Intention in Tension?
Evaluating Evidence of Intention in Contract Construction

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Contents

Introduction

The road to contractual disputes is paved with good intentions. Parties to a contract can have the clearest of intentions when they execute their written contract and still end up in court, disputing the legal meaning of the contract they created. Trying to enforce their intentions can inflame a number of tensions between interpretation and rectification, subjectivity and objectivity, and principles and policy.

Chapter I establishes how the intentions of the contractual parties enter the contract construction process through the doctrines of interpretation and rectification. I explain the basic premise for each doctrine before examining how a key overarching debate in contract construction is the relationship between interpretation and rectification: do they serve the same purpose? Then I engage with four recent cases in contract construction that show the extraordinary breadth of interlinking issues in contract construction, how they affect the role of intention, and how heavily cases are framed to address the relationship question between interpretation and rectification.

Chapter II puts the intentions of the parties squarely in focus. I identify the status quo of the judicial approach to evidence of intentions and question the usefulness of principles of objectivity as the master of intentions. Objectivity is fatally flawed as method for controlling which evidence is available for a judge to look at. Instead, I propose that contract construction takes an approach to intentions that recognises how they are presented in every case: as evidence. I explain what an evidentiary approach would look like and explore the rationales for its current underuse.

Chapter III makes the case for an evidentiary approach for analysing evidence of intentions. This approach still leaves plenty of room for traditionally valued elements of contract construction, such as principles of objectivity. Dividing the enquiry into admissibility and weighing, and engaging with concepts of relevance and reliability, puts the intentions of the parties at the forefront of the enquiry. It also creates a far clearer process to follow in a judgment, making the law in contract construction more transparent to those who rely on it.

I. Muddling the Modern Approach? Identifying New Tension with Evidence of Intention in Modern Contract Construction

Having a 'modern approach' to contract construction means there is a somewhat crystalised approach to how the courts determine the meaning and legal effect of a contract. The meaning and legal effect of the contract that the parties commonly intended at the time of executing the contract are important considerations in the contract construction process. But how well does the modern approach actually consider those common intentions?

I propose that the modern approach, and its current overarching debate, focuses on an outcome of coherence between the various processes within contract construction, mainly between interpretation and rectification. This focus does not adequately address how the courts should evaluate the intentions of the parties. I will show this by first establishing the processes of construction that include the actual and apparent common intentions of the parties. By this, I mean the honestly held and observable intentions held commonly between the parties. Then I identify the landscape of the debate within contract construction that asks whether there are a number of different construction processes or if instead they are all trying to achieve the same outcome.

With this foundation laid, I introduce four new and interesting cases in contract construction. These cases all in part contribute to how interpretation and rectification should exist in contract construction, and the various internal rules that come with the enquiries. I will show that when considered together, these cases identify a number of tensions that exist in contract construction, especially with the intentions of the parties. I leave this chapter with a question: is there a better way?

A. The Modern Approach to Contract Construction

Contract construction describes the overarching process of identifying the terms of a contract and their meaning. The modern approach provides the general, principled method for court piecing together the evidence presented to determine what a contract actually says and the

corresponding legal effect. This process is simultaneously informed by 'Principles of Objectivity'.[1]

The modern approach to contract construction breaks up with formalist rules and runs lovingly into the arms of contextualism.[2] The most important contextual elements are the common intention of the parties and accepts the need for commercial sense as a consideration. Because I am focusing on how contract law honours the common intentions of the parties actually and apparently held when the contract was executed, I focus on the two contract construction processes informed by this actual intention of the parties: interpretation and rectification.[3]

1. Interpretation

Interpretation is the process of deriving the meaning and legal effect of contractual terms from words expressly written in a contract, as coloured by their context. For example, a written contract has a term that says "Party A must pay Party B US$40 million dollars when 25,000 tonnes of coal have been shipped".[4] A judge would use interpretation to determine whether 'shipped' means 'transported by any method' or 'transported on a boat'. The choice of definition will determine the overall legal effect of the term.

The quintessential expression encapsulating the modern approach to interpretation comes from Lord Hoffman in *ICS*:[5]

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

Lord Hoffman addresses two fundamental features in this quote: wide background knowledge and principles of objectivity.

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[1] To be analysed further in Chapter II.
[2] There is still no firm consensus within the modern approach, but there is at least enough support and uniformity for there to a definable separation from the 'traditional approach'. For more on the modern approach to contract interpretation, see Matthew Barber "The Contractual Interpretation of Tipping J" (2016) 47 VUWLR 227.
[3] The process of implication is considered to exist within contract construction, but it plays a 'gap-filling' exercise where the parties had not turned their mind to the situation in question. See Andrew Phang "The challenge of principled gap-filling: a study of implied terms in a comparative context" (2014) 4 JBL 263.
[4] A simplification of the facts in *L&M Coal Holdings Ltd v Bathurst Resources Ltd* [2018] NZHC 2127
[5] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 BCLC 493 at 547 [*ICS*]

Because the written contract is a derivative of its context, emphasising the use of a wide background of context ensures the meaning of the contract is consider amongst its full array of influences. This is where the intentions of the parties become relevant to the interpretation enquiry. The parties' intended meaning for the contract becomes a persuasive indication of what the contract actually means. A necessary yet complicating consideration for the use of intentions is whether interpretation is concerned with the *actual* intentions of the parties or just the *apparent* intentions. Currently, this question is mainly addressed through the guidance of objectivity principles.

Lord Hoffman alludes to the two closely related principles of objectivity used in an interpretation enquiry: manifest objectivity and reasonable-person objectivity. Manifest objectivity describes how the contextual features within the background must appear in an observable manner. Following manifest objectivity typically leads to the conclusion that the parties' intentions must be apparent, manifested in words and actions, to be a part of the context. Reasonable-person objectivity describes how the process of examining all of the contractual context is from the perspective of a reasonable third person, unrelated from either party.[6] The principles of objectivity acting in tandem explain "what each party by words and conduct would have led a reasonable person in the position of the other party to believe".[7]

Another important question to consider in the development of the modern approach to interpretation is: just how wide is the background context? There are two common contexts where that question arises. The first is when it comes to the use of commercial common-sense, particularly when used in contrast to 'plain-meaning'.[8] Trailblazing cases like *ICS*,[9] and the enthusiastic adopters like *Vector Gas*,[10] embraced commercial common-sense and indicated no conceptual limitation to when it was appropriate to look at it or not. In contrast, cases like

[6] Within this process, there is some debate whether or not the reasonable person has the ability to step into the shoes of a contractual party to fully assess all possible influencing context.
[7] *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52; (2004) 219 CLR 165; (2004) 211 ALR 342; (2004) 79 ALJR 129; at [40].
[8] For an in-depth exploration of the breadth of what commercial common-sense entails and its use in judicial decisions, see Neil Andrews "Interpretation of Contracts and 'Commercial Common Sense': Do Not Overplay this Useful Criterion" (2017) 76 CLJ 36.
[9] *ICS*, above n 5.
[10] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] NZLR 444.

Arnold v Britton[11] and *Firm PI 1*[12] emphasised "the need for a moderate and cautious use" of commercial common-sense and reaffirmed the value of plain meaning.[13] However, Glazebrook J in *NZALPA* emphasised in her dissent that a linguistic plain meaning cannot be presumptive as this "fails to recognise the more symbiotic nature of the relationship between words and background".[14]

The second common conflict on the background's width is whether prior negotiations can be within the background context. One view to take is that the prior negotiations are no different from other contextual elements and that so long as the usual objective rules around the parties' intentions apply, the negotiations can constitute the background. This was Tipping J's perspective in *Vector Gas* and, until recently, seemed to reflect the approach in New Zealand.[15] By contrast, the United Kingdom has consistently held an exclusionary stance since conceptualism's inception.[16] Lord Hoffman said in *ICS* that prior negotiations were excluded from the background for reasons of policy.[17]

2. Rectification

Rectification is a process for correcting an express contractual term that, because of a mistake, fails to represent the parties' intended meaning and legal effect of their contract. I mainly discuss rectification for common mistakes: where there is proof of a *common* actual intention of the parties and this intention is mistakenly not represented in the written contract. For example, A and B are entering a mortgaging arrangement and both parties anticipate that the loan will have a floating interest rate which they can prove with correspondence. However, by mistake, the words of a mortgage contract state there is a fixed interest rate with no room for adjustments.[18]

There is an additional situation for rectification of unilateral mistakes: where only one contracting party has made a mistake and the non-mistaken party ought to be held to the

[11] *Arnold v Britton* [2015] UKSC 36, [2015] 2 WLR 1593.
[12] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR.
[13] Andrews, above n 8 at 62.
[14] *New Zealand Air Line Pilots' Association Inc v Air New Zealand* Ltd [2017] NZSC 111 at [190] [*NZALPA*].
[15] At [31].
[16] For the sake of clarity, I use *ICS* as the indication of a fully embraced modern approach.
[17] At 547.
[18] A variation of facts from *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 (HC).

mistaken party's intention of the contract. However, I will focus on rectification of common mistakes because the commonality of the mistake and intention creates a directly relevant relationship with interpretation.

Unlike interpretation, where the parties' intentions form part of the context for discussion, the parties' intentions are the focus from the outset of the rectification process. Continuing my previously used example, if A and B cannot prove an actual consensus over the intended interest type, then there is either no enforceable contract or an alternative enquiry of implication would be necessary. Similar to interpretation, the modern approach has questioned what *type* of intention is relevant for the rectification enquiry: an actual common intention or an apparent common intention?

The 'traditional' process for rectification has continued to apply in many modern cases, where the focus is on an *actual* intention that is commonly shared.[19] The process has four parts. First, the parties formed a common intention on a point in question. Secondly, the common intention was *actually* held and continued up to formal execution of the formal instrument seeking rectification. Thirdly, the continuing common actual intention was objectively apparent from the words or actions of each party but it was not formally communicated. Finally, the document seeking rectification would reflect that common actual intention if rectified

Alongside this continuing process, some cases and academics have engaged more deeply with these elements of rectification and question: how *apparent* does the actual common intention need to be? What type of communication is relevant? Sir George Leggatt insists that some form of disclosed and observable communication is integral to rectification because the courts need something more sufficient than a coincidence of intention to enforce a contract.[20] Contrastingly, David McLauchlan sees no reason why an 'uncommunicated' yet actual common intention could not be enforced if the high burden of proof is met.[21] McLauchlan emphasises that this opinion can be held and still agrees that "[i]t is axiomatic, for example, that cross offers do not give rise to a binding contract."[22]

[19] See the consistency in *Westland Savings Bank*, above n 18, at [30]; *Swainland Buildings Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71 at [33], *Robb v James* [2014] NZCA 42 at [21].
[20] George Leggatt, 'Making Sense of Contracts: The Rational Choice Theory' (2015) 131 LQR 454 at 461.
[21] David McLauchlan "Rectification Rectified?" (2020) 36 JCL 135 at 150.
[22] At 151.

3. *The relationship between interpretation and rectification: the 'unionist' versus 'separatist' debate.*

As aforementioned, interpretation and rectification's direct relationship and relationship within contract construction is frequently debated and remains an underlying contest within the modern approach.[23] The two extremes of the debate are whether the overall goals and functionality of interpretation and rectification are in 'union' or are 'separate'.[24]

Lord Hoffman's obiter discussion on rectification in *Chartbrook* is a prime example of a "unionist" position.[25] Lord Hoffman's discussion in *Chartbrook* is most effectively described as being one which sees no fundamental differences in the purpose of interpretation and rectification.[26] Rather than an actual common intention, Lord Hoffman felt that an apparent common intention was the most appropriate form of intention in *both* interpretation and rectification. This stance was further encouraged by exercise of examining the common intention as ascertaining the meaning which an objective observer would take after looking at the evidence.

The first post-*Chartbrook* Court of Appeal case to address rectification was *Daventry*.[27] The Court of Appeal was compelled to accept Lord Hoffmann's obiter comments on rectification in *Chartbrook*, although *Daventry* does contain some critique of that approach. The United Kingdom Court of Appeal cases following the *Daventry* judgment had, until recently, found that the parties' actual and apparent common intentions had conveniently been the same and, thus, avoided confirming or denying the *Chartbrook* principles.[28]

Those who take a stronger separatist approach can be divided by two underlying motivations. The first group has a particular view of the role of rectification based on a stricter conception of interpretation. Under this approach, interpretation should have a 'strict objective' inquiry that only looks at the apparent common intentions of the parties. If rectification can encompass rejected interpretation evidence, rectification can act as the main mechanism for preventing

[23] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 110 ("*Chartbrook*").
[24] Simon Connell "Consensus, Correction and Conscience: Formal and Substantive Reasoning in the Requirements for Rectification" (unpublished article for conference on formative and substantive reasoning) at 6.
[25] At [55]-[67].
[26] Connell, "Consensus, Correction and Conscience", above n 24, at 6.
[27] *Daventry District Council v Daventry & District Housing Ltd* [2012] 1 WLR 1333; [2011] EWCA Civ 1153.
[28] *Ahmad v Secret Garden (Cheshire) Ltd* [2013] 3 EGLR 42; *Day v Day* [2014] Ch 114.

situations of injustice in contract construction. This is the perspective of Kós P in *Bathurst* where preventing injustice caused by interpretation was one of the four key policy justifications his stance on principles of objectivity.[29]

The second group of separatists see the distinct objectivity rules for rectification as a necessary corollary of the equitable origins of rectification. These separatists see interpretation as a "common law process of determining objective meaning" and rectification as an "equitable remedy concerned with preventing unconscionable reliable on objective meaning".[30] This was one of the justifications in the High Court of Australia in *Simic*,[31] and is emphasised by equitably focused contract academics such as Paul Davies.[32]

Both sides of the debate agree that interpretation and rectification are distinct processes. Their distinction is further emphasised by their different judicial enquiries. Interpretation persuades the judge to find the correct meaning is in the contract with the help of background context. Rectification persuades the judge that there is an actual common intended meaning that cannot be found in the written contract, but that mistake should be corrected. This separation, however, does not contest that there is a high degree of overlapping functionality between the two processes. As French CJ said in *Simic*, "[t]here is a conceptual distinction between construction and rectification but that does not mean that there is not a close connection in their practical operation."[33]

This close, practical operation may allow both methods of construction to use similarly wide pools of evidence. I am less convinced that this close, practical operation can justify *different* strictness of evidence between interpretation and rectification because they are separate parts of the same linear enquiry. Problems that cannot be solved under a strict interpretation are not necessarily going to be applicable to a case of rectification.

B. New Tensions in the Recent Contract Construction Cases

[29] *Bathurst Resources Limited v L&M Coal Holdings Limited* [2020] NZCA 113 at [40].
[30] Connell, "Consensus, Correction and Conscience", above n 24,at 6.
[31] *Simic v NSW Land and Housing Corp* [2016] HCA 47; (2016) 339 ALR 200 at [104] per Kiefel J.
[32] Paul Davies "Agency and rectification" (2020) 136 LQR 77.
[33] At [95].

Concepts which may have appeared to be on their way to crystallisation have seemingly been unsettled in a number of recent cases in New Zealand and the United Kingdom. This chapter will specifically examine *L&M Coal*,[34] its appeal *Bathurst*,[35] *Phoenix Engineering*,[36] and *FSHC Group*[37] and extract the principles of the modern approach which the cases appear to champion or dismiss. These cases provide prime examples of how tensions around the role of the parties' intentions arise and how judges then use those tensions as a vehicle for contributing to the wider 'unionist' versus 'separatist' debate.

1. *L&M Coal Holdings Limited v Bathurst Resources Limited* [2018] NZHC 2127

The New Zealand High Court judgment *L&M Coal* is a particularly interesting case for exploring the boundaries of what evidence of an actual common intention looks like, especially when the common intention is in the context of prior negotiations. The evidence presented for the common intention is unique because it is testimony from the lead negotiators from both parties and they are *both* testifying in favour of L&M Coal's case.

In 2010, L&M Coal and Bathurst entered into a contract for the sale of exploration and mining permits on the West Coast. The agreement included in-depth forecasting on the profitability of the mine, particularly focusing on the possibility of 'hard coking coal' with metallurgical uses in the highly profitable overseas market.[38] The contract's payment scheme included a performance payment where Bathurst owed L&M Coal US$40 million if 25,000 tonnes of coal had been "shipped".[39] As it turned out, the mine did not have high levels of hard coking coal and this made the profitable export market inaccessible. Between early 2015 and March 2016, over 50,000 tonnes of coal had been mined and transported away from the mining area, but none was exported outside of New Zealand.[40] The 50,000 tonnes comprised of lower grade and substantially less profitable thermal coal which was sold domestically. Bathurst did not pay L&M Coal the first performance payment.[41]

[34] *L&M Coal*, above n 4.
[35] *Bathurst*, above n 29.
[36] *UK Insurance Ltd v Holden and another* [2019] UKSC 16 [*Phoenix Engineering*].
[37] *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361; [2020] 2 WLR 429.
[38] At [16].
[39] At [5].
[40] At [9].
[41] At [9].

L&M Coal sought a High Court declaration that the performance payment was owed when the 50,000 tonnes of coal was shipped within New Zealand.[42] Bathurst argued that payment was not required because 'shipped' referenced shipping the coal overseas to the export market.[43] Thus, Dobson J was required to engage in an interpretive enquiry to determine the meaning of "shipped" for the performance payment clause to be enforced or not.[44]

A large variety of evidence was presented to prove: the nature of the contract, how the contract fit within the wider commercial context, and, most importantly, that there was an actual common intention for the meaning of "shipped". This is where the unique evidence from both parties' lead negotiators became relevant. The negotiators testified that they shared a common actual intention during the contract negotiations.[45] Bathurst questioned the admissibility of this evidence based on principles of objectivity in interpretation. To make sure that relevant and reliable evidence was not outright rejected, Dobson J allowed the parties to present and cross examine the evidence and withheld determining admissibility until after hearing the evidence in its entirety.[46]

After hearing all the evidence, L&M's evidence from the lead negotiators was allowed.[47] Dobson J was satisfied that the negotiators "were ad idem as to what they intended the [contract] to record" and allowed the testimony "[t]o the extent that the evidence establishe[d] mutual intentions".[48] Dobson J further emphasised the relevant rules for intentions in interpretation and clarified that evidence from prior negotiations are not inherently inadmissible.[49] Evidence that was "no more than" a party's "subjective recollections" or "subjective understanding" were inadmissible.[50] So too were one-sided communications within one party, whether or not the evidence of those communications was available to the other side or not.[51]

[42] At [13].
[43] At [15].
[44] At [21].
[45] At [41].
[46] At [37].
[47] At [39].
[48] At [40].
[49] At [39].
[50] At [39].
[51] Annexure, at [8].

Once the testimony of the lead negotiators was allowed, Dobson J applied a holistic contextualist approach to interpreting all of the admissible evidence.[52] Ultimately, Dobson J held that shipped meant transported generally and favoured the approach argued by L&M Coal.[53] The judgment did not specifically mention how the evidence of intention contributed towards the case's ultimate outcome.

Dobson J was persuaded to include the lead negotiators' testimony by Wilson J's *Vector Gas* judgment and Arnold J's conception of "background" in *Firm PI 1*,[54] justifying the decision to admit the evidence on:[55]

> … where the principals negotiating a contract *subsequently confirm* that they shared the same view of what was to be intended by the terms of the contract when it was being negotiated"

Including "subsequently confirm" may have implied that the lead negotiators at the time of the negotiations may not have directly communicated that they shared a common actual intention. This may indicate Dobson J's support for allowing evidence of an actual common intention to extent to instances of *uncommunicated* or *unexpressed* actual common intentions.

If *L&M Coal* became the leading authority on contract construction in New Zealand, there would be many extractable principles for evidence of intentions. Evidence from prior negotiations are presumptively admissible until another proven inadmissible. Evidence that does no more than establish an individual party's actual intended meaning of the contract is inadmissible. Evidence of the parties' common actual intended meaning is admissible when it is a part of the 'dialogue' between both parties leading to consensus. The judgment may even support a definition of 'dialogue' that includes *unexpressed* communications for the actual common intention.

[52] See Simon Connell "Prescriptive and Holistic Contextualism: Emerging Variants of Modern Contract Interpretation" (2018) 28 NZULR 317.
[53] At [113].
[54] At [40], referencing *Vector Gas*, above n 10 at [100] and *Firm PI 1* at [60]-[63].
[55] At [40] (emphasis added).

2. *Bathurst Resources Limited v L&M Coal Holdings Limited* [2020] NZCA 113

The first of the three issues at the Court of Appeal in *Bathurst* was whether the High Court used the correct meaning of "shipped".[56] Kós P ultimately agreed with the High Court that "shipped" meant transported generally.[57] However, Kós P disagreed with the High Court's approach to interpretation, intention and objectivity.

Kós P expressed concern that the inherently "subjective" inquiry into actual intention created tension with the principles of objectivity that mandate the interpretation exercise to exclude "subjective" evidence.[58] To manage the tension, Kós P asserted that interpretation and rectification have different subscriptions to the principles of objectivity.[59] Interpretation has a strict objectivity approach and only allows apparent common intentions into the inquiry. Rectification is where any injustices from interpretation's strict approach can be remedied. Consequently, there is evidence admissible for rectification that is inadmissible for interpretation. For example, Kós P felt that prior negotiations were 'best evidence' of actual common intention, thus, excluded from interpretation enquiry.[60] As the meaning of 'shipped' was a process of interpretation, Kós P excluded *all* evidence from prior negotiations.[61]

The exclusion of all evidence from prior negotiations was unfortunate for two main reasons. The first was that the Court of Appeal did not address legally relevant judicial analysis in the High Court judgment. This is most obvious from the High Court's analysis of the lead negotiators' testimony. Under one examination, a court could conclude that there were two instances of an individual persons testifying, 'this is what I thought shipped meant during negotiations' and would exclude the evidence. Under another, it was testimony that there was an identifiable common actual intention in existence, but perhaps unexpressed.[62] In the later instance, the correct outcome is unclear. Overall, not even engaging in this discussion was a missed opportunity to clarify an evidence of intention related enquiry that was relevant for both interpretation and rectification.

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[56] At [6].
[57] At [60].
[58] At [62].
[59] At [44].
[60] At [41].
[61] At [41].
[62] It was not entirely clear from the High Court judgment what extent the testimony was corroborated. Both negotiators testified to having the same intention, but not whether this was common intention was directly or indirectly communicated.

The second frustration was that prior negotiations have been confidently used in New Zealand courts during interpretation enquiries for the past ten years. No reference is made to Tipping J's *Vector Gas* judgment, nor to any cases in the past ten years that used prior negotiations during the interpretation process without a problem. David McLauchlan has even suggested that the decision in *Bathurst* could be considered *per incurium* for only referencing *Firm PI 1* as authority for principles of interpretation.[63]

If *Bathurst* became the leading authority on contract construction in New Zealand, the principles for contract interpretation would be in complete contrast to the principles used during the High Court case. The *actual* common intentions of the parties would only be relevant insofar as they are *apparent* common intentions. The relevant intentions must manifest in a way which is observable for the reasonable person. Rectification is used where the contract's "objective expression" (the apparent actual intention) has failed the parties.[64] Only then can the "[subjectively] intended bargain" (the actual common intention) be reinstated by the court.[65] Therefore, evidence from prior negotiations is not admissible for interpretation, but admissible for rectification.

3. UK Insurance Ltd v Holden [2019] UKSC 16 [*Phoenix Engineering*]

Mr Holden held a motor vehicle insurance contract with UK Insurance.[66] The insurance policy stated "we will cover you and your legal responsibility if you have an accident in your vehicle and… you damage [third party] property".[67] Further, the Road Traffic Act 1988 prescribed that motor vehicle insurance must cover "damage to property caused by, or arising out of, the use of the vehicle on a road or other public place".[68] One day, Mr Holden was distracted while performing some welding work in Phoenix Engineering's car repair garage and accidentally started a fire.[69] The fire caused extensive damage to the car, garage and neighbouring structures.[70] Phoenix Engineering's insurance provider AXA paid for the garage and the neighbour's repairs but sought a subrogated payment from UKI as Mr Holden's car insurance

[63] David McLauchlan "A New Conservatism in Contract Interpretation? (Part I)" (2020) NZLJ 273 at 275.
[64] At [36]
[65] At [36]
[66] At [2].
[67] At [7].
[68] At [12].
[69] At [3].
[70] At [3].

provider.[71] The key question was whether Mr Holden's motor vehicle insurance with UK Insurance covered the damage to the car repair garage caused by the welding fire.[72]

The Supreme Court's method of contract construction was threefold and began by establishing what the Road Traffic Act 1988 required for insurance policies.[73] After an examination of the Act and policy, the Court found that the mandatory third-party cover requirements from the Act were not satisfied by the Policy's current wording. The parties agreed with the court.[74] The Supreme Court found that the Policy's deficient language should be viewed as an incidence of an obvious mistake in the execution of a written contract because of the absolute requirement to abide by the Road Traffic Act 1988.[75] The next step in the threefold construction method was to identify what words should be "read into" the existing UKI policy to comply with the Act.

Typically, a case involving with a mistake in the execution of a written contract would indicate an instance for the doctrine of rectification. However, the Court instead felt that the necessary construction "[could] be done in this case without resort to rectification" because "this is one of those rare cases where the mistake is clear as is the intended meaning, so that a party to the agreement does not need to apply for rectification of the Policy."[76]

The Supreme Court engaged in limited discussion of the law of contract construction that informed this conclusion and seemed to use *Chartbrook* as the main proposition for adopting a "corrective interpretation" approach.[77] Further, the Court's only indication of any particular rule or precedent it was directly following was that "it should be clear that something has gone wrong with the language and… it should be clear what a reasonable person would have understood the parties to have meant".[78] Ultimately, the Supreme Court ruled that, even with the alterations, the Policy did not extend cover to the garage damage because the policy required a causal link between the use of a vehicle on a road and an accident.[79]

[71] At [4].
[72] At [1].
[73] At [32].
[74] At [24].
[75] At [47].
[76] At [24] and [47].
[77] At [46]
[78] At [46] citing *Chartbrook*, above n 23, at [25].
[79] At [57].

If *Phoenix Engineering* was the leading authority on contract construction, it would paint a favourable picture for continuing the trajectory of *Chartbrook* and *Daventry*. The method of the Court was ultimately concerned with altering the words of the contract. Although typically the realm of rectification, the Court confidently asserted that the alterations could occur within an interpretation process. The evidence of the 'obvious' nature of the mistake was largely based on the linguistic meaning of the Policy and incorporated the wider contextual needs from national insurance policies. At no point was the Court concerned with the actual common intention of the parties. However, the Court did not signpost its rationale for these choices, and the broader needs for statutory compliance in insurance policies may have been influential in the decision.

4. FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd [2019] EWCA Civ 1361

FSHC Group and GLAS had a complicated intercreditor agreement.[80] The parties discovered an element of security that FSHC Group owed GLAS was missing from the agreement, so they executed a deed of amendment.[81] The Deed provided the missing security with a corollary of imposing additional but onerous obligations on FSHC Group.[82] FSHC Group claimed that this was a common mistake because the Deed was solely meant to provide the missing security and sought rectification to remove the additional obligations.[83] GLAS challenged the claim and argued that the apparent intention of the parties, the only relevant intention, was to enforce the full scope of the Deed.[84]

At the High Court, Henry Carr J found that rectification is concerned with an actual common intention, the parties had an actual common intention to provide the missing security, and the deed as executed failed to give effect to that intention.[85] GLAS appealed the decision, arguing that the law of rectification uses objective intentions (an apparent common intention) and that objective assessment would conclude that the parties had intended to include the additional obligations alongside the missing security.[86]

[80] At [2].
[81] At [3].
[82] At [33].
[83] At [40]-[42].
[84] At [47]-[48].
[85] At [4].
[86] At [5].

The Court of Appeal ultimately decided that the law of rectification in the United Kingdom was concerned with the actual common intention of the parties and that here, those intentions were for the Deed to do no more than provide the missing security.[87] The Court of Appeal removed *Daventry* as a binding authority for Lord Hoffman's objective approach in *Chartbrook* because the judgment did not authoritatively affirm nor reject the approach.[88]

In determining the current law of rectification, the Court of Appeal analysed the history of rectification cases for precedents or principles, considered coherence with rectification of unilateral mistake, and looked to the approaches of other jurisdictions.[89] Ultimately, Leggatt LJ was persuaded that the rectification process is inherently involved with the "subjective" accounts of the parties' actual common intention.[90]

Although the appeal was only concerned with the High Court's approach to the law of rectification, and not a factual enquiry, the Court of Appeal still applied its law of rectification to the facts at hand. There were three elements of the parties' common intention for Deed to do not more than provide the security. The background contractual context and communications prior to the Deed's accession indicated there was "one missing brick in the edifice".[91] It was commercially absurd for FSHC Group to undertake onerous obligations without pre-existing obligations or receiving additional commercial value.[92] The greater silence came the lack of discussion of the additional obligations fundamentally changing the transaction's structure.[93]

If *FSHC* was the leading authority on contract construction, *Chartbrook* and *Daventry* would not reflect binding authority on contract construction. Rectification for common mistake focus on the actual common intention of the parties. An 'outward expression of accord' would be a requirement in the sense that the actual common intention has been communicated between the parties.

[87] At [147].
[88] At [119]: "a court is not bound by a proposition of law which was not the subject of argument because it was not disputed in an earlier case (even if that proposition formed part of the ratio decidendi of the case)."
[89] At [51]-[146].
[90] At [147].
[91] At [157].
[92] At [160].
[93] At [161].

C. Conclusion: Are the Recent Cases and the Modern Approach in Tension?

These recent cases of contract construction do not seem to fit neatly together, or within the precedents developed over the last 10 years. The High Court in *L&M Coal* and the Court of Appeal in *Bathurst* disagreed on the evidence of intention allowed in an interpretation enquiry. Specifically, when evidence of an actual common intention is presented in prior negotiations. This may suggest that New Zealand does not have as coherent an approach to principles of objectivity.

The United Kingdom Supreme Court in *Phoenix Engineering* supported a contract construction enquiry that takes a more unified approach to interpretation and rectification. By contract, *FSHC* purposely spells out how rectification should apply separately to interpretation. This separation is largely justified based on the need for an actual common intention in rectification.

L&M Coal and *Phoenix Engineering* were both seemingly open to 'constructive interpretation', but had different stances on the relevant evidence of intention. *L&M Coal* allowed actual common intention while *Phoenix Engineering* seemed only to use apparent common intentions. Both *Bathurst* and *FSHC* thought that interpretation and rectification used distinct evidence of intention, with only rectification being allowed to use evidence of an actual common intention.

While the cases may have spoken about a tension existing between intention and objectivity, there was an even larger tension between the focusing on the intentions of the parties and focusing on crafting a judgment that contributes to overarching 'unionist' versus 'separatist' debate.

II. The Current Judicial Approach to Evidence of Intention in and the Usefulness of Objectivity and Evidentiary Principles in Modern Contract Construction

In the previous chapter, I established that the parties' *intended* meaning of the contract is a leading factor when a court determines what their contract *actually* means. I explored how the role of intention is different depending on whether the court is using interpretation or rectification. The differences are highlighted by recent cases in contract construction that have identified a need to clarify aspects of the intention enquiry, particularly in the *evidence* used to prove an intention.

In this chapter I ask, regardless of whether interpretation or rectification is used, what is the *actual* process taken by a judge to determine how those intentions can be used? To answer the question, I first evaluate the current judicial status quo: that it is all a matter of judgment. In this judgment, one of the consistently used tools for addressing evidence of the parties' intentions are principles of objectivity. However, I argue that principles of objectivity provide a limited framework for the practical judicial processes in both interpretation and rectification.

I then propose recharacterizing the approach to intentions as an *evidentiary* approach, based on principles crystalised in the Evidence Act 2006. An evidentiary approach could illuminate the various interlinking elements that should influence whether a judge can should honour an intention or not. An evidentiary approach appropriately deals with the different facets of objectivity and the probative quality of evidence remains a separate aspect of the broader evidentiary approach.

A. The Status Quo: All a Matter of Judgment?

The status quo can be described as 'all a matter of judgment'. Apart from the precedents, principles and policies within contract construction, there are few mechanisms imposed on judges when it comes to how they should make a decision. This status quo is not often directly referred to in judgments. In *Divett v Skeates*, this 'matter of judgment' attitude was reflected

when the Court said "it is a matter for the Court to draw inferences *as it sees fit* and to attribute appropriate weight to the evidence".[94]

A broad acceptance of judgment is not exclusive to contract construction. In the Supreme Court appeal *Attorney-General v Strathboss*, the Court made it clear that the trial judge "was entitled to take into account any piece of admissible evidence adduced to prove causation".[95] It is possible that both cases reflect that the judicial process of adducing conclusions from admissible evidence is part of the court's an inherent jurisdiction.[96]

There are certainly benefits to championing judgment as the key approach to evaluating evidence of intention. A jurisprudential piece by American critical legal theorist Anthony Kronman analysed what is meant by 'judgment' in the context of law.[97] Kronman explained that judgment is more than deductions or intuition, and involves elements of sympathy, detachment, deliberation and choice.[98] Applying judgment in a dispute resolution process requires more than just a wealth of knowledge on the law.[99] Judgment allows for the context of a case to be fully absorbed into the process.[100]

Based on this perception of judgment, Kronman elaborates on what makes a good judge:[101]

> A judge may be intellectually brilliant and socially farsighted, but what makes his judgments wise is another quality altogether—his own personal capacity to satisfy the conflicting claims of sympathy and detachment, and the tendency of his decisions to promote a similar attitude among the members of his community generally.

The wise nature of judicial judgment could not be replicated in a series of rules or procedure.

However, the more human elements involved in judgment are just as often referenced as the failing of judgment. There have always been concerns that contextual inquiries of the modern

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[94] *Divett v Skeates* [2011] HC Auckland CIV-2007-404-3606, 11 February 2010 at [136] (emphasis added).
[95] *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98 at [478].
[96] McGechan on Procedure (online looseleaf ed, Brookers) at [HR9.74.02]; Civil Procedure: District Courts and Tribunals (online looseleaf ed, Brookers) at [HC9.74.01(4)].
[97] Anthony T Kronman "Living in the law" (1987) 54 UCLR 835 at 846.
[98] At 847-857.
[99] At 864.
[100] At 864.
[101] At 865.

approach expose the judges' human vulnerabilities.[102] Criticism based on judges using 'commercial common-sense' appears more frequently than a response to evidence of intentions specifically. [103] Neil Andrews, in the conclusion of his cautionary article on the use of commercial common-sense, summarises that:[104]

> Judges should not be beguiled by forensic rhetoric which is a barely disguised plea for a favourable revision or gloss to suit one party but which is not truly supported by the document… Judges should not pretend to greater commercial or trade or "street" experience than they in fact possess.

The same fear that judges are persuadable or inexperienced in the more complex of contract construction cases could easily apply to more direct evidence of parties' common intention.

Considering the costs and benefits to using judgment, it is important to consider the wider effects even a singular case's judgment can have on contract law . The actual power to change or to strengthen the current position, in any aspect of contract law, is controlled by judges.[105] Their judgments become binding decisions to evolve or crystallise a contract law theory and are the most authoritative reflection of the positive state of the law. It is this power which should invite some element of caution into the judicial process.

Evaluating the judicial approach raises the question: if the status quo is "all a matter of judgment", what are the possible alternatives or amendments?[106] Before I consider these alternatives, I will examine how principles of objectivity are currently contributing to judicial decisions on evidence of intention in contract construction.

B. Principles of Objectivity and their Limited Effectiveness on Evidence of intention

[102] Andrews, above n 8; Anthony Grabiner "The Iterative Process of Contractual Interpretation" (2012) 128 LQR 41; John Gava "How Should Judges Decide Commercial Contract Cases?" (2013) 30 JCL 133.
[103] Grabiner, above n 102, at 48: "Judges are not always the most commercially-minded, let alone the most commercially experienced, of people, and should, I think, avoid arrogating to themselves overconfidently the role of arbiter of commercial reasonableness or likelihood."; Martin Hogg "Fundamental Issues for Reform of the Law of Contractual Interpretation" (2011) 15 Edin LR 406 at 420: "[commercial sense has a] tendency to encourage judges to stray into contract making rather than contract interpretation."
[104] Andrews, above n 8, at 62.
[105] Actual power as decision makers and enforcers, not just advocates, although some would argue that the advocates are more powerful. See Katharina Pistor *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, Princeton, 2019).
[106] I propose the answer in Part C of this chapter.

Undoubtedly, principles of objectivity are engrained and inalienable within contract law.[107] Mindy Chen-Wishart has pointed out that written contracts reflect the agreed outcome of a series of communications and that this "communication is impossible without objectivity".[108] However, principles of objectivity alone are not dynamic enough to provide a direct framework for assessing evidence of intentions.

There are linguistic restrictions inherent in the word 'objective' for objectivity to be a primary tool in an exercise consisting of constructing the meaning of words. Additionally, when principles of objectivity are constructed into a strict approach, the current number of exceptions that apply makes objectivity's existence as a formal rule less convincing. Finally, objectivity is essentially dealing with evidence of intentions and yet, these principles cannot provide a thorough assessment of the evidence's quality.

1. The inherent restrictions in the language of objectivity

Kós P recently asserted "gallons of ink have been spilt" over "mediating the tension between intention and objectivity".[109] From a high-level perspective, it is not difficult to see where such a tension exists. Intentions are what a person wants and plans to achieve. The wanting, planning, and arguably even the achieving, exist within that person's mind. Things that exist within a person's mind are described as subjective. The oppositive to subjective is objective. This contrast considered, how can contract law simultaneously pursue the parties' intentions, which are inherently subjective in nature, and still abide by principles of objectivity?

The real problem posed in that question is that the literal words 'objective' and 'subjective' provide very little assistance on their own. It is an axiomatic principle of contract law that evidence of a singular party's intentions should be excluded from an interpretation or

[107] For more information on principles of objectivity and their development in contract construction (and formation), see: William Howarth "The Meaning of Objectivity in Contract" (1984) 100 LQR 265.; J P Vorster "A Comment on the Meaning of Objectivity in Contract" (1987) 103 LQR 274., William Howarth "A Note on the Objective of Objectivity in Contract" (1987) 103 LQR 527., Mindy Chen-Wishart "Contractual Mistake, Intention in Formation and Vitiation: the Oxymoron of Smith v Hughes" in Jason W Neyers, Richard Bronaugh and Stephen G A Pitel (eds) Exploring Contract Law (Hart Publishing, Oxford and Portland, Oregon, 2009) at 341; David McLauchlan "Objectivity in Contract" (2005) 24 UQLJ 479.
[108] Mindy Chen-Wishart, above n 107, at 346.
[109] *Bathurst*, above n 29, at [35].

rectification process, and this is confirmed in many cases and commentary.[110] As David McLauchlan recently reaffirmed: [111]

> Neither I, nor to my knowledge any other common law commentator, has argued that the task of contract interpretation might entail an inquiry into each individual party's state of mind at the time the contract was formed.

Even Kós P swiftly recognised this after bringing up the 'objectivity-intention' tension in *Bathurst*.[112] Contract construction, as guided by principles of objectivity, rejects the intentions which are exclusively held in the mind of a single party to the contract. Thus, principles of objectivity falter because the *scope* of objective intentions is not inherently obvious from the language or the case law. Kiefel J expressed a similar concern in *Simic*:[113]

> But the term "objective" is apt to be misunderstood because it can be applied with respect to a quite different process, as the decision in *Chartbrook Ltd v Persimmon Homes Ltd* shows.

The open texture of words will always invoke an element of ambiguity;[114] 'Objectivity' is not alone in this respect. But, somewhat ironically, this ambiguity extends to judgments describing the principles and the actual judicial processes used to extract that legal meaning of words in contract construction cases. There is a somewhat heightened expectation of clarity in this setting. Furthermore, there are not often many attempts to cure this ambiguity. There are numerous examples where the language of "objectivity", "subjectivity" and "actual common intention" are used in judgments without any further clarification.[115]

This is not to say that there are no difficult situations that arise with evidence of common intentions in contract construction. There are of course, more nuanced situations where it may be hard to see how an individual party's intention could possibly be removed from context and, thus, how the intention in context could ever be manifestly-objective. For example, David

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[110] *Simic*, above n 31, at [95] per French CJ, referencing *Byrnes v Kendle* (2011) 243 CLR 253 at 263 [17] per French CJ; at 275 [59] per Gummow and Hayne JJ; at 284 [98] per Heydon and Crennan JJ.; *Vector Gas*, above n 10, at [20] per Tipping J; Andrews, above n 8 at 62; "Construction and Rectification" in A Burrows & E Peel (eds), *Contract Terms* (Oxford University Press, Oxford, 2007) at 82–83.
[111] McLauchlan "A New Conservatism", above n 63, at 275.
[112] *Bathurst*, above n 29, at [35] quoting *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251 at [8].
[113] At 104.
[114] Stanley Fish, "The Law Wishes to Have a Formal Existence" in Stanley Fish (ed), *There's No Such Thing as Free Speech and It's a Good Thing Too* (Oxford University Press, New York, 1994).
[115] McLauchlan, "A New Conservatism", above n 63, at 274.

McLauchlan's support for uncommunicated common actual intention acknowledged the need for a high standard of proof from the surrounding context.[116]

McLauchlan justified how the foundational principles of objectivity would still be met because the fundamental exclusion is on a party's uncommunicated *actual intention*; the problem is not that the intention was unexpressed.[117] One criticism may be that allowing a court to look at an unexpressed common actual intention is essentially allowing the premise that "contracts can be thought into existence".[118] But, this is simply not what is being suggested. There would have to be other existing contextual evidence compelling enough to build a picture of an actual common intention notwithstanding direct communication.

Ambiguity issues are not unique to objectivity in the modern approach to contract construction. William Howarth described this same problem in 1987:[119]

> "The commonplace slogan that courts take an *objective* view of these matters [of contract construction] conceals certain important differences of approach which are revealed by a closer examination of what can be done, and what courts actually do, in the name of objectivity."

Howarth alludes here to the importance of principles of objectivity because they are often the direct guiding principles for 'what courts actually do': admitting and assessing evidence of intentions. The terminology of objectivity, even once it is analysed for its peak usefulness, does not provide a substantial enough process for admitting and assessing the actual evidence of intention.[120]

2. Too many exceptions in a rules-based application of strict objectivity

A 'strict objective' approach for interpretation, as advocated by Kós P in *Bathurst*, would create a 'rule-based' approach for what intentions and other contextual elements a judge could look at. While there has been a general upheaval of rules-based processes in contract construction, the simple benefits of a clear and transparent rule applied consistency across cases are at least

[116] McLauchlan "Objectivity in Contracts", above n 107; McLauchlan "Rectification Rectified?", above n 21.
[117] McLauchlan "Objectivity in Contract", above n 107, at 482 referencing J W Carter and E Peden 'Good Faith in Australian Contract Law' (2003) 19 JCL 155 at 160.
[118] Howarth, "A Note on the Objective", above n 107, at 530.
[119] Howarth, "A Note on the Objective", above n 107, at 530.
[120] Even reasonable-person objectivity is applied in different ways; See McLauchlan "A New Conservatism", above n 63, at 275.

recognisable from a high level examination. For example, having a firm rule that judges cannot look at context from prior negotiations in interpretation judgments in the United Kingdom has, at least in theory, created a level of certainty not seen in New Zealand.

The benefits of a rules-based approach to objectivity simply dissolve when there is a high quantity or impact from a number of exceptions to those rules. When there are a high number of exceptions, or the door to an exception opens wider, the principal rule becomes less and less convincing. David McLauchlan's piece on a "new conservatism" in New Zealand's contract construction has identified five examples of existing exceptions to a strict objectivity approach: the equitable remedy of rectification, estoppel by convention, the "private dictionary" principle, the "background facts" exception, and "united in rejection" exception.[121]

McLauchlan emphasises that having multiple ways for a court to examine prior negotiations makes the principal rule to reject prior negotiations less convincing, particularly when the exclusion of prior negotiations is justified on grounds of litigation efficiency:[122]

> In any event, the efficiency policy is further undermined by the fact that, even if there is a general rule that evidence of prior negotiations is inadmissible as an aid to interpretation, the reality is that little of substance remains because there are so many exceptions and qualifications to the rule that enable it to be easily avoided by well-informed counsel.

Although a strict objectivity approach aims to prevent the court from being overwhelmed by evidence, the approach is not helpful where exceptions to the rule have low barriers of entry.

The strength of a rules-based approach is largely deflated once exclusionary holes have been poked through. Having exclusions that can apply to a vast number of situations makes the premise of a presumptive exclusion of certain evidence, such as prior negotiations, seem illusory.

3. Provides no reflection on the quality of evidence presented

Principles of objectivity that exclude or allow evidence of intentions without any engagement with the actual quality of the evidence is another weakness of solely using principles of

[121] David McLauchlan, "A New Conservatism in Contract Interpretation? (Part II)" NZLJ (forthcoming) – where "united in rejection" means accepting evidence of *deleted* contract terms to prove a *negative* intention.
[122] McLauchlan, "A New Conservatism (Part II)", above n 121.

objective as the framework for evidence of intention. The idea that evidence with a more 'subjective' quality would be inherently less helpful or convincing in *all* contract cases is an unconvincing preposition. The *presumptive* low quality evidence is often presumptively removed to save the court's time.[123]

However, the connection between quality and presumptive exclusions is not in itself clearly guided by principles objectivity. The corollary of the presumption is then the idea that evidence with an 'objective' quality is inherently helpful in all contract cases. Yet, we would not want to allow all objective evidence into a proceeding for that same policy reasoning of saving time. There must be additional evidentiary factors that are considered when deciding if a judge can look at evidence of intentions. Presently, these factors are too tacit within principles of objectivity. As Burrows and Peel explained in 'Contract Terms':[124]

> "It has sometimes been suggested that the exclusion of previous negotiations and declarations of intention is logically dictated by the objective approach. But that is not so and tends to *confuse the approach being applied with the separate question of what evidence is to be permitted* in applying that approach. To allow in previous negotiations or declarations of intention (including witness statements as to what was said between the parties) is consistent with an objective approach in that one is still ascertaining a party's intentions through objective evidence.

Without an approach to evidence of intentions that more explicitly engages with the actual value of material, sweeping assessments of evidence will unsatisfactorily continue under the guise of objectivity.

C. The Enlightening Evidentiary Principles for Intention Tensions in Contract Construction

A better way to frame the focus on evidence of intentions consistently across interpretation and rectification may be to adopt a more structured evidentiary process. To help develop this approach, I propose that the language and contextually focused approaches of the Evidence Act 2006 would be substantially helpful.

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[123] See *Bathurst*, above n 29, at [42].
[124] Burrows, above n 110, at 82–83 (emphasis added).

An evidentiary approach would have two stages for processing evidence of intentions: admissibility and weighing. Admissible evidence is the evidence a judge is permitted to look at. Evidence must reach a certain quality threshold to be admissible and the process of measuring whether evidence meets that threshold that is the admissibility process. The measuring would be an analysis of the *relevance* and *reliability* of the evidence.[125] Admissibility also allows room for considering other specific exclusionary rules which may render evidence inadmissible, even if it meets the threshold for relevance and reliability.[126]

Once the pool of evidence that a judge can look at is established in the admissibility enquiry, a judge can begin to weigh up the evidence. Weighing is an analysis of the *probative* quality of the intention evidence: determining to how well a piece of evidence tends to prove or disprove something.[127] The weighing process assigns an appropriate weight to a piece of evidence to reflect its value of, for example, the actual degree of relevance and reliability in a piece of evidence.

The actual application of this evidentiary process to evidence of intentions in contract construction will be unpacked in the next chapter. This chapter will first establish if an evidentiary approach could work in theory in the operation of contract construction.

1. Applicability of the Evidence Act to contract construction

The principles and language of the Evidence Act 2006 may provide substantial clarity to an otherwise opaque area of law. In determining the extent to which the rules of the Evidence Act are enforceable in the case of contract construction, it is important to consider all the ways in which those rules have already appeared in judgments. This may create a principled argument that there is *precedent* to use an approach to evidence which is compatible with Evidence Act.

[125] To be unpacked further in the next chapter.
[126] For examples of the courts discussing 'admissibility' of evidence of intentions in a general sense, distinct from just relevance or reliability, see *Portofino Takapuna Ltd v Bye* [2017] NZHC 1580 at [29]; and *Talleys Group Ltd v Biomex Trustees Ltd* [2020] NZHC 591 at [7].
[127] Evidence Act, s 7.

The two most relevant sections are ss 7 and 8, as they contain the fundamental general rules for the admissibility of evidence. Section 7 explains how it is a fundamental principle that all evidence that is relevant should be admissible. Section 8 outlines the general exclusionary principle that evidence with probative value should be excluded where this value is outweighed by an unfairly prejudicial effect on the proceeding.[128]

Beginning with existing engagement with the relevance principle in section 7, Tipping J in *Vector Gas* said:[129]

> It is often said in contract interpretation cases that evidence of surrounding circumstances is admissible. Circumstances which surround the making of the contract can operate both before and after its formation. In either case irrelevance should be the touchstone for the exclusion of evidence. I do not consider there are any sufficiently persuasive pragmatic grounds on which to exclude evidence that is relevant. Indeed, to do so would require reconciliation with s 7 of the Evidence Act 2006.

Asher J at the High Court in *I-Health* follows Tipping J in *Vector Gas* as a guiding influence for the interpretation process for evidence of intention:[130]

> In accordance with the judgment of Tipping J in Vector Gas, I propose to take into account in the interpretation process the evidence of relevant background facts that can be extracted from the negotiations, and also any exchange between the parties in the negotiations which on an objective reading points conclusively to a particular meaning. Such an approach is consistent with s 7 of the Evidence Act 2006. Section 7 provides that all relevant evidence is admissible unless specifically declared inadmissible or excluded by the Evidence Act or another enactment. Evidence is relevant under s 7(3) if it has the tendency to prove or disprove anything that is of consequence to the determination of a proceeding. If the negotiations construed objectively cast light on meaning by, for instance, showing the purpose of a clause, they will be relevant.

I-Health shows how an evidentiary approach has the capacity for multiple principles to influence what evidence should be looked at by the judge or not.

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[128] Evidence Act, s 8(1)(a).
[129] At [29].
[130] *i-Health Ltd v iSoft NZ Ltd* (HC, Auckland, CIV-2006-404-007881, 8 September 2010) at [40].

Section 8 of the Evidence Act has not made an obvious appearance in contract construction judgments. This is likely because contract construction does not typically evoke emotive language like prejudice and there is certainly a distaste for judges engaging with fairness.[131] Even if it is "a matter of controversy whether the common law discretion to exclude unduly prejudicial evidence [exists] in civil proceedings", the Evidence Act "s 8 provides that the rule applies in all proceedings."[132] In the next chapter, I will explore how contract construction can best use section 8 for evidence of intentions.

2. How principles of objectivity can be reconciled within an evidentiary approach

An evidentiary approach leaves rooms for rule-based admissibility principles to develop and accommodate specific rules of law in each particular legal context. For example, objectivity principles could be transformed into strict admissibility rules that exclude certain 'classes' of intention evidence. However, a better way to absorb principles of objectivity could be under a *relevancy* discussion.[133]

I will fully clarify what I mean by a relevancy discussion in the next chapter. It is important to note here, however, that there are already examples where this 'transformation' has successfully occurred. After considering the relationships between the Evidence Act, principles of objectivity and precedents for prior negotiation as background contextual evidence, Asher J in *I-Health* summarised:[134]

> a) Exchanges in negotiations which construed objectively tend to establish background facts known to both parties are *relevant*;
> b) Exchanges between the parties in negotiations which, construed objectively, cast light on meaning are *relevant*;
> c) Material created by one party that relates to negotiations but is not communicated and relates to the subjective understandings and beliefs of that party is *irrelevant*.

[131] Gava, above n 102.
[132] Simon France (ed) *Adams on Criminal Law — Evidence* (online looseleaf ed, Thomson Reuters) at [EA8.02(2)].
[133] Explained in the next chapter.
[134] At [41] and referenced in *JMM v TTM* [2012] NZHC 2522 at [21] and [23].

This summary shows that it is possible for objectivity to remain an influential factor when approaching evidence of intentions under an evidence-focused approach. An evidentiary approach can still absorb all the important, necessary considerations for assessing evidence of intention in contract construction. The approach does so in a way that directly explains why certain outcomes should occur. Explaining an evidentiary exclusion on the grounds of objectivity requires a reader to understand the complex background concepts and historical developments with principles of objectivity. Explaining the exclusion of evidence because the evidence was *irrelevant* is a much more tangible explanation because relevancy linguistically refers to something being sufficiently connected.

3. Why have we not seen an evidentiary approach flourish in contract construction?

There are two possible reasons why the Evidence Act and its principles have not played a dominant role in assisting contract construction with processing the evidence of intentions. The first is that the status of the Evidence Act as New Zealand's evidentiary code has been largely denied amongst theorists.[135] If the Act is not a complete code, this allows for certain common law principles to exist in tandem with the Act. As common law evidentiary principles of contract construction are not completely excluded, justifying judicial discretion over a more uniform approach.

Secondly, determining the meaning of a contract is overall asking a question of law not fact. Contract construction is a judicial enquiry into the legal effect of a contract. While this enquiry is guided by contextual elements, presented as matters of fact, it is overall how these contextual elements persuade the application of legal principles. Judges have "jealously regarded the law as being for them" and may not be convinced that there is anything in the Evidence Act which they are not already indirectly applying.[136]

However, the benefits of this evidentiary approach would not be derived from judges following the Evidence Act. As the next chapter will show, and what was alluded to briefly in my previous discussion, there is at least an appetite for evidentiary inspired language. Language that has been carefully crafted to specifically describe the desirable qualities of evidence. The clarity

[135] Megan Paterson, "Go No Further Than the Words of the Section: From the Evidence Act to the Comfort of the Common Law" ((LLB (Hons) Dissertation, University of Otago, 2014) at 15.
[136] *Discount Brands Ltd v Northcote Mainstreet Inc* [2005] NZRMA 57; [2004] 3 NZLR 619 (CA) at [58].

of this language, and its ability to improve the transparency of the judicial process, would be the main benefits of an updated judicial approach.

D. Conclusion: How Could the Current Judicial Approach to Evidence of Intention be Improved?

When it comes to actually evaluating evidence of intentions in contract construction, the status quo is that judges may apply the principles of construction in whichever way they think best. This on the whole has seemed to better reflect the intentions of the parties more than a formalist approach, but there could still be some improvements. One of those improvements could come from shifting from Principles of Objectivity to frame the discussion on evidence of intention.

Mindy Chen-Wishart urged that:[137]

> We need to take great care to define what we mean by the 'objective' or 'subjective' tests of intention. Needless muddle can arise when the label is used to designate quite different points of reference.

After looking at the recent cases in Chapter I and analysing the judicial approaches in Chapter II, it seems as if contract construction is in a bit of a muddle.

To mitigate the muddle, I have proposed an evidentiary approach to fully illuminate how all intention enters the judicial contract construction process. An evidentiary approach could address the weakness of objectivity as a dynamic framework without introducing formalist rules far removed from the contextualist approach to contract construction.

[137] Chen-Wishart, above n 107, at 357.

III. Reframing the Evaluation of Evidence of Intentions Through an Evidentiary Approach

In this chapter, I outline three aspects of an evidentiary approach to evidence of intentions in contract construction that could improve the clarity in judgments and final judicial decisions. First, I argue the probative value of evidence, measured mainly through relevancy and reliability, should play a larger role for evidence of intentions in construct construction. Secondly, I identify that rules-based admissibility can be useful to enforce strict, formal rules that derive from broader principles for situations where there should be limited allowances for situational anomalies. Finally, I explain how weighing evidence after admissibility can reflect rebuttable presumptions of the value of certain types of evidence.

Kós P provides an eloquent summary of how a systematic, logical, evidence-based process would work in the judgment of the Court of Appeal in *Commerce Commission v Bunnings*:[138]

> It is thus inherent in evidence that it first must be relevant: that is, it is probative (by tendency to prove or disprove) of something material (a fact in issue). There follows a second and subsequent question as to whether the evidence is then *inadmissible* because it belongs to a class of evidence the law excludes. And then a third enquiry as to what *weight* is to be given to evidence that is relevant and admissible.

The words 'relevance', 'reliability', 'admissibility' and 'weight' are key indicators of an evidentiary approach within judgments. Using evidentiary language consistency is important because "[t]he plausibility and weight of evidence are very different matters from the admissibility and relevancy of evidence."[139] Additionally, distinguishing the process admissibility from the weighing process keeps absolute evidentiary requirements separate from the more contextually influenced evidentiary requirements.

A. Admissibility Based on Probative Value: Relevance and Reliability in Contract Construction.

[138] *Commerce Commission v Bunnings Limited* [2020] NZCA 310 at [32].
[139] A L Corbin, *Corbin on Contracts* (West Publishing, St Paul, Minnesotta,1960) at [535.17-18].

Two fundamental qualities of evidence that partially make up the admissibility threshold are relevance and reliability. I refer to relevance and reliability together as the qualities that contribute to the 'probative value' of evidence of intentions.

1. Relevance

A fundamental principle in the law of evidence is that relevant evidence should be admissible.[140] As outlined in the previous chapter, evidential relevancy as a principle has been crystalised in s 7 of the Evidence Act. Section 7 defines relevancy as evidence with "a tendency to prove or disprove anything that is of consequence to the determination of the proceeding".

Relevancy has already played a role in developing fundamental principles for using evidence in contract construction, particularly for the doctrine of interpretation. Lord Hoffman conceived the language of "background" material in *ICS* when advocating for a more expansive approach for to extrinsic evidence at the time.[141] However, in a later case, Lord Hoffman clarified that his assertion on unbounded background materials was, of course, implicitly caveated by matters of relevance.[142]

When developing these principles in New Zealand, Tipping J stated in *Vector Gas* that:[143]

> The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be *relevant* to that question.

In *Firm PI 1*, the Supreme Court went back and adopted the *ICS* principles with the clearer representation of the relevancy caveat:[144]

[140] Evidence Act, s 7.
[141] At 547.
[142] *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2002] 1 AC 251, [2001] 1 All ER 961, [2001] 2 WLR 735 at [39].
[143] At [19] (emphasis added).
[144] At [60] (emphasised added).

> "While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as *relevant*. Accordingly, the context provided by the contract as a whole and any *relevant* background informs meaning."

This passage has been referenced in many New Zealand cases as a reflection of the fundamental features in the modern approach to contract construction.[145] Additionally, *Firm PI 1* justifies including 'commercial context' evidence during interpretation because of the relevancy principle: "the courts have accepted that understanding the commercial purpose of a commercial contract is *relevant* to its interpretation".[146]

Excluding evidence which is solely an assertion of an individual's perception of a contract's intended meaning under a relevancy enquiry may provide more clarity in judgments than an objectivity discussion. For example, instead of an objective assessment being the justification for different cases admitting *and* excluding prior negotiations,[147] the key objectivity principle excluding a single party's lone assertions could be characterised into a discussion of relevancy. *Robb v James* distinguished between evidence of the Robb's intentions and evidence presented on the shared intention of both parties, describing the latter as "the *relevant* intentions of Mr and Mrs Robb".[148] This is a much more palatable and transparent description than 'the permissible intentions following principles of objectivity'.

If there is a preference for an approach to contract construction that includes separate conceptions of admissible evidence across interpretation and rectification, relevancy can be used to communicate those differences succinctly. Tipping J, using interpretation in *Vector Gas* explained that "[a]lthough subjective evidence would be *relevant* if a subjective approach were taken to interpretation issues, the common law has consistently eschewed that approach".[149] Furthermore, in *Westland Savings Bank*, the Court applied the same distinction from rectification favoured in *Vector Gas* and said "… evidence was admitted which was relevant to rectification and estoppel but which would not have been admissible if the case had involved a point of construction alone".[150]

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[145] See *Portofino*, above n 126; *Green Growth No 2 Ltd v Queen Elizabeth Second National Trust* [2019] 1 NZLR 161; [2018] NZSC 75; *Sleight v Beckia Holdings Ltd* [2020] NZHC 1120 at [17].
[146] At 89.
[147] For example, *Bathurst*, above n 29, at [44]; C.f. *Tower Insurance Ltd v Nicon Ltd* [2019] NZCA 332 at [33].
[148] *Robb v James*, above n 19, at [33] (emphasis added).
[149] At [20].
[150] *Westland Savings Bank*, above n 19, at [25].

2. Reliability

Unlike relevancy, which has developed a more specific definition, reliability as a term does not inherently specify what aspect of evidence is deemed reliable. The term reliability is open textured in nature, similar to objectivity. There are inevitably mixed assessments, such as accuracy and trustworthiness, within a reliability enquiry. The Evidence Act may provide a level of assistance but, unlike 'relevance' in s 7, the Act provides no overarching definition.[151]

Dividing the reliability assessment for evidence of intentions into the *form* of the evidence and the *substance* of the evidence may be of assistance. Reliability in *form* may reflect the circumstances of presenting the evidence of intention during the proceeding, such as how the passing of time may affect the reliability of uncorroborated testimony. For example, during the contract construction process, the Court in *Kusabs v Staite* rejected intention testimony on the basis that the person's memory seemed unreliable.[152] Kós P in *Bathurst* also illustrated this point when he identified that "[w]hat parties have to say with the benefit of hindsight about their contractual intentions is unlikely to be either *reliable* or helpful".[153]

Evidence of intentions that is reliable in *substance* would refer to the ability of that evidence to represent the meaning of consensus, even at the time that consensus was reached. For example, the Court of Appeal in *Robb v James* agreed with the High Court findings that certain witnesses were more reliable than others, based on their veracity and propensity to be accurate.[154] But the underlying tone of the judgment was that Mr Robb's recollections of the events were unconvincing because they did not seem to a plausible exposition of the events.

Reliability may also fall into a relevance enquiry; evidence which is not reliable, particularly in *form*, may not have a "tendency to prove or disprove anything of consequence".[155] This means the evidence is irrelevant and, therefore, inadmissible.

[151] For examples of definitional contributions to 'reliability' in the Evidence Act 2006, see ss 16 and 28.
[152] *Kusabs v Staite* [2019] NZCA 420, at [73].
[153] At [42].
[154] At [63] and [69].
[155] Evidence Act, s 7.

Reliability may also contribute another specific element to be considered when weighing the admissible evidence. In *Westland Savings Bank v Hancock*, the judge found that the evidence of subsequent conduct in particular was a more reliable presentation of the parties' actual common intention and consensus than Mr Hancock's "unconvincing" testimony.[156] The possible existence of this reliability distinction may be reflected in *Tower Insurance*, which distinguished examining the credibility of competing evidence of intentions and determining what the actual common of the parties was.[157]

B. Rules-Based Admissibility

Using an evidentiary approach inspired by the Evidence Act does not prevent specifically developed 'rules' from contract principles from influencing what evidence a court can and cannot look at. For example, I have previously discussed how applying principles of objectivity in contract construction to restrict evidence from the court could be characterised as an exercise of rules-based admissibility. A rules-based approach is often associated with the traditional theories of contract law which used to include many strict rules such as the parole evidence rule.[158]

This section explores two mediums of law which have a strong, formalist, rules-based approaches to evidence when determine the intended meaning: registered instruments and legislation. I argue that the substantially different effect on third parties, and intrinsic public law elements, justify why a rules-based approach to evidence for intentions would apply in these instances. The different nature of general contracts may then suggest less concern with an approach that prefers probative value as the persuasive indicator.

1. Registered instruments

Constructing the meaning of registered instruments provides an interesting example of where rules-based admissibility is at the forefront of discussion, specifically on the admissibility of extrinsic evidence beyond the words of the instrument to prove an actual shared common

[156] At [28] and [29].
[157] At [33].
[158] Fish, above n 114.

intention. In *Lakes International v Vincent*, the Supreme Court was asked to consider an approach include extrinsic evidence and the Court responded that:[159]

> In any event, a conclusion that the material relied on by Mr Vincent is admissible would require an approach to the admissibility of extrinsic evidence which is more expansive than we would be prepared to accept.

Here, the extrinsic evidence was not available to the third parties who may have been relying on the registered instrument, and this was one of the main influences on the evidence's rejection.[160]

The Supreme Court addressed the admissibility of 'extrinsic' evidence of intentions again in *Green Growth No 2* and determined:[161]

> A very flexible approach to the admission of extrinsic evidence as bearing on the construction of registered documents will promote litigation and, as was recognised in *Westfield*, has the potential to *undermine the policy* of indefeasibility of title. On the other hand, if we were to adopt a rigid rule excluding such evidence, there will still be marginal cases which will have to be addressed and, in some instances, perverse outcomes, despite there being *no good reason* why, as between the parties to the dispute, the extrinsic evidence should be ignored.

The conflict appeared to be that matters of policy strongly suggest the exclusion of extrinsic evidence, even where there is relevant and reliable evidence.

The justification for having a strict, rules-based exclusion to extrinsic evidence is largely due to the nature of the registered instruments and their role for third parties.[162] The same argument comes up in the context of contracts, but there is not the same level of concentrated purpose with contracts. For example, the purpose of a registered interest on a property is to alert and inform interested third parties of equitable and proprietary interests. Third parties can then

[159] *Lakes International Golf Management Ltd v Vincent* [2017] NZSC 99; [2017] 1 NZLR 935 at [29].
[160] Don McMorland, "Green Growth in a Wider Context" (2019) NZLJ 168.
[161] At [73] and [74] (emphasis added).
[162] For more detailed discussion on the nuances of interpretation in registered instruments, see McMorland, above n 160; Matthew Barber "Problems with Westfield" (2013) 22 APLJ 143; M Barber and R Thomas "Contractual Interpretation, Registered Documents and Third Party Effects" (2014) 77(4) MLR 597; Don McMorland "The interpretation of registered documents" [2016] NZLJ 166; Simon Connell "Admissibility or weight?" [2016] NZLJ 304.

adapt their behaviour with the information they now have from the register. But no two contracts will innately affect third parties in a similar way. This breadth of creative possibility which advocates for probative value having more effect in ordinary contract construction than the reintroduction of strict rules.

2. Parliamentary intentions

The meaning of legislation "must be ascertained from its text and in the light of its purpose".[163] To some extent, Parliament's intentions are considered as a part of that purpose. Parliament's intentions are a particularly important purposive element when constructing legislation that may not address naturally occurring societal mischief. For example, Parliament's intentions are more obviously derived from a general societal consensus when enacting criminal legislation like the Crimes Act 1961 versus the penalties associated with tax avoidance in the Income Act 2007.

Thus, the boundaries of *evidence* for Parliament's intention are more commonly explored in areas like taxation and accident compensation and provide interesting insight for the same approach in contract law. What makes the situations interesting comparisons is that contract construction looks to the common intention between two parties. But there is only one entity when construing Parliament's intention. The difficulty in Parliament's intention becomes almost one of attribution or agency: what circumstances can rightly contribute to the intention?

In *NRS Media v CIR*, the Court of Appeal rejected the use of evidence from the Select Committee process to determine Parliament's intention behind a section on assessable income in the Income Tax Act 2007:[164]

> We also note that in her submissions the Commissioner relied in particular on correspondence from an individual taxpayer to the Select Committee as evidencing the type of expenditure Parliament had in mind when enacting s DB 55. We think that expands the net of legitimate interpretational material at least a step too far. Whatever may or may not have been the motivation of an individual taxpayer, or group of taxpayers, in seeking a particular amendment

[163] Interpretation Act 1999, s 5(1).
[164] *NRS Media Holdings Ltd v Commissioner of Inland Revenue (CIR)* [2019] 2 NZLR 19; [2018] NZCA 472 at [44].

> to the legislation does not, in our view, constitute relevant interpretational material, beyond the extent to which that material becomes part of the official Parliamentary record.

Looking to the Select Committee process may the something of an equivalent to accessing prior negotiations in contract construction. Rejecting evidence of a singular contribution to the process is similar to contract law's rejection of individual party's actual or apparent intention.

In *ACC v Ng*, the Court of Appeal rejected an affidavit from the Minister of ACC at the time of drafting the Accident Compensation Act 2001.[165] The affidavit described the intentions of parliament at the time of drafting the Act:[166]

> In our view the affidavit is plainly inadmissible. 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.

Once again, showing there may be some consistency between relevant intentions in contract and Parliamentary contexts.

The most important consideration when determining whether or not a certain instance can reflect a Parliamentary intention, is how publicly accessible is this evidence. As explained in *ACC v Ng*:[167]

> We add that it would be wrong in principle for the meaning of legislation to be ascertained by reference to material concerning legislative history that did not form part of the publicly available record of the process leading up to enactment of the legislation.

Similar to the effect on third parties with registered instruments, all of New Zealand is affected by legislation. It is the wide net of possibly effected people which makes the process of allowing evidence of intention more stringent. The scope of affected parties is not constitutive of contract law. Rather, it is the individual contract's context which controls how far and wide the contract will be effective. And it is possible that this width is often in the direct

[165] *Accident Compensation Corporation v Ng and "L*" [2020] NZCA 274 at [43].
[166] At [43].
[167] At [44].

contemplation of the contracting parties and, thus, becomes a part of the intention enquiry itself.

The context driven particularities of contract construction may make the strongest case for why a rules-based approach for *all* contracts is less necessary for the interests of justice. Certain cases with elements of this third party effect or public law nature may require the influence of these stricter rules. For example, the wider consequences of constructing a public insurance provider's policies in *Phoenix Engineering* may have influenced the more narrow approach to evidence of intentions in that case. Ultimately, an evidentiary approach to contract construction would still allow for these rules to be influential in certain instances, but the requirement for a blanket approach may be too demanding for the diversity of contract law.

C. After Admissibility: Introducing Presumptions to the Weighing Process

Weighing here refers to the process *after* admissibility, where each piece of admissible evidence is assigned a probative value. For example, the lower the level of relevance, the lower the weight assigned to that otherwise admissible evidence. After weighing the evidence, the judge will make their ruling based on the relative value of each side's evidence.

Things can get blurry between admissibility and weighing because there is a certain degree of overlap between the two processes. For example, evidence may be so unreliable that it is inadmissible or just reliable enough that it should have low probative value in the determination of the parties' actual common intention.[168] Either way, if the evidence is unhelpful, it does not matter whether it is excluded first or put to the side during a weighing process.[169] But even smaller or less valuable evidence can build strength in numbers, like acting as a "strand in the cable".[170] Waiting to remove evidence until a weighing process gives that evidence a chance to be useful.

1. Current approach to weighing evidence

[168] *Westland Savings Bank*, above n 19, at [28] and [29].
[169] *Portofino*, above n 126, at [36] and [49].
[170] *AG v Srathboss*, above n 95 at [477].

There is already great capacity for courts to capitalise on a more explicit weighing process. for discussing the probative value of evidence and balancing the evidence altogether to assist the judge's ruling.

When discussing probative value, as previously mentioned, it could also involve the same principles of relevance and reliability analysed during the admissibility process. In *Savvy Vineyards*, the court was "not assisted" by evidence from negotiations and determined that "little weight can be given" to the witnesses' recollections from 12 years ago "no matter how earnestly they may have been held".[171] This decision could be reframed under an evidentiary approach. The reframing could look like 'the evidence was admissible because it was relevant to the common intentions and minimally reliable admissible because of the trustworthiness of the witness'. 'But overall the evidence contributes a low probative value because the elapsed time since the negotiations makes it much harder to determine the extent of hindsight influencing the evidence'.

Identifying the weight and probative value of evidence is also a valuable tool during appeals. The appellant judges can easily refer to passages in the previous judgment, tangibly describe how they disagreed with a decision, and describe how the court will now the matter going forward. For example, the Court of Appeal in *Kusabs v State* disagreed with how the High Court's used certain evidence. The Court of Appeal said the evidence was "at best equivocal on the issue of common intention".[172] Additionally, analysis of weighing is not restricted to judges. In *Talleys Group*, the court felt that there was not enough substance in the evidence presented "to be relied on as evidence of common intention".[173]

The weighing stage in an evidentiary approach also includes the balancing process to determine how the relevant and reliable evidence reflects the actual common intention of the parties. The judge in *Marac Finance* provided a succinct explanation of a weighing process and the evidentiary decision ultimately made:[174]

[171] *Savvy Vineyards 3552 Ltd v Kakara Estate* Ltd [2014] NZSC 121; [2015] 1 NZLR 281 at [46].
[172] *Kusabs v Staite*, above n 152, at [89] and [99].
[173] At [51].
[174] *Marac Finance Ltd v Vero Liability Insurance Ltd* [2013] NZHC 2525 at [109].

> Whilst there are aspects of Mr Atkinson's conduct that are not consistent with an intention to cause Marac loss, after weighing them against the conduct that I have found to be dishonest I find that the overwhelming weight of evidence is towards that intent.

With a slight adaption, the weighing process could also be characterised as establishing whether the evidence of intentions has met the burden of proof to represent the common intention of the parties. This terminology seemed to be the preference in *Kusabs v Staite*.[175]

The balancing aspect to the weighing process may currently overlap with broader weighing processes of the court. The outcome of weighing evidence of intention can be disguised or even dissolved within the court's determination of the contract's overall meaning. The Court of Appeal in *Robb v James* described the High Court's decision to grant rectification as the outcome of "[w]eighing all these matters" where many of the matters were directly related to determining the actual common intention.[176] If it is overall clear how a decision was made and with what justifications, then a clearer distinction may not be necessary. The specific impact that evidence of intentions has on the final decision, however, should be transparent for the parties' personal satisfaction.

2. Examples of new presumptions in the weighing process

The weighing inquiry may be an appropriate environment for incorporating an Evidence Act section 8 style balancing act between the probative value of evidence and any unfairly prejudicial effects. We might find it hard to say that there is *unfairly* prejudicial evidence in contract construction cases that would warrant a general exclusion of certain evidence of intention. However, there is room to admit that some evidence has a potential for contract contextualised prejudice. For example, Anthony Grabiner has long advocated for a lesser reliance on evidence where a court is "invited to form its own view" of commercial common-sense.[177] It may be desirable to deal with evidence with low reliability, weaker relevance, and additional inflammatory elements that may not deservedly contribute to the persuasiveness of the evidence in a particular case.

[175] At [89] and [112].
[176] At [28].
[177] Grabiner, above n 102, at 54 – also see 48 and 55.

Parties to contracts can be natural or legal persons. Various agents can be involved in the contract's negotiation processes, and there can be additional advisers providing guidance along the way. The particular variety of actors in each case will influence how a party's intention is proven; the evidence of intentions in contracts between two natural persons will be very different to the intention evidence from contracts between companies.[178] In situations with multiple entities contributing to the intention of the party, it is not just an issue of measuring whether they have a relevant or reliable contribution. Some types of communication used to impart intention are more inherently prone to mistakes. Contract construction may benefit from placing a higher presumptive weight on evidence of intention the closer a person is to being the actual operating mind and will of the party.

There are undeniable, additional issues when there are various actors that overall contribute to the personality of a legal entity. The most obvious rationale for treating certain evidence more stringently is because of the possible additional complications with agency and attribution.[179] There is also opportunity for those actors within the personality to have conflicts with other duties they may hold to other entities. For example, *Kusabs v Staite* involved a contract for a lease between two trusts, and a negotiator for one trust was a trustee for both trusts.[180] A breach in fiduciary duty would likely have tainted the intentions presented in negotiations. Where the actual intention of a party is inherently more difficult to identify, let alone verify, we may have good reason to presumptively rest less weight on that evidence's ability to prove an actual common intention.

Additionally, the courts have displayed noticeable discomfort when oral evidence is relied on in contract construction, particularly in cases of interpretation. Actions seem to speak louder than words in contract construction.[181] *Talleys Group* determined that a statement of claim for rectification requires particulars on whether the evidence of the actual common intention was oral or in writing.[182] In *Portofino,* the judge specifically highlighted that in "rectification, unlike

[178] *Robb v James*, above n 19; c.f. *FSHC Group*, above n 37.
[179] See Bethany Mathers "Solving the corporate issue from Couch v Attorney General: how can legal persons be subjectively reckless?" (LLB (Hons) Dissertation, University of Otago, 2016).
[180] At [3].
[181] *Kusabs v Staite*, above n 152, at [66].
[182] At [49], [50] and [56].

interpretation, oral evidence is admissible" to prove an actual common intention not reflected in the written contract.[183] *Kusabs v Staite* had a similar assertion.[184]

These cases indicate how the courts see that oral evidence has an inherently questionable value, and this is likely because of the challenge of verifying the truthfulness of certain oral statements. Even with this discomfort, it would seem slightly absurd to exclude on principle all instances of oral evidence when the process of cross examination can act as the robust tester for minimally relevant and reliable elements. Creating a presumption that draws attention to the inherent veracity challenges of oral evidence may provide due attention to oral evidence without being unduly cautious.

These types of presumptions may provide a better way to deal with evidence of intention from prior negotiations. Many concerns with intention evidence from prior negotiations are then not inherent to prior negotiations as a category of evidence. Rather, they are the same concerns previously mentioned with oral evidence and the troubles with legal persons and their requirements for attribution or agency discussions. Implementing these presumptions may solve most of the concerns expressed over the admissibility of prior negotiations.

The admissibility concerns expressed specifically in the context of prior negotiations often make mention of the heightened risk of allowing 'one-sided' evidence into the construction process.[185] Traditionally, the principled reason for excluding prior negotiations was that the negotiation process was inherently a part of contract formation and, therefore, all material *before* the final consensus reached are inadmissible reflections of an individual party's intention.[186] But why should this fear of one-sided intentions rule out the *possibility* of valuable, probative intention evidence from negotiations? As David McLauchlan advocated, if we know what is minimally required for evidence of common intention, why should we stop parties from presenting evidence if they can prove it meets the necessary high threshold?[187]

[183] At [80].
[184] At [66].
[185] *Bathurst*, above n 29, at [44].
[186] Ernest Weinrib *The Idea of Private Law* (Harvard UP, Cambridge (Mass), 1995) at 137.
[187] McLauchlan, "Rectification Rectified?", above n 21.

Overall, this presumptive approach would help to better distinguish the negotiation ‘rally’ from the consensus and satisfy those who want prior negotiations in all aspects of contract construction and those who want the risks of prior negotiations recognised.

D. Conclusion

Explicitly referring to the relevance and reliability of evidence of intentions may centre the intentions of the parties more firmly within the judicial process of contract construction. This recentring is valuable regardless if the process ends up admitting or excluding evidence any differently than how it is currently.

Should a more dominant answer appear from to the ‘unionist’ versus ‘separatist’ debate, the evidentiary approach could provide a space for these admissibility rules. This space could also accommodate rules for certain types of contracts, such as the stricter evidentiary rules for registered instruments.

The introduction of a presumptive weighting for more cautionary elements during the weighing part of an evidentiary process may be the best way to recognise evidential concerns without concealing the potential value from certain types of evidence of intention, like prior negotiations.

IV. Evaluating a New Evidentiary Approach in Contract Construction and Beyond

The aim of introducing a new evidentiary approach would be for "the development of a coherent system of contract law entails decisions which are consistent with logic, justice and fairness as well as common sense".[188] This chapter evaluates the evidentiary-focused approach within contract construction. Then, I look at how this approach would contribute to broader contract law and beyond.

A. Justifying the Evidentiary Approach for Evidence of Intentions in Contract Construction

The modern approach to contract law has had a noticeable evolution towards contextualism and away from formalism. This evolution is entirely coherent when contract construction focuses on honouring the intentions of the contracting parties. Formal rules that restricted the use of 'extrinsic' evidence led to outcomes that were too removed from the reality of contracting and communicating generally.[189] A contextualist approach opens opportunities for evaluating each contract's circumstances and hopefully reach more satisfying outcomes for disputes. However, there are some contextual elements, particularly in their evidentiary manifestations, with consistently questionable value in a variety of circumstances.

While there may be good reasons for why an overly formalistic approach to evidence of intentions may 'cost' more than it would 'cure', a *presumptive* approach during the weighing process would recognise where a wariness should exist alongside appropriate flexibility for more nuanced cases. Creating a rebuttable presumption that some evidence is 'more equal than others' may utilise the benefits of judgment; Allowing a broad approach to admissibility while recognising where there are greater interests at stake.

Overall, there is no identifiable golden thread running through contract construction cases creating a uniform response to evidence of intentions. Admissibility discussions are frequently preoccupied by furthering preferences in the unionist versus separatist debate over engaging with the substance of the case at hand. Once admissible, judges may follow a weighing process

[188] Phang, above n 3, at 264.
[189] Fish, above n 114.

or they may not and the process may be spelled out or merely referenced when delivering a verdict on the meaning.

Retaining flexibility for parties to prove an actual common intention is valuable but having this flexibility in an initial admissibility stage has challenges. A flexible admissibility inquiry is too easy usurped for the wider contract construction agenda. While it is important to have an approach to evidence that furthers the advocator's preferred theory of contract construction, the wider interests of developing theory must be balanced against the direct interests of the parties in the case at hand. Shifting the influence of broader contract theory preferences to a weighing inquiry would be a more successful approach for achieving this balance. This could operate as simply as asking "what weight should be given to evidence derived from the factual matrix or to broader notions of commercial common sense?"[190]

B. How Would this Evidentiary Approach Improve the Modern Approach to Contract Construction and Contract Law Generally?

Going to court is not the only way for contract parties to solve their contractual disputes. There are always 'alternative' dispute resolution processes like negotiation, mediation, and arbitration. Therefore, there must be inherent additional value to going a judicial process beyond the court's dispute resolution mechanism. Catherine Mitchell referred to this additional feature as "standard setting", describing the enforceable principles and precedents.[191] When the standard set is "not concerned with the intentions of parties", then litigation "is addressed at meeting a fundamentally different set of purposes and policies" and the value parties see in litigation will fade.[192] Any approach which helps focus the construction process on the intentions of the parties, therefore, has inherent value in simple, distributional effects of the court's values.

An alternative solution to a presumptive weighing process could be to enforce a different process. Anthony Grabiner has advocated for an 'iterative' process to contract construction in the past.[193] This involved the enforcement of a step by step process starting with analysis of

[190] Grabiner, above n 102, at 46.
[191] At 149.
[192] At 149.
[193] At 45.

the plain meaning and moving through to the commercial context;[194] a simple contract construction recipe for a court to follow. Grabiner largely advocated for this process to keep judges acting within their best authority.[195] However, New Zealand has the series of *NZALPA* cases which highlighted the risks involved when plain meaning acts as filter on the construction process.[196] A weighing process would be more holistic;[197] Less like a recipe and more just focusing on using quality ingredients.

The language of law is important, and this dissertation identifies the need to improve the language of contract construction. Post-structuralist critiques identify how language itself is seldom neutral or axiomatic.[198] The choices innate in the use of language control who we can communicate with and what we can say.[199] Some of the more complex or opaque terms in contract construction, like the principles of objectivity, can act as a barrier.[200] This barrier may prevent a lay-person from fully understanding contract law, but it may also prevent those attune to the linguistics of contract construction from being fully empathetic to the lay-person's misunderstanding. This is not necessarily a unique problem to the law of contract, and there is no denying the accessibility improvements since adopting a more contextualist approach.

If we do not continue addressing the complexity of contract law and do not continue to offer possible solutions, Richard Susskind would argue that lawyers would be failing to uphold their side of a societal bargain.[201] This bargain describes a theory of how law operates in society. Lawyers are given the power to operate as a self-regulated profession, and enjoy the associated benefits, on the corollary that the profession regulates itself for the good of the public.[202] Additionally, judges may have the power to implement the legal arguments advanced during litigation, but it is the lawyers who have control over which arguments are advanced and whether these arguments seek to make change.[203] Lawyers not improving the accessibility of contract law may be interpreted as taking advantage of the self-regulation.

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[194] At 49.
[195] At 48.
[196] *NZALPA*, above n 14.
[197] Connell "Prescriptive and Holistic Contextualism", above n 52.
[198] See Michael Duggan and David Isenbergh, "Poststructuralism and the Brave New World of Legal Research" (1994) 86 LLJ 829.
[199] Carol Cohn, "Sex and Death in the Rational World of Defense Intellectuals" (1987) 14 Signs 687 at 690.
[200] Richard Susskind and Daniel Susskind "The Future of the Professions" (2018) 162 Proceedings of the American Philosophical Society 125 at 127.
[201] Susskind and Susskind, above n 200.
[202] Susskind and Susskind, above n 200, at 126.
[203] Pistor, above n 105, at 152.

The future of law is uncertain, including the roles of judgment and technology in contract construction disputes. In Canada, there have already been studies with the use of automated evidential weighting in the judgment of criminal trials.[204] Blockchain technology has conceived 'smart-contracts' for more certain transaction-focused agreements.[205] Richard Susskind predicts that the exponential growth of technology will see contracts and legal documents transform from bespoke services all the way to becoming complete commodities.[206] Whether or not these concerns eventuate, they raise interesting questions for how contract law, in particular contract construction disputes, will evolve. Addressing possible improvements now, even with analysis of non-technological improvement to judgment, keeps contact law evolving with society.

[204] Gerald Seniuk "Weighing evidence in criminal trials - computer assisted decision making" (2019) 66 CLQ 429.
[205] Pistor, above n 105, at 195.
[206] Richard Susskind *The End of Lawyers?* (Oxford University Press, New York, 2008).

V. Conclusions

I have shown many instances of tension with the intentions of the parties in modern contract construction. The uncertain boundaries between interpretation and rectification within contract construction leads to a great uncertainty for the role of evidence of intentions. Without a definite structure for either interpretation or rectification, the entry point for intention evidence is unclear. The objectivity terminology used to guide the assessable evidence of intentions can be muddling. Opacity in the judicial process when examining the intentions may not adequately honour the valid intentions of the contracting parties.

To relieve some of this tension, I proposed the addition of an evidentiary-focused approach for judicially analysing the evidence of intentions. This approach encourages the use of evidentiary language from the Evidence Act, specifically the terms admissibility, weighing, relevance and reliability. Using evidentiary terms allows for judges to recognise the quality of intention evidence in each case, enhancing a contextualist approach, while allowing for other formalist rules to come into the mix should contract construction need them.

The main benefit to this evidentiary-focused approach is that it centralises the intentions of the parties. The approach opens a space for discussing the features of relevant intention in contract construction, like whether communications of intention can be unexpressed and remain valid in the contract construction process. Shifting from terms like objectivity and focusing on relevance and weighing can hopefully introduce more transparency into judgments. Overall, it could improve the general accessibility of contract construction for the public and shows that contract law is open to evolving wherever the future may take it.

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