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A wrong turn in history: re-understanding the exclusionary rule against prior negotiations in contractual interpretation

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Keywords: Contract terms; Contractual negotiations; Exclusionary rule; Interpretation

Cases cited: [Prenn v Simmonds \[1971\] 1 W.L.R. 1381 \(HL\)](#)
[A&J Inglis v John Buttery & Co \(1878\) 3 App. Cas. 552 \(HL\)](#)

***360 Introduction**

A reason justifying the exclusionary rule against prior negotiations in the interpretation of contracts¹ is its longevity.² Yet, the authorities commonly cited in support of the exclusionary rule are mostly traceable to Lord Wilberforce's speech in the relatively recent case of *Prenn v Simmonds*.³ This article suggests that the law took a wrong turn in that case and caused later courts to support the exclusionary rule by recourse to policy-oriented justifications, instead of principle-based ones.⁴ The emphasis on policy-oriented justifications,⁵ and the recantation of *Prenn v Simmonds* as reason enough for the exclusionary rule, support an independent rule against prior negotiations that was never meant to be. The consequence is the judicial⁶ (and academic⁷) acknowledgement of the exclusionary rule's uncertain boundaries, and the simultaneous maintenance of its legitimacy.*361 8

This article is divided into three parts. The first part, which is the focus of this article, makes the case for a historical misstep in the judicial understanding of the exclusionary rule. It will be shown that the exclusion of prior negotiations was originally a facet of the parol evidence rule. However, this exclusion then became detached from its evidentiary basis and evolved into an independent rule, a process which started with *A & J Inglis v John Buttery & Co*⁹ and became greatly strengthened following *Prenn v Simmonds*. For completeness, the second part of this article looks at the present-day consequences of this misstep. Even if it is accepted that the misstep does not prevent the common law from developing the exclusionary rule independently, it will be shown that such development is unprincipled. The last part of this article looks to the future: from the historical context and present-day application of the exclusionary rule, it will be argued that the principle-based justifications for the exclusion of prior negotiations are narrow. There is no independent exclusionary rule against prior negotiations. Prior negotiations are still sometimes excluded in contractual interpretation, but this is not as a consequence any exclusionary rule specific to them. Rather, they are excluded because of broader principles underpinning the interpretation enterprise.

The past—wrong turns by misunderstanding the historical justifications for the exclusionary rule

Historical justifications for excluding prior negotiations

The exclusionary rule as a facet of the parol evidence rule

Historically, the exclusion of prior negotiations in contractual interpretation was regarded as a facet of the parol evidence rule.¹⁰ In other words, prior negotiations were not excluded on the basis of their status alone. Instead, they were generally admissible to ascertain the aim and object of the contract; this was acknowledged as early as 1835 in *Reay v Richardson*.¹¹ In that case, a previous conversation was held admissible to explain the motive that induced the plaintiff to enter into a compromise agreement with the defendant. Parke B held that the evidence of the conversation was not to add to or qualify the terms of the agreement, but to show with what view the agreement was written.¹²

Extrinsic evidence inadmissible to add to, vary or subtract from written document

There were two separate but related reasons for the exclusion of prior negotiations as a facet of extrinsic evidence in the 19th century.¹³ Indeed, as Carter notes, most of the judicial formulations of the parol evidence rule spoke of evidence to "add*³⁶² to, vary or subtract from" the document, whereas others spoke of the rule in relation to what the contract meant.¹⁴ They both related to the belief that the final agreement embodied the parties' assent and so should be

superior to anything else.¹⁵The first related to that aspect of the parol evidence rule of not adding, varying or subtracting from the final agreement.¹⁶The rule is stated as such¹⁷:

"Parol testimony shall not be received, even to add to a written agreement, a term or stipulation orally agreed by them before, or at the time the bargain was reduced into writing, to be parcel of the written instrument, but not introduced therein; for this would be in effect to alter such agreement."

By this formulation, prior negotiations would be excluded together with all other extrinsic evidence if they were being used to "add, subtract or vary" the contract. The exclusion of prior negotiations on this basis did not affect its exclusion (or inclusion) when used for contractual interpretation. Indeed, it was said that while the writing cannot be departed from, one might "argue touching the operation thereof".¹⁸The test, it seems, is whether the evidence explains the language used or "labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument".¹⁹

However, the imprecise meaning of "adding, varying or subtracting" from the final agreement meant that prior negotiations were sometimes excluded even though they were being used to interpret the contract. In *The Countess of Rutland's Case*,²⁰ Sir John Popham CJ explained that "every contract or agreement ought to be dissolved by matter of as high a nature as the first deed" and that:

"It would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory."²¹

The averment to "slippery memory" potentially excluded prior negotiations used for contractual interpretation. If the accuracy of the prior negotiations is in doubt, then, going by this reasoning, not only should they be inadmissible to vary the final agreement, but also to explain that agreement. Indeed, some treatises of the 17th century read *The Countess of Rutland's Case* as supporting the exclusion of prior negotiations to interpret the contract.²² However, this by no means represented the then-orthodoxy; indeed, notwithstanding this potentially extended reach of this aspect of the parol evidence rule, extrinsic evidence was generally excluded on the basis that it "added, subtracted or varied" the contract.

Extrinsic evidence inadmissible to explain written document except in latent ambiguity

Prior negotiations were also excluded as part of the general principle that "it is not permitted to interpret what has no need of interpretation".²³ This rested upon the belief that words have

fixed meanings, such that a party who has used clear and unambiguous language will be held to all that naturally follows from a direct and plain understanding of such language.²⁴ It was only when a term was susceptible to several meanings²⁵ that recourse could be had to the relevant context in order to discover the parties' true intentions.²⁶ This principle is derived from Lord Bacon's maxim that where an ambiguity is made apparent only by what is extrinsic to the writing, it must be corrected by extrinsic evidence.²⁷ Although some cases treated this principle as being distinct from the parol evidence rule,²⁸ it was later regarded as part of the parol evidence rule.²⁹

According to this understanding of the parol evidence rule, extrinsic evidence, including prior negotiations, was not admissible to *explain* the contract unless there was latent ambiguity. Latent ambiguity is distinguished from patent ambiguity, which is incurable.³⁰ Leaving aside criticisms of this distinction,³¹ where there was a latent ambiguity, "the actions of the parties *previous to*, and contemporaneous with, (but not subsequent to), the agreement, are admissible to explain it, by directing its application".³² Thus in *Hughes v Statham*,³³ letters written before an agreement were rejected because, as explained by Bayley J, the purpose of their admission "was not to show and explain any latent ambiguity, but to contradict*³⁶⁴ the plain meaning of the bargain".³⁴ The implication, however, is that had there been latent ambiguity, those letters, examples of prior negotiations, may have been properly admitted.³⁵

Indeed, the law reports are replete with examples showing prior negotiations being admitted to explain a latent ambiguity. For example, it was accepted in *Macdonald v Longbottom*³⁶ that extrinsic evidence may be admissible for the purpose of showing the subject-matter in a contract. Specifically, a prior conversation between the parties was admissible in that case to construe what "your wool" meant in the contract. According to Lord Campbell CJ, this evidence neither altered nor added to the written contract, but merely allowed the court to ascertain what the subject-matter referred to was.³⁷ Byles J held on appeal that the prior conversation was admissible so as to remove the latent ambiguity present in the contract.³⁸ Similarly, in *Smith v Thompson*,³⁹ prior correspondence between the parties was admitted to interpret a document by the defendant directing the plaintiff to use money remitted to him for "business purposes". The justification for such admission was variously stated to be for the explanation of ambiguous contractual terms.⁴⁰

Clear historical justifications

From the foregoing discussion, it is clear that the exclusion of prior negotiations was premised on two aspects of the parol evidence rule in the 19th century. Prior negotiations were excluded as part of the general prohibition against any variation of the written contract. Further, prior negotiations were excluded from being used to interpret the contract except where there was

latent ambiguity.⁴¹ Unless one disagreed with the basis for the parol evidence rule,⁴² the exclusion of prior negotiations in the application of the parol evidence rule was not objectionable. At the very least, such exclusion was premised on clear justifications and guidelines. These justifications and guidelines were, however, to become muddled following wrong turns in subsequent cases.

Wrong turns in history

The case of *Inglis v John Buttery Co*

The first wrong turn came with the 19th century case of *Inglis*. The issue in that case was whether a contract obliged shipbuilders to pay for extra new plating which was not contemplated specifically in the contract but which was required³⁶⁵ to enable the ship to meet the classification concerned. The lower courts had considered the effect of a deleted sentence in the contract, an approach that was rejected by all members of the House of Lords. However, each differed somewhat as to the exact reason why.

Lord Gordon's speech was the shortest and he expressed agreement with Lord Gifford's view of the law in the court below that⁴³:

"It is quite fixed, and no more wholesome or salutary rule relative to written contracts can be devised, that where parties agree to embody, and do actually embody, their contract in a formal written deed, then in determining what the contract really was and really meant a Court must look at the formal deed and to that deed alone."

This statement of the law was unfortunately incompatible with the prevailing law at the time. While it was correct that the parol evidence rule prohibited recourse to extrinsic evidence to ascertain "what the contract really was", it did not do the same with respect to what it "really meant". Lord O'Hagan's speech proceeded along similar lines. He stated as a general rule that a contract, "perfect in itself",⁴⁴ could not be interpreted by "acts antecedent to it".⁴⁵ He then went on to say that prior negotiations could not be admitted at all and that the "contract must stand by itself: and must be construed according to its own words, and the provisions contained within its own four corners".⁴⁶ McLauchlan perceptively identifies Lord O'Hagan's speech as a reflection of the exclusionary rule of today.⁴⁷ However, Lord O'Hagan did not refer to any authority in support of this principle beyond the assertion that admission would be "contrary to reason and principle".⁴⁸ But the prevailing reason and principle of the time was that extrinsic evidence, including prior negotiations, could be admitted in the event of a latent ambiguity. While Lord O'Hagan appeared to allude to the requirement of ambiguity when he referred to a contract that was "perfect in itself"⁴⁹ (and hence admitting of no ambiguity), his later state-

ments—as McLauchlan rightly points out—are reminiscent of an independent exclusionary rule.

Quite apart from the speeches already referred to, it was Lord Blackburn's speech that became the most referred to subsequently. He said that recourse to deleted sentences—which he regarded as an instance of prior negotiations—was not correct because the formal contract superseded all previous communications between the parties.⁵⁰ He likewise expressed full agreement with Lord Gifford's view of the law.⁵¹ Notwithstanding Lord Blackburn's agreement with Lord Gifford, it is arguable that Lord Blackburn's principal objection to the lower court's approach was not that the lower court admitted prior negotiations per se. Rather, it was because the lower court had made use of prior negotiations to be "placed in the position in which the parties stood before they signed".⁵² This expression³⁶⁶ admits of two possible meanings. The first is an objection of the lower court's consideration of the parties' declarations of intentions (as contained in the prior negotiations) to alter the written contract. The second is an objection of the lower court's consideration of the background in which the parties found themselves (again, contained in the prior negotiations) to explain the contract. Out of these two possibilities, it seems unlikely that Lord Blackburn intended to jettison what he had said just a year earlier. In his well-known judgment in *River Wear Commissioners v Adamson*,⁵³ he said that contractual interpretation involved inquiring beyond the language and involved examining all relevant background. Moreover, since 1859,⁵⁴ it had been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term. Lord Blackburn's objection was therefore not with the admission of prior negotiations for the interpretation of contracts per se, but rather with the specific use of prior negotiations as being declarations of the parties' intentions.⁵⁵

Finally, Lord Hatherley LC appeared to base his decision on the inadmissibility of extrinsic evidence where the plain meaning of the contractual words was clear. Indeed, he said that the contractual words are "so plain and simple as to require no aid of testimony specially to explain them".⁵⁶

On the foregoing analysis of the various judges' speeches, the ratio of *Ingliš* does not as strongly support the exclusionary rule as is commonly believed. More substantively, the error in *Ingliš* appears to be a conflation of prior negotiations which "added, subtracted or varied" the contract (a complete exclusion), and those which "explained" the contract (a qualified exclusion). Both Lords Gordon and O'Hagan ignored the qualified exclusion in favour of a complete exclusion, contrary to the prevailing authority of the time. This error led to the formulation of an independent exclusionary rule.⁵⁷

The significance of *Ingliš* was regarded differently by the treatises of the time, affecting the

subsequent development of the law. Some treatises promulgated the error that there is no distinction between variation and interpretation, illustrated most prominently by Chitty's treatise, which regarded *Inglis* as setting an absolute rule that, in construing a contract, "the Court [is not] entitled to look at what the parties thereto said or did whilst the matter was in negotiation".⁵⁸ The case of *Cumberland v Bowes*⁵⁹ was cited as supporting this reading of *Inglis*.⁶⁰ However, *Cumberland v Bowes* did not support this reading of *Inglis*; rather, all that Jervis CJ said in that case was that he had "considerable doubt" whether it was correct to refer to alterations in the draft contract to interpret a contract.⁶¹ The court did not see it as necessary to consider this question⁶² and even if it had had to, it appears*³⁶⁷ that Jervis CJ's doubt was premised on the extrinsic evidence being "contradictory".⁶³ Therefore, if it were necessary to explain Jervis CJ's reasoning, it would have been perfectly reconcilable with the prevailing rule that extrinsic evidence, including prior negotiations, could not be admitted if they contradicted, rather than explained, the contract. Furthermore, this broad reading of *Inglis* is inconsistent with other parts of Chitty's treatise of the time. It continued to maintain that extrinsic evidence might be admissible to explain a contract where there was ambiguity, provided that the evidence was not being used to vary or contradict the contract.⁶⁴ The treatise also cited *Macdonald v Longbottom* as an example where evidence of a previous conversation may be considered in the interpretation of a contract,⁶⁵ which would not have been possible had *Inglis* introduced an absolute bar against recourse to prior negotiations. These two inconsistencies remained in later editions of Chitty's treatise.⁶⁶

Shaw in his treatise took a similar view that prior negotiations were completely excluded in the interpretation of contracts,⁶⁷ although he did not cite *Inglis* for this proposition. Rather, he cited *The Countess of Rutland's Case*⁶⁸ and Lord Abbot CJ's statement in *Kain v Old* that "if the contract be in the end reduced to writing, nothing which is not found in the writing can be considered as a part of the contract".⁶⁹ These demonstrate the confusion between prior negotiations that contradict the contract, and those that merely explain it. The cases of *The Countess of Rutland* and *Kain v Old* both concerned that aspect of the parol evidence rule which prohibited admission of extrinsic evidence, including prior negotiations, to contradict the contract by "adding, subtracting or varying" it. They did not prohibit recourse to such evidence for the purpose of explaining the contract. That aspect of admissibility is instead controlled by the presence or absence of ambiguity. Yet, Shaw proposed the absolute exclusion of prior negotiations in a section on "interpretation of obligations".

Other treatises attempted to reconcile *Inglis* with the prevailing rule. For example, Addison's treatise cited *Inglis* as standing for the proposition that⁷⁰:

"But where there is a written contract, the meaning of which as it stands is clear and unambiguous, former correspondence between the parties cannot be considered for the purpose of

arriving at the intention of the parties, nor can words deleted from the document and initialed by the parties as deleted, be used for such purpose.*368 "

This statement from *Inglis* did not introduce an independent exclusionary rule. Rather, the exclusion of prior negotiations was still premised on the underlying aspect of the parol evidence rule that looks to ambiguity. Indeed, on its narrower reading of *Inglis*, Addison's treatise continued to include *Macdonald v Longbottom* as illustrating the admissibility of prior correspondence to ascertain the subject matter of the contract.⁷¹ Anson's treatise similarly adopted a narrower reading of *Inglis*, although it did not refer to the case. It instead regarded cases like *Macdonald v Longbottom* as examples involving latent ambiguity, in which "explanatory evidence" is admissible.⁷² It is submitted that this is the correct view based on the prevailing law.⁷³ Notwithstanding these arguments for a narrower reading of *Inglis*, *Inglis* laid the seeds for the rise of an independent exclusionary rule.

Developments following *Inglis*

Despite the divergent treatment of *Inglis* by the treatises of the time, the courts did not appear to treat *Inglis* as standing for an independent exclusionary rule against prior negotiations. Instead, the courts explained the rejection of prior negotiations in contractual interpretation on the basis that there was insufficient ambiguity to admit extrinsic evidence. For example, in the Privy Council decision of *Bank of New Zealand v Simpson*,⁷⁴ Lord Davey stated that "[e]xtrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about".⁷⁵ The extrinsic evidence in that case included prior negotiations (including correspondences and a circular prepared by the respondent) between the parties. In allowing such evidence to be admitted, Lord Davey held that the words in question did not possess a fixed meaning and were susceptible to different meanings depending on the surrounding circumstances. This reasoning was clearly based on the finding of latent ambiguity that allowed for the admission of parol evidence, including prior negotiations, to explain the contract.

Notwithstanding the case law, some treatises continued to assert a broad proposition that prior negotiations may not be looked at to construe the contract right before *Prenn* was decided. A prominent example is Chitty's treatise, where the relevant statement of law had now evolved to read:*369

"In construing a contract the court is not entitled to look at what the parties thereto said or did whilst the matter was in negotiation."⁷⁶

Six cases were cited in support of this proposition, which, on closer examination, do not all

stand for such a broad rule. The first, *Prison Commissioners v Middlesex Clerk of the Peace*,⁷⁷ concerned the interpretation of a conveyance "upon trust ... for the purposes of the Prison Act, 1865". One issue was whether minutes discussing the conveyance could be admitted to interpret the conveyance. While it is true that Jessel MR disallowed recourse to those minutes, the reason behind his decision can be predicated on the lack of ambiguity⁷⁸ rather than a broad view that all prior negotiations are inadmissible. First, although Jessel MR said that "the law is that whatever the negotiations may be that precede the purchase, still the parties to the conveyance are bound by it",⁷⁹ there is nothing particularly startling about this statement. It simply shows that contracting parties are bound by the final agreement reached. By contrast, the interpretation of that agreement is a different matter and may be assisted by recourse to extrinsic evidence. The minutes concerned were not admitted in this case because the conveyance "in the most express terms, recites that the land was bought for the purposes of the Prison Act, 1865".⁸⁰ There was simply no latent ambiguity present to justify the admission of extrinsic evidence, including prior negotiations (the minutes), to interpret the conveyance. The second case cited in support of a broad exclusionary rule, *Leggott v Barrett*,⁸¹ may also be explained similarly. That case concerned the interpretation of a deed that had been signed following an executory contract agreed between the parties. The issue was whether the executory contract constrained the effect of the deed. James LJ stated clearly that⁸²:

"If the parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract ... except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself."

Leggott v Barrett is therefore explainable on the basis that extrinsic evidence (whether prior negotiations or not) is not admissible to "add, subtract or vary" the contract eventually reached and does not stand for any broader proposition. Indeed, James LJ's statement quoted above expressly allows recourse to extrinsic materials to construe the final contract. *Millbourn v Lyons*,⁸³ another case cited in Chitty's treatise, may be likewise explained.

The next case of *Mercantile Bank of Sydney v Taylor*⁸⁴ can also be explained similarly. In that case, the appellants argued that prior negotiations should be³⁷⁰ admitted to interpret a contract which released a co-surety from a guarantee but which allegedly reserved rights against other co-sureties. The Privy Council rejected that contention. Lord Watson said that those prior negotiations could not be referred to "either for the purpose of adding a term to their written agreement, or of altering its ordinary legal construction".⁸⁵ This is rather different from a general rule that excludes recourse to prior negotiations altogether. Lord Watson's statement excludes such recourse only where the prior negotiations *add to* the contract or where there is *no*

latent ambiguity present. What is left unsaid is that if the legal construction of the contract is not "ordinary", then latent ambiguity would be present and would in turn permit recourse to prior negotiations.

Another case cited, *Davis Contractors Ltd v Fareham Urban DC*,⁸⁶ concerned whether a covering letter qualifying a tender was incorporated into the tender. It was not about the admissibility of prior negotiations to interpret a contract. If at all, the case rested on that aspect of the parol evidence rule that prohibits extrinsic evidence from adding, subtracting or varying the contract.

In contrast, the last case cited, *City and Westminster Properties (1934) v Mudd*,⁸⁷ does support a broader reading of *Inglis*. While admitting that surrounding circumstances may be called in aid to interpret contracts,⁸⁸ Harman J held that neither "past history" nor deleted words in previous drafts may be referred to. The difficulty with this reading of *Inglis* has already been alluded to⁸⁹; suffice it to say that *Mudd* was the only case out of six cited in Chitty's treatise that actually supported a broad reading of *Inglis*. The least that can be said is that the case law after *Inglis* did not uniformly support a broad exclusionary rule.

The edition of Chitty's treatise just before *Prenn* was decided also cited *National Bank of Australasia Ltd v J Falkingham & Sons*⁹⁰ as a specific example where previous drafts were not admitted to interpret a final deed.⁹¹ However, that case did not stand for such a broad proposition. On the facts, the drafts were not admitted to "alter its [the final deed's] language; still less to explain or assist in the interpretation of the deed as finally executed".⁹² While the second part of this sentence may support a broad exclusionary rule, the fact is that the court went on to say that the "legal effect of the deed appears ... to be quite plain up to a certain point".⁹³ Accordingly, the drafts were not admitted to interpret the deed simply because there was no latent ambiguity present. This is aptly supported by other parts of the treatise that cited *Shore v Wilson* to the effect that:

"Where the words of any written instrument are free from ambiguity ... evidenced *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties, is utterly inadmissible.*³⁷¹ "94

The case of *Prenn v Simmonds*

Thus, the state of the law at the time *Prenn* was decided did not, on balance, support an independent exclusionary rule. The exclusion of prior negotiations, if at all, could still be explained on the basis of various aspects of the parol evidence rule. However, *Prenn* was to herald a judicial preference for an absolute prohibition of prior negotiations in contractual interpretation.

Prennmainly concerned the interpretation of a profit trigger in an option to purchase shares. The dispute was whether "profits" concerned simply the profits of the principal company, or whether it encompassed group profits, including those of subsidiary companies.⁹⁵ Lord Wilberforce, in a speech that has since become one of the longstanding English authorities against the admissibility of prior negotiations, said that prior negotiations could not be admitted because of "unhelpfulness", rather than "technical" reasons or "convenience".⁹⁶ However, as McMeel perceptively notes, Lord Wilberforce in his speech also acknowledged the supposed "utility" of previous documents to ascertain an interpretation that "completely frustrates" the object of the contract, but then went on to say that such negotiations are "unhelpful". There is therefore a tension between limited use and complete uselessness and, as McMeel points out, Lord Wilberforce seems to have equated the two rather too quickly. McMeel further notes that Prenn is not as strong an authority for the exclusionary rule because Lord Wilberforce acknowledged that prior negotiations could be taken into account if they supply a commercial purpose or aim for the agreement.⁹⁷ Elsewhere, McLauchlan notes that the reasons advanced by Lord Wilberforce in Prenn are "unconvincing", and goes on to cite examples of cases in which prior negotiations were in fact helpful.⁹⁸ Notwithstanding these concerns, Prenn was cited in treatises as a determinative authority for the exclusionary rule.⁹⁹ A further point that may be made, in light of the discussion above, is that the authorities before Prenn did not support an exclusionary rule and Prenn must therefore be judged on its own substantive reasoning. However, given the problems identified, Prenn cannot itself be regarded as a reasoned authority for the exclusionary rule.

Consequences leading to present day

Two consequences flowed from Prenn and what had gone on before. The first is that it heralded the rise of an independent exclusionary rule without understanding its proper justifications. Although Lord Wilberforce probably did not intend this consequence,¹⁰⁰ it did in fact result from the erosion in the distinction between the variation and interpretation of a contract. Whereas extrinsic evidence that varied the contract was prohibited by the parol evidence rule, interpretation did not suffer from such an absolute prohibition.¹⁰¹ Yet the two were conflated, leading to an independent exclusionary rule.¹⁰² The second consequence of Prenn is that it turned later courts towards policy-based justifications for the exclusionary rule. The combination of the vague justification of "unhelpfulness" advanced in Prenn, as well as the uncertain origins of the rule, led later courts to justify the exclusionary rule primarily based on policy, not principle. Cases subsequent to Prenn that simply cite Prenn as authority suffer from the same problem caused by these consequences since the historical support of the exclusionary rule remains weak, and citation of Prenn merely amplifies, and does not resolve, that weakness.¹⁰³

The present—uncertain boundaries of exclusionary rule

Two distinct understandings of exclusionary rule

The above discussion of the past brings us to the present. We have seen that the historical basis of the exclusionary rule is not strong. That is a strong reason against the legitimacy of the rule based on its longevity, but it also shows why the subsequent development of the rule is uncertain and unprincipled. Indeed, accompanying the rise of an independent exclusionary rule was the acknowledgement that its boundaries remain unclear. For example, in *Investors Compensation Scheme v West Bromwich Building Society*, Lord Hoffmann said that the boundaries of the exclusionary rule "are in some respects unclear",¹⁰⁴ although he declined to explore them in the case itself. In the subsequent case of *Chartbrook v Persimmon Homes*, Lord Hoffmann accepted that the exclusionary rule did not always preclude evidence of previous communications between the parties, especially if such communications formed part of the background that explained what the parties reasonably meant by their language,¹⁰⁵ but did not explain exactly when this was the case, leading to continued uncertainty in the application of the exclusionary rule.¹⁰⁶

These acknowledgements are unsurprising given the questionable origins of the exclusionary rule. However, that alone is not sufficient to reject the exclusionary rule. Indeed, the present-day application of the exclusionary rule may be premised on some new justifications, justifying the departure from the rule's historical backdrop. In understanding these new justifications, the present-day understandings of the rule must be canvassed. The first is to view the exclusionary rule as being very broad: it disallows the admission of prior negotiations in the interpretation of a contract *in all cases*. The second understanding is to view the exclusionary rule as applying only when prior negotiations are used for certain purposes, although it is not quite clear what those purposes are.*³⁷³

Broad version

Characteristics of broad version

Cases following *Prenn* have attributed a broad meaning to the exclusionary rule. For example, in the New Zealand case of *Yoshimoto v Canterbury Golf International Ltd*,¹⁰⁷ Thomas J thought that "the rule of evidence of pre-contractual negotiations is not receivable is seemingly absolute".¹⁰⁸ By this understanding, prior negotiations are inadmissible because all extrinsic evidence is inadmissible. An example where prior negotiations were inadmissible together with other extrinsic evidence is *Banque Sabbag SAL v Hope*,¹⁰⁹ where Mocatta J held that oral

evidence of what was said between the contracting parties could not be admitted in evidence.¹¹⁰ This understanding of the exclusionary rule, therefore, appears to be that prior negotiations are excluded because of their status as such. This is also illustrated by *Lep Air Services v Rolloswin Ltd*,¹¹¹ in which it was said that a contract cannot be construed by reference to negotiations leading thereto, although it is permissible to look at all the circumstances.¹¹² Exceptions¹¹³ are, however, permissible in certain instances, such as to ascertain the "genesis and aim" of the contract,¹¹⁴ as part of the "private dictionary" exception where a particular trade or community has its own unconventional or idiosyncratic linguistic usage,¹¹⁵ and to "rectify" the contract without actually amounting to rectification.¹¹⁶

Reasons for excluding prior negotiations under broad version

There are several possible justifications specific¹¹⁷ to the broad version that exclude prior negotiations in contractual interpretation. The first is that prior negotiations do not contain the relevant background. Contemporary learning tells us that contracts should be interpreted contextually, that is, with a consideration of all relevant factual background, which is very broad,¹¹⁸ although there are limitations. The broad version of the exclusionary rule accounts for this particular learning by an almost irrebuttable presumption that prior negotiations never contain the relevant factual background. For example, in *The Lysland*,¹¹⁹ Ackner J rejected the evidence of negotiations leading up to the agreement concerned, although he also acknowledged, in the very same sentence, that he must have regard to the factual background of the agreement, including its genesis and aim, when construing it.¹²⁰ This implies that prior negotiations and the "genesis and aim" of the agreement are mutually exclusive, such that the former can never contain useful information about the latter.³⁷⁴ However, this is not a convincing justification: surely prior negotiations *sometimes* contain the relevant factual background.

A second way of justifying the broad version is that prior negotiations *always* contain the parties' subjective intentions and are hence inadmissible. This answers the separate concern that contractual interpretation is an objective process, with the courts concerning themselves only with the manifested, rather than actual, intentions of the parties. Thus, in *Jones v Forest Fencing Ltd*,¹²¹ Chadwick LJ thought that the trial judge had fallen into error because he had asked himself what the purchaser would have understood from a reply he received from the agent acting on behalf of the vendor. He held that the correct approach was to ask what meaning should be given to the words used in the memorandum in light of known circumstances to the parties, but without regard to evidence of negotiation or of subjective intention.¹²² This equates prior negotiations with the parties' subjective intentions. This justification again suffers from being too broad: it is not always the case that prior negotiations contain the parties' subjective intentions.

Narrow version

Characteristics of narrow version

In contrast, there have been cases attributing a narrower understanding to the exclusionary rule. By this view, the exclusionary rule is not absolute.¹²³ This is best explained in *Bank of Scotland v Dunedin Property Investment Co Ltd (No.1)* in the following terms¹²⁴:

"Certainly Lord Wilberforce proceeds to explain how the substance of negotiations must be excluded from questions of construction. However I do not think his Lordship meant this to be applied too rigidly. As he states (p 1385): 'It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact.'"

After *Chartbrook*, there are cases that now regard this to be the correct understanding of the exclusionary rule. Thus in *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd*,¹²⁵ Briggs J held that the exclusionary rule operates, and excludes "evidence of the parties' negotiations, at least for the purpose of identifying, as a relevant background fact, 'a provisional consensus which may throw light on the meaning of the contract which was eventually concluded'".¹²⁶

Reasons for excluding prior negotiations under narrow version

There are principally two specific justifications supporting the narrow version of the exclusionary rule. First, cases characterise the rule not as one barring admissibility³⁷⁵ of all prior negotiations, but only those that show the subjective intentions of the parties. While it is often the case that prior negotiations will correspond to the parties' subjective intentions, this is not always the case.¹²⁷ For example, in *Pritchard v Briggs*,¹²⁸ Goff LJ stated the rule as such: "[D]irect evidence of intention is not admissible nor are negotiations save as factual background."¹²⁹ There is here a parallel drawn between "direct evidence of intention" and "negotiations", although that parallel is qualified to the extent that negotiations may sometimes contain evidence of "factual background", which are admissible. In more recent cases, the breadth of the exclusionary rule has been more carefully delimited. Thus in *Proforce Recruit Ltd v Rugby Group Ltd*, two members of the Court of Appeal said that prior negotiations may be admitted in certain circumstances even when it was for the interpretation of the contract concerned. Mummery LJ also accepted Lord Nicholls's extrajudicial view that the exclusionary rule, as it is broadly understood, was too "rigid".¹³⁰ Mummery LJ appeared to accept that prior negotiations will only be inadmissible should they afford direct evidence of the parties' actual

intentions.¹³¹ One plausible justification of the exclusionary rule is hence the prohibition against parties' subjective intentions.

Another way in which the exclusionary rule is justified in this narrow sense is by narrowing the definition of what constitutes a "negotiation" in the first place. In *New Hampshire Insurance Co Ltd v MGN Ltd*, negotiations were defined as consisting of "one side proposing terms and the other rejecting them and proposing other terms, and matters like that".¹³² Staughton LJ appeared to accept that the exclusionary rule does not preclude admission of everything that was said or written from the time when the parties started the process of making a contract until they were about to place their signature on the final version so long as the document being admitted did not fall within the definition above. This, however, is a definitional, rather than substantive, justification.

Taking stock

The past and the present have afforded an exclusionary rule that is not properly justified. The broad version, which enunciates an absolute ban on prior negotiations, is unsupported by authority since prior negotiations were never treated apart from other extrinsic evidence and excluded completely. Indeed, its possible justifications are too broad and do not represent the nature of prior negotiations. The narrow version, while much preferable to the broad version, requires the courts to draw impossible distinctions between classes of negotiations which are admissible, and those which are not, principally because its boundaries are unclear.¹³³ It seems, however, to be justified by the prohibition against parties' subjective intentions but this justification has been overshadowed by other policy-oriented justifications.*³⁷⁶

These problems, which have arisen from a disconnection between past and present, can only be rectified in the future by correcting the wrong turns made in history. The real problem is that an independent exclusionary rule that is specific to prior negotiations was never supported by history. It is far better to detach ourselves from the notion that there is such an exclusionary rule and examine the reasons why prior negotiations should be excluded, if at all, as part of broader principles underpinning contractual interpretation.

The future—rectifying the wrong turns in history

Choosing between principle and policy

Two levels of justifications

Assuming that it is correct that an independent exclusionary rule against prior negotiations is

unsupported by history, it remains to be examined just when prior negotiations should be excluded, if at all. In this regard, it is useful to see the justifications for the exclusion of prior negotiations on two different levels.¹³⁴ The more fundamental, or "primary" level, is concerned with the proper way to interpret a legal document. At this level, the concern is not with "functional" reasons—such as those involving resources and time—but with foundational ones. These reasons are foundational or "primary" because they have to do with the core principles of contractual interpretation.¹³⁵ As Mitchell states, the policy-oriented reasons must always be secondary to reaching the right result in the individual case on the basis of the evidence.¹³⁶

A second, less fundamental, level of objection can simply be termed the "secondary" level. This is the level at which the debate is informed by more "pragmatic" or "policy-oriented" reasons, such as resources and time.¹³⁷ At this level, there is agreement or resolution at the primary level: *assuming that a particular approach is to be adopted in the interpretation of a legal document, ought certain specific practices flowing from the approach be rejected owing to such functional reasons?* These reasons, as Mitchell puts it, "are not internally related to the substance of contract law at all, but are concerned with the efficient processing of contract disputes and contract litigation".¹³⁸ Thus, if a particular approach prescribes a "comprehensive" manner of interpreting legal documents, considerations of time and effort may preclude the law from accepting that all relevant documents be looked at. However, even in rejecting these other documents, the law does not reject the general approach. Instead, the general approach is accepted, if conditioned.*³⁷⁷

Separating principle-based and policy-oriented justifications

The debate surrounding the exclusion of prior negotiations does not disagree on the proper way to interpret contracts.¹³⁹ Contracts ought to be interpreted objectively and in such a way as to give effect to the parties' intentions. Instead, the contemporary justifications are of the secondary or "functional" kind. Lord Nicholls, writing extra-judicially, has identified, without accepting, several of these justifications. First, it is said that the admission of prior negotiations would promote uncertainty and unpredictability in dispute resolution.¹⁴⁰ Secondly, the admission of prior negotiations may be detrimental to third parties.¹⁴¹ This is a justification supported by Lord Steyn, who has written that the popularity of England as a legal forum means that the objectivity approach in contractual interpretation should be maintained so as to afford some commercial certainty to third parties.¹⁴² Thirdly, the admission of prior negotiations may increase the time and expense of trial. This is, again, a view shared by Lord Steyn¹⁴³ and Lord Bingham,¹⁴⁴ both writing extra-judicially. Fourthly, and as an umbrella factor stated by Lord Wilberforce in *Prenn*, prior negotiations are simply "unhelpful". The supremacy which policy-oriented reasons have over principle-based reasons in the modern jus-

tification of the exclusion of prior negotiations received its strongest confirmation yet in *Chartbrook*, where Lord Hoffmann maintained that it is reasons of policy that justify the rule and even helpful evidence will be excluded under it.¹⁴⁵

As discussed above, about the only convincing contemporary principle-based reason commonly advanced in support of the exclusion of prior negotiations is that the admission of prior negotiations would subvert the objective approach in contractual interpretation.¹⁴⁶ Thus, as Mason J said in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*,¹⁴⁷ the investigation of the actual intentions, aspirations or expectations of the parties before or at the time of contract would tend to give too much weight to these factors at the expense of the language of the written contract.¹⁴⁸ Lord Bingham has also written that any detailed consideration of such prior negotiations will lead to "excessive emphasis on what the parties wanted to agree and too little on what they actually did agree".¹⁴⁹ And in *Chartbrook*, Lord Hoffmann explained the concern in similar terms.*^{378 150}

Understanding exclusion of prior negotiations in proper historical context: was the shift to an absolute rule justified?

Are the "new" policy-oriented reasons warranted by modern circumstances?

Much has been written about the flaws of the policy-oriented reasons justifying the exclusion of prior negotiations.¹⁵¹ This article agrees with these criticisms by adding that the policy-oriented reasons never featured obviously in older decisions leading up to *Prenn*. There was never a concern that the admission of extrinsic evidence, including prior negotiations, would result in greater uncertainty in contractual interpretation cases, or that it would affect the rights of third parties. Neither was there an overt concern that the cost and time spent on litigation would increase.

The former two reasons are not time-sensitive; either they exist or they do not, independent of time. Thus, it is not likely that any change in modern circumstances would account for their sudden emergence. Given that prior negotiations were previously admitted together with extrinsic evidence to explain away latent ambiguities without any complaint of uncertainty, it is difficult to argue that the abolition of the present-day exclusionary rule would result in widespread uncertainty. So long as the rules that inform contractual interpretation are open-textured, there will be some unavoidable uncertainty in the entire enterprise of interpretation. Likewise, if the admissibility of prior negotiations before did not give rise to concerns about third parties' rights, then it ought not to be of concern now. As McLauchlan rightly points out, it is difficult to conceive of a specific situation where the admission of prior negotiations would adversely impact on third parties' rights in a way that could not be avoided by the application of some

other legal doctrine.¹⁵² Further, as Bayley notes, third parties are afforded little protection under the current law in any event and so a relaxation of the exclusion of prior negotiations is unlikely to expose them to additional risks.¹⁵³ The reason about increased cost and time should also not be taken too seriously. Even though the admissibility of prior negotiations was allowed without complaint in older times, it is undeniable that, measured in absolute terms, the scale of litigation has increased since then. However, the argument is a relative one: just as the scale of litigation has increased, so too have the resources available in response to that increase.¹⁵⁴ Therefore, these reasons never supported an *independent* exclusionary rule against prior negotiations.

However, the principle-based reasons are not easily dismissed. Unlike the policy-oriented reasons which are not supported by the weight of history or present circumstances, the principle-based reasons do have such support, even if not expressly alluded to by the courts.*³⁷⁹

Are the "old" principle-based reasons still relevant?

Objectivity

One principle-based reason for the exclusion of prior negotiations is said to be to exclude the consideration of parties' subjective intentions.¹⁵⁵ As Lord Steyn has said¹⁵⁶:

"The real reason for the exclusion of such evidence is the philosophical starting point of English law: the purpose of the process of interpretation is not to find what the parties intended but to determine what the language of the contract would signify to an ordinary speaker of English, who is properly informed as to the objective setting of the contract. In relation to that enquiry evidence of the actual intentions of the parties, or rather their pre-contractual communications, is unhelpful."

The starting point is that the English contractual interpretation approach is objective: that is, the search is not for what the parties *actually* intended, but what they reasonably had intended. The objective principle¹⁵⁷ was neatly encapsulated in the words of Blackburn J in the oft-cited English decision of *Smith v Hughes*.¹⁵⁸ However, objectivity is not pursued to the exclusion of the contracting parties. Indeed, another (and more important) aspect of "objectivity" concerns the relevance of the parties' own intentions. One school of thought holds the parties' own consideration to be completely irrelevant, such that it is not even permissible to consider what each respective party objectively thought. Such a proposition would lead to courts enforcing promises between two strangers because they, to all outward appearances, can reasonably be said to have come to an agreement.¹⁵⁹ This would certainly be undesirable. Thus it has been said, "surely there is something wrong with a theory which forces upon *both* parties an agree-

ment which neither of them wants".¹⁶⁰ Probably the more accepted level of objectivity in the English (and Commonwealth) context is not pitched at so high a level. It is permissible for the court to objectively consider what the parties understood from their respective perspectives.¹⁶¹

This view of objectivity cannot be easily ignored as a basis for the exclusion of prior negotiations. It is indeed one with historical support. A specific application of the parol evidence rule required that declarations of intention (as are commonly contained in such negotiations) be not admissible.¹⁶² The chief reason for their*³⁸⁰ exclusion is that they "set up a rival declaration of volition, coming directly into competition with the words of the document which alone is to be regarded as the legal act".¹⁶³ However, there should not be an absolute prohibition of prior negotiations on this basis. As has been noted by Collins, the exclusionary rule, in its broad sense, is indeed too broad.¹⁶⁴ And as Lord Nicholls likewise noted, there will be occasions where the prior negotiations are helpful and shed light on the meaning the parties intended to convey by the words they used.¹⁶⁵ While these prior negotiations may sometimes afford direct evidence of the parties' actual intentions, that should not be a reason to prohibit their use because they would enable the reasonable person to be more fully informed of the background context.¹⁶⁶ Indeed, one might go further and add that since evidence of subjective intention is important in misrepresentation and non-disclosure cases because the law operates an inducement test,¹⁶⁷ such evidence, including prior negotiations, can be used for interpretation as well. While it may be argued that subjectivity is allowed in those cases because of the presence of fraud,¹⁶⁸ the fact that subjective intention is allowed in some cases means that, in the absence of fraud, some degree of subjectivity could be admitted, especially if it is only to establish the relevant background. The important point is to recognise that subjective intention is here used in interpretation for identifying the relevant background, and not to advance the parties' actual intentions specifically.

Latent and patent ambiguities

Another specific reason for the exclusion of prior negotiations rested on the now-abandoned adherence to interpreting a contract literally. It used to be said that extrinsic evidence is only admissible to explain an ambiguity which is latent, that is, an ambiguity which is raised by application to extrinsic facts.¹⁶⁹ Thus the court in *Mercantile Bank of Sydney v Taylor* spoke of how prior negotiations could not be "legitimately referred to, either for the purpose of adding a term to their written agreement, or of altering its ordinary legal construction".¹⁷⁰ The distinction between latent and patent ambiguities no longer affects contractual interpretation in modern times; it is now commonly accepted that extrinsic materials may be referred to in the interpretation of contracts even if the contractual words are not ambiguous.¹⁷¹ It has in fact been shown that the distinction between latent and patent ambiguity is fallacious; all words

need to be interpreted in the first instance, thus implying some sort of ambiguity. It therefore makes little sense to distinguish between degrees of ambiguity with the result of a profound effect on whether the relevant context can be taken into account in interpreting the words. Corbin in fact characterised this recourse to ambiguity as one based on a great illusion that "words either singly or in combination, have a*381 'meaning' that is independent of the persons who use them".¹⁷² In any event, this aspect of the parol evidence rule is largely dismissed as being irrelevant today.¹⁷³

Restating the proper basis for excluding prior negotiations

The general premise

Taking stock, there remains at least one principle-based reason for the exclusion of prior negotiations, and this is adherence to the objectivity principle. The key, however, is not to approach the desirability of the exclusion of prior negotiations in pure binary terms. History has shown us that rejecting prior negotiations—simply on its status and without any understanding of the true underlying basis—is flawed. It is therefore on the basis of objectivity, supplemented by any substantively correct policy-oriented reason, that the true reasons for excluding prior negotiations can be understood, instead of prescribing a blanket exclusionary rule.¹⁷⁴

Assuming then that the exclusion of prior negotiations is properly explained by the rejection of the parties' subjective intentions based on the objective approach towards contractual interpretation, a proper understanding of the exclusion can be premised on an overarching "purpose" test. Properly considered, the exclusion of prior negotiations comes into play only when a contract is being interpreted. This is thus not a rule exclusive to prior negotiations, and such negotiations are an example of evidence inadmissible under a broader rule concerning subjective intentions. Prior negotiations may be admitted for rectification or vitiation of the contract, but these have nothing to do with the interpretation of the contract. If support is necessary for this trite proposition, the Court of Appeal decision of *Arrale v Constain Civil Engineering Ltd* might be cited; in that case Lord Denning MR observed that the exclusionary rule was only relevant where prior negotiations were being admitted to interpret the contract.¹⁷⁵

After we have filtered out the occasions where the exclusion of prior negotiations is inapplicable, we can then consider the precise ambit of the exclusion when prior negotiations are being used to interpret a contract. We start with the proposition advanced above that a key objective that the exclusion of prior negotiations enforces is the objection against subjective declarations of the parties' intentions. Thus, if the "only" purpose of admitting the prior negotiations is effectively for the parties themselves to tell the court what their intentions are, then the evidence will not be admissible.¹⁷⁶ An example is provided by the case of *Rabin v Gerson*

Berger Association Ltd.¹⁷⁷In that case, evidence of counsel's opinion on a draft deed was sought to be admitted for the purpose of informing the court of certain facts, such as the existence of relevant statutory provisions and the concept of a company with charitable objects taking a gift absolutely.¹⁷⁸However, the Court of Appeal rejected these as being the true purposes of admission; instead, the court construed³⁸² the true purpose as being to show the drafter's actual intention in order to avoid the effect of the written words he had used.¹⁷⁹This avoids the law having to make very fine distinctions¹⁸⁰and accords with the historical origins of the exclusionary rule. Historically, prior negotiations have always been admitted to prove the relevant background. There is no reason to stop that. The solution is to recognise, through the historical evolution of the rule, why it came about, and how to give effect to its underlying purposes. In this sense, there is no exclusionary rule specific to prior negotiations but the language of exclusion can still be used insofar as it accurately describes the fact that prior negotiations are sometimes excluded for specific principle-based reasons.

Instances where prior negotiations are admissible

Once it is realised that the reason for excluding prior negotiations is a narrow one based on avoiding reference to the parties' subjective intentions, then it becomes clear why prior negotiations are admissible in some instances. There is no longer any need to formulate so-called "exceptions" to the exclusionary rule, which are, in any event, difficult to reconcile with the basis of a rule that excludes prior negotiations per se. Prior negotiations will generally be admitted if they are being admitted to show the background to the contract and are not being used to shed light on the parties' subjective intentions. Staughton LJ in *New Hampshire Insurance Co Ltd v MGN Ltd*¹⁸¹ explained the concept as such:

"The concept, in my view, is as I there said, what they must have had in mind when, as I think, they embarked on making the contract. But it is not necessarily limited to the start of the process. There may be evidence which comes later which will show the genesis, the aim, the background. But in the ordinary way, one should look at evidence which answers the question: why did these parties start to make this contract? What did they have in mind? I would not rigidly confine it; but that, as it seems to me, is the principle."¹⁸²

Applying the understanding of the exclusion of prior negotiations argued for in this article—that is, not as an independent exclusionary rule against prior negotiations specifically—it is suggested that they will be admissible in the following instances.

Fact and nature of negotiations

Prior negotiations can be admitted to show that negotiations had taken place between the

contracting parties. It is even possible for the *nature* of the negotiations to be adduced in evidence. The only problem with such evidence is that they are usually unhelpful towards the interpretation of a contract. The fact that parties had negotiated, and even the nature of such negotiations (i.e. whether one party was dominant or not), is neither here nor there. Thus, in *The Raven*,¹⁸³ the defendants sought to admit certain affidavit evidence and attendance notes*³⁸³ which showed the plaintiff to be largely in control of the negotiations concerned. The purpose of this was to show that the plaintiff never demanded an outright assignment so as to justify a departure from the ostensibly unqualified words used in the assignment.¹⁸⁴ Parker J, while referring to Lord Wilberforce's statement of law in *Prenn v Simmonds* and accepting that evidence of negotiations or of the parties' intentions ought not to be received, accepted that he could nonetheless find that the plaintiff took an active, indeed dominant, role in the negotiations.¹⁸⁵ However, that was the furthest he would venture since the fact that the negotiations had taken place, or indeed their very nature, shed little or no light on the nature of the assignment concerned. A similar example may be found in *Rabin v Gerson Berger Association Ltd*,¹⁸⁶ where the fact that counsel had advised and settled a draft trust deed was deemed admissible, although such evidence was rightly said to usually lead nowhere. However, the content of the advice will not be admissible as they reflect counsel's interpretation of the settlor's intention.

Commercial purpose or business object

Prior negotiations will generally be admissible to shed light on the "commercial purpose" or "business object", both being really examples of "background information". In many cases, they will be the most important evidence to emerge from the correspondence in the interpretation of the contract concerned, but that itself does not justify treating them as a distinct category in the admission of prior negotiations as was done in *Prenn v Simmonds*.¹⁸⁷

An example is provided by *AG ex rel Scotland v Barratt Manchester Ltd*.¹⁸⁸ In that case, the issue was whether a later agreement had rescinded or varied an earlier agreement. Staughton LJ, contrary to counsel's submissions, treated this as a matter of interpretation, which required an ascertainment of the parties' common intention deduced from the terms of the contract in light of the surrounding circumstances. At issue was whether correspondence between the defendant and the council, with whom the defendant had entered into the later agreement, was admissible in interpreting the later agreement. The correspondence was important because the council expressly stated that it was seeking legal advice as to the status of the earlier agreement, thus indicating that the later agreement was not intended to abrogate, rescind or vary the earlier agreement. These were clearly not "negotiations" in the strict sense of the word, but were certainly pre-contractual. Nonetheless, Staughton LJ accepted that the correspondence was admissible. He said that it was not evidence of negotiations for the conclusion of the agreement

concerned, but rather was evidence of the aims of the agreement (and non-aims).¹⁸⁹As a matter of principle, he stated that:³⁸⁴

"When one has correspondence immediately preceding the conclusion of a formal contract, which shows that the contract whilst intended to deal with planning matters was not intended to deal with the continued existence of a restrictive covenant, it seems to me proper, in accordance with orthodox doctrine, to take that correspondence into account."¹⁹⁰

If the perception that there is an exclusionary rule against prior negotiations is dispensed with, then there is no need for the court to draw such a strained distinction as to whether this correspondence was prior negotiations or not.

In *Jones v Bright Capital Ltd*,¹⁹¹ pre-contractual letters between the parties, which had been characterised by the defendants as being negotiations leading up to either an uncompleted compromise or the compromise presently being interpreted, was held admissible to interpret the compromise concerned.¹⁹² The Chancellor held that these letters were admitted to show the "genesis" and "subject matter" of a particular paragraph of the defence which subsequently became a term of the compromise concerned. The letters showed the connection between the actuary's calculations and explain the figures and other terms which appear in it; none was being relied on as an indication of subjective intent.¹⁹³ Once again, by not treating the exclusionary rule as specific to prior negotiations, these situations where prior negotiations are admissible can be very well justified. They are admissible because they are not being used to ascertain the subjective intentions of the parties.

Background information or surrounding circumstances

Sometimes the content of the negotiations has been taken into account by the courts as the relevant "background information" or "surrounding circumstances" in interpreting contracts. Flaux J has commented on this in *Excelsior Group Productions Ltd v Yorkshire Television Ltd*¹⁹⁴:

"It seems to me that there is a very fine line between looking at the negotiations to see if the parties have agreed on the general objective of a provision as part of the task of interpreting the provision and looking at the negotiations to draw an inference about what the contract meant (which is not permissible), a line so fine that it almost vanishes."¹⁹⁵

However, if we free ourselves of the conception that there is an independent exclusionary rule against prior negotiations specifically, then this thin line becomes unnecessary to draw. Prior negotiations should always be admissible to explain the relevant background information or

surrounding circumstances unless they show the parties' subjective intentions:³⁸⁵

Previous drafts: An example is where previous drafts of contracts are admitted in a few cases to explain the contract.¹⁹⁶In fact, in *Kyle Bay Ltd v Underwriters*,¹⁹⁷Judge Jonathan Hirst QC went as far as to say that prior contracts are always admissible evidence of the factual matrix, even if superseded by the later contract, although the degree of assistance they can offer may often be slight.¹⁹⁸For example, in *Kuwait Airways Corp v Kuwait Insurance Co*,¹⁹⁹the plaintiff sought to rely on the previous year's quotation to interpret the currently expiring quotation, which was the basis of the contract of insurance between the parties. Rix J disagreed that this was prior negotiations and held that the previous year's quotation was "the basis upon which the previous year's contract was made".²⁰⁰He therefore thought it was legitimate to interpret the present quotation against the background of not only the expiring policy, but also the previous year's quotation.²⁰¹Indeed, Rix LJ in *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co*²⁰²held that it is always admissible to look at a prior contract as part of the matrix or surrounding circumstances of a later contract. This should be the default position if the starting point is that there is no independent exclusionary rule, and the reason for excluding prior negotiations is understood.

Private meanings: Another instance of relevant background fact or surrounding circumstance, since qualified, arose out of the first instance decision of *The Karen Oltmann*.²⁰³The principle emanating from that case is that:

"If a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the words as a result of their common intention."²⁰⁴

This principle was regarded as incorrect in *Chartbrook*. Lord Hoffmann²⁰⁵thought that this was an illegitimate extension of the "private dictionary" principle that was only available where there³⁸⁶ was unconventional usage of a particular word.²⁰⁶Indeed, at the first instance stage of *Chartbrook*,²⁰⁷Briggs J would have treated the "private dictionary cases" as involving rectification and not construction, had authority not bound him.²⁰⁸Instead, he was satisfied to identify as a limitation of the rule that "the private dictionary inroad into the exclusion of the parties' negotiations from the admissible background ought not to extend to any case in which the word, phrase, clause or term is itself subject of an express definition in the contract itself".²⁰⁹

However, the scope of this factor should also be considered in light of the Court of Appeal decision of *Proforce Recruit v Rugby Group*.²¹⁰ In that case, Mummery LJ accepted the possibility of admitting prior negotiations in order to ascertain whether the contracting parties had in their previous correspondence made clear the meaning of the Preferred Supplier Status provision in the agreement concerned. In particular, Arden LJ in that case held that because the parties had used a very unusual combination of words (i.e. "preferred supplier status"), and those words are undefined or explained, it would be appropriate in these circumstances to admit prior negotiations between the parties to show what meaning the parties had attributed to the words up to the signing of the agreement.²¹¹ However, she drew a distinction between the search for objective rather than subjective intention thus:

"In admitting evidence as to those communications, the court would be hearing that evidence not with a view to taking the parties' subjective intent into account for the purposes of interpretation (a purpose precluded by the principles laid down by Lord Hoffmann in the *ICS* case) but for the purpose of identifying the meaning that the parties in effect incorporated into their agreement in circumstances where the court was satisfied that on their true interpretation the terms of the agreement were to have this effect."²¹²

There was also a further distinction drawn between this situation and the usual situation "in which, in the course of negotiations, the parties agree a matter which is to become binding on them (only) when a written agreement has been drawn up and signed"; in the latter situation, prior negotiations would not be admissible.²¹³ Once again, such evidence should generally be admissible if we dispense with the historically inaccurate idea that there is an independent exclusionary rule against prior negotiations specifically.*³⁸⁷

Objectively discernible meaning: It appears also that where the negotiations reveal an objectively discernible fact (as opposed to subjective meaning), then the negotiations will be admissible. It appears important that such facts and circumstances must be known to both parties.²¹⁴ Hence, information such as particulars of sale contained in pre-contractual inquiries have been held to be admissible.²¹⁵ This may be the case even if the negotiations were without prejudice, provided that they contain evidence of the factual matrix.²¹⁶

Conclusions

This article has argued that the exclusionary rule has a much weaker historical lineage than is presently believed. It certainly did not exist as an independent rule until, arguably, *Inglis*, and even then support for its independence was not strong. Its rise as an independent rule really came after *Prenn*, the very case where Lord Wilberforce claimed that the rule has had a long following. Its uncertain history led to confusion about its proper principle-based justifica-

tions. The truth is that the exclusion of prior negotiations was never regarded as a specific rule before the 20th century; if at all, it was a facet of the parol evidence rule. The parol evidence rule prohibited recourse to extrinsic evidence either on the basis of avoiding alterations to the written contract or, in so far as contractual interpretation is concerned, avoiding recourse to extrinsic materials to explain the contract in the absence of latent ambiguity. Both these aspects of the parol evidence rule probably do not survive at the present time. However, one principle-based justification is still relevant, and that is adherence to the objectivity principle in contractual interpretation.

In summary, it is time to return to historical bases and not regard prior negotiations as a species of evidence separate from the rest. Historically, prior negotiations were not treated apart from other extrinsic evidence in so far as contractual interpretation was concerned. They were all treated the same with identical considerations from various aspects of the parol evidence rule. Paying heed to those aspects, and giving effect to the relevant principle-based justifications with appropriate policy-oriented ones, would serve us better than debating on the false premise that the exclusionary rule is aptly justified by its longevity. A limited, non-specific, exclusion of prior negotiations can be justified in English law based on existing notions of contractual interpretation. More accurately, it may be said that there is no rule specific to prior negotiations per se; rather, prior negotiations are excluded on the basis of a broader rule prohibiting recourse to parties' subjective intentions. The sooner we realise this, the sooner we can concentrate on the true reasons why prior negotiations are excluded, rather than be distracted by defending or attacking an exclusionary rule that never was historically justified.

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1. Referred to as the "exclusionary rule" hereafter.
2. Thus, it has been said that the exclusionary rule is "well established and salutary" (*Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 S.C. 657 CS(IH) at 665; and "vouched by ... compelling authorities" (*Alexiou v Campbell* [2007] UKPC 11 at [15]). See also *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101 at [28], although cf. D. McLauchlan, "Chartbrook Ltd v Persimmon Homes Ltd: Commonsense Principles of Interpretation and Rectification?" (2010) 126 L.Q.R. 8, 10; D. McLauchlan, "Interpretation and Rectification: Lord Hoffmann's Last Stand" [2009] N.Z.L.R. 431, 443–434. See also *J.W. Carter, The Construction of Commercial Contracts (Hart Publishing, 2013)*, p.265; J. Edward Bayley, "Prior Negotiations and Subsequent Conduct in Contract Interpretation: Principles and Practical Concerns" (2011–12) 28 J.C.L. 179.
3. *Prenn v Simmonds* [1971] 1 W.L.R. 1381 H.L. at 1384–1385.

4. See C. Mitchell, "Contract Interpretation: Pragmatism, Principle and the Prior Negotiations Rule" (2010) 26 J.C.L. 134, who makes the distinction between principle and policy reasons.
5. See Mitchell, "Contract Interpretation" (2010) 26 J.C.L. 134, 140–142.
6. See, e.g., *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 HLat 913; *Proforce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69at [57]; *Chartbrook* [2009] 1 A.C. 1101at [33], [42]; *Luminar Lava Ignite v Mama Group Plc* [2010] CSIH 1, 2010 S.L.T. 147at [39].
7. Lord Grabiner, "The Iterative Process of Contractual Interpretation" (2012) 128 L.Q.R. 41, 50–51.
8. Cf. e.g. E. McKendrick, "Interpretation of Contracts and the Admissibility of Pre-Contractual Negotiations" (2005) 17 S. Ac.L.J. 248, 264–268, 274–275; Lord Nicholls of Birkenhead, "My Kingdom for a Horse: The Meaning of Words" (2005) 121 L.Q.R. 577; G. McMeel, "Prior Negotiations and Subsequent Conduct—The Next Step Forward for Contractual Interpretation" (2003) 119 L.Q.R. 272; D. McLauchlan, "Contract Interpretation: What Is It About" (2009) 31 Sydney L. Rev. 5; Mitchell, "Contract Interpretation" (2010) 26 J.C.L. 134.
9. *A & J Inglis v John Buttery & Co* (1878) 3 App.Cas. 552 HL.
10. See *Carter, The Construction of Commercial Contracts* (2013), p.249, who makes the important point that the exclusionary rule is not a rule of evidence and that the evidence is only "inadmissible" if the sole purpose is for a proscribed purpose.
11. *Reay v Richardson* (1835) 2 Cr. M. & R. 421; 150 E.R. 182. See also *Ellis v Thompson* (1838) 3 M. & W. 445; 150 E.R. 1219.
12. *Reay v Richardson* (1835) 2 Cr. M. & R. 421 at 426–427; 150 E.R. 182at 184.
13. See *Carter, The Construction of Commercial Contracts* (2013), pp.254–255 and also 261.
14. See *Carter, The Construction of Commercial Contracts* (2013), p.261.
15. See generally J.H. Wigmore, "A Brief History of the Parol Evidence Rule" (1904) 4 Colum.L. Rev. 338. And for a summary of the history of the parol evidence rule, see T. Cole, "The Parol Evidence Rule: A Comparative Analysis and Proposal" (2003) 26 UNSW L.J. 680, 682–687.
16. This concerns the conclusiveness of the writing as embodying the terms of the contract: see Wigmore, "A Brief History of the Parol Evidence Rule" (1904) 4 Colum.L. Rev. 338. Used in this sense, "'parol" means what is extrinsic to the writing, and 'evidence' means testimony or facts conceived of as tending to show what varies, adds to, or cuts down the writing, or to show the intention": see J.B. Thayer, "The 'Parol Evidence' Rule" (1893) 6 Harv.L. Rev. 325, 331–332. The expression "extrinsic evidence" will be used in this article to contrast such evidence from intrinsic evidence.
17. *J. Chitty, A Practical Treatise on the Law of Contracts, 2nd edn* (Sweet, Chancery Lane, London, 1834), p.87. A simpler version of the principle appears in the 1st edn: "And parol testimony shall not be received, even to *superadda* term or clause to a written agreement; for this

would be in effect to alter such agreement": *J Chitty, A Practical Treatise on the Law of Contracts Not Under Seal and upon the Usual Defences to Actions thereon (Chancery Lane, London: Sweet, 1826), p.25.*

18. *Meres v Ansell* (1771) 3 Wils.K.B. 275 at 276; 95 E.R. 1053 at 1053. See also *Nichol v Godts* (1854) 10 Ex. 190 at 194; 156 E.R. 410 at 412; *Halhead v Young* (1856) 6 El. & Bl. 312 at 325; 119 E.R. 880 at 885; *Hotson v Browne* (1860) 9 C.B. N.S. 443 at 447; 142 E.R. 174 at 176.

19. *Humfrey v Dale* (1857) 7 El. & Bl. 266 at 274; 119 E.R. 1246 at 1249.

20. *The Countess of Rutland's Case* (1604) 5 Co.Rep. 25; 77 E.R. 89.

21. *The Countess of Rutland's Case* (1604) 5 Co.Rep. 25 at 26; 77 E.R. 89 at 90.

22. See the treatises cited in fn.67.

23. *H. T. Colebrooke, Treatise on Obligations and Contracts (Black, Kingsbury, Parbury, and Allen, 1818) at p.66.*

24. *Colebrooke, Treatise on Obligations and Contracts (1818) at p.66; Chitty, A Practical Treatise on the Law of Contracts Not Under Seal (1826), p.20, citing Robertson v French (1803) 4 East 130 at 135–136; 102 E.R. 779 at 781–782.*

25. *Smith v Jeffryes* (1846) 15 M & W 561 at 562; 153 ER 972 at 972–3.

26. *Colebrooke, Treatise on Obligations and Contracts (1818) at p.67.* This is well summarised in *Robertson v French (1803) 4 East 130 at 135–136; 102 E.R. 779 at 781–782 per Ellenborough CJ.*

27. J. B. Thayer, "The 'Parol Evidence' Rule" (1892–1893) 6 Harv.L. Rev. 417 at 422, 436–437.

28. By this view, the parol evidence rule was intended only to exclude evidence that sought to contradict, add to, or vary the terms of any written instrument (see, e.g., *S. Comyn, The Law of Contracts and Promises Upon Various Subjects and with Particular Persons as Settled in the Action of Assumpsit, 2nd edn (London: A Strahan, 1824), p.28.*) It was not, however, understood to disallow extrinsic evidence to explain the contract (see, e.g., *Greaves v Ashlin (1813) 3 Camp. 426; 170 E.R. 1433.*)

29. It seems that later treatises of the time treated the parol evidence rule as extending to cover evidence that could be used to explain a written document (see, e.g., *Chitty, A Practical Treatise on the Law of Contracts Not Under Seal (1826), pp.22–23, citing T. Starkie, A Practical Treatise on the Law of Evidence: and Digest of Proofs, in Civil and Criminal Proceedings, 3rd edn, (Boston: Wells and Lilly, 1826), p.1000.* However, cf. A.L. Corbin, "The Parol Evidence Rule" (1944) 53 Yale L.J. 603, 622, and D. McLauchlan, "Deleted Words, Prior Negotiations and Contract Interpretation" (2010) 24 NZU L.R. 278, 286–287, who take the view that the parol evidence rule only relates to whether a term may be added to a written contract, as opposed to whether it can be used to interpret it.

30. J.B. Thayer, "The 'Parol Evidence' Rule" (1893) 6 Harv.L. Rev. 325 at 423.

31. J.B. Thayer, "The 'Parol Evidence' Rule" (1893) 6 Harv.L. Rev. 325 at 424–425, 434–437; J. H. Wigmore, "A View of the Parol Evidence Rule" (1899) 47 Am.L. Reg. 683–685; J. P.

McBaine, "The Rule Against Disturbing Plain Meaning of Writings" (1942–1943) 31 Cal.L. Rev. 145 at 147–148.

32. Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal* (1826), p.25(emphasis added).

33. Hughes v Statham (1825) 4 B. & C. 187; 107 E.R. 1029.

34. Hughes v Statham (1825) 4 B. & C. 187 at 192; 107 E.R. 1029 at 1031.

35. See also Shore v Wilson (1842) 9 Cl. & F. 355 at 565–566; 8 E.R. 450 at 562–563.

36. Macdonald v Longbottom (1860) 1 El. & El. 977; 120 E.R. 1177.

37. Macdonald v Longbottom (1860) 1 El. & El. 977 at 984; 120 E.R. 1177 at 1179. See also Horsey v Graham (1869–70) L.R. 5 C.P. 9; Magee v Lavell (1873–74) L.R. 9 C.P. 112 at 113–114, where evidence of what had gone on between the parties during their negotiations was admissible to construe the contract concerned.

38. Macdonald v Longbottom (1860) 1 El. & El. 987; 120 E.R. 1181.

39. Smith v Thompson (1849) 8 C. B. 44; 137 E.R. 424.

40. Smith v Thompson (1849) 8 C.B. 44 at 57–62; 137 E.R. 424 at 429–431.

41. The last edition of *Chitty on Contracts* to do this was the 10th edn: see *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph Chitty, 10th edn, edited by J.A. Russell* (London: Sweet & Chancery Lane, 1876), p.88.

42. The Law Commission in 1986 doubted that there was a substantive parol evidence rule: see Cmnd 9700, 1986 (No.154) at para.2.7.

43. A & J Inglis v John Buttery & Co (1877) 5 R. 58 at 69–70.

44. A & J Inglis (1878) 3 App.Cas. 552 at 571.

45. A & J Inglis (1878) 3 App.Cas. 552 at 571.

46. A & J Inglis (1878) 3 App.Cas. 552 at 572.

47. McLauchlan, "Contract Interpretation" (2009) 31 Sydney L. Rev. 5, 32.

48. A & J Inglis (1878) 3 App.Cas. 552 at 572.

49. A & J Inglis (1878) 3 App.Cas. 552 at 571.

50. A & J Inglis (1878) 3 App.Cas. 552 at 577–578.

51. A & J Inglis (1878) 3 App.Cas. 552 at 578.

52. A & J Inglis (1878) 3 App.Cas. 552 at 576.

53. River Wear Commissioners v Adamson (1877) 2 App.Cas. 743 at 763.

54. Macdonald (1860) 1 El. & El. 977; 120 E.R. 1177.

55. Although cf. Lord Blackburn's reference to Lord Ormidale's approach: A & J Inglis (1878) 3 App.Cas. 552 at 576–577.

56. A & J Inglis (1878) 3 App.Cas. 552 at 558. Although later on in his speech, he appeared to adopt a broad exclusionary rule: at 569.

57. See also McLauchlan, "Deleted Words, Prior Negotiations and Contract Interpretation" (2010) 24 NZU L.R. 278, 287.

58. *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph*

Chitty, 11th edn, edited by J.A. Russell (London: Sweet & Chancery Lane, 1881), p.90.

59. *Cumberland v Bowes* (1854) 15 C.B. 348; 139 E.R. 458.

60. *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph Chitty* (1881), p.90.

61. *Cumberland v Bowes* (1854) 15 C.B. 348 at 356; 139 E.R. 458at 461.

62. *Cumberland* (1854) 15 C.B. 348 at 357; 139 E.R. 458at 461.

63. *Cumberland* (1854) 15 C.B. 348 at 356; 139 E.R. 458at 461.

64. *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph Chitty* (1881), p.103.

65. *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph Chitty* (1881), p.106.

66. *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph Chitty, 12th edn, edited by J.M. Lely and N. Geary (London: Sweet & Maxwell, London, 1890), pp.143, 155–156, 160; A Treatise on the Law of Contracts by Joseph Chitty, 13th edn, edited by J.M. Lely (London: Sweet & Maxwell, 1896), pp.123, 135–136, 140; J M Lely, A Treatise on the Law of Contracts by Joseph Chitty, 14th edn, edited by J.M. Lely (London: Sweet & Maxwell, 1904), pp.96, 102–103, 108–112, 115–116, 120; Chitty's Treatise on the Law of Contracts, 16th edn, edited by W. Paine (London: Sweet & Maxwell, 1912), pp.106, 119–121, 124.*

67. *P Shaw, A Treatise on the Law of Obligations and Contracts* (Edinburgh: T & T Clark, 1882), pp.181–182.

68. See text at fnn.20–21.

69. *Kain v Old* (1826) 2 B. & C. 627 at 634; 107 E.R. 517at 519.

70. *Addison on Contracts: A Treatise on the Law of Contracts, 8th edn, edited by H. Smith (London: Stevens & Sons, 1883), p.182.* This also appeared in subsequent editions: see *A Treatise on the Law of Contracts by C G Addison, 9th edn, edited by H. Smith (London; Stevens & Sons, 1892), p 44; A Treatise on the Law of Contracts by CG Addison, 10th edn, edited by A.P.P. Keep and W.E. Gordon (London: Stevens & Sons, 1903), p.43.*

71. *Addison on Contracts* (1883), p.203. This also appeared in subsequent editions: see *A Treatise on the Law of Contracts by CG Addison (1892), p.65; Keep and Gordon, A Treatise on the Law of Contracts by CG Addison (1993), p 64; A Treatise on the Law of Contracts by CG Addison, 11th edn, edited by W.E. Gordon and J. Ritchie (London: Stevens & Sons, 1911), p.46.*

72. *Sir W.R. Anson, Principles of the English Law of Contract and of Agency in its Relation to Contract, 2nd edn (Oxford: Clarendon Press, 1882), pp.242, 244.* This was also the treatment in subsequent editions: see, by the same author, 3rd edn (1884), pp.238–239, 240–241; 6th edn (1891), pp.256–257; 7th edn (1893), pp.263–264; 9th edn (1899), pp.271–272; 11th edn (1906), pp.287–289; 12th edn (1910), pp.201–203. See also *Principles of the English Law of Contract and of Agency in its Relation to Contract by Sir William R Anson, 13th edn, edited by M.L. Gwyer (Oxford Clarendon Press, 1912), pp 309–11, and by the same author, 14th edn (1917),*

pp.319–320; 15th edn (1920), pp.322–323.

73. In fact, there is an even narrower reading of *Inglis* which treated the case as relating to the admissibility of extrinsic evidence to "add, subtract or vary" the contract rather than to "explain" it. For example, Leake's treatise cited *Inglis* among the cases standing for the proposition that contracts in writing cannot be varied by extrinsic evidence of the parties' intentions: see *Sir M. Leake, A Digest of Principles of the Law of Contracts, 3rd edn (London: Stevens and Sons Ltd, 1892), p.153*. In the subsequent editions, however, Leake's treatise also treated *Inglis* as standing for the rule that words deleted and initialed form no part of the contract, and cannot be read for the purpose of construing.

74. *Bank of New Zealand v Simpson* [1900] 1 A.C. 182 PC (New Zealand).

75. *Bank of New Zealand v Simpson* [1900] 1 A.C. 182 at 187.

76. *Chitty on Contracts, 23rd edn, edited by A.G. Guest (London: Sweet & Maxwell, 1968), p.293*. This was the case in previous editions as well, see, e.g., *Chitty on Contracts, 21st edn, edited by K. Scott and B. Clauson (London: Sweet & Maxwell, 1955), p.160*.

77. *Prison Commissioners v Middlesex Clerk of the Peace* (1882) 9 Q.B.D. 506.

78. Which disallows reference to extrinsic materials.

79. *Prison Commissioners* (1882) 9 Q.B.D. 506 at 511.

80. *Prison Commissioners* (1882) 9 Q.B.D. 506 at 511.

81. *Leggott v Barrett* (1880) 15 Ch. D. 306 CA.

82. *Leggott v Barrett* (1880) 15 Ch. D. 306 at 309. Brett LJ made similar remarks (at 311).

83. *Millbourn v Lyons* [1914] 2 Ch. 231 CA.

84. *Mercantile Bank of Sydney v Taylor* [1893] 1 A.C. 317 PC (Australia).

85. *Mercantile Bank of Sydney v Taylor* [1893] 1 A.C. 317 at 321.

86. *Davis Contractors Ltd v Fareham Urban DC* [1956] 1 A.C. 696 HL.

87. *City and Westminster Properties (1934) v Mudd* [1959] Ch. 129 Ch D.

88. *City and Westminster Properties v Mudd* [1959] Ch. 129 at 141.

89. See text to fnn.52–53.

90. *National Bank of Australasia Ltd v J Falkingham & Sons* [1902] 1 A.C. 585 PC (Australia).

91. *Chitty on Contracts (1968), pp.307–308*. This was the case in previous editions as well; see, e.g., *Chitty on Contracts (1955), p.161*.

92. *National Bank of Australasia v J Falkingham* [1902] 1 A.C. 585 at 591.

93. *National Bank of Australasia* [1902] 1 A.C. 585 at 591, and then later at 592, the relevant aspect of the deed was said to be "plain beyond all controversy".

94. *Chitty on Contracts (1968), p.293*. This was the case in previous editions as well, see, e.g., *Chitty on Contracts (1955), p.171*, citing Tindal CJ in *Shore v Wilson* (1842) 9 Cl. & F. 355 at 565–566; 8 E.R. 450 at 532.

95. *G. McMeel, The Construction of Contracts: Interpretation, Implication and Rectification, 2nd edn (Oxford: Oxford University Press, 2011), para.1.64*.

96. *Prenn v Simmonds* [1971] 1 W.L.R. 1381 at 1384–1385.

97. *McMeel, The Construction of Contracts* (2011), p.275.
98. D. McLauchlan, "Common Assumptions and Contract Interpretation" (1997) 113 L.Q.R. 237, 242.
99. See, e.g. *Chitty on Contracts, 24th edn, edited by A.G. Guest* (London: Sweet & Maxwell, 1977), p.329.
100. A view expressed in Lord Nicholls, "My Kingdom for a Horse" (2005) 121 L.Q.R. 577, 584.
101. M.N. Kniffin, "Conflating and Confusing Contract Interpretation and the Parol Evidence Rule: Is the Emperor Wearing Someone Else's Clothes?" (2009) 62 Rutgers L. Rev. 75, 90.
102. Kniffin, "Conflating and Confusing Contract Interpretation and the Parol Evidence Rule" (2009) 62 Rutgers L. Rev. 75, 102.
103. See, e.g., Mitchell, "Contract Interpretation" (2010) 26 J.C.L. 134, 143.
104. Investors Compensation Scheme [1998] 1 W.L.R. 896at 913.
105. Chartbrook [2009] UKHL 38; [2009] 1 A.C. 1101at [33].
106. Lord Grabiner, "The Iterative Process of Contractual Interpretation" (2012) 128 L.Q.R. 41, 50–51.
107. *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 N.Z.L.R. 523.
108. *Yoshimoto v Canterbury Golf* [2001] 1 N.Z.L.R. 523at 541.
109. *Banque Sabbag SAL v Hope* [1972] 1 Lloyd's Rep. 253 QBD.
110. *Banque Sabbag v Hope* [1972] 1 Lloyd's Rep. 253at 258.
111. *Lep Air Services v Rolloswin Ltd* [1973] A.C. 331 HL.
112. *Lep Air Services v Rolloswin* [1973] A.C. 331at 354.
113. We exclude here "exceptions" which operate outside the exclusionary rule:Chartbrook [2009] UKHL 38; [2009] 1 A.C. 1101at [42].
114. See, e.g., *Wickman Tools v Schuler AG* [1974] A.C. 235 HLat 261; *Arrale v Costain Civil Engineer* [1976] 1 Lloyd's Rep. 98 CA (Civ Div)at 104.
115. SeeChartbrook [2009] 1 A.C. 1101at [45].
116. See, e.g., *North Circular Properties Ltd v Internal Systems Information Ltd* Unreported October 26, 1984; *Biggin Hill Airport Ltd v Mayor & Burgesses of the London Borough of Bromley* 2000 WL 1881255.
117. We thus ignore for the moment broad "policy-oriented" reasons that justify the exclusionary rule as a whole.
118. Investors Compensation Scheme [1998] 1 W.L.R. 896at 912–913.
119. *The Lysland* [1976] 1 Lloyd's Rep. 427 CA (Civ Div).
120. *The Lysland* [1976] 1 Lloyd's Rep 427at 434.
121. *Jones v Forest Fencing Ltd* [2001] EWCA Civ 1700; [2001] N.P.C. 165.
122. *Jones v Forest Fencing* [2001] EWCA Civ 1700; [2001] N.P.C. 165at [21].
123. *Luminar Lava Ignite* [2010] CSIH 1; 2010 S.L.T. 147at [41].
124. *Bank of Scotland v Dunedin Property Investment Co Ltd* (No.1) 1998 S.C. 657 CS(IH)at

676–677. See also *Scottish Widows Fund and Life Assurance Society v BGC* [2011] EWHC 729 (Ch) at [17].

125. *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] EWHC 1805 (Ch); [2010] Pens.L.R. 411.

126. *Stena Line Ltd v Merchant Navy Ratings Pension Fund* [2010] EWHC 1805 (Ch); [2010] Pens.L.R. 411 at [86].

127. See, e.g., *Chinn v Hochstrasser (Inspector of Taxes)* [1979] Ch. 447 CA (Civ Div) at 457, 466; and *Bank of Scotland v Dunedin Property Investment (No.1)* 1998 S.C. 657 at 679.

128. *Pritchard v Briggs* [1980] Ch. 338 CA (Civ Div).

129. *Pritchard v Briggs* [1980] Ch. 338 at 387.

130. *Proforce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69 at [33].

131. *Proforce Recruit* [2006] EWCA Civ 69 at [35]. cf. *Great Hill Equity Partners II LP v Novator One LP* [2007] EWHC 1210 (Comm) at [59].

132. *New Hampshire Insurance Co Ltd v MGN Ltd* [1996] 5 Re.L.R. 103 CA (Civ Div).

133. McLauchlan, "Contract Interpretation" (2009) 31 Sydney L. Rev. 5, 31.

134. See Mitchell, "Contract Interpretation" (2010) 26 J.C.L. 134, who makes the distinction between principle and policy reasons. See also McLauchlan, "Contract Interpretation" (2009) 31 Sydney L. Rev. 5, 10. See also Bayley, above, n 2, who refers to three 'practical' arguments sustaining the exclusionary rule, which concern the cost of legal advice and litigation, the safety nets of rectification and estoppel by convention and unfairness to third parties.

135. On the general distinction between principle and policy, see *S. Waddams, Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge: Cambridge University Press, 2011).

136. Mitchell, "Contract Interpretation" (2010) 26 J.C.L. 134, 142.

137. See generally Bayley, "Prior Negotiations and Subsequent Conduct in Contract Interpretation" (2011–12) 28 J.C.L. 179.

138. Mitchell, "Contract Interpretation" (2010) 26 J.C.L. 134.

139. There is of course some disquiet about the exclusion of the parties' subjective intentions, but this is beyond the scope of the present paper. See, e.g., McLauchlan, "Common Assumptions and Contract Interpretation" (1997) 113 L.Q.R. 237, 241; McLauchlan, "Contract Interpretation" (2009) 31 Sydney L. Rev. 5 12.

140. Lord Nicholls, "My Kingdom for a Horse" (2005) 121 L.Q.R. 577, 587. The same sentiments have been echoed by Lord Hoffmann in "The Intolerable Wrestle with Words and Meanings" (1997) 114 S.A.L.J. 656, 664.

141. Lord Nicholls, "My Kingdom for a Horse" (2005) 121 L.Q.R. 577, 587.

142. Sir J. Steyn, "Written Contracts: To What Extent May Evidence Control Language?" [1988] C.L.P. 23, 30.

143. Steyn, "Written Contracts" [1988] C.L.P. 23, 30.

144. Lord Bingham of Cornhill, "A New Thing Under the Sun? The Interpretation of Contract

and the ICS Decision" (2008) 12 Edin.L.R. 374, 389.

145. Chartbrook [2009] UKHL 38; [2009] 1 A.C. 1101at [41]; see also Mitchell, "Contract Interpretation" (2010) 26 J.C.L. 134.

146. Cf. McLauchlan, "Contract Interpretation" (2009) 31 Sydney L. Rev. 5, 35, who sees this as a "policy reason".

147. *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 C.L.R. 337.

148. *Codelfa Construction* (1982) 149 C.L.R. 337at 352.

149. Lord Bingham, "A New Thing Under the Sun?"(2008) 12 Edin.L.R. 374, 389.

150. Chartbrook [2009] UKHL 38; [2009] 1 A.C. 1101at [38].

151. See, e.g., McLauchlan, "Contract Interpretation" (2009) 31 Sydney L. Rev. 5, 32–42; Mitchell, "Contract Interpretation" (2010) 26 J.C.L. 134, 145–50.

152. See, e.g., McLauchlan, "Contract Interpretation" (2009) 31 Sydney L. Rev. 5, 38.

153. Bayley, "Prior Negotiations and Subsequent Conduct in Contract Interpretation" (2011–12) 28 J.C.L. 179, 180.

154. See further McLauchlan, "Contract Interpretation" (2009) 31 Sydney L. Rev. 5, "Contract Interpretation" (2009) 31 Sydney L. Rev. 5, 36–38; and Bayley, "Prior Negotiations and Subsequent Conduct in Contract Interpretation" (2011–12) 28 J.C.L. 179, 186, who suggests that "a relaxation of the exclusionary rules is unlikely to increase materially the cost of litigation".

155. See *Carter, The Construction of Commercial Contracts* (2013), pp.25–26, 54–55 and 267–269.

156. Steyn, *Written Contracts* [1988] C.L.P. 23, 28–29.

157. See, generally, W. Howarth, "The Meaning of Objectivity in Contract" (1984) 100 L.Q.R. 265; J.P. Voster, "A Comment on the Meaning of Objectivity in Contract" (1987) 103 L.Q.R. 247; W. Howarth, "A Note on the Objective of Objectivity in Contract" (1987) 103 L.Q.R. 527; A.D. Moor, "Intention in the Law of Contract: Elusive or Illusory" (1990) 106 L.Q.R. 632.

158. *Smith v Hughes* (1870–71) L.R. 6 Q.B. 597.

159. An example of just such a case in the Commonwealth context is *Upton RDC v Powell* [1942] 1 All E.R. 220 CA.

160. J.R. Spencer, "Signature, Consent, and the Rule in *L'Estrange v Graucob*" [1973] C.L.J. 104, 113 (emphasis added).

161. Although it has been noted that Lord Hoffmann's speech in *Chartbrook* admits of an even more extreme version of objectivity: McLauchlan, "Interpretation and Rectification" [2009] N.Z.L.R. 431, 446.

162. J.H. Wigmore, "A Brief History of the Parol Evidence Rule" (1904) 4 Colum.L. Rev. 338, 443. See also R. Catterwell, "The 'Indirect' Use of Evidence of Prior Negotiations and the Parties' Intentions in Contract Construction: Part of the Surrounding Circumstances" (2012) 29 J.C.L. 183, who draws a distinction between direct and indirect use of prior negotiations in

contractual interpretation and argues that subjective intention could be let in either way. See also in the same article, at 194–195, for arguments against the admission of subjective intent in contractual interpretation.

163. Wigmore, "A Brief History of the Parol Evidence Rule" (1904) 4 Colum.L. Rev. 338, 444.
164. H. Collins, "Objectivity and Committed Contextualism in Interpretation" in S. Worthington (ed.), *Commercial Law and Commercial Practice* (Oxford: Hart Publishing, 2003), p.197. See also Carter, *The Construction of Commercial Contracts* (2013), p.265.
165. Lord Nicholls, "My Kingdom for a Horse" (2005) 121 L.Q.R. 577, 583.
166. Lord Nicholls, "My Kingdom for a Horse" (2005) 121 L.Q.R. 577, 583. Although see D. McLauchlan and M. Lees, "Construction Controversy" (2011) 28 J.C.L. 101, 108, who suggest that there are signs of a recent retreat from the contextual approach to the traditional, literal approach.
167. See, e.g., *Drake Insurance Plc v Provident Insurance Plc* [2004] 1 Lloyd's Rep. 268 CA (Civ Div).
168. See, e.g., *Akerhielm v De Mare* [1959] A.C. 789 at 805.
169. Chitty, *A Practical Treatise on the Law of Contracts* (1834), pp.85–86.
170. *Mercantile Bank of Sydney v Taylor* [1893] A.C. 317 at 321.
171. J. Steyn, "The Intractable Problem of the Interpretation of Legal Texts" (2003) 25 Sydney L. Rev. 5, 6–7.
172. A.L. Corbin, *Corbin on Contracts, Vol.1* (St Paul: West Publishing Co, rev. edn 1963), §106, p.474.
173. McMeel, *The Construction of Contracts* (2011), para.1.103.
174. See also Bayley, "Prior Negotiations and Subsequent Conduct in Contract Interpretation" (2011–12) 28 J.C.L. 179, who advocates a reformulated exclusionary rule while not calling for its outright abolition.
175. *Arrale* [1976] 1 Lloyd's Rep. 98 at 101.
176. *Rabin v Gerson Berger Association Ltd* [1986] 1 W.L.R. 526 CA (Civ Div) at 533–534.
177. *Rabin* [1986] 1 W.L.R. 526.
178. *Rabin* [1986] 1 W.L.R. 526 at 533.
179. *Rabin* [1986] 1 W.L.R. 526 at 534.
180. Mitchell, "Contract Interpretation" (2010) 26 J.C.L. 134, 153.
181. *New Hampshire Insurance v MGN* [1996] 5 Re.L.R. 103.
182. *New Hampshire Insurance v MGN* [1996] 5 Re.L.R. 103.
183. *Banco Central SA v Lingoss & Falce Ltd (The Raven)* [1980] 2 Lloyd's Rep. 266 QBD.
184. *The Raven* [1980] 2 Lloyd's Rep. 266 at 270.
185. *The Raven* [1980] 2 Lloyd's Rep. 266 at 270.
186. *Rabin v Gerson Berger* [1985] 1 W.L.R. 595.
187. See *City Wall Properties (Scotland) Ltd v Pearl Assurance Plc* [2007] CSIH 79; [2007] N.P.C. 114 at [22]: "One aspect of the rules which remains clear is that evidence of previous

negotiations and discussions between the parties to the contract and expressions of their subjective intentions are inadmissible as aids to construction, for the reasons explained by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 W.L.R. 1381 at 1384H–135D. Such evidence is, however, admissible to establish the circumstances surrounding the formation of the contract, including the genesis and the aim or purpose of it and the parties' knowledge of them."

188. *AG ex rel Scotland v Barratt Manchester Ltd* (1992) 63 P. & C.R. 179 CA (Civ Div).
189. *Barratt Manchester* (1992) 63 P. & C.R. 179 at 201.
190. *Barratt Manchester* (1992) 63 P. & C.R. 179 at 201.
191. *Jones v Bright Capital Ltd* [2006] EWHC 3151; [2007] Pens.L.R. 31.
192. *Jones v Bright Capital* [2006] EWHC 3151; [2007] Pens.L.R. 31 at [24].
193. *Jones v Bright Capital* [2006] EWHC 3151; [2007] Pens.L.R. 31 at [24].
194. *Excelsior Group Productions Ltd v Yorkshire Television Ltd* [2009] EWHC 1751 (Comm).
195. *Excelsior Group* [2009] EWHC 1751 (Comm) at [25].
196. See also the Scots case of *MacDonald Estates Plc v Regenesis* (2005) *Dunfermline Ltd* 2007 S.L.T. 719 CS(OH) at [99].
197. *Kyle Bay Ltd v Underwriters* [2006] EWHC 607 (Comm); [2006] Lloyd's Rep.I.R. 718.
198. *Kyle Bay* [2006] EWHC 607 (Comm); [2006] Lloyd's Rep.I.R. 718 at [30].
199. *Kuwait Airways Corp v Kuwait Insurance Co* [1996] 1 Lloyd's Rep. 664 QBD.
200. *Kuwait Airways* [1996] 1 Lloyd's Rep 664 at 680.
201. *Kuwait Airways* [1996] 1 Lloyd's Rep 664 at 680.
202. *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] 2 Lloyd's Rep. 161 CA (Civ Div).
203. *The Karen Oltmann* [1976] 2 Lloyd's Rep. 708 QBD.
204. *The Karen Oltmann* [1976] 2 Lloyd's Rep. 708 at 712.
205. With whom Lord Walker of Gestingthorpe agreed (see *Chartbrook* [2009] 3 W.L.R. 267 at 298).
206. *Chartbrook* [2009] 3 W.L.R. 267 at 284.
207. *Chartbrook Ltd v Persimmon Homes Ltd* [2007] EWHC 409 (Ch); [2007] 1 All E.R. (Comm) 1083.
208. *Chartbrook* [2007] EWHC 409 (Ch); [2007] 1 All E.R. (Comm) 1083 at [42].
209. *Chartbrook* [2007] EWHC 409 (Ch); [2007] 1 All E.R. (Comm) 1083 at [44].
210. *Proforce Recruit* [2006] EWCA Civ 69.
211. *Proforce Recruit* [2006] EWCA Civ 69 at [55].
212. *Proforce Recruit* [2006] EWCA Civ 69 at [55].
213. *Proforce Recruit* [2006] EWCA Civ 69 at [56]. See, however, *Chartbrook* [2007] EWHC 409 (Ch) at [32].
214. *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWCA 2373 (QB) at [152].

[215.](#) *P & S Platt Ltd v Crouch* [2003] EWCA Civ 1110; [2004] 1 P. & C.R. 18at [39]. See also *Huntington v Imagine Group Holdings Ltd* [2007] EWHC 1603 (Comm)at [31]–[35].

[216.](#) *Oceanbulk Shipping SA v TMT Ltd (SC(E))* [2010] 3 WLR 1424 SCat [40]–[42] and [46].

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