The implications of *Western Export*

The High Court's recent observations when dismissing an application for special leave in *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45;(2011) 282 ALR 604 have been the subject of much interest and debate. *Bar News* presents two opinion pieces which consider the implications of *Western Export*. In the article below, Alan Shearer argues that it may undermine the doctrine of precedent. In the following article, Jennifer Chambers takes a different view.

The ambiguous law concerning admission of surrounding circumstances in the interpretation of contracts

By Alan Shearer

In the course of dismissing an application for special leave to appeal, the High Court (Gummow, Heydon and Bell JJ) took the opportunity to make observations as to the circumstances in which evidence of surrounding circumstances may be admitted in aid of contractual interpretation. Whether any greater clarity was added by the adoption of that course is contestable. Furthermore, the making of those observations in the context of a special leave application may result in some confusion as to the system of precedent.

Special leave disposition

The issue which the case concerned perhaps makes the subsequent attention it has received surprising. A contract provided 'For sales by JIREH INTERNATIONAL PTY LTD to GJGC STORES in Australia and to other countries, WES shall receive a commission of 5% of the ex-factory price of the coffees, teas and other products'. The issue was whether reference to 'JIREH INTERNATIONAL PTY LTD' was ambiguous such that the words 'or an associated entity' should be read into that clause. The trial judge considered they were not ambiguous and the additional words should not be read in, but nevertheless adopted a construction which included sales by suppliers other than 'JIREH INTERNATIONAL PTY LTD' as it was thought to make more sense from a commercial point of view. The Court of Appeal overturned that holding on the basis that 'JIREH INTERNATIONAL PTY LTD' (as the trial judge had found) was not ambiguous and 'there was therefore no warrant for departing from the unambiguous terms of [the clause]'.[1]

Against that background, it is not surprising that special leave was refused. In the course of so doing, substantive reasons were given and the opportunity was taken to reject certain authorities of intermediate appellate courts that had held that, when interpreting contracts, it was not necessary to identify ambiguity in the language of a contract before regard may be had to the surrounding circumstances and object of the transaction.[2] Those statements were seen as consistent with certain English authority.[3]

The court considered that acceptance of that proposition would require reconsideration of what was said by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 (Codelfa) at 352 to be the 'true rule' as to the admission of such evidence. As such, it was said in the course of disposing of the leave application that until the High Court embarks upon that exercise, intermediate appellate courts and primary judges are bound to follow *Codelfa*, a point which their honours said should have been unnecessary to reiterate having regard to the confirmation of the authority of *Codelfa* in the face of subsequent English authorities in *Royal Botanic Gardens*.[4]

This echoed comments in a footnote to the reasons of Heydon and Crennan JJ in *Byrnes v Kendle* (2011) 279 ALR 212 where it was said that the extent to which surrounding circumstances are admissible 'is controversial' (fn. 135). In so doing, the issue was seen as a competition for acceptance between *Codelfa* and *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (ICS).

The High Court's observations in *Jireh* were in contrast to a number of decisions of intermediate appellate courts which have considered various decisions of the High Court

subsequent to *Codelfa* and held, based on that trend of authority, that a finding of ambiguity is not first needed for regard to be had to surrounding circumstances.[5] Those decisions have been applied many times subsequently.

Authority post-*Codelfa*

While their honours addressed the issue in the language of stare decisis and the role of intermediate appellate courts and courts beneath them, this does not reflect the grey area that has been created post-*Codelfa*. Much of the difficulty is that the High Court has not spoken clearly and with one voice since *Codelfa*. Comments made in cases post-*Codelfa* have seemed to indicate that ambiguity is no longer essential.[6] Reference to *Royal Botanic Gardens* does not assist in resolving that uncertainty as it was decided prior to those further decisions.

The issue as it has developed is not one concerning the resolution of whether *Codelfa* or *ICS* should be preferred. The issue developed in *Metcash* was whether subsequent authority of the High Court had qualified what had been said in *Codelfa* such that the position in Australia had in certain respects merged with that in England.

In *Jireh*, their honours said that they did not read anything in those subsequent authorities as operating inconsistently with what was said by Mason J in *Codelfa*. That is highly debateable. For example, in *Pacific Carriers* it was said that the construction of certain letters of indemnity required 'consideration, not only of the text of the documents, but also the surrounding circumstances known to [the parties], and the purpose and object of the transaction' (at [22]). The authority cited by the court for that proposition was the decision of the House of Lords in *ICS*. In *Toll* it was said that the meaning of the terms of a contract are to be determined by what a reasonable person would have understood them to mean and that 'normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction' (at [40]).

Moreover, the author of the relevant judgment in *Codelfa* apparently disagrees. Sir Anthony Mason has since said:[7]

> I generally support Lord Hoffman's restatement of principles or guidelines [in ICS].... And I think that the High Court of Australia has endorsed them [citing *Pacific Carriers* and *Toll*]. I am not persuaded by the criticisms thus far made of them....

Indeed, Sir Anthony seemed to suggest that his reasons in *Codelfa* were not intended to lay down a strict rule of the kind which their honours in *Jireh* have apparently taken it to represent, stating:[8]

> [T]he [approach] now favoured, is to say that ambiguity is unnecessary, that the extrinsic materials are receivable as an aid to construction, even if, as may well be the case, the extrinsic materials are not enough to displace the clear and strong words of the contract.
>
> It was that idea that I was endeavouring to express in *Codelfa*, albeit imperfectly, because I recognised that ambiguity may not be a sufficient gateway; the gateway should be wide enough to admit extrinsic material which is capable of influencing the meaning of the words of the contract. The modern

point of criticism is that one should not have been thinking in terms of gateway. At the time, however, it was natural to do so because it stressed the importance of the natural and ordinary meaning of the words used by the parties in their written instrument and it respected the difference between interpretation and rectification.

The status of the remarks and uncertainty to the system of precedent

The irony is that in seeking to uphold the doctrine of precedent, it may have been undermined. Unusually, a judgment number has been assigned to the special leave disposition and it has been reported several times. However, that is apt to breed confusion as to the status of the disposition. The disposal of a special leave application does not involve any proceedings inter partes before the court and merely involves the seeking of permission to commence a proceeding.[9] It is accepted that such a disposition is of no precedential importance; McHugh J stating in one case that '[r]efusal of special leave creates no precedent and is binding on no one'.[10]

What may be seen as an attempt to settle disputed and substantive questions of law on an application for special leave is unfortunate. It may create embarrassment within the system of precedent. Given the debate as to the substantive issue it is apparent that it needs to be properly argued and resolved in an actual proceeding before the High Court. Until then a primary judge is now faced with the dilemma between following decisions of the Court of Appeal (as to the effect of what the High Court has said in actual decisions) which have precedential significance and remarks made in a special leave disposition by the High Court (as to the effect of those same decisions) which have no precedential significance. Strictly the observations in *Jireh* (which were, in any event, obiter to the result of the special leave disposition[11]) should be placed to one side in determining what the law is. Of course, that may be a brave path to adopt.

Where to from here?

How intermediate appellate courts and judges at first instance deal with the issue presented by *Jireh* is yet to be seen. A full court of the Federal Court has already avoided considering the effect of the 'guidance' offered in *Jireh* and the correctness of its earlier decision to the contrary.[12] The issue is obviously of significance in the multitude of proceedings concerning the interpretation of contracts. A practical answer may be to readily find an ambiguity so that surrounding circumstances will be admissible; as McHugh JA (as he then was) said 'few, if any, English words are unambiguous or not susceptible of more than one meaning', an approach apparent in various authorities.[13] After all, in *Royal Botanic Gardens* ambiguity was readily found in respect of the word 'may' (at [9], [147]).

Moreover, in all but the clearest case, a court is unlikely to determine ambiguity up front on a relevance objection when evidence of surrounding circumstances is tendered. Notwithstanding recent frowning upon the approach,[14] such material is likely to be admitted subject to relevance under s 57 of the Evidence Act with admissibility determined as part of the final judgment on interpretation. To the extent that a concern for promoting efficiency in litigation lies behind adherence to a rule requiring a prior finding of ambiguity,[15] it is unlikely to be achieved by the adoption of the rule. Nor are concerns as to the position of assignees of contractual rights likely to provide justification, given the other exceptions recognised in *Codelfa* (for example, rejected clauses in draft contracts), and that surrounding circumstances will be admissible where there is an ambiguity.

In the meantime, the profession must await the resolution of the issue by the High Court in a proper case and in a proper way. As Sir Anthony Mason has observed it is surprising 'to discover that the authorities are in such a state of disarray' and 'the doctrine of precedent ... is partly responsible'.[16] While the outcome may be predictable, *Jireh* should not be afforded a status it does not possess.

Endnotes

1. *Jireh International Pty Ltd t/as Gloria Jean's Coffee v Western Exports Services Inc* [2011] NSWCA 137 at [64].
2. Especially, *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 (Metcash).
3. *Westminster City Council v National Asylum Support Service* [2002] 1 WLR 2956 was referred to.
4. *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at [39] (Royal Botanic Gardens).
5. See *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382 at [2]-[4], [113]; *The Movie Network Channels Pty Ltd v Optus Vision Pty Ltd* [2010] NSWCA 111 at [68]; *WorldBest Holdings Ltd v Sarker* [2010] NSWCA 24 at [17]; *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 at [178]; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at [14]-[16], [49],

[90], [239]-[305]; *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2005) 223 ALR 560 at [78] –[79], approved on appeal (2006) 156 FCR 1 at [45]-[46], [122], [238], [250]-[257]; *Ralph v Diakyne Pty Ltd* [2010] FCAFC 18 at [46]-[47]; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [107]-[109]; *Synergy Protection Agency Pty Ltd v North Sydney Leagues Club* [2009] NSWCA 140 at [22]; *LMI Australasia Pty Ltd v Baulderstone Hornibrooke Pty Ltd* [2003] NSWCA 74 at [40]-[53]. See also the observations of McLure JA (Wheeler JA agreeing) in *Home Building Society Ltd v Pourzand* [2005] WASCA 242 at [25]-[33].

6. *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [8] and [53]; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [15]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 (*Toll*) at [40]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 (*Pacific Carriers*) at [22].
7. Sir Anthony Mason, 'Opening Address' (2009) 25 JCL 1 at 3.
8. (2009) 25 JCL 1 at 3.
9. *Collins v R* (1975) 133 CLR 120.
10. *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 643. See also *Attorney General (Cth) v Finch (No 2)* (1984) 155 CLR 107 at 114–115; *New South Wales Medical Defence Union Ltd v Crawford (No 2)* (1994) 8 ANZ Ins Cas 61 – 226; and D O'Brien, *Special Leave to Appeal*, 2nd Edition (2007), at 48–49.
11. Their honours held that even with regard to surrounding circumstances the result would have been no different (at [6]).
12. *Balani Pty Ltd v Gunns Ltd* [2011] FCAFC 153 at [28].
13. *Manufacturers Mutual Insurance Ltd v Withers* (1988) 5 ANZ Ins Cases 60-853 at 75,343 per McHugh JA. See further *Colby Corp Pty Ltd v Commissioner of Taxation* (2008) 165 FCR 133 at [43]-[44] per Branson and Stone JJ; *Trawl Industries of Australia Pty Ltd v FM Foods Pty Ltd* (1992) 27 NSWLR 326 at 358, 359; *B&B Constructions (Aust) Pty Ltd v Brian A Cheesman & Associates Pty Ltd* (1994) 35 NSWLR 227 at 245; *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at [139]-[144]; *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2003] NSWCA 74 at [40]-[53].
14. *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [83] per Heydon J.
15. See J D Heydon, 'Implications of *Chartbrook Ltd v Persimmon Homes Ltd* for the Law of Trusts' a paper delivered at a symposium organised by the Law Society of South Australia and the Society of Trusts and Estate Practitioners on 18 February 2011 (accessible at http://www.anthonygrant.com/trusts.html).
16. (2009) 25 JCL 1 at 2.

Jireh: is the only controversy the controversy itself?

By Jennifer Chambers

In *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45 (Jireh), the High Court (Gummow, Heydon and Bell JJ) refused an application for special leave and said that, in construing a contract, it is first necessary to identify ambiguity in the language of the contract before regard can be had to the factual matrix in which the contract was made.

In so doing, their honours reiterated (not without some consternation) long-standing High Court authority, namely, the judgment of Mason J (with whom Stephen and Wilson JJ agreed) in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337:[1]

> The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed.

This position was explicitly embraced in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, where the court was required to construe a provision in a deed of lease between two public bodies. In applying settled principles of construction, including a consideration of the legislative framework in which the parties operated and the provision in the context of the whole deed, the plurality held that no question of uncertainty arose as to the meaning of the language employed.[2] As such, evidence of the surrounding circumstances of the deed was not admissible, consistent with *Codelfa*. The court noted that in the course of argument, it had been taken to decisions of the House of Lords[3] which had been decided after *Codelfa* and observed:[4]

> It is unnecessary to determine whether their Lordships there took a broader view of the admissible 'background' than was taken in *Codelfa* or, if so, whether those views should be preferred to those of this Court. Until that determination is made by this Court, other Australian courts, if they discern any inconsistency with *Codelfa*, should continue to follow *Codelfa*.

Post-Jireh, some authors have suggested that the High Court has vacillated in respect of the question as to when regard may be had to surrounding circumstances such that a decision of the court in exercise of its appellate jurisdiction[7] is required to clarify the position.

The court's expression of that particular canon of the doctrine of precedent reflected its earlier decision in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 where the court said *'it is for this court alone to determine whether one of its previous decisions is to be departed from or overruled'*.[5] The principles of the doctrine were affirmed more recently in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.[6]

Post-*Jireh*, some authors have suggested that the High Court has vacillated in respect of the question as to when regard may be had to surrounding circumstances such that a decision of the court in exercise of its appellate jurisdiction[7] is required to clarify the position.[8] In light of the established principles of precedent referred to above, it is difficult to accept that *Jireh* has placed trial judges and intermediate appellate courts in the 'unenviable position'[9] of having to decide which authority to follow, as the High Court has ruled on the subject, not in *Jireh*, but in earlier, binding decisions such as *Codelfa* and *Royal Botanic Gardens*.

The high point of the court's supposed equivocation was reached in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451. In determining a question of construction in relation to certain letters of indemnity, the court held:[10]

> The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction.

Though the court did not make express reference to ambiguity before it took into account evidence of the surrounding circumstances, it is plain from the decision that the letters under consideration were susceptible of more than one meaning, thus satisfying the pre-

condition articulated by Mason J in *Codelfa*.

Notably, the court in *Pacific Carriers* included Gummow and Heydon JJ who, together with Bell J, comprised the bench in *Jireh*, in which their honours said:[11]

> We do not read anything said in this Court in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 45 [and other High Court authorities] as operating inconsistently with what was said by Mason J in the passage from *Codelfa* to which we have referred.

Indeed, the court's decision in *Pacific Carriers* aptly demonstrates that the conflict between *Codelfa* and some intermediate appellate court decisions[12] gives rise to 'difficulties' which may be more illusory than real. As McHugh JA said in *Manufacturers Mutual Insurance Ltd v Withers*:[13]

> …few, if any, English words are unambiguous or not susceptible of more than one meaning or have a plain meaning. Until a word, phrase or sentence is understood in the light of the surrounding circumstances, it is rarely possible to know what it means.

In the ordinary course, it is likely that a trial judge faced with competing interpretations of a contract at an early stage of trial and without the benefit of all the evidence or the parties' submissions will readily admit ambiguity so as to permit reference to the surrounding circumstances.[14]

Endnotes

1. *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352.
2. *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at 62 [38].
3. *Investors Compensation Scheme Ltd v West Bromwich Building Society [No 1]* 1998] 1 WLR 896 per Lord Hoffmann at 912 – 913; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 per Lord Bingham and Lord Hoffmann at 259, 269.
4. *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at 62 – 63 [39], citing *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [17].
5. *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [17].
6. *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 150–151 [134].
7. Special leave applications do not constitute proceedings inter partes before the court: *Collins v The Queen* (1975) 133 CLR 120 at 22.
8. See K Mason AC QC, 'The distinctiveness and independence of intermediate courts of appeal' (2012) 86 ALJ 308 at 331; D Wong and B Michael, '*Western Export Services v Jireh International: Ambiguity as the gateway to surrounding circumstances?*' (2012) 86 ALJ 57; D McLauchlan and M Lees, 'Construction Controversy'(2011) 28 JCL 101.
9. See D Wong and B Michael, '*Western Export Services v Jireh International: Ambiguity as the gateway to surrounding circumstances?*' (2012) 86 ALJ 57 at 66 – 67.
10. *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462 [22].
11. *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45 at [5].
12. For example, *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603; *Ryledar Pty Ltd t/as Volume Plus v Euphoric Pty Ltd* (2007) 69 NSWLR 603; *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006) 156 FCR 1.
13. *Manufacturers Mutual Insurance Ltd v Withers* (1988) 5 ANZ Ins Cas 60-853 at 75,343, followed in *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) NSWLR 326 at 358 where Samuels JA said 'in many, if not most, cases in which the court is seeking to construe a particular term or terms of a contract there will be sufficient uncertainty as to the meaning of the relevant term as to enable the admission of evidence of surrounding circumstances'.
14. See the discussion by Campbell JA in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at 667 – 668 [260] – [261]. Elsewhere in these pages, Alan Shearer ably canvasses other approaches available to a trial judge.

From the High Court (carpark)