LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

Vol. 2, No. 1: Jan 30, 2012

LAURA LINCOLN, ASSISTANT EDITOR
Research Assistant, Victoria University of Wellington School of Law
laura.lincoln@vuw.ac.nz

JOHN PREBBLE, EDITOR
Professor of Law, Victoria University of Wellington, Honorary Research Fellow, Monash University, Gastprofessor, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien
john.prebble@vuw.ac.nz

Browse ALL abstracts for this journal

Links: **Subscribe ~ Unsubscribe** | **Distribution** | **Network Directors** | **Submit ~ Revise Your Papers**

Announcements

Special Issue: Papers on contract interpretation by Professor David Mclauchlan

Table of Contents

^top

LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

"Contract Interpretation: What is it About?"

Sydney Law Review, Vo. 31, pp. 5-51, 2009
Victoria University of Wellington Legal Research Paper No. 1/2012

DAVID MCLAUCHLAN, Victoria University of Wellington - Faculty of Law
Email: David.McLauchlan@vuw.ac.nz

In recent times contract interpretation has become one of the most contentious areas of the law of contract. There are fundamental divisions among commentators, practitioners and judges (often writing extra-judicially) as to the nature of the task and the permissible aids to interpretation. This article highlights the reasons for these divisions and suggests that the position of those who advocate a liberal approach to the latter issue is sometimes misunderstood. The author argues that there are no convincing reasons of principle, policy or convenience for refusing to receive evidence of prior negotiations and subsequent conduct: in particular, admitting such evidence is

not, as commonly thought, inconsistent with the objective approach to interpretation. However, at the same time it is stressed that it will only be in relatively exceptional cases that the evidence will provide a helpful or reliable guide to the true intention of the parties.

"Plain Meaning and Commercial Construction: Has Australia Adopted the ICS Principles?"
Journal of Contract Law, Vol. 25, pp. 7-38, 2009
Victoria University of Wellington Legal Research Paper No. 2/2012

DAVID MCLAUCHLAN, Victoria University of Wellington - Faculty of Law
Email: David.McLauchlan@vuw.ac.nz

In this article Professor McLauchlan discusses the effects of Lord Hoffmann's famous restatement of the fundamental principles of contract interpretation in the Investors Compensation Scheme case and traces the history of its reception in Australia. He argues that the case law is characterised by misunderstandings and mixed messages and concludes that the status of the restatement in Australia remains problematic. Indeed, he suggests that, if the reasoning of the New South Wales Court of Appeal in Kooee Communications case is correct, the Investors Compensation Scheme case itself would have to be decided differently in Australia.

"Interpretation and Rectification: Lord Hoffmann's Last Stand"
New Zealand Law Review, pp. 431-453, 2009
Victoria University of Wellington Legal Research Paper No. 3/2012

DAVID MCLAUCHLAN, Victoria University of Wellington - Faculty of Law
Email: David.McLauchlan@vuw.ac.nz

In this article, the author analyses the recent decision of the House of Lords in Chartbrook Ltd v Persimmon Homes Ltd concerning the law of contract interpretation and rectification. After explaining the difficult facts of the case and the reasons given by their Lordships for reversing the judgments of the lower courts on the interpretation issue, which were based on the plain meaning of the clause in dispute, the author discusses the further, albeit obiter, ruling that evidence of prior negotiations is inadmissible as an aid to interpretation. He argues that the reasons for this conclusion given in the main judgment of Lord Hoffmann are unconvincing and suggests that, in this respect, Chartbrook is unlikely to be followed by the New Zealand Supreme Court in view of that Court's decision in Gibbons Holdings Ltd v Wholesale Distributors Ltd that evidence of subsequent conduct is admissible as an aid to interpretation. The author also discusses Lord Hoffmann's ruling on the alternative claim in Chartbrook for the equitable remedy of rectification and suggests that, while his Lordship's conclusion is correct, the reasoning is difficult and likely to generate further debate as to the requirements for granting that remedy.

"The 'Drastic' Remedy of Rectification for Unilateral Mistake"
Law Quarterly Review, Vol. 124, pp. 608-640, 2008
Victoria University of Wellington Legal Research Paper No. 4/2012

DAVID MCLAUCHLAN, Victoria University of Wellington - Faculty of Law
Email: David.McLauchlan@vuw.ac.nz

This article argues that the object of rectification for unilateral mistake ought to be essentially no different than rectification for common mistake - namely, to ensure that the written contract reflects the true bargain between the parties as determined by ordinary principles of contract formation. Proof dishonesty or unconscionable behaviour prior to entry into the contract should not be the basis of the claim. A party who is mistaken as to the terms expressed in a written contract ought to be granted rectification whenever he or she has been led reasonably to believe that the document does in fact contain the terms intended, regardless of whether the other party shares the mistake, knows of it, or behaved badly in some way.

"Deleted Words, Prior Negotiations and Contract Interpretation"
New Zealand Law Review, Vol. 24, p. 277, 2010
Victoria University of Wellington Legal Research Paper No. 5/2012

DAVID MCLAUCHLAN, Victoria University of Wellington - Faculty of Law
Email: David.McLauchlan@vuw.ac.nz

This article discusses a line of cases that hitherto has not featured in the debate on the contentious issue, yet to be finally resolved in New Zealand, whether evidence of prior negotiations is admissible as an aid to the interpretation of a written contract. These cases concern the question whether words that have been deleted from a written contract prior to its execution are a legitimate aid to the interpretation of the remaining words of the contract. The author argues that his analysis of the often conflicting cases demonstrates the incoherence and lack of transparency in the current law of contract interpretation and adds further weight to the arguments for jettisoning the exclusionary rule.

"Common Intention and Contract Interpretation"

Lloyd's Maritime and Commercial Law Quarterly, pp. 30-50, 2011
Victoria University of Wellington Legal Research Paper No. 6/2012

DAVID MCLAUCHLAN, Victoria University of Wellington - Faculty of Law
Email: David.McLauchlan@vuw.ac.nz

This article challenges the orthodox view that, in adjudicating upon contract interpretation disputes, the task of the courts is to determine the parties' presumed intention and that evidence of the parties' actual mutual intention, usually to be found in their communications in the course of negotiating the contract, is irrelevant and inadmissible as an aid to interpretation. It is argued that, in any event, little of substance is left in the rule excluding evidence of prior negotiations once it is accepted that such evidence is admissible to prove that relevant background facts were known to the parties and that the safety devices of rectification and estoppel are alternative means of enforcing an agreed meaning. The courts are highly unlikely nowadays to give a meaning to contractual terms that is inconsistent with a clearly proven consensus of the parties.

"Construction Controversy"
Journal of Contract Law, Vol. 28, 2011
Victoria University of Wellington Legal Research Paper No. 7/20212

DAVID MCLAUCHLAN, Victoria University of Wellington - Faculty of Law
Email: David.McLauchlan@vuw.ac.nz
MATTHEW LEES, Arnold Bloch Leibler
Email: MLees@abl.com.au

This article examines some of the current controversies in the law of contract interpretation in Australia, particularly in the light of the recent decision of the NSW Court of Appeal in Jireh International Pty Ltd t/as Gloria Jean's Coffee v Western Export Services Inc. The authors suggest, inter alia, that there is an urgent need for the High Court to issue its own restatement of the principles of contract interpretation for the guidance of lower courts.

^top

Solicitation of Abstracts

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachussetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Judicial Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the **Law School** has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

Submissions

To submit your research to SSRN, sign in to the **SSRN User HeadQuarters**, click the My Papers link on left menu and then the Start New Submissions button at top of page.

Distribution Services

If your organization is interested in increasing readership for its research by starting a Research Paper Series, or sponsoring a Subject Matter eJournal, please email: **RPS@SSRN.com**

Distributed by:

Legal Scholarship Network (LSN), a division of Social Science Electronic Publishing (SSEP) and Social Science Research Network (SSRN)

Directors

LAW SCHOOL RESEARCH PAPERS - LEGAL STUDIES

BERNARD S. BLACK
Northwestern University - School of Law, Northwestern University - Kellogg School of Management, European Corporate Governance Institute (ECGI)
Email: **bblack@northwestern.edu**

RONALD J. GILSON
Stanford Law School, Columbia Law School
Email: **rgilson@leland.stanford.edu**

Please contact us at the above addresses with your comments, questions or suggestions for LSN-LEG.

^top

Links: **Subscribe to Journal** | **Unsubscribe from Journal** | **Join Site Subscription** | **Financial Hardship**

Subscription Management

You can change your journal subscriptions by logging into **SSRN User HQ**. If you have questions or problems with this process, please email **UserSupport@SSRN.com** or call 877-SSRNHelp (877.777.6435 or 585.442.8170). Outside of the United States, call 00+1+585+4428170.

Site Subscription Membership

Many university departments and other institutions have purchased site subscriptions covering all of the eJournals in a particular network. If you want to subscribe to any of the SSRN eJournals, you may be able to do so without charge by first checking to see if your institution currently has a site subscription.

To do this please click on any of the following URLs. Instructions for joining the site are included on these pages.

- **Accounting Research Network**
- **Cognitive Science Network**
- **Corporate Governance Network**
- **Economics Research Network**
- **Entrepreneurship Research & Policy Network**
- **Financial Economics Network**
- **Health Economics Network**
- **Information Systems & eBusiness Network**
- **Legal Scholarship Network**
- **Management Research Network**
- **Political Science Network**
- **Social Insurance Research Network**
- **Classics Research Network**
- **English & American Literature Research Network**
- **Philosophy Research Network**

If your institution or department is not listed as a site, we would be happy to work with you to set one up. Please contact **site@ssrn.com** for more information.