Implied terms of fact: counsel's last resort

By David Ash

Author, advocate and judge Robert Megarry said of implied terms that they are 'so often the last desperate resort of counsel in distress'.[1] Perhaps. But and while there is no difficulty in stating the Law, there remains the wretched Fact. This note reviews three primary cases on implied terms of fact, *The Moorcock, Codelfa and BP Refinery (Westernport)*.

Only in the first were all judges of one mind. In the ocean of litigation which was the second, the tide flowed to the plaintiff first from the arbitrator, then from the primary judge, then from the NSW Court of Appeal, only to ebb in the High Court, leaving it marooned on the isle of frustration. BP (Westernport) is disturbing: after two courts had found one term so obvious it went without saying, the final court not only unfound it but found another, also so obvious it went without saying, to the wholly opposite effect. Little wonder, pace Sir Robert, that counsel look on with pensive amazement.

Obvious obviousness

In the galaxy of contract, implied terms are comets, dark matter or stellar remnants. Some, like those implied by usage, recur regularly but never in the same form. Some are unformed, awaiting cataclysmic revelation, like implied terms of good faith. Some, like the subject of this note, are remnants, mere grab bags. The very fact that implied terms of fact are a grab bag explains why both eminent judges and desperate counsel… grab at them. The point of difference with terms implied by law is explained by Gageler J, 32 years after *Codelfa* and by my guesstimate 33 years after he was Sir Anthony Mason's associate:[2]

> Contractual terms implied in fact are 'individualised gap fillers, depending on the terms and circumstances of a particular contract'. Contractual terms implied in law, of the kind in issue in the present case, are 'in reality incidents attached to standardised contractual relationships' operating as 'standardised default rules'. The former are founded on what is 'necessary' to give 'efficacy' to the particular contract. The latter are founded on 'more general considerations', which take into account 'the inherent nature of [the] contract and of the relationship thereby established'.

Despite its celestial mechanics, the implied term of fact needs no rocket science to support it. Something happens to which the contracting parties never turned their mind; unsurprisingly, the beneficiary of the accident says to the other 'Let the loss lie where it falls'; unsurprisingly, the other says to the court 'What the parties really had in mind was…'; and, unsurprisingly, the court is left to arrive at a conclusion which has a legal dignity beyond palm tree justice.

The test for legal dignity here draws its mettle from a familiar source, the idea of freedom of contract: the court looks at what would have been said, had the parties turned their mind to the situation, not what should have been said, now hindsight is the guide. As Mason J explained it in *Codelfa*:[3]

> For obvious reasons the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue. And then there is the difficulty of identifying with any degree of certainty the term which the parties would have settled upon had they considered the question.

The litigation is not in the obviousness but in the paradox of obviousness. The 'universally accepted' test (to use Sir Anthony's own words) is that of MacKinnon LJ:[4]

> Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying. . .

This idea of obviousness really gets an outing in this area, doesn't it? The paradox (obviously?) is that nobody would be in court if anyone had said it in the first place.

Forensic truth

In 1927, Werner Heisenberg restated the uncertainty principle in relation to subatomic particles: the position and the velocity of an object cannot both be measured exactly, at the same time, even in theory.

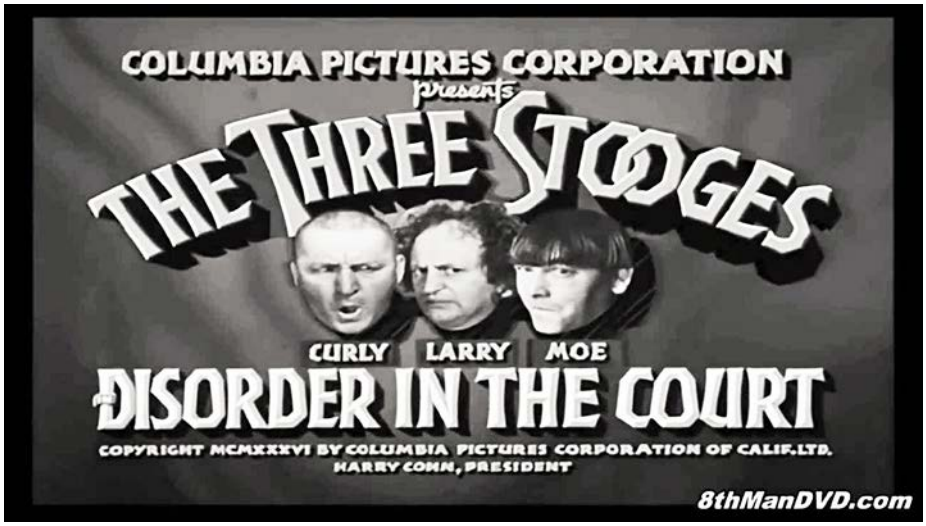
A half century before, experienced commercial judges of England's Court of Appeal had already developed the proposition in relation to contracting parties, namely that the intention of each party to a written contract cannot be determined exactly, even after re-reading the contract and even after spending a lot of money on legal advice, and its true meaning can only be determined with the objectivity of hindsight. Like all forensic truth, it is never complete, it is merely the product of a majority of the last appellate court to which the document is exposed.

The mathematical relationship is:

$$\Delta x \Delta p \geq \frac{\hbar}{2}$$

In other words, the sum of the versions of a written contract (x) multiplied by the sum of the interpretations advanced by lawyers (p) must always exceed or at least be equal to half the number of appellate judges, where h is Banc's constant.

The rapid postwar growth of uncertainty both in law and in science may have been different had an episode in 1943 unwound another way. Professor Heisenberg was giving a lecture in Zurich, and the OSS sent in their man with orders. If it appeared that the Germans were too close to developing the bomb, the man was to kill him. The man it chose was Moe Berg. Berg graduated from



Columbia really was a law school, wasn't it?

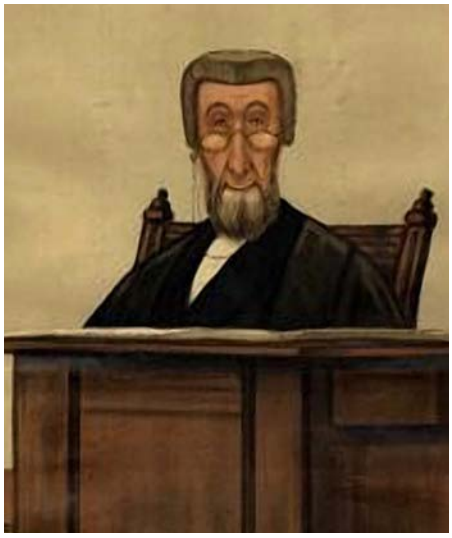
Columbia Law School but chose baseball instead ('I'd rather be a ballplayer than a justice on the U.S. Supreme Court.'[5]) A would-be assassin entering a lecture theatre to shoot the lecturer is possible in anyone's theory, even a law student's; it is a rare thing indeed to have the assassin's lecture notes:[6]

> As I listen, I am uncertain—see: Heisenberg's uncertainty principle—what to do to H… Discussing math while Rome burns – if they knew what I'm thinking.

Berg would decline the Medal of Merit for wartime service. He stopped work on his memoirs after the assigned co-author confused him with Moe Howard of Three Stooges fame.[7]

Wills, wives & wrecks

The younger reader may be confused about court hierarchy. To recap, in England, they call the primary court the High Court, the middle court the Court of Appeal, and the final court the Supreme Court. Like Alice tumbling towards the Antipathies, we call our primary court the Supreme Court and the final court the High Court. Habeus fori appellationis, or is my Latin that bad?



Sir Charles Parker Butt – Caricature by Ape published in Vanity Fair in 1887

The Probate, Divorce and Admiralty Division of England's High Court was its own grab bag, born of Judicature Act reforms. Known to practitioners as the Court of Wills, Wives & Wrecks it was the smallest of the divisions. Hearings must have moved from collision to collusion and back. The headnote to the case but one before *The Moorcock* records:[8]

> In cross-petitions by the husband and wife for dissolution of marriage the jury found that the wife had committed adultery, and that the husband had committed adultery with the wife's sister and with another woman, and that the wife had condoned his adultery.

The Court in the circumstances refused to make any decree, dismissing both petitions. Sometimes the work would cross over. Who hearing a case called *The Erato*[9] could think they were in Admiralty?

In fact, the judge hearing both those matters, Sir Charles Parker Butt, also heard *The Moorcock*. As a gap year or two, Butt had practised in the consular courts at Constantinople while acting as correspondent for the Times. He picked up a lot of mercantile and maritime law which held him in good stead. The NDB records:

> Though by no means a consummate lawyer he was an eminently skilful advocate, and, on taking silk (8 Dec. 1868), succeeded to much of the practice which was liberated by the advancement of Sir William Baliol Brett (afterwards Viscount Esher) to the bench.

The Moorcock at hearing

Loitering, as the High Court reminds us,[10] all depends on context. People may linger either legally or illegally. Two years before *The Moorcock* suffered its accident, parliament had acted to protect England's major river, or at least the upriver Jerome K Jerome part of it:[11]

> … with the changing times, the Thames Preservation Act was passed in 1885 to enshrine the preservation of river for leisure. It prohibited shooting on the river, which had become a cause for concern. The act noted: 'It is lawful for all persons for pleasure or profit to travel or loiter upon any and every part of the river' (apart from private cuts).

As to how the *Moorcock* came to be grounded, history has left us no photo. The Wikipedia entry is of the London docks around 1909. Fittingly, a Thames tug built in 1959 called the *Moorcock* collected a solid following among shipspotters[12] and model builders.[13] We do know, however, that this part of the river was a very different and very busy place.

The West India Docks in 1900, St Bride's Wharf was nearby. © PLA collection Museum of London.

The vessel was in the business of bringing in cargo from Antwerp. The owner was looking for a new wharf to discharge goods and agreed with the owners of St Bride's, a wharf in the Wapping area. An agreement was entered into and the vessel duly arrived and moored. As the tide ebbed, she settled on the ground until a loud noise was heard. The centre had settled on a saddle of hard ground while the vessel's ends were not supported so that, in the words of the judge, she had broken her back.

The ground – that is, the river floor – was vested in the Conservators of the River Thames. Moreover, and so the wharfinger would argue, the river being navigable was a public highway free to all comers. There doesn't seem to be any dispute that the owner of the vessel knew that grounding could occur. Indeed, Butt J downed the owner on his express representation case:

> I think so far as the express representation went, it came pretty much to this, 'Is the place a good one?' perhaps the word 'suitable' was used, 'Well there is a vessel of the same size as yours, or thereabouts, lying there now, come and see,' and they went and they saw a vessel of very nearly the same size, fully the same length, although not quite the same dimensions in other respects. Then the Moorcock was taken there. In the result, not only on the warranty, but on the allegation that an express representation was made of the suitability and safety of this place, I think the plaintiff fails.

However, the judge came in for the plaintiff on the implication. Once it was established that the unloading could not be had without mooring and without taking the ground, the wharfinger had to be taken as saying that they had taken reasonable care to ascertain the safety of that ground.

The Moorcock on appeal

For an advocate's view of appeal benches much depends on how their client has fared. An informal poll indicates two ideals. The first is a strong president, a brilliant and polite number two, and a solid number three. The second is a good manager in the middle with a luminary on each side.

This appeal was more the first. In the middle was Lord Esher, formerly William Brett and the son of the Reverend Joseph G Brett. The 1911 *Britannica* records:

> Lord Esher suffered, perhaps, as master of the rolls from succeeding a lawyer of such eminence as Jessel. He had a caustic tongue, but also a fund of shrewd common sense, and one of his favourite considerations was whether a certain course was 'business' or not. He retired from the bench at the close of 1897, and a viscounty was conferred upon him on his retirement, a dignity never given to any judge, lord chancellors excepted, 'for mere legal conduct since the time of Lord Coke.' He died in London on the 24th of May 1899.

The 1911 *Britannica* is 'considered to represent a summary of human knowledge in the early 20th Century'.[14] It was edited by, and Esher's entry was authored by, Hugh Chisholm sometime barrister. Chisholm was known for his attention to detail, unsurprising for a son of the Warden of the Standards at the Board of Trade.

But I wonder at the when and the where of the elevation of Sir Edward Coke, never King James I's best mate. Oddly Sir Nathaniel Lindley, the great appellate judge at the time of but not on the bench of *The Moorcock* was, according to Wikipedia but not the 1911 Britannica, descended from Coke on his mother's side.

For those that revel in these things Coke was a Serjeant-at-Law; Coke and his contemporary Francis Bacon had a bit of a career clash in the 1590s; in 1596, the Queen appointed Bacon 'Queen's Counsel Extraordinary', the first QC; in 1604, King James formalized it by giving Bacon a patent and SJs began their long decline; but Coke gets the last laugh, for when Lindley died in 1921 he died as the last English SJ. Meanwhile and so debates over dignities don't appear to lay readers as the province of the bar, I note that businessmen were elevating themselves well before Mr Lloyd George put out his hat: five years after creating QCs, James introduced baronetcies – the Gong Lite which is neither knight nor lord – as a means of raising money.

Back to *The Moorcock*. On Lord Esher's left was Sir Charles Fry. Appointed initially as a puisne judge, The Spectator recorded:

> The new Chancery Judge is Mr. Edward Fry, Q.C.—now Sir Edward Fry,—and no better appointment could have been made. Mr. Fry is a very accomplished lawyer in the literary and theoretical sense, as well as a barrister of very large experience and skill in equity cases, and it is only fair to say that his appointment is not in any sense due to party sympathies. He is, we believe, a Liberal in politics, and chosen, therefore, for no other reason than the great additional strength he will bring to the ranks of Conveyancing and Equity lawyers in the High Court of Justice.

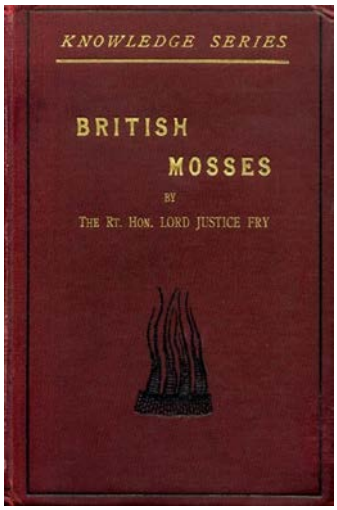
The issue was 5 May 1877, the government a Conservative one. Indeed, 1877 is probably the zenith of imperial conservatism. Not only was Disraeli half way through his second premiership, on 1 January his effort to have the Queen formally Empress of India came to fruition. Fry's view on such matters was a little different. In his foreword to the 1884 report to the Houses of Parliament titled *The Indo-Chinese opium trade considered in relation to its history, morality, and expediency, and its influence on Christian missions*, he wrote:

As Tom Waits says, 'The large print giveth and the small print taketh away'.

> We English, by the policy we have pursued, are morally responsible for every acre of land in China which is withdrawn from the cultivation of grain and devoted to that of the poppy; so that the fact of the growth of the drug [opium] in China ought only to increase our sense of responsibility.

The Fry, Rowntree and Cadbury families are as famous to the history of chocolate as they are to Quakerdom. Fry's reputation as a judge would have been enough for most; he was also a pre-eminent international arbitrator and zoologist. A member of the Royal Society, he penned two books on bryophytes, one with his daughter.

Fry's children largely embraced the Quaker tradition of service. Son Roger was a warm member of Bloomsbury, while daughter Margery was principal of the Oxford women's college Somerville. Interestingly, Sir James Fitzjames Stephen, a cousin of a NSW chief justice and who had served as a puisne judge alongside Fry, was uncle to Virginia Woolf and father to Katharine Stephen, principal of Cambridge women's college Newnham.



"No, the book is not about my colleagues."

Charles Synge Christopher Bowen

We move now to the man on Esher's right, the highly admired Charles Bowen. Bowen was, like Esher, son of a clergyman and, with a brother, a first-class cricketer. He knew a thing or two about contracts and wrote the most enduring of the reasons in *Carlill v Carbolic Smoke Ball Co*. Law students will be familiar with the first advertisement, the

cause of the litigation:

But the second should not go unnoticed:

The rogue has his day. As for Mrs Carlill, she lived to 96. Her certificate noted 'influenza'. A time bar cannot be outlived.

Bowen was a polite and polished judge. His ease with his colleagues was supreme. Megarry tells the tale:[15]

Lots of puff in the first ad

> The opening of the Royal Courts of Justice in 1882 by Queen Victoria was the occasion of a celebrated display of judicial comity. Lord Selborne LC called a meeting of the judges, at which the draft of an address to the Queen was considered. It contained the phrase 'Your Majesty's Judges are deeply sensible of their own many shortcomings…,' whereat Jessel MR strongly objected, saying 'I am not conscious of 'many shortcomings', and if I were I should not be fit to sit on the bench,' a view in keeping with his remark 'I may be wrong, I sometimes am, but I never doubt,' or, as it is sometimes put, 'I may be wrong but I have no doubts.' After some wrangling as to the terms of the address, Bowen LJ suggested a characteristic compromise: 'Instead of saying that we are 'deeply sensible of our own many shortcomings', why not say that we are 'deeply sensible of the many shortcomings of each other'?'

Funnily enough, the one person to come to Jessel's defence is an Australian judge who possessed a similar albeit gruffer self-confidence. When Jessel's remark about doubt was repeated to Sir Samuel Griffith, he immediately replied 'Well, he could hardly have meant that. He must have meant that he never expressed any doubts, for every judge must always feel some doubts at least until the conclusion of the argument.'[16]

Sir Charles Bowen left an impressive grab bag of expressions for anyone interested in language, lay or legal.

In a 1903 decision concerning fair comment, Collins MR referred to 'the ordinary reasonable man, 'the man on the Clapham omnibus', as Lord Bowen phrased it'.[17] Collins himself had a more than passing knowledge of defamation; he was judge on the first and fateful Wilde trial. And following a theme of ordinary reason, in 1885 Bowen observed that 'the state of a man's mind is as much a fact as the state of his digestion'.[18]

Enough of the reasonableness of Bowen's common law. What of the conscience of his equity? It is displayed in his poem:

> The rain it raineth on the just
> And also on the unjust fella;
> But chiefly on the just, because
> The unjust hath the just's umbrella.

The most curious expression of Bowen's involves the cat that wasn't there. A number of sources give Bowen the credit. For example, the *Pall Mall Gazette* for April 1894 stated:

> 'I often hear,' Bowen said once, 'eminent counsel talk of an equity in the case. It always reminds me of the story that Confucius once called his followers together and asked them what was the greatest impossibility conceivable? None could answer. Then he said that it was when a blind man is searching in a dark room for a black hat which is not there.'

In 1911, the distinguished US philosopher William James wrote:

> With his obscure and uncertain speculations as to the intimate nature and causes of things, the philosopher is likened to a 'blind man in a dark room looking for a black cat that is not there.'

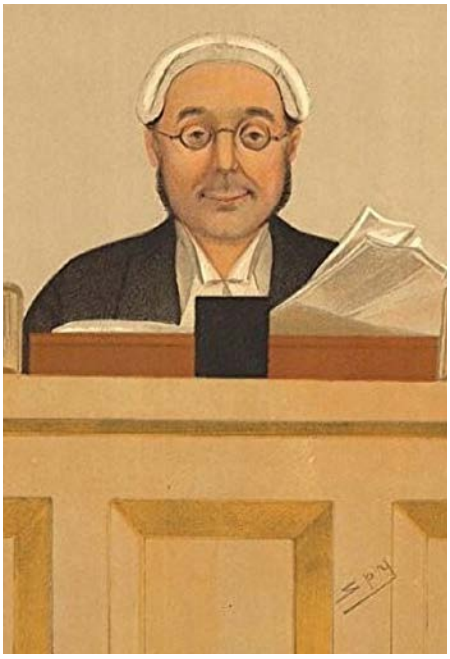
Leading a correspondent to the *Chicago Tribune* in 1926 to write:

> It was not William James but an Englishman, the witty Lord Bowen, who said 'a metaphysician is a man who goes into a dark cellar at midnight without a light looking for a black cat that is not there.'

For the record and whatever the Confucianism of these Chinese whispers, the award goes neither to James nor to Bowen but to an American writing in 1850.[19]

Delay and ducks…

As an appeal judge, Bowen was necessarily a generalist. For example, he was able to bring the common law of reason to the inequity of delay. When a Mr Hall was enjoined, he had the benefit of the usual undertaking by the applicant. Unfortunately, he took four years



"Judicial Politeness" – Bowen as caricatured by Spy (Leslie Ward) in Vanity Fair, March 1892

to get around to doing something about it. The chief judge in bankruptcy didn't call on the opposition and nor did the appeal bench. For Bowen, the matter was clear:[20]

> It is a reasonable presumption that a man who sleeps upon his rights has not got much right.

By the way, the chief judge (Sir James Bacon) was something of an expert on delay. As vice-chancellor he once said:[21]

> This case bristles with simplicity. The facts are admitted; the law is plain; and yet it has taken seven days to try – one day longer than God Almighty required to make the world.

John de Morgan wrote in his book *In Lighter Vein*:[22]

> The English court of Chancery is not, as a rule, a very amusing resort, but the late Vice-Chancellor Malins was always able to command a fairly 'good house' whenever he had the opportunity…
>
> [A cranky litigant] presented himself in court, and taking aim from amid the bystanders hurled a rather ancient egg at the head of the judge. Vice-Chancellor

> Malins, by adroitly ducking, managed to avoid the missile, which malodorously discharged itself at a safe distance from its target… 'I think [the judge said] that egg must have been intended for my brother Bacon.'

De Morgan's writing is 19th century, but don't let that hide a fascinating fellow. He was a professional agitator who among his many projects established the Tichborne Propaganda Release Union, organizing a march on the House of Commons on behalf of the Claimant.[23]

As for *The Moorcock*, Bowen's words were:

> In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men …

There is no need to set out the appeal court's reasons at length, because later words are better known, the reasons of MacKinnon LJ referred to by Mason J in *Codelfa*. The words reek of common sense and are worth setting out:

> I recognize that the right or duty of a Court to find the existence of an implied term or implied terms in a written contract is a matter to be exercised with care; and a Court is too often invited to do so upon vague and uncertain grounds. Too often also such an invitation is backed by the citation of a sentence or two from the judgment of Bowen LJ in The Moorcock. They are sentences from an extempore judgment as sound and sensible as all the utterances of that great judge; but I fancy that he would have been rather surprised if he could have foreseen that these general remarks of his would come to be a favourite citation of a supposed principle of law, and I even think that he might sympathize with the occasional impatience of his successors when The Moorcock is so often flushed for them in that guise.
>
> For my part, I think that there is a test that may be at least as useful as such generalities. If I may quote from an essay which I wrote some years ago, I then said: 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!''

At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.

Of duckings and eggs obiter benedicta

The Moorcock is 'flushed'? Well, it is the red grouse and I suppose this must be so.

If avian analogy is the metewand, Bowen has the last word, not as to the value of ex tempore judgments but their misfit cousin the obiter dictum:[24]

> … like my Brothers who sit with me, I am extremely reluctant to decide anything except what is necessary for the special case, because I believe by long experience that judgments come with far more weight and gravity when they come upon points which the Judges are bound to decide, and I believe that obiter dicta, like the proverbial chickens of destiny come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases.

Bowen can't – and admits he can't – lay claim to such chickens. The earliest reference I can find is the frontispiece of Robert Southey's 1810 opus *The Curse of Kehama*. Under the author's name there is some Greek which is translated as 'Curses are like young chicken, they always come home to roost'. Yes, chicken was then an acceptable plural. Incidentally and as defamation has been mentioned, it is worth recalling that the poet laureate named his school magazine *The Flagellant* and compounded his problems by using an early number to apply the title to Westminster School's headmaster:[25]

> Vincent was moved to uncontrolled wrath and an action for libel against the publisher. Southey at once admitted himself the author of the paper and was promptly expelled.

From river to rail

The author's earlier reliance on cosmology was not singular. In 2015, Justice Martin of the Western Australian Supreme Court gave a paper headed 'Surrounding circumstances evidence: construing contracts and submissions about proper construction: the return of the Jedi (sic) Judii':[26]

> Invoking a Star Wars unfolding saga theme, this episode's point of departure assumes a preceding familiarity with what feels like an almost timeless galactic story about contractual interpretation, ambiguity and the 1982 'true rule' stated in Codelfa Construction Pty Ltd.

Justice Martin, like Gageler J although a couple of years earlier, was an associate to one of the judges in *Codelfa*, Sir Ronald Wilson. For his part, Sir Anthony Mason preferred Joseph Conrad over HG Wells; it was he who used the expression 'this ocean of litigious controversy'.[27] Mind you, there is the liquid nexus as galaxy comes from the Greek *galaxias*, meaning 'milky'.

The background to *Codelfa* is the history of major city infrastructure, in this case Sydney's Eastern Suburbs Railway: an original plan, decades where vision collides with revision, tensions between the public body charged with overseeing construction and the foreign company charged with that construction, local residents' action groups, political shifts, and supervening social change.

The initial plan is set out in the Second Schedule to the *City and Suburban Electric Railways (Amendment) Act 1967*.

"Hello, I've just docked from Antwerp. Pass the whisky."

> … From the Domain the railway will be constructed above ground across Woolloomooloo, in tunnels under Kings Cross and again above ground across Rushcutters Bay to enter tunnels again near Edgecliff. The railway then proceeds in a south-easterly direction through Woollahra and Bondi Junction, thence southerly and south-westerly through Waverley and Randwick to terminate at an underground station at Kingsford, the whole section from Edgecliff to Kingsford being in tunnels except for a small section where Woollahra station is to be provided in an open cutting. Railway stations will be provided at Chalmers Street, Town Hall, Martin Place, Kings Cross, Rushcutters Bay, Edgecliff, Woollahra, Bondi Junction, Charing Cross, Frenchman's Road, Randwick, University of New South Wales and Kingsford with special bus-to-rail interchange facilities being provided at Edgecliff, Bondi Junction, Randwick and Kingsford. Train storage sidings will also be provided in tunnels beyond Kingsford Station.

Shades of the light rail! What made the

Eastern Suburbs Railway saga a particularly Sydney episode was two factors. First, anachronistic social ambition. When Dr Bradfield's plan was in its infancy, growth was anticipated in the southeast, down where the airport now is. By the time Mr Wran's Labor government was elected in 1976, it was the greater west which was and would increasingly remain under-resourced. This factor in the context of huge cost blowouts made truncation of the railway inevitable.

Secondly, that evergreen litigant the Woollahra Resident. Cost-cutting meant that the rail was now to stop at Bondi Junction, but there was still hope that there would be a Woollahra railway station along the way. It would have been bucolic.

In this case it was the Italian construction group *Codelfa* which signed up with the State Rail Authority. These days, *Codelfa*'s parent has on its homepage the ambitious 'Ready to face all new challenges'.[28] Perhaps, but is anyone ever really ready for development work in Sydney?

The facts in *Codelfa* were straightforward enough. *Codelfa* promised the SRA that the railway could be done pronto. With some statutory comfort and a she'll-be-right-mate attitude embracing both Australian and Italian stereotypes, the promise was made on a common assumption that pronto-ness could be achieved as no-one was going to enjoin anyone.

Enjoin them the good burghers of Woollahra most certainly did, with the result that *Codelfa*'s work schedule had to be shredded and the costs exploded. I suggested at the outset that the concern of the court is to look at what would have been said, had the parties turned their mind to the situation, not what should have been said, now hindsight is the guide. In the analysis of Brennan J:[29]

> The contract reveals no lacuna which must be filled to make it work. It works perfectly well. It is a case of a contractor who promised to complete work within a time which was too short having regard to the hours during which it was lawful to work and the speed at which the construction team was capable of working. It was not an express term of the contract that Codelfa would work three shifts a day and, having regard to the environment in which the works were to be performed, Codelfa could not lawfully have promised that it would do so. Codelfa's promise to complete the works was a promise to do so lawfully. It was not an express term of the contract that Codelfa would not be restrained by injunction if it committed an actionable nuisance. The Commissioner could not have promised that the courts would not intervene if Codelfa committed an actionable nuisance. No doubt the Commissioner and Codelfa shared a mistaken belief that Codelfa would be able to work three shifts a day lawfully, or at least without liability to restraint by injunction, because they mistakenly believed that s. 11 of the City and Suburban Electric Railways Act conferred an immunity upon Codelfa. That mistake could not give rise to an implied term. If, at the time when the parties were signing the contract, the officious bystander had asked what did they intend in the event of the issue of an injunction restraining work during the night shift, they would have replied: 'We have thought of that. It cannot happen.' They cannot be presumed to have agreed upon a term inconsistent with their common belief.

Rush hour at Woollahra Station. © Sean Clark, 1992.

The outcome was a loss for *Codelfa*, or at most a draw. The mistaken assumption was not sufficient to imply a term (and thus let *Codelfa* make some money for keeping going) but was sufficient to found frustration (and thus to relieve *Codelfa* of the price of keeping going).

Codelfa has two morals. The first is in Lord Bowen's bones: a requirement of an implied term that 'it must be necessary to give business efficacy to the contract' is not to be Spoonerised by primary judges into 'it must be necessary to give business contracts efficacy'. The second is more general and stated by Mason J as follows:[30]

> 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.

One day a legal historian may write 'Relationships between the High Court and the NSW Court of Appeal in the early 21st century'. It will be a slim volume. Other cases will be at the fore, but *Codelfa* contributed. Let the summary of the aforementioned Western Australian judge suffice:

> For those needing a quick refresher, by the Jireh reasons Gummow, Heydon and Bell JJ, whilst dismissing that application for special leave, admonished the Courts of Appeal of New South Wales and Victoria - for taking it upon themselves to presume that the 'true rule' of contractual construction as articulated by Sir Anthony Mason in Codelfa at 352, had been abrogated in Australia.

The summary is spot on. However, as a loyal oriental may I admonish the occidental? The High Court's news for the eastern appellate courts was not universally grim. The bench – with two of its three members alumni of the NSW Court of Appeal – also praised another member of that court, someone who had been a junior in *Codelfa* three decades earlier.

And so to Western Port

Western Port is a tidal bay. Its mouth is dominated by Phillip Island and opens onto Bass Strait. Its body is dominated by French Island. The peninsula on the western side of Westernport is Mornington Peninsula, which makes Melbourne's Port Phillip Bay to the west of Western Port. Anyway, the eastern side of the peninsula used to comprise the Shire of Hastings. Today, the environment is a primary concern.

But BP Refinery's visit to the courts, unlike that of *Codelfa*'s, did not have its roots in either a generalized environmental dispute or even a localized nimbyism. To the contrary, locals wanted it. In the early '60s, just like before and since, local councils and state governments liked to lure big corporations. The refinery at Westernport was the paradigm example and the lure provided by the shire was a rating preference.

But first, the unions

However, it should not be thought that that the refinery was welcomed by everyone. It was not. And it was this hostility that led to the refinery's first piece of litigation, one unrelated to the implied terms litigation almost a decade later.

A major feature of the refinery was a mechanisation 'leaving little room for the employment of manual labour in connexion with the delivery of crude oil to it, the processes of refining and extraction of marketable products from it, or the delivery of the output of the refinery at the first stage of distribution.'[31]

As white collar workers are finding out in the 21st century, why employ people if you don't have to? One way the blue collar Storemen & Packers' Union sought to get inside the refinery – this product of international capitalism and regional government – was

to invoke the federal industrial jurisdiction. The union sought to invoke this jurisdiction by serving its log of claims not only on BP Refinery but also on five other interstate employers. Setting up a paper dispute to get something interstate and therefore justiciable was a practice already sanctioned by the High Court, but this time round big business won. The majority confirmed that while a paper dispute was kosher, there still had to be some nexus with the interstate employers and there simply wasn't one here.

Sir Edward McTiernan, the Labor politician appointed with HV Evatt over three decades before, dissented. It is an unashamedly centralist piece, summarised in a 1967 casenote by T J Higgins, I assume the later Higgins CJ of the ACT Supreme Court:[32]

> The majority view, on the other hand, while imprecise and unspecified does appear, from the result in this case, to have the effect of gravely circumscribing the jurisdiction of the Commonwealth Conciliation and Arbitration Commission. The local economic or industrial policies of the States will, at least potentially, be elevated above the national interest, and many awards already made may well find they lack jurisdictional basis for either continuance or renewal. It is to be hoped that the High Court will, in future, regard this instant case as a decision only as to whether, on its particular facts, any dispute really existed with the refinery company and the distributors and rebut any inferences that may be drawn from the majority judgment concerning the degree of association of interest between employers in an industry necessary to join them as parties to a single industrial dispute.

Back to implied terms

It is important to get the uncontroversial and unremarkable out of the way, and I intend to use this and the next paragraph for that purpose. The first uncontroversial proposition is that in the case, Lord Simon said:

> [F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that hino term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

The second uncontroversial proposition is that Lord Simon's statement in that case is the current law in Australia. The most recent statement by a majority of the High Court is:[33]

> Such implications are made when the conditions set out in BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 at 283 per Lord Simon of Glaisdale, Viscount Dilhorne and Lord Keith of Kinkel are satisfied. These were conditions adopted by this Court in Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd [1979] HCA 51; (1979) 144 CLR 596 at 605–606 per Mason J, Gibbs and Stephen JJ agreeing at 599, Aickin J agreeing at 615; [1979] HCA 51; see also Codelfa Construction Pty Ltd v State Rail Authority of NSW [1982] HCA 24; (1982) 149 CLR 337 at 347 per Mason J, Stephen J agreeing at 344, Wilson J agreeing at 392, 404 per Brennan J; [1982] HCA 24.

Now to the more controversial

The background to the implied terms litigation can doubtless be put in a number of ways. I've chosen Wikipedia's narrative not from laziness but because the author states the facts with an impish nod to what was to come in the Privy Council:

> In 1963 BP Refinery (Westernport) Pty Ltd reached an agreement with Henry Bolte, the then Premier of Victoria for the establishment of an oil refinery and construction of port facilities at Crib Point, in Western Port, Victoria('the Refinery Agreement'). The Parliament of Victoria, on the same day it ratified the Refinery Agreement, amended the Local Government Act 1958 to allow local councils to agree on the rates payable for industrial land. In 1964 the Shire of Hastings and BP Refinery entered into a Rating Agreement, which set out the rates payable for the following 40 years, and was approved by the Governor ('the Rating Agreement').
>
> BP decided to restructure its Australian operations and on 15 December 1969 wrote to the Shire of Hastings stating 'I hope I may assume that there will be no difficulty over transferring' the rights and privileges including the Rating Agreement to BP Australia Ltd. That the Rating Agreement would transfer was apparently so obvious to BP that it did not wait to hear the position of the Shire of Hastings before transferring the assets to BP Australia Ltd. Under the Rating Agreement the rates would have been $50,000 however the Shire of Hastings said the Rating Agreement no longer applied and assessed the rates in excess of $150,000.
>
> What was obvious to BP was not obvious to the County Court or to the Full Court. [For those courts it] was an implied condition of the rating agreement that it should continue in operation only so long as BP Refinery should be the occupier of the refinery site and rateable as such; so that on BP Refinery going out of occupation on the 1 January 1970, the rating agreement came to an end.

The other thing to note was that there was earlier and separate litigation between the shire and the corporation which ended, to use the words of the County Court, in the Supreme Court deciding that the Rating Agreement was 'a personal contract'.

What was BP to do with these upstart colonial courts? An appeal to the Privy Council was advised and what jolly good advice it turned out to be. The outcome is first hinted at by a question from Viscount Dilhorne to the appellant's counsel about two-thirds the way through his address:

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

Counsel for the appellant properly and promptly got the message:

> We would seek to adopt such a formulation of a term to be implied in the rating agreement as an alternative submission.

Things for the shire only got worse. In their reasons, the majority were at a loss to understand how BP was acting other than as it had to:

> Their Lordships would draw attention to [a number of matters including the following] which must be borne in mind when it comes to the implication of any term in the rating agreement. First, both parties secured substantial benefits over a long period. For the appellant company it was the preferential rating. For the respondents there were the recited advantages of industrial development within their area; there were the large rates (albeit preferential) on the refinery; and there would be full rates on hereditaments ancillary to the refinery (e.g., housing for the workers, and shops to serve them). Secondly, the expenditure of a very large sum of money on an important industrial installation in a particular place may well be irrevocable. If the incentive to the siting within the respondents' district should be withdrawn, the installation could

> not by the mere passing of a corporate resolution be removed elsewhere, as if it were a unit in a cottage industry. Once tempted to a particular site it is there for good - or ill.
>
> A group of companies such as the B.P. group may from time to time for good reasons wish to make changes in its corporate structure - particularly when a period of as long as forty years is envisaged. This possibility was, as has been said, recognized in the refinery agreement, and the identity of the member of the B.P. group occupying the refinery site cannot have been of the least importance to the respondents.

So the attitude is clear enough. Big British Business was going to suffer. How to get around this? Fortunately for the majority - Lord Simon of Glaisdale, Viscount Dilhorne and Lord Keith of Kinkel – Lord Wilberforce had – apparently – provided the path five years earlier:

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

The context, in case the ratepayers of Hastings were under any misapprehension, was British Petroleum. And so Viscount Dilhorne's implied term came to be.

The majority bench

Lord Simon of Glaisdale only died in 2006, the last surviving Englishman to have received an appointment as King's Counsel. Lord Keith of Kinkel was himself the son of a law lord.[34] Both had been mentioned in dispatches. Lord Keith tended to a small-c conservative outlook, and it was said that his judgments in damages cases were 'No'. Lord Simon had been a Tory politician although this did not define him. His specialty had been family law. His other 'last' was as the last President of Wills, Wives and Wrecks. One family lawyer recalled in 2011:[35]

> Simon was an avowed feminist who thought that many divorced women, particularly those no longer young, had a rough deal from husbands who wished to move on to 'newer models'. On one occasion he asked: 'Is it consonant with our ideas of justice that a husband who has enjoyed the services of his wife during her springtime and summer, should be able to cast her away in the autumn?' On another occasion he observed: 'The cock can feather the nest because he does not have to spend most of his time sitting on it.'

Lord Simon had suffered from an operation to remove a tumour, which left him with facial paralysis, a speech impediment, and a dud eye which gave him a good piratical air.

Importantly, Simon was Solicitor-General while Sir Reginald Manningham-Buller was the Attorney. The latter's career was controversial, to say the least. The later Lord Devlin, before whom he appeared, later wrote a scathing piece about him. He became widely known, via Bernard Levin's pen, as 'Sir Reginald Bullingham-Manner'.[36] And, relevantly, he would be Lord Dilhorne.

Yet it is easy enough to lampoon Dilhorne and one must be cautious of over-simplification. Witness the turning knife in this marvelous piece for *The Spectator* by Alan Watkins, the writer who coined the phrases 'the men in grey suits' and 'young fogey':[37]

> Patrick Devlin was one of the outstanding lawyers of the second half of the century. He was also what lawyers, outstanding or otherwise, rarely are: an excellent writer of English… Having been made a High Court judge at 42, a Lord Justice of Appeal at 45 and a Law Lord a year later, he retired from his legal duties in the Upper House at the early age of 58, as soon as he had qualified for a pension. When asked on television what he intended to do with the rest of his life, he replied, 'Enjoy myself.'
>
> … He also made a lot of money out of being an arbitrator. And he wrote some good books.

It was one of these, Easing the Passing, that led to further tut-tutting in the Temple about Pat Devlin. This was an account of the acquittal of Dr John Bodkin Adams of Eastbourne. It is one of the best books ever written about a trial. This is not altogether surprising, because Devlin was the judge. I suspect, however, that what annoyed assorted silks and benchers was not so much that he had breached convention (if, indeed, he had) in writing about a trial over which he had presided as that he was, in the course of the work, rude about the prosecuting counsel, Sir Reginald Manningham-Buller, the Attorney-Gener al, later Lord Dilhorne, the Lord Chancel- lor. He referred to him disrespectfully throughout as 'Reggie' and cast persistent doubt on both his intelligence and his application. The latter charge, at least, was unfair. For Reggie was to do the reverse of what Devlin had done. Having served his brief term on the Woolsack and been succeeded by Labour's Gerald Gardiner, he put his head down, read a few books and some law reports, and turned himself into a thoroughly competent Lord of Appeal.

Nor were Pat's motives for being so scornful of Reggie of the purest. He admits as much in the book. Lord Goddard, one of his mentors, wanted

Lord Simon.

> Devlin to succeed him at some time as Lord Chief Justice. So, at one stage, did Devlin. Somewhere, some- how, Reggie got himself in the way of this plot. As Reggie never became LCJ anyway, and the notion that the Attorney has a reversion on the job is a constitutional myth, Devlin's account does not make complete sense. But there it is.

The minority bench

And what of Lord Wilberforce? After all, he was in the room, along with Lord Morris. The former was one of the most well-known of the 20th century law lords, and great-great-grandson of the abolitionist. Lord Morris fascinated many a law student, being Lord Morris of Borth-y-Gest.

Both, again, served with great distinction, although Morris being a generation older took his decoration (an MC) in World War I. (Dudley Williams of our High Court did too.)

Together they had a marvelous time:

> … this argument appears in the majority judgment and consists in saying that a term ought to be implied that if the rights of the appellant company were assigned or otherwise disposed of to a company in which the British Petroleum

Co of Australia held thirty per cent or more of the issued share capital, 'Company' should mean that assignee company.

Of this argument we would say:

1) It was not put forward in either court below, nor taken or hinted at in the appellant's printed case.

2) It is inconsistent with the decision of the Full Court in the earlier case concerned with B.P. Australia Ltd., and involves contending that that unappealed decision was wrong. In our respectful opinion it was right.

3) It is inconsistent with the appellant's own action in December 1969, when it requested that their rights and privileges vested in the appellants might be transferred to B.P. Australia Ltd.

4) It introduces a method of interpretation which is novel and unsound. We have referred above to the agreement of 7 May 1964, which contains its own definition of 'the Company' - that is, the appellant. Every reference in that agreement to the Company - we have mentioned the main references above - is beyond doubt a reference to the appellant company and to no other entity. To vary an expressed definition agreed between the parties by reference to a recital of another agreement of a different character between different parties involves a process alien to normal methods of construction.

5) The introduction of the new 'implied term' cannot be justified under the normal principles. It is not necessary in order to produce business efficacy, is inconsistent with the expressed terms of the rating agreement, and, in our opinion, is not authorized by s. 390A. In effect it would impose upon the Shire a contractual party to which the Shire has not assented.

It's either Borth-y-Gest *or* The Moorcock reprised.
http://www.snowdoniaguide.com/borth_y_gest.htm

Lord Wilberforce (in oil, ho ho).
© Suzi Malin; University of Hull Art Collection.

6) The extended definition does not produce the result aimed at. For one of two things: either the extended definition means 'any company in the B.P. Group' - but in that case it departs from the 'incorporated' definition; or, if the 'incorporated definition' is taken, it produces the wrong result, for the assignee company is B.P. Australia Ltd. to which alone the benefit of the State agreement has been transferred and which has not re-transferred it to the appellant. It cannot produce the appellant company which has parted with the State agreement and now has merely a three year lease of the site.

Ouch. Think that we might never have known of the dissent had it not been for Sir Garfield Barwick, who only agreed to sit on the council if there were published dissents.

The High Court were alive to the oddity; as Brennan J diplomatically put it:

> In B.P. Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council [1977] HCA 40; (1977) 52 ALJR 20 there are some passages in the majority judgment which suggests that their Lordships went further and sought to derive from the matrix of facts in which the contract was made the implication of a contractual term. If their Lordships went further than Prenn v. Simmonds (1971) 1 WLR 1381; (1971) 3 All ER 237 would permit - and it is by no means clear that their Lordships intended to do so, for Prenn v. Simmonds was cited - then I should not think that the majority judgment would accord with sound principle. Clearly the minority judgment looked to the contract itself as the source of the term to be implied. B.P. Refinery should not be regarded as authorizing an extension of the role of extrinsic evidence, nor as permitting the implication of a term other than what is necessary 'to make the written contract work or, conversely, in order to avoid an unworkable situation', to quote a phrase from the minority judgment in that case. If it appears from the written contract that a term is to be implied, there are conditions which any proposed term must satisfy. They were stated by the majority judgment in B.P. Refinery (1977) 52 ALJR, at p 26 and adopted by Mason J. with the concurrence of the other members of this Court in Secured Income Real Estate v. St. Martin's Investments Pty. Ltd. [1979] HCA 51; (1979) 144 CLR 596, at p 606 .

An epitaph in the books

The Privy Council case was never reported in the official reports, the Appeal Cases. Its only outing in its first round was the Australian Law Journal Reports.

The second peculiarity flows directly. In 1994, well after the Bicentenary and the Australia Acts, the publisher of the High Court's own official reports, the Commonwealth Law Reports, put out Volume 180. For those readers unable to sell their libraries in our post-typographical age, look up to the spine and you will see '1942-91'. In the foreword, Sir Anthony Mason said:

> The thirty cases in this volume are spread over a fifty year period and, like Georges Bizet's opera Carmen, their significance was not initially appreciated by their audience.
>
> … The third group of [these] cases deals with principles of general contract and equity law. The cases range from the Privy Council decision in BP Refinery… to the High Court decision in Bloch v Bloch, which relates to the 'purchase money' resulting trust and the presumption of advancement. The former case has proved most influential, being applied in a number of Australian cases, including the High Court decisions in Codelfa… and Hawkins v Clayton.[38]

It is no surprise that a Privy Council decision appears in the CLRs. For some decades, its law was Commonwealth law. But I think I am correct in saying that, accusations of anachronicism aside, BP Refinery is the last such case to be reported in the CLRs. Incidentally, Sir Anthony was our first chief not to be appointed to the Privy Council, a tradition which is likely to continue!

The environment outs

The majority reasons in BP Refinery are remarkable. As to the law of when a term is implied into a contract, the reasons form the basis of modern Anglo-Australian law. We have seen recent reference by the High Court. So it is with the Supreme Court, albeit and sadly with reference only to the ALJR citation. As to the application of that law and the permissible involvement of facts beyond the contract itself, the reasons are wrong. The judge on whose previous dicta the reasoning was based – Lord Wilberforce – makes clear why.

It is not to the point to criticize the judges themselves. Each in his own way served his country and his office with distinction. The moral, I think, is that the case is a firm reminder that judges who go beyond the case in front of them do so at peril. Usually, this is a criticism levelled by black-letter lawyers on more liberal colleagues; certainty, it is said (and, it must be added, often with great force) is vital to the rule of law. The great irony of BP Refinery is that the majority in wanting certainty for BP came adrift from that certainty upon which the rule of law is often found. As their Lordships said, 'Once tempted to a particular site it is there for good - or ill.' In the 1980s, the refinery was largely abandoned. The only photographs I can locate are on a UK urban exploration site called 28 Days Later. I assume it drew its name from the well-known UK post-apocalyptic horror film made in 2002.

END NOTES

1 R E Megarry QC, ***Miscellany-at-Law – A Diversion for Lawyers and Others***, 2006, Wildy & Sons Ltd, p 210.
2 ***Commonwealth Bank v Barker*** [2014] 253 CLR 169, [113].
3 ***Codelfa Construction Pty Ltd v State Rail Authority of NSW*** (1982) 149 CLR 337, 346.
4 ***Shirlaw v Southern Foundries*** (1926) Ltd (1939) 2 KB 206, 227.
5 web.archive.org/web/20080213152947/http://www.baseballlibrary.com/ballplayers .
6 Set out in Nicholas Dawidoff's *The Catcher Was A Spy: The Mysterious Life of Moe Berg*, first published in 1994 and available on Kindle.
7 web.archive.org/web/20080213152947/http://www.baseballlibrary.com/ballplayers .
8 ***Stoker v Stoker, Skidmore and Murray; Stoker v Stoker*** (1889) 14 PD 60.
9 ***The Erato*** (1888) 13 PD 163.
10 ***Samuels v Stokes*** (1973) 130 CLR 490. See eg 493 (McTiernan J); 499 (Menzies J); 503 (Gibbs J).
11 Stephen Lambe, ***The Three Men in a Boat Companion: The Thames of Jerome K Jerome***.
12 http://www.shipspotting.com/gallery/photo.php?lid=32585 .
13 riverthames.sosugary.com/displayimage.php?pid=380 .
14 en.wikisource.org/wiki/Wikisource:WikiProject_1911_Encyclopædia_Britannica .
15 Megarry, work cited above, pp 8-9.
16 A B Piddington, ***Worshipful Masters***, 1929, Angus & Robertson, p 242.
17 ***McQuire v Western Morning News Company*** [1903] 2 KB 100, 109.
18 Edgington v Fitzmaurice (1885) 29 Ch D 459, 483. According to Wikipedia, this has been quoted in at least four US Federal Court securities judgments, *Aruve v. Creech*, 507 U.S. 463, 473 (1993), *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716-717 (1983), *Blue Chip Stamps v. Manor Drug Stores* 421 U.S. 723, 744 (1975), ***Comm'r v. Culbertson***, 337 U.S. 733, 743 n.12 (1949) (same).
19 quoteinvestigator.com/2015/02/15/hidden-cat/#return-note-10617-8 .
20 *Ex parte Hall*; In re Wood (1883) LR 23 CD 644, 653.
21 Megarry, work cited above, p 244.
22 1907, Paul Elder & Co, pp 99-100.
23 victorianfootnotes.net/2011/05/08/foundation-footnote-john-de-morgan/.
24 38 Ch D 71
25 Sargeaunt, ***Annals of Westminster School***, p 209.
26 supremecourt.wa.gov.au/_files/Surrounding%20Circumstances%20Evidence%20Construing%20Contracts%20and%20Submissions%20About%20Proper%20Construction%20The%20Return%20of%20the%20Jedi%20(sic)%20Judii%20Justice%20Kenneth%20Martin%2017%20Mar%202015.pdf .
27 ***Codelfa***, 345.
28 http://www.itinera-spa.it/en/ .
29 ***Codelfa***, 405.
30 ***Codelfa***, 352.
31 ***The Queen v Gough; ex p BP Refinery (Westernport) Pty Ltd*** (1966) 114 CLR 384, 392, McTiernan J.
32 Higgins, T J --- 'The Queen v Gough and Another; Ex parte BP Refinery Pty Ltd' [1967] FedLawRw 22; (1966-1967) 2(2) ***Federal Law Review*** 282
33 ***Commonwealth Bank v Barker*** [2014] 253 CLR 169, fn 89, French CJ, Bell and Keane JJ, Keifel J and Gageler J in separate judgments agreeing in the result. Whether this is in fact something said by a majority or something said by a 'plurality' must await a further *Bar News*.
34 Lord Keith's ***Daily Telegraph*** obituary is at https://www.telegraph.co.uk/news/obituaries/1398494/Lord-Keith-of-Kinkel.html.
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