to the policy intent" of the Act, which was that only monetary gifts of cash and the like qualify as gifts. The officials therefore recommended that the existing words "monetary gift" be replaced with "gift of money".[213]

5.43. Counsel submitted that the subsequent amendment (made between High Court and Court of Appeal hearings) confirmed that it was not Parliament's purpose on the wording of s LD(3) *prior to the amendment* for gifts of forgiveness of debt to qualify for donations tax credits. Unsurprisingly this was given short shrift by Stevens J who said "we see no merit in this argument and do not discuss it further".[214] The startling nature of the submission is aptly described as follows:[215]

> Moreover, it is (at best) a stretch to rely on commentary written by officials who represent one of the parties to the litigation (and following the judgment at first instance) as part of the legislative history.

5.44. Overall the case is a graphic illustration of how legislative history should not be used. The tail does not wag the dog. The legislative history cannot override, or be used as a substitute for, the statutory language. Even less so self-serving comments by officials.

5.45. Statements by officials may, however, still be looked at, if they appear in orthodox categories of extrinsic aids, but their limitations must be borne in mind in terms of *how* they are used.

Inadmissible subjective evidence

Evidence of intent

[211] At [58]. The officials' commentary on a bill in 2007 "suffered from the same observation".
[212] At [62].
[213] At [53]. I am not quite sure how that change was meant to fix things from Inland Revenue's perspective. Section LD 3 was amended again in 2020, after the Court of Appeal's judgment in *Roberts*.
[214] At [54] fn 43.
[215] Brown and Burnett "Statutory interpretation and policy intent" [2020] NZLJ 204 at 206.

5.46. As in the case of contract interpretation, subjective declarations of intent are never admissible. Despite this there have been regular attempts over the years to adduce evidence from a Minister or other proponent of legislation, purporting to explain what was intended.

5.47. Most recently this occurred in the *ACC v Ng* case.[216] The respondents sought leave in the Court of Appeal to put in an affidavit from the Hon Ruth Dyson, who was the Minister for ACC from August 2002 to November 2007 and was responsible for introducing the current treatment injury provisions. The purpose of the affidavit was to provide Ms Dyson's view about what was intended at the time of drafting and enactment, and whether this intention accorded with the approach now advocated by ACC. The Court ruled that the affidavit was "plainly inadmissible". French J stated:[217]

> It has never been the law that the meaning of a statute can be ascertained by reference to the subjective intentions of the Minister responsible for the Bill, let alone from that Minister's evidence about their subjective intentions given some 15 years later. Such evidence is quite simply irrelevant.

5.48. French J added that it would also be wrong in principle for the meaning of legislation to be ascertained by reference to material that did not form part of the publicly available record of the process leading up to the enactment of the legislation.[218]

Inadmissible opinion evidence

5.49. Witness statements, especially of expert witnesses, stray surprisingly often into opinion about what a statutory provision means. The courts have consistently expressed disapproval about the inclusion in briefs of evidence of 'legal submissions' on questions of statutory interpretation. For example, in *Commissioner of Inland Revenue v BNZ Investments Ltd* O'Regan J observed:[219]

> We agree that both witness statements contain much in the nature of submissions on legal issues. The difficulty which this poses is that it invites a response from the Commissioner from another tax expert essentially providing counter submissions. We do not see it as helpful to the Court to have the roles of counsel and expert witnesses intermingled in this way

5.50. Similarly, in *Penny v Commissioner of Inland Revenue* the Supreme Court emphasised that it is "undesirable and wasteful of time and effort of both parties when such material appears in expert briefs of evidence".[220] As mentioned above, rule 9.7(4)(d) of the High Court Rules expressly now states that briefs of evidence "must not contain any material in the nature of a submission". Nor will such evidence satisfy the requirements of s 25 of the Evidence Act 2006 in respect of expert opinion evidence.

5.51. More recently, questions of admissibility arose in *Provident Insurance Corporation Ltd v Commissioner of Inland Revenue*.[221] The issue of interpretation was whether the premiums paid

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[216] *ACC v Ng*, above n 154.
[217] At [44] per French J (giving the reasons of the Court).
[218] At [44].
[219] [2009] NZCA 47, (2009) 19 PRNZ 553 at [28].
[220] *Penny v Commissioner of Inland Revenue* [2011] NZSC 95, [2012] 1 NZLR 433, at [32] per Blanchard J (giving the reasons of the Court); see also *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, at [34] per O'Regan J (giving the reasons of the Court); *Greymouth Petroleum Mining Group Ltd v Minister of Energy* [2019] NZHC 1222, at [171] per Dobson J.
[221] [2019] NZHC 995. In *Cullen Group*, above n 198, Palmer J ruled at the beginning of trial that part of the evidence of one of Cullen Group's experts was inadmissible because it contained legal submission (at [25]). In the *Ng* case, above n 154,

for two insurance policies were subject to GST or were exempt from tax under the financial services exemption in s 3 of the Goods and Services Tax Act1985. The Commissioner challenged the admissibility of an affidavit from a Mr Oliver, an acknowledged expert in tax policy, on the grounds that most of his evidence was in the nature of legal submission. Mr Oliver had purported to give his opinion on the policy underpinning the Act. He also introduced into evidence, to advance his theories, a number of legislative history documents such as a GST commentary/guide prepared for the insurance industry and three government discussion documents on GST.

5.52. To complicate matters the Commissioner, rather than refraining from responding to the 'legal' content of Mr Oliver's brief, called counter evidence from a Ms Pallot (also an expert in tax policy) just in case Mr Oliver's evidence was held to be admissible. Her 'evidence' was also just her opinion about the policies underlying s 3. In the event, there was no time for an admissibility ruling before trial, so the parties agreed that all the evidence could be admitted de bene esse. Churchman J ultimately held that to the extent that the evidence was in reality legal submission, the two witness statements were inadmissible. Both the commentary and the legislative history documents should have been presented by counsel.[222]

5.53. This case shows the importance of trying to resolve admissibility issues before trial, as rule 9.11 envisages, and of ensuring that views about interpretation are confined to counsel's legal argument. Legislative history documents should be introduced in the bundle of authorities, as is usual practice, not through a witness.[223]

6. Conclusion

6.1. There is still an important place for extrinsic material, both in contractual and statutory interpretation. There is still a sound case for 'jumping off the page'. However, given the courts' increasing focus on a close textual analysis, that should also be counsel's primary focus. Drafting of contracts will require renewed rigour. The choice of background material in the event of dispute will require greater discernment and restraint. If the wording is clear, the court is less likely to engage in creative interpretation (or "interpretive jiggery-pokery" to quote the late Justice Scalia again) in order to rescue a party from a harsh result.

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the affidavit evidence of a medical practitioner was inadmissible to the extent it contained a critique of the High Court decision.

222 At [31]-[33].

223 Churchman J said (at [32]) that this information should be in the "agreed bundle of documents". If he is referring to the rule 9.4 common bundle, then I think inclusion in the bundle of authorities is more appropriate.