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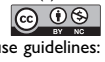

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Relational contract theory, the relevance of actual performance in contractual interpretation and its application to employment contracts in the United Kingdom and Australia

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Abstract

This article articulates a theory of relational contract, as an alternative to traditional freedom of contract philosophy. The law has moved away from freedom of contract to some extent, and it can be criticised on the basis of its unrealistic assumptions and detachment from the typical reality of parties' contracting. Relational contract theory is a possible suitable alternative theoretical framework. It may be useful in relation to contract interpretation. Specifically, it can be utilised to support a broader approach to contract interpretation, with the court focussing on the entirety of the parties' relations, including the written terms and also subsequent performance. It enjoys some support in the United Kingdom and in other common law jurisdictions. It can support the view taken by two justices of the High Court of Australia in a recent contract interpretation decision involving employment contracts. The article favours the approach taken by these justices, rather than that of the majority, whose judgment reflects classic contract law sentiments at odds with the general direction of contract law in comparative jurisdictions.

Keywords

contract law, employment law, relational contracts, comparative law, freedom of contract

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Introduction

Many of the rules of contract were sourced during an era in which the doctrine of freedom of contract prevailed. Of course, over time, some of these rules have been ameliorated in some of their otherwise harsh consequences by principles of equity, other principles of the common law, and/or statute. Nonetheless, important aspects of contract law, including of particular relevance here contractual interpretation, hark from an industrial revolution era of the nineteenth century. This includes a traditional general rule that, in interpreting contractual provision, evidence of how the contract was performed is not relevant to its interpretation, applying the *parol evidence rule*, though a more nuanced contextual view has subsequently developed. In two recent High Court of Australia decisions, division was evident on this matter, with a majority of the justices adopting the traditional rule, and a minority indicating evidence of subsequent performance could or should be taken into account in interpreting the parties' written agreement.

In the latter part of the twentieth century, some contract law scholars developed a relational contract theory. This theory is highly critical of traditional freedom of contract philosophy, and its manifestation in particular rules of contracting. The theory argues freedom of contract notions are unrealistic and unreflective of how most parties actually conduct themselves in contracts, how important the written terms are, how they view their contractual relationships and how they resolve contractual disputes. As will be seen, acceptance of this theory would lead to a re-think in terms of how the Australian contract law deals with issues of subsequent performance and contractual interpretation. This re-think has occurred in comparative countries, though concededly these jurisdictions have not necessarily expressly linked their reform of the law in this area to relational contract theory. This theory has so far had minimal impact on the Australian contract law, and has received limited attention from the Australian scholars.[1] This article will suggest it warrants serious consideration. For space reasons, the article will not consider other possible doctrines that might apply to such a situation, including estoppel, waiver or unjust enrichment. Nor will it consider the suitability of general principles of contract law to the employment context.

Part II of this article will briefly explain traditional freedom of contract philosophy, and explain how relational contract theory fundamentally differs from it. The discussion will focus particularly on what relational contract theory might tell us about contractual interpretation, and the relevance of subsequent performance to that process. Part III will consider case law in the United Kingdom and Australia regarding the use of subsequent performance in interpreting contracts, and note the position in the United States, Canada and New Zealand and in international trade materials. Each of these jurisdictions (apart from Australia) has accepted evidence of subsequent performance as an aid to contractual interpretation. Part IV considers recent High Court decisions involving employment situations, where two justices adopted a position similar to that pertaining in these other jurisdictions, but a

1. Examples of significant Australian works include John Gava, 'What We Know About Contract Law and Transacting in the Marketplace' (2014) 35 *Adelaide Law Review* 409; 'How Should Judges Decide Commercial Contract Cases?' (2013) 30 *Journal of Contract Law* 133 (Gava 'Should'); 'Can Contract Law Be Justified on Economic Grounds?' (2006) 25 *University of Queensland Law Journal* 253 (Gava 'Justified'); John Gava and Janey Greene, 'Do We Need a Hybrid Law of Contract? Why Hugh Collins is Wrong, and Why it Matters' (2004) 63(3) *Cambridge Law Journal* 605; see also Bill Dixon, 'Common Law Obligations of Good Faith in Australian Commercial Contracts – A Relational Recipe' (2005) 33 *Australian Business Law Review* 87 and Gabrielle Golding, 'Employment as a Relational Contract and the Impact on Remedies for Breach' (2021) 30(2) *Griffith Law Review* 270.

majority maintained the traditional view that such material was generally irrelevant and ought not be considered. Part V will argue the Australian law should be willing to accept such evidence, at least in some cases. Relational contract theory can be utilised to support and justify this position. Acceptance of this position does not necessarily undermine other fundamental principles of contract law, such as the objective theory of contract. Part VI concludes. This article is considered to make a contribution to the literature by examining two important recent High Court of Australia employment decisions through the prism of relational contract theory, with broader implications for contract interpretation generally.

Relational contract theory and freedom of contract

Prior to discussing the development of freedom of contract principles and relational contract theory, it is worth pointing out that contract law until the late eighteenth century was primarily based on *executed contracts* (what parties were already doing and had already done, involving concepts of benefits and/or reliance), not *executory contracts* (promises regarding future activity).[2] In some ways, the shift to executory contracts fed the rise of notions of freedom of contract, with a focus on the terms of the engagement, rather than factual evidence of what had occurred or was occurring.

Freedom of contract

Freedom of contract principles that maintain an agreement voluntarily entered into by parties should be respected and given effect to by the courts.[3] The voluntary aspect was critical because the fact the contract and its terms reflected free choice legitimated exercise of state power against an individual, through the law's enforcement of contractual promises.[4] A court is not, and should not be, in the business of re-making the parties' agreement into something that a judge might individually believe would make for a 'better' contract, however that might be defined.[5] It is argued the role of the court is to give effect to the parties' agreement, and the best evidence of what the parties agreed is the written terms of their engagement.[6] This is a formalist position. The court's review role here is limited – concerned to ensure the procedural requirements for entry into a contract have been met, not the substantive fairness of clauses.[7] The parties, not outsiders, are the best judges of what is in their best

2. P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979) 419–20.
3. Eyal Zamir, 'The Inverted Hierarchy of Contract Interpretation and Supplementation' (1997) 97 *Columbia Law Review* 1710, 1768–71; Atiyah (n 2); Morris Cohen, 'The Basis of Contract' (1933) 46 *Harvard Law Review* 553; Shahar Lifshitz and Elad Finkelstein, 'A Hermeneutic Perspective on the Interpretation of Contracts' (2017) 54 *American Business Law Journal* 519, 545.
4. David Trubek, 'Max Weber's Tragic Modernism and the Study of Law in Society' (1986) 20 *Law and Society Review* 573, 580.
5. *Arnold v Britton* [2015] AC 1619, 1628 (Lord Neuberger)('*Arnold*').
6. *Printing and Numerical Registering Co v Sampson* (1875) 19 Eq 462, 465: 'contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice … you are not lightly to interfere with this freedom of contract' (Sir George Jessel MR)('*Printing*').
7. Atiyah (n 2) 402. An example of this is *Stadhard v Lee* (1863) 4 B & S 364, 372; 122 ER 138, 141: 'however unreasonable and oppressive a stipulation or condition may be, the one party intended to insist upon and the other to submit to it, a Court of Justice cannot do otherwise than give full effect to the terms which have been agreed

interests.[8] This approach assumes parties are rational, utility-maximisers,[9] who are in a position to determine what is in their best interests, and have it reflected in contractual terms. It assumes parties have access to adequate information in order to make informed judgments about that, and sufficient bargaining power to secure an agreement reflecting their optimal wishes. Contracts involve an exchange of promises, and perform a risk-allocation function. This approach assumes the *fungibility*, of interchangeability, of goods and services,[10] thereby minimising the importance of the identity of the contracting parties, and particularly the relationship they have with one another.[11]

Freedom of contract is said to support a (relatively) free market economy, where contracts are encouraged in order to provide for efficient exchange of scarce resources. This is the 'classical' contract law model, reflecting the invisible hand theory of classic Adam Smith economics prevalent at the time.[12] It is a public policy.[13] At the height of the freedom of contract approach, courts would often eschew consideration of the factual matrix in which the dispute arose, preferring to resolve disputes purely on legal grounds, which involved formalism. Atiyah notes one reason for this was simply that the courts were being kept very busy with a high volume of commercial disputes, and a focus on legal principles, without delving into sometimes complex factual scenarios, permitted them to decide cases quickly.[14] Given later discussion in the article, concerning the implications (if any) for contractual interpretation of actual performance (i.e. facts), this is considered particularly noteworthy. The courts' tendency in the past to fixate on the written word of the contract, sometimes in the face of actual reality quite to the contrary, might be explicable on such a basis. Of course, it hardly seems like a reasonable justification today for such an approach.

Some laud this formalist approach on the basis it reduces transaction costs – one of the aims of focussing on the written terms of the contract is to reduce the ambit of disagreement between the parties as to what their agreement was. If this possible ambit of disagreement is minimised,

upon between the parties' (Cockburn CJ)(regarding a building contract requiring contractor to lay drainage works 'as rapidly and satisfactorily as required').

8. Sir Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66, 71; Atiyah (n 2).
9. Jay Feinman, 'Relational Contract Theory in Context' (2000) 94 *Northwestern University Law Review* 737, 743; Melvin Eisenberg, 'Why There is no Law of Relational Contracts' (2000) 94(3) *Northwestern University Law Review* 805, 808; *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) [123](Leggatt J) ('*Yam Seng*'). For an argument that Adam Smith was concerned with regulating self-interest in the interests of justice, and viewed mutual consent in transfer as pivotal as a constraint on pure self-interest, requiring parties to be other-regarding, see David Campbell, 'Adam Smith and the Social Foundations of Agreement: *Walford v Miles* as a Relational Contract' (2017) 21 *Edinburgh Law Review* 376; David Campbell, *Contractual Relations: A Contribution to the Critique of the Classical Law of Contract* (Oxford University Press, 2022) 23–30.
10. Jonathan Morgan *Contract Law Minimalism* (Cambridge University Press, 2013) 62.
11. Oliver Williamson *The Economic Institutions of Capitalism* (Free Press, 1985) 69: 'classical contract law endeavours to implement discreteness and presentation in several ways. For one thing, the identity of the parties to a transaction is treated as irrelevant'.
12. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Strahan and Cadell, 1776); Atiyah (n 2) 294–304.
13. *Printing* (n 6) 465: 'it there is one thing which more than another *public policy* requires, it is that men of full and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider in that you are not lightly to interfere with this freedom of contract' (Lord Jessel, MR)(emphasis added).
14. Atiyah (n 2) 390–91.

so too is the risk of, and cost associated with, resolving that dispute.[15] Freedom of contract is also often lauded on the basis that it provides those conducting business with the kind of certainty and predictability that they require from the legal system.[16]

Freedom of contract principles are reflected in the recent High Court of Australia decisions in *CFMMEU* and *ZG Operations*,[17] in focussing on the express terms of the contract to the exclusion of consideration of subsequent performance. These cases will be discussed below.

Criticisms of freedom of contract approach

Atiyah documents the decline of the principles of freedom of contract from about 1870. He discusses many reasons for this, including the increased recognition of inequalities of wealth and power within society. Political changes in favour of extending the right to vote to more people reflected an increased acceptance that individuals were and should be treated as equals. This came into conflict with contract principles that favoured the wealthy and powerful.[18] Atiyah concludes that by the late 1880s, freedom of contract as a political slogan was finished.[19] He further claims that this model was a 'failure … notwithstanding its formal perpetuation to the present day as a body of general principle'.[20]

Ten years ago, the High Court discussed freedom of contract principles. In *ANZ Group Ltd v Andrews*, albeit in a different contractual context, all members of the Court rejected any suggestion that 'untrammelled' freedom of contract provided a universal legal value in the common law.[21] Obviously, development of equitable principle, development of other doctrines in the common law, including unconscionability, implied terms, frustration, estoppel and development of restitution (to say nothing of statutory reform)[22] have reflected realisation that fundamentalist freedom of contract principles, of themselves, are (sometimes) insufficient to lead to outcomes most would view as acceptable and reasonable.[23] Some say that developments

15. Lifshitz and Finkelstein (n 3) 557.
16. Lord Hobhouse, 'International Conventions and Commercial Law: The Pursuit of Uniformity' (1990) 106 *Law Quarterly Review* 530, 532–33; Stewart Macaulay, 'The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' (2003) 66 *Modern Law Review* 44, 57; Alan Schwartz and Robert Scott, 'Contract Interpretation Redux' (2010) 119 *Yale Law Journal* 926, 931–32; Lisa Bernstein, 'The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study' (1999) 66 *University of Chicago Law Review* 710. On the other hand, as Gava points out, it is arguable that formalism simply requires relatively certain rules, but does not mandate the content of any particular rule regarding contract interpretation: Gava, 'Justified' (n 1) 261.
17. *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 ('*CFMMEU*'); *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 ('*ZG Operations*').
18. Atiyah (n 2) 336–40, 587–89.
19. 587; in economic terms, its demise was well explained by John Maynard Keynes in *The End of Laissez-Faire* (The Hogarth Press, 1926).
20. 693. He considered it a failure for many reasons, including its failure to reflect the expectations of contracting parties, failure to meet broader societal demands, failure to deal with monopolies, failure to accommodate differences in bargaining power and the extent to which parliament had found it necessary to intervene to overcome the effect of the common law rules.
21. *ANZ Group Ltd v Andrews* (2012) 247 CLR 205, 216.
22. EG *Unfair Contract Terms Act 1977* (UK); *Australian Consumer Law* (*Competition and Consumer Act 2010* (Cth) Schedule 2); *Contracts Review Act 1980* (NSW).
23. Atiyah (n 2) 716.

of these 'add-ons' to freedom of contract threaten to 'undermine the integrity' of the classical discourse.[24]

Most scholars today accept the assumptions that underlie freedom of contract sentiments are highly questionable. We understand the reality that in many cases, contracts are not the product of negotiation between two parties of approximately equal bargaining power. In practice, there is often a large disparity in bargaining power between the parties, and the stronger party is in a position to, and does, literally dictate the terms of the agreement. That party (more likely, their legal representative) will typically draft the terms of engagement, with little or no input from or negotiation with the other party. This is often true in the current context of an organisation that engages a worker to perform particular services or tasks. As the cases have reflected, often that organisation is in a position to draft terms of the engagement between the parties.[25] Clauses may be taken from standardised banks of templates. Contracts will often, innocently or deliberately, contain significant gaps. Individuals and organisations are not always rational utility-maximisers.[26] The promise of certainty may be illusory,[27] and may conflict with what most regard as justice.[28] A myopic focus on contractual terms may increase transaction costs, by encouraging and rewarding efforts to incorporate provision for every possible contingency ex ante in the contract.[29] Self-interest may not be a zero-sum, I-win-you-lose game, but might include an element of co-operation that might be necessary in order for both parties to win.[30]

This reality is important for current purposes. It can mean the words utilised in the contract do not in fact reflect the parties' actual intentions,[31] and the objective view of contracts, to the extent that it assumes that the words used reflect the parties' actual intentions, falls short in doing so. Empirical evidence suggests there is often a wide gap between the parties' contractual terms and their actual performance.[32] This may be because the original technical terms never accurately reflected the parties' actual intentions (for the reasons outlined in the previous paragraph) or because it was drafted by lawyers who may not have fully appreciated the parties' intentions;[33] it may mean that the parties' intentions are dynamic, rather than static,[34] or that for some other reason, it is difficult to allocate all risks associated with the contract at the

24. David Campbell and Hugh Collins, 'Discovering the Implicit Dimensions of Contract' in David Campbell, Hugh Collins and John Wightman ed *Implicit Dimensions of Contract* (Hart Publishing, 2003) 27.
25. Macaulay (n 16) 51.
26. Morgan (n 10) 53–59.
27. Mason (n 8) 70.
28. Anthony Gleeson, 'Individualised Justice – The Holy Grail' (1995) 69 *Australian Law Journal* 421, 430.
29. Dixon (n 1) 95.
30. David Campbell and Donald Harris, 'Flexibility in Long-Term Contractual Relationships: The Role of Co-Operation' (1993) 20 *Journal of Law and Society* 166, 181.
31. Eyal Zamir, 'The Inverted Hierarchy of Contract Interpretation and Supplementation' (1997) 97 *Columbia Law Review* 1710, 1774; Lifshitz and Finkelstein (n 3) 564: 'most parties to a contract are not willing to reduce the legal perspective of their relationship to the text alone, therefore using the textual approach as the default approach to contract interpretation is problematic'.
32. Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55.
33. *Wood v Capita Insurance Services Ltd* [2017] AC 1173, 1180 (Lord Hodge)('*Wood*').
34. Traditional contract law assumes a 'static', rather than 'dynamic', relation between the parties: Ian Macneil 'Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a Rich Classificatory Apparatus' (1981) 75 *Northwestern University Law Review* 1018, 1039; Eisenberg (n 9) 807.

time of agreement.[35] It may be a combination of these. It may reflect the relational nature of contracts, as explained below, where parties value the ongoing relationship between the parties, rather than enforcing contractual provisions to the letter on a particular occasion.[36] Parties in such a situation may not see the need for a detailed contract, or if such is foisted upon them by legal representatives, may not intend it to reflect the entirety, or even the substance, of the parties' agreement.[37] The assumption that contracting parties are in fact rational utility-maximisers has been questioned.[38]

John Stuart Mill sagely observed limitations of freedom of contract:

> (An) exception to the doctrine that individuals are the best judges of their own interest, is when an individual attempts to decide irrevocably now what will be best for his interest at some future and distant time. The presumption in favour of individual judgment is only legitimate, where the judgment is grounded on actual, and especially on present, personal experience; not where it is formed antecedently to experience, and not suffered to be reversed even after experience has condemned it. When persons have bound themselves by a contract, not simply to do some one thing, but to continue doing something … for a prolonged period, without any power of revoking the engagement … (any) presumption which can be grounded on their having voluntarily entered into the contract … is commonly next to null.[39]

It was noted above that classic contract law was sometimes lauded on the basis of its economic efficiency. However, these supposed merits of contract formality have sometimes been criticised on the basis their promises are illusory.[40] Mitchell suggests that

> In efficiency terms it is not clear that all parties should be directed towards trying to draft complete, fully contingent and interpretation-proof contracts, bearing in mind the likely costs. Use of flexible standards, gaps in the agreement, beginning work and letting performance firm up the obligations may in fact be the most efficient way of managing the commercial relationships.[41]

35. Atiyah (n 2) 725 states that 'the central idea of the executory contract as a risk-allocation device does not fit many of these long-term relationships'. He identifies long-term commercial relationships to typically include employer and employee, company and trade union, business and supplier, and business and distribution network/s; David Campbell and Hugh Collins (n 24) 41.
36. Eyal Zamir (n 31) 1765: 'in most cases, parties are motivated by economic incentives (considerations of short and long term self-interest, including the promotion and maintenance of goodwill), social motivation (the desire for social recognition and acclaim, the fear of negative reactions from colleagues and associates) and moral sentiments (such as the conviction that promises must be kept), and not necessarily by legal incentives'.
37. Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999) 153.
38. 127–28; Melvin Eisenberg (n 9) 810–12 says the rational utility maximiser assumption 'often lacks explanatory power' because their rationality is bounded in nature, because individuals are often unrealistically optimistic and because of defective capability due to decision making based on incomplete data. He concludes that 'modern cognitive psychology instructs us that actors have telescopic faculties that degrade their cognitive ability to make comparisons between present and future costs and benefits. The further out in time a given cost or benefit is located, the less capacity an actor has to determine his own best interests. Similarly, actors systematically underestimate most risks, and often wrongly take the sample consisting of present events to be representative and therefore predictive of future events (815) … by virtue of the nature of such relationships, it will be almost impossible to predict, at the time the contract is made, what contingencies may affect the relationship's future course' (819).
39. John Stuart Mill, *Principles of Political Economy* (W Ashley ed, 1965) 959–60.
40. Mason (n 8) 70.
41. *Contract Law and Contract Practice* (Hart Publishing, 2013) 165; Collins (n 37) 177–78.

Formalism continues to have adherents in the literature.[42]

Relational contract theory

Deep dissatisfaction with freedom of contract principles, and the sometimes harsh outcomes they cause, obviously led to development of new legal principles. However, it also manifested in new contract law theories. One such theory is relational contract theory. Relational contract theory is championed by scholars such as Ian Macneil and Stewart Macaulay.[43] This theory suggests that the freedom of contract model of contract law is based on an inaccurate picture of the relations between contracting parties. It may not reflect the parties' expectations. If this is true, this is considered to be a major flaw.[44] Of all areas of the law, commercial law, including the law of contract, has a deep history of being influenced by commercial practice.[45] Lord Mansfield's position as a legal luminary is partly based on the work he did to incorporate well-established principles of commercial practice into commercial law (*lex mercatoria*).[46] Thus, a suggestion that a fundamental aspect of commercial law does not reflect commercial realities has a bite to it that would not exist in other contexts. Once this is accepted, it is *usual*, though clearly not inevitable,[47] to lead to an argument that commercial law must be reformed so that it is consistent, or more consistent, with typical commercial behaviour, including standards of fair dealing and co-operation.[48]

42. Morgan (n 10): 'interpretation should be textual. The primary emphasis should be on the words of the agreement rather than its context … the text of the parties' agreement … can be presumed to accord with the wishes and expectations of the parties themselves. Commercial draftsmen can be expected to say what they mean, and mean what they say … it is unfortunate that English law has moved away from this strict approach. The courts have been intoxicated by the argument that all linguistic interpretation has to be contextual, and seduced by the call of "commercial common sense"' (228–30). Earlier in the book, Morgan admitted that 'the English law of contract, with its rigid rules, formalist approach and its (fixed idea) of strongly individualistic behaviour, seems quite out of line with the facts of business life' (95).
43. Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55; Stewart Macaulay, 'An Empirical View of Contract' [1985] *Wisconsin Law Review* 465; Macaulay (n 16); Ian Macneil, 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law' (1978) 72 *Northwestern University Law Review* 854 (Macneil, 'Adjustments'); Macneil (n 34); Ian Macneil, 'The Many Futures of Contracts' (1974) 47 *Southern California Law Review* 691 (Macneil, 'Many Futures').
44. Mitchell (n 41) 5: 'there are probably very few scholars who would defend an application of contract rules that proceeded without any reference at all to the expectations, practices, behaviours and norms of the commercial community, at least insofar as the law seeks to retain legitimacy amongst such contractors'; Lord Goff, 'Commercial Contracts and the Commercial Court' [1984] *Lloyd's Maritime and Commercial Law Quarterly* 382.
45. Lord Devlin, 'The Relations Between Commercial Men and Commercial Practice' (1951) 14 *Modern Law Review* 249, 249: 'an economic system which did not include as part of itself … machinery for settling commercial disputes in accordance with the ideas of commercial men would be bad for trade'; Lord Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 433; *First Energy (UK) Ltd v Hungarian International Bank Ltd* (1993) 2 Lloyd's Rep 194, 196.
46. Lord Campbell, *The Lives of the Chief Justices of England* (1873) 299–300. Hugh Collins explains that in medieval and early modern England, merchants preferred local courts because they applied trade customs known to the commercial parties; common law courts struggled to compete with this model. Lord Mansfield worked to incorporate commercial practice into the commercial law applied by the ordinary common law courts, increasing their attractiveness to commercial parties: (n 37) 188–89.
47. Morgan (n 10) 59–60.
48. 67: 'we would expect contract law to recognize, and enforce, the co-operative spirit of the relational contract – the practical reality – rather than the rules appropriate to the mythical "sharp-in, sharp-out", exhaustively presentiated,

Evidence of typical commercial behaviour is available in model template contracts. In the United Kingdom, Clause 10.1 of the *New Engineering Contract* (2005, 3rd ed) and Clause 10.2 of the 4th edition (2017) expressly required parties to work together in a spirit of mutual trust and co-operation;[49] in Australia, clause 2 of draft AS11000 *General Conditions of Contract* required parties to conduct themselves in good faith, but it has not (yet) been formally adopted. There has also been an increase in the use of alliance/partnering contracts and enterprise contracts.[50] The flavour of co-operation in these agreements can seem at odds with traditional contract law, which is seen as adversarial in nature. These contracts may reflect a project-centric, rather than party-centric, approach consistent with relational contract theory.[51] A leading judicial advocate has noted the increased use of express good faith clauses in contracts governed by the United Kingdom law.[52]

Justice Leggatt expressed this view succinctly:

> There is sometimes a tendency of English commercial lawyers to view commerce as it if were a kind of Darwinian struggle in which everyone is trying to gain at the expense of those with whom they do business and where, even when parties have made a contract, that does no more than set limits on the pursuit of profit at the other party's expense … this model of commerce and of contract … does not in my view correspond to commercial reality (based on my experience advising commercial clients) … it is a mistake to see contracting as an essentially zero sum game is which one party's profit is automatically the other party's loss. The essence of trade and commerce is reciprocity which benefits both parties and makes each party better off. To achieve such mutual gain, the parties agree to cooperate with each other … if contract law is to perform that function effectively, it (must) recognise that not all the shared understandings and expectations which contracting parties have and which are necessary to realise their joint aims are ever spelt out … in their contract.[53]

Discrete contracts and relational contracts

The adjective 'relational' is used to describe many contracts, in contrast with a 'discrete' model of contracting that is said to underpin classic contract law. Discrete contracting assumes one-off transactions between parties who are not known to one another. Each is a rational utility maximiser who knows what is in their best interests and has the knowledge and bargaining power to ensure that the contractual terms reflect these interests. In a discrete contracting model, the wording of the contract assumes great significance. Thus, great effort is taken to draft it, particularly given legal requirements and the possibility of non-performance. A discrete model tends to

wholly discrete contracts'; Mark Eisenberg, 'Relational Contracts' in J Beatson and D Friedmann (eds) *Good Faith and Fault in Contract* (Oxford University Press, 1995) 298: 'the general rules of contract law should fit relational contracts, because contracts that involve a relationship between the contracting parties, beyond the mere relationship of stranger-exchange, comprise the bread and butter of contracting …(so) the general principles of contract law … must be catholic enough to govern relational contracts'.

49. *Van Oord UK Ltd v Dragados UK Ltd* (2020 CSOH 87), [25]; *Costain v Tarmac* [2017] EWHC 319, [124].
50. David Christie, Severine Saintier and Jessica Viven-Wilksch, 'Industry-Led Standards, Relational Contracts and Good Faith: Are the UK and Australia Setting the Pace in (Construction) Contract Law?' (2022) 43 *Liverpool Law Review* 287, 291.
51. Ibid.
52. Justice Leggatt, 'Contractual Duties of Good Faith', Lecture to the Commercial Bar Association 2016, [17](now Lord Leggatt of the United Kingdom Supreme Court).
53. [25]–[27].

discount other aspects of the parties' relationship, including what happened (if anything) between these parties prior to the execution of the current contract, and what happened after its execution.[54] It is assumed parties are in an adversarial relationship.[55]

In the view of relational contract scholars, the classic freedom of contract model is based on a fiction, which impacts its utility. Classic freedom of contract assumes discrete, one-off transactions, and its doctrines attempt to resolve disputes involving such transactions.[56] In truth, most contracts are between parties who are known to each other. Their ongoing relationship has a value to them, which discrete contract law models ignore. This value may be intangible, which is perhaps why discrete contract law ignores it, but it should not be ignored, because it explains how parties actually behave in practice. For a relational contract scholar, it is essential to look beyond the written terms of the agreement between the parties, to understand the full scope of the parties' relations.[57] Precisely because they may have an ongoing relationship, with a deep history and a long expected future, the parties' written agreement may be sparse, not reflecting all that has been agreed or would have been agreed if the parties had desired to complete a comprehensive written contract.[58] Macneil says a 'vast amount of economic activity is carried on at least partly on this basis'.[59] Macaulay notes in relation to the classic contract law 'discrete' approach

> often fits the facts poorly. The parties' contract records in detail their plan for all foreseeable contingencies in a written record. Performance is guided by this plan, and any disputes that cannot be avoided by reference to it can be resolved by interpreting it. However, this story better fits situations where trust is limited .. more commonly .. people agree on some terms but not everything, and just start performing … in a relational contract, often it is hard to say when the contract is formed. Moreover, it is not likely to be formed once and for all. Rather than a scene frozen in a still photograph, a relational contract is more like an ongoing motion picture.[60]

54. Ian Macneil, 'Many Futures' (n 43) 693: 'the purity and simplicity of the (classic contract model) arises from its presupposition that a contract is a discrete transaction. A transaction is an event sensibly viewable separately from events preceding and following it'.
55. Philip Girard, 'Good Faith in Contractual Performance: Principle or Placebo?' (1983) 5 *Supreme Court Law Review* 309, 326.
56. Collins in Campbell, Collins and Wightman ed (n 24) 18.
57. Ian Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94(3) *Northwestern University Law Review* 877, 881 summarised relational contract theory into four key propositions: (a) every transaction is embedded in complex relations; (b) understanding any transaction requires understanding all aspects of the underlying relations between the parties; (c) effective analysis of any transaction requires consideration of all facts regarding the parties' relations that might significantly impact the transaction; and (d) combined contextual analysis of relations and transactions is more efficient and better analytically than non-contextual analysis. Contextual analysis would include consideration of matters subsequent to execution of the contract; non-textual analysis would not.
58. It has been observed that this reduces transaction costs to the parties: Joshua Silverstein, 'The Contract Interpretation Policy Debate: A Primer' (2021) 26 *Stanford Journal of Law Business and Finance* 222, 253. Silverstein also concluded there was little difference in the enforcement costs when courts adopted a textual (written terms based) or a contextual (written terms plus surrounding circumstances) approach (268); Mitchell (n 41) 55.
59. Ian Macneil, 'Many Futures' (n 43) 718. These conclusions are buttressed by findings of the work of other contract scholars suggesting contracting parties have 'limited attention' and cannot reasonably be expected to have awareness of all of the issues and contingencies upon which they might make an ex ante agreement. Such arguments again tend against the idea that the express terms of the written contract should be seen as the sum total of the parties' agreement: Allan Farnsworth, 'Disputes Over Omissions in Contracts' (1968) 68 *Columbia Law Review* 860, 870.
60. Stewart Macaulay, 'Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein' (2000) 94(3) *Northwestern University Law Review* 775, 778; see similarly Gava, 'Justified' (n

Macneil's view is that

> The need for a contract law system enhancing discreteness and presentiation will never disappear … such a system will, however, continue to rub in an unnecessarily abrasive manner against the realities of coexistence with relational needs for flexibility and change. Only when the parts of the contract law system implementing discreteness and presentiation are perceived … not as an independent system but only as integral parts of much larger systems, will unnecessary abrasion disappear. By no means will all abrasion disappear … because real conflict exists between the need for reliability of planning and the need for flexibility in economic relations. What will disappear is the abrasion resulting from contract law founded on the assumption that all of a contractual relation is encompassed in some original assent to it, where that assumption is manifestly false.[61]

Relatedly, leading contract law scholar Hugh Collins talks about a three dimensional view of contracting behaviour, including the business relation, the economic deal, and the contract. He says that classical law typically ignores the first of these, notwithstanding its significant importance. The 'business relation' aspect is consistent with relational contract theory, explaining why parties are not as concerned with express contractual terms as the law tends to be, and why parties will often eschew exercising express contractual rights in favour of maintaining good relations etc.[62]

The relational contract theory work of Macaulay in particular was partly empirical. He undertook qualitative research with businesses and their legal advisers to ascertain their contractual practices. The research found that express contractual terms were often incomplete, particularly around performance issues. However, this did not matter particularly, because on almost all of the occasions where a dispute arose between the parties, they settled it informally, without recourse to the contract or to legal action. Internal mechanisms within businesses typically work to ensure parties' performance conforms to expectations. Business is concerned with maintaining good contractual relations with those with whom they deal, and that they preserve a good reputation within the marketplace in terms of their business practice. These forces, rather than contractual provisions, tend to dictate contractual performance.[63] Some interviewees reported that they disfavoured very high degrees of specificity in contracts, because that might encourage the other contracting party to perform to the letter, rather than the spirit, of the contract, and because it might reflect low levels of trust between the parties.[64] In other contexts, for example contracts intended to endure over a long period, it may not be possible or desirable to expressly allocate all risks at the time of agreement. In such a context, the parties might legitimately and reasonably expect a spirit of mutual co-operation between the contracting parties.[65]

There is some judicial support for such a theory. In *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*, Finn J of the Federal Court, accepted that a sub-contract

1) 255: 'the law has always had difficulty in dealing with long-term contracting because its doctrines and rules are more attuned to seeing contracts as a means of regulating discrete transactions'; Gava, 'Should' (n 1) 138.

61. Macneil, 'Adjustments' (n 43) 888.
62. Collins (n 37) 128–40.
63. Atiyah (n 2) 713–15.
64. 64; see similarly Zamir (n 31) 1765: 'empirical research indicates that there is a wide gap between the parties' set of legal rights and obligations and their actual behaviour during the performance of the contract. This gap is reflected in the adaptation of the contract to changing circumstances … (usually) parties are motivated by economic incentives … (including goodwill), social motivations … and moral sentiments … and not necessarily by legal incentives'.
65. Dixon (n 1) 94–95.

was a 'long-term relational one', to which obligations of mutual trust and confidence applied.[66] It was briefly described by three members of the High Court in *Commonwealth Bank v Barker* as one of 'uncertain application',[67] and was not argued in that case. Members of the United Kingdom Supreme Court referred to employment as a 'relational contract',[68] and members of the Court of Appeal have referred with apparent approval to the concept – Jackson LJ in *Amey v Birmingham City Council* referred to the 'relational' nature of the contract it was considering, with implications for how it should be interpreted.[69]

There is some evidence of acceptance of relational contract theory in cases involving alleged undue influence and/or unconscionability, though the courts typically do not use the language of relational contracts. For example, a relatively recent case involved a party wishing to invalidate a pre-nuptial and post-nuptial agreement on the basis of both doctrines.[70] The court explained that undue influence was presumed to exist in respect of transactions involving particular relationships.[71] In other cases, undue influence was not presumed, but it was open for one party to show their will was overborne by another. This might often occur because of the relationship the parties had. In relation to unconscionable conduct, one of the requirements was that the party claiming its existence was required to show they were at a special disadvantage compared with the other.[72] Again, one of the ways in which a special disadvantage might exist could be that the parties have an existing relationship, for example a familial relationship (as occurred in one of the leading Australian cases on unconscionable conduct).[73] Though this category of cases may be explained as an application of relational contract theory, it should be emphasised again that the High Court did not couch its decision in such language.

The discrete contract approach assumes 'presentiation' is readily achievable. On the discrete model of contracting, a high degree of 'presentiation' is possible.[74] Macneil defines 'presentiation' to mean making something present in time or place. In the discrete model of contracting, presentiation is easy to achieve – it is not difficult to articulate today promise/s to do things that will take place tomorrow. It is acknowledged that, with some contracts, presentiation is possible – if I contract to purchase a bottle of water, it would be relatively easy to settle on the terms of future performance, partly because performance is easy and simple, requirements to perform can be readily articulated and performance will occur momentarily after the contract is entered into. Macneil says that 'presentiation of a transaction involves restricting its expected future effects to those defined in the present'.[75] Classical contract law reflects presentiation – with its reification of the written terms over everything else, and the way in which it seeks to

66. [2003] FCA 50, [921]('*GEC*').
67. (2014) 253 CLR 169, 194 (French CJ Bell and Keane JJ)('*Barker*').
68. *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661, 1679 (Lord Hodge, with whom Lord Kerr agreed)('*Braganza*').
69. [2018] EWCA 264, [93]-[94](Jackson LJ); see also *Globe Motors v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [67](Beatson LJ); and at High Court level: *Bates v The Post Office* (No3)[2019] EWHC 606, [705]: 'the concept of relational contracts is an established one in English law' (Fraser J)('*Bates*').
70. *Thorne v Kennedy* (2017) 263 CLR 85.
71. 101–2 (Kiefel CJ Bell Gageler Keane and Edelman JJ), citing the judgment of Latham CJ in *Johnson v Buttress* (1936) 56 CLR 113, 119. The relevant relationships were parent/child, guardian/ward, trustee/beneficiary, legal adviser/client, doctor/patient and religious advisor/adherent.
72. *Thorne v Kennedy* (2017) 263 CLR 85, 103 (Kiefel CJ Bell Gageler Keane and Edelman JJ).
73. *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 (parent and child).
74. Ian Macneil, '*Restatement (Second) of Contracts* and Presentiation' (1974) 60 *Virginia Law Review* 589, 594.
75. Macneil, 'Adjustment' (n 43) 863.

generally exclude other evidence such as the history of the parties' relationship, pre-contractual negotiations, or actual performance after execution of the contract.

However, Macneil says that most contracts are not like this. Specifically, relational contracts (including employment contracts) are not like this, for several reasons.[76] Firstly, they typically occur over a longer period, making it more difficult to 'presentiate'. Secondly, performance is not necessarily easy and simple. Thirdly, it is much more difficult to articulate requirements to perform.[77] Macneil views contracts as a continuum, with discrete contracts at one end and relational contracts at the other end. As a given situation moves closer to the 'relational' end, presentiation plays a less important role. He says that more aspects of the relations between the parties must, of necessity, be left to future determination.[78] Leggatt J accepted this point in *Yam Seng Pty Ltd v International Trade Corp Ltd*, concluding that 'contracts can never be complete in the sense of expressly providing for every event that may happen'.[79] Many years earlier, Atiyah had made a similar point: 'we know too much about social behaviour to believe that people in general can calculate future chances and maximise their satisfaction over any period of time'.[80] He opines that English business people 'have no great desire to use contracts as instruments of risk allocation concerning unknown future events', and business people are 'often constrained to agree to adjustments to contractual terms where subsequent events make the original contract no longer capable of performance on a fair basis'.[81] He states that executory contracting is declining, in favour of a more flexible approach based on notions of reliance and benefit, a throwback to the pre-Industrial Relations era focussed on what has actually occurred or is occurring, rather than a fixation on contract terms.[82] Similarly, Macaulay concludes that 'the object of contracting is not primarily to allocate risks, but to signify a commitment to co-operate'.[83]

Definitional difficulties – which contracts are relational?. It is acknowledged that not every contract type is, of its nature, relational.[84] A casual purchase of goods from a food outlet during a road trip would be one example. There is no prior planning; the parties are strangers to one another, and will unlikely encounter each other again. However, many other contract types would be relational. Goetz and Scott attempted a definition of such contracts, stating that 'a contract is relational to the extent that the parties are incapable of reducing important terms of the

76. 595–96.
77. Ian Macneil, 'Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich" Classification Apparatus' (n 34) 1028–29: 'discreteness calls for measurement and specificity … (but) many kinds of labour beggar any effort at precise specificity or measurement at any time'.
78. See also Richard Speidel, 'The Characteristics and Challenges of Relational Contracts' (2000) 94(3) *Northwestern University Law Review* 823, 823: 'the exchange relationship (in relational contracts) extends over time … because of the extended duration, parts of the exchange cannot be easily measured or precisely defined at the time of contracting'.
79. (n 9)[139].
80. Atiyah (n 2) 629.
81. 714.
82. Atiyah (n 2) 754–60.
83. Macaulay in Campbell, Collins and Wightman ed (n 24) 81. Others claim that risk allocation is a prime objective of contracting: Lord Hobhouse (n 16) 532–33.
84. cf. Ian Macneil, 'Values in Contract: Internal and External' (1983) 78 *Northwestern University Law Review* 340, 341–42: 'all contracts are relational. Nevertheless, some contracts are … far more relational than others'; similarly Campbell (n 9) 147–48.

arrangement to well-defined obligations'.[85] They cited employment contracts as being within this definition, because it was not possible to specify in detail in advance the precise nature of the worker's obligations regarding performance, and because of the impossibility of knowing in advance unforeseen contingencies that may impact on performance subsequent to the execution of the contract. Case law supports the view of employment contracts as being relational in nature.[86]

In *Yam Seng Pte Ltd v International Trade Corp Ltd*,[87] Leggatt J (as he then was) indicated that other examples of relational contracts might include joint ventures, franchise arrangements and long-term distributorships. He suggested such relationships were characterised by a high degree of mutual trust and confidence. Leading contract law scholar Hugh Collins suggests the following features indicate a contract may be relational:

(a) Expectation of a longer-term business relationship;
(b) Investment of substantial resources by both parties;
(c) Implicit expectations of co-operation and loyalty that shape performance obligations to give business efficacy to the arrangements; and
(d) Implicit expectations of mutual trust and confidence, not merely avoiding dishonesty.[88]

Collins says this list is a helpful guide, but no more than that.[89]

In *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*, Finn J acknowledged that in relational contract situations, there was a need to adjust terms to take into account unforeseen events and circumstances. Fairness and commercial reasonableness would be of assistance in guiding such variations.[90] In *Bates v Post Office Ltd (No3)*, Fraser J articulated a list of eight factors to assist in determining whether or not a contractual relationship was relational in nature:

(a) No express terms express to the contrary;
(b) Contract will be long-term in nature, reflecting the parties' intention;
(c) Parties intend their bargain will be performed with integrity, faithful to the bargain;
(d) Parties are committed to collaborating with one another in the performance of their contract;
(e) Spirit and objectives of the contract may not be able to be exclusively expressed in the contract;
(f) Parties repose trust and confidence in one another (but not in the sense of a fiduciary relationship);

85. Charles Goetz and Robert Scott, 'Principles of Relational Contracts' (1981) 67(6) *Virginia Law Review* 1089, 1091.
86. *Johnson v Unisys Ltd* [2003] 1 AC 518, 532 (Lord Steyn); *Braganza* (n 68) 1677–78 (Lord Hodge, with whom Lord Kerr agreed).
87. (n 9) [142].
88. Hugh Collins, 'Employment as a Relational Contract' (2021) 137 *Law Quarterly Review* 426, 429. Collins claims further that 'incompleteness by design' is a 'necessary' feature of relational contracts' (430). I do not necessarily accept this limitation. Cases such as *Yam Seng* recognise that reality that, in most cases, it will be impossible for contracting parties to anticipate in advance circumstances that will occur subsequent to the entry into the contract by the parties. This impossibility is obviously more likely in longer-term contracts.
89. 429.
90. (n 66) [230].

(g) Contact expected to involve a high degree of communication, co-operation and predictable performance between the parties, based on mutual trust and confidence and expectations of loyalty;
(h) Each of the parties has made a substantial investment in the subject matter of the contract; and
(i) The parties' relationship may be exclusive in nature.[91]

The list was expressed not to be exhaustive. It was not necessary that all elements be present in order that a contract be viewed as relational in nature.

Macneil also clearly views contracts involving the engagement of workers to be relational, classifying them as 'contracts of adhesion', where typically there is little or no negotiation as to the terms of the engagement.[92] This places them far from the assumptions underlying the 'discrete' view of contract.

Some relational contract theorists distinguish between discrete contracts and relational ones, primarily on the basis that the former represents a one-off transaction between strangers, while the latter reflect contracts between parties in a pre-existing relationship. Obviously, it can sometimes be difficult to determine when an originally discrete contract has morphed into a relational one. Is it the second occasion on which parties contract that their arrangement morphs from a discrete one to a relational one? Attempts have been made to define relational contracts, whether based on the length of the parties' relationship, the nature of the contractual obligations (for example, whether the contract concerns the purchase of a simple commodity, on the one hand, or involves the delivery of highly skilled labour, on the other), and whether it is possible for the parties to reduce the full scope of their contract to writing.[93] Some have derided such attempts on the basis that all, or virtually all, contracts are relational.[94] It can be acknowledged that it can be difficult at times to determine whether or not a particular relationship is relational, and this is a weakness in the theory.

Kimel argues

> The crux of the matter is that the relationship in question is such that it has the propensity to generate norms, define or inform parties' expectations, provide sources of reassurance, facilitate co-operation, create interdependence … over and above, indeed potentially instead of, what can be gleaned from the express terms of the contract or contracts to which they are parties, and over and above what is provided by the bare legal norms and legal mechanisms that underlie or support these contracts.[95]

91. (n 69) [725].
92. Macneil, 'Many Futures' (n 43) 770. He shares the view of Goetz and Scott is the inability of the parties in such a context to anticipate the future: 'The concept of "I accept" in a transactional sale of goods is an atmosphere of total uncondition. The context of "I accept employment on your terms" is a recognition of the inevitable tentativeness of consent to a relation, the inevitable mutuality of future superseding events, and all the rest of the elements which, in a relation, cause even the clearest expression of adhesive consent to suffer from essential fuzziness' (771). He refers to the tendency of the legal system to assume that contingencies were planned before commencement, but claims such an assumption is unrealistic (774).
93. Goetz and Scott (n 85) 1091.
94. Eisenberg (n 9) 821.
95. Dori Kimel, 'The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model' (2007) 27 *Oxford Journal of Legal Studies* 233, 236.

In essence, it is a weakness of relational contract theory that there is no definitive agreed test for determining whether or not a contract is relational.[96] A further weakness in Macneil's work is that his position seemed to evolve on various matters. At times, he appeared to deny the reality of discrete contracts; at others, he acknowledged their existence. At times, he noted the impossibility of presentiation in contracts; at others, he acknowledged a high degree of presentiation was possible with discrete contracts.[97]

It must also be acknowledged that some theorists argue it is overly simplistic to categorise contractual relationships as being either discrete (where self-interest is paramount) or relational (where co-operation is paramount). In many cases, contracts involve *both* self-interest and commitment to the parties' agreed bargain.[98] To be fair, some of Macneil's work acknowledges this. Some argued a further weakness that, at times, Macneil discussed the individual-centred, freedom of contract approach as being mutually exclusive to a relational, co-operative approach. Yet, at other times, he sought to build a 'third way' that attempted to embrace both, though he was criticised for the impossibility of doing so.[99]

Consequences of a finding that contracts are typically relational. A relational view of contracting potentially has many potential implications for the law of contract generally, though Macneil did not specify in great detail what these should be,[100] and this failure has been documented in the literature,[101] and identified as a further weakness of relational contract theory.[102] He did *not* advocate for special rules that would be applied to a class of contracts considered relational; he seemed to wish to change the approach taken to contracts generally, in light of the realities of contracting, which he believed classical contract law effectively ignored.[103] He identified a trust norm applicable to contracts; sub-categories of this norm included preservation of the contractual relation, harmonisation of conflict, propriety of means and role integrity.[104] Similarly, Collins identified specific consequences of a relational contract. These are: (a) interpretation of contracts in a deeply contextual manner; (b) dynamic variation and adjustment of contractual obligations; (c) recognition of binding, intermittent contracts in the context of long-term business relations; and (d) mandatory contractual obligation to perform it in good faith.[105]

96. Hugh Collins, 'Is a Relational Concept a Legal Concept?' in Simone Degeling, James Edelman and James Goudkamp *Contract in Commercial Law* (Lawbook Co, 2016) 37, 38.
97. David Campbell, 'Introduction' to *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell, 2001) 42–45.
98. Catherine Mitchell, 'Contracts and Contract Law: Challenging the Distinction Between the Real and Paper Deal' (2009) 29 *Oxford Journal of Legal Studies* 675, 694.
99. David Campbell, 'Introduction' *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell, 2001) 55–57.
100. Mitchell (n 41) 184–86; Douglas Brodie, 'Relational Contracts' in Mark Freedland et al (ed) *The Contract of Employment* (Oxford University Press, 2016). Conversely, some scholars, though acknowledging that contracts are typically relational, insist that contract law is (and remain) formal and classical: RE Scott, 'The Case for Formalism in Relational Contract' (2000) 94 *Northwestern University Law Review* 847, 852.
101. Eisenberg (n 9) 813: 'constructing a body of relational contract law requires more than rejecting the approaches and assumptions of classical contract law. It also requires the formulation of a new body of legal rules based on approaches and assumptions that are justified by morality, policy and experience'. For a recent attempt see Campbell (n 9).
102. Collins in Degeling, Edelman and Goudkamp (n 96) 38; Morgan (n 10) 65.
103. 45.
104. Macneil (n 84) 362–66.
105. Collins (n 88) 428.

There is not space here to discuss all possibilities. One would be recognition of a doctrine of good faith,[106] as Collins suggested. This principle remains contentious in the Australian[107] and United Kingdom[108] contract law, while being accepted in Canada[109] and the United States.[110] I have written about it elsewhere,[111] and a discussion here would be beyond the scope of the

106. 885; *Barker* (n 67) 184 (French CJ Bell and Keane JJ). There is a real issue as to whether this would be through a process of construction/interpretation of the contract, or the implication of a term: Elisabeth Peden, 'When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability' (2005) 21 *Journal of Contract Law* 226, 228. It is not necessary to resolve that question here. The Canadian Supreme Court sidestepped the implied terms difficulties by defining good faith as an 'organising principle' of Canadian contract law: *Bhasin v Hrynew* [2014] 3 SCR 494, [33](Cromwell J, for the Court)('*Bhasin*'). Leading judicial advocate of good faith Justice Leggatt suggested the doctrine could evolve so that it applied to every contract, except to the extent it was excluded expressly or by implication: (n 52)[44](now Lord Leggatt of the United Kingdom Supreme Court). It derives support from Sir Frederick Pollock: 'the law of contract may be described as the endeavour of the state … to establish a positive sanction for the expectation of good faith which has grown in the mutual dealings of men of average right mindedness': *Principles of Contract Law* (4th ed, Stevens and Sons, 1885) 9; Roger Brownsword *Contract Law: Themes for the Twenty-First Century* (Oxford University Press, 2nd ed, 2006) ch 6.
107. Lower court decisions have accepted it as a general contractual principle (e.g. *Renard Constructions (ME) Pty Ltd v Canada (Minister of Public Works*)(1992) 26 NSWLR 234; *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Macquarie International Health Clinic v Sydney South West Area Health Service Ltd* [2010] NSWCA 268, but the High Court of Australia has left open the question of its acceptance in Australia either as a general principle of contractual interpretation and/or as conditioning the use of contractual discretion: *Barker* (n 66) 195–96 (French CJ Bell and Keane JJ); 213–14 (Kiefel J). If it does condition the exercise of contractual discretion, naturally questions arise as to why it does not/should not apply more broadly to the contract in general: Justice Leggatt (n 52) [55](now Lord Leggatt of the United Kingdom Supreme Court).
108. *Times Travel (UK) Ltd v PIA Corporation* [2021] 3 WLR 727, 739: 'English law has never recognised a general principle of good faith in contracting' (Lord Hodge), 761 (Lord Burrows); *Walford v Miles* [1992] 2 AC 128, 138 (Lord Ackner, for the Court); cf. *Carter v Boehm* (1766) 3 Burr. 1905, 97 ER 1162 (KB) where Lord Mansfield called it the 'governing principle … to all contracts and dealings'; *Mellish v Motteux* (1792) Peake 156, 170 ER 113 (KB); *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [106]: 'implications of good faith and rationality and the lack of arbitrariness or perversity, are standard, for they represent the very essence of business (and other) relationships' (Rix LJ, with whom Lloyd and Laws LLJ agreed); *Telefonica O2 UK Ltd v British Telecommunications Plc* [2014] UKSC 42, [37] where Lord Sumption (for the court) stated that in the absence of written words to the contrary, a contractual discretion was to be exercised in good faith, and not arbitrary, capricious or inconsistent with its purpose; *Braganza* (n 67) 1670–71 (Baroness Hale, with whom Lord Kerr agreed); *Peters American Delicacy Co Ltd v Champion* (1928) 41 CLR 316, 324–25 (Knox CJ Isaacs Gavan Duffy JJ)(rejecting an 'unfair and unreasonable' interpretation of one contracting party's discretion) ('*Peters*'); *Carr v Berriman* (1953) 89 CLR 327, 347 (Fullagar J, though he did not use the term 'good faith' in requiring that a contractual discretion not be exercised in an unreasonable way); *Meehan v Jones* (1982) 149 CLR 571, 592 (Mason J)(similar to *Carr*) but cf. others who rejected reasonableness as limiting contractual discretion: 581 (Gibbs CJ) and 597 (Murphy J and Wilson J); *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [15] Lord Bingham (with whom Lord Steyn agreed) stated that contracting parties 'assume the honesty and good faith or the other; absent such an assumption they would not deal'. Lord Leggatt (now of the Supreme Court) has expressed support for good faith whilst a member of other courts: *Abu Dhabi National Tanker Co v Product Star Shipping* (No2)[1993] 1 Lloyd's Rep 397 (Leggatt LJ, with whom Balcombe and Mann LJJ agreed)(in the context of contractual discretion); *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); *Nehayan v Kent* [2018] EWHC 333 (Comm), [167]-[176](Leggatt LJ).
109. *Bhasin* (n 106).
110. *Uniform Commercial Code* s 1–203; American Law Institute *Restatement (Second) of Contract* s 205.
111. Anthony Gray, 'Good Faith in Australian Contract Law After *Barker*' (2015) 43(5) *Australian Business Law Review* 358; Anthony Gray, 'Recent Developments in Good Faith in Canada, the United Kingdom and Australia' (2015) 55(3) *Canadian Business Law Journal* 84.'

current article. Other supporters of a relational view of (some) contracts have expressed the link between it and good faith.[112] It might include duties of co-operation,[113] fidelity to the bargain,[114] and reasonableness,[115] meeting of legitimate and reasonable expectations,[116] and avoiding 'opportunistic' behaviour.[117] It might include substantive fairness.[118] It is *not* the equivalent of a fiduciary duty.[119] The Australian High Court has generally eschewed the imposition of fiduciary duties within the commercial context,[120] and acceptance of the relational nature of contracting would not necessitate this being overturned. The immediate focus here is on its application to support use of evidence of actual performance to interpret contract provisions.[121] This would be encompassed within the *second* of Collins' identified principles discussed just above, as Collins himself recognised:

112. Collins (n 88) 442–48; David Campbell, 'Good Faith and the Ubiquity of the Relational Contract' (2014) 77 *Modern Law Review* 475; *Yam Seng Pte Ltd v International Trade Corp* [2013] EWHC 111, [125]–[142](Leggatt J, as he then was); cf. *Taqa Bratani Ltd v Rockrose* [2020] EWHC 58 (Comm) where although the judge agreed the parties' contract was arguably relational in nature, refused to imply that a contractual discretion had to be exercised in a good faith, non-arbitrary way: [56].
113. *Yam Seng Pte Ltd v International Trade Corp* [2013] EWHC 111, [142](disclosure obligation) and [145](not to unreasonably withhold consent within a contractual setting)(Leggatt J), reflecting a nineteenth-century decision that where a contract environment requires both parties to co-operate in order to achieve the objective/s of the contract, an obligation so to co-operate will be implied if not expressed: *Mackay v Dick* (1881) 6 App Cas 251, 263 (Lord Blackburn); *Butt v McDonald* (1896) 7 QLJ 68, 70–71; *Marshall v Colonial Bank of Australasia* (1904) 1 CLR 632, 647 (Griffith CJ).
114. e.g *Yam Seng Pty Ltd v International Trade Corporation Ltd* [2013] EWHC 111, [142](Leggatt J, as he then was); *D and G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB); Collins in Degeling, Edelman and Goudkamp (n 96) 58; cf. Morgan (n 10) 89: 'the law should not enforce norms of trust and co-operation'.
115. For example, in *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661, 1679 Lord Hodge (with whom Lord Kerr agreed) stated in obiter that because employment contracts were relational, an employer's exercise of contractual discretion may need to be justified by cogent evidence. Some interpretations of good faith include a requirement of reasonableness (e.g. *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch), [296]; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 258–63 (Priestley JA); *Compound Photonics Group Limited v Faulkner and Others* [2022] EWCA Civ 1371, [241](Newey LJ, Lady Justice Carr and Snowden LJ); *Bhasin* (n 99)[63](Cromwell J, for the Court); others do not (*Medforth v Blake* [2000] Ch 86, 103 (Scott V-C)); Peden (n 106) 236; see Mason (n 8) 69; Brownsword (n 106) ch 5.
116. Macneil (n 57) 904; Collins (n 37) 143–48.
117. Campbell (n 9) 124–25 (discussing *Arcos Ltd v EA Ronaasen and Sons* [1933] AC 470, involving rejection of goods on a highly technical basis in order to take advantage of a market collapse to obtain an equivalent product at much lower rates). This type of behaviour may also be unreasonable and/or demonstrate lack of fidelity to the bargain.
118. R Austen-Baker, 'Comprehensive Contract Theory: A Four-Norm Model of Contractual Relations' (2009) 25 *Journal of Contract Law* 216, 221–22; P S Atiyah, 'Contract and Fair Exchange' (1985) 35 *University of Toronto Law Journal* 1, 17; cf. *Yam Seng* (n 9) [150](Leggatt J).
119. *Al Neyahan v Kent* [2018] EWHC 333 (Comm) [167](Leggatt LJ); *Macquarie International Health Clinic v Sydney South West Area Health Service* [2010] NSWCA 268, [13]; *Bhasin* (n 106)[65](Cromwell J, for the Court); Collins in Degeling Edelman and Goudkamp (n 96) 43.
120. *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.
121. For example, Boyle argues that cases such as *Quinn v Calder* [1996] IRLR 126 and *Albion Automotive Ltd v Walker* [2002] All ER (D) 170 (Jun), where an employer engaged in practices post-contract entry that were ultimately held to be contractually binding upon them, cannot readily be explained by classic contract law theory, but can be if a relational contract approach is taken: Matthew Boyle, 'The Relational Principle of Trust and Confidence' (2007) 27 *Oxford Journal of Legal Studies* 633, 640.

> In a relational contract, it will be the parties' current reasonable expectations that form the substance of the obligations of the parties, not their historical expectations, and probably not inconsistent express terms of the contract.[122]

Relational contract scholars argue for a reduced importance and emphasis on the written terms of an agreement between parties. If contracts are relational, they involve parties in a relationship typically characterised by a high degree of trust and co-operation, where the parties value the relationship that has been created, and generally work to maintain this relationship, even at a cost. In such a world, the strict wording of the contract matters much less than classical contract law would have us believe. The trust inherent in the relationship means parties in such a situation are unlikely to reduce all terms of their agreement to writing. This supports an argument in favour of the court resolving contractual interpretation issues by considering the surrounding context.[123] This involves conduct after the execution of the contract, including actual performance. This is because

> Business partners engaged in sustained and repeated dealing do not fully plan for and allocate risks in their contract. Instead, the parties depend on relational norms such as flexibility and reciprocity to administer their agreements. Therefore the social context and the great sea of custom form the foundation of the parties' bargain. Critically, relational norms can govern transactions that end up in litigation only if extrinsic evidence regarding the parties' surrounding context may be submitted to identify the context of such norms.[124]

Macneil took a similar view:

> Adjustments of existing contractual relations occur in numerous ways. Performance itself is a kind of adjustment from original planning. Even meticulous performance of the most explicit planning transforms figments of the imagination, however, precise, into a new, and therefore different, reality. A set of blueprints and specifications, however detailed, and a newly built house simply are not the same. Less explicit planning is changed even more by performance … the vaguely articulated duties of a secretary are made concrete by (their) actual performance of a day's work. Perhaps this is merely a way of saying that planning is inherently filled with gaps, and that performance fills the gaps, thereby altering the relations as originally planned.[125]

122. Collins (n 88) 438.
123. Collins in Degeling, Edelman and Goudkamp (n 96) 55: 'a hallmark of relational contracts is that the parties do not regard their written contract as a more or less complete statement of their rights and obligations, but expect that these obligations will evolve and be refined as the project develops'.
124. Silverstein (n 58) 277; Orsola Razzolini, 'The Need to Go Beyond the Contract: Economic and Bureaucratic Dependence in Personal Work Relations' (2010) 31 *Comparative Labour Law and Policy Journal* 267, 298: 'according to relational contracts theory, it goes without saying that the contractual agreement cannot regulate ex ante all the events and changes that occur in the future'.
125. Macneil, 'Adjustments' (n 43) 873. He claims that neoclassical contract law will continue to 'rub in an unnecessarily abrasive' way against the reality of relational contracts and their need for flexibility and change, and this will only improve once it is recognised that the assumption of contract law that all of a contractual relation is encompassed in original assent is called out as false (888).

Relational contract scholars say that, to the extent that the law of contract continues to cling to a formalist rather than substantive view of a contract, its very legitimacy is placed in jeopardy.[126] There is significant scholarly support for such an approach to contractual interpretation.[127]

Acceptance that contracts are typically relational may have important implications for the question of remedies for breach. This important issue has been explored in more detail in recent literature,[128] and will not be considered in detail here.

In summary, Part II has placed relational contract theory into the traditional context of contract law principle involving freedom of contract doctrine. The assumptions made by the freedom of contract doctrine are not realistic today, if indeed they ever were. Although recently, some members of the High Court appeared to re-embrace a version of freedom of contract, 10 years ago the Court expressly acknowledged it was not a 'universal legal value'. An alternative way of viewing parties' contract is through a relational approach. This approach is argued to more realistically explain most contract situations, which involve repeated engagement between parties, high degree of trust and confidence, and behaviour informed by the need to maintain good relations between the parties. Most contracts are relational, not discrete, as the freedom of contract model presumes. In such a situation, the letter of the agreement does not warrant the reification it gets in the freedom of contract approach. Contrary to what freedom of contract might suggest, it is typically difficult for contracting parties to 'presentiate'. This practically limits the ability of any contracting parties, even if they wished to, to comprehensively agree today about every possible issue that might arise in future. Because parties typically do not place the reliance on the written terms that classic contract law assumes, because of the typically high trust and confidence the parties repose in each other, and because of the practical difficulties of presentiation, the reality is that contracting parties leave much of their agreement unstated in the written agreement. This is based on their expectations of trust and co-operation.

Practically, if commercial law reflects and should reflect commercial practice, this leads (should lead) to the conclusion that the court should not be fixated on the written agreement in resolving a dispute between the parties, but consider extraneous circumstances, including subsequent performance. Part III now considers the extent to which common law courts either continue to apply the freedom of contract model to this issue or have moved away from it, and accepted evidence of subsequent performance as being relevant to contractual interpretation. Acceptance of relational contract theory would support the latter.

126. Macaulay in Campbell, Collins and John Wightman ed (n 24) 102: 'we might decide that there is a high court in legitimacy if the legal system comes to symbolise that contract rests on manipulations of forms and courts reject the substance of the real deal of the parties'.

127. Schwartz and Scott, 'Contract Interpretation Redux' (n 16) 938: 'the (almost) scholarly consensus shares the *UCC* and *Restatement* view that the appropriate first order interpretive preference should be goal neutral … and that this preference is best implemented by permitting the court to access a broad evidentiary base in determining both the terms of the contract and the meaning to be attached to those terms'; Collins (n 37) 201 refers to the 'virus of legal formalism'.

128. Golding (n 1) 280–89.

Relevance of subsequent performance to contractual interpretation in the United Kingdom, United States, Canada, New Zealand, in international contractual documents and in Australian law prior to 2022 decisions

Some relevant general principles of contractual interpretation

One relevant principle, consistent with freedom of contract principles, is the parol evidence rule. The (presumptive)[129] rule is that

> Where parties agree to embody, and do actually embody, their contract in a formal written deed, then in determining what the contract really was and really meant, a court must look to the formal deed and to that deed alone.[130]

Generally, contract law seeks to discern the intention of the parties to the contract on an *objective* basis – giving the words used in the parties' contract their naturally understood meaning, and presuming that the words used reflect the parties' intentions.[131] The question is what a reasonable person would have understood the words the parties used to mean.[132] This approach has been described as consistent with relational contract theory discussed above.[133] Traditionally, extrinsic evidence was not *generally* permitted to shed further light on the parties' intentions

129. *Gillespie Bros & Co v Cheney Eggar and Co* [1896] 2 QB 59, 62 (Lord Russell); *Life Insurance Co of Australia Ltd v Phillips* (1925) 26 CLR 60, 71 (Knox CJ).
130. *Inglis v John Buttery & Co* (1878) 3 App Cas 552, 577 (Lord Blackburn, quoting Lord Gifford in an unnamed case); Robert Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' in Andrew Burrows and Edwin Peel *Contract Terms* (Oxford University Press, 2007) 109.
131. *Reardon-Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 996 (Lord Wilberforce, with whom Lords Simon and Kilbrandon agreed); *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, 2907–08 (Lord Clarke, with whom Lords Phillips, Mance, Kerr and Wilson agreed)('*Rainy Sky*'); *Wood (n 32)* 1179 (Lord Hodge); *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 352 (Mason J, with whom Stephen and Wilson JJ agreed)('*Codelfa*'); *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 461–62 (Gleeson CJ Gummow Hayne Callinan and Heydon JJ)('*Pacific Carriers*'); *Toll (FGCT) Pty Limited v Alphapharm Pty Ltd and Others* (2004) 219 CLR 165, 179 (Gleeson CJ Gummow Hayne Callinan and Heydon JJ); *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd and Another* (2015) 256 CLR 104, 116 (French CJ Nettle and Gordon JJ)('*Mount Bruce*'); *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656 (French CJ Hayne Crennan and Kiefel JJ)('*Woodside*'); John Carter *Contract Law in Australia* (LexisNexis, 7th ed, 2018) 256; John Carter *The Construction of Commercial Contracts* (Hart Publishing, Oxford, 2013) s 1-04; see for discussion Tony Cole, 'The Parol Evidence Rule: A Comparative Analysis and Proposal' (2003) 26 *University of New South Wales Law Journal* 680.
132. *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, 1112 (Lord Hoffman, with whom Lord Hope, Lord Rodger, Lord Walker and Baroness Hall agreed)('*Chartbrook*'); *Arnott* (n 5) 1627 (Lord Neuberger, with whom Lords Sumption and Hughes agreed); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–13 (Lord Hoffmann, with whom Lords Goff, Hope and Clyde agreed)('*Investors*'); *Pacific Carriers* (n 131) 462 (Gleeson CJ Gummow Hayne Callinan and Heydon JJ); *Mount Bruce* (n 131) 116 (French CJ Nettle and Gordon JJ). This also applies to cases where there is no written contract, in which case the parties' words *and acts* will be scrutinized objectively to determine their intent: *Realestate.com.au Pty Ltd v Hardingham* [2022] HCA 39, [15]–[17](Kiefel CJ and Gageler J, [47](Gordon J), [83](Edelman and Steward JJ).
133. Douglas Brodie, 'How Relational is the Employment Contract?' (2011) 40(3) *Industrial Law Journal* 232, 240.

or agreement.[134] This general prohibition would also apply to evidence of conduct subsequent to the entry of the contract.[135] This traditional general rule has become subject to such broad-ranging exceptions that the rule is now very marginal,[136] and focus on context has become dominant.[137] Relevant exceptions potentially relevant here include where there is an ambiguity in the written terms,[138] though there is serious doubt as to whether ambiguity is *necessary* in order to resort to 'context' and criticism of the notion of ambiguity.[139] Doubt attends the matter in Australia. There is High Court authority for the proposition that a finding of ambiguity is a pre-condition to a consideration of surrounding circumstances or context (an acceptance of the position of Mason J in *Codelfa*),[140] an apparent finding ambiguity is *not*

134. *Codelfa* (n 131) 347–48: 'the broad purpose of the parol evidence rule is to exclude extrinsic evidence (except as to surrounding circumstances) including direct statements of intention (except in cases of latent ambiguity) and antecedent negotiations to subtract from, add to, vary or contradict the language of a written instrument … it has often been regarded as prohibiting the use of extrinsic evidence (to interpret the written instrument). No doubt this was due to the theory which came to prevail in English legal thinking in the first half of this century that the words of a contract are ordinarily to be given their plain and ordinary meaning' (Mason J)(with whom Stephen and Wilson JJ agreed). For elaboration see Nicholas Tiverios, 'Accuracy, Utility and Gateways: Justifications(?) for Controlling the Use of Surrounding Circumstances in Contractual Interpretation' (2021) 43(4) *Sydney Law Review* 547. There is debate regarding the extent to which (if at all) statements in the High Court decisions subsequently to *Codelfa* embrace the view of Mason J, or express a different view more akin to *Reardon*, obviating the requirement of ambiguity: Joshua Getzler, 'Interpretation, Evidence, and the Discovery of Contractual Intention' in Degeling Edelman and Goudkamp (n 96) 132–33.

135. *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] AC 583: 'it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made' (Lord Reid, 603); to like effect Lord Hodson (606), Viscount Dilhorne (611) and Lord Wilberforce (614)('*Whitworth*'); *Schuler (AG)* v *Wickman Machine Tools Sales Ltd* [1974] AC 235, 261: 'the general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained on legal principles of construction from the words they have used. It is one and the same principle which excludes evidence of statements or actions during negotiations at the time of the contract, or subsequent to the contract' (Lord Wilberforce), to like effect Lord Reid (252), Lord Morris (260), Lord Simon (268) and Lord Kilbrandon (272)('*Wickman*'). These comments were cited with evident approval in *Administration of the Territory of Papua and New Guinea and Another* (1973) 130 CLR 353, 446 (Gibbs J), with whom Menzies and Stephen JJ agreed (405, 459), and in *Agricultural and Rural Finance Pty Ltd v Gardiner and Another* (2008) 238 CLR 570, 582 (Gummow Hayne and Kiefel JJ)('*Agricultural*').

136. John Carter, 'Commercial Construction and Contract Doctrine' (2009) 25 *Journal of Contract Law* 83, 83 says it has 'faded into obscurity'.

137. John Carter and Wayne Courtney, 'Unexpressed Intention and Contract Construction' (2017) 37(2) *Oxford Journal of Legal Studies* 326, 333.

138. *Attorney-General v Shore* (1843) 11 Sim 592, 631; 59 ER 1002, 1021: '(an) instrument (must) … always … be construed according to the strict, plain, common meaning of the words themselves (only where they 'are free from ambiguity in themselves, and external circumstances do not create any doubt or difficulty'; *Watcham v Attorney-General East Africa Protectorate* [1919] AC 533; *Attorney-General v Drummond* (1842) 1 Dr & War 353, 368; *Wickman* (n 135) 261 (Lord Wilberforce) and 272 (Lord Kilbrandon); Lord Simon (268) disagreed. In *Wood* (n 33), Lord Hodge stated that when there were 'rival meanings' as to particular contractual clauses, the court could reach a view more consistent with commercial common sense. This position was accepted in *Farmer v Honan and Dunne* (1919) 26 CLR 183, 197 (Isaacs and Rich JJ) and is reflected in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2009) 240 CLR 45, 70 (Kirby J)('*Royal Botanic*').

139. Campbell (n 9) 118: 'there is no ambiguous natural language to be contrasted to contextual interpretation, for it is content that in one case makes language appear natural and in another makes it appear ambiguous'; Carter states almost any word or expression is capable of more than one meaning: (n 131) 267.

140. *Mount Bruce* (n 131) 116 (French CJ Nettle and Gordon JJ), indicating no departure from *Codelfa* was intended (117), though the justices indicated resort to surrounding circumstances was justified where 'constructional choice' was possible (117). Respectfully, it is submitted (in agreement with John Carter) that constructional choice will

necessary,[141] and acknowledgement that the matter remains open.[142] This is not a satisfactory state of affairs.

Courts will generally consider 'surrounding circumstances' in the interpretation of contractual provision.[143] Further, courts will respond where the literal interpretation of the words does not make commercial sense.[144] A court will tend to lean towards an interpretation reflecting 'business common sense',[145] which can include reasonable expectations of the parties.[146] Parties may argue the written contract was not intended to reflect the entirety of their agreement.[147] Parties may also agree to a variation to the contract after its drafting is complete. Obviously, on occasion, it is also possible to imply terms into contracts, though this occurs sparingly,[148] and is separate from and not part of the interpretation (construction) of the original

almost always, if not always, be possible. Confusion arises because the High Court in *Royal Botanic* (n 138) acknowledging a possible difference in approach between *Codelfa* and United Kingdom decisions favouring a contextual approach such as *Investors Compensation Scheme*, stated that the Court would not resolve the issue in *Royal Botanic* but that lower courts should continue to follow *Codelfa*, in the event of conflict between it and the United Kingdom approach: 63 (Gleeson CJ Gaudron McHugh Gummow and Hayne JJ); similarly *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1, 2–3 (Gummow Heydon and Bell JJ).

141. In *Pacific Carriers* (n 131) 462 five members of the High Court (Gleeson CJ Gummow Hayne Callinan and Heydon JJ) stated that the construction of a contractual clause was based on what a reasonable person would have understood it to mean. In turn, this was based on the text, surrounding circumstances, and purpose and object of the transaction. It did *not* confine this approach to circumstances of ambiguity, as Mason J had done. A similar approach is evident in *Woodside* (n 131) 656–57 (French CJ Hayne Crennan and Kiefel JJ) where reference to a consideration of surrounding circumstances is *not* conditioned by a requirement of ambiguity.
142. *Mount Bruce* (n 131) 132 (Kiefel and Keane JJ).
143. *Arnold* (n 5) 1627–28 (Lord Neuberger, with whom Lords Sumption and Hughes agreed); *Investors* (n 132) 913 where Lord Hoffmann referred to 'absolutely anything,' which could shed light on how a reasonable person would have understood the contract; *White v Australian and New Zealand Theatres Ltd* (1943) 67 CLR 266, 271 (Latham CJ) and 281 (Williams J); *Codelfa* (n 127) 348 (Mason J, with whom Stephen and Wilson JJ agreed); similarly Brennan J: 'the meaning of a written contract may be illuminated by evidence of facts to which the writing refers, for the symbols of language convey meaning according to the circumstances in which they are used' (401). The comments of Brennan J were cited with evident approval by Gleeson CJ Gaudron McHugh Gummow and Hayne JJ in *Royal Botanic* (n 134) 53, though the High Court recognised a possible difference in the use of surrounding circumstances in Australia compared with the United Kingdom, as explained above; Carter (n 132) 94: 'we should not be fooled by the concept of "natural meaning". It does not excuse a court from identifying the appropriate community standard by reference to which linguistic meaning must be determined. Nor does it legitimise literal interpretation of a contract to the facts. In virtually every case, the standard for application under the modern law is the commercial standard'.
144. *Chartbrook* (n 132) 1112 (Lord Hoffmann, with whom Lord Hope, Lord Rodger, Lord Walker and Baroness Hale agreed); later Lord Hoffmann referred to 'something (having) gone wrong with the language' of the contract as a basis for a court 're-arrang(ing) or correct(ing)' the words to reflect what a reasonable person would have understood the parties to mean (1114); *Homburg Houtimport BV v Agrosin Ltd* [2004] 1 AC 715, 738 (Lord Hoffmann); *Arnott* (n 5) 1651 (Lord Carnwath).
145. *Rainy Sky* (n 131) 2911 (Lord Clarke, with whom Lords Phillips, Mance, Kerr and Wilson agreed); *Woodside* (n 131) 657 (French CJ Hayne Crennan and Kiefel JJ).
146. Lord Steyn (n 45) 441.
147. *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348, 357 (Latham CJ).
148. *Marks & Spencer Plc v BNP Paribas Securities* [2016] AC 742, 755 ('*Marks & Spencer*'); *Barker* (n 67) 189 (French CJ Bell and Keane JJ), 199–201 (Kiefel J). In that case, the Court rejected a suggestion to imply into employment contracts a duty of mutual trust and confidence. Five requirements for the implication of a term in fact were stated in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 (PC), and discussed in *Marks & Spencer* (751–57). The *BP* requirements were modified somewhat in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 422–23 (Brennan CJ Dawson and Toohey JJ); John Carter, Wayne

contract.[149] Some argue that the classical model of contract law inevitably relies upon, but does not acknowledge, implied dimensions of contractual relationships,[150] and this is not limited to circumstances of ambiguity.[151]

Obviously, a relational approach to contracting would support a non-literal approach to contractual interpretation envisaged by this focus on context, not merely text, the implication of terms, and a consideration of surrounding circumstances, reasonable expectations of the parties and what is commercially sensible.[152] This would not require a finding of ambiguity as a pre-condition to such analysis.

Australian authorities – relevance of actual performance as well as contract terms in contractual interpretation

The High Court at one time seemed to adopt a practical approach to the determination of a given relationship. Considering a contract that purported to define a relationship as being one of principal/agent rather than employment, three members stated that:

> If in practice the company assumes the detailed direction and control of the agents in the daily performance of their work and the agents tacitly accept a position of subordination to authority and to orders and instructions as to the manner in which they carry out their duties, a clause designed to prevent the relation receiving the legal complexion which it truly wears would be ineffectual.[153]

In *Stevens v Brodribb Sawmilling Co Pty Ltd*,[154] Mason J emphasised it was the totality of the relationship between the parties that was determinative of an issue regarding the classification of

Courtney, Elisabeth Peden, Joellen Riley and Greg Tolhurst, 'Terms Implied in Law: Trust and Confidence in the High Court of Australia' (2015) 32 *Journal of Contract Law* 203.

149. *Marks & Spencer* (n 148) 756–57 (Lord Neuberger, with whom Lords Sumption and Hodge agreed); cf. *Attorney-General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, 1995 (Lord Hoffmann, for the Privy Council); Carter and Courtney (n 137) 355. For example, in *Peters* (n 108) the High Court refused to imply a term that limited the contractual discretion of one of the parties, but construed the contract to prevent that party exercising it in an 'unfair and unreasonable' way: 324 (Knox CJ Isaacs and Gavan Duffy JJ).
150. Campbell and Collins in Campbell, Collins and Wightman ed (n 24) 32.
151. 'The option of sticking to the literal meaning of the contract, except in some cases such as ambiguity, which is sometimes describes as formalism, is not … in reality available' (34); *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502, 524 (Rogers CJ Comm D): 'it is inimical to the effective administration of justice in commercial disputes that a court should use a finely tuned linguistic fork'.
152. Mitchell (n 100) who, after documenting Lord Hoffmann's expression of a contextual approach to contractual interpretation in *Investors* (n 132), stated that 'what the process of contextual interpretation requires is not the construction of the parties' agreement, but the reconstruction of it – the reassembly of its constituent parts, and the expectations and motivations, both documented and undocumented, that helped create it … in many cases contractual relationships are governed both by documents and relational norms at the same time' (702, 704).
153. *The Queen v Foster; Ex Parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138, 151 (Dixon CJ Fullagar and Kitto JJ); similarly *Curtis v Perth and Fremantle Bottle Exchange Co Ltd* (1914) 18 CLR 17, 25 noting that parties to a contract 'cannot by a mere consensual label alter the inherent character of the relations they have actually called into existence. Many cases have arisen where courts have disregarded such labels, because in law they were wrong, and looked beneath them to the real substance' (Isaacs J). Discussion of this is sometimes couched in terms of estoppel: *Thompson v Palmer* (1933) 49 CLR 507, 547 (Dixon J); *Grundt v Great Boulder Pty Ltd Gold Mines Ltd* (1937) 59 CLR 641, 656–57 (Latham CJ) and 676–77 (Dixon J).
154. (1986) 160 CLR 16.

a worker.[155] Mason J appeared to consider actual evidence of contractual performance in reaching his conclusion. He refers to 'the evidence'. It is not always entirely clear to what extent these matters were provided for in the contract, because the contract or relevant parts of it are not reproduced in the judgment. However, Mason J notes, for example, that one of the workers 'was left entirely to exercise his own skill and judgment'.[156] Later he noted the authority of a supervisor 'seems to have been confined to organisation of (specified) activities'.[157] Wilson and Dawson JJ also appeared to consider aspects of actual contractual performance in reaching their conclusion as to the status of a worker. For example, 'the evidence establishes clearly enough that the bush boss determined … where ramps were to be built .. if the weather was bad the bush boss would decide whether to suspend work'.[158] Later, they found that 'the operation of carting the logs appears to have been *carried out* upon similar terms' (emphasis added).[159] Albeit in a different context, Deane J expressed a preference for 'substantive content' of the relationship between the parties, rather than a 'technical characterisation'.[160]

The matter was again considered in the context of bicycle couriers, and the status of their engagement, in *Hollis v Vabu Pty Ltd*.[161] There the written contractual documentation between the company and the couriers was sparse. It did not make express provision for many matters, including the courier's rate of remuneration. In some respects, contents of the written documentation did not match the reality – for instance, the written contracts referred to payment of annual and sick leave, but the High Court noted no such payments were actually given. This led five members of the Court to observe:

> The relationship between the parties, for the purposes of this litigation, is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposes by *Vabu* go to establishing 'the totality of the relationship' between the parties (citing Mason J in *Stevens*); it is that which is to be considered.[162]

Thus, the Court interpreted the reference of Mason J in *Stevens* to the 'totality of the relationship' to include actual performance as being relevant to contractual interpretation, at least in the context of determining the nature of a work-related engagement.

The joint reasons referred to both the contractual documentation 'and the work practices imposed by *Vabu*'[163] in determining whether or not the couriers were employees. The joint reasons referred to the fact that the couriers had little control over the manner in which their work was performed.[164] They referred to payment arrangements that occurred in practice.[165]

155. 29.
156. 25.
157. 26.
158. 37.
159. 39.
160. 50.
161. (2001) 207 CLR 21.
162. 33 (Gleeson CJ Gaudron Gummow Kirby and Hayne JJ). Of course, reasonable minds might differ regarding the meaning of 'totality of the relationship' and whether that does, or does not, contemplate consideration of matters that occurred after the contract was executed: Pauline Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32 *Journal of Contract Law* 149, 156–57.
163. 42.
164. 42.
165. 43–44.

Given that the brief contract terms were included in the judgment in *Hollis*, it can be confidently said that these matters were *not* the subject of express contractual provision. As a result, it was essential, in order for the court to completely understand the nature of the parties' relationship, to refer both to the written terms of the engagement, and how the engagement operated *in practice*. Members of the Court agreed that it was the substance of the agreement that mattered, and that labels were not determinative.[166]

On the other hand, three members of the Court subsequently agreed with comments of a United Kingdom court that 'it is not legitimate to use as an aid in the construction of a contract anything which the parties said or did after it was made'.[167] Carter acknowledges this is the orthodox position in the Australian law.[168] Sir Anthony Mason acknowledged this was the traditional rule, but opined there were 'rational grounds' for discarding it.[169] If this were at one time the United Kingdom position, it will now be shown that that jurisdiction's courts have now departed from this position, *at least with respect to some types of contract*.

United Kingdom authorities – relevance of actual performance as well as contract terms in contractual interpretation

The Privy Council in *Narich Pty Ltd v Commissioner of Pay-Roll Tax* considered the question whether the court was limited in its consideration of the evidence to the contents of the parties' written contract. It concluded:

> Subject to one exception, where there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances surrounding the making of it; *and it is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract.* The one exception to that rule is that, where the subsequent conduct of the parties can be shown to have amounted to an agreed addition to, or modification of the original written contract, such conduct may be considered … by the court.[170] (emphasis added)

The Council also rejected the importance of labels in a contract to describe the parties' bargain, confirming that the substance of the arrangement was the overriding consideration, not the way in which the parties labelled matters.[171]

166. 45 (Gleeson CJ Gaudron Gummow Kirby and Hayne JJ), and 50 (McHugh J).
167. *Whitworth* (n 135) 603 (Lord Reid), cited with evident approval in *Agricultural* (n 135) 582 (Gummow Hayne and Kiefel JJ).
168. Carter (n 131) 264: 'the subsequent conduct of the parties cannot be used to construe a contractual document'.
169. *The Mason Papers* (Federation Press, 2007) 300–2.
170. *Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1984] I.C.R 286, 291 (Lord Brandon, for the Privy Council)(a decision regarding Australian law)('*Narich*'); similarly *Whitworth* (n 135) 603 (Lord Reid), similarly Lord Hodson (606), Viscount Dilhorne (611) and Lord Wilberforce (614); *Wickman* (n 128) 261 (Lord Wilberforce). Earlier Lord Denning had taken a different view: *Amalgamated Property Co v Texas Bank* [1982] QB 84, 119 (CA): 'for many years I thought that when the meaning of a contract was uncertain you could look at the subsequent conduct of the parties so as to ascertain it. That seemed to me sensible enough'; Gerard McMeel, 'Prior Negotiations and Subsequent Conduct – The Next Step Forward for Contractual Interpretation?' (2003) 119 *Law Quarterly Review* 272.
171. *Narich* (n 170) 291 (Lord Brandon, for the Privy Council).

In *Carmichael v National Power Plc*,[172] the House of Lords considered whether tour guides were employees. One issue was whether an exchange of correspondence between the parties amounted to a contract. In denying that it was, Lord Irvine noted the possibility that a lower level decision maker had determined that the correspondence did not reflect the entirety of the parties' bargain, that there were other sources through which the parties' true intention could be gleaned. This comments apparently opened the door to the possibility of evidence of conduct subsequent to contract formation being used to determine the true nature of the parties' relationship.

This possibility was subsequently developed in cases where a written contract existed between the parties. Courts became more prepared to accept that, even in the absence of evidence of a *sham*,[173] the written agreement may not reflect the actuality of the parties' agreement.[174] In tenancy cases, the courts were prepared to overlook clauses in contracts purporting to make agreements licences, when in 'reality' the agreements were leases.[175] The court determined this reality by evidence of what occurred, or more precisely what did not occur, subsequent to the entry into the agreement.[176] These cases could not have been decided based on the sham doctrine, because there was no evidence that *both* parties intended to deceive as to the true nature of the arrangements.[177]

Bomball suggests a nascent doctrine of 'pretence' to describe another circumstance in which the courts will ignore the content, or at least part of the content, of the written contract. This could occur where neither of the parties intend that the contract will be performed as written, that a particular clause or clauses are to be of no effect. This is not a sham as conventionally defined because there is no common intention to deceive.[178] Others say the pretence doctrine is reflected where the *dominant party to the contract* does not intend a contractual clause to be enforced as written.[179]

An approach to the relevance of subsequent conduct in determining the true nature of the parties' relationship clearly different than *Narich* was apparent in *Autoclenz Ltd v Belcher*

172. [1999] 1 WLR 2042.
173. The orthodox view was that a sham involved a situation where *both* parties to a transaction contrived to make an agreement that they did not intend would reflect the reality of their relationship: *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802 (Diplock LJ) and 804 (Russell LJ)('*Snook*').
174. *Protectacoat Firthglow Ltd v Szilagyi* [2009] EWCA Civ 98, [55]–[56]: 'the question is always what the true legal relationship is between the parties … if it is asserted by either party … that the document (if any) does not represent or describe the true relationship, the court … has to decide what the true relationship is … while a document which can be shown to be a sham designed to deceive others will be wholly disregarded in deciding what is the true relationship between the parties, it is not only in such a case that its contents cease to be definitive. If the evidence establishes that the true relationship was, and was intended to be, different from what is described in the document, then it is that relationship and not the document or documents alone which define the contract' (Smith LJ, with whom Keene LJ and Sedley LJ agreed).
175. *Street v Mountford* [1985] 1 AC 809; *A-G Securities v Vaughan; Antoniades v Villiers* [1990] 1 AC 417 ('*Vaughan*').
176. V*aughan* (n 175) 463 (Lord Templeman), 469 (Lord Oliver), and 476 (Lord Jauncey); see for discussion Pauline Bomball, 'Intention, Pretence and the Contract of Employment' (2019) 35 *Journal of Contract Law* 243, 254–56.
177. Other examples include *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm) where Clarke J explained that a contractual party's conduct could be useful in determining the parties' bargain: [348]–[352].
178. Bomball (n 176) 260–61.
179. Susan Bright, Hannah Glover and Jeremias Prassl, 'Tenancy Agreements' in Edwin Simpson and Miranda Stewart eds *Sham Transactions* (Oxford University Press, 2013) 111.

and Others.[180] There the workers were engaged to clean cars. The firm engaging the workers asked workers to sign an agreement. This agreement sought to emphasise that the relationship between the parties was one of client and independent contractor, rather than employer and employee. It expressly permitted contractors to sub-contract the work out, provided the sub-contractor complied with the requirements of the contract. The contract required contractors to perform the work in a good and workmanlike manner, and to meet all taxation and insurance obligations themselves. The contract stated the cleaners would not be required to provide services on any particular occasion, and the company had no obligation to offer work to cleaners over any particular timeframe.

The Supreme Court found that, in reality, the cleaners were *effectively* employees.[181] The reasoning is particularly important, given the contract was written to apparently emphasise an intention that the parties not be in an employment relationship. As noted above, the Court has been prepared to look beyond labels in determining the real nature of the relationship. To that extent, *Autoclenz* did not herald a new approach. What was noteworthy, however, was the willingness of the Court to look *beyond* the written terms of the contract. This was not a case where subsequent performance indicated an agreed variation to the original terms – recall that this was the exception provided in the earlier *Narich* decision to its general admonition that the contractual terms were the sole means by which to determine the status of the parties' relationship. The Court suggested that a different approach might be justified in relation to employment contracts, as opposed to other commercial contracts,[182] because of the unequal bargaining power between the parties. This could lead to a contract being created that was one-sided and potentially artificial, not accurately reflecting either the parties' actual intentions, or how the contract in fact was performed. This led the court to the following conclusion:

> So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.[183]

This is a significant departure from the approach taken by the Privy Council in *Narich*. The concept of 'true agreement' has been criticised on the basis of its ambiguity.[184] It is,

180. [2011] ICR 1157 ('*Autoclenz*').
181. Technically, the Court was considering whether the cleaners were 'workers' within the meaning of relevant United Kingdom statutory instruments. However, that definition refers to those engaged in an 'employment relationship', and the Supreme Court found that the cleaners were so engaged. Thus, it can be said that the Court effectively found the cleaners were employees.
182. In relation to commercial contracts, the orthodoxy is that the courts will only look behind the written terms of the agreement in favour of actual contractual performance in circumstances where the agreement is a 'sham'. This is considered to mean a situation where *both* parties intend that the actual arrangements will differ from the agreed contract terms: *Snook* (n 166) 802 (Diplock LJ) and 804 (Russell LJ). The United Kingdom Supreme Court subsequently found that this may be too narrow an approach to the concept of 'sham', at least in the context of employment-type contracts: *Autoclenz* (n 180)[28](Lord Clarke, with whom Lord Hope, Lord Walker, Lord Wilson and Lord Collins agreed).
183. 1168 (Lord Clarke (with whom Lords Hope, Walker, Wilson and Collins agreed)). As a counter-argument to this, Brodie (n 133) 249 argues that a focus on actual performance could be counterproductive because 'the way in which the parties behave is very much driven by the interests of the party with superior bargaining power. It is therefore extremely dangerous to suggest that the way in which employment relationships are typically operated should be judicially endorsed'.
184. Bomball (n 176) 249.

however, considered to be consistent with the United Kingdom's general approach to contractual interpretation noted above, with a focus on context rather than text, and a willingness to consider all surrounding circumstances.

The Court concluded that, in several ways, the contractual terms did not reflect the actual performance of the contract. Firstly, it accepted factual findings of lower decision making authorities that the cleaners were *in fact* obliged to perform work offered to them, and Autoclenz was under an obligation *in fact* to offer them work (both of which were contrary to the express terms of the engagement). The Court accepted the factual finding that cleaners could not *in fact* sub-contract the work out, again directly contradictory of the express terms of the agreement.[185] It supported application of the law, in such a case, to the facts reflected in the contract as actually performed, rather than that in the written terms.

This approach has been applied subsequently. In determining whether Deliveroo drivers were employees or independent contractors, a Central Arbitration Committee noted the importance of determining all relevant evidence, and stated that this included the written contract and evidence of how parties conducted themselves in practice. The Committee noted evidence of how the parties conducted themselves in practice might be so persuasive as to suggest this reflected the parties' true obligations. These comments were cited and apparently approved in the Court of Appeal as being consistent with *Autoclenz*. Underhill LJ added that the Committee was 'alive to the possibility that the terms of the … contract might not reflect the true agreement between the parties'.[186]

Recently in *Uber BV & Ors v Alsam & Ors*[187], the United Kingdom Supreme Court reflected on the importance of the *Autoclenz* decision:

> The *Autoclenz* case shows that, in determining whether an individual is an employee or other worker for the purpose of the legislation, the approach endorsed in the *Carmichael* case is appropriate even when there is a formal written agreement (and even if the agreement contains a clause stating that the document is intended to record the entire agreement of the parties). This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. Furthermore, … any terms which purport to classify the parties' relationship, or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded.[188]

In other words, 'where the provisions of the contract are at variance with the reality of the facts they should be disregarded'.[189] There is also evidence of this approach to contractual

185. 1170–71.
186. *Independent Workers' Union of Great Britain and Central Arbitration Committee and Roofoods Ltd t/a Deliveroo* [2021] EWCA Civ 952, [26](with whom Coulson and Phillips LLJ agreed).
187. [2021] UKSC 5.
188. [85](Lord Leggatt, with whom Lord Reed, Lord Hodge, Lady Arden, Lord Sales and Lord Hamblen agreed).
189. *Addison Lee Ltd v Lange & Ors* [2021] EWCA Civ 594, [12](Bean LJ).

interpretation outside the context of an employment relationship,[190] countering any suggestions it might be limited to the employment context.

Thus, the United Kingdom law has moved away from an exclusive focus on the written terms of an agreement as per the parol evidence rule and freedom of contract principles, and become increasingly willing to consider conduct after the contract was executed in terms of contractual interpretation. As indicated, this is consistent with more general trends in contractual interpretation in the United Kingdom.

Academic support for a focus on the substantive, including actual performance

Much of the scholarly writing in this area (discussed below) suggests that courts should focus on the economic realities of the situation, the direction in which the United Kingdom law has moved, as opposed to a consideration confined to the terms of the contract. Obviously, this divide can appear in relation to numerous contractual issues. One is the question of actual contractual performance, as opposed to the written terms. Sometimes, but obviously not always, this arises in an employment context, where the issue of whether a worker is an employee or independent contractor is raised, and arguments made that the written terms do not reflect, and perhaps were never intended to reflect, the realities of the engagement. Some of the comments referred to below, and the recent High Court decisions, occur in that context. Of course, this is not the only possible context in which the discussion might appear. And it is acknowledged some of the comments below occur in the broader labour law context of the rights of workers, not contractual interpretation per se, though in this context, the issues overlap.

Leading labour law scholar Andrew Stewart criticises the status quo on the basis that it permits parties (in particular, the employer) to frame an arrangement in a way so as to achieve desired ends (specifically, a finding that the worker is not an employee) although the realities are quite different. As he puts it:

> As Gray J so memorably put it … 'the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck. The fact is though that it is possible under Australian law to do just that. If the contract that governs the parties' relationship has enough duck-like features, most courts … will be persuaded that they are looking at a duck – even if the underlying reality of the relationship would suggest a rooster. The key to this, and to the success of the drafting strategy just described, is the preoccupation that most judges have with the formal terms of the arrangement they are scrutinising.[191]

190. *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710, 730: 'it is not enough to provide in the debenture that the account is a blocked account if it is not operated as one in fact' (Lord Millett, for the Privy Council). The (legal) basis for this observation was not specified.

191. Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 1, 13. In his proposed reforms, Stewart specifically includes that courts should have regard to the practical reality of each relationship, rather than merely the formal agreement (37). He concludes it should not be possible for businesses to escape regulation primarily designed to protect workers by clever drafting (41); see also Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32 *Australian Journal of Labour Law* 4, 7: 'if weight is given to how the parties have chosen to structure their relationship, this will inevitably make it easier for organisations to evade the cost of employment entitlements by drafting contracts that minimise any appearance of control and emphasise what may be illusory 'freedoms' for the worker'; Brian Langille and Guy Davidov, 'Beyond Employees and Independent Contractors: A View from Canada' (1999) 21

Pauline Bomball suggests the courts have sometimes conflated issues relating to ascertaining the actual agreement, and the construction of terms of that agreement. She suggests that courts should take into account the realities of the parties' agreement, including conduct subsequent to entry into the contract, at the first of these stages. She argues this is necessary to prevent the inclusion of clauses in contracts, such as substitution clauses (permitting the worker to substitute the work out to another) or no-obligation clauses (stating that the worker is under no obligation to accept any work offered), in order to make it more likely that a court will interpret the terms of the contract to be a contractor rather than employment relationship, even when these clauses do not reflect, and perhaps were not intended to reflect (at least on the part of one of the parties to it), how the contract is to be actually performed.[192] She views an approach that accords primacy to the contract terms, with little or no reference to the parties' subsequent performance, as privileging form over substance.[193]

David McLauchlan favours evidence of subsequent conduct being relevant to questions of contractual interpretation, in limited cases.[194] His view is that subsequent conduct is or may be relevant if it sheds light on the parties' intentions in entering into the contract. To that extent (only), he says evidence of subsequent conduct is relevant. In contrast, if subsequent conduct relates to a matter the parties had not considered as part of contractual deliberations, it is impossible to say that the conduct relates to the parties' intentions in entering into the contract; in such circumstances, he would deny the relevance of subsequent conduct. There is some judicial support for the view of McLauchlan.[195] Writing extra-judicially, Lord Nicholls stated

> Evidence of the parties' subsequent conduct is sought to be used as a means of identifying the meaning borne by the language of the contract from its inception. The fact that this evidence only came into being after the contract was made can hardly be a good reason for declining to admit it.[196]

Lord Steyn expressed a similar view:

> Business people and, for that matter, ordinary people, simply do not understand a rule which excludes from consideration how the parties have in the course of performance interpreted their contract. The law must not be allowed to drift too far from the intuitive reactions of justice or men and

Comparative Labor Law and Policy Journal *7, 15: 'if the purpose of labor and employment laws is to protect workers that find themselves in a certain position vis-à-vis their employers, it cannot matter that the form has changed. It is only the reality of the relationship – what the actual position of the workers and whether the purpose of the law was to cover workers in such a position that counts'.*

192. Bomball (n 162) 158–59.
193. Pauline Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42 *Melbourne University Law Review* 370, 382.
194. 'Contract Formation, Contract Interpretation and Subsequent Conduct' (2006) 25 *University of Queensland Law Journal* 77, 88; David McLaughlan, 'The Continuing Confusion and Uncertainty over the Relevance of Actual Mutual Intention in Contract Interpretation' (2021) 37 *Journal of Contract Law* 25, 42–44.
195. *Attorney-General v Dreux Holdings Ltd* (1996) 7 TCLR 617, 631 stating that evidence of post-contract conduct was 'admitted for the purpose of persuading the court that it provides a reliable guide to the meaning which the parties attributed to the contract when it was signed. The proper construction is assisted and not changed by the subsequent conduct. In this manner, the court's ability to give effect to the mutual intention of the parties is undoubtedly furthered' (Thomas J).
196. 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 *Law Quarterly Review* 577, 589.

women of good sense: the rule (excluding evidence of) subsequent conduct may have to be re-examined.[197]

Support for use of subsequent conduct in contractual interpretation from international and comparative law sources

International contract materials also contemplate the use of subsequent conduct as an aid to contractual interpretation. For example Article 8(3) of the *United Nations Convention on Contracts for the International Sale of Goods* states that, in determining the 'intent of a party or the understanding a reasonable person would have had', all relevant circumstances are to be considered, including parties' conduct subsequent to the creation of the contract. Article 4 of the *UNIDROIT Principles of International Commercial Contracts* (2016) states that contracts should be interpreted according to the common intention of the parties or, where that cannot be gleaned, the meaning that a reasonable person would put on the terms used. Article 4(3)(c) states that in applying the Article, conduct of the parties subsequent to the conclusion of the contract is relevant.[198] This position reflects civil law practice.[199]

The United States commercial law recognises a doctrine of 'course of performance', which is evidence of how a contract is performed in fact by either party, where the other party has knowledge of how the contract is being performed in fact, has an opportunity to object to it, but does not do so.[200] In such a case, the 'course of performance' is relevant in determining the meaning of the parties' agreement. This includes giving specific meaning to particular terms, including supplementing or qualifying terms. Wherever possible, express terms and course of performance must be interpreted so as to be consistent with one another.[201] If this is unreasonable, express terms will prevail over the course of performance.[202] Stephen Charles observed that the United States had demonstrated for many years the workability of contractual law that included consideration of subsequent performance in contractual interpretation.[203] It must be acknowledged that the United States commercial law typically takes a subjective, rather than objective, view of the parties' intentions. Whether this makes a difference in how important subsequent performance is to contractual interpretation is considered in Part V below. Evidence of subsequent conduct may be relevant to contractual interpretation in Canada[204] and New Zealand.[205] In both contexts, such evidence may be used to provide objective evidence as to what the parties intended by agreeing to particular terms of the written agreement.[206] The

197. 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 5, 10.
198. McLaughlan (n 190) 107–8.
199. Razzolini (n 123) 274–75.
200. *Uniform Commercial Code* (1952) s 1-303(a).
201. Ibid.
202. Ibid.
203. Stephen Charles, 'Interpretation of Ambiguous Contracts by Reference to Subsequent Conduct' (1991) 4 *Journal of Contract Law* 16, 36.
204. *Canadian National Railways v Canadian Pacific Limited* [1979] WWR 358, 372 (BC Court of Appeal); *Shewchuk v Blackmont Capital Inc* [2016] ONCA 912 (Ontario Court of Appeal).
205. *Bathurst Resources Limited v L & M Coal Holdings Limited* [2021] NZSC 85.
206. [84]–[89](Winkelmann CJ and Ellen France JJ, with whom Glazebrook O'Regan and Williams JJ relevantly agreed: [232]; *Shewchuk v Blackmont Capital Inc* [2016] ONCA 912, [48](Strathy CJO, with whom Weiler JA and Watt JA agreed). Strathy CJO added it might also be useful to shoe the meaning the parties gave to the wording in their contract after its execution: [48].

Ontario Court of Appeal also outlined some reasons to be wary about the use of such evidence,[207] and provided criteria for assessing the weight to be given to such evidence.[208] However, it is (or may be) utilised.

In conclusion, the United Kingdom law has moved from a general position reifying the written terms of the contract above all else, to the exclusion of evidence of subsequent performance, to a position whereby subsequent conduct is taken into account. This reflects the position in the United States, Canada, New Zealand and in international contract law materials. It enjoys significant academic support. After an initial period where the Australian law took a similar position, more recent sentiments indicate a return to freedom of contract principles where evidence of subsequent conduct is generally excluded. The next Part will demonstrate that this remains the majority view of the High Court, though two justices dissent from that position.

The 2022 employment decisions – *CFMMEU* and *ZG Operations*

CFMMEU

Construct was a labour-hire company providing workers in the construction industry. Mr McCourt signed a services agreement with Construct. This agreement described him as a 'self-employed contractor'. The contract did not guarantee the contractor would receive any particular work, and the contractor was free to decline work offered and to work for others. The contract stated Construct would not be liable for paying annual leave, sick leave or long service leave, which would typically be payable in respect of an employment relationship. The contractor acknowledged he was not an employee of Construct. The contractor was to provide tools of trade and equipment required by the builder. Construct liaised with construction companies regarding the provision of labour. It would typically negotiate with the company as to the payment rate for the labour supplied, duration etc. The personnel supplied were able to negotiate a higher rate. He was asked to commence work on a construction company's work site, Hanssen. He was given that company's induction form and rules, and was informed he would be directed and supervised by an employee of Hanssen. Construct attended the site occasionally but did not direct Mr McCourt as to the work he should do. The contractor would be paid once they had issued an invoice to Construct. Both the trial judge and the Court of Appeal found that the agreement between Construct and McCourt involved an independent contractor–client relationship, rather than an employment relationship. This was based on the existing law whereby a number of factors were considered to determine the nature of a relationship, including questions of control (see further below), as well as the terms on which Mr McCourt was engaged. The High Court by a majority of 6–1 allowed an appeal against the decision of the Full Court, concluding that Mr McCourt was an employee of Construct. There were essentially two main questions to be considered – how to determine whether or not the workers were 'employees' and the relevance of actual performance of the contract in interpreting it.

207. These include that parties' behaviour may change over time, that such evidence may itself be ambiguous, and it might reward self-serving conduct: [43]–[45]. This led the Court to the conclusion that such evidence should only be used where the written contract was ambiguous.

208. The court indicated the weighting to be given to subsequent conduct would vary from case to case. Its weighting would be affected by considerations such as whether the conduct consisted of acts of both parties or just one, were consistent or inconsistent, whether it was unequivocal or equivocal in meaning and whether it occurred shortly after the contract was executed or not: [52]–[55](Strathy CJO, with whom Weiler JA and Watt JA agreed).

Though admittedly, the second of these questions helped to answer the first, the following discussion relates to the second question *only*.

Kiefel CJ Keane and Edelman JJ ('first joint reasons') placed emphasis on the terms of the contract between the parties to ascertain the true nature of the relationship between them, especially when it was common ground that the agreement between the relevant parties was entirely written:

> Where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under that contract. Where no party seeks to (argue that the contract is a sham or should otherwise be held invalid) there is no occasion to seek to determine the character of the parties' relationship by a wide-ranging review of the entire history of the parties' dealings. Such a review is neither necessary not appropriate because the task of the court is to enforce the parties' rights and obligations, not to form a view as to what a fair adjustment of the parties' rights might require.[209]

The first joint reasons emphasised this approach did not mean that parties could place a label on something that was contrary to the actual terms of the contract, and expect the courts to give effect to the label. To that extent, at least, the reasons emphasised a practical approach, focussed on the actual terms of the contract as objectively construed, rather than labels.[210] This approach was consistent with the High Court's decision in *WorkPac Pty Ltd v Rossato.*[211]

While reaching the same conclusion as the first joint reasons, Gageler and Gleeson JJ ('second joint reasons') took a different approach, which emphasised what occurred during the McCourt's performance of his contractual obligations, taking this together with the precise terms. They drew a distinction between the formation of a contract and its performance. The second joint reasons concluded it was imperative to look at the totality of the circumstances, including performance, to clarify the parties' obligations. This was because sometimes the terms of the engagement were opaque, obscure or ambiguous, and sometimes the court was faced with a standard form agreement where the clauses might have been prepared by one of the parties with little or no input from the other, and such as to 'dress up' the relationship to be something different from what it in fact turned out to be.[212] Gageler and Gleeson JJ concluded that in relation to both contracts entirely in writing, and those partly in writing and partly oral, that the manner of performance of the contract had to be considered.[213] To be clear, Gageler and Gleeson JJ did not dispute that ordinary contractual principles were to be applied in interpreting employment agreements; their difference with the first joint reasons was to the relevance of parties' subsequent conduct in that interpretation exercise.[214]

Gordon J generally agreed with the first joint reasons that it was a matter of construing the contract pursuant to which the worker was engaged. It was not a matter of considering how the

209. (n 17) [59].
210. [58].
211. [2021] HCA 23, [57]: 'to the extent that Bromberg J expressed support for the notion that the characterisation exercise should have regard to the entirety of the employment relationship, his Honour erred' (Kiefel CJ Keane Gordon Edelman Steward and Gleeson JJ); [118](Gageler J).
212. (n 17) [132].
213. [143].
214. [124]–[125].

contract had been performed in construing the contract, though Gordon J acknowledged conduct subsequent to formation could be relevant to other issues, including determining whether or not the contract was a sham.[215] Steward J agreed with the approach of Gordon J.[216]

ZG Operations

These differences of approach were evident in *ZG Operations*. The factual matrix differed – this case concerned the classification of truck drivers engaged by the appellants. The appellants had originally been employees of a previous owner of ZG Operations. The arrangements were restructured, with the drivers being re-engaged as independent contractors, who would provide and use their own trucks and equipment to complete the work. The truck drivers relevantly set up partnerships involving their wives, and provided the services through that vehicle. The question was whether the relationship between the parties was one of employment or independent contractor. All members of the High Court allowed an appeal against a finding by the Full Federal Court that the relationship was an employment one.

Kiefel CJ Keane and Edelman JJ ('first joint reasons') again emphasised that the question must be answered by construing the contract between the parties. It was not a sham, and there was no suggestion it had been altered by subsequent conduct. The first joint reasons concluded that the Full Federal Court had erred in considering aspects of how the parties' actually performed the contract. It had considered evidence that there was an expectation that the trucks would feature the livery of the appellants, that they would wear uniforms contained that company's branding and that the reality of the number of hours the truck drivers worked to meet the appellant's obligations meant that there was little opportunity to work for other businesses, and the appellants did not do so. Further, they had been engaged by the appellants over a long period of time.[217] The Full Federal Court considered these matters in considering the 'totality of the circumstances'. However, the first joint reasons concluded that these matters ought not to have been given significance, and nor should any disparity in bargaining party between the parties.[218] There were other legal remedies for unfairness in contract terms.

Gageler and Gleeson JJ applied the same approach they had taken in *CFMMEU*, focussing on the substance of the relationship, as reflected in contractual performance, together with the express terms. Thus, they largely agreed with the approach taken by the Full Federal Court, although they disagreed with its reasoning, finding that the fact the truck drivers used their own equipment, and had their own business structure, suggested that they were in truth independent contractors.[219] Gordon and Stewart JJ adopted the approach of Gordon J in *CFMMEU*.

Consideration

Criticism of approach of first joint reasons

The first joint reasons is essentially a manifestation of a freedom of contract that seeks to give primacy to the written terms of the contract, disregarding all else. This article has already

215. [177].
216. [222].
217. [52]–[56].
218. [50]–[51].
219. [88]–[89].

discussed difficulties with that approach. As discussed earlier, a relational view of contract suggests that the parties, because of their typically long-standing relationship, simply do not reduce all aspects of their agreement to writing. As noted above, it is not possible to presentiate in the way that freedom of contract principles assume. Simply giving effect to the terms of the parties' bargain assumes the written contract is a product of a healthy negotiation between parties of relatively equal bargaining power. It is fairly common knowledge this is not the reality of much contracting, including in particular employment-type contracts. The assumptions implicitly underlying the reasoning of the first joint reasons are, with respect, not realistic.

It is submitted that the second joint reasons contain a much more realistic view of contracts, specifically acknowledging that the terms may be standard form in nature, determined by the more powerful party and presented to the worker with little or no negotiations.[220] Though concededly Gageler and Gleeson JJ did not expressly refer to relational contract theory, their view of the realities of contracting, and conviction that the 'true character' of a relationship can only be gleaned by a consideration of all of the circumstances, including manner of performance, is consistent with a relational view of contracts.[221]

Though the first joint reasons gave essential primacy to the written terms of the contract above all else, it recognised that an exception might exist when the contract is a 'sham'. The orthodox definition of a sham, drawn from the decision in *Snook v London and West Riding Investments Ltd*,[222] is that it involves a contract where *both* parties intend that the actual arrangement will differ from the agreed contract terms. It is possible a broader view could be taken of the concept, as has occurred in a subsequent United Kingdom Supreme Court decision in *Autoclenz*.[223] However, the High Court of Australia in *CFMMEU* and *ZG Operations* made surprisingly little use of that precedent, despite its apparently central relevance to the issues raised; so frankly, it is not known what definition of 'sham' will be applied in the Australian context. On the assumption it applies the orthodox definition, that exception is arguably too narrow. It is submitted that in many cases, it will be the party who drafted the contract who might intend that performance will differ from contractual terms. The other party to the contract may not have turned their attention to the matter, or may simply have no effective choice other than to sign the contract prepared by the other. In a situation like that, it would be nigh on impossible to prove that both parties intended contractual performance to differ from the written terms. The 'sham' exception as currently conceived arguably poses too high a bar to work effectively,[224] and the first joint reasons were wrong (with respect) to rely on it as effectively a panacea for situations where there may be a difference between contract performance and written contractual terms.

A further reason the first joint reasons give for now taking into account all of the parties' dealings is that to do so would effectively be about 'form(ing) a view as to what a fair adjustment of the parties' rights might require'.[225] Respectfully, this is not considered to be an accurate reflection of the alternative position to theirs adopted by Gageler and Gleeson JJ. The approach of these justices is to seek to understand the true nature of the parties' relationship

220. (n 17)[132]).
221. Ibid.
222. (n 173) 802 (Diplock LJ) and 804 (Russell LJ).
223. (n 180) [28](Lord Clarke, with whom Lord Hope, Lord Walker, Lord Wilson and Lord Collins agreed).
224. A C L Davies, 'Sensible Thinking About Sham Transactions' (2009) 38 *Industrial Law Journal* 318; Bomball (n 169) 252–54.
225. [59](Kiefel CJ Keane and Edelman JJ).

by considering the 'bigger picture' of the parties' relations – here the written contract is important, but only one piece of a bigger puzzle. Other pieces should also be considered, including post-execution performance. This enquiry is designed to get a fuller picture of the parties' agreement; respectfully, it is not designed to make a 'fair adjustment of the parties' rights'; nor is it about estoppel or waiver.[226] Gageler and Gleeson JJ do not express themselves in this way, and it is considered to be an inaccurate portrayal of their views and approach.

Given that Gageler and Gordon JJ favour a view broadly consistent with relational contract theory, and that one member of the joint reasons, Keane J, has been replaced, it is considered realistic that the High Court might in future adopt a relational contract view. The approach has been accepted to some extent in the United Kingdom; it should not be thought that such an approach reflects 'judicial activism' or an inappropriate exercise of judicial power, to develop the common law in this manner. Emphatically, it is for the courts to state, and develop, common law principles.

Is consideration of subsequent conduct contrary to the objective approach to contractual interpretation?

Lord Steyn had previously stated that 'evidence of the subsequent conduct of the parties could only become admissible as relevant to construction if the objective theory to the interpretation of contracts was abandoned'.[227] However, respectfully he apparently subsequently adapted his position, arguing that evidence of how the contract had been performed was relevant in its interpretation.[228] Since this article does not propose an alteration to the orthodox position that an objective view must be taken of the parties' intentions in determining the nature of the bargain, the question must be asked as to whether consideration of subsequent conduct is compatible, or not compatible, with an objective approach to contractual interpretation. It might be argued that a focus on the parties' actual performance is by its nature *subjective*, focussing on what the parties have actually done as a source of wisdom regarding contractual meaning, and that this permits subjectivity to seep into what the common law traditionally regards as an issue to be determined objectively.

Firstly, international contractual instruments apparently do not regard there to be any necessary inconsistency between an objective view and consideration of subsequent conduct. We know this because both the *Convention on Contracts for the International Sale of Goods* and the *UNIDROIT Principles* contemplate consideration of the common intention of the parties or, where this cannot be ascertained, the meaning that reasonable people would provide to the words the parties used. This resembles, respectively, a subjective and objective approach to contractual interpretation. But regardless of which one is used, the instruments both contemplate use of subsequent conduct. Notably, it is not *only* to be used when the court is determining the common intention of the parties (subjective); it is also contemplated to be used when that cannot be determined, and so the court is considering how reasonable people would interpret

226. On the separate question of waiver or estoppel in relation to contractual rights see *Agricultural* (n 135).

227. 'Written Contracts: To What Extent May Evidence Control Language?' (1988) 41 *Current Legal Problems* 23, 30; to like effect Sybrand van Schalwyk, 'Subsequent Conduct as an Aid to Interpretation' (2000) 7 *Canterbury Law Review* 541, 544: 'the court employs a method of interpretation that is concerned with the objective meaning of the contractual terms. The subsequent conduct of the parties will only show the parties' subjective understanding. Subsequent conduct therefore has no place in the interpretation process'.

228. (n 197) 10.

the words used (objective). In other words, the commercial law experts who drafted these instruments did not see a necessary inconsistency or incompatibility between an objective approach to contractual interpretation and a consideration of conduct subsequent to contract formation.

Secondly, it is considered possible to view subsequent conduct *objectively*. Evidence of subsequent conduct can be interpreted through the lens of how a reasonable person would interpret such conduct, not what the person subjectively intended by engaging in such conduct. In this way too, consideration of subsequent conduct can occur on an objective basis, consistent with general principles of common law contractual interpretation. Judge McDougall of the New South Wales Supreme Court has expressed this view:

> I consider the better view to be that subsequent conduct and events are admissible with regards to the implication of terms, but only where that subsequent conduct and events illuminate an objective matter, as opposed to subjective understandings of the contract.[229]

Thirdly, there is an argument that actual performance is not only evidence, but strong evidence, of the parties' intentions. This argument views the parties' intentions as dynamic, rather than static in nature.[230] There is some difference of opinion regarding whether evidence regarding subsequent performance is useful to determine the parties' intentions in relation to the contract terms,[231] or whether it could embrace the fact that the parties' intentions changed subsequent to entry into the contract, and consideration of such conduct is taken to reflect that changed intention.[232]

The view of relational contract scholar Ian Macneil is that the objective theory of contract is basically an illusion forced by the view of contracts as discrete rather than relational:

> The limited extent to which it is possible for people to consent to all the terms of a transaction, even a relatively simple and very discrete one, soon forces the development of legal fictions expanding the scope of 'consent' far beyond anything remotely close to what the parties ever had in mind. The greatest of these … is the objective theory of contract … the classic … contract is founded not upon actual consent but upon objective manifestations of intent … in classical law manifestations of intent include whole masses of contract content one or even both parties did not know in fact (refers to legal interpretations of all the terms the parties used in the contract … it is necessary into cram such absurdities into 'objective consent' in order to avoid recognizing the relational characteristics of the system.[233]

229. Judge Robert McDougall, *The Interpretation of Commercial Contracts – Hunting for the Intention of the Parties*, paper delivered at the College of Law Specialist Legal Conference, 2018.
230. Uri Benoliel, 'The Course of Performance Doctrine in Commercial Contracts: An Empirical Analysis' (2018) 68 *DePaul Law Review* 1, 6.
231. Charles (n 203) 25: 'subsequent conduct is used simply as a means of ascertaining the intention of the parties in relation to an ambiguous contract'. In its context, this passage is understood to be a reference to the parties' intention at the time of contracting.
232. Benoliel (n 230) 6: 'the course of performance doctrine appropriately prefers the parties' new, ex post intention, reflected in their repeated conduct, over their ex ante intention, reflected in their one-time written contract'.
233. Macneil, 'Adjustments' (n 43) 883–84, concluding that 'somewhere along the line of increasing duration and complexity, trying to force changes into a pattern of original consent becomes both too difficult and too unrewarding to justify the effort, and the contractual relation escapes the bounds of the neoclassical system. That system is replaced by very different adjustment processes of an ongoing administrative kind in which discreteness and presentiation become merely two of the factors of decision, not the theoretical touchstones' (901).

Acknowledging that some argue that a focus on actual performance is connected with a subjective view of contractual interpretation, my preferred position is that a focus on actual performance is consistent with an objective view of contractual interpretation, because the subsequent performance is interpreted in terms of how a reasonable person would view that behaviour, not the subjective view of the person engaged in it.

Collins favours a broader contextual view:

> It is argued that the real intentions of the parties must be discovered not only in their express statement but also in the implicit understandings surrounding the transaction. Although these intentions may not have been expressed openly, the context may have rendered that formality superfluous … the parties followed the forms required for a binding contract in order to signal their commitment and trustworthiness, but their expectations of how the transaction should be understood are not confined to the express statements contained in the terms of their agreement. To uncover those latent intentions, legal reasoning must … examine the context of the transaction … to discover a complete picture of the parties' intentions and expectations.[234]

Of course, this approach is consistent with consideration of how contractual relationships actually played out in practice, because the parties might be taken to have expected and intended[235] that the arrangements would be flexible, rather than 'locked-in' at the point of contract. In other words, the parties are taken to have agreed at the outset that their bargain would take shape through performance and interaction.

Finally, I should acknowledge that one possible limitation of relational contract theory is that it says nothing about power imbalances that may inhere in particular contracts. Some may criticise relational contract theory on the basis it makes a liberal presumption that the parties are of relatively equal bargaining power, a presumption that of course does not always (or often) reflect reality. My response is that both the common law and the statute have sought to respond to the admitted reality of these inequalities. Thus, the fact they exist should not undermine the utility of relational contract theory. It is not part of that theory to deal with such inequalities; other areas of the law do so. If they are considered inadequate to the task, they should be reformed.

Conclusion

Much of the traditional law of contract was crafted consistently with freedom of contract doctrine rampant during the nineteenth century. However, the law has to some extent turned away from such a philosophy, dissatisfied with the results it sometimes brings. In the past 50 years, new contract law theories have emerged. Chief among them has been relational contract theory, arguing that many of the assumptions underlying freedom of contract philosophy are inaccurate. There is force in these criticisms. Specifically, relational contract theory eschews total, or near total, reliance on the written terms of an agreement between the parties to determine their

234. Collins, 'Introduction: The Research Agenda of Implicit Dimensions of Contracts' in Campbell, Collins and Wightman ed (n 24) 12–13; relatedly Lord Steyn (n 45); Macaulay in Campbell, Collins and Wightman ed (n 24) 102: 'we might at least focus the issues if we were to accept that there is a text between the lines in most contracts, and if we do not attempt to implement this explicit text, we are denying reasonable expectations'.

235. Pauline Bomball, 'Contractual Autonomy and Public Policy in Australian Labour Law' (2020) 44(2) *Melbourne University Law Review* 502.

contractual rights and responsibilities, on the basis that because parties' relations are typically relational, they often do not reduce all of their bargain into the written contract. Further, given many relationships are longer term, the kind of presentiation assumed by freedom of contract is unrealistic. There is much promise in relational contract theory. Specifically in the current context, it can be utilised to theoretically justify consideration of parties' contractual performance, as a relevant factor in contract interpretation.

The article has documented that most jurisdictions have moved in this direction, including the United Kingdom, United States, Canada, New Zealand and in international commercial circles. However, recent High Court of Australia decisions have taken a contrary view, despite earlier judgments indicating something different, and a majority took an orthodox freedom of contract position. Gageler and Gleeson JJ favoured a broader view of contractual interpretation, including consideration of actual performance, and this article has found there is much to commend that view. It reflects the kind of realistic view of actual contracting implicit in relational contract theory, and can be utilised consistently with the objective approach to contractual interpretation.

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