**Contractual Interpretation Seminar: Local and International Perspectives**

**(UWA Law School, Obligations Law Research Hub)**

# The scope of evidence admissible to support an ad hoc implied term in written contracts

## A TALE OF TWO CLASSIC CASES:

***BP v Hastings*** and ***Codelfa***

**By**

**The Hon Justice Kenneth Martin**
**(Supreme Court of Western Australia)**

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# Table of Contents

## Introductory observations

The position in Australia regarding the use of surrounding circumstances to assist in a contractual interpretation exercise looks to be relatively quelled for the moment. The High Court has yet to sanction any departure from the principles towards interpretation stated in ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** [1982] HCA 24; (1982) 149 CLR 337 (***Codelfa***).[1] For any court lower in the Australian hierarchy to depart from its application is illegitimate. That point was made convincingly in a 2019 analysis on the law of contract in Australia.[2]

For Western Australia there are McLure P's and the ***Codelfa*** orthodox interpretation observations in ***Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd*** [2014] WASCA 164; (2014) 48 WAR 261 [34] - [37]. Additionally, for pure interpretation as to the meaning of words in a contract is the helpful summary of construction principles by Newnes, Murphy and Beech JJA in ***Blackbox Control Pty Ltd v Terravision Pty Ltd*** [2016] WASCA 219 (***Blackbox***).

The Western Australian position is summarised this way in ***Blackbox*** at [42(3) - (4)]:

> (3) The commercial purpose or objects sought to be secured by the contract will often be apparent from a consideration of the provisions of the contract read as a whole. Extrinsic evidence may nevertheless assist in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding of the genesis of the transaction, its background, the context and the market in which the parties are operating.
>
> (4) Extrinsic evidence may also assist in determining the proper construction where there is a constructional choice, although it is not necessary in this case to determine the question of whether matters external to a contract can be resorted to in order to identify

[1] ***Mt Bruce Mining Pty Ltd v Wright Prospecting*** [2015] HCA 37; (2015) 256 CLR 104.
[2] See Heydon JD, *Heydon on Contracts* (2019) Chapter 9.

> the existence of the constructional choice. [see footnote 54] (my emphasis)

Having personally discussed the interpretation topic many times previously, I now leave it to others to debate whether there remains in 2020 any residual life or relevance in an 'ambiguity gateway' arising under a pure application of Mason J's true rule.[3] That is not the issue today - today's question is correlative, but distinct.

The other question I pose today - and, of course, for a wholly written agreement - is whether exactly the same body of extrinsic evidence as to surrounding circumstances that is viewed as admissible in an orthodox exercise of contractual interpretation towards text[4] is to be used again in a somewhat different exercise (for the same agreement) of ascertainment of a contended ad hoc implied term on the basis of business efficiency?

On the basis of what was a plurality position in ***Codelfa*****,**[5] the answer would be a clear 'Yes'. By Sir Anthony Mason's reasons in ***Codelfa***, for him, it was obvious there would be no difference.[6]

On the other hand, a narrower evidentiary approach for finding ad hoc implied terms was taken by Brennan J in ***Codelfa*****.**[7] At the time this narrow approach carried a weighty body of antecedent support[8] including by Sir Frederick Jordan in ***Heimann v The Commonwealth*** (1938) 38 SR (NSW) 691, 695 (***Heimann***). On occasion ad hoc implied terms found in a contract on the basis of business efficacy are referred to as terms arising on the basis of fact. They are distinct to another genre of contractual implied term that arises more generally - and as a matter of law.

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[3] See my observations in 'Contractual Construction: Surrounding Circumstances and the Ambiguity Gateway' (2013) 37(2) *Australian Bar Rev* 118.
[4] That is, meaning ascertainment.
[5] By Mason J (Stephen and Wilson JJ agreeing).
[6] Even though such an implication of terms exercise is one of 'gap filling', rather than one of divining the correct meaning of contractual text.
[7] Although in the end reaching the same negative result against implying such terms.
[8] ***Codelfa***, 401 - 403.

In ***Codelfa***, Brennan J said it would be inconsistent with the very foundation of agreed contractual obligations for a court to find an extra implied term in a contract arising out of facts extrinsic to the written contract - unless the contract stood in need of rectification. Applying 1914 observations by the High Court of Australia from ***Purcell v Bacon*** (1914) 19 CLR 241 (***Purcell***), Brennan J continued as regards these implied terms:[9]

> On the hypothesis that the contract contains the true consensus of the parties, how could a reference to extrinsic facts reveal a term additional to those already expressed? Only the express agreement could stamp a contractual character upon a propounded term, and an unexpressed term bears that character only if it is necessarily to be implied from what the parties expressly agreed.

Sir Gerard Brennan went on to explain the subtlety of the evidentiary difference:[10]

> Although the necessity for the term to be implied must appear from and in the express terms of the contract, not from extrinsic circumstances, those circumstances may aid in ascertaining the meaning of the express terms and in identifying the matters to which they relate. The meaning and operation of the express terms, thus established, are the sole foundation for implying a term which the parties have not expressed.

Applying what was a narrower extrinsic evidence admissibility approach as regards finding ad hoc implied terms, Brennan J reached the same negative result as the plurality Judges in ***Codelfa***, rejecting all the then contended ad hoc implied terms.

This evidentiary distinction over deriving ad hoc business efficacy implied terms in a written contract that can be seen in ***Codelfa*** is so fine it is easily overlooked. Brennan J had said:[11]

> Looking at the contract in the present case, in the matrix of the facts in which it was made, I see no necessity for the implication of a term, nor can I find that the criteria set out in *BP Refinery* is satisfied by any of the terms proposed respectively by the Court of Appeal, Ash J and the Arbitrator.

[9] ***Codelfa***, 402.
[10] ***Codelfa***, 403.
[11] ***Codelfa***, 404.

Nevertheless, Brennan J strongly defended what was until then[12] a key distinction of concept - against any wider evidentiary admissibility approach to surrounding circumstances, as:[13]

> The refusal by the courts to go outside the four corners of a contract to find a term implied therein may be productive of hardship in particular cases. But the remedy is not to apply some general and inevitably imprecise notion of what is fair or reasonable in order to alter what the parties have agreed. The court simply gives effect to their agreement, and leaves in their hands the arrangements which must be made for their respective protection.

## Implied terms - different classes

It is, of course, necessary to distinguish at the outset as between different classes of implied terms to be found within otherwise wholly written contracts.

Some implied terms arise by reason of law, as, indeed, Mason J expressly recognised in ***Codelfa***, referring to ***Liverpool City Council v Irwin*** [1977] AC 239 (***Liverpool City***).[14]

Such terms can present as a genre of implied term found as a legal incident of a particular class of contract.[15] Even further and distinct genres of implied terms may arise for particular contracts as a matter of industry custom and usage - as the surrounding industry environment to a particular written bargain.

## Individualised gap fillers

Ad hoc implied terms that are bespokenly ascertained as a matter of business efficacy upon the facts of a particular case remain conceptually unique.

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[12] That is, 1982.
[13] ***Codelfa***, 406.
[14] ***Codelfa***, 345.
[15] Likewise for such terms found by law, rather than by the underlying facts of a particular contract, see ***Commonwealth v Barker*** [2014] HCA 32; (2014) 253 CLR 169 at [21] - [27] per French CJ, Bell and Keane JJ and especially at footnote 89 to [21].

In ***Codelfa***, Mason J had said of these terms found as a matter of fact in a particular written contract:[16]

> ... the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it - it is not a term that they have actually agreed upon. Thus, in the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it ... the implication of a term is designed to give effect to the parties' presumed intention.

In ***Commonwealth v Barker*** [2014] HCA 32; (2014) 253 CLR 169, the phrase 'individualised gapfillers' was used there by Gageler J to describe ad hoc implied terms.[17] The phrase in turn appears attributable in origin to Steyn LJ, as he then was, sitting as a member of the Court of Appeal in ***Society of Lloyd's v Clementson*** [1995] CLC 117 (***Clementson***). His Lordship drew this distinction:[18]

> That brings me to the terrain occupied respectively by terms implied in fact or by law. Terms implied in fact are individualised gap-fillers, depending on the terms and circumstances of a particular contract. Terms implied by law are in reality incidents attached to standardised contractual relationships, or, perhaps more illuminatingly, such terms can in modern US legal terminology be described as standardised default rules. (my emphasis)

## A conceptual distinction

More recently, the Court of Appeal of Singapore in ***Foo Jong Ping v Phua Kiah Mi*** [2012] 4 SLR 1267; (2012) SGCA 55 (***Foo Jong Ping***), has drawn a very firm conceptual distinction between the process of interpretation towards the text of a written contract, in some conceptual contrast to an exercise in ascertaining by implication the existence of an ad hoc implied term in a particular written contract, as a question of fact.

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[16] ***Codelfa***, 346.
[17] ***Commonwealth v Barker*** [113].
[18] ***Clementson***, 131 - 132, in ***University of Western Australia v Gray*** [2009] FCAFC 116; (2009) 179 FCR 346 at [135] the Full Court of the Federal Court of Australia endorsed those ***Clementson*** observations.

In that appeal, Phang and Rajah JJA and Woo J said:[19]

> … [i]n particular, the process of implication is *separate and distinct* from the more general process relating to the interpretation of documents. Indeed, the process of implication of terms proceeds, *ex hypothesi*, on the *absence* of an *express* term of the contract. Hence, the implication of a term … 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 ... (original emphasis)

I would respectfully endorse those remarks from Singapore. As a matter of experience and commercial common sense, it is difficult to refute the wisdom of those observations.

Yet for Australia, such a conceptual distinction in 2020 does not seem to register at all in regard to the range of surrounding circumstances extrinsic evidence that now will be permitted in an implication of term exercise. But one day it might be important.

In 1982 the distinction as to evidence mattered very much - at least until the appeal reasons in ***Codelfa*** emerged. How did this all happen? An explanation is buried deep in the sweepingly broad reasons of Mason J in ***Codelfa***. The narrower evidentiary counterpoint position towards ad hoc implied terms only really crystallises out of Brennan J's subsequent reasons upon the issue, arising much later in the ***Codelfa*** reasons.

For the purposes of this paper, I direct attention back to the 1982 ***Codelfa*** reasons - but even further back before them to the 1977 origins in the Privy Council of the now celebrated five-fold ad hoc implied term test from ***BP Refinery (Westernport Pty Ltd) v Shire of Hastings*** (1977) 180 CLR 266 (***BP v Hastings***).

I will also foreshadow in passing that in the UK there were steps towards something of a weakening of the five-fold test for implied terms, attributable to the speech of Lord Hoffman in ***Attorney-General (Belize) v Belize Telecom Ltd***

[19] ***Foo Jong Ping*** [31].

[2009] 1 WLR 1988 (***Belize***).[20] But then see the more recent observations in ***Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd & Anor*** (2015) UKSC 72; [2016] AC 742 (***Marks & Spencer***) per Lord Neuberger at [24].

**The question to be answered**

My focus here is on the narrow question as to the scope of the admissible surrounding circumstances evidence that may be lawfully admitted and used to support an advocated derivation of an ad hoc implied term in a wholly written contract. Upon that narrow issue it can be said that broadly seen, certain passages found in the majority advice of Lord Simon of Glaisdale in ***BP v Hastings***, to which I will turn, support the position of Mason J in ***Codelfa*** as to such extrinsic evidence.

**Sir Anthony's wider view of admissible evidence**

The wider Mason J view equates the admissibility of the surrounding circumstances (extrinsic fact evidence) around a contract for distinct exercises: first, construing the meaning of express text; and second, towards ascertaining the existence of a contended ad hoc implied term. But it went further in ***Codelfa*** to a third use.

As we will see, Sir Anthony Mason's reasons in ***Codelfa*** also display the same wide evidentiary view as regards an exercise in ascertaining whether or not the contractual doctrine of frustration can be engaged to put an end to the ongoing performances of a contract - on a basis of the emerging factual circumstances that are fundamentally different and bearing upon the ongoing performance of the contract.

[20] ***Belize*** [17] - [22].

Sir Anthony said that exactly the same class of extrinsic or surrounding circumstances evidence could legitimately be used[21] in that frustration ascertainment end. He said:[22]

> [G]ranted that the [common] assumption needs to be contractual, in the case of frustration, as with the implication of a term, it is legitimate to look to extrinsic evidence in the form of relevant surrounding circumstances to assist us in the interpretation of the contract, unless its language is so plain that recourse to surrounding circumstances would amount to no more than an attempt to contradict or vary the terms of the contract.

Mason J's ensuing observations in ***Codelfa*** return to again discuss ***Scanlan's New Neon Ltd v Toohey's Ltd*** (1943) 67 CLR 169 (***Scanlan's***).[23] Having first discussed in ***Scanlan's*** in a context of evaluating the admissibility of extrinsic evidence as regards a derivation of an implied term,[24] Mason J returned in his ***Codelfa*** reasons to ***Scanlan's***, but now in the context of the appeal's frustration arguments. He now observed again that Latham CJ's approach to extrinsic evidence (***Scanlan's*** being the World War II frustration case) had been based upon an 'outmoded view' which Mason J said had been rejected by McTiernan and Williams JJ. Mason J said that on the outmoded view it was 'not legitimate to take extrinsic evidence into account',[25] citing Lord Wright's observations:[26]

> The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred.

Sir Anthony Mason's reasons in ***Codelfa*** assimilated the scope of the admissible extrinsic evidence of relevant surrounding circumstances - to be, in effect, exactly the same for distinct contractual exercises in (a) orthodox contractual construction as to the meaning of text in a written agreement; (b) a

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[21] See the observations in ***Codelfa*** towards the ultimately successful argument of contractual frustration (with Brennan J dissenting on the frustration issue).
[22] ***Codelfa***, 357- 358.
[23] ***Codelfa***, 358 - 359.
[24] ***Codelfa***, 353.
[25] ***Codelfa***, 358 c/f 353.
[26] ***Codelfa***, 359 citing ***Denny, Mott & Dickson*** [1944] AC 265, 274 - 275.

less orthodox, but nevertheless also a constructional task as to the ascertainment of an ad hoc implied term on a basis of business efficacy within a wholly written contract; and as well (c) an exercise of ascertaining whether or not fully perfected agreement may later be assessed to be effectively at an end in its future mutual performance - by reason of factual events advising post entry of the contract - which events themselves could not have been reasonably foreseen by the parties due to the emergence of a 'fundamentally different' contracting situation.

**Sir Gerard's narrower view**

The complex underlying facts, the multitude of complex legal issues and the common negative conclusions against all the implied terms underlying ***Codelfa*** tend to obscure what delivered then a radical alteration to Australian common law concerning the scope of admissible surrounding circumstances evidence applicable in the exercise of attempting to derive an ad hoc implied term in a fully written contract. Only when the reasons of Sir Gerard Brennan in ***Codelfa*** are reached and digested as to the topic of contended ad hoc implied terms does what is otherwise a relatively subterranean issue over the scope of admissible surrounding circumstances extrinsic evidence towards the ad hoc implied term derivation exercise finally fall into focus.[27] That is, if mental exhaustion has not descended completely by then.

Like his fellow four justices, Brennan J in ***Codelfa*** ultimately rejected all of the contended implied terms then sought to be defended or found on behalf of Codelfa at that appeal. Albeit arriving at the very same negative result on this aspect of the appeal, the evidentiary base used by Brennan J to reach that negative implied term conclusion in ***Codelfa***, as between himself and Mason J, was far narrower.

[27] See ***Codelfa***, 402 - 404.

In ***Codelfa***, Mason J's expressed basis for assimilating the admissible surrounding circumstances evidence to that of an orthodox exercise in contractual construction with that of an implication of a term ad hoc into a fully written contract does find some support in the observations by Lord Simon of Glaisdale in ***BP v Hastings***.

Interestingly, Mason J's reasons in ***Codelfa*** only refer to the majority's advice in ***BP v Hastings*** for its recording of its five-fold implied term ascertainment criteria - the test Brennan J applied under his different evidentiary approach to (not) finding any ad hoc implied term in the Codelfa parties' tunnelling contract.

Whilst Mason J did not, by his ***Codelfa*** reasons, refer to the majority advice in ***BP v Hastings*** towards the issue of admissible surrounding circumstances evidence upon the implication of a term, it did not escape Brennan J. Sir Gerard went out of his way in ***Codelfa*** to address it, observing then:[28]

> In *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* there are some passages in the majority judgment which suggests that their Lordships went further and sought to derive from the matrix of facts in which the contract was made the implication of a contractual term. If their Lordships went further than *Prenn v Simmonds* ([1971] 3 All ER 237) would permit - and it is by no means clear that their Lordships intended to do so, for *Prenn v Simmonds* was cited - then I should not think that the majority judgment would accord with sound principle. Clearly the minority judgment looked to the contract itself as the source of the term to be implied. *BP Refinery* should not be regarded as authorizing an extension of the role of extrinsic evidence, nor as permitting the implication of a term other than what is necessary 'to make the written contract work or, conversely, in order to avoid an unworkable situation', to quote a phrase from the minority judgment in that case. If it appears from the written contract that a term is to be implied, there are conditions which any proposed term must satisfy. They were stated by the majority judgment in *BP Refinery* and adopted by Mason J with the concurrence of the other members of this court in *Secured Income Real Estate v St Martin's Investments Pty Ltd* ((1979) 144 CLR 596 at 606).

[28] ***Codelfa***, 403 - 404.

Sir Gerard Brennan's ***Codelfa*** reasons proceed to repeat from ***BP v Hastings*** the now celebrated five-fold criteria ascertainment conditions to be used for a derivation exercise towards the finding of an ad hoc implied term in a wholly written contract. He continued:[29]

> Looking at the contract in the present case, in the matrix of the facts in which it was made, I see no necessity for the implication of a term, nor can I find that the criteria set out in *BP Refinery* are satisfied by any of the terms proposed respectively by the Court of Appeal, Ash J and the Arbitrator.

The actual extrinsic evidence and surrounding circumstances evidence used to successfully imply one (of the two) contended implied terms that ultimately came to be accepted under the majority advice in ***BP v Hastings***, is actually quite difficult to identify out of the majority advice. I take a closer look now at ***BP v Hastings*** before turning back to ***Codelfa*** and the Mason v Brennan divide thereafter in this paper.

## ***BP v Hastings***

It is now 43 years since the divided advice given to her Majesty by the Board of the Judicial Committee of the Privy Council on an appeal from the Full Court of the Supreme Court of Victoria in ***BP v Hastings***. Five years later the High Court of Australia delivered its opinion in ***Codelfa***. Both were contract cases about ad hoc implied terms. Both have had a profound influence on the development of contract law in Australia and the common law world.

***BP v Hastings*** is perhaps best known in contract law for the five-fold criteria ascertainment test found in the majority advice, towards the basis upon which an implied term will be found in a wholly written contract on the basis of business efficacy - sometimes described as a term implied 'ad hoc' or implied by fact. There is a need to distinguish such a term from a different species of

[29] ***Codelfa***, 404.

implied term otherwise arising in a contract as a matter of law, or differently again, a term arising by way of an imported industry custom and usage.

The implied term argument in the end carried the day for the appellant corporation with the majority in the Privy Council. The majority advice in ***BP v Hastings*** was to allow that appeal. That advice was delivered by Lord Simon of Glaisdale, with the concurrence of Viscount Dilhorne and Lord Keith of Kinkel. Rarely with decisions of the Privy Council, there was also delivered a strong dissenting advice to the contrary, offered by Lords Wilberforce and Morris of Borth-y-Gest. The minority advice was unusually robust, condemning what two of the finest commercial judges of the 20th Century viewed as an unsatisfactory and late emerging implied term (ultimately successful) during arguments at the appeal hearing.

To fully appreciate the impact of the remarks contained in the minority advice, to which I will come to later, some very complex underlying facts and documents under scrutiny within the ***BP v Hastings*** appeal need to be better understood. It helps to remember, at the very end, that one implied term canvassed in ***BP v Hastings***, failed badly. Yet another implied term emerging only during the arguments at the Privy Council appeal, was accepted by 3:2. It saved the day for BP's restructure of its Australian operations in Victoria.

**The majority advice: extrinsic evidence and reasoning**

The actual extrinsic evidence and surrounding circumstances evidence that was used to successfully imply the one (of two contended implied terms) that ultimately came to be accepted under the majority advice in ***BP v Hastings***, is difficult to identify out of the majority advice.

Possibly, Lord Simon for the majority was referring to facts identified as the 'immediate matrix of the rating agreement' and described as being two-fold

in the majority advice.[30] This included, first, a statutory provision in Victorian legislation allowing local governments to enter agreements with occupiers of industrial land to get highly subsidised rating agreements.

The second aspect of the extrinsic evidence was the refinery agreement, effectively then a State agreement, entered by the State of Victoria with BP Refinery (Westernport) Pty Ltd (BPW), a BP Australia subsidiary.[31]

The refinery agreement had provided for a construction of an oil refinery by that BPW corporation at Westernport,[32] Victoria, as part of a 'policy of securing decentralization of industry by offering preferential rating'.[33]

Lord Simon referred approvingly[34] (and somewhat ironically, given his stance in the minority) to Lord Wilberforce's generic observations towards contractual interpretation years earlier, in ***Prenn v Simmonds*** [1971] 3 All ER 237 (***Prenn v Simmonds***), namely:[35]

> In order for the agreement ... to be understood, it must be placed in its context. The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations.

Those ***Prenn v Simmonds*** observations, of course, were in their context -being then an exercise in entirely orthodox interpretation towards ascertaining the true meaning of the problematic text deployed in an express term within a written agreement.

Nevertheless, Lord Simon continued in ***BP v Hastings***:[36]

> Such a consideration of the matrix of an agreement is particularly called for when it is sought to imply in it a crucial term which the parties have not expressed. In the instant case consideration of the context of the agreement is, in their Lordships' opinion, essential.

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[30] ***BP v Hastings***, 272.
[31] The appellant in ***BP v Hastings***.
[32] In the Shire of Hastings, outside of Melbourne.
[33] ***BP v Hastings***, 272.
[34] ***BP v Hastings***, 271.
[35] ***Prenn v Simmonds***, 239.
[36] ***BP v Hastings***, 272.

That transition between meaning to implication is seen to be both swift and seamless. Those remarks were a predecessor to Lord Simon's subsequent identification of the legislative rate subsidy *Local Government Act* (Vic) amendment provided in Victoria for decentralised industries in 1963, and the refinery agreement entered between the State of Victoria and BPW, also in 1963.[37]

Later, the majority advice returned to identify some further matters Lord Simon said needed to be borne in mind, as regards an implication of a contended term within the rating agreement with the Shire of Hastings.[38]

Such matters were identified, first, as a substantial benefit secured by both parties over a long period under that agreement which could extend out to 40 years. Lord Simon identified preferential rating for BPW as being to its advantage. For the respondent Shire of Hastings, an identified advantage was the industrial development of the general area, including areas where full rates would then be paid for places ancillary to the refinery.

A second identified feature was the expenditure of a very large sum of money upon the establishment of the Westernport refinery by BPW, an amount which when spent was observed by Lord Simon to be essentially 'irrevocable'.[39] These are undertones in these remarks, of almost a quasi-misrepresentation being perpetrated against BPW, by reason of a withdrawal of subsidised rates by the Shire of Hastings under the unfolding circumstances of BP's restructuring of its Australian operations in Victoria. Lord Simon observed:[40]

> Once tempted to a particular site it is there for good - or ill.

The majority advice proceeded to reject the ad hoc implied term that had been accepted by the Victorian Full Court below, which was to the effect that

[37] The refinery agreement appears as the schedule to the *Westernport (Oil Refinery) Act 1963*, (No 7018) passed into law on 28 May 1963, the same day as the *Local Government Act*.
[38] ***BP v Hastings***, 277.
[39] ***BP v Hastings***, 277.
[40] ***BP v Hastings***, 277.

the rating agreement with the Shire of Hastings came to an end upon the appellant going out of possession of the refinery and by its assigning the ownership and operation of the refinery over to another (Australian) BP subsidiary corporation.

Lord Simon assessed that a termination of the rating subsidy agreement term was not **necessary** to give business efficacy to the rating agreement.[41]

Beyond failing a necessity threshold, the adverse view of that term by the majority in ***BP v Hastings*** was that an implied term to the effect that the rating agreement would come to an end in the assignment circumstances of the refinery described was, assessed in context of 'the matrix of facts in which the agreement was set', would be then to imply a termination term that would be 'wholly unreasonable and inequitable'.[42]

Rejecting that first implied term favouring the Shire of Hastings, the majority had been left with the subsidised rating agreement still on foot. From there, a more fundamental difficulty over the subsidised rating agreement emerged (only problematic during the appeal to the Privy Council).

The problem was as related by Lord Simon:[43]

> It affects its very heart and substance - namely, the quantification of rates in cl 2. Capital expenditure by some other company in BP's Australia group would not enure to the respondents' advantage by way of increase of rates over £25,000 ... The appellant company might have transferred all its assets to BP Australia Ltd and taken simultaneously an immediate lease back without ever going out of occupation. The implied term contended for by the respondents and upheld by the Full Court would not in such circumstances avail the respondents. The appellant company would continue to enjoy preferential rating, but without the capital expenditure by BP Australia being taken into account in the quantification of rates. In other words, the term implied by the Full Court not only operates inequitably, it fails to give business efficacy to a defective contract and vindicate the obvious intention of the parties.

[41] ***BP v Hastings***, 284.
[42] ***BP v Hastings***, 284.
[43] ***BP v Hastings***, 285.

Hence, Lord Simon thought that some extra term needed to be implied into the rating agreement, other than the one as was now rejected. That led to his observation:[44]

> In their Lordships' view in the light of the matrix of facts in which the rating agreement is set, the answer to that question is clear. It is to imply a term which would make the rating agreement accord with and not differ from the refinery agreement - to imply a provision that if the rights of the 'company' [the BP Westernport company under the rating agreement] were assigned or otherwise disposed of to a company in which the British Petroleum Co of Australia Ltd held thirty per cent or more of the issued share capital, 'company' should mean the assignee company.

So seen, that term presents as a complex and so, somewhat less than obvious looking implied term. A cynic might be forgiven for thinking that if the term was so clear and obvious, it ought to have seen the light of day much earlier, and particularly so for circumstances where the subsidised rating agreement (unlike the refinery agreement that did) contained no provision at all to permit its assignment to anyone, let alone to another 30% held part-subsidiary within the BP corporate group.

Nevertheless, invoking the now celebrated five-fold criteria ascertainment test towards ad hoc implied terms of business efficacy, Lord Simon observed:[45]

> Such a term would be both reasonable and equitable. It is capable of clear expression. It does not contradict any express term of a contract, but adds to it, and it gives business efficacy to the contract. In the light of the provisions of the refinery agreement it was something so obvious that it went without saying and if an officious bystander had been asked whether that was the common intention of the parties the answer would have been 'Of course'.

Given the need for the 'obviousness' in any such implied term, the concluding observations by Lord Simon carry a somewhat inconsistent tone toward a lately discovered implied term that just saved the day for BP:[46]

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[44] ***BP v Hastings***, 285.
[45] ***BP v Hastings***, 285.
[46] ***BP v Hastings***, 285 - 286.

> The crux of their Lordships' decision only emerged in the course of argument before the Board. While their Lordships naturally regret that the grounds on which they reached their conclusion were not considered in the County Court or by the Full Court and that they accordingly have not had the advantage of the views of the learned judges in those Courts thereon, the point having been taken before the Board, they must decide it.

There resulted a costs award as suggested in the majority advice to the effect costs orders below would not be disturbed (ie, adverse costs orders to BP as the appellant as it lost below). There would be no order as to the costs of the appeal to the judicial committee of the Privy Council.

### *The two implied terms under consideration*

It is often overlooked towards this influential 1977 Privy Council decision that there were actually two ad hoc implied terms under consideration as regards the relevant rating agreement. The implied term found below by the Victorian Court of Appeal was to the effect that the rating agreement had ended, after the party with whom it was made had gone out of occupation. That term was rejected by the majority members of the Privy Council.

A second ad hoc implied term only emerged during counsel's arguments before the Privy Council when raised by Viscount Dilhorne:[47]

> Why should not a term be implied in the rating agreement that if the appellant's rights were assigned to another company in the BP group, the word 'company' in the agreement meant the assignee?

This permissible assignment term, or as the dissenting Board reasons called, a 'version' of it, developed somewhat protean qualities. Nevertheless, it was ultimately endorsed by the majority members of the board of the Privy Council.[48]

[47] ***BP v Hastings***, 269.
[48] ***BP v Hastings***, 293.

***The rating agreement and benefit to BPW– more detail***

The key monetarily significant provision within the rating agreement for subsidised rates (over a 40-year period) applied in the period after the commissioning of the Westernport refinery by BP.

The subsidised rates benefit for BPW was to only pay annual rates of not less than £25,000, but variable upwards by the amount of capital expenditure as invested by 'the Company upon the refinery site from time to time' - the upwards variation delivered by an equation of capital expenditure of £20 million generating rates of £33,000 per annum.[49]

To implement the rate bargain (subsidised by reference to an expenditure of capital by 'the Company', ie, the appellant, BPW) was a promise under cl 5 of the rating agreement that each year the refinery's auditors, after the accounts were done, were to provide at December each year a certified audited statement identifying the level of capital expenditure on the refinery site and providing any further details the Shire of Hastings might require as regards capital expenditure for the purpose of an annual rating exercise.

Towards this agreement, Lord Simon had observed that a determination of the rates payable each year was to depend upon the amount of capital expenditure and the commissioning date of the refinery.[50]

The refinery agreement had provided for a future scenario of its possible assignment within the BP group in Australia and for performance by third parties. The rating agreement did not.[51]

So then, if within the rating agreement the word 'Company' was to be read as only referring to the entity BPW (ie, the appellant) it would have been possible in theory for the BP corporate group to arrange for any capital

[49] ***BP v Hastings***, 275 - 276.
[50] ***BP v Hastings***, 276.
[51] ***BP v Hastings***, 277.

expenditure on the refinery be made by 'some company in the group other than the appellant'.[52]

The rateability of 'the Company' under the rating agreement was tied only to capital expenditure by 'the Company'. The rates payable during the last 40 years of the rating agreement would then be considerably less than the parties had 'obviously contemplated'.

Lord Simon gave that hypothesis as an example of how lesser rates might be paid were other entities within the BP group in Australia to make the capital expenditures, whilst, nevertheless, leaving the annual refinery rates at their minimum level of £25,000 per annum.

The significance of a theoretical 'slickness' over the actual capital expenditure corporate personality maker was then used to undermine the workings of the rating agreement. That was expressed as a counterbalance against an asserted inequity of the Shire of Hastings to deny any further subsidised rating benefits under the rating agreement for circumstances where BPW had been a subject of a voluntary winding up - as a part of the Australian restructure of BP's operations.

The winding up of BPW was halted and possession of the refinery was transferred to another BP subsidiary in Australia.

The Shire of Hastings' denial of subsidised rating to the new entity, upon BPW going out of possession of the refinery was upheld by the Victorian Court of Appeal. That decision was against that assignee BP corporation who had claimed the benefit of the rate subsidy at first.

In the face of that loss, BPW went back into possession of the refinery, but now as a lessee. From that time on, BPW for itself claimed the subsidised rates, under the old rating agreement.

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[52] ***BP v Hastings***, 277.

But the respondent Shire now told BPW the rating agreement had ended when it went out of possession and had commenced to be wound up.

Hence, BPW was told by the Shire of Hastings it would need to pay normal level rates - because the subsidised rating agreement was all over.

The suggested inequity was because the Westernport refinery was established and would be running for years to come.

The Privy Council decision found there was no implied term ending the performance of the rating agreement as regards BPW, leaving the agreement on foot. That would have been enough to reverse the decision below to allow BPW as appellant to enjoy a resumed benefit of subsidised annual rates for the refinery over the period it was back in possession as lessee after these events.

But the decision of the majority went further. The implied term they ultimately did find within the rating agreement had, as mentioned above, emerged only as a suggestion during counsel's arguments from Lord Dilhorne.[53] This newly suggested implied term was then adopted as an alternative submission by BPW's counsel.

***The reach of the implied term as found***

From the arguments of counsel, it can be seen that a counter-submission of counsel for the Shire of Hastings (as respondent) was that Viscount Dilhorne's suggested term was inconsistent with the actual definition of 'Company' in the rating agreement.

The appeal to the Board was over a differential in rates for BPW in 1977 of the rating year, between a general rate levied at $154,960, in contrast to a claimed preferential rate under the rating agreement of $50,000. The decision carried rate repercussions for the enjoying of subsidised rates for a 40-year period after the refinery was commissioned, ie, potentially out until 2007.

[53] ***BP v Hastings***, 269.

The newly emerged implied term as ultimately found by the majority was to the benefit of not just the appellant, BPW. The new term would sanction a potential future assignment of benefits under the subsidised rating agreement to any 30% controlled BP subsidiary in the future.

Critically, that implied term as so found was said to be derived on the 'matrix of facts in which the rating agreement [is] set'.[54]

The term found would allow the rating agreement, which did not expressly provide for its assignment, to align with an express term of the refinery agreement, which did permit corporate assignments within the BP group.

The end result of the majority effectively cleared a path for BP to implement from that point its otherwise thwarted corporate restructure in Australia - and the inconvenient denial of continued subsidised deal rates from the Shire of Hastings to a new refinery operator and the earlier vindication of the Shire's decision by the Victorian Full Court on no less than two occasions. ***BP Australia v Shire of Hastings*** [1973] VR 194 was never appealed - as regards the denial to the refinery assignee, then BP corporation, of subsidised rates under the rating agreement made only with BPW. But the effect of the majority implied term indirectly reversed the outcome under the Victorian Full Court's decision.

That emerges as a context for the still white hot dissenting advice by Lords Wilberforce and Morris - to the effect that any provision for assignment of the rating agreement would likely have been invalid, falling foul, in effect, of the amended provision under the Victorian *Local Government Act* that became s 390A.

[54] ***BP v Hastings***, 285 - 286.

Lords Wilberforce and Morris said the events leading to the rating dispute were only to be found in the case stated for that appeal, not elsewhere which they pointedly observed was 'outside which it is impermissible to go'.[55]

**The dissenting advice in the Privy Council**

The majority Lords on the Judicial Board of the Privy Council were able to overcome a long term restructuring problem for BP in Victoria by their new implied term. As discussed, it emerged only during counsel's arguments at the Privy Council.

The minority members of the Board of the Privy Council would have endorsed the termination conclusion. And they were scathing of the majority's new implied term.

In their joint dissenting advice, Lords Wilberforce and Morris said the newly emerged implied term failed the criteria for implication by inconsistency, measured against the express terms of the rating agreement. The term could not be justified under 'normal principles'.[56] It was not necessary for business efficacy, and would likely be ultra vires of the Shire of Hastings, by not being authorised under s 390 of the Victorian *Local Government Act*. They observed it would 'in effect impose upon the Shire a contractual party to which the Shire has not assented'.[57]

Strongly dissenting in their advice, Lords Wilberforce and Morris said this:[58]

> We must however deal briefly with a fresh argument which found its way into the appeal: that was, as we understood it (for it has never been formulated in writing and has assumed a protean character) that the words 'the Company' in the agreement of 7 May 1964, may be read as including any company in the British Petroleum Group of companies which happens to occupy the refinery site ...

[55] ***BP v Hastings***, 289.
[56] ***BP v Hastings***, 294.
[57] ***BP v Hastings***, 294.
[58] ***BP v Hastings***, 293 - 294.

> Another version of this argument appears in the majority judgment and consists in saying that a term ought to be implied that if the rights of the appellant company were assigned or otherwise disposed of to a company in which the British Petroleum Co of Australia held thirty per cent or more of the issued share capital, 'Company' should mean that assignee company.
>
> Of this argument we would say:
>
> 1. It was not put forward in either court below, nor taken or hinted at in the appellant's printed case.
> 2. It is inconsistent with the decision of the Full Court in the earlier case concerned with BP Australia Ltd, and involves contending that that unappealed decision was wrong. In our respectful opinion it was right.
> 3. It is inconsistent with the appellant's own action in December 1969, when it requested that their rights and privileges *vested* in the appellants might be *transferred* to BP Australia Ltd.
> 4. It introduces a method of interpretation which is novel and unsound ...
> 5. The introduction of a new 'implied term' cannot be justified under the normal principles. It is not necessary in order to produce business efficacy, is inconsistent with the expressed terms of the rating agreement, and, in our opinion, is not authorized by s 390A. In effect it would impose upon the Shire a contractual party to which the Shire has not assented.
> 6. The extended definition does not produce the result aimed at ...

[Having experienced the trauma of an appellate reversal on the basis of new arguments that never saw the light of day at first instance, I confess to derive a certain measure of therapy in regularly re-reading the above remarks in the minority advice.]

In that divisive environment it was the surrounding circumstances or extrinsic facts which had enabled the majority members of the Privy Council to reach a conclusion as regards the newly emerged implied term ultimately endorsed.

## The five-fold criteria test for an ad hoc implied term in a wholly written contract

The majority advice delivered in ***BP v Hastings*** retains a sustained legitimacy, particularly in Australia as regards the five-fold criteria test seen expressed there in the advice by Lord Simon.

Nevertheless, the test towards the implication of ad hoc terms within a contract, on the term delivering business efficacy to a bargain, on review, is probably one of the least uncontroversial aspects in that appeal. Intriguingly, the basis on which the test is stated there by Lord Simon can be observed to have been on somewhat less than considered terms, than might today otherwise be assumed.

Lord Simon, delivering the majority advice of the Board, expressed the five-fold implication criteria this way:[59]

> Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, 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.

## Repercussions in Australia

The ***BP v Hastings*** reasons were delivered on 27 July 1977. As observed, they have been profoundly influential ever since, particularly in Australia.

Even so, the majority advice result now may suggest something of a 'home town' decision for the UK based parent BP corporation of BPW - on the 3:2 ascertainment of the ad hoc implied term that effectively conferred a highly subsidised long term lower local authority rate exposure to the Shire of Hastings

[59] ***BP v Hastings***, 282 - 283.

than would otherwise have been the case had that term not emerged at the eleventh hour.

That 1977 majority advice and the five-fold criteria test quickly came to be accepted and applied in Australia by the High Court. In 1979, it was used by Mason J in ***Secured Income Real Estate v St Martin's Investments*** (1979) 144 CLR 596 (***Secured Income***).[60] Two years later, in ***Codelfa***, all members of the High Court (save for Aickin J) either used or endorsed the five-fold test criteria for the finding of ad hoc implied terms.[61] Wilson J in ***Codelfa*** had concluded:[62]

> [I]n the circumstances of this case the correct conclusion is not that a term must be implied in the contract ...

He agreed as well that the interlocutory injunction as obtained by third parties against Codelfa on 28 June 1972 may well have '**frustrated**' the contract and that 'a finding as to frustration and its consequences lie within the jurisdiction of the Arbitrator'.[63]

Brennan J likewise adopted and applied the five-fold ad hoc implied term criteria test from ***BP v Hastings***.[64]

By May 1982 then, two High Court of Australia decisions had unequivocally adopted and applied the ***BP v Hastings*** five-fold test criteria for wholly written contracts.

The five-fold ad hoc implied term criteria test from the majority advice in ***BP v Hastings***, whilst still the applicable legal ascertainment touchstone in Australia in 2020, now appears now to have been diminished somewhat in the United Kingdom - by Lord Hoffman in providing the advice of the Privy

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[60] ***Secured Income***, 606 (with whom Gibbs, Stephen & Aickin JJ all agreed).
[61] See first Stephen J at page 344, agreeing with 'all' Mason J had said concerning the implication of a term in that construction contract, then by Mason J at 347, then Wilson J at 392 (adopting the reasons advanced by both Mason J and Aickin J).
[62] ***Codelfa***, 392 (Wilson J).
[63] ***Codelfa***, 392 (Wilson J).
[64] ***Codelfa***, 404.

Council in ***Belize***.[65] Whilst itself criticised, Lord Hoffman's approach has been stoutly defended.[66] I will return to this later in this paper.

**Relationship between *BP v Hastings* and this paper**

The objective of my paper is directed at the subject matter of ad hoc implied terms. But my immediate quest is not undertaken from any perspective of reviewing the five-fold criteria test applied as regards situations of wholly written agreements, or (axiomatically) to the implication of such terms in deeds. For Australia, at least that ascertainment criterion looks to be well settled.

But towards the exercise of the finding such implied terms, however, which is my objective, and in applying that test, it is necessary to scrutinise more closely the character of the admissible evidence of surrounding circumstances or extrinsic evidence, that is accepted as permissible to be admitted and used in undertaking the ascertainment task.

To that quest, one of the few reliable guide posts to commence with is that such evidence must be temporally anchored to the time period that the contract or deed was entered. Subsequent events cannot be used to drive the exercise of implication of ad hoc terms in the parties' agreement - no matter how troublesome the problems that might have emerged.

## ***Codelfa***

**The context of the observations on contractual interpretation**

For all their ensuing and venerable importance upon contractual construction generally, the observations on a 'true rule' in ***Codelfa*** must be recognised to have been delivered then in an unusual underlying appellate context. The ***Codelfa*** appeal was determining issues over what were the

[65] ***Belize***, 17 - 27

[66] See, for instance, McLaughlan D 'Construction and Implication: in defence of *Belize Telecom*' (2014) *Lloyds Maritime and Commercial Law Quarterly* 203. But see ***Marks & Spencer plc v BNP Paribas*** (supra).

contentious implied terms found in the ***Codelfa*** parties' contract by the New South Wales Court of Appeal.

The ***Codelfa*** appeal to the High Court of Australia was concerned with ad hoc implied terms favouring Codelfa Constructions - as builder for the NSW Rail Authority of two inner city tunnels.

The ***Codelfa*** implied terms had been found by the New South Wales Court of Appeal. If those terms could not be defended in the High Court on appeal, there was next some level of fall back argument over whether the parties' contracted bargain had been terminated in any event by reason of its legal frustration.

An 'ocean' of litigious controversy (to use Mason J's description) preceding the High Court's decision had emerged out of an arbitration between the same parties. Following delivery of the arbitrator's award, both Codelfa and the NSW Rail Authority initiated actions in the New South Wales Supreme Court. They were determined at first instance by Ash J. His decision was appealed to the NSW Court of Appeal,[67] after which Codelfa appealed to the High Court, and with a cross-appeal by the NSW Rail Authority.

So, the environment in which Mason J's classic true rule interpretation observations as to the meaning of text in a contract were made,[68] was Codelfa's appeal seeking to defend, and even to enhance the implied terms as had found favour below, initially by the parties' arbitrator and, later, by Ash J.

When the dispute reached the New South Wales Court of Appeal - the ad hoc implied terms being found for Codelfa turned out to be somewhat different to what had been accepted to then.

But by its cross-appeal in the High Court, the NSW Rail Authority challenged any such implied terms. Further, it resisted efforts by Codelfa in the

[67] Reynolds, Glass & Samuels JJA.
[68] ***Codelfa***, 352.

High Court to expand on the implied term found below - seeking to encompass a term to redress its lost profits on the tunnelling project.

Codelfa was alternatively contending in that High Court appeal that its building contract for the Eastern Suburbs Railway was at an end on the basis of its legal frustration. That was argued to arise by reason of a post contract injunction as obtained by local residents against Codelfa, in effect, stopping it working around the clock by successive eight hour shifts which had created unrelenting noise, dust and vibration for the residents.

Yet another issue had arisen in ***Codelfa*** over whether the arbitrator, in the face of then conflicting case authority between the House of Lords and the Privy Council, could actually give a frustration of contract conclusion towards a termination of the parties' tunnelling construction contract.

Eventually, the High Court said in ***Codelfa*** that the arbitrator could and should make that frustration determination. So the frustration of contract issue at the end was remitted back to the arbitrator to resolve. It is apparent, however, especially from Sir Anthony Mason's reasons in ***Codelfa***, that the arbitrator was to be assisted by a very strong 'hint' towards a conclusion that the contract was ended in its future performance obligations on a basis of frustration as being, effectively, overwhelming. Sir Anthony had observed[69]:

> That is something that remains for him to consider, although, having regard to the view I have taken of his findings, I cannot think that it will cause him much difficulty.

Chronologically, however, before the High Court appeal got to consider whether the parties' tunnelling contract had come to an end on a basis of it being frustrated by the 'fundamentally different situation' that had unexpectedly emerged, the Court needed first to resolve earlier issues. These were the

[69] ***Codelfa***, 366.

contended ad hoc implied terms of fact on the basis of business efficacy, which had been ascertained in Codelfa's favour, albeit differently, in levels below.
If the ad hoc implied terms were sustained on appeal, that result meant, in effect, that a financially problematic situation under which Codelfa had found itself by being injuncted against working around the clock in eight-hour shifts six days a week (and without any inhibition for Sundays), would be mollified to an extent by Codelfa being allowed extra time and extra money to complete the promised tunnelling works. Codelfa then was pursuing a two level strategy before the High Court. Only if Codelfa's significantly constrained working hours and adverse remuneration problems were not redressed by the force of ad hoc implied terms would it then be necessary to advance to stage two - to consider then whether performance of the parties' tunnelling contract had been ended by the frustrating event of an unexpected superior court injunction obtained against Codelfa by residents.

**The implied term environment in *Codelfa***

So then the first tier exercise of Codelfa in the appeal was to defend the ad hoc implied terms found in its favour below - such terms allowing Codelfa Constructions more time to complete and by additionally compensating for extra costs and taking longer time to complete the tunnelling contract.

That was the appeal environment that led to Sir Anthony Mason needing to explain the nature of the process by which ad hoc implied terms might be found in a commercial contract.[70]

Commencing at that task, Mason J carefully distinguished what he contrasted as the orthodox exercise[71] in the interpretation of written contractual language (ie, meaning), as against a different exercise in the implication of an ad

[70] ***Codelfa***, 345 - 346.
[71] ***Codelfa***, 345.

hoc implied term. The ad hoc implied term derivation process was described by Si Anthony as 'not an orthodox incidence' of (contractual) interpretation.[72]

Within that underlying, albeit unorthodox, interpretive contractual framework, Sir Anthony Mason (as later did Sir Gerard Brennan) observed on the nature of the extrinsic evidence that would be allowed as admissible in the process by which ad hoc implied terms might be found.

By his approach Sir Anthony did not differentiate between the admissible extrinsic evidence permitted to be used in either an orthodox exercise of meaning ascertainment and for finding such terms. That was assumed to follow logically from both exercises being in the nature of contractual interpretation - one orthodox, the other not.

Mason J's use of nomenclature linkages as between the two processes was, with respect, brilliant, if not novel, at then. No case authority was cited for the orthodox/unorthodox process of ascertainment linkage. But Sir Gerard Brennan saw the distinction. Indeed, he saw the difference as fundamental. Defending what he saw then as a different status quo, he called to his aid an extensive catalogue of prior case authority.

Different categories of ad hoc implied term had been found in the determinations below, first by the arbitrator, next by Ash J, and later still, by the New South Wales Court of Appeal. These various terms can be located in ***Codelfa***, in the reasons of Sir Keith Aickin[73] and of Brennan J.[74]

A vital temporal orientation point emerges from Sir Keith Aickin's reasons. It is sometimes missed, as so obvious not to require stating.

The key temporal point is that any exercise in ascertainment of an ad hoc implied term on a basis of business efficacy, must only be conducted by reference to the (objective) positions of the parties **at the time they entered**

[72] ***Codelfa***, 345, 353.
[73] ***Codelfa***, 372 - 373, 375.
[74] ***Codelfa***, 400 - 401.

their relevant contract.[75] The ascertainment of term exercise is not to be conducted with the benefit of hindsight to 'post contractually emerging problem'. The derivation task must not be focused at the later time, when the 'gap' term problem arises - subsequent to the parties' contract being perfected and when it is attempted to be being performed.

A reverse engineering approach taken towards an attempted implication of a term to fix a problem would be inventive but intellectually dishonest. The process must be temporally focused at the occasion when the parties perfected their contract.

So much might be thought startlingly obvious. Nevertheless, it is instructive from ***Codelfa*** that the first version of an implied term as it had been found by the arbitrator had been framed by reference to working backwards to address the problematic situation of the injunction obtained by the residents against Codelfa, restraining it, in effect, from working shifts around the clock by successive eight hour shifts.[76].

Aickin J rejected the implied term of the arbitrator as, indeed, he also did for the implied term in a different form as found by Ash J and then also, even later still, again in slightly different form, by the New South Wales Court of Appeal.

Sir Keith Aickin concluded that none of the contended versions of the implied term were so obvious as to go without saying. That negative conclusion was reached applying a 'testily suppressed - officious bystander - Oh, of course' test, taken from colourful observations by MacKinnon LJ made in ***Shirlaw v Southern Foundries 1926 Ltd*** [1939] 2 KB 206 at 227.

Reaching the same negative implied term conclusions as Mason J as regards a lack of obviousness, Aickin J, by his own reasons, interestingly, did

[75] ***Codelfa***, 375.
[76] ***Codelfa***, 375.

not otherwise seek to use the five-fold criteria from the majority advice in ***BP v Hastings***.[77]

Nevertheless, it is unthinkable that Sir Keith was distancing himself from that test given that only two years earlier he had been part of the coram in ***Secured Income***. That coram had expressly approved Mason J's application there of the five-fold implied term criteria test from ***BP v Hastings*** for Australia.[78] The reasons of Aickin J in ***Codelfa*** do not canvass the scope of admissible extrinsic evidence which may be used upon an exercise in the attempted derivation of ad hoc implied terms in a party's written contract.

**Rejection of the various ad hoc implied terms by the High Court**

As mentioned, the various implied term formulations will be found in Aickin and Brennan JJ's reasons. At the end, they were all rejected by all members of the ***Codelfa*** High Court.

Upon the ad hoc implied issue in ***Codelfa***, there were three substantive reasoned judgments delivered along with written reasons from the other members of the High Court.

Mason J, as already seen, deployed the five-fold criteria ***BP v Hastings*** test. The problem, as he saw it, was not so much over **necessity** for the tunnelling work that required maintenance of around the clock eight-hour shifts, six days a week. Rather, Mason J's concern was over the lack of obviousness in the terms:[79]

> This is not a case in which an obvious provision was overlooked by the parties and omitted from the contract. Rather it was a case in which the parties made a common assumption which masked the need to explore what provision should be made to cover the event which occurred. In ordinary circumstances negotiation about that matter might have yielded any one of a number of alternative provisions, each being regarded as a reasonable solution.

[77] Mason J did, of course, as did Brennan J.
[78] See ***Secured Income*** at 605 - 606.
[79] ***Codelfa***, 355 - 356.

The lack of obviousness in the implied terms Codelfa advocated for was also the problem for Aickin J in his similarly rejecting all attempted formulations of the formerly found ad hoc implied terms favouring Codelfa.

Both Mason and Aickin JJ made a point of expressing a difficulty in finding an ad hoc implied term out of a 'boiler plate' terms contractual tendering situation.[80] If, effectively, a governmental rail authority had presented to the construction market its assembled catalogue of required written terms, on a take it or leave basis to would-be contractor tenderers seeking then in effect, to be chosen as the successful tenderer builder, it is difficult to **objectively** hypothesise as well that these parties had 'obviously' left out a further unexpressed term. For contracts of adhesion, even applying an objective approach, it was difficult to accept that as a matter of concept an unwritten ad hoc implied term of fact could be assessed as being so obvious as to meet the ***BP v Hastings*** standard of that extra term 'going without saying'.

Brennan J likewise rejected all earlier contended versions of the ad hoc implied terms. Nevertheless, he approached the evaluation on the basis, first, of such terms not being 'necessary'. He proceeded to conclude that Codelfa's ad hoc implied terms did not meet any of the five-fold test ***BP v Hastings*** criteria.[81]

Stephen J, on the implied term issue in ***Codelfa***, agreed with '**all**' Mason J had written about it.[82]

Likewise for Wilson J, in brief reasons. He agreed not only with the conclusions as to the finding of no implied term of fact. But, as well, Wilson J agreed with the affirmative indications of a contractual frustration of the tunnelling contract by **both** Mason J and Aickin J.[83] Lastly, Wilson J

[80] ***Codelfa***, 356 (Mason J) and 375 (Aickin J).
[81] ***Codelfa***, 404 - 407.
[82] ***Codelfa***, 344.
[83] ***Codelfa***, 392.

specifically aligned himself with the **reasons** of both Mason J and Aickin J towards those results, not just their conclusions.

Consequently, as regards the finding of ad hoc implied terms, on the basis of a ***Codelfa*** plurality of three justices of five,[84] Mason J's uniformity observations upon the scope of the surrounding circumstance and extrinsic evidence admissible towards an (unorthodox) exercise of contractual interpretation required to ascertain an ad hoc implied term, carried the day in ***Codelfa*** over the unsupported narrower views of Brennan J expressed as to the range of such evidence.

But the weight of high level earlier case authorities as assembled in Brennan J's reasons on this evidence issue, including Sir Frederick Jordan's observations from ***Heimann***, carrying later an affirmation of Sir John Latham in ***Scanlan's***, was ostensibly impressive.[85] That was especially so when that body of case authority was viewed against Mason J's somewhat less convincing footnoted references to suggested 'majority' views by McTiernan and Williams JJ in ***Scanlan's***, plus to one generic passage from out of *Wigmore on Evidence* vol ix (3rd ed) (1940).[86]

The eventual ***Codelfa*** plurality position upon the range of extrinsic evidence admissible upon an ad hoc implied term of surrounding circumstances evidence, could be said to enjoy a somewhat questionable parentage.

## Sir Anthony Mason's observations in *Codelfa* concerning the evidence admissible upon the implication exercise towards an ad hoc implied term on the basis of business efficacy

Given an undoubted and understandable general focus on the utility of Sir Anthony Mason's general articulation in ***Codelfa*** upon a 'true rule' towards the meaning of words in contracts by the use of evidence of surrounding

[84] Brennan J contra and Aickin J not addressing the extrinsic evidence issue as regards implied terms at all.
[85] Not to mention the 1914 observations of the High Court from ***Purcell v Bacon***.
[86] ***Codelfa***, 353.

circumstances,[87] his Honour's following observations on the scope of admissible evidence to be permitted towards the very subject of that appeal, namely, for sustaining the findings of ad hoc implied terms in a written contract have received less attention to date. I hope to address that omission.

In ***Codelfa***, Sir Anthony rendered the following observations on finding ad hoc implied terms with the assistance of extrinsic evidence across the following key paragraphs:[88]

> However, it is equally obvious that in making the enquiry whether a term is to be implied the court is no more confined than it is when it construes the contract. For the implication of a term is an illustration of the process of construction, though differing from the more orthodox ascertainment of the meaning of a contractual provision.
>
> There are, of course, older authorities which support a more restricted approach to the implication of a term. One example is the statement of Jordan CJ in *Heimann* (footnote 87 - (1938) 38 SR (NSW) at p 695) which confines recourse to the intention manifested by the express term of the contract. It was later approved by Latham CJ in *Scanlan's New Neon Ltd v. Tooheys Ltd* (footnote 88 - (1943) 67 CLR 169 at p 195). These statements reflect an unduly restrictive approach to construction, an approach which is outmoded or 'antiquated', to use the expression favoured in *Wigmore on Evidence*, 3rd ed (1940), vol ix, par 2465 (p 214). Indeed, they do not accord with the approach taken by the majority in this Court in *Scanlan's* - see McTiernan J (footnote 89 - referring to *Scanlan's* at pp 206, 209 - 215 especially at pp 214 - 215) and Williams J (footnote 90 - referring to *Scanlan's* at pp 221 - 225).
>
> The implication of the term found by the Court of Appeal rests on findings made by the Arbitrator based on circumstances surrounding the making of the contract, including evidence of the discussions between the parties which preceded entering into the contract. Thus the Arbitrator found that there was a common understanding (described as a 'belief' by the Court of Appeal) that the works would be carried out on a three shift continuous basis six days per week and without restrictions as to Sundays ... (my emphasis)

Mason J further observed that the arbitrator had found the NSW Rail Authority had represented to Codelfa (as prospective builder of the two inner city Sydney tunnels), and that Codelfa had then accepted that no injunction

[87] ***Codelfa***, 352.
[88] ***Codelfa***, 353 - 354.

would be granted in relation to noise or other nuisance. The arbitrator also found that the works could not be carried out in accord with methods and programmes agreed between the parties unless Codelfa did the work in three shifts each day for six days a week.

Continuing in ***Codelfa***, Mason J's implied term derivation and evidence reasons say this:[89]

> The first question is whether, in the light of the principles as I have explained them, it was legitimate to look to this material on the issue of implication of a term. I think it was. ...

As now seen, notwithstanding the endorsed use of that admitted surrounding circumstances evidence for the implication exercise seeking to sustain implied terms that would afford Codelfa more time and more money to complete the tunnelling works (in circumstances where its working schedule was dramatically impacted by the residents' interlocutory injunction), Mason J had ultimately rejected all the contended implied terms that Codelfa was defending or advocating for to the High Court.

Ultimately, however, Codelfa saved the day in the appeal somewhat, by winning on showing a likely engagement of the contractual doctrine of frustration.[90] More correctly it should be said that Codelfa almost won - given that frustration issue was then identified as one exclusively for the arbitrator to resolve, within his jurisdiction. Nevertheless, as mentioned the arbitrator had received the strongest possible indication from the High Court that the contract was likely to be at an end in its ongoing performance under an application of modern contractual frustration doctrine principles.[91]

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[89] ***Codelfa***, 354.
[90] By 4:1 majority (Brennan J dissenting).
[91] ***Codelfa***, 356 -357, (Mason J applying Stephen J's observations in ***Brisbane City Council v Group Projects Pty Ltd*** (1979) 145 CLR 143 (***Brisbane City Council***) 159 - 163).

As seen above, Mason J's observations on this issue saw him dismissing Sir Frederick Jordan CJ's (NSW) views on this aspect of ***Heimann***[92] and also their application by Sir John Latham CJ (five years later) in ***Scanlan's*** (as a suggested minority approach in ***Scanlan's***) and as a 'more restricted approach to the implication of a term.' So-called older authorities were thus sidelined, on a basis that they reflected an outmoded or 'antiquated' approach. Contended support on the basis of the observations of Dean Wigmore in his (1940) Treatise on Evidence[93] - also requires examination.

Only when one journeys on in ***Codelfa*** to reach the reasons of Sir Gerard Brennan concerning the evidentiary issue for an implication of an ad hoc term[94] are Mason J's earlier observations exposed as controversial. The scale of a change to the Australian common law effected under the earlier observations by Mason J then becomes apparent.[95]

Because this outcome was achieved by invoking only two real sources, first the 1940 observations by Dean Wigmore leading to a suggested non-application of Jordan CJ (NSW)'s evidentiary approach towards the ad hoc implication of terms as expressed in ***Heimann's*** case - and second, by reference to suggested 'majority' positions by McTiernan and Williams JJ over that of Latham CJ in ***Scanlan's*** these two sources require closer scrutiny.[96]

History, of course, is written by victors. So it is that the ***Codelfa*** views of Sir Gerard Brennan favouring a narrower range of evidence admissible towards an exercise conducted towards the attempted implication of an ad hoc implied term in a wholly written contract, in particular by explicitly applying

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[92] ***Codelfa***, 353.
[93] Wigmore D, *Wigmore on Evidence* (3rd ed) (Little Brown and Co, 1940) Vol 9, page 214, par 2465 (*Wigmore)*.
[94] Commencing ***Codelfa***, 400.
[95] ***Codelfa***, 402 - 404.
[96] ***Codelfa*****,** footnoted references on 353.

Sir Frederick Jordan's observations on that issue from ***Heimann***,[97] ultimately did not carry the day in ***Codelfa***.

The body of case precedent assembled in Sir Gerard's reasons including prior High Court of Australia authority, the House of Lords and the Privy Council, reflected a narrower evidentiary approach by the common law to the deriving of such terms before 1982. That older regime was swept aside in ***Codelfa*** under the observations of Mason J.[98]

Given a historically significant change in Australian law as regards the genre of evidence to support an ascertainment of ad hoc implied terms in written contracts, it is insightful to dwell further on the two sources of authority invoked by Mason J in ***Codelfa***[99] to achieve that departure from a so-called former antiquated and unduly restrictive former approach.

Consequently, I propose to look more closely at the passages referred to from the 1940 edition of *Wigmore*, then at suggested rival positions taken by the three judges of the High Court who sat in what was a World War II contractual frustration appeal, all reported as ***Scanlan's*** - being the two core platforms of enlightenment used by Mason J to deliver change for Australia.

Interestingly, at this point there are some passing observations found in the majority reasons of their Lordships of the Privy Council providing their advice in ***BP v Hastings*** that might have been invoked to support the 'modern' approach to surrounding circumstances. Mason J did not mention them in ***Codelfa***. Nevertheless, Brennan J did and he sought to push them aside.[100]

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[97] ***Heimann***, 695.
[98] ***Codelfa***, 353.
[99] ***Codelfa***, 353.
[100] ***Codelfa***, 403 - 404.

***Wigmore* - par 2465**

At par 2465 of his Treatise on Evidence Dean Wigmore does use the term '**antiquated**'. But the context for his observation is important. To that end, I will set out below the very par 2465 to which Mason J referred in ***Codelfa***.[101]

> But the universal application of **the principle** to *contracts and other documents* has also gradually been perceived. There is no transaction whatever in which, for some idea or other, the parties do not use words in a sense of their own. Having themselves locked up the idea in the words, themselves must furnish the key to unlock it. The antiquated notion (2470 *intra*) that a document must be construed solely within its four corners, no matter how puzzling the problem, served for a time to retard the full appreciation of sound doctrine. But it was well settled by the middle of the 1800s in England; the case of *Macdonald v Longbottom*, in which 'your wool' was to be interpreted, served to mark the period of full conviction [footnote 5 on page 214 for England refers to many cases including finally *Macdonald v Longbottom* in (1859) 28 LJQB 297]. In the United States the principle has also received ample sanction and illustration. (my emphasis in bold and underline)

For me, one observation and two enquiries emerge out of this paragraph from *Wigmore*. My observation is that Dean Wigmore's reference to an '**antiquated notion**', by construing a document solely within its four corners no matter how puzzling the problem, looks demonstrably to be a comment then rendered towards the interpretation of text found within a written agreement. Manifestly, it was not, I suggest, an observation specifically directed towards the exercise of finding by implication an ad hoc implied term - as an otherwise unexpressed term within the written agreement.

It might then be responded that all Mason J said in ***Codelfa*** vis-à-vis *Wigmore* was to speak of an 'unduly restrictive approach **to construction**',[102] which was outmoded or antiquated and not as any direct reference to evidence admissible towards an exercise of an 'implication of an ad hoc implied term' in a written contract. Whilst that is true, it should be observed again that the relevant

[101] ***Codelfa***, 353.
[102] ***Codelfa***, 353.

paragraph at ***Codelfa***[103] commences with an observation against older authorities supporting a more restricted approached to the implication of a term. A trek back to the ensuing 1940 commentary of Dean Wigmore unearths only a very generic observation concerning a suggested better approach to the interpretation of words within documents more generally.

Within three sentences of ***Codelfa***[104], therefore, Mason J's reasons fully assimilated the evidence available for an orthodox interpretation exercise conducted over the true meaning of text in a written contract - to the less orthodox task concerning implication of an unexpressed term ad hoc into a wholly written agreement as a matter of business efficacy.

Two more questions emerge out of Dean Wigmore's par 2465. They arise by reference to his reference to a 'universal application of **the principle**'. The first question must be - what precise principle was being referred to? The other is to ask what precisely is the 'antiquated notion' addressed by Dean Wigmore's observations at the referenced following par 2470.

### *Question 1 - the 'principle' 1*

The 'principle' addressed by Dean Wigmore at par 2465 it is not easy to capture, it has to be said, from out of the preceding passages within par 2465. Reference is seen to application of 'the principle' (or a principle) in text at page 213 of *Wigmore*. But there is no more elaboration. Reference is also found earlier to a 'general principle', the subject of two intervening rules which are there said may obstruct (the principle's) simple application, at page 212 of *Wigmore*.

As a matter of inference from at the commencement of par 2465 under a heading 'Parties' Mutual Understanding - Identifying a Description', as seen at page 211, I could venture to speculate that the 'principle' as referred was:

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[103] ***Codelfa***, 353.
[104] ***Codelfa***, 353.

> There is no reason, in the nature of things why, the *individual parties* to a transaction may not employ words in a particular sense, irrespective of the ordinary or popular sense; because what we are seeking, in interpretation, is their actual standard, and the popular standard is merely taken provisionally, as presumably theirs …

So exposed, that general principle as a matter of contract law presents as almost trite, uncontroversial - but contextually here, unrevealing. More importantly, that principle, with great respect, would provide little assistance towards weighing the surrounding evidentiary scope question to be undertaken as regards an exercise of attempted ad hoc implication of a term in a written contract.

***Question 2 - the notion at issue***

As regards Dean Wigmore's 'antiquated notion', referenced at his following par 2470 an ascertainment exercise towards his 'notion at issue' is a little easier located. The discovered notion, once located, is seen as expansive. But again, the notion is not precisely directed at the genre of evidence admissible towards an exercise of an implication of an extra term ad hoc, into a written contract.

A subheading to Dean Wigmore's par 2470 under 'Sources of Interpretation' reads 'General Principle: All Extrinsic Circumstances may be Considered'. Here, Dean Wigmore observed:[105]

> It was a part of the stiff formalism of earlier interpretation, not only that the law should fix the meaning of words and phrases …, but also that all aides to meaning must be found *in the document itself*. …

Wigmore observed this notion had long since been discarded.[106] He then commenced a discussion of what had been classified as three stages of progress

[105] *Wigmore*, 224 - 225.
[106] *Wigmore*, 225.

in that discarding end. His third (last) stage of progress was explained in the following terms:[107]

> The truth had finally to be recognised that words *always* need interpretation; that the process of interpretation inherently and invariably means the ascertainment of the association between words and external objects; and that this make inevitable a free resort to extrinsic matters for applying and enforcing the document.
>
> …

That passage concludes:[108]

> … Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore *all the circumstances must be considered which go to make clear the sense of the words*, - that is, their associations with things.

A possible insight, perhaps, towards the earlier ***Codelfa*** articulation by Mason J of his 'true rule' as regards surrounding circumstances evidence and the interpretation of a contract, I can mention in passing the Wigmore observations contrasting a so-called traditional rule, against a liberal rule:[109]

> The traditional rule is found in application almost side by side with the liberal rule. The former is nowadays perhaps less frequently enforced in England. In the United States it is often invoked under the guise that no peculiar or individual meeting can be shown unless there is 'ambiguity'. There are nevertheless abundant instances of the liberal rules recognition.

### ***Scanlan's***

### ***Use by Sir Anthony Mason in Codelfa***

Next, I must turn to observations by three justices of the High Court who sat in ***Scanlan's*** - being Mason J's other significant source of authority and invoked in ***Codelfa*** to support the modern evidentiary regime for the admission of surrounding circumstances evidence. Critically, such evidence was to be allowed not merely towards a process of understanding the true meaning of

[107] *Wigmore*, 227.
[108] *Wigmore*, 227.
[109] *Wigmore*, par 2463, 196.

words used within parties' contracts, but equally for an ad hoc implication exercise to add an extra and otherwise wholly unexpressed term into that wholly written contract. The equating was said to obviously be so, on the basis of an assimilation for two processes of construction for a written contract - one a pure orthodox construction exercise as regards an ascertainment of meaning, with the other process (the implication of ad hoc of extra terms) likewise being an exercise in construction, albeit not an orthodox one.

In the ***Codelfa*** reasons, once Mason J had dealt with the issue of frustration, he also returned to ***Scanlan's***.[110] ***Scanlan's*** was now invoked (more correctly, the suggested reasons of Sir Edward McTiernan and Sir Dudley Williams in that decision) to justify the assimilating of the scope of admissible surrounding circumstances evidence towards evaluating the frustration of contract arguments - in terms of ascertaining a termination of the performance of the contract - by using the same admissible body of extrinsic surrounding circumstances evidence.[111]

At this point, Mason J had said, 'Of course, we need to read the judgments in *Scanlan's* in light of the more recent statements as to the theoretical basis of the doctrine (ie, the doctrine of contractual frustration)'. In a distinct context now of evaluating fall back termination by frustration arguments at the ***Codelfa*** appeal, Mason J observed:[112]

> *Krell v Henry* was strongly criticised by Latham CJ in *Scanlan's* (referring to (1943) 67 CLR at pp 188 - 194), but much of his Honour's criticism appears to be founded on the outmoded view, rejected by McTiernan and Williams JJ, that it was not legitimate to take extrinsic evidence into account. … In any event McTiernan and Williams JJ took a more favourable view of *Krell v Henry*, demonstrating that it was consistent with the latter cases and that the views expressed by Vaughan Williams LJ in that case confirmed to the doctrine of frustration as it was subsequently elaborated. (my emphasis)

[110] ***Codelfa***, 358.
[111] ***Codelfa***, 358 - 359.
[112] ***Codelfa***, 353.

Given its ostensible evidentiary significance to the evidentiary views expressed by Mason J in ***Codelfa***, I turn to examine more closely that World War II contractual frustration decision, ***Scanlan's***.

***The reasons of Latham CJ and McTiernan and Williams JJ in Scanlan's***

Beyond a now seen above reference to an outmoded view that was 'rejected', it will be remembered that in ***Codelfa***, Mason J[113] had invoked ***Scanlan's*** reasons of McTiernan and Williams JJ, said to be in 'the majority' as regards (presumably) a suggested, by inference, minority view of Latham CJ in ***Scanlan's*** on the issue of a more liberal approach to the admission of surrounding circumstances evidence.

***Scanlan's*** appeal, in fact, was two appeals heard together, over an alleged contractual termination under the doctrine of frustration of multiple hiring contracts entered in respect of a use of illuminated neon advertising signs erected on the top of various hotels in New South Wales and Victoria.

The appeals in ***Scanlan's*** concerned post contractual circumstances arising under emergency legislation and the alleged frustrating effects of consequential emergency orders issued at the height of World War II.

Hirers of the neon advertising signs were then contending that they were not liable to pay at the stipulated level of their hiring fees, because of an intrusion, post-contract, of constrictive wartime regulations and orders that, in effect, prohibited neon signs from being illuminated at night. The argument resonates as somewhat reminiscent in the COVID-19 ravaged world in 2020.

Nevertheless, back in ***Scanlan's*** the envisaged advertising signs were constructed, erected and in place. There was no issue that the signs could be plainly seen in their terms during daylight hours. The problem was that the wartime regulations prohibited them being illuminated at night.

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[113] ***Codelfa***, 363 (Mason J).

The three justices who sat in that High Court decision across their separate reasons were unanimous in their end conclusions that all the hiring contracts under scrutiny in each instance had not been terminated on a basis of a contractual frustration under such post contracting emergency circumstances. In the end, the hirers of the neon signs all remained fully obligated to continue to pay the originally set levels of hiring fees when they fell due under each of the hiring contracts they entered - notwithstanding the signs could not be lawfully illuminated out of daylight hours.

One of the two appeals to the High Court in ***Scanlan's*** was from a divided New South Wales Full Court. That appeal was allowed. A second appeal from the Full Court of the Supreme Court of Victoria which saw the Victorian court uphold the obligation to pay the hiring fees, was dismissed.

In that context of contractual frustration arguments a question over surrounding circumstances evidence had arisen under what then was an exercise seeking to derive by implication within written contracts an existence (on an objective basis) of ad hoc implied terms - to the effect the parties' contractual obligations under the hiring contracts would come to an end, performance-wise, for such post contractual emergency circumstances

The ***Scanlan's*** decision rejecting the application of the contractual doctrine of frustration as it was requires an excursion back to ancient contractual history to see how then (not now, of course, or even in 1982) the contractual doctrine of frustration had then theoretically been grounded - on the fashionable, in the 1940s, implied contract theory.

At 1942 - 1943, the common law contractual doctrine of frustration was then differently founded, compared to now, for its theoretical rationale. Similarly to how implied contract had once been thought to conceptually underlie relief available in the way of quasi contractual remedies (the misconception being identified and overturned by the High Court of Australia in

***Pavey & Matthews Pty Ltd v Paul*** (1987) 162 CLR 221), the same rationale had also been used as the theoretical basis for the contractual doctrine of frustration applied on a basis of an implied term theory towards the ending of the agreement.

The old implied contract theory was the context for references buried deep in the ***Scanlan's*** reasons of McTiernan J and Williams J towards surrounding circumstances evidence - which they had said, wholly uncontroversially, was relevant to an exercise in the implication of a term to bring about a termination in the performance of a contract when ascertaining the suggested frustration of the ***Scanlan's*** hiring contracts.

On the other hand, Sir John Latham CJ conducted within his ***Scanlan's*** reasons a wide-ranging evaluation of, at then, a multitude of case authorities on the contractual doctrine of frustration, by reference to a then leading contemporary article.[114]

Latham CJ reached the same negative conclusions as regards the contended ending by frustration of the hiring contracts as his other two brethren. Both Latham CJ and McTiernan J in their separate reasons agreed in rejecting a wider formulation of contractual frustration which had been used by the New South Wales Court of Appeal below, including by Sir Frederick Jordan.[115]

At the time of the ***Codelfa*** decision in 1982, the underpinnings of the contractual doctrine of frustration at common law had by then been revised. That first was a result of the decision of the House of Lords, ***Davis Contractors Ltd v Fareham Urban District Council*** [1956] AC 696, and then subsequently by the High Court of Australia, particularly under the reasons of the Stephen J in

[114] McNair AD, 'Frustration of Contract by War' (1940) 56 *Law Quarterly Review* 173.
[115] ***Scanlan's***, 198 - 199, 215.

***Brisbane City Council*** - which Mason J referred to in his reasons in ***Codelfa*** dealing with the specific topic of frustration.[116]

Concerning the residual worth of ***Scanlan's***, a number of matters would have been clear by the time the ***Codelfa*** decision was delivered in May 1982:

> **First**, any question as to the nature of extrinsic evidence or surrounding circumstances that would be admissible upon an exercise of an attempted derivation of an ad hoc implied term on the basis of business efficacy, was not 'front and centre' as a controversial issue of dispute requiring resolution within the ***Scanlan's*** appeals. At best, that evidentiary question may have been peripherally relevant to a (now redundant) implied term theory then underlying the common law doctrine of frustration as regards an implication as to a termination under post-contractual circumstances.
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> **Second**, it would also have been clear Latham CJ's express endorsement of observations by Sir Frederick Jordan from out of ***Heimann*** in ***Scanlan's***[117] was then a completely uncontroversial reference, and not then under any level of challenge in the ***Scanlan's*** arguments. There is nothing express within the reasons of McTiernan J or Williams J in ***Scanlan's*** in any way casting a suggestion of doubt over the authenticity of the passage from ***Heimann*** as regards what Jordan CJ (NSW) had said about evidence and the implication of terms ad hoc in a written contract.
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> **Third**, as Sir Gerard Brennan came to observe in his ***Codelfa*** reasons upon admissible surrounding circumstances evidence admissible towards the implication of such terms, Sir Ninian Stephen as late as his 1977 reasons in ***LJ Hooker Ltd v WJ Adams Estates Pty Ltd*** (1977) 138 CLR 52 (***LJ Hooker***) referred with evident approval to exactly the same

[116] ***Codelfa***, 356.
[117] ***Scanlan's***, 194 - 195.

passage Latham CJ had used from Jordan CJ (NSW's) reasons in ***Heimann***. Stephen J's reasons in ***LJ Hooker*** say:[118]

> No clear necessity exists for the imputation of a term, such as Jordan CJ regarded in *Heimann v Commonwealth of* Australia, as essential before any implication might be made. This is not a case in which any inference that the parties intended the implication of the term as to the reward-earning conduct is of such cogency 'that another intention could hardly be supposed' ... (citation of authority omitted).

Consequently, a 1982 denunciation of that aspect of ***Heimann*** as undertaken by Mason J in ***Codelfa***[119] invoking a suggested majority approach to the contrary to be found in the ***Scanlan's*** reasons of McTiernan J and Williams J, on a basis the ***Heimann*** surrounding circumstances approach was 'outmoded' or 'antiquated' may be seen as something of a 'stretch', given a better understanding of what was at issue in ***Scanlan's*** and how Jordan CJ's reasons from ***Heimann*** had been subsequently applied with approval, even in the High Court itself.

The other platform called in aid by Mason J was by invoking Wigmore on Evidence. I have discussed that attempted foundation of support earlier. On my review, the Wigmore passages present as generically directed at broad general principle, rather than at the specific evidentiary issue addressed by Brennan J in ***Codelfa*** concerning the process undertaken for finding an implication of such terms in particular.

**Why?**

It might be asked why is any scrutiny of the scope of the admissible evidence accessible in ascertainable an implication of such a term at all relevant when otherwise examining the principles underlying contractual interpretation? It is a fair question. I suggest it is always helpful to know the

[118] ***LJ Hooker***, 79.
[119] ***Codelfa***, 353.

foundations for our evidencing rules to see if they remain relevant to our modern world.

Ironically, another insight was provided by Sir Anthony Mason within the ***Codelfa*** reasons. His Honour said this:[120]

> When we say that the implication of a term raises an issue as to the meaning and effect of the contract we do not intend by that statement to convey that the court is embarking upon an orthodox exercise in the interpretation of the language of a contract, that is, assigning a meaning to a particular provision. Nonetheless, the implication of a term is an exercise in interpretation, though not an orthodox instance. (my emphasis)

No real authority was cited for what was that seamless ***Codelfa*** assimilation of very different exercises, under a common suggested umbrella of 'interpretation'. Nevertheless, that was the logical platform for what followed as regards evidence that could be used in each process.

**Different exercise, same evidence**

In ***Codelfa***,[121] having stated the 'true rule',[122] Mason J returned to the subject matter of the real divide as between the parties within that appeal - as regards contended implied terms Codelfa was defending in the High Court.

Contrasting the very different position where a contract is to be rectified by an equitable remedy, distinctly to where a term is implied into the contract on a basis of business efficacy, Mason J had emphasised the interpretive contractual orthodoxy by the common law's **objective** approach.[123]

Since an objective approach was to be used in an ascertainment of textual meaning exercise, Mason J considered by extension of reasoning that same approach was also to be applicable to an implication exercise, as regards an ascertainment of an ad hoc implied term, rather than allowing or having regard to evidence of the contracting parties' actual (ie, their subjective)

[120] ***Codelfa***, 345.
[121] ***Codelfa***, 353.
[122] ***Codelfa***, 352.
[123] ***Codelfa***, 353.

intentions at the time. There can be little basis for debate over a linkage of the objective approach generally.

More controversially, however, Mason J then proceeded to address the nature of the admissible surrounding circumstances evidence for the ad hoc implied term ascertainment exercise. At this point he declared it as 'obvious':[124]

> However, it is equally obvious that in making the inquiry whether a term is to be implied the court is no more confined than it is when it construes the contract. For the implication of a term is an illustration of the process of construction, though differing from the more orthodox ascertainment of the meaning of a contractual provision. (my emphasis)

The ensuing passages in the ***Codelfa*** reasons saw Mason J proceed towards evaluating support for the implied terms Codelfa was then defending This was done on a basis that the admissible extrinsic and surrounding circumstances evidence permitted to be used towards an objectively conducted exercise as to ascertaining an existence or otherwise, of contended ad hoc implied terms, ought proceed upon exactly the same body of extrinsic evidence otherwise admissible in a more orthodox contractual meaning determination.[125]

Rather than 'obvious', the suggested alignment then was revolutionary. To achieve the assimilation, Mason J distanced 'older authorities'.[126] They only supported, he said, a 'more restricted approach to the implication of a term'.[127]

As discussed, at the commencement of his reasons, Mason J acknowledged that, before settling his own reasons, he had seen the reasons of Brennan J and commenced by adopting only the facts and questions from Brennan J's reasons.[128]

As regards a use of surrounding circumstances evidence towards ascertaining an existence of an extra term in a written contract, two future Chief

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[124] ***Codelfa***, 353.
[125] ***Codelfa***, 353 (including footnotes).
[126] ***Codelfa***, 353.
[127] ***Codelfa***, 353.
[128] ***Codelfa***, 345.

Justices of Australia could not have been further apart - albeit their conclusions upon the issue were in alignment negatively.

Mason J would have been more than alert then, as he settled his reasons in ***Codelfa***, to the very considerable body of older local and common law case precedents, all found carefully assembled in Brennan J's reasons. Those precedents were, of course, in support of a narrower view over the scope of admissible extrinsic evidence in a derivation ad hoc implied terms exercise - and particularly, of Sir Frederick Jordan's view on the evidence issue, as expressed in ***Heimann***.[129]

It is more than significant then, over the issue of the scope of admissible evidence allowed to be accessed (not for orthodox interpretation as to meaning, but to a finding of an ad hoc implied term in a written contract) that Mason J[130] specifically did not favour the 'accustomed lucidity' upon that point[131] of Jordan CJ (NSW)'s observations in ***Heimann*** - where Jordan CJ had delivered the lead reasons, to be agreed with by Nicholas and Owen JJ. Mason J's observations in ***Codelfa*** expressly declined to follow that aspect of ***Heimann***.[132]

That was said to be due to what Sir Anthony said was their 'more restricted approach to the implication of a term'. That distancing from Jordan CJ (NSW) was undertaken, notwithstanding an acknowledgement of their direct application by the High Court in 1943, under a similarly 'more restricted approach' by Latham CJ in ***Scanlan's***.[133]

Mason J in ***Codelfa*** expressly declined to follow that aspect of ***Heimann*** and, indeed, a line of other so-called 'older authorities. He continued:[134]

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[129] Cited by Brennan J verbatim at ***Codelfa***, 403.
[130] ***Codelfa***, 353.
[131] See ***Codelfa***, 403 (Brennan J).
[132] ***Codelfa***, 353.
[133] ***Scanlan's***, 195.
[134] ***Codelfa***, 353.

> These statements reflect an unduly restrictive approach to construction, an approach which is outmoded or 'antiquated', to use the expression favoured in *Wigmore on Evidence*, 3rd ed. (1940), vol IX, par 2465 (p 214).

As seen, Mason J observed that such statements in the 'older' authorities 'do not accord with the approach taken by the majority of this court in ***Scanlan's***' - referring to the McTiernan J and Williams J reasons.[135] Within the ***Codelfa*** footnotes 89 and 90, Mason J refers to broadly stated passages within the ***Scanlan's*** reasons by McTiernan J and Williams J.[136]

Subsequently discussing the frustration arguments in the ***Codelfa*** appeal (that would most likely succeed once referred back to the arbitrator to finally resolve) Mason J returned to ***Scanlan's*** and again to the surrounding circumstances evidence admitted including the as expressed views in ***Scanlan's*** by McTiernan and Williams JJ.

Shortly, I will turn to the rival ***Codelfa*** reasons of Brennan J on the surrounding circumstances evidence issue as regards an ad hoc implication of unexpressed further terms in the parties' contract.

Brennan J had used the 'outmoded' observations upon the scope of that by extrinsic evidence of Jordan CJ (NSW) from ***Heimann***. In ***Codelfa***, supported by much as cited case authority, Brennan J explicitly rejected a wider evidentiary base as regards use of the extrinsic evidence in an implication of terms derivation exercise.

## The reasons of Brennan J in *Codelfa*

Brennan J referred to, indeed, applied the five-fold ***BP v Hastings*** criteria test, while conducting his ultimately negative assessment of the contended implied terms in ***Codelfa***. That is uncontroversial.

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[135] ***Codelfa***, 353.
[136] ***Scanlan's***, 214 - 215 (McTiernan J) and 221 - 225 (Williams J).

Yet it is equally clear Sir Gerald Brennan's evidentiary canvass for the ad hoc implication of terms ascertainment process was significantly more confined than that favoured by Mason J.[137] Wilson J in ***Codelfa*** had agreed with the reasons of both Mason J and Aickin J (but not Brennan J), as regards both a negative result concerning ***Codelfa's*** implied terms and, as well, the affirmative indication given by the Court towards success for ***Codelfa*** on the frustration argument.[138]

Conducting the ad hoc implied term analysis,[139] Brennan J was at pains to draw the key distinction between evidence admissible towards the process of interpretation for ascertaining a true meaning of an express term within a written contract - in some contrast to the distinct exercise of an attempted deriving of a contended contractual term argued to be implied in an otherwise fully written agreement on an ad hoc basis and as a matter of business efficacy, to be added as an extra term within the contract.

Toward that implied term derivation process, Brennan J observed:[140]

> The necessary foundation for the creation of contractual rights and obligations is the agreement of the parties, and their agreement is equally necessary to vary those rights and obligations prior to discharge. A term implied in a contract is stamped with a contractual character because it is a part of the contract. It cannot derive that character from extrinsic circumstances which do not evidence a contract. It would be inconsistent with the foundation of contractual obligations to find an implied term in facts extrinsic to a written contract unless the contract stands in need of rectification. (my emphasis)

Brennan J proceeded to differentiate other genres of evidence permissible to resolve distinct contract situations - namely, the finding of an existence of a collateral contract, or for rectification of a contract to render the

[137] Stephen J, of course, agreed with Mason J's reasons in '**all**' respects in ***Codelfa*****,** see 344.
[138] Albeit formally recognising that any frustration conclusion was a matter entirely for the arbitrator, upon the remission of the matter back to him, see page 392.
[139] Commencing at ***Codelfa***, 401.
[140] ***Codelfa***, 401.

words used to accord with what the parties actually agreed upon, albeit imperfectly expressed by their words.

He returned to the situation of the unexpressed term in a contract sought to be implied on a basis of business efficacy:[141]

> But where the term propounded is said to be implied in a contract, that term must inhere in its express terms, and reference to extrinsic circumstances is permissible only to construe the contract and to understand its operation (my emphasis).

In support, Brennan J cited observations by three members of the High Court, Isaacs, Gavan Duffy, and Rich JJ in ***Purcell***.[142] Part of the cited extract from ***Purcell*** read:

> For those preparatory purposes the Court places itself in the position of the parties. But it cannot place itself in their position for the purpose of finding what words they intended to use and had not used. That would be making a contract for them, and surrounding circumstances are not admissible for any such purpose: citing *Inglis v Buttery* (1878) 3 App Cas 552 at p 557. (my emphasis)

The passage clearly supports a stance against a use of wider evidence.

Brennan J had next observed the subsequent reversal of ***Purcell*** by the Privy Council in 1916 had not undermined the principle cited by those members of the High Court in ***Purcell***. He proceeded to endorse what he referred to as a 'correct' approach, stated by Lord Wilberforce from ***Liverpool City*** at 254. This was:

> … such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less: a test, in other words, of necessity.

Towards a barring of surrounding circumstances evidence for an ad hoc implied term derivation exercise, Brennan J referred not only to ***Purcell***, but also to Sir Frederick Jordan CJ (NSW) in ***Heimann***.[143]

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[141] ***Codelfa***, 402.
[142] ***Purcell***, 265.
[143] ***Codelfa***, 403.

Introducing his reference to ***Heimann***, Sir Gerard highlighted what is a fine distinction, as between an exercise in contractual meaning ascertainment - of the text used in a contract, as opposed to a use of extrinsic evidence that may be admitted to a very different task of deriving an existence of an extra (unwritten) term within that same contract. He said:[144]

> Although the necessity for the term to be implied must appear from and in the express terms of a contract, not from extrinsic circumstances, those circumstances may aid in ascertaining the meaning of the express terms and in identifying the matters to which they relate. The meaning and operation of the express terms, thus established, are the sole foundation for implying a term which the parties have not expressed. The relationship between the construction of express terms and the implication of a term is stated by Jordan CJ with his accustomed lucidity in *Heimann v The Commonwealth*:
>
> > 'In order to justify the importation into a contract of an implied term which is not to be found in the express language of the contract when properly construed, and is not annexed by some recognised usage, or by statute or otherwise, it is essential that the express terms of the contract should be such that it is clearly necessary to imply the term in order to make the contract operative according to the intention of the parties as indicated by the express terms. It is not sufficient that it would be reasonable to imply the term: *Bell v Lever Bros Ltd* [1932] AC 161 at p. 226. It must be clearly necessary. And the test of whether it is clearly necessary is whether the express terms of the contract are such that both parties, treating them as reasonable men - and they cannot be heard to say that they are not - must clearly have intended the term, or, if they have not adverted to it, would certainly have included it, if the contingency involving the term had suggested itself to their minds.' (my emphasis)

Sir Frederick Jordan's ***Heimann*** observations seen above address two different issues. First, and wholly uncontroversially, a need for a term as being **necessary**, not just as a reasonable augmentation to the contract. But, second, by that discussion Jordan CJ (NSW) clearly emphasises the force of what is 'indicated by the **express terms**' of a contract as to what is **necessary** or not - and that is where the present interest lies.

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[144] ***Codelfa***, 403.

Brennan J in ***Codelfa*** proceeded to observe on a fine extrinsic evidentiary admissibility distinction between the two different scenarios as follows:[145]

> The cases which, in recent times, have countenanced a reference to extrinsic facts are cases where the reference is made in order to understand the meaning and operation of the express terms of a contract; no case in this Court has approved an examination of extrinsic facts in order to find in them a promise to be implied: see *LJ Hooker Ltd v WJ Adams Estates Pty Ltd* ((1977) 138 CLR 52); *DTR Nominees v Mona Homes Pty Ltd* ((1978) 138 CLR 423) per Stephen Mason and Jacobs JJ.

At the foot of page 403, a circle was, in effect, completed by Brennan J referring to ***BP v Hastings*** and to passages within the majority advice of the Board. He said:[146]

> In *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (then only reported in (1977) 52 ALJR 20) there are some passages in the majority judgment which suggests that their Lordships went further and sought to derive from the matrix of fact in which the contract was made the implication of a contractual term. If their Lordships went further then *Prenn v [Simmonds]* would permit (referring via footnote 91 to (1971) 1 WLR 1381 or [1971] 3 All ER 237) - and it is by no means clear that their Lordships intended to do so, for *Prenn v [Simmonds]* was cited - then I should not think that the majority judgment would accord with sound principle. Clearly, the minority judgment looked to the contract itself as the source of the term to be implied. *BP Refinery* should not be regarded as authorizing an extension of the role of extrinsic evidence, nor as permitting the implication of a term other than what is necessary 'to make the written contract work or, conversely, in order to avoid an unworkable situation', to quote a phrase from the minority judgment in that case. If it appears from the written contract that a term is to be implied, there are conditions which any proposed term must satisfy.

Brennan J used the five-fold criteria test emanating from Lord Simon's majority advice in ***BP v Hastings*** as seen earlier in these observations. So much was uncontroversial.

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[145] ***Codelfa,*** 403.
[146] ***Codelfa***, 403 – 404.

But on the more controversial issue of what was admissible extrinsic evidence available to be used to ascertain if the implied term contended for was necessary, Brennan J said:[147]

> Looking at the contract in the present case, in the matrix of the facts in which it was made, I see no necessity for the implication of a term, nor can I find that the criteria set out in *BP Refinery* are satisfied by any of the terms proposed respectively by the Court of Appeal, Ash J and the Arbitrator. (my emphasis)

So seen, the critical, but ultimately very fine, distinction upon what evidence may be admitted to be used as surrounding circumstances evidence around the making of the contract in an ad hoc implied term ascertainment exercise is made. The expressed view was by no means idiosyncratic at the time. It carried then an extensive body of support from highly respectable sources[148] including a relatively recent ***LJ Hooker*** decision where Stephen J referred with ostensible approval to the observations of Jordan CJ (NSW) from ***Heimann*** cited by Brennan J.[149]

In the face of a body of supporting authority on the evidentiary point (which Sir Anthony Mason was obviously alive to from the circulated reasons of Brennan J before he settled his own reasons in ***Codelfa***) - it might be viewed as somewhat dismissive for a vital issue over the admissibility of surrounding circumstances evidence towards the exercise of implication for such an extra term in a contract to be waved through as 'equally obvious', as Mason J, in effect, declared.[150] Remarks directed at diminishing 'older authorities' and a 'more restricted approach' to surrounding circumstances evidence generally were certainly not then so obvious to Brennan J.

Albeit Mason J in ***Codelfa*** ultimately carried the day over the scope of admissible implied term extrinsic evidence issue (by 3:1, with Aickin J not

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[147] ***Codelfa***, 404.
[148] ***Codelfa***, 402 - 404.
[149] ***LJ Hooker***, 79.
[150] ***Codelfa***, 353.

deciding the point in ***Codelfa*** in his reasons), it might be asked whether, given the other and more high profile issues also then under intense consideration in ***Codelfa***, a fine distinction over the range of admissible extrinsic evidence when seeking to derive an implied term ad hoc in a wholly written contract was afforded the highest level of evaluation scrutiny it might otherwise have warranted.

That is particularly so given a departing in ***Codelfa*** away from what on the face of it appeared to be a number of well-established prior High Court dicta all pointing to a contrary admissibility approach for such evidence in an implication exercise. The weight of Sir Frederick Jordan's highly respected jurisprudential insights in ***Heimann*** were also cast aside in that result.

Likewise, I respectfully submit that deeper consideration should be directed towards passages from the ***Scanlan's*** case. There, Latham CJ, McTiernan J and Williams J uniformly found the particular contracts under scrutiny in that appeal were not frustrated and at an end. It is highly debatable whether Latham CJ was ever in a minority position (vis-a-vis McTiernan and Williams JJ) as regards an extrinsic evidence issue, insofar as the implication of an ad hoc implied term on the basis of business efficacy ever needed to be ascertained in ***Scanlan's***.

My thesis is that it is difficult to see that McTiernan J and Williams J did take an explicitly different or narrower approach to admissible evidence than Latham CJ. Likewise, I suggest the generic character of the Wigmore on Evidence passages as invoked by Mason J in ***Codelfa***[151] were, on closer scrutiny, not actually directed precisely to the issue of the admissible evidence allowed when seeking to derive an ad hoc implied term in a wholly written contract.

[151] ***Codelfa***, 353.

## ***Belize*** **- Lord Hoffman's recent distancing from the five-fold determination criteria**

Some difference in position now looks to have emerged as between the United Kingdom and Australia in terms of the applicable test for the ascertainment of an ad hoc implied term. This was observed upon by Edelman J in the Federal Court at first instance in ***Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 6]*** [2015] FCA 825; (2015) 329 ALR 1 at [1,002].

The difference of position seems to be applicable only as regards wholly written instruments or, presumably, for an 'unorthodox' exercise of interpretation required in the ascertainment of a contended ad hoc implied term of fact.

For Australia, given the High Court's explicit acceptance of the five-fold criteria test in both ***Secured Income*** and ***Codelfa***, a departure would look to require the explicit sanction of the Court, unless they in turn are brushed aside as 'outmoded'.

In the United Kingdom the observations of Lord Hoffman in ***Belize*** have been described as liberalising and influential. Lord Hoffman said of the five-fold ***BP v Hastings*** criteria that this test is:[152]

> ... best regarded, not as a series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think it did so ...

Lord Hoffman, of course, is well known in another quarter for his liberal view of the contractual sphere relevant to admissibility of extrinsic evidence in an orthodox interpretation of contracts. He was an evidentiary proponent for the 'absolutely anything' test, towards allowing admissible surrounding circumstances evidence known to the parties - a position antithetic to the 'true rule' stated by Sir Anthony Mason in ***Codelfa***.

[152] ***Belize*** [27].

As regards an implication of ad hoc terms in England and Wales (by adoption of the Privy Council decision in ***Belize***), the Hoffman view emphasises a need to read words of the written instrument against the 'relevant background' in order to ascertain what had been reasonably meant in effect by the parties.

Dyson Heydon QC contrasted the rival approaches towards implication of an ad hoc implied term as they have emerged as between England and Australia:[153]

> … In short, the *Belize* test asks: What would the contract, read against the background, reasonably be understood to mean? The *Codelfa* approach asks that of the express language (and conduct) of the parties but approaches the question of implying terms to give business efficacy through the five traditional requirements. Even though those requirements are sometimes still used in England, that is not always so …

Notably, however, in December 2015, in ***Marks & Spencer***,[154] the Supreme Court of England and Wales has sought to distance itself from that liberalising approach of Lord Hoffman in ***Belize*** to reaffirm that '... the law governing the circumstances in which a term will be implied into a contract remains unchanged following the ***Belize Telecom*** case'.

**Implied terms in informal agreements**

The position in Australia towards finding ad hoc implied contractual terms in situations where the parties' contract is not fully written - such as, where there are elements of verbal terms or further or alternatively the parties' agreement arises from elements of their conduct - appears closer to the Hoffman position as regards a more flexible approach. In large part that position arises by reason of two decisions of the High Court of Australia by Deane J, first in ***Hospital Products Pty Ltd v United States Surgical Corporation*** (1984) 156 CLR 41, 121 and followed then his Honour's further observations in ***Hawkins v Clayton*** (1988) 164 CLR 539, 571 - 572.

[153] *Heydon on Contracts*, 449 - 450 [10.670].
[154] ***Marks & Spencer***, [24].

Dyson Heydon QC discussed the passages from Deane J's two decisions above[155] and labels the category of contracts that are not wholly written as a distinct category of 'informal contracts'.

The end point of Deane J's discussion in ***Hawkins v Clayton*** of so-called informal contracts was:[156]

> … The most that can be said consistently with the need for some degree of flexibility is that, in a case where it is apparent that the parties have not attempted to spell out the full terms of their contract, a court should imply a term by reference to the imputed intention of the parties if, but only if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case. That general statement of principle is subject to the qualification that a term may be implied in a contract by established mercantile usage or professional practice or by a past course of dealing between the parties.

Subsequently, it appears in ***Byrne v Australian Airlines Ltd*** (1995) 185 CLR 410 (***Byrne v Australian Airlines***) all members of that court approved Deane J's observations[157] for situations where there was no formal contract, '… [i]n those cases the actual terms of the contract must first be inferred before any question of implication arises. That is to say, it is necessary to arrive at some conclusion as to the actual intention of the parties before considering any presumed or imputed intention'.[158]

Those observations did not suggest any departure in the process of ascertainment of an ad hoc implied term in an 'informal contract', from the received orthodoxy of an objective approach to the interpretation of the parties' agreement. That would be too radical a departure from the accepted common law position towards the interpretation of contracts generally and be more of an approach taken in a scenario of rectification.

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[155] *Heydon on Contracts*, 451 [10.680].
[156] ***Hawkins v Clayton***, 573.
[157] ***Byrne v Australian Airlines***, 422.
[158] See Brennan CJ, Dawson and Toohey JJ in ***Byrne v Australian Airlines***. McHugh and Gummow JJ expressed like views at page 442.

Presumably all the court was saying in ***Byrne v Australian Airlines*** was that a court starts with what the parties have actually agreed, either expressly or by inference, before embarking on a necessarily subsequent task of ascertaining the existence of an ad hoc implied term. Antecedent to the task I would respectfully suggest would be an identification of any terms to be otherwise implied by way law or custom such as, for instance, under a ***Mackay v Dick*** (1881) 6 App Cas 251 implied term of required mutual co-operation as between contracting parties, as observed upon by Mason J in ***Secured Income***[159] as implied as a matter of law in commercial contracts.[160]

Deane J's test was applied in ***Breen v Williams*** (1996) 186 CLR 71 where Dawson and Toohey JJ said towards circumstances where there was no formal agreement between the parties, that 'the actual terms of the contract must be inferred before any question of implication can arise …'.[161] See also their Honours' following observations towards the line as between inference and implication not being easy to draw.[162]

## Almost the end

In ***Codelfa***, Mason J's seamless assimilation of the same body of surrounding circumstances evidence that may be used towards the meaning of text in a written agreement to the body of evidence admitted for an exercise in implying an ad hoc term otherwise left unexpressed by the parties (and also for a finding of frustration and ending of that contract's performance) was seen as based on it being accepted that all these exercises are in the nature of the 'interpretation' of a written contract - the first exercise being 'orthodox', the others (for implication and presumably for frustration) being 'less orthodox'.

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[159] ***Secured Income***, 607, citing ***Mackay v Dick***, 263 (Blackburn LJ).
[160] Applying ***Butt v McDonald*** (1896) 7 QLJ 68 at 70 - 77 (Griffiths CJ).
[161] ***Breen v Williams***, 91; see also 123 - 124 (Gummow J).
[162] ***Breen v Williams***, 91.

From out of that linked commonality it is then said to follow, and obviously so it was put, that the very same body of surrounding extrinsic evidence will be deployed in all those exercises and effectively, at the outset in undertaking all three exercises, rather than first interpreting the express terms in their context of admissible surrounding circumstances evidence.

That result is only obvious if the reader unquestionably accepts a starting premise of commonality as between all three processes. I humbly submit that the three exercises are conceptually different, a distinction highlighted by the Singapore Court of Appeal.[163] Such distinctions ought not, I also suggest, be glossed over.

One day perhaps the evidencing distinction which was valiantly, but at then, unsuccessfully, defended without reward by Brennan J in ***Codelfa*** may nevertheless prove pivotal for or against a finding (or otherwise) as to a contended extra term sought to be found ad hoc in a written contract, by reference to a use of extrinsic evidence. The arguments around ***BP v Hastings*** could have been assisted by a clearer focus upon the different character of distinct processes.

## **Postscript – *Pilbara Iron Ore v Ammon***

A recent example of confusion that can arise between the distinct processes of finding ad hoc implied terms in a contract, by contrast to the process of ascertaining the proper meaning of the express terms of a written contract, can be found in the circumstances of the appeal in ***Pilbara Iron Ore Pty Ltd v Ammon*** [2020] WASCA 92 (***Pilbara Iron Ore v Ammon***) (Buss P, Murphy & Vaughan JJA) delivered 11 June 2020.

[163] ***Foo Jong Ping*** as discussed above.

The Court of Appeal of WA in the end[164] needed to allow that appeal, notwithstanding that the court had also concluded[165] that the essential but unarticulated attributes for a required feasibility study for a joint venture could be derived as a matter of the proper interpretation of the express, but sparse on detail, terms of that wholly written joint venture agreement (JVA).

The Court of Appeal found there, in effect, that the same content outcome for the feasibility study could be reached as a matter of the proper construction of the JVA. But it had concluded that this same result could not be defended on the basis of a tranche of ad hoc implied terms as initially found in the JVA by the mining warden, three of which terms had been upheld on the initial appeal to the Primary Judge.[166]

In its reasons for decision the Court of Appeal said:[167]

> It may accepted ... that all of the express terms in the JVA needed to be construed prior to the consideration of any implied terms, although it is recognised that the implication of terms is ultimately one aspect of the overall process of construing the contract as a whole and ascertaining the presumed intention of the parties.

Also of interest in the same decision are the following additional features:

(a) There were no extrinsic facts or mutually known surrounding circumstances sought to be used in either the true meaning ascertainment process or in the ad hoc implied term derivation process.[168]

(b) The Court of Appeal referred with apparent approval to ***Heimann***.[169] But that reference was only as authority for the relatively uncontroversial proposition that '[t]he party alleging that term should be implied bears the onus of proof'. The Mason J/Brennan J divide from ***Codelfa*** over

[164] ***Pilbara Iron Ore Pty Ltd v Ammon***, [119].
[165] ***Pilbara Iron Ore Pty Ltd v Ammon***, [105].
[166] ***Pilbara Iron Ore Pty Ltd v Ammon***, [114].
[167] ***Pilbara Iron Ore Pty Ltd v Ammon***, [117.3] referring to [74].
[168] ***Pilbara Iron Ore Pty Ltd v Ammon***, [73].
[169] ***Pilbara Iron Ore Pty Ltd v Ammon***, [88] and footnote 94 referring to ***Heimann***, 695.

what force ***Heimann*** still carried in Australia over the extrinsic evidence that may be used in an ad hoc implied term ascertainment exercise was not then live as an issue and, understandably, was not addressed.

(c) One of the errors observed upon by the court in the approach below was the use below of the somewhat looser ad hoc implication of terms approach as taken from ***Byrne v Australian Airlines*** that may be used where agreements are not found to be made wholly in writing. But that more flexible approach to implication of terms ad hoc was not applicable for a fully written agreement (axiomatically, a deed), where the five-fold criteria for the ascertainment of ad hoc implied terms in such an agreement remains as the more rigorously applicable threshold.[170]

KMJ
20 October 2020

[170] ***Pilbara Iron Ore Pty Ltd v Ammon***, see [92], [116] and [117.7].