

# So Obvious It Goes Without Saying?

An Argument for the Singaporean Approach  
to the Implication of Terms in Fact

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## Table of Contents

I Introduction .....	4
II The Classical Approach .....	6
A Interpretation .....	6
B Implication.....	8
1 The classical approach to implication summarised by the threefold framework .....	11
III The Contemporary Position: Changing Tides and the Great Divergence.....	13
A Interpretation: 1990's – Present: Changing Tides.....	13
1 <i>ICS</i> and the modern approach to contract interpretation .....	13
2 Post <i>ICS</i> Developments .....	15
B Implication: The Great Divergence .....	17
1 <i>Belize Telecom</i> - The Unitary Approach .....	18
2 The Singaporean Approach .....	22
3 <i>Marks and Spencer</i> - The English Approach.....	27
4 Summary of the Great Divergence .....	29
IV Evaluation and Selection Criteria.....	31
A Reconciliation: Why the Circle Cannot be Squared.....	31
B Why the Singaporean Approach Should be Adopted in New Zealand .....	33
1 Coherence .....	34
2 Workability.....	36
3 Suitability.....	39
V Conclusion .....	42
Bibliography .....	44
Appendix.....	49

## *I Introduction*

*Attorney General of Belize v Belize Telecom Ltd (Belize)* has transformed the law of implication of terms in fact from well settled to highly contentious.<sup>1</sup> Terms implied by fact are terms that, despite not being expressed by the parties, are still part of the contract. They can occur when the express terms of a contract offer no guidance on a situation, leaving a gap in the contract. The substantive content of such a term arises from the presumed intentions of the parties.<sup>2</sup>

The debate in implication revolves around the decision in *Belize*, but in distinct ways. Firstly, whether *Belize* represents a change in the law of implication. Secondly, the desirability of any change *Belize* represents. There is also a further issue of what subsequent cases stand for themselves. The reason the debate in implication has been so contentious is because there has been a failure to distinguish these arguments. This arises from the absence of a consistently applied conceptual framework. This dissertation will use a consistent framework to assess the different approaches to implication. This framework breaks the analysis into three distinct, but related questions:

- 1) Is there a distinction between express terms and implied terms?
- 2) Are the principles of interpretation and implication distinct?
- 3) What is the specific methodology for the implication of a term?

This dissertation is in five chapters. Chapter Two will set out the understanding of implication before *Belize*. This is referred to as the classical approach because it precedes the current debate initiated by *Belize*. Chapter Three will set out the differing approaches to implication that have emerged following *Belize*. These are the unitary approach, the Singaporean approach and the English approach. This is referred to as the Great Divergence due to the emergence of different approaches to implication. Chapter Four will evaluate these approaches and conclude that the Singaporean approach is preferable.

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<sup>1</sup> *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] BCC 43 [*Belize*].

<sup>2</sup> In contrast with terms implied by law, which are imposed upon a contract by statutory or common law policy imperatives (see *Geys v Société Générale* [2013] 1 AC 523 (CA) at [55].) Terms implied by law have different sources and principles than terms implied by fact. This dissertation is solely about terms implied by fact and references to ‘implication’ herein mean implication of terms implied in fact.

It is an appropriate time to consider the issue of implication in New Zealand. The law remains very unclear at the appellate court level.<sup>3</sup> Moreover, trial courts are asking for guidance,<sup>4</sup> or recognizing the lack of clear authority.<sup>5</sup> This situation should be remedied.

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<sup>3</sup>*Mobil Oil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89 at [76] – [81]; *BDM Grange Ltd v Trimex PTY Ltd* [2017] NZCA 12 at [67]; Matthew Barber “Implied terms” [2013] NZLJ 238 at 240; Simon Connell “Interpretation and implication” [2017] NZLJ 71 at 72.

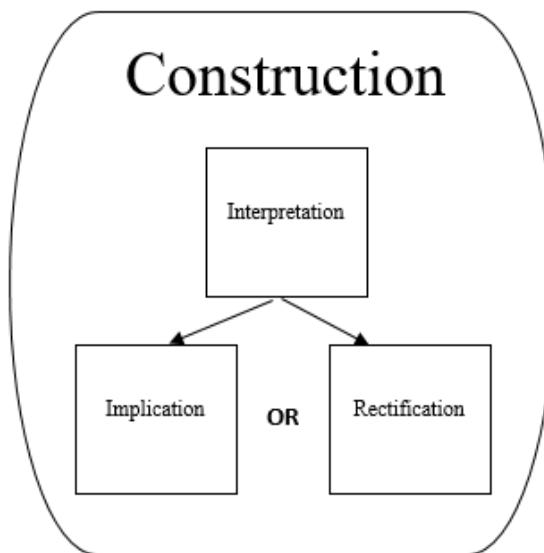
<sup>4</sup> *The Rintoul Group Ltd v Far North District Council* [2017] NZHC 1132 at [26] – [29].

<sup>5</sup> *Body Corporate 74246 v QBE Insurance (International) Ltd* [2017] NZHC 1473 at [47] – [48].

## *II The Classical Approach*

Understanding the current debate in implication requires an understanding of the enormous changes that occurred in ‘construction’ in the latter half of the 20<sup>th</sup> Century.<sup>6</sup> Construction, in the law of contract, is an umbrella concept and is concerned with determining the meaning of a document.<sup>7</sup> Within construction, in the classical approach, were three distinct areas of law with distinct rules: Interpretation, Implication and Rectification. These areas had a clear order of occurrence. Interpretation necessarily preceded both implication and rectification. Interpretation set out the meaning of the contract given the express terms. From there, implication could fill gaps left by interpretation with implied terms. Rectification could correct an interpretation not in accordance with the parties’ true intentions.

Figure 1: Classical Conception of Construction



### *A Interpretation*

Interpretation is about determining the meaning of the expressions used by the parties in a contract.<sup>8</sup> In the classical approach there were two central rules of interpretation: The parol evidence rule and the plain meaning rule. The parol evidence rule was a rule of evidence in

<sup>6</sup> John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th Ed, LexisNexis, Wellington, 2012) at 190 – 193.

<sup>7</sup> Margaret Kniffin *Corbin on Contracts* (Revised Edition): Interpretation of Contracts (Lexis Law Publishing, Charlottesville, 1998) vol 5 at [24.3].

<sup>8</sup> At [24.1].

contract disputes. It prevented a court from using extrinsic evidence to interpret the contract.<sup>9</sup> The plain meaning rule made a court adopt the natural and ordinary meaning of the words used in the contract.<sup>10</sup> There were exceptions to the rules, such as the ‘Private Dictionary’,<sup>11</sup> and the ‘Trade Usage’ exceptions.<sup>12</sup> These allowed the parties to define terms or use a specific context where those words were not used in accordance with their plain meaning. In a situation where the ordinary meaning of a document was ambiguous, the court could use extrinsic evidence. This may arise due to irreconcilable provisions in the contract or simply poor drafting making a sentence incomprehensible. This evidence could then be used to determine the meaning of the words used by the parties. These interconnected rules and exceptions made interpretation a narrow exercise that placed a lot of importance on dictionaries and grammar.<sup>13</sup>

In the 1970’s, Lord Wilberforce’s ‘factual matrix’ initiated an acceptance of contextual analysis.<sup>14</sup> The factual matrix emphasised that the purpose and circumstances of a contract’s formation are important considerations when a court is interpreting a contract.<sup>15</sup> This would appear to be a repudiation of the parol evidence and plain meaning rules at first sight. However, courts treated the factual matrix as subordinate to those rules.<sup>16</sup> Use of the factual matrix was often limited to deciding between equally open interpretations rather than being part of the process of interpretation.<sup>17</sup> Use of the factual matrix to completely depart from the plain meaning of the document tended to be where a party was opportunistically trying to get out of a contract.<sup>18</sup> Interpretation remained a rule based exercise until 1997.<sup>19</sup>

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<sup>9</sup> David McLauchlan “The New Law of Contract Interpretation” (2000) 19(2) NZULR 147 at 147; Simon Connell “Admissibility or weight?” [2016] NZLJ 304 at 304.

<sup>10</sup> McLauchlan “The New Law of Contract Interpretation”, above n 9, at 147; Connell “Admissibility or weight?”, above n 9, at 304.

<sup>11</sup> *The Karen Oltman* [1976] 2 Lloyds Rep 708 (QB) at 712.

<sup>12</sup> Kniffin, above n 7, at [24.8]; *Hutton v Warren* (1836) 1M & W 466 (Exch) at 475-475.

<sup>13</sup> Burrows, above n 6, at 190 - 191.

<sup>14</sup> *Prenn v Simmonds* [1971] 1 WLR 1381 (HL); *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 3 All ER 570 (HL).

<sup>15</sup> *Prenn*, above n 14, at 1384-1356; *Reardon Smith Line Ltd*, above n 14, at 574.

<sup>16</sup> Burrows, above n 6, at 191; see also *Benjamin Developments Ltd v Robert Jones (Pacific) Ltd* [1994] 3 NZLR 189 (CA) at 199.

<sup>17</sup> *Benjamin Developments Ltd*, above n 16, at 203.

<sup>18</sup> In *Prenn*, business partners fell out and one sought to use a power to erode the profits of a firm to prevent a conditional share transfer. In *Reardon Smith*, the 1973 Arab Oil Embargo collapsed the market for oil tanker charters, leaving Reardon facing large losses and wanting to get out of its charter party contract.

<sup>19</sup> Johnathon Sumption, Law Lord of the United Kingdom Supreme Court “A Question of Taste: The Supreme Court and the Interpretation of Contracts” (Harris Society Annual Lecture, Keble College, Oxford, 8 May 2017): “But Lord Wilberforce’s statement of this principle was deliberately restrained. He was not proposing to use the surrounding circumstances as an alternative way of discovering the parties’ intentions”.

## B Implication

Implication's role in construction relates to situations where there is a 'gap' in the contract. A gap is where the express terms of a contract do not provide for circumstances that arise. It would be impossible for contracts to provide for every potential circumstance.<sup>20</sup> Implied terms are about gaps that risk undermining the functionality of the contract.<sup>21</sup> It is not simply feeling aggrieved with, or being surprised by, how the contract apportions such a consequence. There are two important things to note about the classical approach to implication. Firstly, and strongly linked to the order in which they occur, the ability for a gap to exist is determined by the limits of interpretation. These gaps occur due to the parol evidence and plain meaning rules preventing interpretation from finding a meaning that covers the gap. Secondly as interpretation could not cover this circumstance, implication must be doing something beyond interpretation. This makes the process inherently more 'dangerous' than interpretation because there is a lack of words.<sup>22</sup> A court runs the risk of rewriting the bargain of the parties because it is not constrained by the objective indicators of the parties' text and its plain meaning.<sup>23</sup> This risks undermining core values like freedom of contract and security of contract.

In the classical approach, two tests emerged and came to dominate the theory and practice of implication. The first of these was the business efficacy test from *The Moorcock*.<sup>24</sup> The issue was whether there was an implied term warranting the safety of a berth from the wharfingers to the ship.<sup>25</sup> The berth required the ship ground at low tide. When grounded the condition of the riverbed damaged the hull of the ship.

Lord Justice Bowen considered that implied terms arise from what the parties "must obviously have intended".<sup>26</sup> This maintains the cardinal rule of English contract law that a court is concerned only with the objectively ascertainable intentions of the parties, not their subjective desires.<sup>27</sup> The business efficacy test captures these presumed intentions. The test was satisfied if the implied term "gave business efficacy to the transaction" in the sense that it allowed the contract to function. This was because the parties are presumed to be reasonable business men who, while having antagonistic interests, want the transaction to succeed and "prevent a failure

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<sup>20</sup> Adam Kramer "Implication in fact as an Instance of Contractual Interpretation" [2004] 63(2) CLJ 384. at 387.

<sup>21</sup> Burrows, above n 6, at 219.

<sup>22</sup> *Hamlyn & Co Ltd v Wood & Co* [1891] 2 QB 488 (CA) at 494 - 495.

<sup>23</sup> *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 (CA).

<sup>24</sup> *The Moorcock* (1889) 14 PD 64 (CA).

<sup>25</sup> At 64.

<sup>26</sup> At 68. This is the precursor to the modern phrase 'the presumed intentions of the parties'.

<sup>27</sup> *Smith v Hughes* (1871) LR 6 QB 597 at 607.

of consideration".<sup>28</sup> The court needs to assess the commercial purpose of the contract and whether an implied term is needed to fulfil that purpose. Being the presumed intentions of the parties means an implied term is an implicit part of the bargain. This is an important conceptual point. An implied term is not imposed on a contract, it already exists within the contract and reflects the implicit allocation of risk. The concern is to hold the parties to their bargain, but a court will not rescue a contract or refashion it in the name of fairness. The essence of the test is, ‘but for this implied term, would the contract function?’.

The business efficacy test was further developed in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd*,<sup>29</sup> the focus was on the threshold of the business efficacy test. The implied term needed to give the minimum efficacy necessary.<sup>30</sup> This was arguably implicit in *The Moorcock* seeking to prevent a “failure of consideration”, but it does reinforce that an implied term will only deliver the minimum level of functionality to a contract. The threshold of necessity was defended by the House of Lords in *Liverpool City Council v Irwin*.<sup>31</sup> In the Court of Appeal, Lord Denning MR had argued for reasonableness to replace necessity as the threshold for an implied term.<sup>32</sup> This was firmly rejected in favor of necessity.<sup>33</sup>

The second test to emerge was the “Officious Bystander” test in *Shirlaw v Southern Foundries (1926) Ltd*.<sup>34</sup> Lord Justice McKinnon was concerned about the quality of the analysis in the business efficacy test.<sup>35</sup> His Lordship emphasised the need for careful consideration of the contract to determine if a term was ‘so obvious it goes without saying’. The officious bystander test was created to aid in this evaluation. The test was that a court would not be wrong to imply a term in the following scenario: If at the time of contracting an officious bystander was to suggest the implied term as an express term to the parties, they would testily suppress him with an “oh of course!”.<sup>36</sup> The testiness comes from it being ‘so obvious it goes without saying’ that such a term was part of the contract. There are two things worth noting here. Firstly, this test is like the business efficacy test in that it seeks to find something implicit in the agreement, but efficacy and obviousness are different concepts. Efficacy is focusing on making the contract work. Things that are ‘so obvious they go without saying’ will often be about making the contract work, but they are not necessarily. The second is that the bystander is officious rather than

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<sup>28</sup> *The Moorcock*, above n 24, at 68.

<sup>29</sup> *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592.

<sup>30</sup> At 605.

<sup>31</sup> *Liverpool City Council v Irwin* [1977] AC 239 (HL).

<sup>32</sup> *Liverpool City Council v Irwin* [1975] 3 WLR 663 (CA) at 669 – 672.

<sup>33</sup> *Liverpool City Council*, above n 31, at 253.

<sup>34</sup> *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206.

<sup>35</sup> Frank McKinnon, Lord Justice of the English Court of Appeal “Some Aspects of Commercial Law” (London School of Economics, London, 3 March 1926).

<sup>36</sup> *Shirlaw*, above n 34, at 227.

reasonable. Where the reasonable person gets subtlety, nuance and context, the officious bystander does not. The unsolicited advice in need of testy suppression is evidence of that. This factor is used to reinforce how obvious such a term must be.

While these two tests were widely accepted, they were poorly understood.<sup>37</sup> This uncertainty took many forms. The tests were uncertain due to the rather vague terms used: What is the minimum efficacy in any contract dispute? What is it to be officious rather than reasonable? More importantly, this uncertainty also occurred in the relationship between the tests.<sup>38</sup> Were they cumulative, requiring satisfaction of both? Are they alternates as they do fundamentally the same thing? The position was uncertain, and the tests were not applied in a consistent manner.<sup>39</sup>

This uncertainty continued until 1977 when the Privy Council restated the law of implication in *BP Refinery (Westernport) Proprietary Limited v The President, Councillors and Ratepayers of the Shire of Hastings*.<sup>40</sup> Lord Simon set out five criteria for an implied term:<sup>41</sup>

for a term to be implied, the following conditions (which may overlap) must be satisfied:

- 1) it must be reasonable and equitable;
- 2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- 3) it must be so obvious that “it goes without saying”;
- 4) it must be capable of clear expression;
- 5) it must not contradict any express term of the contract.

The business efficacy and officious bystander tests were subsumed into this framework through criteria two and three respectively. This is an important development because it set an unambiguous relationship between the tests. They are cumulative requirements, so an implied term must satisfy both the business efficacy test and the officious bystander test. This places the tests on an equal footing and makes them distinct inquiries.

*BP Refinery* remained the leading case in implication until *Belize*. The caselaw does reveals some developments within implication though. Australia adopted *BP Refinery* in 1979,<sup>42</sup> but

<sup>37</sup> *Foo Jong Peng v Phua Kiah Mai* [2012] SGCA 55, [2012] 4 SLR 1267, at [27]; Richard Hooley “Implied Terms After Belize Telecom” (2014) CLJ 73(2) 315 at 323.

<sup>38</sup> *Foo Jong Peng*, above n 37, at [34].

<sup>39</sup> Kramer, above n 20, at 395 and 396; David McLauchlan “Construction and implication: In defence of Belize Telecom” [2014] LMCLQ 203 at 226.

<sup>40</sup> *BP Refinery (Westernport) Proprietary Limited v. The President Councillors and Ratepayers of the Shire of Hastings (Victoria)* [1977] UKPC 13, [1994] 180 CLR 266 (PC).

<sup>41</sup> At 283.

<sup>42</sup> *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 (HCA).

diverged to a ‘flexible’ version of it in *Byrne v Australia Airlines Ltd*.<sup>43</sup> This approach accepts *BP Refinery*, but does not consider it the universal test for implication. The cumulative elements of *BP Refinery* are appropriate where a contract sets out to govern the entire relationship of the parties.<sup>44</sup> This intention makes strict adherence to *BP Refinery* appropriate.<sup>45</sup> Where the contract is oral or does not attempt to set out the full parameters of the relationship, the cumulative criteria are inappropriate. The presumed intentions of the parties are to allow the relationship to develop as events occur. The contract in *Byrne*, which was archetypal of a non-exhaustive relationship, was an employment contract.

England did not follow Australia in specifically limiting the scope of *BP Refinery*, but the reasoning in implication cases in the late 1990’s and early 2000’s did not follow the five criteria strictly. *Equitable Life Assurance Society v Hyman* did not even cite *BP Refinery*.<sup>46</sup> It instead preferred Lord Hoffmann’s judgment in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*.<sup>47</sup> The analysis in *Equitable Life Assurance Society* revolved around the construction of the contract and “strict necessity”.<sup>48</sup> *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* considered that the *BP Refinery* criteria were the abstract guiding principles, but that their “simplicity” could be deceptive.<sup>49</sup> The substantive reasoning in *Philips Electronique* also heavily focused on the construction of the contract.

### *1 The classical approach to implication summarised by the threefold framework*

As to the first and second questions, in the classical approach to implication, the answer would be a yes. The distinction of express terms and implied terms is an explicit premise of *The Moorcock* and is carried forward into later cases.<sup>50</sup> The distinction comes from express terms dealing with the words the parties used. In contrast, implied terms deal with the distinct absence of the parties’ words. The ability to recognise a gap in the contract comes from there being such a distinction.

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<sup>43</sup> *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 (HCA).

<sup>44</sup> At 442.

<sup>45</sup> John Carter “The implication of contractual terms: problems with *Belize Telecom*” (2013) 27(3) CLQ 3 at 4.

<sup>46</sup> *Equitable Life Assurance Society v Hyman* [2000] Pens LR 249 (HL).

<sup>47</sup> *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 (HL).

<sup>48</sup> *Equitable Life Assurance Society*, above n 46, at [29].

<sup>49</sup> *Philips Electronique Grand Public SA*, above n 23, at 481.

<sup>50</sup> *The Moorcock*, above n 24, at 68 per Bowen LJ: “Now, an implied warranty, or as it is called, a covenant in law, as distinguished from an express contract or express warranty”; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 (HL) at 137; *BP Refinery*, above n 40, at 284; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 (HCA) at 346; *Philips Electronique Grand Public SA*, above n 23, at 481.

As to the second question, this distinction between express and implied terms also links to the justification for the distinction between the principles of interpretation and implication. If interpretation is about dealing with the meaning of the words used by the parties, it cannot extend to a situation where there is an absence of words as interpretation must be exhausted before implication can begin. This argument, that implication proceeds “*ex hypothesi*” the absence of express terms, is the classic justification for this distinction.<sup>51</sup> Moreover, the parol evidence and plain meaning rule support this too. These rules prevent the interpretive process being applied to these gaps. Furthermore, the standards are different in interpretation and implication. Interpretation uses reasonableness whereas implication uses necessity.<sup>52</sup>

As to the third question, in the classical approach the methodology for an implication was a multifactorial test. This was undeniably the case after *BP Refinery*. The five criteria are a list of mandatory considerations to evaluate, but there is no set methodology as to how a court goes about considering them. The criteria need not be assessed in a predetermined order. In the period preceding *BP Refinery*, the business efficacy and officious bystander tests came to dominate the thinking. Given the elements of the tests, the methodology could be fairly described as multifactorial. The tests did not prescribe the way a court must go about those tests application.

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<sup>51</sup> *Philips Electronique Grand Public SA*, above n 23, at 481.

<sup>52</sup> *Liverpool City Council*, above n 31, at 253; *Equitable Life Assurance Society*, above n 46, at [29].

### *III The Contemporary Position: Changing Tides and the Great Divergence*

This Chapter will assess the contemporary state of interpretation and implication. It will primarily focus upon implication and a period referred to as the Great Divergence. The initial discussion of interpretation is necessary to understand the debate in implication.

#### *A Interpretation: 1990's – Present: Changing Tides*

*There's a sign on the wall  
But she wants to be sure  
'Cause you know sometimes words have two meanings*

*Stairway to Heaven (1971)  
Led Zeppelin*

#### *1 ICS and the modern approach to contract interpretation*

*Investors Compensation Scheme Ltd v West Bromwich Building Society Ltd (ICS)* ushered in the modern era of contract interpretation.<sup>53</sup> Whilst there had been an increasing use of context, interpretation remained controlled by the parol evidence and plain meaning rules.<sup>54</sup> *ICS* blew everything out of the water and turned the classical approach to interpretation on its head. Lord Hoffmann gave the leading judgment, setting out five principles of interpretation.<sup>55</sup>

These five principles are a dramatic departure from the classical approach interpretation. His Lordship frames the analysis as a mere restatement of Lord Wilberforce's judgments in *Prenn* and *Reardon Smith Line Ltd*.<sup>56</sup> They are anything but.<sup>57</sup> Principles 1 and 4 undo the plain meaning rule. Interpretation is not about the linguistic meaning of the text, but the meaning a fully informed reasonable person would come to.<sup>58</sup> Principles 1 and 2 are the opposite of the

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<sup>53</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28, [1997] PNLR 541 [*ICS*].

<sup>54</sup> *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] CLC 1124 (HL) at 1137-1139; Sumption, above n 19: "Lord Diplock's pronouncement was not taken at face value. Although frequently cited, it was regarded as an uncharacteristic expletive".

<sup>55</sup> *ICS*, above n 53, at 559 – 560. See Appendix for the five principles set out in full.

<sup>56</sup> At 559.

<sup>57</sup> McLauchlan "The New Law of Contract Interpretation", above n 9, at 148; Paul Davies "Recent developments in the law of implied terms" [2010] LMCLQ 140; John McCaughran "Implied Terms: The Journey of The Man on The Clapham Omnibus" (2011) CLJ 607 at 610; Richard Buxton "'Construction' and rectification after *Chartbrook*" (2010) CLJ 253 at 256; Anthony Grabiner "The Iterative Process of Contractual Interpretation" (2012) 28 LQR 41 at 44.

<sup>58</sup> McLauchlan "The New Law of Contract Interpretation", above n 9, at 152.

parol evidence rule. The courts will always consult the background context and that consists of “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man”.<sup>59</sup>

There are three important changes to note here. Firstly, the exception has become the rule. Context is always consulted to inform the meaning of the contract rather than being inherently excluded unless certain conditions are met. Secondly the method of interpretation has been reversed. Interpretation is no longer based around rules with exceptions but upon general principles. Thirdly this modern approach raises questions about whether the other parts of construction, implication and rectification, remain distinct areas of law. Interpretation would appear to be performing all the functions of construction in finding out what the document means, leaving no room for implication and rectification. *Chartbrook Ltd v Persimmon Homes Ltd* is an important indicator of how interpretation would appear to have no conceptual limit.<sup>60</sup> Lord Hoffmann considered that:<sup>61</sup>

What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.

Professor Hugh Collins has called this view of interpretation “committed contextualism”.<sup>62</sup> It is the belief that context is the ultimate arbiter of the meaning of a contract. This is a dramatic change from the classical approach:<sup>63</sup>

What is not-text determines how much weight should be attributed to the text. 'Text matters' is not a basic principle of interpretation in a contextualist approach; it is a product of the context. The context may determine that the text is all-important, or of little importance at all, or somewhere in the middle. For the committed contextualist, ultimately it is only context that really matters.

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<sup>59</sup> *ICS*, above n 53, at 560.

<sup>60</sup> *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2010] 1 P&CR 9 (2000) 162 at [14], [37].

<sup>61</sup> At [25].

<sup>62</sup> Hugh Collins “Objectivity and Committed Contextualism in Interpretation” in Sarah Worthington (ed) *Commercial Law and Commercial Practice* (Hart Publishing, Portland, 2003).

<sup>63</sup> At 193.

## 2 Post ICS Developments

*ICS* became the leading case on contract interpretation in England and New Zealand.<sup>64</sup> The nature and emphasis of which *ICS* principles are given the most weight has altered over time.

### (a) Tide Runs In

New Zealand adopted *ICS* and the modern approach to interpretation in 1999. The Supreme Court reaffirmed this position in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.<sup>65</sup> The judgment has been criticised for its lack of clarity as to the principles of interpretation.<sup>66</sup> Despite this it was an affirmation of the modern approach to interpretation. More importantly, the leading judgment in the lower courts' view was that of Tipping J.<sup>67</sup> His Honour endorsed the most extensive use of context.<sup>68</sup>

England moved in a similar direction with *Chartbrook*. It was litigated at a similar time to *Vector Gas* too. Whilst slightly later, *Rainy Sky v Kookmin Bank* and *Aberdeen City Council v Stewart Milne Group Ltd* fit this pattern too.<sup>69</sup> *Aberdeen City Council* is a useful demonstration of this style of interpretation. There, the council sold land to Stewart Milne Group, subject to a profit-sharing agreement. If the land was later sold, the council would be entitled to a percentage of the 'Gross Sale Proceeds'. These were defined as "the aggregate of the sale proceeds of the Subjects received by the Purchasers for the Subjects".<sup>70</sup> This would appear to make the profit-share calculation solely relate to the money 'received' for the land. The company sold the land to a related company resulting in no 'Gross Sale Proceeds'. The majority found that the definition of 'Gross Sale Proceeds' included a hypothetical arms-length sale in the absence of a genuine market transaction because other defined terms included a hypothetical transaction.<sup>71</sup> The context

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<sup>64</sup> New Zealand: *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA).

<sup>65</sup> *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5.

<sup>66</sup> Jessica Palmer and Andrew Geddis "What Was That Thing You Said? The NZ Supreme Court's Vexing *Vector Gas* Decision" (2012) 31 UQLJ 287.

<sup>67</sup> *Trustee Executors Ltd v QBE Insurance Ltd* [2010] NZCA 608 at [30] - [33]; Mathew Barber "Contractual Interpretation" in Mary Rose-Russel and Mathew Barber (eds) *The Supreme Court of New Zealand* (Thomson Reuters, Wellington, 2015) 171 at 181.

<sup>68</sup> *Vector Gas Ltd*, above n 65, at [13] - [18]; Jeremy Johnson "Contract: missed opportunity?" [2010] NZLJ 50 at 54.

<sup>69</sup> *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Aberdeen City Council v Stewart Milne Group Ltd (Scotland)* [2011] UKSC 56.

<sup>70</sup> *Aberdeen City Council*, above n 69, at [7].

<sup>71</sup> At [16]: "These three approaches appear, as I have said, to be mutually exclusive. But the context tends to indicate that they have one thing in common. This is that the base figure is to be taken to be the amount which the subjects would fetch in a transaction that was conducted at arms-length in the open market. This is expressly provided for in the case of a buy out, in which event a valuation of the subjects must be undertaken. This is also provided for expressly in the case of a lease. No mention is made of a valuation exercise in the case of a sale. But a sale at arms-

used in *Aberdeen City Council* arose from the text rather than extrinsic context as in *Vector Gas*.<sup>72</sup> Despite this, *Aberdeen City Council* still represents committed contextualism. The court was willing to use the *Chartbrook* red ink to deviate from the plain meaning of the words used by the parties. It is also a challenge to the law of implication. These facts more resemble a gap in the contract, the parties overlooking a related party sale, than an issue of interpretation. Lord Clarke's judgment considered the issue to be one of implication.<sup>73</sup> Of interest is that the court seemed to take this difference as being a matter of taste and did not seem too concerned by it.<sup>74</sup>

#### (b) Tide Runs Out

*Vector Gas*, *Chartbrook* and *Aberdeen City Council* are examples of committed contextualism that defined interpretation in the post *ICS* era. This took an expansive view of interpretation in their willingness to use context in a way that is hard to reconcile with the words used by the parties. However, recently there has been a consistent movement against such a view of interpretation.<sup>75</sup> There had been an earlier movement towards plain meaning in contracts that third parties rely on such as registered instruments.<sup>76</sup> *Arnold v Britton* initiated the United Kingdom's move to strong focus on text and plain meaning in contracts more generally.<sup>77</sup>

In New Zealand, the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* restated the principles of interpretation.<sup>78</sup> The majority judgment reemphasised the role of the language that the parties used:<sup>79</sup>

While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning,

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length is usually taken to be the best evidence of the value of the subjects in the open market. On this view there was nothing more to be said about the base figure in the event of a sale, other than that it was to be the gross sale proceeds".

<sup>72</sup> *Vector Gas Ltd*, above n 65, at [22]; See also Burrows, above n 6, at 194.

<sup>73</sup> *Aberdeen City Council*, above n 69, at [31].

<sup>74</sup> At [32] – [33].

<sup>75</sup> Yihan Goh "From Context to Text in contractual interpretation: Is there really a problem with the plain meaning rule?" (2016) 45(4) CLWR 298 at 300.

<sup>76</sup> Rohan Havelock "Common Sense in Contractual Construction" LMCLQ 174 at 177; *Re Sigma Finance Corp* [2009] UKSC 2, [2010] 1 All ER 571; *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305.

<sup>77</sup> *Arnold v Britton* [2015] UKSC 36, [2015] 2 WLR 1593 at [17] – [23].

<sup>78</sup> *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.

<sup>79</sup> At [63]. The majority judgment was from McGrath, Arnold and Glazbrook JJ. The minority judgment consisted of Elias CJ and William Young J. They did not feel the need to discuss the principles of interpretation beyond the need to consider the contract objectively in its statutory context. The minority took a different view as what the provisions of the contract meant as a matter of interpretation.

that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

This places greater weight on the plain meaning of the text than Tipping J's judgment in *Vector Gas*.<sup>80</sup> *Firm PI* is not a repudiation of the modern approach though. It is arguably putting more emphasis on the fifth principle of *ICS*. A more plain meaning focused approach would appear to be the consensus.<sup>81</sup> In *Lakes International Golf Management Ltd v Vincent* the Supreme Court reemphasised this position.<sup>82</sup> A recent dissent of Glazebrook's J has created some uncertainty,<sup>83</sup> particularly as the majority judgment does not clearly articulate its principles of interpretation.<sup>84</sup> On the other hand, there are two very clear decisions by the Supreme Court endorsing a more conservative and plain meaning focused approach to interpretation.<sup>85</sup> This is a rejection of committed contextualism.

### *B Implication: The Great Divergence*

In implication, this dissertation refers to the contemporary period as the Great Divergence. This period begins with *Belize* and continues to the present. This period has been called the Great Divergence because the consensus of the classical approach to implication, explained above, has broken down. There are now a variety of competing conceptions of implication. This is an interesting point of contrast to interpretation where the changes within that area of law have been broadly uniform, hence the tide analogy used. This seems to be reflective of implication dealing with the absence of words and how conceptually challenging that is for contract law, being the law of private agreement. There is far more room for debate and far more risk of inappropriate intrusion by the court in an implication dispute.

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<sup>80</sup> Havelock, above n 76, at 177 - 178.

<sup>81</sup> David McLaughlan "The *ICS* Principles: A Failed "Revolution" In Contract Interpretation?" (2016) 27(2) NZULR 263 at 264; Havelock, above n 76, at 177-178; Goh, above n 75, at 298 - 302.

<sup>82</sup> *Lakes International Golf Management Ltd v Vincent* [2017] NZSC 99 at [28].

<sup>83</sup> *New Zealand Air Line Pilots' Association Incorporated v Air New Zealand Ltd* [2017] NZSC 111, (2017) NZELR 402 at [190]: "If the Court of Appeal meant by this that plain meaning prevails unless it clearly is displaced by the background, this fails to recognise the more symbiotic nature of the relationship between words and background. A court's task is to identify what a "reasonable person having all the background knowledge which would reasonably have been available to the parties" would have understood them to be using the language in the contract to mean" per Glazebrook J. Her Honour's dissent in this case, but participation in the majority of *Firm PI* has been a further source of confusion.

<sup>84</sup> At [71] – [79].

<sup>85</sup> *Firm PI*, above n 78, at [63]; *Lakes International Golf Management Ltd*, above n 82, at [28].

## *1 Belize Telecom - The Unitary Approach*

### (a) Facts

The facts of *Belize* are outlined as they are useful in assessing the differences between the approaches that have emerged in the Great Divergence. *Belize* was a dispute over the articles of association of Belize Telecommunications Ltd, which was created to partially privatise telecommunications services.<sup>86</sup> Belize Telecommunications Ltd had a special share that along with a certain number of ordinary shares, gave the holder the right to appoint and remove two members to the board of directors.<sup>87</sup> The special share was initially held by the government. Belize Telecom Ltd acquired it and the necessary ordinary shares to appoint two directors to the board. It later surrendered the special share to the government as it defaulted on loans. This resulted in nobody holding the share qualifications to remove those two directors under the articles of association.<sup>88</sup> It would appear that those directors could not be removed until a subsequent party met the qualifications.

### (b) Law

*Belize* was a unanimous decision of the Privy Council delivered by Lord Hoffmann.<sup>89</sup> His Lordship's analysis begins with reference to the court's role in any construction dispute:<sup>90</sup>

The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed.

His Lordship identifies the type of situations where an implied term could occur. This is where the express terms of the contract do not provide for the situation. The facts of *Belize* are a good

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<sup>86</sup> *Belize*, above n 1, at [1].

<sup>87</sup> At [2].

<sup>88</sup> At [12].

<sup>89</sup> The Board of the Privy Council consisted of Lord Hoffmann, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood.

<sup>90</sup> *Belize*, above n 1, at [16].

example. The articles did not specify whether those specially appointed directors were removed when their appointor no longer meet the qualification. As His Lordship notes:<sup>91</sup>

The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.

Despite this, in some instances the reasonable person would understand the parties to have agreed to something different, notwithstanding its lack of expression.<sup>92</sup> This reference, to the reasonable person's view, is what is most controversial about *Belize*. His Lordship stated that in any implication dispute:<sup>93</sup>

There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

The final branch of His Lordship's argument is that this one question is not only the fundamental conceptual principle governing implication, but also the practical basis on which to imply a term. The two traditional tests and the *BP Refinery* criteria, are potentially helpful thought experiments. Their primary purpose though is to assist in answering the one question. Such tests came at a risk of becoming a distraction to the one question.<sup>94</sup>

### (c) Application

Was there an implied term that such directors were removed when their appointor no longer meet the qualification? The articles gave no guidance on this type of situation. Lord Hoffmann considered there was an implied term removing such directors.<sup>95</sup> His Lordship notes that the "overriding purpose of the machinery of appointment and removal of directors, namely to ensure that the board reflects the appropriate shareholder interests in accordance with the scheme laid out in the articles".<sup>96</sup> Given this purpose of control being reflective of the interests within the company, an implication was necessary to achieve a board representative of the stakeholder interests in the company.

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<sup>91</sup> At [17].

<sup>92</sup> At [18].

<sup>93</sup> At [21].

<sup>94</sup> At [25].

<sup>95</sup> At [30] - [31].

<sup>96</sup> At [32].

#### (d) Controversy

The controversy in *Belize* is over what it means and whether that is desirable. There are a range of views on this. Some argue it is a fundamental shift in the law for the worse,<sup>97</sup> some consider it a fundamental shift in the law for the better,<sup>98</sup> and some see it as no change at all.<sup>99</sup> There are two viable understandings of what *Belize* means for implication. By viable this dissertation means that they are understandings which a court could accept. Which understanding is accepted will depend upon how much weight is attached to His Lordship's analysis of the one question or the claim that it was merely an orthodox restatement.

The first understanding is the unitary approach. This would be putting a greater weight on the one question analysis. Here, the answer to the first question of the threefold framework would be a yes. Lord Hoffmann's judgment maintains the classical approach's distinction of express terms and implied terms being recognisably different things.<sup>100</sup> Express terms are about determining the meaning of the words used by the parties, whereas implied terms are about gaps in the contract. As to the second question, the answer would be a no. This makes *Belize* a change in the law of implication. While they are recognizably different categories, the principles of interpretation and implication are the same because of the one question and the reasonable person's view of an implied term's presence. The corollary of this is that the classic tests are not requirements, but heuristic rules of thumb.<sup>101</sup> They do have a place as a helpful thought experiment. As to the third question, the methodology could be called a unitary approach, hence the name of this understanding. This represents the fact that the methodology for the implication of a term is working from the same principles as the interpretation of a term. It is all part of the one question "of what does the document mean?". While the unitary approach uses the reasonable person's view of an implied term's presence, this does not signal a more permissive approach to implications.<sup>102</sup>

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<sup>97</sup> Davies, above n 57, at 144; McCaughran, above n 57, at 614 - 618; *Foo Jong Peng*, above n 37, at [32];

<sup>98</sup> Grabiner, above n 57, at 41; Hooley, above n 37, at 347; David McLauchlan "Construction and implication: In defence of *Belize Telecom*", above n 39, at 240; Andrew Robertson "The Limits of Interpretation in the Law of Contract" (2016) 47 VUWLR 191 at 207.

<sup>99</sup> *Marks and Spencer plc v BNP Paribas Security Services Trust Company (Jersey) Ltd* [2015] UKSC 72 at [22] - [31].

<sup>100</sup> *Belize*, above n 1, at [17]: "The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls".

<sup>101</sup> Kramer, above n 20, at 404.

<sup>102</sup> *Belize*, above n 1, at [18], [25] and [27].

The second understanding of *Belize* is simply the classical approach to implication. On this view *Belize* does not represent a change in the law of implication. *Belize* emphasised that implication is a matter of construction as prior cases have done.<sup>103</sup> This would be putting a greater weight on Lord Hoffmann's claim of it being an orthodox restatement.

There are two understandings of *Belize* worth discounting. The first of these is a stronger version of the unitary approach. This would consider that there is no true distinction between express and implied terms because the process of determining the meaning of text requires evaluation of both simultaneously.<sup>104</sup> It is all simply a matter of what the document means, so there is no useful distinction to draw in this meaning being express or implied. This is a very radical idea that is more in the domain of linguists than lawyers. Whilst neither Adam Kramer, nor Stanley Fish have argued that this is what *Belize* means, it is an argument that could be extended from their writings as to the nature of language and the law.<sup>105</sup> *Belize* is incapable of being construed as standing for this given Lord Hoffmann's statement that "The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs".<sup>106</sup> Nor would there appear to be any judicial appetite for such a view either given the consistent pattern of judicial statements asserting such a distinction.<sup>107</sup>

The other understanding is a strawman version of *Belize* that it stands for mere reasonableness being the threshold for implying a term.<sup>108</sup> This argument confuses a term that would be reasonable to imply into a contract with a term that the reasonable person would accept is implied into the contract despite its non-expression. The first is an inappropriately more permissive standard given the discussion of necessity and its role in implication. Lord Hoffmann's statements as to the rarity of implying a term demonstrate that mere reasonableness is not the threshold His Lordship is setting out.<sup>109</sup> The reasonable person's view builds in the inherent resistance to an implied term because people feel strongly that the contract sets out all the terms of the agreement.

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<sup>103</sup> At [19] - [20], citing *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601 at 609 (HL); *Equitable Life Assurance Society*, above n 46, at [29].

<sup>104</sup> Kramer, above n 20, at 387.

<sup>105</sup> Kramer, above n 20, at 403 – 404; 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) 141.

<sup>106</sup> *Belize*, above n 1, at [17].

<sup>107</sup> See discussion in, above n 50.

<sup>108</sup> Davies, above n 57, at 144; *Foo Jong Peng*, above n 37, at [32]. Sumption, above n 19, "The problem about the process of construction described by Lord Hoffmann in *Investors Compensation Scheme* is that it is in reality a process of implication but without reference to the concept of necessity. When combined with his analysis in *Belize*, it is tantamount to allowing terms to be implied on the ground that they are commercially reasonable and must therefore have been intended".

<sup>109</sup> *Belize*, above n 1, at [18], [25] and [27].

Having set out *Belize* and the differing understandings of it, this dissertation will now go on to consider the differing judicial responses to it that have occurred in different jurisdictions.

## 2 The Singaporean Approach

The Singapore Court of Appeal considers *Belize* stands for the unitary approach and heavily criticises it in *Foo Jong Peng v Phuia Kiah Mia*.<sup>110</sup> The court then develops a new methodology in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*.<sup>111</sup> These create the Singaporean approach. In terms of the threefold framework, *Foo Jong Peng* answers the first two questions and *Sembcorp* proceeds to answer the third question.

The Singaporean approach bundles together the answer to the first and second questions of the threefold framework. The distinction between express terms and implied terms necessarily leads to the difference in the principles of interpretation and implication. Whilst both exist under the umbrella of construction, they are different conceptions of construction. The order that interpretation and implication occur necessitates such a distinction:<sup>112</sup>

implication of terms proceeds, ex hypothesi, on the absence of an express term of the contract. Hence the implication of a term, whether in fact or in law involves tests as well as techniques that are not only specific but also different from those which operate in relation to the interpretation of documents in general and the (express) terms contained therein in particular.

This ‘specific’ and ‘different’ basis of implication is the presumed intentions of the parties and necessity. This stricter threshold is used due to the lack of express terms as there is a risk of the court rewriting the bargain of the parties.<sup>113</sup>

The court recognises there is some fairness in the scepticism of a distinction between the presumed intentions and the reasonable meaning of the words. These are similar concepts, but the court rejects the idea of such a distinction being impossible or simply inserting its own view.<sup>114</sup> “The cardinal (and guiding) principle” is that a court “will not re-write the contract”.<sup>115</sup> This unfair scepticism comes from post-modern legal critiques that consider law’s rules,

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<sup>110</sup> *Foo Jong Peng*, above n 37.

<sup>111</sup> *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43, [2013] 4 SLR 193.

<sup>112</sup> *Foo Jong Peng*, above n 37, at [31].

<sup>113</sup> At [33].

<sup>114</sup> At [34].

<sup>115</sup> At [34].

language and institutions inherently indeterminate.<sup>116</sup> Post-modern critiques confuse the goals of a legal system with its means. Substantively fair outcomes are the goal, but legal, linguistic and grammar rules set boundaries that cannot be arbitrarily manipulated by a court in pursuit of fair outcomes.<sup>117</sup>

As to the third question, there is a three-stage methodology:<sup>118</sup>

- 1) Evaluation of the silence on the issue.
- 2) Use of the business efficacy test to find the gap.
- 3) Use of the officious bystander test to find the term to fill the gap.

Step 1). Like Lord Hoffmann in *Belize*, The Singapore Court of Appeal consider that implied terms can only arise when a contract fails to specify what is to happen in certain circumstances.<sup>119</sup> It considers that there are three different ways that a contract can come to be silent on an issue:<sup>120</sup>

- a) The issue was not contemplated by the parties.
- b) The issue was contemplated by the parties, but the parties mistakenly believed they had resolved it through the term they put in the contract.
- c) The issue was contemplated by the parties, but they could not come to an agreement and proceeded to contract anyway.

Focusing on how the silence occurred provides an effective way to evaluate the presumed intentions of the parties. Only type (A) gaps are candidates for implication as the presumed intentions of the parties do not prevent a term being implied. This is a “true gap” in the contract.<sup>121</sup> An example of this type of gap are the facts of *Belize*. The parties did contemplate this right to appoint and remove directors being transferred, but they did not contemplate a situation where someone ceased to have this right without someone acquiring it.

In contrast, for type (B) and (C) gaps the presumed intentions of the parties cannot support an implied term. For type (B) gaps the issue is one of rectification as the claim is that the terms do not reflect the actual intentions of the parties. The presumed intentions of the parties could only

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<sup>116</sup> Andrew Phang “Doctrine and Fairness in the Law of Contract” (2009) 29(4) LS 534 at 536 – 537.

<sup>117</sup> At 535 - 536.

<sup>118</sup> *Sembcorp Marine Ltd*, above n 111, at [101].

<sup>119</sup> At [29].

<sup>120</sup> At [94].

<sup>121</sup> At [94].

be for that term to operate. In type (C) gaps the parties have contemplated that situation, but failed to agree on a term to deal with it. The presumed intentions of the parties, if that situation was to occur, must be that no term will be implied because they considered the issue and proceeded regardless.

Step 2). While the first step identifies a “true gap”, an implied term does not necessarily follow. The first step is only concerned with how the silence occurred, not its effect. The business efficacy test brings the concept of necessity to the analysis. The business efficacy test in the Singaporean approach takes on a different functional role than was articulated in the classical approach. In the classical approach, before *BP Refinery* at least, the implied term needed to give business efficacy to the contract.<sup>122</sup> The Singaporean approach reverses the focus of the test. The assessment of business efficacy is on the “true gap” identified at the first stage rather than the term added. The test identifies “the existence of a lacuna... for the sake of the efficacy of the contract something more needs to be added into the contract”.<sup>123</sup> If the gap makes the contract lack business efficacy, the business efficacy test is satisfied. In practice this requires the court to do two things. Firstly, to discover through the objectively ascertainable evidence what the parties were trying to achieve. Secondly, the court must determine whether the gap thwarts that purpose. The threshold remains one of necessity, because if the contract remains “commercially workable” the business efficacy test will not be satisfied.<sup>124</sup> The focus at this stage is whether the purpose of the contract is defeated by the gap. A court aims to hold parties to their bargain, it will not enhance a disappointing but functional bargain.<sup>125</sup> The facts of *Foo Jong Peng* are illustrative of how the business efficacy test works in practice.

In *Foo Jong Peng* the proposed implied term was for the governing body of an incorporated society to be able to remove a member it had lost confidence in. There were no express powers of removal in the articles of association except in instances of misconduct. There were also biyearly elections to the governing body by the general membership. Taking the gap in the contract as given, did the inability to remove such a member undermine the functionality of the governing body? The purpose of the articles, as to the governing body, was to set out a framework to manage the association’s affairs. The court accepted that such a term may be desirable. It could lead to a better administered society, but such a term could not satisfy the business efficacy test. The governing body remained functional in the absence of such a term. It

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<sup>122</sup> See prior discussion of the business efficacy test in Chapter II.B.

<sup>123</sup> *Sembcorp*, above n 1, at [91].

<sup>124</sup> At [84].

<sup>125</sup> At [88].

was still able to administer the society's affairs.<sup>126</sup> Simply being more desirable was not sufficient.

The business efficacy test has a commercial focus.<sup>127</sup> It envisions such efficacy as the minimum needed between antagonistic commercial parties, but the context may allow for some other "external normative standards".<sup>128</sup> The more important point is that the test tries to put a court in the right mindset as it goes about the implying a term. The difficulty of determining the minimum efficacy is acknowledged.<sup>129</sup> The safeguard is "found in the conservatism which ensures a court will not rewrite the contract for the parties based on its own sense of what is fair".<sup>130</sup>

Step 3). The third step is to apply the officious bystander test. In the Singaporean approach this test is distinct, but complementary to the business efficacy test. The business efficacy test is more general in that it considers the purpose of the contract and whether that is thwarted by such a gap. The officious bystander test is about the specific contents of an implied term that remedies this failure. The court must consider how the objectively reasonable versions of the parties, the idealised incarnations, would react to the officious bystander's question: would the parties respond with a testy "oh of course!"? The test is not as loose as it first may appear. The officious bystander test is complementary because the nature of the response will be informed by the business efficacy test:<sup>131</sup>

The role of the officious bystander is simply to suggest a term, and the true test is whether the parties themselves would suppress that suggestion with a common 'Oh, of course!'. Whether the parties would so suppress the officious bystander can only be decided with a normative reference point, and it is suggested that the 'business efficacy' test here guides the parties' response to the officious bystander. Thus, only if a court thinks that the parties would, out of necessity for business efficacy, suppress the officious bystander's suggestion with those famous words, would the court imply the term concerned.

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<sup>126</sup> *Foo Jong Peng*, above n 37, at [46].

<sup>127</sup> At [33].

<sup>128</sup> *Sembcorp*, above n 111, at [99].

<sup>129</sup> At [91].

<sup>130</sup> At [88].

<sup>131</sup> Andrew Phang and Yihan Goh *Contract Law in Singapore* (Wolters Kluwer Law and Business, Singapore, 2012) at [1063].

### (a) The Singaporean Approach in Practice: *Sembcorp*

*Sembcorp* is a good illustration of how the Singaporean approach operates in practice. *Sembcorp* was a dispute between joint venture partners Sembcorp Marine Ltd and PPL Holdings Pte Ltd over a Joint Venture Agreement (JVA). The partners were initially equal shareholders in a joint venture company. The JVA gave each the right to appoint three board members. PPL later sold most of its shares to Sembcorp, retaining a 15% stake in the company. Sembcorp then appointed three additional directors to the board. The relationship continued amicably, but later soured after PPL disclosed confidential information to another company. Sembcorp's nominee directors then purported to remove the PPL's nominee directors from the board.

Under the JVA, Clause 5 split control of the joint venture company between the partners. An initial issue over the scope of Clause 5.1 was resolved as a matter of interpretation. Clause 5.1 gave equal board membership for "so long as they shall hold such number of shares for the time being in the capital of [PPL Shipyard] as are not less than the proportions set out herein". Equality on the board ended when equal shareholding ended. The subsequent implication dispute was whether an implied term extinguished the rest of Clause 5 once equal shareholding ceased. The JVA appeared to maintain PPL's rights within the joint venture company regardless of its shareholding.

Step 1). PPL's rights of equal control over the company, regardless of the number of shares it held, was a type (A) "true gap". The parties had constructed a series of rights to guarantee equal control over the company. This could initially appear to be a Type (B) gap, with Clause 5.1 as a matter of interpretation, not being able to perform its intended function of extinguishing all equal rights. The court considered that the parties had turned their minds to the consequences of a change in shareholdings in Clause 5.1 in so far as board representation. The parties had genuinely overlooked the consequences of the rest of Clause 5.

Step 2). The business efficacy test was satisfied here. The court considered the commercial purpose of the JVA. The JVA's purpose was to divide control of a joint venture company between two equal shareholders. This gap resulted in the JVA lacking business efficacy. Firstly, the construction of clause 5.1 indicated this. As a matter of interpretation, the entitlement to equal board rights ended when the parties no longer had equal shareholdings in the company. Continuation of other provisions guaranteeing equality whilst equality on the board ceased was illogical and defeated the purpose of apportioning control in the company through issuing shares. Secondly, the principles of company law implied that such a result lacked business efficacy too. Shareholding represents a right of control in a company proportionate to the number of shares

held. PPL maintaining a right of control that was completely disconnected from shareholding undid the commercial purpose of the JVA.<sup>132</sup> The presumed intentions of these commercial parties would be for shareholding to fulfil its ordinary function unless clearly abrogated. This reasoning is very similar to Lord Hoffmann's discussion in *Belize* as to the "overriding purpose of the machinery" in a company.<sup>133</sup>

Step 3). If an officious bystander had asked "Will the rest of Clause 5 stop working if equal shareholding ends?", would the parties respond with a testy "oh of course!"? The facts suggest their idealised incarnations would have. Clause 5.1, as a matter of interpretation, extinguished equal representation on the board of directors when the shareholding proportions changed. Given this equality of representation was connected to equality of shareholding, "oh of course!" the other clauses giving equal rights in the company would be extinguished too. Equal control is linked to equal shareholding in this contract because of the role of shareholding generally.

### 3 Marks and Spencer - *The English Approach*

England restated its law of implication in *Marks and Spencer plc v BNP Paribas Security Services Trust Company (Jersey) Ltd.*<sup>134</sup> This forms a very important part of the Great Divergence as it sets out an understanding of implied terms that differs from both the unitary approach and Singaporean approach. There are two judgments within *Marks and Spencer* that take irreconcilable views of the law. Firstly, there is the majority judgment of Lord Neuberger.<sup>135</sup> This approach to implication will be referred to as the English approach. Secondly there is the judgment of Lord Carnwath which adopts the unitary approach.<sup>136</sup> Given this conclusion, no further analysis of Lord Carnwath's judgment is merited.

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<sup>132</sup> *Sembcorp*, above n 111, at [119].

<sup>133</sup> *Belize*, above n 1, at [32].

<sup>134</sup> *Marks and Spencer*, above n 99.

<sup>135</sup> Lord Sumption and Lord Hodge in agreement.

<sup>136</sup> *Marks and Spencer*, above n 99, at [69]: "On this point also I see no reason to depart from what was said in *Belize*. While I accept that more stringent rules apply to the process of implication, it can be a useful discipline to remind oneself that the object remains to discover what the parties have agreed";

At [70]: "Nor do I agree that support for such a division can be found in the judgments referred to by Lord Neuberger: that is, the judgments of the Master of the Rolls in the *Philips* case, and of this court in *Aberdeen City Council*";

At [74]: "In conclusion, while I accept that Lord Hoffmann's judgment has stimulated more than usual academic controversy, I would not myself regard that as a sufficient reason to question its continuing authority. On the contrary, properly understood, I regard it as a valuable and illuminating synthesis of the factors which should guide the court".

(a) The English approach: the majority judgement of Lord Neuberger

The analysis of the first two questions in the threefold framework is indistinguishable from that of the Singaporean approach. The majority in *Marks and Spencer* consider that there is a distinction between express and implied terms and that this distinction informs the difference in the principles that govern interpretation and implication. The discussion of how implication proceeds “ex hypothesi” the absence of express terms is the same as *Foo Jong Peng*.<sup>137</sup> The majority judgment is a rejection of the unitary approach of *Belize*.

The Singaporean and English approaches diverge over what they consider *Belize* stands for. The Singaporean approach considers that *Belize* stands for the unitary approach. In contrast, the English approach considers that *Belize* stands for the classical approach. Firstly, the English approach asserts that *Belize* did not represent any ‘dilution’ of the threshold for the implication of a term.<sup>138</sup> Secondly, the English approach then argues that the principles of interpretation and implication have not been unified by Lord Hoffmann.<sup>139</sup> Finally, the English approach sidelines the discussion of the principles of implication in *Belize*. Lord Hoffmann had engaged in “characteristically inspired discussion rather than authoritative guidance on the law of implied terms”.<sup>140</sup>

This difference in opinion as to what *Belize* stands for leads to a larger difference between the Singaporean and English approaches on the third question. The Singaporean approach creates new staged methodology. The English approach reaffirms the criteria of *BP Refinery* and its multifactorial approach.<sup>141</sup> Lord Neuberger also adds six observations to the criteria of *BP Refinery*. These place significant weight on cases like *Philips Electronique* and *Equitable Life Assurance Society*, where *BP Refinery* is cited as the guiding principle rather than the specific methodology to be closely followed. The six additional observations can be paraphrased as:<sup>142</sup>

- 1) A court is concerned about the idealised parties’ intentions, not the actual parties’ subjective intentions.
- 2) Terms being ‘fair/reasonable’ are a necessary but not a sufficient condition for implication.

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<sup>137</sup> *Marks and Spencer*, above n 99, at [27] – [30].

<sup>138</sup> At [24].

<sup>139</sup> At [26].

<sup>140</sup> At [31].

<sup>141</sup> At [21].

<sup>142</sup> At [21].

- 3) The first criterion of *BP Refinery* in being ‘reasonable and equitable’ will usually follow the satisfaction of the rest of the criteria.
- 4) Criteria two (business efficacy) and three (officious bystander) can be alternate rather than cumulative requirements.
- 5) Care is needed when forming the question for the officious bystander.
- 6) Business efficacy is value judgement, while a high level is needed, it need not be absolute, with a ‘lack of practical or commercial coherence’ being sufficient.

Observations one, two and five are restatements of orthodox implication principles. But three and four are substantive changes to the cumulative framework of *BP Refinery*. The business efficacy and officious bystander tests can now be alternates circumstances.<sup>143</sup>

#### *4 Summary of the Great Divergence*

The impact of *Belize* on the law of implication is highly contested. The threefold framework has highlighted some interesting elements of the contemporary debate. As to the first question, there is agreement as to when an implied term can occur.<sup>144</sup> An implied term could occur where the express terms of the contract do not deal with the occurrence of an event.<sup>145</sup> The unitary, Singaporean and English approaches all agree that such a distinction does exist. The Great Divergence is then a debate over the second and third questions. As to the second question, the disagreement on the principles of implication see the Singaporean Approach and English approaches diverge with unitary approach. The former consider that the principles of implication are distinct from interpretation. The latter does not. There is even more disagreement as to the third question. All conceptions propose differing methodologies. The unitary approach proposes the one question of the reasonable person’s view, the English approach proposes a multifactorial test and the Singaporean Approach is a staged analysis. This is a debate over how a term is implied, not where a term could be implied.

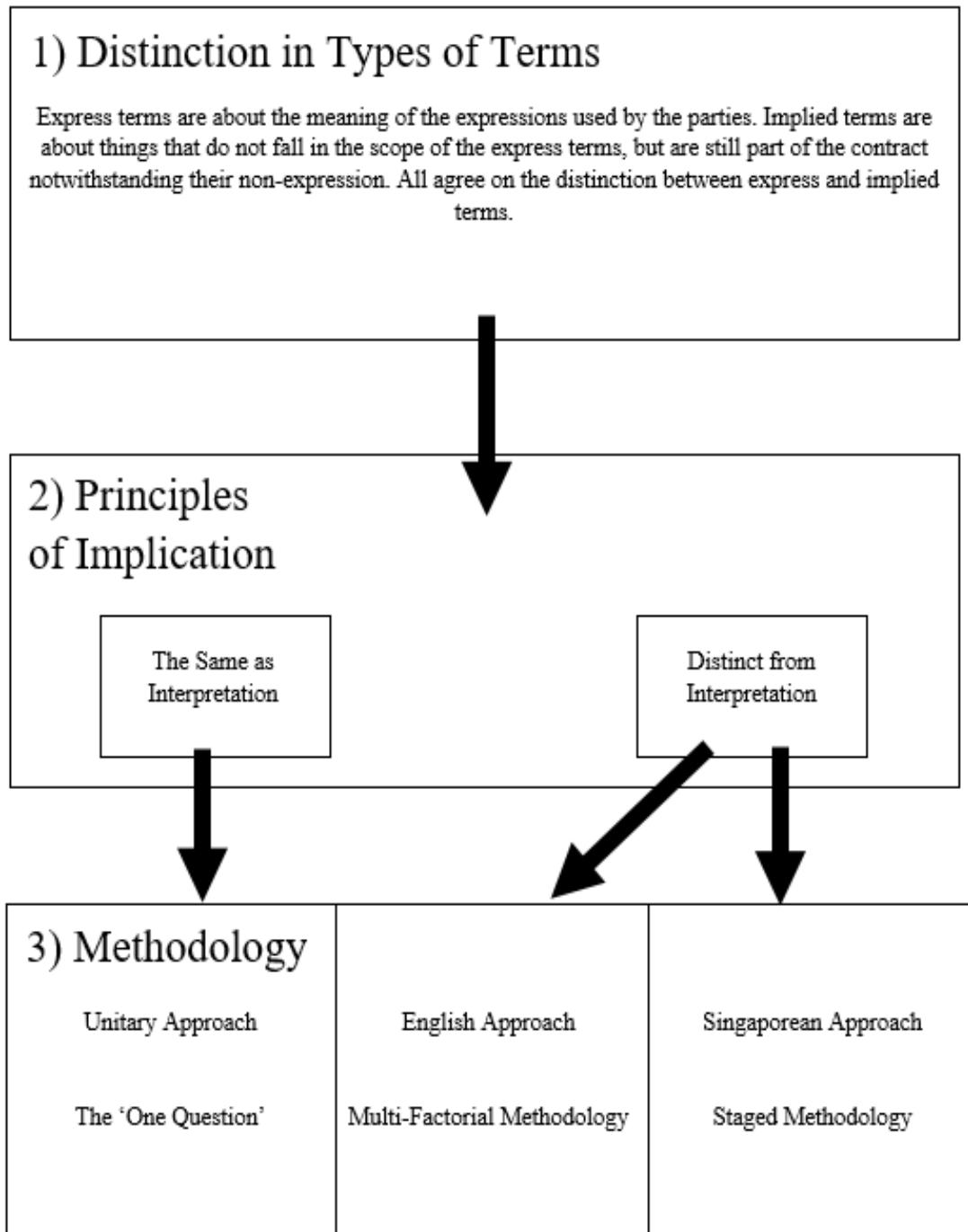
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<sup>143</sup> At [21].

<sup>144</sup> This could also be framed as an acceptance of what constitutes an implied term.

<sup>145</sup> *BP Refinery*, above n 40, at 283; *Belize* above n 1, at [17]; *Foo Jong Peng*, above n 37, at [27]; *Sembcorp Marine Ltd*, above n 111, at [29]; *Marks and Spencer*, above n 99, at [14] – [16].

Figure 2: Summary of the Great Divergence



## *IV Evaluation and Selection Criteria*

*“A Time for Choosing”*

*Address in Support of Barry Goldwater*

*Ronald Reagan*

*October 27, 1964*

As was set out in Chapter Three, the unitary approach, Singaporean approach and the English approach define the Great Divergence. Whilst there are disagreements between these approaches, there are areas of agreement too. These approaches all accept the distinction between an express term and an implied term, and accept that implied terms arise from the presumed intentions of the parties. These two propositions are connected as the need to rely on the presumed intentions of the parties arises from the lack of express terms to infer meaning from.

The first part of Chapter Four will assess whether the differing approaches can be reconciled. If the positive elements of the mooted models can be combined into a superior hybrid framework that would be a preferable option. It will be argued that this is impossible on a proper understanding of each approach.

The second part of Chapter Four will determine which approach is preferable. This analysis will use three criteria to evaluate the different approaches. This will conclude that the Singaporean approach is the framework New Zealand should adopt because it offers the best approach to implication.

### *A Reconciliation: Why the Circle Cannot be Squared*

The strongest argument for reconciliation would be the one that follows. The three different approaches are manifestations of the same fundamental idea, that implied terms relate to gaps in the contract and are discovered through the presumed intentions of the parties. The approaches are not mutually exclusive, but simply operating on differing levels of abstraction. The most abstract of these arguments is the unitary approach. The one question analysis is simply setting out that an implication dispute is a dispute over what the contract truly means. This approach sets out what the fundamental concern of implication is. The English approach is less abstract as it sets out some guidance as to what considerations are important. The *BP Refinery* criteria, along with the six additional considerations, direct courts to the things they should consider in coming to a determination of what the contract truly means. Finally, the Singaporean approach could be

the specific methodology that a court uses when implying a term. It embodies the unitary approach's conceptual concern as well as incorporating the important factors signaled by the English approach, but in clear and replicable template. This template is the set questions in a set order required by the Singaporean approach. These approaches are really arguing past each other, rather than against each other, as they operate on different levels of abstraction.

Such reconciliation is impossible given the conclusions reached through the threefold framework. The unitary approach differs from both the Singaporean and English approaches as to the second question in the framework. The former considers that interpretation and implication share the same principles while the latter approaches do not. The Singaporean and English approaches cannot be practical manifestation of something they differ with on a fundamental principle. There is also an irreconcilable difference between the unitary approach and the English and Singaporean approaches answer to the third question. The unitary approach's methodology is the one question of "what the instrument, read as a whole against the relevant background, would reasonably be understood to mean".<sup>146</sup> This is an explicit rejection of the Singaporean approach's staged methodology of set questions in a set order. The same is true for the mandatory considerations of the English approach. The unitary approach rejects the idea that there are necessary considerations when one is considering the true meaning of the document. Like the mismatch in principles, there is a mismatch in methodology too which cannot be reconciled.

There is a stronger argument for reconciliation between the Singaporean and English approaches as they both have the same answer to the second question of the threefold framework. As to the third question there is a similarity in that the methodology articulates mandatory considerations. The Singaporean approach may just be a more practical articulation of the English approach's considerations. The distinction in methodology is problematic though. In *Marks and Spencer* Lord Neuberger did not consider that there was a fundamental difference between the business efficacy test and the officious bystander test as they "can be alternatives".<sup>147</sup> This means that a term could be implied with only one of these tests satisfied. This cannot be reconciled with the Singaporean approach. This is because the Singaporean approach considers that the business efficacy test and officious bystander test are distinct and indispensable to the law of implication.<sup>148</sup> There are set questions in a set order that cannot be deviated from.

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<sup>146</sup> *Belize*, above n 1, at [21].

<sup>147</sup> *Marks and Spencer*, above n 99, at [21].

<sup>148</sup> *Foo Jong Peng*, above n 37, at [36].

## *B Why the Singaporean Approach Should be Adopted in New Zealand*

This part of Chapter Four will argue that the Singaporean approach should be adopted in New Zealand. Three criteria will be used in the evaluation. These have been chosen as they represent important aspects of how the law should operate:

- 1) Coherence: Coherence is about how consistent a proposed approach is to the law of contract and the law more generally.
- 2) Workability: Workability is about whether the proposed approach offers effective guidance to stakeholders about the process of implying a term.
- 3) Suitability: Suitability is about whether the proposed approach is fit for purpose given the mischief the law of implication seeks to remedy.

For such a controversial area of the law, an interesting feature of implication is that the substantive outcome of a case will likely not be affected by the particular approach chosen. This situation is quite distinct from the substantive differences in outcome that can occur between the classical and modern approaches to contract interpretation.<sup>149</sup> As Professor Andrew Robertson notes:<sup>150</sup>

it is easy to identify the obvious solution to the problem that arose, but much more difficult to say whether the contract means that the obvious solution is to govern the problem. A process of reasoning is needed in implied terms cases to determine whether the instrument, properly construed, both identifies a solution to the problem that has arisen and indicates that the solution is to govern the problem. The crucial question is how we determine whether the contract means that the obvious but unarticulated solution governs the problem.

This focus on the nature of the process of implying a term is crucial to the conclusion of this dissertation. The fundamental dispute in the Great Divergence is over the process of implying a term. This dissertation argues that the Singaporean approach is the best way to structure the process of implication because it is more coherent, workable and suitable.

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<sup>149</sup> *Reardon Smith Line Ltd*, above n 14, is a good example. There the contract was for a ship, ‘Hull No 354’ at Osaka Shipyard. Due to production issues at Osaka the vessel was built at Oshima Shipyard. This was owned by the same company, and was ‘Hull No 004’ there. Under a modern approach there is no problem in looking at the transaction and accepting the ship can be both of those Hull numbers simultaneously. In the classical approach, given the plain meaning and parol evidence rule, there would be focus on how this is Hull 004 which is not the hull in the contract.

<sup>150</sup> Robertson, above n 98, at 196.

## *1 Coherence*

An argument that an approach is coherent will need to be an argument that an approach is conceptually consistent with the law of interpretation. A consistent theme in the implication literature is the acceptance that *ICS*, and the changes it brought about to interpretation, has been the basis of the current debate in implication.<sup>151</sup> Paul Davies, a very strong critic of the unitary approach, has argued that “a major reason for viewing implication and interpretation as part of a continuous spectrum is the unfortunately wide scope given to the doctrine of interpretation in the wake of *ICS*”.<sup>152</sup> Putting aside the value judgment as to *ICS*, this dissertation accepts that it is the changes brought about by *ICS* that are fundamental to the contemporary debate in the implication. The idea of interpretation and implication being on a spectrum concerned with construction of a contract is not novel. Lord Wilberforce discussed this concept in the 1970’s,<sup>153</sup> but what *ICS* has done is make it “continuous” by expanding the ambit of interpretation to seemingly cover all areas of construction. The ‘unlimited red ink’ of *Chartbrook* embodies this view. Professor Richard Hooley has argued that the most coherent way to approach construction is to:<sup>154</sup>

jettison the distinction between interpretation and implication. Lord Hoffmann did this in *Belize* when he decided that the implication of terms is, in essence, an exercise in interpretation. By doing this Lord Hoffmann has placed the common intention of the parties centre stage. This is what links interpretation and implication. It is the common thread. Interpretation is used to identify the common intention of the parties and implication gives effect to that intention.... The advantage of this approach was identified by Arden L.J. in *Stena Line Ltd. v Merchant Navy Ratings Pension Fund Trustees Ltd.*, when she said that:

This development promotes the internal coherence of the law by emphasising the role played by the principles of interpretation not only in the context of the interpretation of documents simpliciter but also in the field of the implication of terms. Those principles are the unifying factor. The internal coherence of the law is important because it enables the courts to identify the aims and values that underpin the law and to pursue those values and aims so as to achieve consistency in the structure of the law.

Hooley’s argument is that interpretation and implication smoothly transition into one another. On this view an incoherent law of construction results from placing a barrier between interpretation

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<sup>151</sup> Davies, above n 57, at 145; McCaughran, above n 57, at 613; David McLaughlan “Construction and implication: In defence of *Belize Telecom*”, above n 39, at 207 and 208; Hooley, above n 37, at 326; John Carter and Wayne Courtney “Unexpressed Intention and Contract Construction” (2017) 37(2) OJLS 326 at 344.

<sup>152</sup> Davies, above n 57, at 145.

<sup>153</sup> *Liverpool City Council*, above n 31, at 254.

<sup>154</sup> Hooley, above n 37, at 333.

and implication. This incoherence is due to there being no such barrier in fact. Professor David McLauchlan, Robertson and Kramer put forward similar arguments.<sup>155</sup>

The coherence argument Hooley puts forward depends on an expansive conception of interpretation articulated in *ICS* and *Chartbrook*. *Firm PI and Vincent*, as the leading cases in interpretation in New Zealand, do not support this argument. The facts of *Vincent* are a good example of this. There, a covenant required the paying of fees to a golf club that accompanied a housing development. The golf club was defined as “an incorporated society”, but when the club was set up it was a company. Mr Vincent refused to pay the fees due to the definition. He lost in the High Court,<sup>156</sup> but won in the Court of Appeal and the Supreme Court. While the Court of Appeal was more emphatic in its statement than the Supreme Court,<sup>157</sup> both courts clearly emphasise that interpretation has a limit to what it can do.

The contemporary law is in a similar position to the classical approach where the limits to interpretation create the gap for implication to be a distinct. Arguably this is only a necessary condition for the Singaporean approach. It, like the English approach, consider that the principles of interpretation and implication are distinct. The acceptance of limited interpretation does not necessarily preclude the adoption of the unitary approach. One can accept that it is useful to set clear limitation to interpretation and implication without accepting that they operate under distinct principles. This is in the same way that we can accept that verbs and nouns are different but that their meanings can be assessed through the same process of consulting a dictionary.

The reassertion of a limited interpretation is likely fatal to the idea that interpretation and implication operate under the same principles. A limit to the proper function of interpretation implies that the principles of interpretation must be limited. They can be exhausted and can go no further. It also necessitates the classical approach’s rank ordering where interpretation necessarily precedes implication too. The refocusing of interpretation on plain meaning has

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<sup>155</sup> David McLauchlan “Construction and implication: In defence of *Belize Telecom*”, above n 39, at 206 - 211; Robertson, above n 98, at 192: “reorientation of the implication of terms that stands up to close scrutiny and represents a positive development... The implication of terms in fact can properly, and helpfully, be regarded as an interpretative exercise”; Kramer, above n 20, at 409.

<sup>156</sup> *Lakes International Golf Management Ltd v Vincent* [2015] NZHC 2771.

<sup>157</sup> *Vincent v Lakes International Golf Management Ltd* [2016] NZCA 382 at [44]: “That said, we are not without some sympathy for the position of the respondents. However, for the reasons outlined above we consider that as a matter of interpretation the Court would not be justified in departing from the clear words of the covenant. To do so would be to rewrite it”;

*Lakes International Golf Management Ltd*, above n 82, at [28]: “The meaning of the definition of “Golf Club” is crystal clear in that the language used shows that the golf club envisaged was to be an incorporated society. In the absence of a genuine issue of interpretation, an elaborate review of the principles of interpretation relied on by Mr Goddard would be largely abstract in character”.

resulted in implication being, as Sir Thomas Bingham MR described it, a process of interpolation:<sup>158</sup>

The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters which, ex hypothesi, the parties themselves have made no provision.

This interpolation occurs around the plain meaning of the text that interpretation now delivers. Moreover, the Court of Appeal would appear to be considering interpretation and implication as distinct in their principles too.<sup>159</sup> In *Vincent* it considered that going beyond the bounds of interpretation would amount to rewriting the contract,<sup>160</sup> and in *Satterthwaite v Gough* the same court talked of the risk of going “outside its proper function of interpretation”.<sup>161</sup>

Even if the reassertion of limits to interpretation does not necessarily preclude the unitary approach, its adoption would leave construction incoherent. Interpretation is narrowing itself with inherent limits and a plain meaning focus. This is a rejection of *Chartbrook*’s ‘unlimited red ink’ and committed contextualism in general. It would be incoherent to be simultaneously abandoning committed contextualism in interpretation whilst adopting a derivative of committed contextualism in implication. The two would not sit well together.

The coherence argument has been an argument against the unitary approach rather than for the Singaporean approach. The arguments for the Singaporean approach arise from workability and suitability.

## 2 Workability

Workability is a very important goal. While academic discussions of the law have value, the point of the law is to resolve a dispute.<sup>162</sup> There are many stakeholders who have an interest in the law of implication giving practical guidance to this area of law: trial courts, appellate courts, lawyers and commercial parties. Workability is also important because, as Professor John Smillie

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<sup>158</sup> *Philips Electronique Grand Public SA*, above n 23, at 481.

<sup>159</sup> Simon Connell “A shift from Belize to Singapore? Interpretation and implication in *Satterthwaite v Gough*” [2015] NZLJ 263 at 265: “This response arguably contains two propositions of law. The first is that interpretation and implication are different functions, and that there are limits to what can be achieved through interpretation. The second is that implication is appropriate only when there is a ‘gap’ in the contract that cannot be addressed through interpretation”.

<sup>160</sup> *Vincent*, above n 157, at [44].

<sup>161</sup> *Satterthwaite v Gough* [2015] NZCA 130 at [68].

<sup>162</sup> Phang, above n 116, at 536.

argues, contracts have inherent moral and economic value.<sup>163</sup> This moral and economic value is best served by a workable framework. The Singaporean approach is the most workable approach in that it clearly articulates the process for the implication of a term. This is due to its staged methodology based around rules and the primary criticism that the traditional tests are a fiction being misunderstanding of those fictions function.

The Singaporean approach is more workable due to its staged methodology. This provides greater clarity as to the process of implication. This approach does not claim to eliminate uncertainty. Implication cases are notoriously difficult,<sup>164</sup> and nobody seriously claims that uncertainty can be eliminated in contract disputes. Professor Rex Ahdar argues that what should be done is “the avoidance of unnecessary or avoidable uncertainty”.<sup>165</sup> The point of legal rules is to offer certainty as to the process not the outcome.<sup>166</sup> The Singaporean approach achieves this through set questions in a set order:

- 1) How did the silence on the issue occur?
- 2) Is the business efficacy test satisfied?
- 3) Is the officious bystander test satisfied?

This framework provides greater clarity than the unitary approach and the English approach. In the former the one question means everything is potentially assessable. While this has advantages, it does not give guidance as to how a court should go about this process. The English approach does have the five criteria of *BP Refinery*, but the same criticisms remain. There is no specific guidance on the relationship between the criteria. The English approach has set out what is important without setting out how it is important. Moreover, requiring a term to be reasonable and equitable makes the English approach no different to the unitary approach through the open-ended nature of that criterion. Furthermore, the six extra considerations are counterproductive. More factors to consider are not a substitute for a certain process. More problematically, the idea that the business efficacy and officious bystander tests may or may not collapse into one another reduces certainty. There was no guidance as to when this is appropriate. The unitary and English approaches both fail to clearly articulate clear the process of implying a term. Such a lack of clarity makes these approaches inappropriate.

Focusing on the relative clarity of the approaches is important due to the nature of construction disputes. Every contract is unique which means that caselaw cannot act as precedent in the way a

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<sup>163</sup> John Smillie “Security of Contract and the Purpose of Contract Law” (2000) 6(1) NZBLQ 104 at 110.

<sup>164</sup> *Sembcorp Marine Ltd*, above n 111, at [76].

<sup>165</sup> Rex Ahdar “Contract Doctrine, Predictability and the Nebulous Exception” (2014) 73(1) CLJ 39 at 58.

<sup>166</sup> At 53.

prior decision on a statutory definition can. Professor Emeritus John Carter and Dr Wayne Courtney succinctly capture why rules are preferable in contract construction disputes.<sup>167</sup>

rules ensure that implied term decisions do have value as precedents. Since decisions on what individual contracts mean have no value as precedents, any case applying [the unitary] approach has no precedent value. In effect, a circumstantial guide in construction—context—is a surrogate for legal rules and precedent.

The Singaporean approach's set questions in a set order capture these benefits unlike the unitary and English approaches. The Singaporean approach assists trial courts by clearly setting out the process they must go through in implying a term. Trial courts have been asking for more concrete guidance from appellate courts. Some have chosen *BP Refinery* due to it being a more certain guide as to the process of implication.<sup>168</sup> The Singaporean approach is even more certain than *BP Refinery* and is exactly the type of guidance that those courts are asking for. The Singaporean approach also aids appellate court when reviewing decisions on appeal. It clearly structures the analysis they need to undertake. It also means that appealed decisions will already be following this structure, making the appellate courts job easier. Moreover, caselaw can be built around the stages of analysis to further clarify the law as time goes on.

The primary criticism of the Singaporean approach is its reliance on the traditional business efficacy and officious bystander tests. These have been criticised for being fictions.<sup>169</sup> Lord Hoffmann, writing extrajudicially, called the officious bystander test “an entire musical hall act” and a “little pantomime” that has taken a throwaway comment too seriously.<sup>170</sup> Such criticisms have some force. A chain of narrative revolving around a pedantic question and ‘testy’ suppression is a fiction and somewhat comical. The point of this criticism though, is to present the approaches that adopt those tests as unworkable. This is not accepted because such criticisms lose sight of the function of the fiction. It also confuses the inherent difficulty of this area of law with it being unworkable. Again, certainty of process, not certainty of outcome, is the goal. The Singapore Court of Appeal’s argument that “not all legal fictions are necessarily fictitious in the pejorative sense” is accepted here.<sup>171</sup> The fiction serves a useful purpose. It puts the court in the right mindset to consider the presumed intentions of the parties. The reformulation of the business efficacy test to focus on the nature of the gap rather than its filling reduces the scope to criticise it as a fiction. The functional role it fulfils in the Singaporean approach is one of

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<sup>167</sup> Carter and Courtney, above n 151, at 343.

<sup>168</sup> *The Rintoul Group*, above n 4, at [48].

<sup>169</sup> Hooley, above n 37, at 330; McLauchlan “Construction and implication: In defence of *Belize Telecom*”, above n 39, at 225 - 226; Robertson, above n 98, at 200.

<sup>170</sup> Leonard Hoffmann, “Anthropomorphic Justice: The Reasonable Man and His Friends” (1995) 29 The Law Teacher 127 at 138.

<sup>171</sup> *Foo Jong Peng*, above n 37, at [34].

assessing contractual purpose. A court is perfectly competent to assess this.<sup>172</sup> The nature of the Singaporean approach's officious bystander test also counteracts some of Lord Hoffmann's criticism of it being a "a little pantomime". The complementary nature of the business efficacy and officious bystander test gives substance to the process. The question and answer are not conjured out of 'thin air', but arise from the consideration of contractual purpose.

### *3 Suitability*

The mischief implication exists to resolve is determining if, due to the presumed intentions of the parties, a certain right exists within a contract notwithstanding its lack of expression. Implication is giving a contract a meaning that its text cannot bear. There is a risk of a court rewriting the bargain with the benefit of hindsight.<sup>173</sup> The law of implication has also consistently claimed that it has a high threshold too.<sup>174</sup> The approach adopted must be suitable in the sense it is able to deal with the specific challenges and imperatives of implication.

The Singaporean approach is best placed to deal with these challenges. The style of reasoning that will follow the unitary approach will be more prone to "threshold slippage". Threshold slippage is the tendency for the standard required of a threshold to reduce over time. This is not an argument that unitary approach represents a threshold of mere reasonableness for a term to be implied though. Lord Hoffmann, repeatedly, asserts that the threshold for an implication is not weakened by the unitary approach.<sup>175</sup> The argument is an unfair strawman used by critics.<sup>176</sup> The Singaporean's have somewhat wound back on this position.<sup>177</sup> This argument arises from a failure to distinguish a reasonable implied term from a reasonable person's view of whether there is an implied term. The response of employers who breach an implied term of an employment contract are representative of this distinction.<sup>178</sup> They demonstrates the depth of feeling that the written terms alone are the contract.

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<sup>172</sup> At [35].

<sup>173</sup> *Philips Electronique Grand Public SA*, above n 23, at 477.

<sup>174</sup> At 481: "the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power".

<sup>175</sup> *Belize*, above n 1, at [17], [21] - [22].

<sup>176</sup> Davies, above n 57, at 144; *Foo Jong Peng*, above n 37, at [32].

<sup>177</sup> *Sembcorp Marine Ltd*, above n 111, at [79].

<sup>178</sup> Nick Truebridge "Christchurch employer 'can't sleep at night' after losing employment dispute" *The Press* (Online ed, Christchurch, 21 June 2016):

The authority ruled Furze was unjustifiably dismissed... Harley said he was "absolutely disappointed and furious" by the ruling, calling the amount he was ordered to pay Furze "a joke" ... It has had a big strain on me and my family, I can't sleep at night," Harley said. He would appeal the ruling, adding he had never been in dispute with an employee before. "I don't know how [the ERA] agreed with him. All he produced was a few texts," Harley said.

Arguments that the unitary approach is simply a standard of mere reasonableness are also counter-productive because it distracts the debate from the risk of threshold slippage. This threshold slippage arises from two related sources. Firstly, the substantive guidance on the process of implying a term is lacking in the unitary approach.<sup>179</sup> Secondly, the shift from rule based reasoning to principles based reasoning creates risk. The unitary approach claims that the court's inherent conservatism in and of itself can maintain the appropriate threshold.<sup>180</sup>

Scepticism of this claim arises from the treatment of the Supreme Court's decision in *Vector Gas Ltd.* The lower courts took Tipping's J judgment as the leading one. His Honour articulated the most context reliant approach.<sup>181</sup> The importance of this is that courts will gravitate towards a judgement that gives them the most freedom. *Aberdeen City Council* and *Rainy Sky* serve as a reminder that changes in the law can result in decisions taking principles too far. In the unitary approach the traditional tests are being discarded as well as the focus of the entire exercise changing from necessity to the reasonable person's view of the presence of an implied term. The argument put forward here is that this creates a risk of a more permissive threshold by accident rather than design. The Singaporean approach is not able to eliminate this risk, but set rules are better able to contain it. Those rules can structure the reasoning process in a way that can best incentivise the maintenance of those thresholds.

The unitary approach, and its one question, is also not a suitable approach due to its focus. As Brandon Kain argues, the unitary approach is reductionist and overly focuses on the meaning of the document.<sup>182</sup> The meaning of the document is an important element of the presumed intentions of the parties, but meaning is not synonymous with it.<sup>183</sup> Kain rightly points out that policy concerns can "preclude [courts] from taking positions which may otherwise appear normatively correct".<sup>184</sup> Courts have broader considerations to account for than meaning alone. They must have regard for the abstract considerations such as a court's institutional and constitutional role.<sup>185</sup> There are also practical consequences to consider like the promotion of "commercial certainty by encouraging parties to make their obligations express",<sup>186</sup> and dissuading speculative litigation for an implied term.<sup>187</sup> McLauchlan has criticised this argument for failing to recognise that Lord Hoffmann's one question accounts for such considerations.<sup>188</sup>

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<sup>179</sup> *The Rintoul Group Ltd*, above n 4, at [28].

<sup>180</sup> *Belize*, above n 1, at [25].

<sup>181</sup> At [19] - [26].

<sup>182</sup> Brandon Kain "The Implication of Contractual Terms in the New Millennium" [2011] CBLJ 170 at 176.

<sup>183</sup> At 177.

<sup>184</sup> At 179 - 180.

<sup>185</sup> At 177.

<sup>186</sup> At 180.

<sup>187</sup> Ahdar, above n 165, at 53.

<sup>188</sup> McLauchlan "Construction and implication: In defence of *Belize Telecom*", above n 39, at 215 – 218.

Such concerns were articulated by Lord Hoffmann,<sup>189</sup> but the point of Kain's argument is the consequence of the one question being the fundamental principle of implication. It places the meaning of the document as the core focus of the process of implication. Given the preceding discussion on threshold slippage, the risk is that the one question leads to a focus on meaning which fails to account for those other factors.

Kain's argument is best served by the Singaporean approach. Certainty, an important policy goal itself,<sup>190</sup> is best achieved by the Singaporean approach. Policy considerations are also built into the stages of the methodology too. The first stage restricts implied terms to Type (A) gaps. These are where the parties did not contemplate the issue.<sup>191</sup> This can be seen as a policy decision. It incentivises parties to expressly, and properly, provide for the situations they contemplate. The business efficacy test, in assessing the minimum functionality of the contract, takes account of the court's institutional role. The threshold of necessity also takes an appropriately deferential position towards the principles of freedom of contract and security of contract. Similar considerations occur in the business efficacy test but are focused on the contents of the term.

The unitary approach is broader than the English approach as it has no predefined considerations in the one question. In contrast the English approach has Lord Neuberger's modified *BP Refinery* criteria. The same fundamental criticisms of the unitary approach will carry over to the English approach though. The English approach's multifactorial analysis has no predetermined structure between the *BP Refinery* criteria to control the application of the law of implication. There is no clear guidance as to the process required of a court in implying a term. The capacity for the business efficacy and officious bystander criteria to collapse into one another, is problematic too. This can occur in the right circumstances, but this only serves to increase the uncertainty surrounding the process of implying a term and leaves open the prospect of speculative litigation. This leaves the English approach in the same position as the unitary approach.

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<sup>189</sup> *Belize*, above n 1, at [17], [18], [21], [22].

<sup>190</sup> *Vallejo v Wheeler* (1774) 1 Cowp 143 at 153.

<sup>191</sup> *Sembcorp*, above n 111, at [94].

## V Conclusion

This dissertation has achieved two things. Firstly, it has explained the law of implication that existed before *Belize* and competing the approaches that emerged in the Great Divergence. By analysing the cases through the threefold framework, the important differences in the approaches have been revealed. This clarity is something that is missing in the literature on implication and will hopefully help foster a clearer debate on this important issue.

Figure 3: Summary of Implication Approaches

	<b>Classical Approach</b>	<b>Unitary Approach</b>	<b>Singaporean Approach</b>	<b>English Approach</b>
<b>Q1)</b>	Yes	Yes	Yes	Yes
<b>Q2)</b>	Yes	No	Yes	Yes
<b>Q3)</b>	Multifactorial ( <i>BP Refinery</i> )	One Question	Staged Analysis	Multifactorial (Expanded <i>BP Refinery</i> )

Secondly, Chapter Four set out the argument for the adoption of the Singaporean approach. It initially demonstrated why reconciliation between the unitary approach, Singaporean approach and English approach is impossible. The differences in their answer to questions two and three determine this. It is impossible for these approaches to be simply different manifestations of the same idea because they disagree on the fundamental principles and methodology of implication. It has then gone on to argue for the adoption of the Singaporean approach. The criteria of coherence, workability and suitability were chosen as they embody core values the law should have.

The Singaporean approach is the most coherent, as it best fits with the contemporary position of interpretation in New Zealand. It also clearly affirms the difference between interpretation and implication as distinct exercises with distinct principles. While the English approach makes the same claim, the lack of clarity as to the process for implying a term undermines its coherence. The Singaporean approach is also more workable as it creates the most certain framework of any of the approaches. Criticisms of it being a fiction misunderstand the point of such a fiction. The highly individualised nature of construction disputes requires rule based reasoning to act as a proxy for precedent. This gives certainty to the process. This allows for a clear, replicable and reviewable process for implying a term. The unitary and English approaches cannot deliver a similarly clear process. Finally, the Singaporean approach is the most suitable one to deal with

the challenges of implication disputes. Implication deals with the absence of express terms, so the law needs to be able to prevent threshold slippage. This is even more important due to how high a threshold this area of law has claimed to have. A rule based methodology that has set questions in a set order is best placed to ensure the threshold does not slip.

The arguments for the Singaporean approach being preferable is revealing of the nature of the debate in implication. These are challenging disputes, both in fact and in law, that arise from an “imperfect contract”.<sup>192</sup> Success here is relative not absolute, and so too is the preference for the Singaporean approach. It is more coherent, more workable and more suitable than the unitary and English approaches.

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<sup>192</sup> *Foo Jong Peng*, above n 37, at [35].

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## Appendix

Principles of Interpretation: *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28, [1997] PNLR 541 at 559 – 560:

- (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
- (2) The background was famously referred to by Lord Wilberforce as the “matrix of fact”, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
- (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
- (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd* [1997] 2 W.L.R. 94).
- (5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common-sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would

nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compañía Naviera S.A. v. Salen Rederierna A.B.* [1985] 1 A.C. 191 (HL) at 201:

... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.