Objectivity and Interpretation in the Supreme Court


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When Professor Littlewood invited the writer to contribute a piece on the Supreme Court’s treatment of Contract during the first decade of its existence what we had in mind was a general survey article describing with a somewhat broad brush the contract cases which had been decided during that period. There was an abundance of interesting material, including cases on formation, on implication of terms, on interpretation, on the nature of essential terms, on the nature of a repudiation and whether it is true that an unaccepted repudiation is a thing writ in water, on frustration, novation, and damages. Some of the material raised questions of great theoretical interest. Thus the Court’s decision in Mana Property Trustee Ltd v James Developments Ltd raised the question whether CB Morison’s original and somewhat heretical ideas on the nature of essential terms had ongoing validity. The Court’s decision in Planet Kids Ltd v Auckland Council raised fundamental questions as to the link between the doctrine of failure of consideration (in the extended meaning of that term) and frustration. This was an area which had occupied a former Mayor of Auckland, in his younger days, and on which he wrote a distinguished doctorate which argued that failure of consideration was the litmus test.

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1. Southbourne Investments Ltd v Greenmount Manufacturing Ltd [2008] 1 NZLR 30; Dysart Timbers Ltd v Nielsen [2008] 3 NZLR 78
2. Larsen v Rick Dees Ltd [2007] 3 NZLR 577; McLauchlan “Timely payment, but no settlement: a necessary requirement of notification” (2008) 14 NZBLQ 37
6. Planet Kids Ltd v Auckland Council [2014] 1 NZLR 149
7. Savvy Vineyards 3552 Ltd v Kakara Estate Ltd [2014] NZSC 121
8. Marlborough District Council v Altimarloc Joint Venture Ltd [2012] 2 NZLR 726
9. CB Morison, Principles of Rescission of Contracts (Stevens & Haynes, London, 1916). Morison, a Wellington practitioner, argued that in cases of executory contracts you looked at the stipulation broken from the point of view of its probable effect as an inducement to enter into the contract.
10. Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour [1943] AC 32, 48 per Lord Simon: “in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration... it is generally speaking, not the promise which is referred to but the performance of the promise”
test of frustration. There is an important opinion in *Planet Kids*, assented to by all their Honours, giving effect to that idea. In *Ingram v Patcroft Properties Ltd*[^13], the Court considered whether an unaccepted repudiation was without effect and decided, not following the House of Lords[^14], that an unaccepted repudiation may nevertheless operate as a waiver if it leads the counterparty to believe that the tender of ongoing performance would be useless[^15]. In *Marlborough District Council v Altimarloch Joint Venture Ltd*,[^16] the Court had to grapple with the question whether the cost to cure rather than difference in value was the appropriate measure of damages. The decision considers the scope of the primary obligation involved in that case and the relation between the nonperformance of that obligation and compensation for its breach. It provides a good example of the interrelationship between the primary obligation and the secondary obligation to pay damages.

It soon became apparent on a brief consideration of these riches that it would be impossible to do justice in the space and time allotted to the thought provoking material in these cases. The instruction to the writer was to confine the review to manageable and conventional proportions. So in place of a general review, the proposed offering is a critical analysis of two of the cases which deal with the mainstream issues of objectivity and interpretation. Each of the cases has already been subjected to critical analysis and both cases may rightly be said to be controversial. In the writer's view, they provide a good illustration of the Court's treatment of contract disputes.

II

*Dysart Timbers Ltd v Nielsen*[^17] illustrates some of the complexities revolving around the objective interpretation of promises in the law of contract. The case raises the question whether the objective test of contract formation depends on viewing an offer through the eyes of a reasonable offeree/promisee or whether it is

[^11]: McElroy and Williams, Impossibility of Performance, CUP 1941.
[^12]: [2014] 1 NZLR 149, at [173] per William Young J
[^13]: [2011] 3 NZLR 433
[^15]: See also Foran v Wight (1989) 168 CLR 385 adopting substantially the same reasoning as is found in the Supreme Court and also not following the House of Lords.
[^16]: [2012] 2 NZLR 726
based on an objective assessment of how a reasonable promisor/offerrer\textsuperscript{18} would assess the relevant offer. The proposition advanced in this case is that when one is interpreting an offer, the focus ought to be on the unilateral actor—that is to say on the offeror, rather than the offeree.

The specific issue in the case was whether an offer to make a contract had lapsed when a significant event occurred after the making of the offer, but prior to its acceptance. The case concerned the proposed settlement of legal proceedings under which the offeror Nielsen had been found liable in the lower courts to pay a sum exceeding $314,000 to Dysart Timbers Ltd [Dysart]. The liability had arisen under a guarantee given to Dysart by Nielsen of the indebtedness of a company in which Nielsen was interested. Nielsen contested his liability. Nielsen sought leave to appeal the judgement of the Court of Appeal to the Supreme Court.

Submissions in support of the application for leave were filed by Nielsen on 18 July 2007, and Dysart responded by filing submissions in opposition to the grant of leave on 6 August 2007.

On the morning of 9 August 2007, Nielsen by his counsel made an offer of settlement. Relevantly, the offer read as follows:

“Dysarts v. Rod and Greg Nielsen

I have been instructed to put forward an offer of $250,000 in full and final settlement of the above matter. The sum can be paid on Monday at which time the leave application to the Supreme Court will be discontinued. Can you please take urgent instructions”

At 12.30 p.m. on that day, the Registrar of the Supreme Court advised the parties that the Court had granted Nielsen leave to appeal. Then at 1:12 pm Dysart as offeree purported to accept the offer. The question was whether Nielsen’s offer was still capable of acceptance once leave to appeal had been granted.

\textsuperscript{18} It is assumed for the purposes of this paper that an offer is a promise conditioned on its acceptance: see Farnsworth, on Contracts, (Little Brown, 1990), vol. 1, para. 3.3; Williston and Thompson, Contracts (Baker, Voorhis, 1936, Rev. Ed), vol. 1, para. 25; Restatement, Contracts, (1st), section 24
As the trial judge observed\textsuperscript{19}, obtaining leave to appeal from the Supreme Court does not guarantee ultimate success on the appeal hearing, but the odds are certainly altered. From figures supplied by the Supreme Court shortly before the trial date of the instant case, of 145 leave applications, only 41 had been granted, but of these 23 had been successful.

It was therefore argued at trial that the arrival of the Supreme Court leave decision represented a material change of circumstances and it could not have been the intention of the offeror that the offer remained open for acceptance once leave to appeal had been granted. It was said that the offer contained an express term relating to discontinuing the leave application which was no longer capable of being satisfied. Additionally, it was argued that the offer was subject to implied terms that Nielsen’s leave application would be withdrawn before the Supreme Court made a decision on it and/or that the offer would automatically lapse if leave to appeal were granted prior to its acceptance.\textsuperscript{20}

At first instance\textsuperscript{21} the trial judge considered that the words "at which time the leave application will be discontinued" could not be construed as being an express term of the settlement offer expressly restricting acceptance to a time before the leave application had been granted. Those words were a mere statement of the consequence of the offer being accepted and were in the nature of a machinery provision. The trial judge was also not prepared to imply a condition into the offer that the offer would no longer be capable of acceptance after leave had been granted.\textsuperscript{22}

On appeal by Nielsen to the Court of Appeal, the Court affirmed the trial judge for reasons which were in all material respects in accord with those given by the trial judge\textsuperscript{23}. But based on a line of Scottish cases in which settlement offers had been held to have lapsed where prior to acceptance there had been a material change in circumstances\textsuperscript{24}, the court said that an offer will usually be subject to an implied condition that it will lapse if there were a change of circumstances of such

\begin{footnotes}
\item[19] [2008] 3 NZLR 78,81 at [12]
\item[20] Ibid,at [21]
\item[21] [2008] 3 NZLR 78 at [31]
\item[22] Ibid,at [34]
\item[23] [2009] 2 NZLR 9 (William Young P.,Arnold and Baragwanath JJ.)
\end{footnotes}
significance that it could not fairly be regarded as still open for acceptance\textsuperscript{25}. Since
the dispute continued to exist, the court held that the granting of leave by the
Supreme Court was not so fundamental a change as to bring the offer to an end.\textsuperscript{26}

On appeal to the Supreme Court, it was argued that the determination of the
question whether the offer was capable of being accepted required the matter to be
looked at not so much from the perspective of an offeror and in terms of implied
conditions, but from the position of a reasonable person in the shoes of the offeree.
One should ask the question– would such a person consider that the offer was still
open for acceptance?

It was submitted that a reasonable person in the shoes of Dysart would have
appreciated that the offer was intended to lapse when the Supreme Court
unexpectedly gave leave to appeal\textsuperscript{27}. The argument therefore posed in sharp form
what was meant when a court resorted to the objective test of agreement. What was
being argued for by the appellant was that the Court should apply a theory of promisee objectivity: one should interpret the meaning of the offer from the
perspective of a reasonable person standing in the shoes of the person to whom the
offer was addressed.

The Supreme Court refused to accede to this argument and decided by a majority
that the offer remained capable of acceptance notwithstanding the change of
circumstances. Four members of the court said that the question had to be resolved
by reference to the expressed intention of the offeror.\textsuperscript{28} The court has to work out
what was intended by the offeror–it is the objective intention of the unilateral actor
which is the proper focus. The intention of the offeree in purporting to make an
acceptance was said to be irrelevant.\textsuperscript{29} What the offeror meant to happen must be
objectively assessed.\textsuperscript{30} Whether it is appropriate to infer that the offer was meant to
lapse in the events which have occurred will depend on the terms of the offer itself
and all the relevant circumstances in which the offer was made\textsuperscript{31}. A condition that
an offer lapse upon a particular change of circumstances should only be implied

\textsuperscript{25}[2009] 2 NZLR 9 at [26]
\textsuperscript{26}Ibid, at [28–29]
\textsuperscript{27}Transcript of argument at pages 3,7,9,10,15,22,25,28
\textsuperscript{29}Ibid, at [5]
\textsuperscript{30}Ibid, at [5] and [26]
\textsuperscript{31}Ibid, at [26]
into the offer if it were objectively apparent that the willingness of the offeror to be bound had been fundamentally undermined by a change of circumstances.\(^{32}\)

In the event, in spite of their agreement on the principles to be applied, Elias C.J. and Blanchard J could not agree with Tipping J and Wilson J on the outcome. Tipping and Wilson JJ considered that the reference in the offer to the discontinuance of the leave application made it clear that Mr Nielsen had made the offer on the basis that the leave decision should still be pending at the time of the performance of the act requested in the offer.\(^{33}\) By contrast Elias C.J. and Blanchard J thought that the reference to the discontinuance of the leave application was merely a recognition of the fact that the proceedings had to be formally brought to an end in the event that the settlement offer were accepted.\(^{34}\)

Professors McLauchlan and Bigwood in their penetrating analysis of this case \(^{35}\) have described these opinions as exceptionally difficult, confused and inconsistent. They have identified the following difficulties:

1. The test adopted by the majority is inconsistent with that usually adopted by the common law in relation to formation of contracts. Normally, the test is focused on a reasonable person in the offeree’s shoes. The essential question is whether the alleged offeree was reasonably entitled to infer an intention to be bound on the part of the offeror. The law usually does not ask what the offeror reasonably meant but what a reasonable person in the position of the offeree would have considered the offeror to have meant by his communication.\(^ {36}\)

2. If as their Honours suggest the intention of the offeree in purporting to accept an offer is irrelevant\(^ {37}\), why is it said that an offeree cannot reasonably expect to be able to accept an offer if the basis on which it has been made has fundamentally changed?\(^ {38}\)

\(^{32}\) Ibid, at [6] and [26]
\(^{33}\) Ibid, at [40]
\(^{34}\) Ibid, at [9]
\(^{36}\) Ibid, at 232
\(^{38}\) (2011) 27 Journal of Contract Law 222, 232
3. Tipping and Wilson JJ state that a condition that an offer lapse upon the occurrence of a particular event should be implied into the offer only if it is objectively apparent that the willingness of the offeror has been fundamentally undermined. This implies that the implication is made only after the change of circumstances has occurred and as a result thereof. This is, it is said, illogical for one must first determine whether an offer is conditional, and then see whether the subsequent event falls within the condition.

The learned authors express a preference for the opinion of McGrath J. His Honour initially rejects a rule of law approach as developed by the Scottish courts and holds that the preferable way to resolve the question is as a matter of construction by ascertaining the scope of the offer made by the offeror in his offer. The court's task was to ascertain whether a reasonable person in the offeree's position [Dysart's position] with Dysart's knowledge of the change of circumstances would still believe the offer remained open for acceptance. His Honour did not consider that the promise contained in the offer was subject to a condition that it would only be binding if the court had not granted leave to appeal prior to acceptance. Like Elias CJ and Blanchard J, his Honour considered that the reference to the discontinuance of the leave application in the offer was merely a recognition that the proceedings had to be formally brought to an end in the event that the settlement offer were accepted.

There can be no doubt that Professors McLauchlan and Bigwood's observation that the test usually adopted in relation to the formation of contracts is one of promisee objectivity represents the generally received view of jurists. The common law's

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39 [2009] 3 NZLR 160 at [26]
40 [2009] 3 NZLR 160 at [39]
41 (2011) 27 Journal of Contract Law 222,233
42 Ibid, 239
43 [2009] 3 NZLR 160 at [51 to 57]
44 Ibid, at [61]
45 Ibid, at [69]
approach to the formation of simple contracts is generally traced back to the influential judgement of Blackburn J in *Smith v Hughes*\(^\text{47}\) where his Lordship said:

“I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v. Cooke*. If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”\(^\text{48}\)

As is clear from that extract, the underlying premise is that in order to establish a bilateral simple contract the parties must be subjectively agreed on the terms of their proposed contract. There is an exception to that general position, where one of the parties communicates an apparent intention to undertake contractual liability which is inconsistent with his actual intention.

In such a case, the counterparty is entitled to take the words and conduct of the first party at their face and rely on the apparent intention as communicated to the counterparty and to assume that the first party’s contractual intention is as manifested. So if Smith offers oats, which are in fact new oats to Hughes at a certain price, and permits Hughes to take away a sample, and subsequently Hughes indicates that he will buy the oats at the offered price\(^\text{49}\), there will be a contract


\(^{48}\) There is earlier authority to the same effect: *Wood v Scarth* (1858) 1 F & F 293; *Cornish v Abington* (1859) 4 H & N 549,556; *Scott v Littledale* (1858) 8 E & B 815; *Benjamin, A Treatise on the Law of Sale of Personal Property*, (Henry Sweet, 1st edn., 1868) p.39: “And when the mistake is that of one party alone, it must be borne in mind that the general rule of law is, that whatever a man’s real intention may be, if he manifests an intention to another party, so as to induce the latter to act upon it in making a contract, he will be estopped from denying that the intention as manifested was his real intention..”

\(^{49}\) *In Smith v. Hughes* (1870–71)L R 6 Q B 597,598 itself, Hughes (the buyer) made a counter–offer for the oats.
even though Hughes actually intended to purchase old oats rather than the new oats which were the subject matter of the sample.

The reason that the law adopts an objective interpretation of the promise and is prepared to impute an intention to the promisor which he or she may not have actually held subjectively is to protect the certainty of commercial transactions and to enable counterparties to make commercial decisions with confidence by giving words and conduct their ordinary plain meaning. There would be no certainty of transactions if Hughes were able to take away the sample, examine it, make an offer for the sample and then deny liability to pay by virtue of a subjective belief as to the characteristics of the sample which he was purchasing.

But it is crucial to Blackburn J’s analysis that the other party should enter into the contract upon the belief that the apparent intention represents the offeror’s actual intention. Thus the counterparty is only entitled to rely on an apparent intention if he believes that the apparent intention represents the offeror’s actual intention. If he knows that it does not do so, then the first party’s actual intention will govern and there will be no concluded contract. This explains why the cases hold that an offeree cannot snap up on offer, which he knows to be mistaken. The centrality of these ideas to the law on formation of contracts is clearly evident in the House of Lords decision in the Hannah Blumenthal.

In that case it was held that although a contract to abandon an arbitration might be inferred from prolonged inactivity, since the seller knew by reason of intermittent letters passing between buyer and seller, that the buyer’s apparent intention to abandon the arbitration did not represent the buyer’s real intention, the seller could not hold the buyer’s apparent intention against it. It was said that to create a contract by an exchange of promises between two parties, what is necessary is that the intention of each as it has been communicated to and understood by the other should coincide—even though that which has been communicated does not


represent the actual state of mind of the communicator. Where the inference that a reasonable person would draw from a prolonged failure of an arbitration procedure is that one of the parties was willing to consent to the abandonment of the arbitration, and the counterparty did in fact draw that inference and by his own inaction indicated his [the counterparty’s] consent to the abandonment it would be right to treat the arbitration agreement as having been terminated. But as the facts in the *Hannah Blumenthal* were inconsistent with any actual belief on the part of the seller that the buyer had agreed to abandon the arbitration, the seller’s actual knowledge of the buyer’s true intention was fatal to the seller’s claim to rely on the buyer’s apparent intention. Lord Diplock said that the absence of actual belief on the seller’s part that the buyer had abandoned the arbitration would mean that there had been no injurious reliance by the seller and to treat that ingredient of consensus ad idem as unnecessary would introduce a novel heresy into the law of contract.

It may be observed then that the objective theory as represented by *Smith v. Hughes* and *The Hannah Blumenthal* requires that the question whether an offer has been made and accepted be answered by reference to the intention of the offeror as it would be seen by a reasonable person standing in the shoes of the person to whom the communication was addressed. Whether an offeror is actually bound by an acceptance of his apparent offer depends in part on the state of mind of the offeree; and as the discussion has shown the test is not entirely objective. As Lord Phillips once observed, the task of ascertaining whether the parties have reached agreement as to the terms of a contract can involve quite a complex amalgam of the objective and subjective.

One question which logically follows is what is the impact of this analysis on the instant case? There was only a short interval between the notification by the Registrar of the grant of the leave application and the notification by Dysart of its

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53 *ibid*, at 915
54 [1983] 1 A C 834,915;and see at p.924 per Lord Brightman:” To entitle the sellers to rely on abandonment, they must show that the buyers so conducted themselves as to entitle the sellers to assume, and that the sellers did assume, that the contract was agreed to be abandoned...”
acceptance. Does this suggest that Dysart was snapping up an offer which it had reason to believe no longer represented the declared intention of Nielsen? Could Dysart reasonably believe that the offer still represented the continued intention of Nielsen?

A reading of the transcript of the argument in the Supreme Court makes it clear that this question was put to their Honours, but was rejected, because one or more of their Honours considered that to focus on the offeree and its reaction was inappropriate— the relevant focus should be on the offeror.\textsuperscript{56} Can such reasoning be supported as a matter of principle? Or as McLauchlan and Bigwood have suggested must one conclude that it is simply the product of difficult, confused and inconsistent reasoning?\textsuperscript{57}

In fact, and notwithstanding the misgivings of McLauchlan and Bigwood, it is not hard to empathise with the Court’s reluctance to find that promisee objectivity was the answer to the problem in hand. The difficulties surrounding promisee objectivity were exposed by Williston in an article published in the Illinois Law Review early last century\textsuperscript{58}. He observed that the traditional explanation of promisee objectivity in the formation of contracts makes it dependent on an estoppel being established, and that estoppel requires an act of detrimental reliance to have occurred before it becomes binding. Williston considered that there were many examples of an acceptance becoming binding without any regard to an action by the acceptor in reliance on his acceptance.\textsuperscript{59} As a consequence, Williston subscribed to a theory of detached objectivity which focused on the outward expressions and actions of the parties.\textsuperscript{60}

\textsuperscript{56} Transcript, p 2 lines 20 to Page 3 line 22 and see supra at note 27
\textsuperscript{57} In Bartolo v. Hancock [2010] SASC 305 at [12]and [17], in considering whether an offer had lapsed by virtue of a change of circumstances the court does adopt the usual test based on promisee objectivity.
\textsuperscript{58} "Mutual Assent in the Formation of Contracts", (1919) 14 Illinois Law Review 85
\textsuperscript{59} See, e.g., Henthorn v. Fraser [1892] 2 Ch 27 (posting letter constitutes acceptance without detrimental reliance by offeree even though no actual consensus ad idem: offeror had posted a letter of revocation prior to the time of the postal acceptance by the offeree and there had been no detrimental action in reliance by the offeree)
\textsuperscript{60} Williston, Contracts, (Rev.Ed.1936), paras. 20 and 94. Detached fly on the wall objectivity may lead to the conclusion that a contract exists where neither party intended to conclude the agreement on the terms in question: Taylor v Johnson (1983) 151 CLR 422,428; Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd [1953] 2 QB 450,460–461.
Williston’s concerns about the ingredient of detrimental reliance in the traditional explanation of formation doctrine were echoed in the English Court of Appeal in *Centrovincial Estates Plc v. Merchant Investors Assurance Co. Ltd*.61 There a lease required the parties to reach agreement as to the current market rental value of the premises for the purposes of agreeing a revised rent. The landlord through its solicitors wrote to the tenant inviting the tenant to agree that the market rental value of the premises was £65,000. The tenant accepted that figure. The question in issue was whether there was a realistic prospect that the tenant could make out an argument that a binding agreement had been concluded in circumstances in which the landlord had made its offer by mistakingly inserting the figure of £65,000 instead of £126,000. The landlord argued that the lease envisaged a genuine agreement being reached—a real meeting of the minds. In the present case there was no real meeting of minds because of the landlord’s error. The landlord argued that whilst it was true that intention fell to be judged objectively, the principle of promisee objectivity was based on an estoppel. The landlord said that if there were no detrimental reliance by the tenant, there could be no estoppel and therefore the acceptance was ineffective and there was no binding contract.

The Court of Appeal rejected this argument and said that it was contrary to well-established principles to suggest that an acceptance can be rendered ineffective on the ground that the offeree had not acted to its detriment. As Atiyah has observed the decision in *Centrovincial* may be viewed as a case in which it was held that an offeree may accept an offer in the sense which a reasonable man would give it, despite clear evidence that the offer did not represent the offeror’s true intention and had not in any way been acted upon by the offeree.62 This decision points firmly to the need for the objective theory to be uncoupled from estoppel and to be rationalised as a rule of contract law63.

Against this background of the uncertain conceptual foundations of promisee objectivity, it is worthwhile remarking that in his examination of the different ways in which the objective test of agreement was capable of being explained, Howarth

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62 Atiyah, (1986) 102 LQR 362,363
63 De Moor,” Intention in the Law of Contracts”,(1990) 106 LQR 632,642 has argued that by firmly denying that detrimental reliance was a condition for the objective interpretation of contracts the court in *Centrovincial* had severed the connection between estoppel and the objective principle
identified promisor objectivity as a potential explanation. Significantly, Howarth analysed each of the well-known English Court of Appeal decisions in *Denny v. Hancock* and *Tamplin v. James* as being best explained in terms of promisor objectivity. Howarth also showed that in *Smith v. Hughes* itself, the court was responding to an argument of counsel that a promise should be interpreted in the sense that a reasonable person standing in the shoes of the promisor would understand the promise would have for the promisee. Counsel’s submission was derived from an essay by Bishop Paley, who took the view that where the terms of a promise admit of more senses than one, promises were to be performed in that sense in which the promisor apprehended at the time that the promisee received it.

Paley argued that it was not the sense in which the promisor actually intended it that always governed the interpretation of an equivocal promise. Nor was it the sense in which the promisee actually received the promise: for according to that test you might be drawn into engagements which you never intended to undertake. He concluded that it must be that sense in which the promisor believed the promisee accepted his promise.

Austin in his lectures on jurisprudence took issue with Paley’s formulation. Austin observed that when we speak of the intention of contracting parties, we mean the sense in which it is to be inferred from the words used or from the transaction or

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65 (1870) L.R.6 Ch. App. 1 (CA in Chancery). There a prospective purchaser of land inspected a property and found it bounded by an iron fence with three magnificent trees lying inside the fence. Evidence given by a surveyor indicated that the property being offered for sale would appear on inspection by any reasonable person to include the three trees and everything up to the fence. The purchaser made an offer for the property in the belief that he was purchasing the land up to the iron fence, including the trees. In fact the land did not include the three magnificent trees which were situated on an adjoining property. The purchaser claimed that he was not bound to complete. The court held in the context of the surrounding circumstances that any reasonable person standing in the shoes of the purchaser would consider that what he was promising to purchase was the land up to the iron fence and including the trees. James L.J. said that he would have arrived at exactly the same conclusion and would have gone to the sale and bid in the belief that he was buying the land up to the iron fence with those trees upon it. Howarth views this case as supporting an objective test focused on a reasonable promisor: what would a reasonable promisor understand his promise to mean to the promisee?
66 (1880) L.R.15 Ch.D. 215, CA
67 Loc. Cit., p. 267
68 Austin, Lectures on Jurisprudence, (Holt, 1875) Lecture 21, p. 216
from both that the one party gave and the other received the promise. He argued that Paley’s rule might result in an injustice to the promisee. A mistaken apprehension by the promisor of the promisee’s understanding would exonerate the promisor. This would be to disappoint the promisee.

Austin’s misgivings can be met, and the promisee protected, if the promise were to be interpreted objectively—i.e. in the sense in which a reasonable person standing in the shoes of the promisor and taking account of the surrounding circumstances would consider the promisee would receive it. This appears to have been the approach adopted by Hannen J. in *Smith v. Hughes*, where he said:

“the rule of law applicable to such a case is a corollary from the rule of morality which Mr Pollock cited from Paley.. that a promise is to be performed in that sense in which the promiser apprehended at the time the promisee received it, and may be thus expressed: “the promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it”

As with the more famous test propounded by Blackburn J the purpose of a test based on promisor objectivity and focusing on how a reasonable person standing in the shoes of the promisor would consider the promisee would receive the promise is to protect the counterparty’s ability to act on the apparent meaning of promise with confidence. But an approach focused on the promisor’s reasonable understanding of how the promisee would receive the promise has two distinct advantages over its more famous rival—the first is that it is not grounded in estoppel, so there is no need to complicate matters by finding any injurious reliance. Both parties concerns are necessarily addressed by the test and the promise takes effect as a rule of interpretation, with the promise having the meaning which ordinary language gives to the words of the promisor. The second advantage is that the focus on the promisor’s understanding of the promise is more consistent with the central idea underlying contract that liability arises because a promise has been made and because the promisor intends to undertake liability in

69 (1870–71)L.R. 6 Q.B. 597,610
70 De Moor, loc.cit.,644:"we can accept the objective principle for what it is, that is the general and obvious principle for the interpretation of contracts: in other words, the courts interpret contracts objectively, simply because this is the ordinary way in which we interpret what people say"
respect of that promise. The focus is on the promise and on the language of the promise rather than on reliance by the counterparty.

It may be observed that in the instant case the reasoning of their Honours was entirely focused on the offeror and the meaning of the promise made by the offeror. As McLauchlan and Bigwood point out the adoption of an approach to the objective theory from the perspective of the promisor is an unusual approach: but is it necessarily wrong?

It is not if one adopts the viewpoint that the objective sense of the promise can be viewed from the perspective of the promisor—i.e. a reasonable promisor considering what the promise would mean to the promisee in the circumstances in question. And viewing the matter in this way it could be said that the grant of leave in *Dysart Timbers Ltd v. Nielsen* would not of itself alter the apparent willingness of a reasonable offeror to be bound by the promises contained in his offer. The context of the leave application was known to the offeror. Judgement had been obtained against the offeror and the dispute remained unresolved. The offer was open for acceptance until Monday unless earlier withdrawn. It was possible for the offeror to specify that the offer remained open for acceptance only whilst the leave application remained undetermined but it did not do so. A reasonable person standing in the shoes of the promisor and considering how such conduct might be viewed from the perspective of the promisee might well consider that the offer was intended to remain open for acceptance in those circumstances. This is in substance the reasoning of Elias CJ and Blanchard J in the decision under review.

All of which may lead one to conclude that rather than being characterised as a product of difficult, confused and inconsistent thinking, the decision under review may be of real importance as signalling that promisee objectivity as it is generally explained is not a universal solvent to problems of formation because of its dependence on estoppel and detrimental reliance, and that there may be other more rewarding ways of approaching those problems—including in particular that of viewing the objective principle as a rule of interpretation uncoupled from estoppel, which focuses on the promise and the meaning which it would convey to the counterparty in the given circumstances.
It is generally accepted nowadays that interpretation is the ascertainment of the meaning which a document would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties in the circumstances.71 But it remains controversial as to how the meaning is to be arrived at, and what extrinsic evidence in aid of the interpretation of the written document is admissible and if it is admissible how it may ultimately be allowed to influence the question of interpretation. 72

The Supreme Court has considered the admissibility of extrinsic evidence on a number of occasions in the recent past and most notably in Vector Gas Ltd v. Bay of Plenty Energy Ltd3 in which the extent to which preliminary negotiations might be admissible to aid interpretation was considered.

It is evident from a reading of the opinions in this case that there is no consensus on the court as to why extrinsic evidence ought to be admissible in aid of interpretation, or indeed as to what the general approach to interpretation of contracts should be74. It is with this latter point that we should begin because the differences in the opinions expressed in the case cannot be fully appreciated without an understanding of the different approaches which are available on the question of interpretation.

The common law’s traditional approach to questions of interpretation of a written document is to give effect to the expressed intention75. When parties reduce their

71 Firm Pl 1 Ltd v. Zurich Australasian Insurance Ltd [2014] NZSC 147 at [60]; Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896,912
agreement into written form their intention is to express their agreement in writing and to shut out appeals to what has previously passed between them.76

The general idea behind the common law’s traditional approach is graphically captured by Heydon J in a presentation to the Society of Estates and Trusts Practitioners in South Australia where he said:77

“there is relevance in some words of Charles Fried. He expressed scorn for the notion that in interpreting poetry... we should seek to discern authorial intent as a mental fact of some sort.

He said:

“we would not consider an account of Shakespeare’s mental state at the time he wrote a sonnet to be a more complete or better account of the sonnet itself. On that false notion the text of a sonnet... would be a kind of second-best; we would prefer to take the top off the heads of authors... like soft boiled eggs to look inside for the truest account of the brain states at the moment that the texts were created”.

He continued:

“the argument placing paramount importance upon an author’s mental state ignores the fact that authors writing a sonnet or a constitution seek to take their intention and embody it in specific words. I insist that words and text are chosen to embody intentions and thus replace enquiries into subjective mental states. In short, the text is the intention of the authors.”

The court must therefore in interpreting the agreement look to the formal written agreement, because that is to carry out the will of the parties79. As a consequence,
once a writing is validly executed a court looks to the writing to discern the parties intention. It is the expressed intention derived from the meaning of the words which becomes relevant, and not what the parties subjectively meant the words to mean. Where words have a clear objectively ascertainable meaning then that is the meaning which a court of law will hold the parties to have intended. Thus, Lord Hope, once said:

“The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used, according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract.”

By reducing their agreement into writing and by intending that the writing express their intention, the parties have chosen to be bound by the meaning to be attached to the words which they have used. The parties are free to give the words used in the writing an extended meaning by defining any term in the interpretation clause. But if they have not done so, their intention is to be bound by the plain meaning of the words used. Where the surrounding circumstances demonstrate that the parties do not intend their agreement to be completely integrated into the writing, as for example, where the writing is entered into against a background of trade usage or

80 Stewart v. Kennedy (No. 1) (1890) 15 App.Cas. 75, 103; Mclean v. Kennard (1874) L.R. 9 Ch. 336, 345, 346, 347, 348; Byres v. Kendle [2011] HCA 26; (2011) 243 CLR 253 at [95-100] per Heydon J; Woodhouse AC; Israel Cocoa Ltd v. Nigerian Produce[1972] AC 741, 768 per Lord Cross:” the true construction of the words spoken is that which would be placed upon them by the court if called upon to decide their meaning”
81 L.Schuler AG v. Wickman Machine Tool Sales Ltd [1974] AC 235, 263 per Lord Simon: there is one general principle.. which has been frequently stated…” The question to be answered always is,’ what is the meaning of what the parties have said?’ Not’what did the parties mean to say?... it being a presumption.. that the parties intended to say that which they have said.’And see Rickman v. Carstairs (1833) 5 B. & Ad. 662–663 per Denman C.J.: unfortunately, however, they have used words which will not, we think, effectuate that intention. The question in this and other cases of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used.”
custom it will be appropriate to allow extrinsic evidence of the custom and if necessary depart from the plain meaning. A reference to trade usage and custom is not strictly speaking an exception to the plain meaning rule, but simply an illustration of a situation in which the surrounding circumstances demonstrate that the intention of the parties was not that the writing be the exclusive record of the agreement. Where the surrounding circumstances demonstrate that the parties intend that their writing contain the exclusive record of their agreement, the parties intend to be bound by the words used in accordance with the meaning that an intelligent reader would give to their words without regarding their negotiations and without regard to what either of them subjectively intended the words to mean.  

The actual language used by the parties is thus intended to impose constraints on a court and the court cannot properly go beyond the available meaning of the words because that would be for the court to make a contract for the parties rather than to enforce the contract which they have made. The writing must be construed with reference to its object and read as a whole and the words of each clause should be interpreted so as to bring them into harmony with the other provisions of the writing if that interpretation does no violence to the meaning of which they are naturally susceptible.

It may perhaps be objected that this way of looking at things ignores the equitable doctrine of rectification and only conveys half the picture, for if a court can admit extrinsic evidence and investigate the actual meaning which parties intended to attach to their writing, in considering an application for rectification, then why should it not also be able to do so in the case of the interpretation of a provision in a contract? The answer to this objection is that it is important to understand Equity’s technique and its objectives.

A Court of Equity when it exercises its discretionary power to reform writings exercises an in personam jurisdiction which is focused on the defendant’s

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83 Farnsworth, on Contracts, (Little Brown 1990), para. 7.2: “it is this purpose that the parole evidence rule ought to serve—giving legal effect to whatever intention the parties may have had to make their writing a complete expression of the agreement that they have reached, to the exclusion of all prior negotiations.”


86 Yoshimoto v. Canterbury Golf International Ltd[2001] 1 NZLR 523,545 per Thomas J
conscience. Equity allows extrinsic evidence to be adduced because it is engaged in examining the subjective intention of the defendant. In doing so Equity is careful not to undermine the policy of the common law on the integration of writings.\textsuperscript{87} A long line of Chancellors have insisted that this jurisdiction must be exercised cautiously. For that reason Equity requires that there must be strong irrefragable evidence of the existence of an actual intention contrary to the intention expressed in the writing. The policy of the common law is not undermined because the court intervenes and the writing is departed from only where there is clear and convincing evidence of an actual intention contrary to the intention expressed in the writing.\textsuperscript{88}

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\textsuperscript{87} Shelburne v. Inchiquin (1784) 1 Bro.Ch.Cas.338; Marquess of Townshend v. Stangroom (1801) 6 Ves. 328; Attorney–General v. Sitwell (1835) 1 Y & C.Ex. 559; Fowler v. Fowler (1859) 4 De G & J 250; Ball v. Storie (1823) 1 S.& S. 210.

\textsuperscript{88} In Shelburne v. Inchiquin (1784) 1 Bro.Ch.Cas.338,350, Lord Thurlow said that a court of equity could rectify a conveyance or settlement where the written words were contrary to the intent of the parties, but he said that he would require strong irrefragable evidence. He added that the difficulty of proving that there has been a mistake in a deed is so great that there is no instance of its prevailing against a party insisting that there was no mistake. In Townshend v. Stangroom (1801) 6 Ves.328,339 Lord Eldon accepted that to be the rule of the court and added that it must never be forgot to what extent the defendant admits or denies the intention. In Fowler v. Fowler (1859) 4 De G & J 250,264, Lord Chelmsford confirmed the principle and said that the denial that the writing is contrary to intention ought to have considerable weight. In Attorney–General v. Sitwell (1835) 1 Y.& C. Ex.559,582 respect for the integrity of written agreements precluded the rectification of an agreement on the basis of extrinsic evidence unless there was an admission of mistake by the defendant. It followed that where the defendant denies having held an intention, contrary to that contained in the writing, it can only be in the rarest case as for example where dishonesty is involved that it should be considered against conscience for him to seek to enforce the writing. It is somewhat surprising that none of this jurisprudence is cited in the recent English cases on rectification, and this perhaps explains why the English courts are finding the subject so impenetrable: see Daventry District Council v. Daventry & District Housing Ltd [2012] 1 WLR 1333(CA) where a written agreement which unambiguously provided that the plaintiff council make a payment to the trustee of a trust fund to remedy an anticipated pension fund trust deficit was ordered to be rectified to conform with an earlier ambiguous proposal notwithstanding that the writing was perfectly explicit and had been vetted by the plaintiff’s solicitors, and that the defendant claimed it always intended to contract in terms of the writing and was not mistaken. The trial judge considered that the defendant’s agent, Roebuck, did not know that the plaintiff was mistaken at the time the writing was executed, although he found that Roebuck had not behaved honourably in the negotiations as he realised that the proposal was ambiguous and did not alert the plaintiff to the ambiguity. The net result is topsy–turvy: the writing is departed from, and rectified to
As Story explains the court intervenes in such cases to ensure that the writing is not used as an instrument of fraud:

“A court of equity would be of little value, if it could suppress only positive frauds, and leave mutual mistakes innocently made, to work intolerable mischiefs, contrary to the intentions of the parties. It would be to allow an act, originating in innocence, to operate ultimately as a fraud by enabling the party who receives the benefit to resist the claims of justice under the shelter of a rule formed to promote it…If the mistake should be admitted by the other side, the court would certainly not overturn any rule…by varying the deed: but it would be an equity dehors the instrument. And if it should be proved by other evidence entirely satisfactory, and equivalent to an admission, the reasons for relief would seem to be equally cogent and conclusive.”

This is the traditional approach to interpretation, and as can be seen it seeks to give effect to the intention of the parties that their writing should be the exclusive repository of their agreement whilst leaving a safety valve in equity.

A learned writer asked long ago what is it that gives rise to all questions of interpretation? Is it not that the meaning of the words fails to give effect to the meaning of the writer? The meaning of the words can be ascertained: they prove not to be appropriate to the surrounding facts and circumstances. One must then look further than the words for the meaning. The object of interpretation is to supplement the language of the writing and to bring the expressed meaning into harmony with the probable intention. Interpretation is a process of reasoning from probabilities, and of remedying the imperfections of language. According to this approach the task of the court when interpreting a written contract is so far as possible to give effect to the intended meaning of the parties. To understand the intended meaning requires the court to be fully apprised of the surrounding circumstances so that it can read the document in the context in which it was made.

Now it may appear that the difference between an approach based on the expressed meaning of a document and one in which the object of the interpretation exercise is

accord with one version of an ambiguous proposal proved by extrinsic evidence to which the defendant had never assented.


90 Phipson, “Extrinsic evidence in aid of interpretation” (1904) 19 LQR 245, 248–254 citing the earlier work of FV Hawkins.
to give effect to the intended meaning is very slight. But in fact the chasm between the two approaches is in legal terms as great as that which separates the two sides of the Grand Canyon. If you once accept the premise that the law’s object in interpreting a contract is to discern the expressed intention and to give effect to that intention, then you will decide that preliminary negotiations should be excluded because admitting the preliminary negotiations runs counter to the purpose of reducing an agreement into writing and allowing the writing to express the contractual intention. If the writing expresses the contractual intention, everything which happens beforehand is intended to be superseded by the writing and can be of no relevance. Equally clearly, it would be improper to rely on subsequent conduct because what a party subjectively believes the writing to mean cannot have any bearing on the intention expressed in the writing. When two persons reduce their agreement into writing, it is what they have said in the writing, which expresses the intention and that meaning is fixed on the day of entry of the written agreement. It is the meaning of the words which is important because the text is the intention.

On the other hand, if you are seeking to give effect to the intended meaning of the parties, what is there likely to be of more relevance than the preliminary negotiations? These will very likely show what the parties were seeking to achieve and what they did agree to immediately prior to reducing their agreement into writing. Why would one exclude evidence which is so logically probative? Equally clearly, subsequent conduct might also show how the parties intended their agreement to operate, and could be very relevant in ascertaining the intended

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91 Inglis v. Buttery (1878) 3 App Cas 552, 577; Prenn v. Simmonds [1971] 1 WLR 1381, 1384–1385
92 James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 572, 603
93 Cherry Tree Investments Ltd v. Landmain Ltd [2013] Ch 305 at [99]
95 Yoshimoto v. Canterbury Golf International Ltd [2001] 1 NZLR 523 at [69] (drafts of contracts provided evidence of the planning consents the parties had in mind and enabled the court to arrive at a meaning of the contract which accorded with the ascertainable intention of the parties); Vector Gas Ltd v. Bay of Plenty Energy Ltd [2010] NZSC 5; [2010] 2 NZLR 444 at [31] per Tipping J:” the key point is that extrinsic evidence is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both..parties intended their words to bear”. 
meaning. If one were to adopt an approach which sought the intended meaning, one might conclude that the meaning which a document would convey to a reasonable person is not the same thing as the meaning of the words. And one might even be tempted to conclude that the court should depart from the principle that the meaning to be given to a term must be an available meaning if it were evident that something must have gone wrong with the language for the law should not attribute to the parties an intention which they could not have had.

Each of these approaches is logically defensible if one accepts the object which it is trying to achieve. Phipson once likened the two approaches to the controversy that divided the Proculian and Sabinian schools in ancient Rome—the fundamental antithesis between intention and expression and between spirit and letter.

Viewed as a theoretical matter there are advantages in adopting an approach based on discovering the intended meaning for it permits a court to avoid giving an agreement a meaning which is contrary to the parties’ actual intention. But it is important to understand the practical drawbacks of adopting such an approach. Practically one makes the interpretation of the contract dependent on an understanding of the whole of the background, and no advice can be given without having seen all of the preliminary correspondence and having considered all of the relevant subsequent conduct. As one commercial practitioner has pointed out, it

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98 Chartbrook Ltd v Persimmon Homes Ltd[2009] UKHL 38;[2009] AC 1101 at [25]per Lord Hoffman: “what is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.”
99 Phipson, loc.cit.,248:see generally
100 Yoshimoto v. Canterbury Golf International Ltd [2001] 1 NZLR 523,542 (NZCA): “surely the parties are reasonably entitled to expect that the courts will… not arrive at a meaning of their contract, which is at variance with their actual intention”.
101 Shore v. Wilson (1842) 9 Cl. & Fin. 355,566 per Tindal CJ: “if it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled…if parole evidence of the
is difficult to imagine any principle of contract law, which is less conducive to keeping the cost of giving commercial advice within manageable proportions.\textsuperscript{102} We also come close to defeating the intention of the parties by allowing a resort to extrinsic evidence to reveal the apparently intended meaning, especially in the case of certain classes of contract--such as those in which the contract document is also registered as a public document\textsuperscript{103}, or a security trust deed\textsuperscript{104} or in cases in which the contract contains an entire agreement clause\textsuperscript{105}.

Shortly after \textit{Investors Compensation Scheme Ltd v. West Bromwich Building Society}\textsuperscript{106} was decided, Professor Mclauchlan perceptively observed that the mindset of a court applying the traditional approach to interpretation of a contract was poles apart\textsuperscript{107} from the approach discernible in propositions four and five in Investors Compensation in which Lord Hoffmann had said\textsuperscript{108}:

"(4) The meaning which a document(or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is particular meaning which the party affixed to his words... might be set up to contradict or vary the plain language of the instrument..."

\textsuperscript{102} Berg, "Thrashing through the Undergrowth" (2006) 122 LQR 354
\textsuperscript{103} Cherry Tree Investments Ltd. v Landmain Ltd. (2012) EWCA Civ 736; (2013) Ch 305 (CA)
\textsuperscript{104} Thompson v. Goblin Hotels Ltd (2011) UKPC 8; (2011) 1 BCLC 587 (JCPC); re Sigma Finance Corporation (2009) UKSC 2; (2010) 1 All E.R. 571 (SC) at [36–37] per Lord Collins: "Sigma Finance Corp financed its investments over a 13 year period by debt securities issued or guaranteed by it... The security trust deed secures a variety of creditors, who hold different instruments, issued at different times, and in different circumstances. Consequently, this is not the type of case where the background or matrix of fact is, or ought to be relevant, except in the most generalised way. I do not consider, therefore, that there is much assistance to be derived from the principles of interpretation re-stated by Lord Hoffmann in the familiar passage in Investors Compensation Scheme Ltd... Where a security document secures a number of creditors who have advanced funds over a long period it would be quite wrong to take account of circumstances which are not known to all of them. In this type of case it is the wording of the instrument which is paramount..."
\textsuperscript{105} Inntrepreneur Pub Company v. East Crown Ltd (2000) 2 Lloyd’s Rep. 611 at [7]. And see Firm PI 1 Ltd. v. Zurich Australian Insurance Ltd. (2014) NZSC 147 at [62]. "the fact that parties are aware their contract might be relied upon by a third party may justify a more restrictive approach to the use of background in some instances, the parties awareness being itself part of the background"
\textsuperscript{106} [1998] 1 WLR 896
\textsuperscript{107} DWMcLauchlan, "The new law of contract interpretation", (2000) 19 NZULR 147, 152
\textsuperscript{108} [1998] 1 WLR 896, 912–913
what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax...

(5) The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had…”

As is evident from the text the approach is intended to remain an objective approach and requires the reader to determine the meaning which the agreement would convey to a reasonable man having the background knowledge. It does not permit the court to determine the sense in which the parties actually intended to use their words\(^{109}\). But Lord Hoffmann’s reformulation in ICS enables modern courts to reject the traditional approach based on the expressed meaning of the words, and allows instead that a court ascertain and give effect (by reference to extrinsic evidence) to the apparently intended meaning of the words provided that that apparently intended meaning can be ascertained in an objective manner. What Lord Hoffmann appears to be attempting in ICS is to blend the two contrasting approaches to interpretation. The task is not to interpret the meaning of the words alone. Nor is it to give effect to the actually intended meaning for what the writer subjectively intended to say must be ignored as being inconsistent with the objective principle. The task is rather to discover the apparently intended meaning of the words.

It is this heroic attempt to straddle the Grand Canyon which makes the whole area so difficult and which is the source of many of the difficulties in subsequent cases.

\(^{109}\) JD Heydon, Implications of Chartbrook Ltd. v. Persimmon Homes for the law of Trusts—a paper given to the Law Society of South Australia and the Society of Trust and Estate Practitioners at p.3–7. Heydon argues that the ICS principles rest on a datum (contractual construction depends on finding the meaning of the language) and go on to state a compromise which does not search for the actual meanings which the parties may have intended but seeks after intended meaning and is consistent with an objective approach to the interpretation of contracts.
The difficulties go beyond the ambit of determining technical issues such as what is meant by the term surrounding circumstances. Judges who consider that they are giving effect to the expressed meaning inevitably struggle with the legitimacy of straying beyond the available meaning of the words. By contrast, those who wish to give effect to the intended meaning cannot understand why the shackles imposed by the traditional approach should still bind. Why not admit subsequent conduct and preliminary negotiations if they go to show the intended meaning? If it is clear that apples has been agreed to mean pears why not permit effect to be given to the parties agreement in exactly the same way in which it would have been had apples been defined in the interpretation clause in the written agreement as including pears?

If one considers that it is appropriate to try to blend expressed intention and intended meaning as Lord Hoffmann appears to have attempted to do, one should appreciate that the effect of the reformulation is to place far more emphasis on the intended meaning than has hitherto been considered legitimate, and that as a logical consequence the exclusionary rules barring resort to extrinsic evidence in aid of interpretation no longer appear to be so self-evident. What takes their place is an emphasis, rather, on the objective nature of the evidence which is to be relied on. A court seeking to give effect to the ICS principles will be tempted to say that all extrinsic evidence going to show intended meaning is relevant, but the extrinsic evidence of intended meaning must be objective evidence directed to the contract. Mere subjective evidence of negotiations will still be looked at somewhat sceptically.

It is therefore of the first importance to an appellate court considering what its future position on the admissibility of extrinsic evidence in aid of interpretation of a writing should be, to be clear about its premises and what it considers the object of

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110 Potter v. Potter [2003] 3 NZLR 145 at [32–36];Heydon, loc.cit., at p.21 critically assesses what is meant by the term surrounding circumstances including in particular the extent to which the background information must be known to both parties or must only be capable of being known.
111 Potter v. Potter [2003] 3 NZLR 145
112 Yoshimoto v. Canterbury Golf International Ltd [2001] 1 NZLR 523;and compare [2004] 1 NZLR 1 in which the Privy Council rejected the Court of Appeal's analysis based on intended meaning.
113 DWMcLauchlan, Commonsense Principles of Interpretation and Rectification,(2010) 126 LQR 8,11
interpretation to be—is it to discover the expressed meaning of the promisor because this reflects the intention of the parties? Or is it about giving effect to the intended meaning of the parties because linguistic misunderstandings are bound to happen? Or is it rather about a reconciliation of the two—the pursuit of the objectively apparent intended meaning of the words as Lord Hoffmann’s compromise would suggest? It is only when a court has a clear position on what it is seeking to achieve that there will be clarity as to why extrinsic evidence such as preliminary negotiations or subsequent conduct should be admitted or excluded or clarity on the question of the extent to which surrounding circumstances may otherwise properly influence the interpretation exercise.

Against this background, it is instructive to analyse the opinions delivered in the Supreme Court in Vector Gas Ltd v. Bay of Plenty Energy Ltd. The case concerned the interpretation of an informal written agreement for the interim supply of gas between NGC (subsequently Vector), and Bay of Plenty Energy Ltd (BoPE) which was contained in an exchange of letters. The agreement was to apply pending determination by the High Court of a dispute, whether NGC had lawfully terminated its existing gas supply agreement with BoPE. The relevant provision which required interpretation was as follows:

“2. .... For the avoidance of doubt, the terms of the proposal are set out in full below. Please can you confirm BoPE’s agreement to the terms of the proposal by return.

3. Without prejudice to its position, NGC will continue to supply gas based on the terms of the Agreement for Supply of Gas dated 10 October 1995 (the “Agreement”) pending determination of BoPE’s proceeding, or 30 June 2006, whichever is the earlier, provided that BoPE undertakes to:

3.1 file that proceeding on or before 31 October 2004; and
3.2 in the event that BoPE is unsuccessful in, or withdraws, that proceeding, pay NGC on demand, for each GJ supplied, the difference between the price set out in the Agreement (as escalated) and $6.50 per GJ, plus interest at the Interest Rate set out in the Agreement...”

114 [2010] NZSC 5; [2010] 2 NZLR 444
It followed that under the agreement, the seller NGC was bound to continue to supply gas to the purchaser BoPE pending determination of the lawfulness of the termination of the earlier agreement. If NGC's termination were found to have been lawful, which in the event it ultimately was, BoPE was obliged to pay NGC $6.50 per GJ for gas supplied. The agreement was expressed to be based on the terms of the 1995 Agreement which provided that the point of supply of the gas was at the purchaser’s premises. On that basis, transmission was included in the cost of gas. The plain meaning of the agreement therefore suggested that BoPE was entitled to have the gas at an all in price of $6.50 per GJ. This is what the Court of Appeal had found.\(^\text{115}\)

Earlier correspondence passing between the parties and other extrinsic evidence suggested that the parties' intention was to sell and to purchase gas at or near market price, that the market price for gas alone was in the region of $6.50 per GJ, and that transmission costs should be payable in addition\(^\text{116}\). During the negotiations, there was correspondence passing between the parties suggesting that the parties were negotiating on a common understanding of resolving the price of the gas alone and that they were using the expression $6.50 per GJ as meaning $6.50 exclusive of transmission costs\(^\text{117}\). The question was whether this extrinsic evidence could be adduced in aid of the interpretation of the writing.

There were four relevant opinions which were given on the general principles applicable to the interpretation of written contracts, as one member of the court considered that the case could be determined without any detailed reexamination of the principles applicable to the interpretation of writings. Gault J considered that the relevant agreement was a contract by correspondence and not a contract in writing and that it was therefore permissible to consider the correspondence as a whole\(^\text{118}\).

Blanchard J. considered that the meaning of the words based on the terms of the agreement were ambiguous. The surrounding circumstances demonstrated that it could not have been intended by the parties that BoPE obtain the gas at an all in price of $6.50 per GJ and pay nothing for transmission costs. That meaning was

\(^{115}\) [2008] NZCA 338
\(^{116}\) [2010] 2 NZLR 444 at [41] and [111]
\(^{117}\) [2010] 2 NZLR 444 at [41–42]
\(^{118}\) [2010] 2 NZLR 444 at [151]
commercially absurd. Although his Honour considered that the words in the agreement were ambiguous, he thought it was not essential to find an ambiguity before proceeding to look at the background to assist in the interpretation of the language which had been used\textsuperscript{119}. His Honour noted that the background demonstrated that the parties were negotiating the agreement against a backdrop of injunction proceedings in which a condition of relief would almost certainly have been an undertaking by BoPE to pay market price for the gas plus transmission costs. There was evidence that the market price for the gas alone was in the region of $6.68 per GJ , with transmission costs being calculated by reference to the location and being payable in addition\textsuperscript{120}.

His Honour was of the opinion against this background that the phrase $6.50 per GJ was not intended to cover anything other than the price of the gas itself so that the transmission costs were additional costs. His Honour added that in accordance with the ICS principles, the law does not require the court to attribute to parties an intention which they plainly could not have had.

His Honour then sought to buttress this reasoning by referring to the extrinsic evidence of the preliminary negotiations in the correspondence passing between the parties. His Honour noted that the traditional view has been that it is impermissible to have regard to negotiations when interpreting a written agreement but he considered that this rule was not absolute. He thought that extrinsic evidence of the negotiations could be relied upon to establish the knowledge of the background circumstances with reference to which the parties used the words in the written agreement\textsuperscript{121}. His Honour considered that evidence of the negotiations demonstrated that the parties had been negotiating on the basis of an all in gas price, and had agreed that transportation and metering were to be additional costs which were for subsequent determination. In his Honour’s view this evidence was admissible to determine that the subject matter of the agreement was an agreement dealing solely with the supply of gas\textsuperscript{122}.

\textsuperscript{119} Ansley v. Prospectus Nominees Unlimited [2004] 2 NZLR 590 (CA) at [36]
\textsuperscript{120} [2010] 2 NZLR 444 at [111]
\textsuperscript{121} Ibid, at [13]
\textsuperscript{122} As in Macdonald v Longbottom (1859) 1 E & E 977; Bank of New Zealand v Simpson [1900] AC 182,187
The opinion provides a useful illustration of the benefits of adopting Lord Hoffmann’s compromise approach in the interpretation of contracts. Context is admissible to inform the reader. The meaning of the words is examined and is found to be ambiguous. In context, one meaning gives rise to absurd results and it should be discarded because the court should not attribute to the parties an intention which it knows that they could not have had. In its place an available alternative meaning is preferred. On an objective view that alternative meaning is most likely to have been the intended meaning of the words. As Phipson might have observed interpretation is a process of reasoning from probabilities to remedying the imperfections of language. Nevertheless, this opinion can hardly be described as evidencing a revolutionary approach to interpretation, because it gives effect to one of two available meanings and resorts to context to resolve the ambiguity.

Tipping J begins his opinion by observing that the ultimate objective in contract interpretation is to establish the meaning that the parties intended their words to bear. Having so clearly stated that the object of the exercise is to seek after the intended meaning, his Honour immediately retreats from that position by saying that the language used by the parties appropriately interpreted is the only source of intended meaning. This is what a reasonable and properly informed third-party would consider the parties intended their words to mean. To be properly informed, a court must be aware of the commercial or other context in which the contract was made and the facts and circumstances known to and likely to be operating on the parties minds. He then observes that it is the meaning of the document, which is the principal focus and that subject to the private dictionary exception it is fundamental that words can never be construed as having a meaning they cannot bear. But it is open to a party to show that despite words having a meaning that linguistically they cannot bear, the parties intended their words to have a special meaning for the purposes of their contract. If parties wish they may contract on the basis that black means white. His Honour considers that if there is relevant

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123 Phipson, “extrinsic evidence in aid of interpretation”, (1904) 19 LQR 245,248 citing FV Hawkins
124 Ibid at [19]
125 Ibid at [19]
126 Ibid, at [23]
127 Ibid, at [26]
evidence of the intended meaning it should be admissible.\textsuperscript{128} Extrinsic evidence of preliminary negotiations,\textsuperscript{129} subsequent conduct,\textsuperscript{130} and special meanings attributed to written terms\textsuperscript{131} are all admissible because the key point is that extrinsic evidence is admissible if it tends to establish a fact or circumstance capable of demonstrating what meaning both or all parties intended their words to bear.\textsuperscript{132} And if the parties have reached agreement on the meaning an otherwise ambiguous word or phrase should have for their purposes, that definitional agreement is itself an objectively determinable fact.\textsuperscript{133}

Having regard to the foregoing, his Honour resolves the matter by stating that the phrase $6.50 per GJ is ambiguous. The preliminary correspondence demonstrates that the parties were negotiating against the background of injunction proceedings and as a substitute for interim injunction undertakings. Those negotiations were conducted under a common understanding that the point to be resolved was the price of gas as a gas only component. Correspondence dated 28 September leading up to the agreement showed that the transmission and metering arrangements had been put to one side and were to be discussed separately.\textsuperscript{134} Against this background, his Honour considered that the phrase $6.50 per GJ was intended to mean a gas only price with transmission costs to be extra.

It is evident that this opinion although containing traces of reasoning based on expressed meaning, is in fact deeply indebted to the idea that the object of interpretation is to give effect to the intended meaning. In the important areas of the admissibility of extrinsic evidence of preliminary negotiations and on the question of special meanings to be attributed to written terms the reasoning is a compelling working out of an approach seeking to give effect to the intended meaning. His Honour’s opinion vividly illustrates the stresses to which Lord Hoffmann’s compromise approach is exposed. His Honour considers that prior negotiations are admissible as a part of the background if they throw light upon

\textsuperscript{128} Ibid, at [31]
\textsuperscript{129} Ibid, at [29]
\textsuperscript{130} Ibid at [30]
\textsuperscript{131} Ibid, at [32] and [37]: there is no logic in ascribing a meaning to the parties if it is objectively apparent they have agreed what the meaning should be
\textsuperscript{132} Ibid, at [31]
\textsuperscript{133} Ibid, at [32]
\textsuperscript{134} Ibid, at [41]
what the parties intended to mean by the language which they used. Lord Hoffmann’s compromise approach does not admit that a court can go so far for Lord Hoffmann has sought to maintain the basic edifice of the traditional approach and has said that evidence is inadmissible “of what is said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant”\textsuperscript{135}.

The conflict between his Honour’s views and Lord Hoffmann’s on the question of the admissibility of preliminary negotiations is mirrored in the third opinion given in this case. Mcgrath J’s opinion is an elegant defence of the traditional approach based on expressed meaning. He considers that the ordinary meaning of the text of a commercial agreement is the result of an abstract analysis of the language\textsuperscript{136}. Whilst it is true that the common law has moved to make greater use of extrinsic evidence which indicates the purpose of the parties, the language that the parties use is generally given its natural and ordinary meaning and intention plays no real part in contractual interpretation\textsuperscript{137}. The emphasis after ICS is on the meaning conveyed to the reasonable person with the relevant background. In His Honour’s opinion a general rule excluding extrinsic evidence of pre-contractual negotiations was justified in that such evidence is no more than evidence of statements of intentions of the terms parties sought to achieve. They shed no light on the meaning of the terms later agreed upon. The admission of preliminary negotiations would bring the intention of the parties into prominence, and this was inconsistent with the traditional approach to interpretation\textsuperscript{138}.

His Honour resolved the dispute in favour of NGC on the ground that although the plain meaning of the agreement was that BoPE was entitled to have the gas it purchased transmitted to its facility for the agreed price of $6.50 per GJ, an estoppel by convention applied to estop BoPE from contending that the price payable under the written agreement was other than a gas only price. The

\textsuperscript{135} Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38; [2009] 1 AC 1101 at [42]
\textsuperscript{136} Ibid, at [57]
\textsuperscript{137} Ibid at [61] and at [76]. His Honour rejects the idea that evidence of the preliminary negotiations should be admissible whenever that will provide a reliable guide to intended meaning because that would have significant detrimental consequences for efficiency and economy in contractual interpretation in particular where third parties have acquired contractual interests.
\textsuperscript{138} Ibid, at [76]
correspondence showed that there was a common understanding that $6.50 per GJ was a gas only price, and that it was therefore unconscionable for BoPE to depart from the common understanding and insist on the enforcement of the writing to avoid paying the transmission costs.

As is evident, this opinion is an attempt to maintain the essence of the traditional approach whilst accepting that there has been a movement away from literalism. It recognises that estoppel is a principled safety valve to the orthodox approach to interpretation and like rectification is focused on the conscience of the defendant in equity. Equity allows parole evidence to be adduced because it is engaged in examining the subjective intention of the defendant.

Wilson J gives the final opinion. He considers that the general principle is that the words of an enforceable commercial contract should be given their ordinary meaning in the context of the contract in which they appear because the parties are presumed to have intended the words to be given that meaning. But where the words of the contract are ambiguous, or where they make no commercial sense, the court may have regard to any extrinsic material which assists in assessing the intention of the contracting parties in using the words which they did. The court’s task is to ascertain the intended meaning, and on this basis prior negotiations may be relevant, because they illuminate what the parties were intending to achieve by their contract. Their conduct subsequent to the entry into the contract may also be a helpful guide to what was intended in their contract.

This opinion perhaps best illustrates the difficulties that Lord Hoffmann’s compromise has created for busy practitioners. Here we have an experienced commercial lawyer espousing a perfectly orthodox position on plain meaning at one moment and then at the next moment, declaring an adherence to a liberal approach...

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139 Ibid, at [77]
140 Ibid, at [73]
141 Ibid, at [119]
142 Ibid, at [122]–the court may then have regard to any extrinsic material which assists in assessing objectively the intention of the contracting parties in using the words they did. Only claims of undeclared intent (what the parties were thinking in contrast to what they were saying) are excluded because unlike communications they do not assist in ascertaining objective intent.
143 Ibid, at [122]–the time has come to remove the barrier imposed by Prenn v. Simmonds
144 Ibid, at [122]
to interpretation seeking after the intended meaning which would allow in preliminary negotiations because they illuminate the intended meaning. It has been observed perhaps somewhat unkindly that his Honour’s judgement is a novel version of the law since it is an amalgam of the two conflicting approaches of expressed meaning and intended meaning\textsuperscript{145}.

We have therefore three very different explanations advanced in the Vector case as to what the object of contract interpretation is, and these in turn lead to different points of view as to the admissibility of extrinsic evidence. Ultimately, it can be seen that the result on the admissibility of extrinsic evidence must be shaped by the approach that the court takes to the object of contract interpretation. One must in this difficult area begin by considering what one is trying to do.

In large part the difficulties in this area stem from propositions four and five in the ICS litigation and the failure to articulate that these principles are an attempt to blend the two contrasting approaches to interpretation by seeking after the intended meaning of the words. The resort to context compels a court to depart from the text if the court is driven to conclude that the intended meaning cannot have been what the text says. This must in the long run destroy the foundation of the plain meaning rule which seeks to give effect to the text. The suggestion that there is no limit to the amount of red ink or verbal rearrangement which a court is allowed does violence to the concept that the parties written agreement is the expression of their intention for it permits a court to stray from the available meaning and to give effect to what it considers the parties must have intended. The Court is not then enforcing the agreement that the parties have made but one which it thinks the parties would probably have made but for their failure to draft with precision. By permitting a resort to the context and to preliminary negotiations, the court is also defeating the intention of the parties which was to have the writing exclusively express their agreement.

There cannot logically be a satisfactory compromise solution to these issues for in truth, the actual choice is between a textual and literal approach giving effect to the expressed meaning, and a contextual approach seeking after the intended meaning. Of course context can be helpful for the purpose of identifying what the words mean, but only within the boundaries of and to the extent of the available meaning.

\textsuperscript{145} DWMcLauchlan, loc.cit.,(2010)16 NZBLQ 229,257–258
The halfway house approach evident in ICS which enables a court to go beyond available meaning is a compromise which loses the clarity of the traditional approach whilst apparently still carrying most of the pre-existing restrictions. It is an unsatisfactory compromise and we can surely do better than this.

The significant point for present purposes is that in Vector their Honours were clearly divided on the main issue, and that the real argument is yet to be had.

Francis Dawson.