12-2016

From context to text in contractual interpretation: Is there really a problem with the plain meaning rule?

Yihan GOH

Citation

GOH, Yihan. From context to text in contractual interpretation: Is there really a problem with the plain meaning rule?. (2016). *Common Law World Review*. 45, (4), 298-318.

Available at: https://ink.library.smu.edu.sg/sol_research/2150

Published in Common Law World Review, Volume 45, issue 4, pp. 298-318.
http://doi.org/10.1177/1473779516672811

From context to text in contractual interpretation: Is there really a problem with a plain meaning rule?

Yihan Goh

Abstract
Much of the contemporary scholarship on contractual interpretation is staunchly against a textual analysis, by which a court can only depart from the plain meaning of a contract exceptionally. It is therefore no surprise that scholars have reacted negatively to the spate of recent cases where the English courts have re-emphasized the plain meaning of the text in contractual interpretation. Yet one cannot help but wonder whether a textual analysis is really so problematic when courts across the common law world have re-embraced it. Drawing from both theoretical and comparative perspectives, this paper suggests that a focus on the text in contractual interpretation, and the corresponding application of the plain meaning rule, is to be welcomed and not scorned.

Keywords
contextual approach, contract, interpretation, plain meaning

Introduction

Much of the contemporary scholarship on contractual interpretation is staunchly against a textual analysis, in which the plain meaning of the text takes centre stage. It is therefore no surprise that scholars have reacted negatively to the spate of recent cases where the English courts have re-emphasized the plain meaning of the text in contractual interpretation. For example, one of the leading scholars in the field, Professor McLauchlan, remarked that Lord Hoffmann's legacy in promoting a more contextual analysis 'appears in danger of being rather more short-lived than . . . imagined' (McLauchlan, 2015: 420). Yet one cannot help but wonder

School of Law, Singapore Management University, Singapore.

Corresponding author:
Yihan Goh, School of Law, Singapore Management University, 60 Stamford Road, #04-11, Singapore 178900.
Email: yihangoh@smu.edu.sg

whether a textual analysis is really so problematic when it is not only the English courts that have recently re-embraced it. In a revolution of sorts, the highest courts across the common law world in Australia, Canada, New Zealand and Singapore have recently either reaffirmed or returned to a more textual analysis. Drawing from both comparative and theoretical perspectives, this paper will suggest that a focus on the text in contractual interpretation, and the corresponding application of the plain meaning rule, is to be welcomed.

This paper will make two main points. First, through a discussion of the approaches taken by the highest courts in Australia, Canada, New Zealand and Singapore, it will be argued that the supposed 'return' to a textual analysis is more apparent than real. It will be shown that courts have always applied some version of the plain meaning rule. As such, the proper debate to be had is not the choice between a textual or contextual analysis, but rather the extent to which the plain meaning rule should be applied. Secondly, having situated the proper question to ask, this paper will argue that the courts should apply a strong version of the plain meaning rule. It will be argued that this version of the rule is aptly justified as a permissible pragmatic policy choice made within the imperfect apparatus of contractual interpretation. And, if it is accepted that the strong version of the plain meaning rule is justified, this paper will then make some suggestions to improve its continued application within the modern approach to contractual interpretation.

A renewed emphasis on the text

Retreat from contextual analysis in England

It is necessary for any paper on contractual interpretation to begin with what Lord Hoffmann said almost 20 years ago in *Investors Compensation Scheme Ltd* v *West Bromwich Building Society* (*ICS*).[1] In a landmark restatement, Lord Hoffmann said that interpretation 'is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties'.[2] While this did not represent a new direction in the interpretation of contracts,[3] Lord Hoffmann's restatement did re-emphasize the importance of interpreting words with regard to the overall context (Lewison, 2011: 3–4). Formally at least, the focus on context moved the law away from a more textual analysis, under which the courts regarded the 'natural and ordinary' or 'plain' meaning of contractual words as almost conclusive.[4] Indeed, because a contextual analysis starts with the fundamental proposition that words acquire their intended meanings from the context, courts are less likely to regard that words have any plain meaning to begin with; the 'natural meaning of words in one sentence may be quite unnatural in another'.[5] This has led to what Davies has termed the 'modern approach' of contractual interpretation, where 'words might not mean what you think they mean' and which 'wreaks violence upon the language chosen by the parties' (Davies, 2013: 448). Consequently, it has become common to regard the view that words have 'absolute and constant referents'[6] as 'unhelpful' (McMeel, 2011: 39) and as 'fallacious' (Carter, 2013: 365). In the immediate aftermath of *ICS*, courts in England and elsewhere in the common law world adopted the contextual analysis with almost uniform enthusiasm (a major exception is Australia: see Lewison, 2011: 5). It appeared as if the textual analysis, together with the plain meaning rule, would be consigned to being relics of legal history.

However, this has not been so. In a recent survey of the English decisions, McLauchlan observes that the *ICS* restatement is 'now being questioned or not applied by the courts as Lord Hoffmann intended' (2015: 408–409). According to McLauchlan (2015: 420), the shift from

context to text in the UK Supreme Court began in *Multi-Link Leisure Developments Ltd* v *North Lanarkshire Council*, where Lord Hope said that the court's task in contractual interpretation 'is to ascertain the intention of the parties by examining the words they used and giving them their ordinary meaning in their contractual context'.[7] While Lord Hope's reference to the 'contractual context' might suggest that the contextual analysis still operates, it is clear from the overall tenor of his Lordship's speech that there is a renewed emphasis on the text, especially as he imposed a precondition of finding an 'ambiguity' before any syntactical arrangement can take place.[8] The need for such a precondition refocused attention on the plain meaning of the text as a starting point, since that will be the default meaning in the absence of any ambiguity.

The shift to the text continued hesitantly with *Rainy Sky SA* v *Kookmin Bank*.[9] Lord Clarke commenced his analysis of the relevant principles in agreement with the *ICS* restatement, and repeated Lord Hoffmann's exaltation that the relevant reasonable person in the interpretative exercise is one with all the relevant background knowledge.[10] This is an unmistakable allusion to the importance of context (McLauchlan, 2015: 423). However, his Lordship also said that '[w]here parties have used unambiguous language, the court must apply it'.[11] This, in contrast, is a decidedly textual analysis that implies a precondition of ambiguity before a more contextual analysis can be undertaken. The inconsistency in Lord Clarke's analysis led Davies to question whether much weight should be placed on it (2012: 27). However, even then, it had become apparent to Davies that the UK Supreme Court was 'quietly drifting away' from the contextual analysis (2012: 27). McLauchlan is more certain that Lord Clarke's statements in *Rainy Sky* are inconsistent with the *ICS* restatement, although he also highlights that his Lordship's confusing terminology made it unclear whether the plain meaning rule was in fact adopted (2015: 425). Adodo goes a step further and thinks that Lord Clarke's pronouncements profess the 'continuing existence of the natural and ordinary meaning rule' (2013: 538). Be that as it may, it is clear that *Rainy Sky* represented yet another movement towards the textual analysis.

The next key point came in *Marley* v *Rawlings*, a surprising case given that it concerned the interpretation of a will, not contracts. Nonetheless, its importance can be attributed to Lord Neuberger's citation—with apparent approval—of Sir Richard Buxton's article (2010) that questioned Lord Hoffmann's approach to interpretation in *ICS* and *Chartbrook Ltd* v *Persimmon Homes Ltd*.[12] Sir Richard had objected to Lord Hoffmann's view in *ICS* that the meaning of the document is not the meaning of its words. Instead, Sir Richard was of the view that a document 'can only speak through the words used in it', and that this is the 'whole point of drawing up a document' such as a contract (Buxton, 2010: 255–256). This again re-emphasizes the importance of the text, and echoes the pragmatic concerns of commercial men that 'words mean what they say in ordinary English' (Staughton, 1999: 310). It ought nevertheless be emphasized that Lord Neuberger was not all too clear in *Marley* v *Rawlings* as to his endorsement of Sir Richard's critique of the *ICS* restatement.

However, what Lord Neuberger did not explicitly say in *Marley* v *Rawlings*, his Lordship did say in *Arnold* v *Britton*.[13] *Arnold* involved the interpretation of service charge contribution clauses in relation to the leases of chalets. The landlord advanced an interpretation by which the initial service charge of £90 per annum was compounded by 10% every three years. This would have given rise to what the lessees called an 'increasingly absurdly high annual service charge in the later years of each of the 25 leases'.[14] Eventually, the landlord prevailed as the language of the clauses was regarded by the Supreme Court to be clear and unambiguous and thus to be

given effect to. More significant than the result reached was Lord Neuberger's own restatement of the principles of contractual interpretation, consisting of 'seven factors' as follows:[15]

> First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16–26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. . . .
>
> Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning . . . The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language . . . Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight . . . The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties . . .
>
> Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention . . .
>
> Seventhly, reference was made in argument to service charge clauses being construed 'restrictively'. I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation . . .

A clear theme running through those factors is a re-emphasis on the text and, quite plausibly, a return to some kind of plain meaning rule. Indeed, the explicit emphasis on the 'natural meaning' of words is clear in the second and third factors. The second factor emphasized that the less clear the contractual words are, the 'more ready the court can properly be to depart from their *natural meaning*'.[16] The third factor provided that although a contractual arrangement, 'if interpreted according to its *natural language*', is unfavourable to one of the parties, the courts should not for this sole reason depart 'from the *natural language*'.[17] The reference to 'natural language' clearly assumes that words have a plain meaning, which the courts cannot depart from unless there is ambiguity. In fact, that Lord Neuberger intended to return to a textual analysis is evident from the very first factor, which is that the meaning of a contractual provision is 'most obviously to be gleaned from the *language* of the provision'.[18] Taken collectively, it is clear that recent English case law on contractual interpretation has, formally at least, returned to a more 'conservative' (McLauchlan, 2015: 438) approach, which focuses on the text and accords with a plain meaning rule.

Similar occurrences in other common law jurisdictions

The shift from context to text is not peculiar to English law. In New Zealand, one of the earliest cases to embrace the *ICS* restatement was the Wellington Court of Appeal decision of *Boat Park Ltd* v *Hutchinson*,[19] where Thomas J rejected the textual analysis as 'an outdated approach to contractual interpretation'.[20] However, the New Zealand Supreme Court has more recently in *Firm PI 1 Ltd* v *Zurich Australian Insurance Ltd*[21] adopted a greater role for the plain meaning of words as a starting point for interpretation (Havelock, 2015). The case

concerned the interpretation of a clause in an insurance policy that had become the subject of a claim following an earthquake in Christchurch. The question was whether the insurer's liability was restricted to the difference between the statutory compensation and the sum insured, pursuant to the clause which provided that such liability was 'limited to the amount of loss in excess of the Natural Disaster Damage cover'. The majority of the Supreme Court found that the insurer's liability was indeed so restricted, based on a reading of the contract in its proper context. Although Arnold J, writing for the majority, referred with agreement to the *ICS* restatement, there are aspects of his judgment that in fact departed from it. For instance, his Honour stated that the text 'remains centrally important' in the interpretative process. Thus, if the contractual clause, 'construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant'.[22] This is a formal return to a plain meaning rule, inasmuch as it presupposes that words can have an 'ordinary and natural meaning'. It is true that Arnold J does not go so far as to say that the plain meaning can never be departed from, but his Honour seems to suggest that it would take a lot, presumably the finding of ambiguity or absurdity, before the 'powerful' presumption of the parties' intention can be displaced.

A similar shift can be observed in Singapore. The Singapore Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd* v *B-Gold Interior Design & Construction Pte Ltd* had characterized the *ICS* restatement as a 'watershed, representing a decisive endorsement of the modern approach'.[23] Although the law of contractual interpretation in Singapore is indirectly affected by the more limited set of extrinsic evidence admissible by its Evidence Act (see Goh, 2013), the court embraced the contextual analysis within the confines of the Act. The court held that the contextual analysis was compatible with the Evidence Act, and that ambiguity is not a prerequisite for the consideration of the context in the interpretation of contracts.[24] However, barely a few years later, the same court, albeit with a different composition of judges, retreated from the enthusiastic acceptance of the contextual analysis in *Sembcorp Marine Ltd* v *PPL Holdings Pte Ltd*.[25] Although the court accepted the usefulness of the contextual analysis, it also cautioned against the lack of 'evidentiary discipline and procedural rigour' in the admission of extrinsic evidence.[26] The enthusiasm for the contextual analysis had waned. Subsequently, in *YES F&B Group Pte Ltd* v *Soup Restaurant Singapore Pte Ltd*, the court held that 'although the relevant context is also important, the *text* ought always to be *the first port of call* for the court'.[27] And a bit earlier in its judgment, the court also said that it is 'not inconceivable that the *text* itself might be *plain and unambiguous inasmuch as it admits of one clear meaning*'.[28] Although the court did not, similar with Arnold J's approach in *Firm PI 1 Ltd*, regard the plain meaning to be absolutely conclusive, the significance of its analysis is that Singapore law formally acknowledges that words do have a plain meaning, which forms the starting point for analysis.

In Australia and Canada, the highest courts have cited the *ICS* restatement but not fully embraced it. Their rulings instead subscribe to a plain meaning rule. Thus, the High Court of Australia has always taken a 'more cautious' view of the *ICS* restatement (Lewison, 2011: 5; see also McLauchlan, 2009). Before *ICS* was decided, Mason J in *Codelfa Construction Pty Ltd* v *State Rail Authority (NSW)* held that the 'true rule' is that contextual evidence is only admissible to interpret a contract if its words are ambiguous.[29] This clearly calls for a textual analysis and recognizes a plain meaning rule. This approach has held true through time, even though the lower courts, which had begun to allow contextual evidence even in the absence of ambiguity, had to be reminded by the High Court in *Western Export Services Inc* v *Jireh International Pty Ltd*[30] to apply the approach in *Codelfa* until it was overruled. More recently,

the prevailing approach in Australia might be described as 'uncertain'. In *Electricity Generation Corporation* v *Woodside Energy Ltd*, a majority of the High Court said that the meaning of a contract should be ascertained by what 'a reasonable businessperson would have understood those terms to mean',[31] but made no reference to the prevailing requirement of ambiguity, rendering the law unclear. More recently, French CJ, Nettle and Gordon JJ in *Mount Bruce Mining Pty Ltd* v *Wright Prospecting Pty Ltd*[32] repeated the direction in *Electricity Generation* but also said that the process of interpretation is ordinarily 'possible by reference to the contract alone'.[33] Thus, evidence of surrounding circumstances cannot be admitted to contradict the plain meaning of the contractual words, if those words are 'unambiguous or susceptible of only one meaning'.[34] The other members of the court also accepted that Mason J's approach continued to apply, but said that the refusal to grant special leave to appeal in *Western Export Services* should not be taken to have reaffirmed that approach by way of a fresh precedent.[35] This may suggest that there is some willingness to consider the need for ambiguity at the next clear opportunity (Ashurst LLP, 2015). Until then, Australian law seems to adopt a more textual analysis.

Although the Canadian Supreme Court in *Sattva Capital Corp* v *Creston Moly Corp*[36] cited the *ICS* restatement with apparent approval for the very first time, it is less clear whether it fully adopted it. Before *Sattva*, the leading case on contractual interpretation in Canada was *Eli Lily & Co* v *Novopharm Ltd*.[37] The court explained that if the contractual language was 'clear and unambiguous on its face', it would be 'unnecessary to consider any extrinsic evidence'.[38] *Eli Lily* was taken to have laid down the principle that ambiguity was a precondition before further extrinsic evidence is admissible to depart from the plain meaning of the text. This position was retreated from in *Sattva*, where the court explained that 'words alone do not have an immutable or absolute meaning'.[39] However, the court also said that the decision-maker must, after reading the contract as a whole, give the words used 'their ordinary and grammatical meaning', albeit 'consistent with the surrounding circumstances'.[40] The court's reference to 'ordinary' meaning is probably not meant to contradict its view that words do not have 'immutable or absolute' meanings. It is more likely that the court was referring to the 'conventional' meaning of words. However, when discussing the surrounding circumstances that can be considered, the court appeared to return to the importance of the text. It said that the interpretation of a written contractual provision 'must always be grounded in the text and read in light of the entire contract', and that courts cannot use surrounding circumstances to 'deviate from the text such that the court effectively creates a new agreement'.[41]

It is clear from the above discussion that there has been a formal retreat from the contextual analysis not only in England, but also in New Zealand and Singapore. In Australia, there have been repeated reaffirmations of the textual analysis even to the present day. Finally, although the Canadian Supreme Court accepted the *ICS* restatement belatedly in 2014, the court placed some importance on the text such that its embrace of *ICS* may not be total. The commonality between all of the judicial approaches discussed above is the formal return to (or affirmation of) a more textual analysis and the concurrent acceptance of the possibility that words *can* have a plain or fixed meaning. This almost uniform shift in the judicial approach towards contractual interpretation in multiple jurisdictions requires a fresh reconsideration of whether a return to a more textual analysis is desirable. The manner of this reconsideration is important. As mentioned earlier, much of the contemporary scholarship is against a textual analysis as opposed to a contextual analysis. This in turn presupposes that there is a stark distinction between these two analyses. However, as will now be shown, there is in fact a great degree of overlap between the textual and contextual analyses. They are not two different methods of contractual

interpretation. Rather, they are different in the emphasis they each give to the plain meaning of words. The modern approach to contractual interpretation certainly does not ignore the plain meaning rule completely.

Modern contractual interpretation and the plain meaning rule

The origins and purposes of the plain meaning rule

In order to understand the relevance of the plain meaning rule in the modern approach to contractual interpretation, it is necessary to sketch out the historical origin and purposes behind the rule. In the first place, Sullivan explains that 'plain meaning' is the meaning that a competent user of language would understand by reading the words in their immediate context (1994: 8–9). Côté similarly describes a plain meaning as one that a normal reading would not dispute or regard as controversial (1992: 240).

From this starting point, it was the emphasis on the document and the finality of the text that gave rise to the plain meaning rule in contractual interpretation. Writers differ on the origins of a rule that attached fidelity to the written word, but Perillo suggests that it originated as a result of the Protestant Reformation in sixteenth-century Britain (Perillo, 2000: 435). Powell explains that there was a 'cultural rejection' of interpretation, captured by the Reformers' slogan of '*sola Scriptura*' (Scripture only) (1985: 889). Invoking obedience to the Bible, Protestants believed that the literal meaning of the text was the only safe way of understanding Scripture (1985: 889). Any 'human invention' beyond the text was therefore corruptive of the text's meaning (1985: 890). The debate on the interpretation of Scripture easily affected the interpretation of legal texts. Puritans argued in the seventeenth century that, while the Bible could be understood on its own terms because it was clear to the normal reader, the same could not said of legal texts, which were usually crafted in obscure language (1985: 891). There were thus calls for the law to be drafted in clear and certain words that could not be manipulated by judges through the use of 'judicial construction' (1985: 891).

Although the Puritan attack on traditional legal hermeneutics did not succeed in Britain, it did not detract from the belief then that words could be understood on their own terms, without any external context. With this background, the plain meaning rule originally surfaced in statutory interpretation (Mawakana, 2011: 45). It was explained in the case of *Sussex Peerage* that 'if the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in the natural and ordinary sense'.[42] The rule surfaced in contractual interpretation shortly thereafter, ostensibly to control faulty memory and dishonesty.[43] Perillo suggests that the plain meaning rule developed in contractual interpretation because pre-nineteenth century common law presumed that sealed instruments were the best evidence of parties' intentions to be bound (2000: 432). Yet other writers suggest that the rule grew out of a 'concerted effort' by jurists 'to remake the common law for purposes of a grand theory of contract, which would accommodate free-market capitalism during the industrial revolution' (Goldstein, 2013: 84–85). Whichever is the true historical account, it has rightly been pointed out that the plain meaning rule was used by formalists to further the objective determination of parties' intentions (Goldstein, 2013: 84–85).

The different versions of the plain meaning rule

Although the purpose of the plain meaning rule is clear, this only takes us so far. In particular, *how* does the rule further its purpose of furthering objectivity? This question is difficult to

answer because the content of the rule has never been comprehensively defined. At its simplest, the idea behind the rule is that the plain or natural/ordinary meaning of words cannot be departed from. But a moment's thought reveals several possible understandings of the rule. For example, what does it mean to 'depart' from the plain meaning? Are there really no situations where the plain meaning can be departed from? Indeed, a closer examination of the cases and academic commentaries reveal a few versions of the plain meaning rule, which we will term the 'very strong version', 'strong version' and 'weak version' respectively.

The very strong version of the rule posits that 'words are symbols with fixed meanings, and parties to a writing should be held to that meaning, regardless of whether it coincides with their intention' (Snow, 1987: 685). By this version, words have a fixed meaning that must be given effect to. For example, in *Holt & Co* v *Collyer*,[44] Fry J regarded that the word 'beerhouse' should have a fixed meaning. He said that it was 'important to the public that the meaning of the word ''beerhouse'' should be ascertained once for all, because then persons who have to draw instruments relating to businesses of this sort will know on what principle to proceed'.[45] Another example is the expression 'consequential loss' in exclusion clauses. As Professor Carter has accurately summarized, there are two views on the meaning of this expression. First, the English cases provide that 'consequential loss' refers to loss that, in the absence of the exclusion clause, is recoverable under the second limb of the *Hadley* v *Baxendale*[46] test (Carter, 2009). Secondly, *McGregor on Damages* suggests that 'consequential loss' refers to loss that is not a 'normal loss'.[47] Both views assume that the expression 'consequential loss' has a fixed meaning that can be applied consistently in every case.

Moving down one level, the strong version of the rule provides that the plain meaning can be departed from, but extrinsic evidence to effect such departure can only be considered if certain preconditions are satisfied. One usual precondition is that the writing or term in question is 'ambiguous' on its face. This is illustrated by Mason J's insistence in *Codelfa* that contextual evidence is only admissible to interpret a contract if its words are ambiguous. If not, the plain meaning of the words must be applied.[48] According to this view, the court is expected to assess whether there is an ambiguity by examining the text alone without recourse to anything outside of the contract. Yet another precondition for admitting extrinsic evidence to contradict the plain meaning is if that meaning, in the words of Lord Blackburn in *River Wear Commissioners* v *Adamson*, produces 'an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification'.[49] Again, the court is expected to come to this conclusion simply by looking at the contractual words only. Under the strong version of the plain meaning rule, plain meaning 'exists as a strong concept largely free of contextual influences' (Perell, 1998: 48). The consequences of ambiguity or absurdity only have a limited effect on the interpretation of the contractual language since the first port of call is the language *alone*. Indeed, the difficulty here is that the court cannot consider extrinsic evidence in deciding whether the contractual words are ambiguous or lead to an absurdity. This, together with the absence of guidelines to decide if there is in fact ambiguity or absurdity, make it difficult for the courts to find that the plain meaning can in fact be departed from (Snow, 1987: 685).

Finally, the weak version of the rule similarly allows departure from the plain meaning on the satisfaction of certain preconditions but, unlike the strong version, allows for the consideration of extrinsic evidence to decide if those preconditions are satisfied. Thus, apart from the contractual language, a court is permitted to look at the context to assess whether those words, *read in that context*, give rise to either ambiguity or absurdity. Indeed, if extrinsic evidence is considered in this manner, the plain meaning rule merely affects the weight of the evidence

(McLauchlan, 1996: 100). This is because if extrinsic evidence is routinely admitted to consider whether the plain meaning gives rise to an ambiguity, then the plain meaning merely establishes a rather weak rebuttable presumption that that was the meaning adopted by the parties.[50] Thus, as compared with the very strong and strong versions of the plain meaning rule, the plain meaning is less absolute here, and more readily gives way to 'context, purpose and consequences' as being 'more integral and more influential' (Perell, 1998: 48). It has been explained that this is effectively a contextual analysis (Goldstein, 2013: 96), but, even here, the context does not deny that words can have a 'determinate grammatical and ordinary sense' (Perell, 1998: 48).

The strong and weak versions of the plain meaning rule in modern contractual interpretation

Although the modern approach in contractual interpretation calls for a 'contextual' analysis, this is not done to the complete exclusion of the plain meaning rule. It is suggested that courts in fact apply some version of the plain meaning rule, specifically the strong and weak versions. At the outset, it is perhaps simpler to discuss what the modern approach is *not* about. We can first rule out the possibility of the modern approach being an *entirely* contextual approach, or based on what has been called a 'sceptical' view of meaning. By this view, words do not have default or conventional meanings (Carter, 2013: 364). There is simply no starting point to meaning. Perell explains that sceptical arguments founded on epistemology or the philosophy of language postulate that there is no such concept as a plain meaning because language is inherently indeterminate (1998: 31). Language is therefore really a matter of 'unconstrainable interpretation' (Carter, 2013: 364) that is wholly determined by the interpreter and not by language or words. Some critics go even further and suggest that the 'plain meaning' of a word will never be objective, since each interpreter brings a different perspective that will interact with the text, rendering a different interpretation each time (Scallen, 1995: 1746–1747). Put another way, there is substituted for the 'plain meaning' the indeterminacy of the interpreter's own intentions and purposes.

Such an extreme view of language has not gained currency in either the cases or academic commentaries in the jurisdictions discussed above. The plain or natural and ordinary meaning of words is still emphasized in the modern 'contextual' analysis. In so far as cases are concerned, it is unlikely that Lord Hoffmann subscribed to a sceptical view of language when he said in *Charter Reinsurance Co Ltd* v *Fagan* that 'the notion of words having a natural meaning is not a very helpful one'.[51] This is because his Lordship later said in *ICS* that words can have a presumptive meaning to begin with. Moreover, the recent shift from context to text has only fortified the plain meaning of words. Thus, in *Firm PI 1 Ltd*, the New Zealand Supreme Court regarded the plain meaning as only a 'powerful, albeit not conclusive, indicator of what the parties meant'.[52] This is likewise the position under English law after *Arnold*, inasmuch as the UK Supreme Court emphasized the plain meaning of the text as a starting point. This is all the more so in Australia, where *Codelfa* still applies. The result is that the modern contextual approach, far from regarding context as determinative, takes the plain meaning of contractual words into account in the interpretative exercise. In line with Lord Mustill's view in *Charter Reinsurance* that 'most expressions do have a natural meaning, in the sense of their primary meaning in ordinary speech',[53] the modern contractual approach does not deny that the meaning of words have a natural starting point that is otherwise known as their 'plain meaning'.

Also, although some commentators suggest that meaning is a 'relative concept', they should not be taken to mean that words do not have default or conventional meanings (Carter, 2013: 364). First of all, these commentators also accept that 'judicial decisions may create presumptions about the meanings of words' (Carter, 2013: 365). Indeed, as McLauchlan has said, '[t]o deny the existence of a plain meaning rule by virtue of which parties may be bound to a contract in accordance with a meaning which neither of them gave to it is not to deny the existence or relevance of "plain" meanings' (1996: 87). Professor McMeel, another prominent scholar in the field, similarly accepts that it is possible to speak of the 'conventional' or 'common sense' meaning of words, while insisting that the context is always relevant in selecting which conventional meaning best accords with the parties' intentions (2011: 39). These commentators therefore acknowledge that words do have conventional meanings as starting points for interpretation, which may, however, be contradicted by the extrinsic evidence. Where these commentators part company with the plain meaning rule is whether and to what extent that plain meaning can be departed from. Notwithstanding this, there is no indication that their objection of the plain meaning rule is founded on any sceptical view of language itself. The most that can be said is that critics of the plain meaning rule outside of the United States are mild sceptics, who believe that meaning is 'transitionally possible but relatively unverifiable' (Perell, 1998: 37). On this milder view, there is no objection to words having a plain meaning to begin with, but that the meaning can change depending on the context.

The second thing that the modern approach is not about is the very strong version of the plain meaning rule. Courts and commentators do not disregard the relevance of the plain meaning, nor do they treat it as the absolute determinant of meaning. It would be hard put to find a modern court or commentator advocating that the plain meanings of words are absolute and can never be departed from. This much is clear from the *ICS* principles, which stress the importance of the context in interpretation. Indeed, Lord Hoffmann, the author of the influential *ICS* restatement, pointed out in *BCCI* v *Ali* that 'the primary source of understanding what the parties meant is their language interpreted in accordance with conventional language'.[54] The reference to 'conventional language' is a reference to context, albeit in a more limited sense. But it is clear that Lord Hoffmann did not intend context to be so restricted; his Lordship said in *Chartbrook Ltd* v *Persimmon Homes Ltd* that 'there is not . . . a limit to the amount of red-ink or verbal rearrangement or correction which the court is allowed' in contractual interpretation pursuant to the context.[55] Even in Australia, where *Codelfa* applies to stress the importance of the plain meaning, McHugh JA has observed in *Manufacturer's Mutual Insurance Ltd* v *Withers* that because it is rarely possible to know what a word means without recourse to the surrounding circumstances, contextual evidence will generally be admissible 'if it is known to both parties or sufficiently notorious to be presumed to be within their knowledge'.[56]

Thus far we have seen that the modern approach in contractual interpretation is *not* about a complete disregard of either the plain meaning or context. The truth, as with many things, is in between. Put one way, the courts differ in the *extent* to which they consider the context (Ricks, 2008: 785). Thus, some cases consider a more restrained extent of context; in these cases, judges bring to a text 'all their internalized rules for common usage—rules of grammar, syntax, etc—through which they interpret the contract' (Goldstein, 2013: 109–110). The High Court of Australia in *Darlington Futures Ltd* v *Delco Australia Pty Ltd* emphasized this approach by alluding to the need to construe a clause 'according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause

appears including the nature and object of the contract'.[57] The approach here is thus to consider the context as a necessary, if limited, part of the contractual interpretative exercise, but without ignoring that plain meaning remains possible and, indeed, necessary (Perell, 1998: 58). Similarly, Carnwath LJ stated in *ING Bank NV* v *Ros Roca SA*[58] his preference for an interpretation that 'does significantly less violence to the language of the clause'. This is effectively the strong version of the plain meaning rule, where courts place more emphasis on the plain meaning as compared to the context. This may be contrasted to how some courts place a greater emphasis on the context. This can be seen in, for example, *ICS*, which concerned the interpretation of the following clause that excluded certain claims made against West Bromwich:

> Any claim (whether sounding in rescission for undue influence or otherwise) that you [the investors] have or may have against the West Bromwich Building Society in which you claim an abatement of the sums which you would otherwise have to repay to the Society . . .

Although the House of Lords accepted that the obvious plain meaning of the clause meant that ICS could not sue West Bromwich, a majority of their Lordships felt able to interpret the clause to mean otherwise in light of the context (Davies, 2013: 435). This was thus an approach that paid greater heed to the context in the interpretative exercise or, as was discussed above, the weak version of the plain meaning rule.

From the above discussion, it can be seen that the courts consider *both* the plain meaning and context in interpretation. Specifically, they apply both a strong and weak version of the plain meaning rule in contractual interpretation. This is an important point because then the correct question to ask is not whether the courts should prefer a 'textual' analysis over a 'contextual' analysis, but rather how the courts should *balance* the interplay between plain meaning and context. The recent shift in contractual interpretation across the common law world can thus be more properly viewed as the courts' return to a *greater emphasis* on the plain meaning as the starting point of analysis, rather than the stark acceptance of text *in place* of context. Two issues arise in connection with this characterization. First, is the reliance on plain meaning ever justified in light of the widely accepted view that context is fundamental in contractual interpretation? Secondly, if it is justified, what is the proper balance to be drawn between plain meaning and context? In particular, should the courts apply a strong or weak version of the plain meaning rule?

Justifying recourse to plain meaning generally

The real objection against 'plain meaning' generally

Any justification of the recourse to plain meaning, to whatever extent, requires the proper identification of the real objection against such meaning generally. Commentators have raised concerns against the plain meaning on the basis that by looking to such meaning, contractual interpretation is returning to a 'more conservative approach', where disputes are 'resolved primarily on the basis of textual analysis' (McLauchlan, 2015: 438). This, as discussed above, should not be taken to be a linguistic objection on the basis that the meaning of words can never have a starting point. Rather, the objection really is with *when* that plain meaning can be departed from. In particular, these commentators disagree on the set of prerequisites imposed by the courts based on ambiguity/absurdity that dictate when the plain meaning can be departed from. The better choice for these commentators, it seems, is for the plain meaning to be considered together with an unrestrained set of context at the outset.

Because this objection is generally concerned with the accuracy of the final interpretation, it may be termed the 'accuracy objection'. The accuracy objection is premised on the notion that meaning ultimately depends upon context. Hence to exclude or restrict the context is to render the interpretation inaccurate. McLauchlan puts this clearly when he says that '[t]he truth is that no words have a fixed or settled meaning' and that '[r]ather it is some *person* who gives a meaning to them' (1996: 84). Professor Williams made the point much earlier (1945: 384) when he said that:

> Apart from such ordinary or assigned meanings words have no 'actual', 'correct', 'essential', 'grammatical', 'legitimate', 'literal', 'natural', 'necessary', 'rational', 'real', or 'reasonable' meaning (all of which adjectives are common in legal literature).

The great American judge, Holmes J, made the same point judicially by saying that '[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used'.[59]

Contractual interpretation is about choices

The problem with the accuracy objection is that it ignores the fact that contractual interpretation is really about choices. These choices need to be made because there is no perfect way of ascertaining the parties' actual intention through the interpretative exercise. Thus, choices are made to get at the best, if imperfect, way of doing that, balanced by concerns of certainty and efficiency. To begin with, contractual interpretation is concerned with an objective ascertainment of the parties' intention. Indeed, objectivity has been described as 'the cornerstone of the theory of contract and permeates our entire approach to contractual interpretation'.[60] However, it is not immediately obvious that the ascertainment of the parties' intentions can *only* or *should* be done objectively. This is because, as Powell points out, the Latin equivalent of the word 'intent' (*intentio*) admits of two meanings in medieval usage: it could refer to 'the meaning the drafters wished to communicate' or 'the meaning the reader was warranted in deriving from the text' (1985: 895). In choosing the latter meaning, the common law committed itself to the belief that the parties' intentions are to be determined from their words and conduct, not their unexpressed intentions.[61] Thus, Lord Hoffmann alluded to the futility of any other approach, writing extra-judicially that the courts 'have no direct access to [the parties'] subjective mental states' (1998: 660). By this approach, even subjective evidence of conformity 'to an intention common to both or all the parties . . . [which] violates the usage of all other persons'[62] cannot be considered. This was aptly demonstrated by Lord Hoffmann's disapproval of *The Karen Oltman*[63] in *Chartbrook*; in his Lordship's view, Kerr J's consideration of evidence of the parties' agreed meaning was an 'illegitimate extension' of the rule that a particular trade or community has its own peculiar linguistic usage.[64]

Despite the numerous recent cases that have emphasized the objectivity of contractual interpretation, it must not be thought that objectivity is a recent development of the common law of contract. Except for a short experimentation with the subjective approach in the mid-nineteenth century, the common law of contract interpretation has always been objective (Perillo, 2000: 432). In an early sixteenth century text, *Doctor and Student*, a common law student describes the then-prevailing approach toward contracts as 'the intent inward in the heart, man's law cannot judge', and that a promise would bind if there is a 'charge by reason of the promise' (Germain, 1988: 179). Similarly, John Joseph Powell's treatise on contract law in the eighteenth century stated that the law of contract is not concerned with 'internal sentiments'

but only 'external expression' (1790: 372–373). The focus was on the objective meaning of the promise, as manifested in writing, rather than the unexpressed subjective intentions of the parties. There were—and continue to be—cogent policy reasons for this approach, founded on the need for certainty as contained in the written word. Thus, in *Throckmerton* v *Tracy*, Brook CJ explained that to give effect to the parties' meaning instead of the words would 'introduce barbarousness and ignorance, and to destroy all learning and diligence'.[65] In more contemporary language, McMeel explains that this approach enables commercial parties to act upon the expressed intentions of other parties, without needing to be concerned about any intention that was not communicated (2011: 36). Another rationale McMeel advances is that the objectivity approach frees the courts from the 'time-consuming and potentially fruitless task' of ascertaining the parties' actual intentions (2011: 36).

The modern objective approach had become the undeniable truth in the twentieth century. The choice of an objective approach over a subjective one is a compromise, for, as Kramer puts it, 'the best that the interpreter can hope for is to discover the *apparently* intended meaning of the communicator' (2003: 176). Without telepathy, the interpretation is 'no less a pragmatic process involving presumptions and hypotheses' and 'guesswork built upon the assumption that the utterance is a rational means to an end' (Kramer, 2003: 176). However, the need to make choices does not end with the undisputed commitment[66] to the objective principle. Objectivity must be given effect to by further choices. Historically, formalism was chosen as the way to ascertain the parties' intentions. The parol evidence rule and the plain meaning rule were then chosen to give effect to formalism, by focusing on the document, and the textual meaning of words. The existence of choices means that there is no one right answer in how contracts are to be interpreted. Ultimately, the method of interpretation employed is a choice. And the correctness of that choice needs to be evaluated based on the consistency between the reasons behind *secondary* choices and *primary* choices. Thus, if the underlying rationale behind the primary choice of objectivity is certainty and efficiency, then it might be of concern if subsequent, secondary choices as to how that objectivity is to be manifested are made on inconsistent bases.

Recourse to plain meaning justified as a pragmatic choice

Contemporary discussions of contractual interpretation seldom ever discuss the existence of these choices, much less evaluate the desirability of elements of contractual interpretation with them in mind. For example, the accuracy objection may not accord with the more policy-oriented reasons for preferring an objective principle in the first place. Indeed, if imperfect meaning is accepted as matter of policy in choosing objectivity, then should not inaccuracy through the use of plain meaning be similarly accepted? The plain meaning rule is ultimately a choice taken in the light of the contractual interpretation framework as a whole. There is undoubtedly some artificiality in the entire exercise, but this is necessary for the following policy reasons.

First of all, an emphasis on the plain meaning as a starting point is simply necessary for communication to work in the real world. In *Slim* v *Daily Telegraph Ltd*, a defamation case, Diplock LJ acknowledged that it is artificial to assume that there is only one correct meaning to words when reasonable people recognize that words are not precise for communicating the thoughts of one man to another.[67] Yet, his Lordship also recognized the practical need for the attribution of a 'right' meaning to words so that they can be used to define legal rights and duties. Similarly, as Calnan observes, the view that words have plain meanings 'finds its roots

in pragmatism and experience' (2013: 70). The assumption, which is a sound one, is that most interpreters will share a common vocabulary so that any major discrepancy is avoided. Plain meaning rests on our 'unreflective, public, conventional practice of language use' (Ricks, 2008: 769). For communication to work, meaning has to be based on 'public and shared conventions' and the 'consistent, conventional patterns of our usage' (Ricks, 2008: 784). It is always possible to assign meaning to words in a contract using the text of the contract and the limited context under the plain meaning rule (Goldstein, 2013: 110). Indeed, it is difficult to imagine language working apart from such shared conventions being utilized in interpretation. Thus, while it may accord with theory that the meaning of words can only ever be contextual, the practical, if 'untheoretical' solution, is to acknowledge that 'most words are pretty easy to understand in the context of the few words which surround them' (Calnan, 2013: 70).

Secondly, recourse to the plain meaning promotes certainty. It is clear that some application of a plain meaning rule offers a 'certainty of writing' that is absent when extrinsic evidence is admitted without regard to the text as a starting point (Johnson, 2005: 671). Such a starting point would bind the parties to the language of the contract that the court has deemed to be 'plain' (Johnson, 2005: 638). As Kirby J stated in *Agricultural and Rural Finance Pty Ltd* v *Gardiner*, courts do no service to parties by adopting 'atextual meanings' since that will tend to defeat the expectations of parties who rely on the use of the English language to express their bargains.[68] Colman J similarly alludes to the importance of certainty in *BP Exploration Operating Co Ltd* v *Kvaerner Oilfield Products Ltd*[69] when he said that '[t]he whole basis of contractual certainty is the words actually used in their ordinary meaning'. In contrast, an examination of the context can undermine the parties' ability to confirm their agreement into writing that will be enforced by the court predictably (Goldstein, 2013: 98). This emphasis on certainty will also avoid the 'gamesmanship and dishonesty' that a contextual analysis might bring (Solan, 2001: 87–90). In essence, as Solan notes, '[p]rivileging the written contract serves a useful function precisely because people really do testify dishonestly, or at least consistently with a self-serving reality that they have created in their own minds about events underlying a litigation' (2001: 89–90).

Thirdly, reliance on the plain meaning is also efficient in that the courts and parties do not need to deal with the contextual evidence, much of which may well have been admitted for strategic, rather than accuracy, reasons. Short of a detailed empirical study confirming this, the intuitive (and logical) thinking must be that as courts spend less time on controversial contractual interpretation issues by elucidating a set of clear and consistently applied rules, appeals from the lower courts to appellate courts will decrease over time as litigants no longer deem it worthwhile to try and reverse the decision below. This will make courts more efficient overall. Moreover it is not only the courts' resources that one should be concerned about; the parties' resources (and corresponding efficiency) also matter. As Schwartz and Scott have argued, commercial parties will prefer courts to interpret the text of the contract alone because the costs of drafting and litigating such contracts will be lower than using a vast array of contextual evidence (2003: 569, 2010: 930). Not only is such a process more efficient, it is also *fairer*, in the sense that if parties have chosen the language of the contract with a certain plain meaning in mind, then they should be held to that meaning (Goldstein, 2013: 125).

Justifying shift to the strong version of the plain meaning rule

Accordingly, the allusion to some kind of plain meaning in contractual interpretation promotes common sense, certainty and efficiency. This is really not so controversial. Indeed, as we have

discussed above, although the modern courts may speak of a 'contextual' approach, the truth is that they have never abandoned the relevance of the 'plain meaning'. The real question is the extent to which the courts should place on the plain meaning in contractual interpretation. What ought to be the proper balance between plain meaning and context? It is suggested that if the above justifications for recourse to the plain meaning are taken seriously, then it ought to be the *strong version* of the plain meaning rule that the courts should adopt going forward.

Certainty is enhanced with the courts adopting the strong version of the plain meaning rule because it avoids the parties having to guess at when a court will shift to a more 'contextual' interpretation. The undesirability of uncertainty is aptly demonstrated by the facts of *ICS*, where the departure from the plain meaning was unexpected because the interpreted meaning was so different from the plain meaning, which was neither ambiguous nor absurd. Although this may have been 'theoretically' more faithful to the contextual meaning of words, it is equally important to recognize that contractual interpretation has immensely practical functions as well. It must be sufficiently certain not only to allow commercial parties to structure their dealings with one another in advance, but also to discourage those same parties from reopening a concluded deal endlessly on the basis of a difference in 'interpretation'. What is really needed is not perfect theoretical neatness, but practical certainty. In this regard, Davies rightly suggests that the way forward from *ICS* is for there to be restraint and the avoidance of violence to the contractual language (2013: 450). By this approach, the courts should depart from the plain meaning only if gives rise to absurdity or is unworkable. This is a predictable set of criteria that can guide commercial parties in structuring their deals and keeping concluded deals closed. Rather than spend considerable resources litigating over the correct 'meaning' of words that is founded on the uncertainty in the law of contractual interpretation, the law should encourage parties to devote resources towards properly structuring their commercial arrangements in the first place. The borderline between plain meaning and a more contextual meaning need not be difficult to define: courts can encourage greater certainty and efficiency by laying down a default rule that the plain meaning will be adhered to, unless ambiguity or absurdity can be discerned from the contract as a whole.

In a similar vein, the strong version of the plain meaning rule also promotes efficiency by defining the context that can be used in the interpretative exercise. Rather than promote the endless search through multiple correspondence and background facts, Goldstein proposes that courts should look at the language of the contract and the 'publicly and conventionally' meaning of words to determine if the contractual words are unambiguous (2013: 112). Thus, parties will put forward extrinsic evidence to show that their proposed interpretation of the word is relevant, and the courts will be furnished with a list of possible meanings that the word can bear (Goldstein, 2013: 113). The context is kept artificially restricted to only the boundaries of usage particular to the parties. Thus, where parties are in a specific trade, the courts will more readily consider the trade usage of particular words.[70] The trade usage in essence becomes the relevant context for ascertaining the meaning of the word concerned. Such an approach is to be encouraged as it provides a predictable framework on how extrinsic evidence is to be tendered. Apart from the general guidance that such evidence must relate to the conventional understanding of the word, parties will first present to the court evidence of common usages of the term. Then, more particular evidence of usage within a more limited segment of the public is allowed (Goldstein, 2013: 115–116).

Ultimately, it must not be lost in the interpretative exercise that people use language to enter into contracts to control future affairs (Goldstein, 2013: 123). Due to the circumstances in which contracts are made, this general proposition will likely concern commercial affairs, but

can equally apply to non-commercial situations. The parties, or a court, must in the end be able to implement the contract. The parties should be confident that their original record of their agreement is that which is given effect to (Goldstein, 2013: 124), instead of a meaning that is theoretically sound but practically unreal. A court also has to have access to the shared and conventional meaning of words and that needs to be given effect to so as to create a predictable state of future affairs. In order to achieve these outcomes, it is suggested that the courts should adopt the strong version of the plain meaning rule. In that regard then, the courts' recent shift to a more 'conservative' approach in contractual interpretation, in as much as that corresponds to a shift away from a weak version to a strong version of the plain meaning rule, is to be welcomed.

Improvements in the application of the strong version of the plain meaning rule

However, the strong version of the plain meaning rule is not without its difficulties. The first difficulty is not with the content of the rule itself but rather the courts' inconsistent application of the plain meaning rule. With the courts purporting to apply at least two versions of the plain meaning rule, and some disavowing the utility of any plain meaning rule altogether, it is unclear what the prevalent approach is. It is important for the courts to recognize a *consistent* approach, preferably the strong version of the plain meaning rule for the reasons discussed above. The harm from an unsettled state of law as to the approach to interpret contracts is far greater than using either a textual or contextual analysis. If parties are unable to know in advance what the applicable approach is, they will be unable to draft their agreements in a way that will legally reflect their true intentions. Indeed, even if it is thought that the plain meaning rule does not accurately reflect the parties' intentions, the irony is that the contextual analysis will have this effect as well, if only because it is nearly impossible to predict in advance what the 'contextual' meaning will be owing to the countless body of contextual evidence potentially available. It is therefore to be welcomed, not scorned, that the highest courts across the major common law jurisdictions are conducing consistently towards a more textual analysis and applying a plain meaning rule. As more courts settle on this approach, it may be that, as in economics and business, a network effect will apply (see generally Shapiro and Varian, 1999). When a network effect is present, the benefit that accrues is not with the precise approach being applied, but with how many jurisdictions subscribe to a particular approach. Thus, the more jurisdictions that use a particular method to interpret contracts, the more certain and consistent the law will be. Parties will then know in advance how to draft their agreements with this widespread approach in mind. The benefit of the approach, accelerated by the network effect, lies in its widespread adoption, rather than its substantive merits.

A more specific challenge particular to the strong version of the plain meaning rule is to recognize the mutability of language (Perell, 1998: 65). Although the strong version rests on a definable body of meanings, it is obvious that the range of meanings of words can be varied over time (Perell, 1998: 65). One prominent example is Queen Anne's comment that Sir Christopher Wren's architecture was 'awful, artificial, and amusing', by which, she actually meant that it was 'awe-inspiring, highly artistic, and thought-provoking' (Scalia and Garner, 2012: 78). According to Scalia and Garner, all three words used by Queen Anne have undergone 'pejoration', that is, their meanings have degenerated over time to bear only negative connotations (2012: 78). This example illustrates the fundamental rule that words must be given the plain meaning they had *when the text was adopted*. While there is some debate in

constitutional and statutory interpretation whether this is the right approach, this is much more accepted in contractual interpretation. This is because contracts are generally not expected to endure as long as constitutions and statutes, which reduces the relevance of the need for an 'updated' interpretation to cater to societal needs over time. Moreover, a contract cannot bind other parties and does not (usually) confer rights on others (Claybrook, 2006: 118). Thus, the parties, by their agreement, fix the meaning as it is plainly or conventionally used at the time of contracting. This is also in line with the rationale behind not admitting subsequent conduct to interpret contracts for fear that such evidence will alter the original bargain between the parties.[71]

A related challenge particular to the strong version of the plain meaning rule is to have clear and certain default rules that apply if it becomes impossible to determine the plain meaning due to the malleability of language (Perell, 1998: 59). This is quite different from the criteria of ambiguity and absurdity that define when it is permissible to depart from the plain meaning. A failure to define these default rules properly will give rise to the same problems of uncertainty and inefficiency associated with the contextual analysis. In this regard, certain words are simply not precise and may also define concepts that are imprecise or do not have a concrete form (Perell, 1998: 59). In most cases, the interpretative task will be easy because it is possible to work out the correct meaning from the possible meanings by ascertaining the underlying formula and applying the necessary variables (Perell, 1998: 59). Where, however, the interpretative task is difficult due to the inexact circumstances, or because the word's possible meanings are not settled, the courts will need to define the boundaries within which the correct meaning lies, and then select one of those meanings as the correct one. The courts frequently turn to default rules or 'canons of interpretation' to help defuse the ambiguity and choose one meaning as the correct one. The use of these canons should not make interpretation 'gratuitously roundabout and complex' (Scalia and Garner, 2012: 70), but should actually help reach the correct interpretation. The foremost canon is that words are to be understood in their conventional meanings, unless the context provides otherwise. Context in this regard refers to the contextual and idiomatic clues which of the several meanings a word is to bear (Scalia and Garner, 2012: 70). Common experience tells us that a reasonable person interprets a vast majority of words in this manner everyday. Other semantic, syntactic and contextual canons can be applied if the immediate context fails to yield a meaning. In order that certainty is preserved, the content and application of these canons must be consistent. The benefit is, once again, with the consistent application of a rule, more than its substantive content.

Conclusion

It is interesting to observe the ebb and flow of contractual interpretation from the textual to the contextual, and now from the contextual back to the textual. The very change shows that a choice is involved in choosing the appropriate methodology. If so, it needs to be recognized that formalist conventions such as the plain meaning rule are artificial but necessary to ensure that contracts can be predictably and efficiently interpreted, ensuring a conducive environment for commerce. High theory about linguistics aside, it is difficult to quarrel with the commonsensical notion that people need conventions to communicate, and contractual interpretation is merely a more particular example of that general principle (Goldstein, 2013: 141).

In conclusion, this paper has argued that the courts' return to a more textual analysis, or the adoption of the strong version of the plain meaning rule, is to be welcomed. In the first place, the courts have never disavowed the plain or conventional meanings of words as a starting point

in contractual interpretation, and so the correct question is not with choosing between a 'textual' or 'contextual' analysis, but with balancing the importance of plain meaning and context. The choice of giving importance to the plain meaning of words is entirely in line with the rationales underpinning the objectivity principle, justified on account of its certainty and efficiency. The strong version of the plain meaning rule enhances the certainty and efficiency brought about by recourse to the plain meaning. Looking ahead to the future, challenges to the strong version of the plain meaning rule, such as the malleability and mutability of language, can all be addressed by having a definite and certain set of rules in contractual interpretation. In the final analysis, the way forward may well be a more consistently defined and applied strong version of the plain meaning rule, rather than an ambiguous (and tedious) search for context.

Acknowledgements

I would like to thank Man Yip for her helpful comments and Calvin Lim for able research assistance. All errors remain my own.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

Notes

1. [1998] 1 WLR 896.
2. Ibid. at 912.
3. Indeed, in *Chartbrook Ltd* v *Persimmon Homes Ltd*, Lord Hoffmann, quoting Lord Bingham, said that there was 'little' in that restatement which could not be found in earlier decisions: see [2009] AC 1101 at [37].
4. This became known as the 'plain meaning rule'. However, as will be discussed below, there are different versions of this rule.
5. *Charter Reinsurance Co Ltd* v *Fagan* [1997] AC 313 at 391.
6. *Pacific Gas and Electric Co* v *G W Thomas Drayage & Rigging Co Inc*, 69 Cal 2d 33 at 38.
7. [2011] 1 All ER 175 at [11].
8. Ibid.
9. [2011] 1 WLR 2900.
10. Ibid. at [41].
11. [2011] 1 WLR 2900 at [23].
12. [2014] 2 WLR 213 at [39].
13. [2015] 2 WLR 1593.
14. Ibid. at [10].
15. Ibid. at [16]–[23].
16. Ibid. at [18].
17. Ibid. at [17].
18. Ibid. at [17].
19. [1999] 2 NZLR 74.
20. Ibid. at 81.

21. [2014] NZSC 147.
22. Ibid. at [63].
23. [2008] 3 SLR 1029 at [61], citing McMeel (2007: [1.101]).
24. Ibid. at [132].
25. [2013] 4 SLR 193.
26. Ibid. at [70].
27. [2015] 5 SLR 1187 at [32].
28. Ibid. at [31].
29. (1982) 149 CLR 337 at 352.
30. [2011] HCA 45.
31. (2014) 251 CLR 640 at [35].
32. [2015] HCA 37.
33. Ibid. at [48].
34. Ibid. at [49].
35. Ibid. at [112] (*per* Kiefel and Keane JJ) [120] (*per* Bell and Gageler JJ).
36. 2014 SCC 53.
37. [1998] 2 SCR 129.
38. Ibid. at [55].
39. 2014 SCC 53 at [47].
40. Ibid. at [47].
41. Ibid. at [57].
42. (1844) 8 ER 1034 at 1057.
43. Thus, in *The Countess of Rutland's Case* 77 ER 89 at 90, the court declared that 'it would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory'.
44. (1881) 16 Ch D 718.
45. Ibid. at 722.
46. (1854) 9 Ex 341.
47. Carter (2009: 118–119), referring to McGregor (2003: [1-036]–[1-039]).
48. (1982) 149 CLR 337 at 352.
49. (1877) 2 App Cas 743 at 764–765.
50. McLauchlan (1996: 100). See also Claybrook (2006: 112). A similar approach can be seen in Drieger's attempt at identifying a single, literal or plain meaning as the intention of the legislator in statutory interpretation: Drieger (1983: 87).
51. [1997] AC 313 at 391.
52. [2014] NZSC 147 at [63].
53. [1997] AC 313 at 384.
54. [2002] 1 AC 251 at [39].
55. [2009] AC 1101 at [25].
56. (1988) 5 ANZ Insurance Cases 75.336 at 75.343.
57. (1986) 161 CLR 500 at 510.
58. [2011] EWCA Civ 353 at [29].
59. *Towne* v *Eisner* 245 US 418 at 425 (1918).
60. *Zurich Insurance (Singapore) Pte Ltd* v *B-Gold Design & Construction Ptee Ltd* [2008] 3 SLR(R) 1029 at [125].
61. *BCCI* v *Ali* [2001] 1 AC 251 at [8]. See also (Perillo, 2000).

62. Restatement (Second) of Contracts § 227(3) (1932).
63. [1976] 2 Lloyd's Rep 708.
64. [2009] 1 AC 1101 at [45]. See also McLauchlan (2005: 488).
65. (1816) 75 ER 222, 251.
66. *Cavell USA Inc* v *Seaton Insurance Co* [2009] Lloyd's Rep IR 616 at [30].
67. [1968] 2 QB 157 at 171–172.
68. [2008] HCA 57 at [116].
69. [2005] 1 Lloyd's Rep 307 at 321.
70. In fact, Goldstein argues against the use of course of performance or dealing as inconsistent with the objective approach of contractual interpretation: see Goldstein (2013: 117).
71. See *Wickman Machine Tool Sales Ltd* v *L Schuler AG* [1972] 1 WLR 840 at 851.

References

Ashurst LLP (2015) High Court on contractual construction and royalties. Available at: www.ashurst.com/doc.aspx?id_Content=12463 (accessed 23 July 2016).

Adodo E (2013) Is the plain meaning approach to construction of 'unambiguous words' in contracts still alive in the English courts? *European Business Law Review* 24(4): 537.

Buxton R (2010) 'Construction' and rectification after *Chartbrook*. *Cambridge Law Journal* 69(2): 253–262.

Calnan R (2013) *Principles of Contractual Interpretation*. Oxford: Oxford University Press.

Carter JW (2009) Exclusion of liability for consequential loss. *Journal of Contract Law* 25: 118–134.

Carter JW (2013) *The Construction of Commercial Contracts*. Oxford: Hart Publishing.

Claybrook F Jr (2006) It's patent that 'plain meaning' dictionary definitions shouldn't dictate: what *Phillips* portends for contract interpretation. *The Federal Circuit Bar Journal* 16: 91.

Côté PA (1992) *The Interpretation of Legislation in Canada*. Cowansville, Quebec: Les Editions Yvon Blais.

Davies PS (2012) Interpreting commercial contracts: a case of ambiguity? *Lloyd's Maritime and Commercial Law Quarterly* 1: 26–29.

Davies PS (2013) Construing Commercial Contracts: No Need for Violence. In: Freeman M and Smith F (eds) *Law and Language*. Oxford: Oxford University Press.

Drieger E (1983) *Construction of Statutes*. 2nd ed. Toronto: Butterworths.

Germain CS (1988) *Dialogues Between a Doctor of Divinity and a Student in the Laws of England*. Legal Classics Library.

Goh Y (2013) Contractual interpretation in Indian Evidence Act jurisdictions: compatibility with the modern contextual approach? *The Oxford University Commonwealth Law Journal* 13(1): 17–48.

Goldstein A (2013) The public meaning rule: reconciling meaning, intent, and contract interpretation. *Santa Clara Law Review* 53: 73–142.

Havelock R (2015) Common sense in contractual construction. *Lloyd's Maritime and Commercial Law Quarterly* 33(1): 174–178.

Hoffmann (1998) The intolerable wrestle with words and meaning. *Singapore Academy of Law Journal* 56: 656.

Johnson W (2005) Interpreting government contracts: plain meaning precludes extrinsic evidence and controls at the Federal Circuit. *Public Contract Law Journal* 34(4): 635–672.

Kramer A (2003) Common sense principles of contract interpretation (and how we've been using them all along). *Oxford Journal of Legal Studies* 23(2): 173–196.

Lewison K (2011) *The Interpretation of Contracts*. 5th ed. London: Sweet & Maxwell.

Mawakana K (2011) In the wake of *Coast Federal*: the plain meaning rule and the Anglo-American rhetorical ethic. *University of Maryland Law Journal of Race, Religion, Gender & Class* 11: 39–57.
McLauchlan D (1996) The plain meaning rule of contract interpretation. *New Zealand Business Law Quarterly* 2: 100.
McGregor H (2003) *McGregor on Damages*. 17th ed. London: Sweet & Maxwell.
McLauchlan D (2005) Objectivity in contract. *University of Queensland Law Journal* 24(2): 479–497.
McLauchlan D (2009) Plain meaning and commercial construction: has Australia adopted the ICS principles? *Journal of Contract Law* 25(1): 7–38.
McLauchlan D (2015) The lingering confusion and uncertainty in the law of contract interpretation. *Lloyd's Maritime and Commercial Law Quarterly* 33(3): 406–438.
McMeel G (2007) *The Construction of Contracts*. 1st ed. Oxford: Oxford University Press.
McMeel G (2011) *The Construction of Contracts*. 2nd ed. Oxford: Oxford University Press.
Perell P (1998) Plain meaning for judges, scholars and practitioners. *Advocates' Quarterly* 20: 24–84.
Perillo J (2000) The origins of the objective theory of contract formation and interpretation. *Fordham Law Review* 69: 427–477.
Powell H (1985) The original understanding of original intent. *Harvard Law Review* 98(5): 885–948.
Powell J (1790) *Essay Upon the Law of Contracts and Agreements*. London.
Ricks V (2008) The possibility of plain meaning: Wittgenstein and the contract precedents. *Cleveland State Law Review* 56(4): 767–822.
Scalia A and Garner B (2012).*Reading Law: The Interpretation of Legal Texts*. St Paul, MI: Thomson West.
Scallen E (1995) Classical rhetoric, practical reasoning, and the law of evidence. *American University Law Review* 44: 1717–1749.
Schwartz A and Scott R (2003) Contract theory and the limits of contract law. *Yale Law Journal* 113: 541.
Schwartz A and Scott R (2010) Contract interpretation redux. *Yale Law Journal* 119: 926.
Shapiro C and Varian H (1999) *Information Rules*. Cambridge, MA: Harvard Business School Press.
Snow C (1987) Contract interpretation: the plain meaning rule in labor arbitration. *Fordham Law Review* 55: 681–706.
Solan L (2001) The written contract as safe harbor for dishonest conduct. *Chicago-Kent Law Review* 77: 87–120.
Staughton C (1999) How do courts interpret commercial contracts? *Cambridge Law Journal* 58(2): 303–313.
Sullivan R (1994) *Drieger on the Construction of Statutes*. 3rd ed. Toronto & Vancouver: Butterworths.
Williams G (1945) Language and the Law. *Law Quarterly Review* 61: 384–406.