PREScriptive AND HOListic CONTEXTualISM:
EMERGING VARIANTS OF MODERN CONTRACT INTERPRETATION

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Debate over the proper approach to modern contract interpretation continues even in this era of modern contract interpretation where context is always considered. This paper identifies and contrasts two rival approaches to contract interpretation: “prescriptive contextualism” which demands that contract interpretation start with plain meaning, and only then go on to consider textual context, extra-textual context and finally commercial sense; and “holistic contextualism” which involves consideration of those same factors but is not fussy about the order. In setting out the two approaches, I provide an exposition of the present law of contract interpretation. Then, I consider the main arguments that can be advanced by proponents of the two approaches, and conclude by offering my own arguments that, I suggest, tip the scales in favour of holistic contextualism: the prescriptive process inhibits identification of viable interpretation, and is overly dependent on which words are used to start the interpretive process.

I. INTRODUCTION

The central thesis of this paper is that two competing conceptions of the principles of contract interpretation, which take different approaches to the proper role of plain meaning and contextual evidence in the interpretive process, have emerged in the modern era of iterative contextual contract interpretation. The first is prescriptive contextualism: contract interpretation is properly performed by starting with a consideration of plain meaning, then textual context, then extra-textual context, and finally commercial sense, in that order. The second is holistic contextualism: interpretation is a unitary exercise involving consideration of those same elements but does not demand that they are considered in a specific order.

Part two of the article considers the two approaches in more detail. I have endeavoured to set out the most plausible construction of each. I begin by observing the many features that the two approaches have in common: they can both be described as modern, contextual, objective and iterative; plain meaning and commercial sense play a role in the interpretive process for both; and both are concerned with the post-hearing formal analysis of interpretation. Then, I describe how the two approaches differ, in terms of methodology and expected judgment structure. Finally, I set out the steps of the prescriptive process in detail, giving some examples of cases where it could be suggested that a court had reason to depart from plain meaning in one of the steps.

Part three of the article sets out the main arguments raised in the debate about which approach is preferable. After noting that the most recent leading authority, Wood v Capita, is in the holistic camp, I go on to consider the major points of dialogue: whether the prescriptive approach offers certainty and the relative desirability of certainty, the importance and feasibility of constraining judicial

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thought, whether the prescriptive approach misconstrues the fundamental role of context, and whether prioritising plain meaning respects party autonomy. Of course, much has been written about contract interpretation, with authors taking different positions on various aspects of the process. Here, I have generally focused on recent pieces of writing that help illuminate the specific debate between prescriptive contextualism and holistic contextualism as a methodology for interpreting express terms. The clearest support for the prescriptive approach is found in Anthony Grabiner’s 2012 article “The Iterative Process of Contractual Interpretation.” David McLauchlan has been a consistent academic voice for a contextual approach to contract interpretation more in alignment with what is described herein as the holistic approach. A clear judicial exposition of the holistic approach can be found in the judgment of the United Kingdom Supreme Court in *Wood v Capita*, given by Lord Hodge.

Part four of the article seeks to add to the dialogue. In my view, the case for each side is reasonably balanced, once we discard straw man theories of interpretation. However, I offer two arguments that I consider tip the scales in favour of holistic contextualism. Both concern the starting point of prescriptive contextualism: a consideration of the plain meaning of the centrally important words in the contract for the dispute in question. The first argument is that the prescriptive methodology can inhibit identification of viable interpretations, which I illustrate with reference to a case that was recently the subject of a judgment of the New Zealand Supreme Court. Setting out the first argument helps highlight the importance to the prescriptive process of picking the right centrally important words, which then leads on to the second argument: the

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3 So, I have not engaged in detailed discussion of the debate over other issues in construction, such as the admissibility of prior negotiations or the relationship between interpretation and implication.

4 Anthony Grabiner “The Iterative Process of Contractual Interpretation” (2012) 128 LQR 41. The following recent articles in particular, I would identify as being broadly in favour of a prescriptive approach: Rohan Havelock “Return to Tradition in Contractual Interpretation” (2016) 27 KLM 188 and Yihan Goh “From Context to Text in Contractual Interpretation: Is there really a Problem with a Plain Meaning Rule?” (2016) 45 CLR 298. In terms of judgments, I would suggest that the following in particular are capable of being read as consistent with the prescriptive approach: that of Lord Neuberger P (with whom Lord Sumption and Lord Hughes agreed) in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and that of McGrath, Glazebrook and Arnold JJ in *Firm P Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432. See also Lord Sumption’s extra-judicial speech: Jonathon Sumption, Justice of the Supreme Court “A Question of Taste: The Supreme Court and the Interpretation of Contracts” (Harris Society Annual Lecture, Keble College, Oxford, 8 May 2017) and, from another judge writing extra-judicially, James Spigelman, “From Text to Context: Contemporary Contractual Interpretation” (2007) 81 ALJ 322.


7 *New Zealand Air Line Pilots’ Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948.
prescriptive process relies on identifying the centrally important words, but that will not always be easy or even possible.

II. PRESCRIPTIVE CONTEXTUALISM AND HOLISTIC CONTEXTUALISM

A. What the Two Approaches Have in Common

1. Modern

Prescriptive contextualism and holistic contextualism are varieties of modern contract interpretation. That is, they belong to the era of contract interpretation following Lord Hoffmann’s re-statement of contract interpretation in the *Investors Compensation Scheme (ICS)* case as being a process governed by the following principles:  

1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person appraised of all the contextual background material which would reasonably have been available to the parties in the situation in which they were at the time of the contract;

2. That contextual background material includes whatever evidence a reasonable person would consider is of assistance for the task described in principle 1;

3. Prior negotiations and declarations of subjective intent are inadmissible as a pragmatic policy choice rather than because a reasonable person would think them necessarily irrelevant;

4. The meaning that a reasonable person would give to a document in its context is not the same thing as the meaning of the words of the document — context can allow a court to conclude that the parties intended something other than what their words, without context, would normally suggest; and

5. As a matter of common sense, where words do have a plain meaning, that is probably the meaning that the parties intended. However, just because words do have a plain meaning, that does not require judges to attribute to the parties a meaning that they plainly could not have had, for example when that meaning is commercially absurd.

Lord Hoffmann’s presentation of interpretation as a process governed by principles stands in contrast with the traditional era of understanding of interpretation as a process governed by rules. Two rules in particular loomed large in pre-ICS contract interpretation: the parol evidence rule (evidence extrinsic to a written contract was inadmissible for the purposes of contract interpretation, with limited exceptions including ambiguity) and the plain

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8 *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 WLR 896 (HL) at 912–913. The principles are summarised for brevity and consistency with the language used in this article.

9 See Rohan Havelock “Return to Tradition in Contractual Interpretation” (2016) 27 KlJ 188 at 188–189: “the dominant modern approach to contractual interpretation in the Commonwealth [is] represented by the ‘restatement’ of principles by Lord Hoffmann in [ICS]”.

10 For example, see *Codega Construction Pty Ltd v State Rail Authority (NSW)* [1982] 149 CLR 337 (HCA) at 352; and *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919 at [49].
meaning rule (if words used in a contract have a plain meaning, then the parties must be taken as having intended that meaning). 11

There is room for argument over the extent to which ICS marked a genuine turning point in the substance of the law away from an era of strict literalism towards contextualism, 12 or whether ICS is better understood as bringing to the surface a rich vein of pragmatic and contextual thinking that already existed in the case law. 13 Either way, the point of the label “modern” in this article is to locate prescriptive and holistic contextualism in the post-ICS era, where commentary on contract interpretation tends to take the ICS principles as a starting point, and the ongoing discussion is on how to best elucidate those principles.

2. Contextual

Prescriptive contextualism and holistic contextualism are both contextual approaches to interpretation. For each, evidence outside of a written contract both can and ought to be considered by a court in determining the meaning of that contract. Contractual meaning is to be discovered with reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, as Lord Hoffmann stated in Chartbrook. 14 This can be contrasted with approaches that impose an additional hurdle before a court can consider extra-textual evidence, such as that the text of the contract must be ambiguous. Both approaches are also contextual in the sense that they reject the proposition that words have an innate meaning discoverable without reference to context. 15

3. Objective

Contract interpretation is performed objectively. The meaning of a contract is determined by considering what a reasonable person would think the parties intended. Evidence that does no more than state what one of the parties was intending is disregarded, 16 as is context known to only one of the parties. 17 Both approaches are objective in this sense, and we cannot sensibly choose between the two on the basis that one is objective and the other is not.

11 For example, see Melanesian Mission Trust Board v Australian Mutual Provident Society [1997] 1 NZLR 391 (PC) at 394–395.
15 See Lord Hoffmann “The Intolerable Wrestle with Words and Meanings” (1997) 114 SALJ 656 at 670.
16 See ICS principles 1 and 3 discussed above at II.A.1 “Modern”, and Rohan Havelock “Return to Tradition in Contractual Interpretation” (2016) 27 KLJ 188 at 206.
4. Iterative

Both approaches are “iterative” in the sense that the task of interpretation involves the repetition of a process. The first notable judicial description of interpretation as an iterative process appeared in Lord Neuberger’s judgment in the Court of Appeal in *Sigma Finance*.18

[Where the interpretation of a word or phrase is in dispute, the resolution of that dispute will normally involve something of an iterative process, namely checking each of the rival meanings against the other provisions of the document and investigating its commercial consequences.

That description has proven influential. On appeal to the Supreme Court, Lord Mance stated that it was “right” to observe that the process of interpretation in a case like *Sigma Finance* was an iterative process,19 which Lord Clarke then referred to in *Rainy Sky*.20 In a 2012 article titled “The Iterative Process of Contractual Interpretation”, Lord Grabiner QC endorsed what he took to be “Lord Neuberger’s iterative process”,21 which has a fundamental role in Grabiner’s exposition of interpretation.22 More recently, Lord Hodge, giving the judgment for the United Kingdom Supreme Court in *Wood v Capita*, stated that the exercise of interpretation “involves an iterative process.”23

The two approaches differ on what is being iterated, the details of which we will return to shortly. In brief, the prescriptive approach repeats the consideration of the parties’ objective intentions while taking into account incremental aspects of the context, while the holistic approach repeats a unitary process of construction for each rival interpretation.

4. Plain meaning plays a role

Prescriptive contextualism and holistic contextualism both accept, as Lord Hoffmann did, that words can have a plain meaning. The “plain meaning” of both approaches is the same entity, and it is worth setting out clearly what the “plain meaning” of modern contract interpretation is. In terms of terminology, in this article I generally use “plain meaning” for brevity but courts sometimes speak of “plain meaning”, “ordinary meaning”, “natural meaning”,24 or use

22 Anthony Grabiner “The Iterative Process of Contractual Interpretation” (2012) 128 LQR 41 has been noted in several judgments, including *Firm P Ltd v Zurich Australian Insurance Ltd & Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 at [93]; and Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2016] AC 742 at [71].
similar language\textsuperscript{25} or some combination of such words.\textsuperscript{26} Regardless of the exact language used, the basic concept is the same:\textsuperscript{27}

Words \( X \) in a contract have a plain meaning if, and only if, a reasonable person taking into account the conventional meaning of the words and phrases that constitute \( X \) would think that there is one meaning \( Y \), out of all the possible things that \( X \) could mean, that is far more likely than any other meaning to be what the parties intended by \( X \).

The concept that individual words and phrases can have conventional meanings is embedded in the concept of plain meaning. Meaning \( Y \) is within the set of conventional meanings of word or phrase \( X \) if people can reasonably say “when people say \( X \), \( Y \) is one of the things they usually mean by \( X \).”\textsuperscript{28} Conventional meaning is distinct from literal meaning, because words are not always commonly used in their literal sense, and is not the same thing as dictionary meaning, because dictionaries list possible meanings, not all of which will be in common usage.

A word or phrase has a plain meaning if there is one conventional usage that is far more common than any other.\textsuperscript{29} For example, I would suggest that the conventional uses of the word “park” as a noun include “a grassy area” and “a place to put one’s car”, but only the former meaning is the plain meaning.

Moving beyond words and phrases to larger groups of words, it is not uncommon for judges to state a view on the plain meaning of a clause in a contract.\textsuperscript{30} This is an important shift, because the plain meaning of a contractual clause cannot, as a general rule, be defined simply as the most likely conventional meaning of that clause. This is because a clause in a contract, unlike commonly used phrases,

\begin{itemize}
\item \textsuperscript{25} For example, “popular” meaning in Manufacturers’ Mutual Insurance Ltd v Queensland Government Railways (1968) 118 CLR 314 (HCA) at 321; and Federal Commissioner of Taxation v Hamersley Iron Pty Ltd (1980) 33 ALR 251 (VSC) at 271.
\item \textsuperscript{26} For example, Lord Hoffmann used “plain and ordinary meaning” in Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1) [1998] 1 WLR 896 (HL) at 913; “natural and ordinary” Firm Pl 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand [2014] NZSC 147, [2015] 1 NZLR 432 at [88] per Elias CJ; and Arnold v Britton [2015] UKSC 36, [2015] AC 1619 at [15] per Lord Neuberger P.
\item \textsuperscript{27} See Yihan Goh “From Context to Text in Contractual Interpretation: Is there really a Problem with a Plain Meaning Rule?” (2016) 45 CLWR 298 at 304.
\item \textsuperscript{28} See Lord Hoffmann “The Intolerable Wrestle with Words and Meanings” (1997) 114 SALJ 656 at 658; and Sir George Leggatt “Making Sense of Contracts: The Rational Choice Theory” (2015) 131 LQR 454 at 468–469.
\item \textsuperscript{29} See Anthony Grabiner “The Iterative Process of Contractual Interpretation” (2012) 128 LQR 41 at 43: “The natural or ordinary meaning of a word is the meaning that most people would understand it to have and that is derived from the way in which most people use that word in everyday communication.”
\item \textsuperscript{30} For example, Arnold v Britton [2015] UKSC 36, [2015] AC 1619 at [15]: “the natural and ordinary meaning of the clause”; Firm Pl 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand [2014] NZSC 147, [2015] 1 NZLR 432 at [88]: “Where contractual language, interpreted in the context of the contract as a whole, has a natural and ordinary meaning, the courts will generally give effect to that”; Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1) [1998] 1 WLR 896 (HL) at 905 per Lord Lloyd: “what I have called the plain meaning of section 3(b)”; and Arnold v Britton [2015] UKSC 36, [2015] AC 1619 at [24]: “When one turns to cl 3(2) of each of the 91 leases of the chalets in Oxwich Park, the natural meaning of the words used, at least until one considers the commercial consequences, seems clear.”
\end{itemize}
will generally not have any conventional usage. The idea of conventional meaning requires the particular collection of words to have an established usage. However, the wording of contractual clauses will, in many cases, be a novel combination of words crafted to achieve the parties’ particular purposes.\(^{31}\) So, it would normally be quite odd to say something like:\(^{32}\)

When people say “23.4% of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value less the Costs and Incentives”, they normally mean Y.

So, the conventional meaning of the words in a clause can operate as a reference point for the determination of the plain meaning of the clause, but the plain meaning of a clause cannot simply be defined, as a rule, as the conventional meaning of the clause, because there generally will be no such thing. Neither can the plain meaning of a clause sensibly be deduced, as a rule, by assuming that each individual word in a sentence has its individual plain meaning.

Rather, determining the plain meaning of a clause is an exercise of judgement. It is a complex evaluation that requires weighing up the possible meanings of each word (conventional and otherwise) simultaneously, before arriving at an overall assessment of the intended meaning. To draw on my earlier example, the meaning of the word “park” can differ depending on whether it is used as a noun or a verb, which must be determined by a consideration of the other words in the sentence and the way they are put together.

Thus, the determination of plain meaning is an art rather than a science.\(^{33}\) Furthermore, in the context of contract law, it is a job for judges, not linguists. It requires knowledge of conventional syntax and grammar in addition to conventional meaning, as well as some understanding of the things that words refer to in the world, and of the goals that contracting parties might have—a “vast background of facts and a framework of mental assumptions”, as Lord Hoffmann put it.\(^{34}\) It is that knowledge that allows a court considering a clause to make an assessment of what the parties are likely to have intended based on the words that they used.\(^{35}\)

Plain meaning is an important concept for both prescriptive and holistic contextualism; it is not the case that plain meaning is important for one approach but not the other. They differ on whether recognising the importance of plain meaning necessitates commencing interpretation with consideration of plain meaning.

\(^{31}\) Of course, there will be some instances where the same standard clause occurs in many contracts, and it might be that sometimes such clauses will develop conventional usage. But that will not always be the case.

\(^{32}\) This was the contractual clause at issue in [Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101 at [9].


\(^{34}\) Lord Hoffmann “The Intolerable Wrestle with Words and Meanings” (1997) 114 SALJ 656 at 658.

\(^{35}\) See Glazebrook J in [New Zealand Air Line Pilots’ Assoc Inc v Air New Zealand Ltd [2017] NZSC 111, [2017] 1 NZLR 948 at [191] citing Lord Hoffmann in [Charter Reinsurance Co Ltd v Fagan [1997] AC 313 (HL) at 391: “the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another”.}
6. Commercial sense plays a role

For both approaches, commercial sense plays a part in the process of interpretation. "Commercial sense" can be used to refer to the broad notion of a set of expectations that judges have about how commercial parties usually behave, the sorts of decisions they typically make, and the sorts of intentions that they are likely to pursue in their contracts. It can also be used in a narrower sense to refer specifically to consideration of the symmetry of the bargain (i.e. the value of what each party gives up and gains from the contract) represented by a particular interpretation. The two senses are connected: part of the broad notion of commercial sense is the idea that commercial parties typically behave like economically rational actors; and, assuming that both parties are economically rational, we would expect that bargains are normally reasonably symmetrical. References to "commercial sense" herein typically refer to the narrower sense, taking into account that the narrower sense is informed by the broader one.

Lord Hoffmann explained the basis of the plain meaning rule as being common sense presumption that commercial parties have normally chosen their words carefully and not made linguistic mistakes. We can similarly see commercial sense as being based on the presumption that commercial parties have normally weighed their deals carefully and have not made commercial mistakes. The more serious the business mistake represented by a particular interpretation, the less likely that that interpretation is what was intended. Even where it is not the case that one interpretation is commercially absurd and the other is not, commercial sense can still assist a court in deciding between the two.

Of course, we are dealing with a mere presumption, one that can be overcome if the balance of considerations points in the other direction. Just as there might be something in the context to tell us that the parties did not intend

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36 Neil Andrews "Interpretation of Contracts and 'Commercial Common Sense': Do Not Overplay this Useful Criterion" (2017) 76 CLJ 36 at 37. It refers to the broad notion of "commerciality" and identifies at least six different ideas included in it:

- commercial documents are to be read from the perspective of commercial users; in particular, the commercial reader abhors pedantry, including excessive technicality or semantic logic;
- the court should avoid frustrating the parties' commercial object or purpose revealed by the contractual text and its factual matrix;
- the adjudicator must understand the trade practices and market assumptions within the relevant contractual pigeonhole;
- inapt words can be overridden when manifestly inconsistent with business common sense ...;
- absurd constructions are to be avoided; and
- [commercial common sense] can be used as a compass to point the way when the court is confronted by rival meanings.

37 See the discussion of the "economic deal" framework for understanding contracting in Hugh Collins Regulating Contracts (Oxford University Press, Oxford, 2002) at 129–130.

38 Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1) [1998] 1 WLR 896 (HL) at 913.

39 As Lord Reid put it in Wickman Machine Tool Sales Ltd v L.Schuler AG [1974] AC 235 (HL) at 251: "The more unreasonable the result the more unlikely it is that the parties can have intended it", see Neil Andrews "Interpretation of Contracts and 'Commercial Common Sense': Do Not Overplay this Useful Criterion" (2017) 76 CLJ 36 at 47–49.

the plain meaning of their words, there might be something in the context to explain why one of the parties ended up agreeing to a bad, or even extremely bad, bargain.\(^{41}\) In reality, sometimes commercial parties do simply make mistakes. Even assuming that contracting parties are economically rational actors, there are several reasons why they might enter into a bargain that turns out to be a bad one. Asymmetry of information can explain why both parties thought that they were entering into a balanced bargain when, in fact, it was much better for one of them. And it might be economically rational to enter into a specific deal that is a bad bargain in the interests of some longer-term gain. For example, a party might offer significant concessions in the interests of forging a new long-term relationship, or mending a rift in an established one.\(^{42}\)

7. Concerned with post-hearing formal analysis of interpretation

Both approaches to contextualism are primarily concerned with describing the discrete task of post-hearing formal consideration of interpretation that is then manifested in a judgment. Both approaches accept that, before that can take place, a court has already gone through the hearing process and has been exposed to background material and counsel’s submissions about possible interpretations, as well as seeing the text of the contract itself. Both approaches accept that judges will have given at least passing thought to the viability of different interpretations before making final judgment on the matter. Neither approach is concerned with trying to marshal the thought processes that might occur during a hearing when a judge hears submissions about different interpretations and evidence involving both text and context. Accordingly, prescriptive contextualism does not seek to re-establish the parol evidence rule and bar judges from even considering extra-textual evidence when there is a textual plain meaning, and holistic contextualism accepts that there will need to be judicial consideration of the words in question before “detailed analysis” commences.\(^{43}\) So, both approaches have the same starting point: the court is already familiar with the interpretation dispute and its context, and has heard and possibly engaged with the parties’ submissions about the correct interpretation. Where they diverge is exactly what happens next, which I will now explain.

B. How the Two Approaches Differ

The prescriptive approach takes the position that the detailed analysis of interpretation is an iterative process with a series of discrete steps that must be performed in a proper order. The first step is the consideration of the plain meaning of the words in question, followed by consideration of the textual context, extra-textual context (often referred to as “extrinsic evidence”) and, finally, commercial sense. At each stage after the first, the court repeats the

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\(^{42}\) For example, the Court of Appeal in Bay of Plenty Electricity Ltd v Vector Gas Ltd [2008] NZCA 338 at [93] thought that the seller might have agreed to a (very) bad bargain to protect their reputation. The Supreme Court disagreed, see the discussion below at II.C.4 “Step four: Commercial sense”.

consideration of the parties’ intentions in light of the new material. Deviation from the correct process is an error in law, and risks (but does not guarantee) that the court will arrive at the wrong interpretive outcome. I will discuss the steps in further detail shortly.

By contrast, holistic contextualism sees the process of interpretation as best understood as “one unitary exercise” involving consideration of various factors.\textsuperscript{44} The holistic approach rejects the idea of interpretation being, as Lord Hodge put it in \textit{Arnold v Britton}, “a matter of reaching a clear view on the natural meaning of the words and then seeing if there are circumstances which displace that meaning”.\textsuperscript{45} Holistic contextualism does not entail the position that there is something inherently wrong with judges in interpretation cases working through the particular interpretive issue in a series of steps beginning with the plain meaning of the words central to the dispute.\textsuperscript{46} The difference is that holistic contextualism does not demand that all contract interpretation is performed that way.\textsuperscript{47} Rather than being four discrete steps, plain meaning, textual context, extra-textual context and commercial sense are four necessary considerations in the overall holistic process of interpretation, the relative importance of which, and the order in which they are addressed, will vary from case to case.\textsuperscript{48}

In holistic contextualism, this unitary exercise is repeated for each of the rival interpretations under consideration. “[E]ach of the rival meanings is checked against the provisions of the contract and its commercial consequences are investigated”, as Lord Hodge put it in \textit{Arnold v Britton}.\textsuperscript{49} That is, interpretation is iterative in the sense that the same evaluative process is used for each interpretation under consideration.


\textsuperscript{45} \textit{Arnold v Britton} [2015] UKSC 36, [2015] AC 1619 at [76].


The following diagram contrasts what is being iterated in each approach:

**Prescriptive Contextualism**

- **Iterated process**: consider the purpose of the contract and the relative viability of interpretations afresh in light of:
  1. centrally important words and their plain meaning
  2. textual context
  3. extra-textual context
  4. commercial sense

**Holistic Contextualism**

- **Iterated process**: for each rival interpretation, consider:
  - plain meaning
  - textual context
  - extra-textual context
  - commercial sense as a unitary exercise

Arrive at a conclusion about which interpretation best reflects the parties’ intentions

While we might normally expect the structure of a judgment following prescriptive contextualism to follow the prescribed steps, we can expect greater variety in judgments applying holistic contextualism both in terms of structure and focus. As Lord Hodge put it in *Wood v Capita:*\(^50\)

[O]nce one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

In some cases, there might be a compelling basis in the extra-textual context for preferring a particular interpretation – if that is so then there may be no need to wade through a detailed textual consideration before turning to the contextual “smoking gun” that establishes the parties’ intended meaning. In other cases, such as where the text has been forensically prepared by its drafters, it is the detailed textual analysis that will be decisive, and we might we might expect to see only cursory references to extra-textual context and commercial sense.\(^51\)

### C. The Steps of the Prescriptive Process

The overarching goal of the prescriptive process is the determination of the parties’ objective intentions. Each stage of the process after the first introduces new considerations and then contemplates that goal afresh – that is the iterative nature of contract interpretation for the prescriptivist. The overarching

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consideration of the parties’ intentions can be broken down into two related tasks. The parties will usually have put forward at least one interpretation each. The court may also identify other possible interpretations, and some interpretations might arise after consideration of the context. The first task is forming a view on the relative viability of each interpretation. The second task is forming a view of the purpose of the contract – that is, the ends that the parties are trying to achieve through it. These two tasks are interrelated – the viability of an interpretation is informed by the extent to which it appears to achieve the parties’ ends, and the process of considering various interpretations assists the court in determining what it is that the parties might by trying to achieve. Both the relative viability of different interpretations, and the court’s ideas of what it is that the parties are objectively trying to achieve, are updated as the wider picture emerges. For prescriptive contextualism, it is vital that the performance of those two tasks is marshalled by the introduction of new considerations in the proper order.

I will now consider each step of the prescriptive process in further detail. The aim is to articulate how the four steps in the process can be conceived of as discrete steps that proceed in a particular way. For steps two and three, I provide examples of cases that can be seen as being ones where a reason to doubt the correctness of plain meaning emerges at that particular step. The outcomes in these cases could also be produced by the holistic approach but would not need to be explained in terms of a plain meaning presumption arising and then being rebutted. Rather it could simply be that, for example, the extra-textual context provides clear evidence of the parties’ intentions, without delving into a detailed and syntactical analysis of the clause in question.

1. Step one: The centrally important words and their plain meaning

The court must first identify the centrally relevant words to the dispute;\(^\text{52}\) and then consider if those words have a plain meaning. If there is a plain meaning, then this essentially triggers a presumption that that plain meaning is the one that the parties intended and is the correct way to interpret the contract.\(^\text{53}\) The higher the level of confidence that there is one plain meaning, the stronger the presumption.\(^\text{54}\) Each step can strengthen, weaken, or possibly overcome that initial view that the plain meaning is the right one. Since it is expected that the plain meaning is normally the right one, the other three steps will normally function as a kind of cross-check.\(^\text{55}\)

Regardless of whether or not the pivotal words have a plain meaning, the court must also consider the viability of any other interpretations that have been put forward. It might be, for example, that the words are somewhat ambiguous

\(^{52}\) The “centrally relevant words” in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [18]; the “language at issue” in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd v/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 at [63]; Anthony Grabiner “The Iterative Process of Contractual Interpretation” (2012) 128 LQR 41: “the words of the provision in question”, at 45; and the Court of Appeal in *Air New Zealand Ltd v New Zealand Air Line Pilots’ Assoc Inc* [2016] NZCA 131, [2016] 2 NZLR 829: “the words in question” at [40].

\(^{53}\) *Firm PI 1 Ltd v Zurich Australian Insurance Ltd v/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 at [63]: “powerful, albeit not conclusive”.

\(^{54}\) “[T]he plainer the words, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say”: *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [23].

and there are two viable meanings, but one is a slightly more conventional use of language than the other. In such a case, the more conventional meaning is slightly ahead in the race, compared to if one meaning has a plain meaning, in which case it gets a substantial head start. Of course, getting a head start does not always mean winning the race, and sometimes there will be something in the later steps that allows another interpretation to overtake the early favourite. This analogy of plain meaning having a head start in the race does not apply to the holistic approach, because plain meaning is not necessarily the starting point.

2. Step two: Textual context

The next step is to look beyond the centrally relevant words and consider the rest of the text of the contract. Other words in the text might give the court reason to adjust the relative viability of different interpretations, might bring to light new possible purposes of the contract, and can even raise new ways of interpreting the pivotal words in question.

_Aberdeen City Council_ can be explained as a case where textual context gives a reason to revisit plain meaning.⁵⁶ The case revolved around what Lord Hope described as a “short point of construction”.⁵⁷ Stewart Milne Group (Group) purchased land from the Aberdeen City Council (Council) with a view to developing it. The contract provided that the Group would pay the Council a “profit share” if the Group sold the land. The profit share, which could also be triggered by a Council buy-back of the land or by the Group entering into a long-term lease, was defined as:⁵⁸

40% of 80% of the estimated profit or gross sale proceeds or lease value less the Allowable Costs [which were concerned with costs associated with obtaining planning permission and consents].

“Estimated profit” and “lease value” were both defined with reference to an open market valuation.⁵⁹

Arguably, the plain meaning of the pivotal text is that, in the case of a sale, the profit share is calculated based on the gross sale proceeds.⁶⁰ The Group had sold the land to an associated company at a price where the gross sale proceeds less Allowable Costs meant that no profit share would be payable to the Council. The Council argued that, in the case of a sale that was not on the open market, a profit share should be payable based on open market value, similar to the calculation used in the case of a buy-back or lease. In considering these two readings of the contract, the Supreme Court considered various other aspects of the text. Lord Hope observed several “infelicities” of drafting in other parts of the contract,⁶¹ which could rebut the normal expectation that commercial parties

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⁵⁸ _Aberdeen City Council v Stewart Milne Group Ltd_ [2011] UKSC 56, 2012 SCLR 114 at [7].
⁵⁹ _Aberdeen City Council v Stewart Milne Group Ltd_ [2011] UKSC 56, 2012 SCLR 114 at [7].

One of these infelicities was that, if read literally, the contract required Allowable Costs to be deducted twice, because the definitions of both Estimated Cost and Profit Share stated to deduct Allowable Costs. As Lord Hope put it at [9], “that plainly cannot be right”.

have chosen their words carefully and probably intended the plain meaning. More significantly, the Court considered that the use of an open market valuation in the calculation of the profit share in the case of a buy-back or lease gave an insight into what the parties were trying to achieve through the profit share: regardless of what triggered it, the profit share was supposed to give the Council a share of the open market value of the land. In the case of a sale, normally that would be achieved by using the gross sale proceeds. However, if the sale was not at arms length on the open market, the parties’ intentions would be thwarted by basing the profit share on the actual sale. Accordingly, the Supreme Court was in agreement that, in the case of a sale to a related party as had happened, the profit share was to be calculated based on open market value.

3. Step three: Extra-textual context

The next step is to consider what is sometimes described as extrinsic evidence – “the facts and circumstances known or assumed by the parties at the time that the document was executed” as Lord Neuberger put it in *Arnold v Britton*.

Where the pivotal words have a plain meaning, in some cases the extra-textual context might do nothing to dissuade the initial impression that the plain meaning is probably the right one. An example of this is *Mobil Oil*, where the dispute centred over a provision in a lease that required the tenant to “keep” the land “in good order and clean and tidy” and “deliver up” the land in “good and clean and tidy” condition at the end of the lease. The central question in the case was whether the provision required the tenant to address subsurface contamination that predated the lease. The New Zealand Supreme Court found that the natural and ordinary meaning of the words in the provision did not support the tenant being obliged to transform the land by remediating underground contamination that predated the tenancy, and found nothing in the context to suggest otherwise.

On the other hand, in some cases there is something in the extra-textual context that points away from plain meaning. One example is where a consistent pattern of non-conventional usage of a word or phrase is evident in the

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63 Although Lord Hope and Lord Clarke differed on whether the result was best understood as being achieved through interpretation and implication, see [22] and [33] respectively. For present purposes, the important point is that they agreed on the intention that could be determined from the text as a whole. This can be seen as a case where a strong argument against plain meaning emerges at step two, before even having to consider extra-textual context or commercial sense.

64 *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15].

65 *Mobil Oil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89, [2017] 1 NZLR 48 at [56] for the clause in full.

66 *Mobil Oil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89, [2017] 1 NZLR 48 at [75], overturning the Court of Appeal, *Auckland Waterfront Development Agency Ltd v Mobil Oil New Zealand Ltd* [2015] NZCA 390, [2016] 2 NZLR 281 at [62]–[70], which found that the context drove the opposite conclusion.
extra-textual context, either in communications between the parties or at large within a particular industry, trade or locality.67

Or, there might be something in the extra-textual context that sheds light on the purpose of the contract, as could be said of Vector Gas.68 The contract in that case was for the supply of gas, and the dispute was over whether a “$6.50 per [gigajoule]” price for gas in the contract was inclusive or exclusive of transmission costs. If the latter, the purchaser would have to pay extra to receive gas. Arguably, the plain meaning of the contract is that the price is inclusive of transmission costs – if the parties had intended the purchaser to pay more, they would have said so – and the Court of Appeal effectively took that approach.69 However, features of the extra-textual context arguably suggested that the parties intended that the price take into account additional transmission costs. The contract in dispute was an interim contract put in place while a dispute about a purported termination of an earlier contract between the parties for the long-term supply of gas was resolved. The interim contract allowed for the supply of gas to continue while the underlying dispute was resolved, and, in the event that the supplier’s purported termination was upheld (which it ultimately was) for the purchaser to pay, for each gigajoule supplied, the difference between the price set out in the earlier agreement and $6.50 per gigajoule.

Blanchard J’s judgment in the Supreme Court shows how this extra-textual context could be used to conclude that the $6.50 per gigajoule price was intended to be exclusive of transmission costs. Blanchard J stated that, to “fully understand” the interim contract, the reader must refer to the earlier contract and “comprehend” that the larger dispute was over long-term supply,70 and went on to state that:71

The words “$6.50 per GI” also have as an important part of their context or background what both parties must have been anticipating would happen if an interim agreement were not reached. Putting oneself in the position of the parties in that circumstance, it is very easy to see that [the purchaser] was not likely to have tolerated a situation in which supply of gas was simply withdrawn by [the supplier] pending resolution of the dispute. Absent an interim agreement, [the purchaser], like any other purchaser in a similar position, would certainly have sought to have the High Court order [the supplier] to continue to supply it on the terms of the [earlier contract] until the Court could give judgment on the larger dispute. But, equally obviously, the Court would not make such an interim order unless [the purchaser] gave an undertaking to meet any loss which [the supplier] might suffer if it were ultimately found that [the purchaser] was not entitled to a continued supply at the rate provided for under the [earlier contract]. The negotiating parties both would also readily have perceived that the loss to [the supplier], and therefore what [the purchaser] would have to pay under

67 That is, cases where the “private dictionary” principle applies, see Firm PI 1 Ltd v Zurich Australian Insurance Ltd &a Zurich New Zealand [2014] NZSC 147, [2015] 1 NZLR 432 at [84]. For a recent example see YL NZ Investment Ltd v Ling [2017] NZHC 1793, (2017) 28 NZTC 23-026 at [28]: “this is a private dictionary case where the parties have adopted as a term of art the words ‘registered person’ under the GST Act, so that terms used in that act apply to the parties”.
69 Bay of Plenty Electricity Ltd v Vector Gas Ltd [2008] NZCA 338 at [90]. [98].
71 Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] NZSC 5, [2010] 2 NZLR 444 at [7].
its undertaking, would almost certainly be measured by comparing what [the supplier] was likely to receive on the basis of current market rates, if it sold the gas to someone else, with the price fixed under the 1995 Agreement. As Wilson J points out in his judgment, in or around October 2004 [the supplier] was managing to obtain contracts at an average price of $6.68 per GJ plus transmission costs. In contrast, an inclusive price of $6.50 per GJ was the equivalent of a gas only price of $4.64 per GJ.

That background, Blanchard J considered, made it clear that the parties must have intended the $6.50 per gigajoule price to be exclusive of transmission costs.

4. Step four: Commercial sense

The final consideration is commercial sense. As a discrete and final consideration in an iterative process, turning to commercial sense in this final step means considering how balanced the bargain is in each interpretation under consideration. In many cases, a court will still be weighing up multiple viable interpretations after consideration of extra-textual context. If that is the case, then the relative symmetry of those bargains can assist the court in deciding between them. Where the court has already found something in step two or three to doubt that plain meaning reflects the parties’ intentions, that the plain meaning is not commercially sensible can lend further support. However, commercial sense should not generate an entirely new interpretation like a magician pulling a rabbit out of thin air, as Andrews put it.

Conceiving commercial sense as a discrete step in the iterative process concerned with the symmetry of the bargain explains the caution that several leading authorities have given about commercial sense. In Firm PI 1, a majority of the Supreme Court of New Zealand stressed that (citing Grabiner’s article in support):

[W]here contractual language, viewed in the context of the whole contract, has an ordinary and natural meaning, a conclusion that it produces a commercially absurd result should be reached only in the most obvious and extreme of cases.

In Arnold v Britton, Lord Neuberger stated that:

73 See Arnold v Britton [2015] UKSC 36, [2015] AC 1619 at [69]–[71] for a helpful explanation of why in several cases (The Starlin [2003] UKHL 12, [2004] 1 AC 715; Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101; and Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56, 2012 SCLR 114 (which I discuss above as a case where consideration of textual context points away from plain meaning, while the plain meaning was not commercially sensible, there were also reasons found in the textual and extra-textual context for departing from plain meaning. We can add Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] NZSC 5, [2010] 2 NZLR 444 to that list of cases – although a plain meaning interpretation of the contract would have been an extraordinarily bad bargain (see [82] and [137], the earlier contract in the extra-textual context also provided a reason to depart from plain meaning.
74 Neil Andrews “Interpretation of Contracts and ‘Commercial Common Sense’: Do Not Overplay this Useful Criterion” (2017) 76 CLJ 36 at 51, and see 50–53 more generally for discussion of this point.
The reliance placed in some cases on commercial common sense and surrounding circumstances ... should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

In short, commercial sense will almost never operate as a standalone justification for rejecting plain meaning. In the context of prescriptive contextualism, where the centrally important words have a plain meaning, and consideration of textual and extra-textual context has not provided a reason to displace the presumption (or has bolstered the case for the plain meaning being what the parties intended), the possibility of the presumption being displaced after consideration of the symmetry of the bargain is vanishingly small.

Of course, commercial sense does not operate as a standalone justification for overriding plain meaning under the holistic approach either. However, there are different reasons for why that is the case. None of the four factors can override another, because the process of interpretation is a unitary one, so it is not helpful to think of one factor displacing or overriding another.

III. Arguments for and Against the Two Approaches

It is easy to construct and knock down a straw man version of each approach. An approach to contract interpretation that empowers judges to disregard the parties’ words and make them a new bargain out of whole cloth must be rejected. Similarly, caricature literalism is not a viable approach to contract interpretation. The actual debate between holistic and prescriptive contextualism is more finely balanced. One reason for this is that the two approaches have much in common. Both approaches are unashamedly contextual approaches to interpretation, and both take plain meaning and the parties’ decision to put a contract in writing seriously. Ultimately, the choice of approach is one upon which reasonable people can disagree, and may turn on one’s experience or conception of the role of documents and plain meaning in the commercial world.

This section is an attempt to capture the reasonable dialogue that can exist between supporters of the two positions. In providing arguments that can be put forward for the prescriptive side, I turn to Grabiner, who expressly adopts a prescriptive approach. I also draw on other jurists who are broadly supportive of an approach to contract interpretation that places emphasis on plain meaning, even if they do not explicitly adopt the prescriptive approach as I have described it here, to the extent that the arguments of the latter group can help bolster the case for prescriptive contextualism.

The first five topics of argument are the main points of discussion found in the literature: judicial authority for the approaches, whether plain meaning is a necessary or useful starting point, certainty, the need to constrain judicial thought and the role of context. The final two are two additional arguments that, I would

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suggest, help swing the balance of argument towards holistic contextualism. The first is that the prescriptive approach can inhibit the identification of viable interpretations. The second is that the pivotal role of the centrally important words poses a problem for prescriptive contextualism. These two arguments emerge from an examination of a recent application of the prescriptive approach by the New Zealand Court of Appeal,\textsuperscript{78} the shortcomings of which were identified by the Supreme Court.\textsuperscript{79} To some extent, they could be seen as a development of the more general concern that a focus on specific words in the text may not align with the parties’ intentions. That said, they show that the difference between prescriptive and holistic contextualism is not merely academic by illustrating how the plain meaning starting point can produce anomalous results.

\textit{A. Authority}

Taking \textit{Wood v Capita} as the leading authority on the principles of contract interpretation, it is fairly clear that the weight of authority is now in favour of holistic contextualism. Indeed, in light of \textit{Wood v Capita}, it could be argued that the prescriptive approach has never had any support in modern contract law cases. The prescriptive process could then be viewed as existing only in the academic literature – a figment of Grabiner’s imagination, if anything.

Gribiner, writing before \textit{Arnold v Britton} and \textit{Firm PI 1}, cites two authorities specifically in relation to the parties’ words as the starting point of the iterative process. The first is Lord Neuberger’s statement in \textit{Re Sigma Finance Corp Ltd v North Lanarkshire Council} that:\textsuperscript{80}

\begin{quote}
[While one is seeking to interpret the document as a whole, the ultimate issue between the parties turns on the meaning of the provision, and, in order to resolve the issue, the reasoning and analysis have to start somewhere. The natural, indeed, I would have thought, the inevitable, point of departure is the language of the provision itself.]
\end{quote}

The second is Lord Hope’s statement in \textit{Multi-Link Leisure Developments Ltd v North Lanarkshire Council} that:\textsuperscript{81}

The court’s task is to ascertain the intention of the parties by examining the words they used and giving them their ordinary meaning in their contractual context. It must start with what it is given by the parties themselves when it is conducting this exercise. Effect is to be given to every word, so far as possible, in the order in which they appear in the clause in question. Words should not be added which are not there, and words which are there should not be changed, taken out or moved from the place in the clause where they have been put by the parties. It may be necessary to do some of these things at a later stage to make sense of the language. But this should not be done until it has become clear.

\textsuperscript{78} \textit{Air New Zealand Ltd v New Zealand Air Line Pilots’ Assoc Incorp} [2016] NZCA 131, [2016] 2 NZLR 829.

\textsuperscript{79} \textit{New Zealand Air Line Pilots’ Assoc Inc v Air New Zealand Ltd} [2017] NZSC 111, [2017] 1 NZLR 948.

\textsuperscript{80} \textit{Re Sigma Finance Corp} [2008] EWCA Civ 1303, [2009] BCC 393 at [98], cited in Anthony Grabiner “The Iterative Process of Contractual Interpretation” (2012) 128 LQR 41 at 45 n 16 (emphasis added). I return to the question of whether plain meaning is a natural or inevitable starting point immediately after this discussion of authority.

that the language the parties actually used creates an ambiguity which cannot be solved otherwise.

Both of these passages can reasonably be read as suggesting that plain meaning is not only important in the process of interpretation but should be considered first. Although neither *Arnold v Britton* nor *Firm PI 1* expressly state that interpretation must start with consideration of plain meaning, in my view those decisions can reasonably be read as consistent with the prescriptive approach. That is not to say that this is the only reading available, as the decisions do not expressly reject the prescriptive approach in the way that *Wood v Capita* does.

One point in favour of reading *Arnold v Britton* in favour of the prescriptive approach is that the majority judgment was given by Lord Neuberger (with whom Lord Sumption and Lord Hughes agreed), whose judgment in *Sigma Finance* stressed the language of the provision as an inevitable starting point. In *Arnold v Britton*, he stated that the court determines the parties’ objective intentions.  

... by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions.

That listing of factors to assess meaning “in the light of” can reasonably be read as setting out the order for consideration of those factors, rather than simply the factors themselves. Furthermore, the progression from textual (documentary) to extra-textual (factual) and commercial context effectively appears twice in the paragraph.

A further point in favour of reading that passage in line with the prescriptive approach is that Lord Hodge, who agreed with Lord Neuberger on the outcome of the case, chose to give a separate judgment, in which he effectively stated that that outcome did not follow from an application of the prescriptive process. From this, we might infer that Lord Hodge wished to avoid endorsing a judgment that supported, or at least could be read as supporting, a more prescriptive approach.

Turning now to *Firm PI 1*, the majority stated that the text “remains centrally important” and that, where the “language at issue” has a plain meaning, that is a “powerful, albeit not conclusive, indicator” of the parties’ intentions, with “wider context” potentially providing a basis for departing from a textually “obvious” interpretation. The majority then went on to consider the clause at issue in its contractual context, before turning to considering whether the “structure of the bargain, any specialised meaning, or considerations of commercial absurdity affect that assessment”. That is all at least consistent with the prescriptive

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83 *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [76].
84 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd v/s Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 at [63]–[64].
approach, and could be read as requiring it. Furthermore, the majority cite Grabiner’s article in their discussion of commercial sense.85

The minority, who came to a different conclusion from the majority on the outcome, also thought that the case did not call for general discussion of the principles of contract interpretation but reserved their position on unnamed "matters of some controversy in this area of law" which were "touched on" in the majority’s articulation of the principles of contract interpretation.86 This might be an indication, like Lord Hodge’s judgment in Arnold v Britton, of a reluctance to endorse an exposition of contract interpretation that is, or could be read as, taking a prescriptive approach.

So, in my view, there is a reasonable case that Arnold v Britton and Firm PI I could be read as authorities supporting the prescriptive approach. Some pre-Wood v Capita academic and judicial readings of those cases supports that position. Rohan Havelock described Arnold v Britton as “an effective coup de grâce to the emphasis on the wider context in the ICS Restatement”, and, describing the law at the time, suggested that “the primary source of meaning is the text itself” which was a departure from the “starting point” of the ICS approach.87 The final two arguments in this section arise in light of a case where the New Zealand Court of Appeal clearly read Arnold v Britton and Firm PI I as making consideration of plain meaning the compulsory first step in the interpretive process, and chastised the Employment Court for failing to do so, which I discuss in detail below.

So, in terms of recent authority, proponents of holistic contextualism have the clear advantage. Of course, the leading authority can change, and the recent history of leading authorities on contract interpretation has swung between those that emphasise the importance of context and commercial sense,88 to those emphasising the importance of plain meaning,89 then back again.90 And, the question of how the law of contract interpretation ought to be configured cannot be answered solely by identifying the leading authority. So, I will turn to consider other arguments for and against the rival approaches.

B. Plain Meaning: The Best Starting Point for Determining the Parties’ Intentions?

Lord Grabiner claims that: “The process of construction must start somewhere and the most natural place to begin is with the words of the provision in

85 Firm PI I Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand [2014] NZSC 147, [2015] 1 NZLR 432 at [93].
87 Rohan Havelock “Return to Tradition in Contractual Interpretation” (2016) 27 KLJ 188 at 200–201.
question. He suggests that plain meaning is a natural and logical starting point primarily because, where words have a plain meaning, that is probably the meaning that the parties intended. This is not just a matter of probability but of respecting the parties’ autonomy: parties choose written contracts to reduce their obligations to a clear written form. Taking the parties’ intentions seriously means taking the written text seriously, which means that the language of the document must be the logical starting point.

Proponents of holistic contextualism can dispute both parts of Grabinner’s claim. First of all, a rejection of the idea that all exercises of construction must start in the same place is inherent in holistic contextualism. Of course, simply because an approach to interpretation can exist without a standard starting point does not mean that that approach should be preferred. The more interesting argument is whether the plain meaning starting point is preferable.

In rebutting the claim that plain meaning is a sensible starting point, proponents of holistic contextualism can argue that their rivals overstate the extent to which, in reality, commercial parties actually pay close attention and care to the words of their contracts. If that is the case, then focusing on plain meaning risks undermining the parties’ autonomy, rather than supporting it.

C. Certainty

One of the claimed merits of the prescriptive approach is that it provides certainty and predictability for contracting parties and third parties. This predictability means that, in terms of future contracts, parties can be reasonably confident that the bargains they make will be given effect in the event of a dispute over interpretation, provided that they have taken care with their wording. In addition, because of the emphasis on plain meaning which is accessible to all parties, anyone looking at a contract is usually able to get a good idea of what the parties’ obligations are.

Proponents of the holistic approach object that the certainty provided by a plain meaning-focused approach is overstated. As McLauchlan put it: “The argument from certainty might have some merit were it not for the fact that the

96 For example, see Anthony Grabinner “The Iterative Process of Contractual Interpretation” (2012) 128 LQR 41 at 51; and Rohan Havelock “Return to Tradition in Contractual Interpretation” (2016) 27 KLJ 188 at 202 and 206–208.
outcome of interpretation disputes is so notoriously difficult to predict anyway. The inherent uncertainties in language and the fact that contracting parties cannot be certain of the future conspire to make certainty a difficult objective to pursue.

In addition, one can question the importance of certainty in contract law — not just for the process of contract interpretation but for contract law as a whole. Certainty as a goal can be seen as conflicting with fairness, or the ability of the law to respond to oppression or imbalances of power. Certainty is sometimes argued to be beneficial to the promotion of the institution of contracting, to promote economic efficiency, and to be desirable for commercial parties. However, it can be argued that the relentless pursuit of certainty can provide a disincentive for people to enter into contracts, thereby harming the institution of contracting, that the strict rules of classical contract law cannot be justified on economic grounds, and furthermore it is unclear whether commercial parties actually value certainty as highly as some contract law scholars say they do.

D. A Prescriptive Process: Necessary to Control Judicial Thought, or Unnecessary and Useless?

To put it bluntly, proponents of prescriptive contextualism can argue that the law must make interpretation a prescriptive process because judges cannot be trusted with a free-form one. This is classic formalistic thinking: rules are needed to prevent “misguided, incompetent, wicked, power-hungry, or simply mistaken decisionmakers whose own sense of the good might diverge from that of the system they serve”. In the sphere of contract interpretation, arguably, there is an acute risk that courts will try and improve on the parties’ bargain instead of


103 See Catherine Mitchell Interpretation of Contracts (Routledge-Cavendish, London, 2007) at 99 for a review of empirical research on whether parties desire certainty or flexibility in the law of contract interpretation.

simply recognising it.\textsuperscript{105} There are three aspects of modern contract interpretation that proponents of prescriptive contextualism are especially concerned with: the use of extra-textual context, commercial sense reasoning, and the notion of commercial purpose. These three things all, unless constrained, give courts far too much latitude to make a contract for the parties, even when the words used have a plain meaning.\textsuperscript{106} Grabiner states that the risk is heightened because counsel for a party trying to escape the consequences of a clearly worded contract will often invite the court to look outside the words to “find” the commercial purpose of the bargain, and then override the plain meaning with that supposed purpose.\textsuperscript{107} Again, this is reflective of a formalistic approach to law: judges are prone to being bamboozled by crafty lawyers, and accordingly firm rules are needed.

Supporters of prescriptive contextualism consider that these risks can be managed by channeling judicial thinking through the prescriptive process. This allows courts to consider extra-textual context and commercial sense as part of the interpretive process, in contrast to imposing rules of admissibility that might deny context entirely but puts those aspects of the context in their place as sub-ordinate and subsequent considerations to the text. The prescriptive process, argues Grabiner, prevents a court from being “distracted away from the more important question, namely, the meaning of the contract as recorded in the words used”.\textsuperscript{108} By grounding commercial purpose in the wording of the contract, it prevents commercial purpose from being a malleable abstract concept.

For the avoidance of doubt, the point of disagreement here between proponents of the two approaches is not whether courts should be able to re-write commercial contracts to make them more fair, or to the court’s subjective idea of what might be commercially sensible.\textsuperscript{109} Nobody seriously argues that, and rightly so, because it would be an anathema to the purpose of contract interpretation – it would be giving effect to the court’s idea of a nice bargain for the parties rather than the parties’ intentions. The point of disagreement is over how pronounced the risk is that judges will do the wrong thing, and whether the prescriptive process will actually work. Proponents of holistic contextualism are, broadly speaking, less formalistic and more trusting of judges. They tend to view decisions where courts ultimately depart from plain meaning as perfectly explicable in terms of


\textsuperscript{107} Anthony Grabiner “The Iterative Process of Contractual Interpretation” (2012) 128 LQR 41 at 49. See also Neil Andrews “Interpretation of Contracts and ‘Commercial Common Sense’: Do Not Overplay this Useful Criterion” (2017) 76 CLJ 36 at 62: “Partisan arguments are often dressed up as issues of [commercial common sense]: judges should not be beguiled by forensic rhetoric which is a barely disguised plea for a favourable revision or gloss to suit one party but which is not truly supported by the document.”


\textsuperscript{109} See the majority judgment of New Zealand Air Line Pilots’ Assoc Inc v Air New Zealand Ltd [2017] NZSC 111, [2017] 1 NZLR 948 at [77], citing Firm Pl I Ltd v Zurich Australian Insurance Ltd v a Zurich New Zealand [2014] NZSC 147, [2015] 1 NZLR 432 at [78]–[79] and [88]–[93].
standard principles of contract interpretation, rather than being suspicious that the court might have given in to the temptation of abandoning plain meaning for a subjectively fair outcome. Accordingly, they are less likely to see a need for rules to control judges during the interpretive process.

Furthermore, proponents of holistic contextualism can question whether prescriptive contextualism actually works to constrain judges. The prescriptive contextualist does not ask judges to avert their eyes from extrinsic evidence lest they be led astray like the parol evidence rule used to do. Grabiner expressly rejects “artificial constraints on the admissibility of background material”, and rightly so: the parol evidence rule was never very successful at preventing extra-textual evidence from coming before a judge and influencing him or her, either consciously or sub-consciously, because that evidence was only inadmissible for the purpose of contract interpretation and could still be put before the judge for other reasons. Nevertheless, the prescriptive contextualist still expects judges to be able to perform the first two steps of the process, which involve nuanced considerations such as the assessment of plain meaning and are not simply the application of clear rules, without being influenced by the extratextual context that they are already aware of. Arguably, that is an unrealistic demand that the holistic contextualist does not expect of the judiciary.

E. Does the Prescriptive Approach Miss the Fundamental Role of Context?

Holistic contextualists argue that context “is always a necessary ingredient in ascertaining meaning”, as Tipping J put it. The idea of an interpretive process that appears to purport to divorce meaning from context, even for a stage or two, arguably “fails to recognise the more symbiotic nature of the relationship between words and background”, as Glazebrook J put it.

The prescriptive contextualist can respond that no one is seriously arguing that words can have an acontextual meaning, and everyone accepts that context necessarily colours meaning – even “plain meaning” is determined in the context of a general understanding of how words are used. However, acknowledging that context is always an ingredient in meaning does not, by itself, as Goh points out, answer the question of which context ought to be used for the purposes of contract interpretation. The prescriptive contextualist can argue that their methodology does not purport to generate acontextual meaning. Rather, it searches for the ultimate contextual meaning in a way that ensures proper regard is given to what is generally the most important part of the context: the words of

111 As Lord Nicholls admitted frankly while writing extra-judicially: Donald Nicholls “My Kingdom for a Horse: The Meaning of Words” (2005) 121 LQR 577 at 578.
112 Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] NZSC 5, [2010] 2 NZLR 444 at [23]. See also Towne v Eisner 245 US 418 (1918) at 425 per Holmes J; and Yam Sung Pie Ltd v International Trade Corporation Ltd [2013] EWHC 111, [2013] 1 All ER (Comm) 1321 (QB) at [133].
114 See the discussion in Frederick Schauer “Formalism” (1988) 97 Yale Law Journal 509 at 527–528.
the contract. As Havelock put it: “The proposition that meaning always depends on context does not mean that it only depends on context, for it must also primarily depend on the existence of common or conventional meanings of words.”116 The holistic contextualist’s response117 might be to draw on Lord Hoffmann’s fourth principle in ICS:118

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

However, this is not really an answer to the prescriptive contextualist’s position, because the prescriptive position is not that the meaning of a document is simply the dictionary meaning of its words. The notion of plain meaning is more complex than that, and draws on conventional meaning not just dictionary meaning.119 So, we cannot fairly dismiss developed articulations of the prescriptive approach on the basis that they fail to properly appreciate the role of context.

F. The Prescriptive Process can Inhibit Identification of Viable Interpretations

Proponents of the prescriptive process argue that starting with plain meaning is necessary to mitigate the risk of judges getting misdirected by context. I would suggest that the prescriptive approach brings with it its own risk: the plain meaning starting point can inhibit the consideration of possible interpretations – the focus on plain meaning risks becoming myopic.

On this point, the recent New Zealand Supreme Court decision, New Zealand Air Line Pilots’ Assoc Inc v Air New Zealand Ltd (Air Line Pilots’) is instructive.120 Air Line Pilots’ was centred on a dispute over the interpretation of a collective agreement121 between Air New Zealand and a pilots’ union, the New Zealand Air Line Pilots’ Assoc Inc (NZALPA). NZALPA was the larger of the two main unions that competed for the membership of pilots flying for Air New Zealand, the other being the Federation of Air New Zealand Pilots Inc (FANZP). Clause 24.2 of the collective agreement between NZALPA and Air New Zealand provided that:122

During the term of this Agreement any agreement entered into by [Air New Zealand] with any other pilot employee group which is more favourable

116 Rohan Havelock “Return to Tradition in Contractual Interpretation” (2016) 27 KLIJ 188 at 204.
118 Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1) [1998] 1 WLR 896 (HL) at 913.
119 See Rohan Havelock “Return to Tradition in Contractual Interpretation” (2016) 27 KLIJ 188 at 204.
121 A “collective agreement” is a binding agreement between one or more unions, one or more employers, and two or more employees: Employment Relations Act 2000, s 5.
than provided for in this Agreement will be passed on to pilots covered by this
Agreement on the written request of [NZALPA].

During the term of the agreement, Air New Zealand entered into a new
collective agreement with FANZP, which provided for higher rates of pay for
some pilots than the agreement with NZALPA. The agreement with FANZP
also contained some provisions that were arguably more favourable to Air
New Zealand compared with the NZALPA agreement.\textsuperscript{123} NZALPA then requested
that Air New Zealand pass on the higher rates of pay to their collective, citing cl
24.2. Air New Zealand declined, arguing that cl 24.2 did not allow individually
favourable clauses to be passed on and only allowed the whole of an agreement
with another union to be adopted.

The Employment Court took a holistic contextual approach to interpretation,
and found in favour of NZALPA’s interpretation, in part on the basis that cl 24.2
was a concession that Air New Zealand made to NZALPA to try and prevent
a strike.\textsuperscript{124} The principles of contract interpretation are central to the \textit{Air Line
Pilots’} case at the Court of Appeal level and beyond, because overturning
an Employment Court decision requires identifying an operative error in the
statement or application of those principles.\textsuperscript{125} The Court of Appeal noted that
counsel for Air New Zealand had not raised any objections to the exposition
of the principles of contract interpretation by the Employment Court,\textsuperscript{126} and
observed that there had been two new authoritative re-statements of the law of
contract interpretation since the Employment Court’s decision, \textit{Firm PI 1 and

\textsuperscript{123} The provisions that were more favourable to Air New Zealand included an undertaking that
FANZP and its members would not take legal proceedings with respect to a dispute about the
allowable meal allowance and removal of “35/7” (i.e. no more than 35 hours in a seven-day

\textsuperscript{124} \textit{New Zealand Airline Pilots’ Assn Inc v Air New Zealand Ltd [2014] NZEmpC 168}, (2014) 12 NZLR 401. The judgment included a wide-ranging discussion of the textual and extratextual context as well as commercial sense. Notably, the discussion of interpretation does not
commence with identifying the plain meaning of the pivotal words. Indeed, the closest thing to
discuss the meaning of the word “agreement” by itself comprises one paragraph in the
middle of a discussion of business commonsense, at [65].

\textsuperscript{125} Employment Relations Act 2000, s 214(1): “A party to a proceeding under this Act who is
dissatisfied with a decision of the court (other than a decision on the construction of … a
collective employment agreement) as being wrong in law may, with the leave of the Court of
Appeal, appeal to the Court of Appeal against the decision”. At first glance, one could think that
that s 214(1) would mean that there was no jurisdiction to hear the appeal, since the dispute centred
on the interpretation of a clause in a collective employment agreement. That was the position
under an earlier era of employment law in New Zealand, that, as McGrath J put it in \textit{Secretary for Education v Yates} (2004) 2 NZLR 423 (CA) at [5], citing \textit{Combined Unions v NZMC Ltd [1983] ACJ 233} at 239 and \textit{Foodtown Supermarkets Ltd v NZ Shop Employees’ IAOW [1984] ACJ 1043} (CA) at 1048 per Somers J: “reserve[d] to the Arbitration Court, and its successors,
the exclusive right to interpret awards, applying its specialist knowledge and expertise without
being restrained by technical legal principle”. However, the Employment Contracts Act 1991,
s 135 which is identical in effect to s 214 of the Employment Relations Act 2000, ushered in
a new philosophy that, as William Young J put it in \textit{Secretary for Education v Yates} (2004) 2 NZLR 423 (CA) at [97]: “parties to Employment Court litigation are entitled to the application

\textsuperscript{126} \textit{Air New Zealand Ltd v New Zealand Air Line Pilots’ Assoc Incorp [2016] NZCA 131}, [2016] 2
NZLR 829 at [31].
Arnold v Britton,\textsuperscript{127} but said nothing to suggest that these new authorities brought the Employment Court’s statement of principles into question. However, the Court of Appeal found that the Employment Court had made an operative error in the application of the principles of contract interpretation. In short, the Court of Appeal considered that “agreement” has a plain meaning, which refers to the whole of an agreement, and that the Employment Court failed to give proper regard to that plain meaning.\textsuperscript{128} In reaching that conclusion, the Court of Appeal worked through the steps in the prescriptive process and, having identified a clear plain meaning, found nothing in the textual or extra-textual context or in the idea of commercial sense to depart from it.\textsuperscript{129} Accordingly, the Court of Appeal found in favour of Air New Zealand’s interpretation.

The Supreme Court, however, was unanimous in rejecting the premise that there were only two viable interpretations of cl 24.2.\textsuperscript{130} At the hearing of the case in the Supreme Court, members of the Court raised with counsel two other possible interpretations which, William Young J recounted, was not received warmly by counsel.\textsuperscript{131}

The first alternative interpretation is that cl 24.2 allows for NZALPA to incorporate a specific beneficial provision into their agreement, but only if they also incorporate any corresponding dis-benefits linked to that particular provision.\textsuperscript{132} The second, taking a “wider interpretation” of “agreement”, as the majority put it,\textsuperscript{133} is that cl 24.2 allows a particular group of pilots to take on all the terms (favourable and otherwise) in the other agreement that apply to that group. William Young J stated in his judgment that there may be other

\textsuperscript{127} Air New Zealand Ltd v New Zealand Air Line Pilots’ Assoc Incorp [2016] NZCA 131, [2016] 2 NZLR 829 at [34]–[35].

\textsuperscript{128} Air New Zealand Ltd v New Zealand Air Line Pilots’ Assoc Incorp [2016] NZCA 131, [2016] 2 NZLR 829 at [47].

\textsuperscript{129} Air New Zealand Ltd v New Zealand Air Line Pilots’ Assoc Incorp [2016] NZCA 131, [2016] 2 NZLR 829 at [40]–[50], step two at [51]–[57], step three at [58]–[64] and step four at [65]–[75].

\textsuperscript{130} New Zealand Air Line Pilots’ Assoc Inc v Air New Zealand Ltd [2017] NZSC 111, [2017] 1 NZLR 948 per Ellen France J, with whom Arnold and O’Regan JJ agreed, at [93]–[97], William Young J at [114]–[119], Glazebrook J at [195]–[197]. The case did not resolve the question of which was the correct interpretation, with a majority finding only that the Employment Court was wrong to find in favour of the interpretation that NZALPA had argued for. See Ellen France J at [97]–[100] and William Young J at [145]–[146] for the factors that led to this outcome.

\textsuperscript{131} New Zealand Air Line Pilots’ Assoc Inc v Air New Zealand Ltd [2017] NZSC 111, [2017] 1 NZLR 948 at [120].

\textsuperscript{132} New Zealand Air Line Pilots’ Assoc Inc v Air New Zealand Ltd [2017] NZSC 111, [2017] 1 NZLR 948, see Ellen France J, with whom Arnold and O’Regan JJ agreed, at [94], William Young J at [114].

\textsuperscript{133} New Zealand Air Line Pilots’ Assoc Inc v Air New Zealand Ltd [2017] NZSC 111, [2017] 1 NZLR 948, see Ellen France J, with whom Arnold and O’Regan JJ agreed, at [95]. See also William Young J at [114].
interpretations worth considering, and Glazebrook J raised the possibility of a third interpretation in her judgment.

Of course, the fact that counsel for each side had each argued for one interpretation played a role in the Court of Appeal treating the case as a context between two viable readings. But it will often be the case that each side argues for an interpretation that is particularly favourable to their client, and there is no reason for a court to buy into that framing. Interpretation is concerned with the parties' collective intentions expressed in their contract, and not with determining which of the parties succeeded in imposing their subjective intentions over the other. Accordingly, the court should at least entertain the possibility of middle-ground interpretations that best reflect the parties' collective intentions. This is where, I would suggest, the prescriptive process led the Court of Appeal astray. The Court of Appeal's blindness to other interpretations can be traced back to its first step in the interpretive process being a consideration of the plain meaning of the word "agreement". Having found a plain meaning, that plain meaning drove the rest of the interpretive process, at the expense of other viable interpretations. This is not simply a case where too much weight was attached to plain meaning, leading to the wrong interpretation being chosen. Rather, this is a more serious sort of error: a failure to even consider interpretations which could have turned out to best capture the parties' intentions in the eyes of the law. That the prescriptive process can produce such errors gives us a significant reason to doubt its desirability.

That said, I can identify two arguments for why the Court of Appeal's decision is a flawed application of the prescriptive process and does not give us good reason to doubt the merits of that approach in general. The first is that the prescriptive process does not prohibit new viable interpretations arising as the court ventures beyond plain meaning to work through the following steps, so there was nothing to prevent the Court of Appeal from identifying alternative interpretations, even though the parties had not argued them. This argument is unpersuasive, however, as a detailed and syntactical analysis of plain meaning practically invites the overlooking of other interpretations.

The second argument that the Court of Appeal failed to properly apply the prescriptive methodology is that the Court of Appeal did not correctly identify the centrally important words in the dispute. The Court of Appeal found that the words "any agreement" were the centrally important words, so considered the plain meaning of those particular words, before going on to consider them in the context of cl 24.2 and then the contract as a whole. Arguably, a proper application of the prescriptive methodology would have been to identify the whole of cl 24.2 as being the relevant words, and then consider the plain meaning of the clause, before considering the clause in the context of the text as a whole. That is a different exercise to determining the plain meaning of "any agreement", because

134 New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd [2017] NZSC 111, [2017] 1 NZLR 948 at [114]-[115] per William Young J.

135 New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd [2017] NZSC 111, [2017] 1 NZLR 948 at [196] per Glazebrook J: "any additional pay not related to any additional burdens should be passed on under the clause". Glazebrook J suggested at [197] that this might be the most plausible interpretation of cl 24.2, on the basis that "if any additional burdens had to be passed on for cl 24.2 to apply, one would have expected some mechanism for working out the existence and extent of such burdens."
the plain meaning of a clause takes into account but is not determined solely by, the conventional meanings of the words of that clause.\textsuperscript{136}

In my view, this second argument has some merit, because the authorities do seem to envisage the centrally relevant words being a clause rather than words (or a word) in a clause.\textsuperscript{137} So, the Court of Appeal was arguably not faithful to the prescriptive process, although it is not clear that considering the plain meaning of the whole of cl 24.2 would have been of assistance in identifying additional interpretations. However, consideration of this issue of the centrally relevant words in \textit{Air Line Pilots'} brings us to my second argument: identifying the centrally relevant words is an absolutely crucial step in the prescriptive process, but the idea that there are easily discoverable centrally important words is questionable.

\subsection*{G. The “Centrally Important Words” Will Not Always Be Obvious}

Identifying the centrally important words is a pivotal step in the prescriptive process, because it is the plain meaning of \textit{those particular words} that is carried through the rest of the process. Other parts of the contract form the textual context of the centrally important words, to be consulted only after consideration of the plain meaning of the centrally relevant words. Thus, identification of which words are the centrally important ones can be a key driver of the outcome in any particular case.

However, it will not always be easy to identify the “right” centrally relevant words, especially considering that the court is supposed to do so prior to a full consideration of the textual and extra-textual context. True, disputes are often explained as being about a particular part of the contract. However, there will be a number of inter-related provisions and clauses that define words or phrases in other clauses, as in \textit{Aberdeen City Council}\textsuperscript{138} and \textit{Wood v Capita}, as the following paragraph from the latter decision illustrates:\textsuperscript{139}

The indemnity in clause 7.11 is an addition to the detailed warranties in schedule 4. The mis-selling which clause 7.11 addresses is also covered by the warranty in para 14.1 of schedule 4: paras 18 and 19 above. But liability for the schedule 4 warranties is time-limited by schedule 5. In particular para 3.1(b) of that schedule (para 20 above) required the Company to claim within two years of the completion of the sale and purchase. The scope of the clause 7.11 indemnity, breach of which gives rise to a liability which is unlimited in time, falls to be assessed in the context of those time limited warranties.

Consider, for example, a case involving a dispute about the application of a clause, some of the words of which are defined in an interpretation provision. Is the clause centrally relevant while the interpretation provision is part of the textual context? If so, the Court should consider the plain meaning of the clause before turning to the interpretation provision as part of the textual context. It seems unnecessary and perhaps contrary to the parties’ intentions for a court

\textsuperscript{136} See the discussion above at ILA.5 “Plain meaning plays a role”.

\textsuperscript{137} See above n 51.

\textsuperscript{138} \textit{Aberdeen City Council v Stewart Milne Group Ltd} [2011] UKSC 56, 2012 SCLR 114. See above at II.C.2 “Step two: Textual context”.

\textsuperscript{139} \textit{Wood v Capita Insurance Services Ltd} [2017] UKSC 24, [2017] AC 1173 at [27].
to first concern itself with plain meaning when the parties themselves have provided a definition.

Alternatively, one might suggest that both the clause and its interpretation provision are centrally relevant. That might initially seem appealing but, the more words are considered centrally relevant, the less likely it is that those words could collectively be said to have one particular plain meaning, and the more cumbersome the process of considering them becomes. This would undermine the certainty that the prescriptive approach is supposed to offer.

The holistic approach does away with the need to pick one particular part of the contract a priori to revolve the exercise of interpretation around, and does not give the plain meaning of one particular clause a disproportionate role in the process. Although the holistic approach might pick a certain clause as the entry point into the interpretive process, it allows for what initially might have appeared to be the centrally relevant words to fade into the background when it becomes clear that something in the textual or extra-textual context provides greater insight into the parties’ intentions. Thus, it does not matter if the Court did not initially identify the “right” centrally important words.

IV. CONCLUSION

Lord Hoffmann stated in ICS that much of the old intellectual baggage of legal interpretation has been discarded.140 The dialogue about the development of the principles of contract interpretation is most productive if we focus on the sometimes-subtle differences in the emerging approaches to modern contract interpretation, rather than try and retrieve discarded approaches, or knock down straw men. No one is seriously suggesting that courts should not pay close attention to the words that the parties have used, especially if those words have a plain meaning. Neither is anyone proposing a return to blunt literalism.141 As Lord Hodge put it in a passage that is sure to be quoted again and again:142

Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement.

Where reasonable people can disagree, however, is on how best to explain the relative roles that plain meaning, context, and commercial sense play in the interpretive process. Here, I have argued that two rival approaches have emerged in the post-ICS era of modern contextual contract interpretation. The prescriptive approach requires courts to first consider the plain meaning of the centrally important words to the dispute, before considering textual and extra-textual context, and finally commercial sense. The holistic approach also considers those same factors as a unitary exercise. Which approach is preferable depends in part on one’s position on the importance of certainty in contract law, the extent to which commercial parties actually pay close attention to wording,

140 Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1) [1998] 1 WLR 896 (HL) at 912.

141 And, of course, it is arguable that there never really was an era of blunt literalism to return to. See above n 12 and accompanying text.

and whether judges are in need of constraint lest they be led astray by wily lawyers. I favour the holistic approach, and have suggested that the focus on plain meaning that is characteristic of the prescriptive approach brings with it the risk of failing to identify viable interpretations. I have also argued that the pivotal role that the centrally important words play for the prescriptive approach is a problem, because the identification of “centrally important words” is less straight-forward than it may at first appear.