

The Plain Language Movement and Legal Reform in the South African Law of Contract

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**THE PLAIN LANGUAGE MOVEMENT AND LEGAL
REFORM IN THE SOUTH AFRICAN LAW OF
CONTRACT**

by

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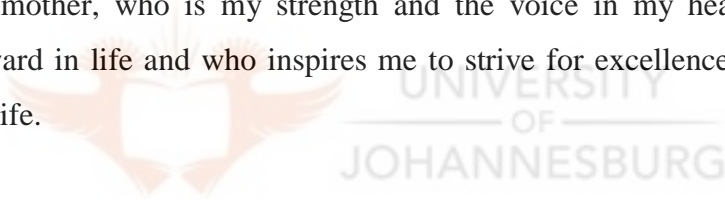
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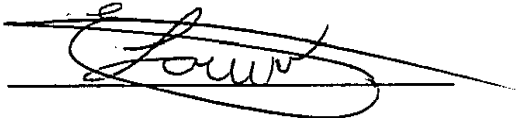
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Declaration

I hereby declare that this report is my own, unaided work. Any use made of prior research by other individuals has been duly referenced. This dissertation being submitted in partial fulfillment for the degree of Masters in the Law of Contract at the University of Johannesburg. This thesis has not been submitted in any form or way at any other tertiary institution before.

Signed on this the 26th of February 2010 at Johannesburg

A handwritten signature in black ink, appearing to read 'Esti Louw', is written over a horizontal line. The signature is stylized and cursive.

Esti Louw



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THE PLAIN LANGUAGE MOVEMENT AND LEGAL LANGUAGE REFORM IN THE SOUTH AFRICAN LAW OF CONTRACT

It seems to me that a sort of hieratic language has developed by which the priests incant the commandments. I seem to see the ordinary citizen today standing before the law like the laity in a medieval church: at the far end the lights glow, the priestly figures move to and fro, but it is in an unknown tongue that the great mysteries of right and wrong are proclaimed.¹

1 Introduction and Overview

In one of his most acclaimed works, *The Morality of Law*,² Lon Fuller stated that one of the fundamental requirements of law is that it should be clear. The call for the reform of language in legal documents has been heard in many countries around the world. Mostly it has been a cry emanating from the ‘victims’ affected by the practice of legal professionals and intellectuals who still adhere to the English law tradition of contract and legislative drafting.³ This way of practicing and enforcing the law of contract is reminiscent of various factors and historical events which includes, but is not limited to, it being colonised by the Dutch and subsequently the English. The modern trend in drafting and interpretation of contracts on the other hand can also be seen as reminiscent of the struggle for freedom and equality that the majority of South Africans fought for before the dawn of democracy in 1994. With regard to the formation of the traditional theory and practice of law in South Africa it will become clear during this discussion that the fusion of Roman-Dutch and English law as the two main sources of law has had the effect that even though South African law follows the basic principles and rules of interpretation of Roman-Dutch law, it has been influenced by the objective approach, the rules with regard to admissibility of evidence and the common law

¹ Lord Radcliffe ‘Some Reflections on Law and Lawyers’ (1950) 10 *Cambridge Law Journal* 368 at 368.

² Fuller LL *The Morality of Law* (The Storrs Lectures Series) rev ed (1969).

³ Hofman J ‘Language rights, legal rights and plain language’ 1 ed in K Prinsloo et al (eds) *Language, Law and Equality: Proceedings of the Third International Conference of the International Academy of Language Law held in South Africa, April 1992* (1993) 90 at 90.

English formal drafting technique in the different spheres of contract law.⁴ ‘Legalese’, the ironical colloquial term for traditional legal language has repeatedly been accused of comprising of obscurities, circumlocutions, convoluted language, and difficult sentence structure.⁵ It is the aim of the Plain Language Movement to reform traditional legal writing in all legal documents through the promotion of plain language drafting.⁶ The principle objective of the movement is to advocate clear and effective use of language for its intended audience. This audience comprises of people from all spheres of society who are required to sign contracts on a daily basis in order to give effect to their needs as consumers and/or to organize their daily activities in accordance with the law.⁷

Consumers are fast becoming more articulate in their demands for documents written in plain language as the ideal of equality before the law has become the. Parties are wary of incomprehensible legal documents and are more likely to exhibit loyalty to legal service providers that promote the use of plain language as a tool in their communication practices. It is this consumer awareness that led to many of the national and international legislative interventions that now require ‘plain language’ in all legal information given to consumers or any contracts that may bind them. It is therefore of great importance that research should be done in order to address this issue. This study has taken on that challenge and aims to provide an historical overview and general exploration of the Plain Language Movement as well as provide a comparative analysis of the relevant laws to propose a way forward for drafters and interpreters of consumer related contracts. The aim of this study is to give a broad overview of the various aspects and principles related to the law of contract and the effect of the global movement towards reformation of the language in contracts. This study will primarily focus on exploration of the following topics:

- The history of South African contract law and methods of interpretation.
- How the use of language changed throughout history and the theories of contract used to interpret words.
- The modern contextual approach and the admissibility of evidence in interpretation.

⁴ See discussion below in chapter 2 in this regard.

⁵ Vanterpool V ‘A Critical Look at Achieving Quality in Legislation’ (2007) vol 9 2 *European Journal of Law Reform* 167 at 187.

⁶ K D Collins ‘The Use of Plain-Language Principles in Texas Litigation Formbooks’ (2005) 24 *Review for Law Students* 429 at 431.

⁷ P Butt & R Castle *Modern Legal Drafting: A Guide to Using Clearer Language* 1 ed (2001) 86.

- The need for the use of plain language in legal documents.
- The call for reform of statutory language within the framework of a new democratic society with reference to the constitution.
- Consumer protection and what the law says about interfering into the sphere of the contracting parties so as to alleviate detriment that might be caused due to the inequality in bargaining power between parties.
- The way forward with regard to the general law of interpretation of contracts and specifically consumer protection.

This study will reflect on the origins of the plain language movement as well as its development over time and in different jurisdictions as well as the general approach that various jurisdictions follow with regard to the existence of unequal bargaining power between contracting parties. It will address further issues such as the significance of this movement in South Africa and specifically its influence on contract law. Another area of focus will be consumer protection and the new legislation that will in all probability have an effect on how contracts will have to be drafted in the future. During discussion of the various topics, selected domestic laws will be compared and discussed in order to paint a more global picture of the various concepts that is applicable to this study. The following laws, inter alia, will be referred to: the law of South Africa, that of selected states of the United States of America, Dutch Law, Canadian Law and international European instruments. An historical overview of Roman law, Roman-Dutch law and English law will also be done, as these laws are the formative elements of what has become modern South African law. In addition to these legal historically relevant legal systems, modern English law and Dutch law will also be examined and compared in order to assess how well South Africa has fared in terms of its development away from the ancient rules and principles relating to plain language use. This will provide the necessary background for the primary purpose of this study, which is to track the development of South African law with regard to linguistic reform in various spheres, to highlight the need for change in the way contracts are drafted, and to examine the effect of the latest consumer protection legislation on legal drafting as well as a possible exposition of what the future of consumer contracts might hold.

2 Historical Development of the Concept of Contract and Interpretation of a Contract

Bonitas non est pessimis esse meliorem

(It is not goodness to be better than the worst)⁸

2.1 The Origin of Contract Law in South Africa

When trying to gain an understanding of the present a reflective journey to the past is always advisable in order to give the present position more substance and context. With regard to South African contract principles, the origins reflect a mixture of Roman-Dutch Law and English Law principles and rules. The establishment of European settlements in South Africa – first by the Dutch and thereafter the British – has shaped South African legal language, concepts and reasoning used today. European influence, in other words, permeates the history and the language of our law but the journey does not end there. The South African Constitution,⁹ which is necessarily coloured by a unique South African perspective, has also had a profound influence since its first inception in 1993 after the abolishment of apartheid and has given a moral context to the law of contract, its application and interpretation.

In viewing the problem from another perspective it can have been said that, in general, the legal language used in contracts has traditionally been viewed as being on a different level to the common language of the majority.¹⁰ It has become standard practice that individuals leave themselves in the hands of the legal practitioners to handle their affairs and draft contracts to give effect to their wishes. Unfortunately the problem has arisen that parties do not understand the content of these contracts, even though they are supposedly an expression of their will (or *consensus*). In order to ameliorate this, the law of contract tries to achieve a balance between relevant principles and policies to satisfy the requirements of reasonableness and fairness, along with economic, commercial and social appropriateness.¹¹ This is the reason why

⁸ Available at <http://latin-phrases.co.uk> [Accessed 10 December 2009]

⁹ The Constitution of South Africa 108 of 1996.

¹⁰ See A Van Blerk *Jurisprudence: An Introduction*, revised, 1st ed (1998) 66 with regard to the jurisprudential views of some of the world's most famous legal philosophers with regard to 'legal language'.

¹¹ SW Van der Merwe et al *Contract: General Principles* 4 ed (2007) 11.

contract law and theory is never stagnant and is always developing along with the need for modification and importation of new principles.

2.2 The Call for Plain Language throughout history

The call for the use of more generally accessible legal language is as old as the language itself, but it is not until recently that there has been a audible call to action to implement the ideal of bridging the gap between the actual and written meaning contained in legal writing in general. This call to action can be seen in the development of movements such as the Plain English Campaign¹² and organizations such as PLAIN.¹³ The fight for plainer legal documents and laws has gained so much momentum throughout the decades that it has been appropriately termed the plain language movement.¹⁴ In looking at the recent history of contract law specifically in South Africa, it becomes apparent that there has been a move away from the formalism of the past towards understandable legal language in contracts as well as all other legal documentation and notices intended for use by consumers as well as the public in general.

2.3 When Descended from Rome – the Origin of South African law

Roman law informs us on the content of many modern legal institutions, not only of the legal systems of continental Europe, but also of the numerous states that have borrowed from European legal systems or were inspired by their traditions. Roman law is thus a common denominator in many legal systems, including those of England and South Africa, although some have broken away from their Roman law heritage to formulate their own rules, doctrines and principles.¹⁵ For the purpose of this study it is not necessary to have a detailed exposition of the history of Roman law. Emperor Justinian, who was in power over 2000 years ago, in

¹² Launched in 1979 outside the Houses of Parliament in the UK where a woman named Chrissie Maher shredded lots of jargon-filled government documents in parliament square. See *The Magazine of Plain English Campaign* (1999) at 42 Available at www.plainenglish.co.uk [Accessed 19 December 2009].

¹³ Plain Language Association International Available at www.plainlanguagenetwork.org [Accessed 19 December 2009].

¹⁴ Blamford C 'Plain Language: Beyond a Movement' At the Heart of Communication PLAIN 4th International conference September 2002 1 Available at www.Plainlanguagenetwork.org/conferences/2002/movement/1htm [Accessed 23 March 2009].

¹⁵ EA Kellaway *Principles of Legal Interpretation: Statutes Contracts and Wills* (1995) at 38.

the Roman Republic, took on the momentous task to reduce Roman law to writing, which he envisioned to supersede all other sources of law, which makes his writings and the commentary thereon the most important sources of Roman Law.¹⁶ This codification held great value for the development of the majority of legal systems in Europe during the Middle Ages and finally found its way into South Africa as the basis of our common law, which is Roman-Dutch Law.¹⁷

The way in which English law made its way into South Africa was through the British occupation of Cape in 1795 and 1806. In terms of the Convention of London of 1914 South Africa was a territory of England and therefore all England's laws and doctrines were incorporated into South African law.¹⁸ Enforcement of these laws in the Supreme Court was also not done by South African-schooled immigrants but by judges who were appointed solely from the ranks of the English-trained judiciary. Obviously the British-trained judges and advocates were not familiar with Latin or Old Dutch and therefore had to rely on translations of the Roman-Dutch laws.¹⁹ In the event that these Dutch translations did not provide an answer, the English-trained judges and advocates looked to English law for a legal principle to suit the situation.²⁰ Shifting focus back to the law of contract and the development of the language of contracts, a helpful starting point would be to ascertain what the definition, elements and theories surrounding contracts were, and how many survived into modern law. An assessment should be done within this paradigm of post-modernist theory to provide a clearer understanding of how much has happened within the realm of contract law in recent times. This is relevant in relation to contractual validity in general as well as with regard to subsequent interpretation of a *prima facie* enforceable contract. The development of interpretation theory in general makes it clear that much has changed with regard to the way in which we interpret contracts. As long ago as 1905 Wigmore²¹ described the history of the law of interpretation as 'a progress from a stiff and superstitious formalism to a flexible rationalism'. If this was the case over a hundred years ago, then it is even more so with regard

¹⁶ See F Schulz, *History of the Roman Legal Science*, 2 ed (1953) 5.

¹⁷ DH Van Zyl *History and Principles of Roman Private Law* (1983) 9.

¹⁸ HR Hahlo and E Kahn *The Union of South Africa: The Development of Its Laws and Constitution* (1960) 4.

¹⁹ HR Hahlo and E Kahn *The South African Legal System and its Background* (1973) at 570, 580 and 584.

²⁰ Hahlo and Kahn *ibid* at 17.

²¹ JH Wigmore *A Treatise on the System of Evidence in Trials at Common Law* (1940) 4 at par 2462.

to a twenty-first century approach to interpretation, as the courts move away from the strict literalism and formalism of the past.

2.4 The Development of the Law of Contractual Liability

In early Roman law, the law revolved largely around a single contract – *stipulatio*. *Stipulatio* was a unilateral and *stricti iuris* contract consisting of a formal promise made in answer to a formal question. According to Justinian's *Digest*,²² a stipulation was a verbal expression in which the man to whom a question has been put replies that he will give or do what he has been asked. The parties had to use the words *spondesne* and *spondeo*²³ which amounted to an exchange of formal promises.²⁴ Not even duress or fraud would have an effect on the validity of the contract so concluded. Agreement between the parties was achieved by unilateral promises.²⁵ This serves as an example of how formality and a formal contract was a prerequisite for being bound to an undertaking and how in this early stage in the development of law the mere will of the parties to be bound by the contract was not recognized as a ground for contractual liability. There was therefore no room for the use of parties' own words in the exercise of their wills and rights and so the language of the law was forced upon ordinary citizens to give effect to their wishes.²⁶ Thus it is clear that, in pre-classical Roman law, juristic acts were inflexible in terms of form and much emphasis was placed on the literal meaning of words.²⁷ As a result, the terms of these contracts also had fixed meanings.²⁸

The basic classification of contracts was originally done by Gaius and thereafter taken over by Justinian.²⁹ Justinian, however, expounded the concept of *consensus*, and where this was lacking no contract could be concluded.³⁰ Another development was that consensus could be excluded if mistake (error), fraud (*dolus*) or duress (*metus*) was present at the time of conclusion of the contract.³¹ There were however only certain types of agreements that would

²² Justinian's *Digest* D.45.1.5.1. See also JA Burkowski *Textbook on Roman Law* 2 ed (1997) at 296.

²³ Borkowski *ibid* at 199. It means 'do you promise?' and 'I do promise.'

²⁴ Borkowski *ibid* at 199.

²⁵ TG Watkin *An Historical Introduction to Modern Civil Law* (1999) 289.

²⁶ Burkowski *ibid* at 296.

²⁷ SJ Cornelius S J *Principles of the Interpretation of Contracts in South Africa* 2ed (2007) at 7.

²⁸ Cornelius *ibid* at 12.

²⁹ Commentaries of Gaius G 3.89.

³⁰ Justinian *Digest* 2.14.1.3.

³¹ Van Zyl *op cit* note 17 at 257.

be considered to have contractual enforceability and they were limited to four. The categories were defined by the type of obligation (*causa*) and were:³²

- (i) **consensual contracts** (*contractus consensu*), where the obligation arose from agreement of the parties;
- (ii) **verbal contracts** (*contractus verbis*), where the pronouncement of specific words in a prescribed form created the obligation (the rigid *stipulatio* formed part of this category);
- (iii) **contracts re** (*contractus re*), where the delivery of a thing (*re*) created an obligation; and
- (iv) **written contracts** (*contractus litteris*), where the obligation arose from a written acknowledgment of debt.

Agreements which did not fit into the specific categories were not of themselves legal contracts. Roman jurists regarded them merely as pacts which did not give rise to legal claims.³³ Another example of how formality dictated contractual liability was that there had to be a *causa obligationis* in addition to consensus before liability could be incurred in terms of a contract. The *causa* formed the ground for contractual liability. Thus the first enforceable contractual obligation in Roman law would appear to have been achieved by the transfer of something tangible rather than by consent or agreement alone.³⁴ The first rules limiting extrinsic evidence can be found with regard to the abovementioned *contractus verbis* in that the precise words employed were of primary importance and the intention of the parties did not play a role.³⁵ The category of contracts which did hold the agreement between the parties in high regard was the *contractus consensu*, which was considered binding even though none of the rigid formalities had been met.³⁶ This type of contract paved the way for a more flexible approach to conclusion of a contract and even included freedom of the parties to use their own language. These were however limited to contracts of letting and hiring, partnership, purchase and sale and contract of mandate which were based on *bona fides*.³⁷ Agreement between the parties was essential to the making of a contract. There had to be a genuine meeting of minds,

³² Borkowski op cit note 22 at 258.

³³ TG Watkins *An Historical Introduction to Modern Civil Law* (1999) Dartmouth Publishing Company, Ashgate at 290.

³⁴ Watkins *ibid* at 289.

³⁵ JH Wigmore 'A Brief History of the Parol Evidence Rule' 1904 *Columbia Law Review* 338; See also Cornelius op cit note 26 at 15.

³⁶ Van Zyl op cit note 17 at 287.

³⁷ Van Zyl *ibid* at 30.

a *consensus ad idem* at the moment when the contract was made.³⁸ In contrast to this, all the agreements were also still subject to the utterance of the formal words prescribed by Justinian and therefore did not assist citizens to formulate the contractual terms, about which they had reached *consensus*, in their own words. Even though the intention of the parties now received attention, there was still no room for parties to contract in their own informal language to give expression to these intentions. Therefore there was still no room for plain language in contracts.

Modernization of the law

It is safe to say that a contract is only as good as its enforceability and therefore the laws and remedies surrounding contracts were, and still are, very important. It is therefore useful to look at how the administrators of justice changed the rigidity of the law of contract to include certain warranties and remedies that were automatically included in specific contracts. This was the first move towards contextualism and inclusion of terms that were not contained in the actual words of the contract.

In Roman law the *praetor*, who was put in office to control the administration of justice, had great influence over the existing laws and could even grant remedies that were not in existence at that time.³⁹ The *praetor* could decide whether to grant an action or allow new remedies or new defences in certain cases, and once an edict was published it had to be adhered to.⁴⁰ Another office that was instituted at approximately the same time as the praetorship was the office of the *aediles curules*, who could also issue edicts in certain circumstances.⁴¹ Along with the two previously mentioned offices it was the function of certain of the high-ranking magistrates to see to the administration of law and justice. This included the power to issue *edicts*, which were essentially directives which were legally binding.⁴² These so-called

³⁸ Borkowski op cit note 22 at 260.

³⁹ Van Zyl op cit note 17 at 30.

⁴⁰ Borkowski op cit note 22 at 33.

⁴¹ Van Zyl ibid at 19.

⁴² Borkowski ibid at 31.

aedilian edicts became an independent source of law, which along with the edicts of the *praetor* and the *aediles curules*, became known as the *ius honorarium*.⁴³

Two of the most important actions formulated by the *aediles curules* with reference to the law of contract were the *actio redhibitoria* and the *actio quanti minoris*, which were two actions available to the purchaser in a contract of sale.⁴⁴ If latent defects were found to be present in a purchased item then the purchaser could rescind the contract and recover the full purchase price (in terms of the *actio redhibitoris*) or recover the difference between the actual value and the purchase price (in terms of the *actio quanti minoris*).⁴⁵ We see here how the principles surrounding contracts became more ‘consumer-friendly’ in that implied warranties were given without having to be written (or uttered) when entering into the contract. With regard to the development of the written contract it is also relevant to mention that during the Republican era the *stipulatio* (the most important form of the *contractus verbis*) could for the purposes of evidence be reduced to writing and, during the classical period, the emphasis was placed on the written document rather than verbal utterances in terms of the *stipulatio*. By the fifth century AD any verbal agreement could be regarded as *stipulatio*, irrespective of its form, provided it promised performance and the intention of the parties were clearly expressed.⁴⁶

Eventually law developed to include *consensus* of the parties, although it was not the overriding factor.⁴⁷ A *causa obligationis* (for example, delivery of a thing) had to be present before contractual liability could be incurred. Thus the language of the parties still came second to the actual formal requirements set out by law. If there was an unresolved ambiguity in the language used by the parties, the contract would be void. A judge would, however, strive to resolve the ambiguity by considering the conduct of the parties at the time of conclusion of the contract and the custom of the region where the contract was entered into.⁴⁸

⁴³ ‘... in order to let the citizens know and allow for the jurisdiction which each magistrate would exercise over any given matter, they took to publishing edicts. These edicts, in the case of the praetors, constituted the *jus honorarium* (honorary law): ‘honorary’ is the term used because the law in question had come from the high honor of praetorian office’ (Justinian’s *Digest*: D.1.2.2.10).

⁴⁴ Van Zyl op cit note 17 at 298.

⁴⁵ PH Thomas, CG Van der Merwe and BC Stoop *Historical Foundations of the South African Private Law* (1998) 319.

⁴⁶ Van Zyl *ibid* at 256.

⁴⁷ Van Zyl *ibid* at 31, In this regard the *praetor* could grant a defence to a defendant when the claim brought against him was based on fraud (*exceptio doli*), duress (*exceptio metus causa*) or where it was in conflict with an existing agreement (*exceptio pacti conventi*).

⁴⁸ Burkowski op cit note 22 at 260.

These same principles were taken over in contract law with regard to the exclusion of consensus where consensus could be excluded by the presence, at the time conclusion of the contract, of mistake, fraud or duress.⁴⁹ It is these defences that brought a degree of flexibility to the enforceability of contracts, and they looked beyond the contract itself to ascertain its validity. *Consensus* became part of the law that was internationally accepted by merchants and traders and the outcome of this development was the acceptance of the maxim *pacta servanda sunt* as one of the guiding principles of the law of contract. This can be loosely translated to mean ‘agreements must be adhered to’. It can be argued that if a person does not understand what he is agreeing to there can be no agreement and therefore such a contract would be seen as void, but this argument has not always been used.⁵⁰

Even though the above discussion shows that the Roman jurists did recognize consensus, Christie⁵¹ is of the opinion that there were flaws in the way the Romans approached contracts in that ‘Romans never reached the conclusion that every serious agreement creates a contractual obligation’. This was also highlighted by De Villiers AJA in *Conradie v Rossow*,⁵² where he said that the Roman jurists never took the final step of declaring that all lawful agreements involving consensus give rise to a civil obligation.

2.4.1 The Roman-Dutch Law (taking the final step)

In the development of Roman-Dutch law we see the actual agreement between parties gaining more ground. Germanic law adopted the concept of pledge of faith, *fides facta*, and used this concept as a form capable of rendering an agreement actionable. This was often expressed in Germanic law by a handshake or a clash of palms, *palmatio*. Once again the language of the parties used to express their will is hindered by formalism and strict rituals. This strict formalism slowly receded and by the seventeenth century the scene was set for the acceptance in the law of Holland of the principle that mere consensus is legally binding in terms of the

⁴⁹ Van Zyl op cit note 17 at 257.

⁵⁰ Van der Merwe et al op cit note 11 at 17; the abovementioned principle is still used in South African law today and is the basis of the will or consensual theory of contract. On the one hand, the emphasis fell on *pacta*, in other words that mere agreements could be binding without recourse to form. On the other hand, the words *servanda sunt* indicated that it was (in terms of religion, morals, and eventually the law) imperative to honour simple agreements.

⁵¹ RH Christie *The Law of Contract in South Africa* 5 ed (2006) 6.

⁵² 1919 AD 279 306.

pacta servanda sunt principle.⁵³ The influence of canon law, by the *ius gentium* and the notion that the honouring of promises was inherent in peoples of Germanic origin, caused Roman-Dutch law to treat every agreement that was made seriously and deliberately as a contract.⁵⁴ At last plain language began to emerge in the utterances of the parties to express their wills in the formation of all types of contracts but not to the exclusion of formalism.

2.4.2 English Law

Early English law did not concern itself with the Roman and Roman-Dutch fascination with *consensus* as a prerequisite for contractual liability. English law grew out of the common law system of writs.⁵⁵ Royal justice was a favour that had to be specifically granted by the king, and the party who wished to found a suit in the king's court first had to obtain a royal writ from the king's Chancery to authorize commencement of the action.⁵⁶ At first this applied only to decisions about land suits, in which case the Writ of Right was granted to the claimant.⁵⁷ It soon developed beyond the sphere of land to movables, where a claim could be expressed in terms of an amount of money. In such case the Writ of Debt was granted to the claimant.⁵⁸ Still later the scope of the writs was extended further to cover cases of special assumption or undertaking, where a person took it upon him- or herself to do something, in which case the Writ of Assumpsit was granted.⁵⁹ The mere fact that the parties intended to create a contract, therefore, did not in itself create contractual liability. There was thus no room for plain language in contracts and parties had to adhere to the prescribed formalities to create enforceable contracts. The most important of the personal actions in the realm of contract law was covenant.⁶⁰ Covenant was usually an action for unliquidated damages and provided a remedy for the tort or wrongdoing that lay in breaching an agreement that had to do with something other than paying a debt. It could however only be used with regard to formal contracts under seal.⁶¹

⁵³ Kahn E *Contract and Mercantile Law, A Source Book* 2ed 1 (1988) 9.

⁵⁴ Christie op cit note 51 at 6.

⁵⁵ J Oldham 'Reinterpretation of 18th Century English Contract Theory: The View from Lord Mansfield's Trial Notes' (1987 to 1988) *Georgetown Law Journal* 1949 at 1950.

⁵⁶ JH Baker *An Introduction to English Legal History* 2 ed (1979) 49; EA Jenks *A Short History of English Law* 3 ed (1924) 47; Cornelius op cit note 11.

⁵⁷ Cornelius op cit note 26 at 11; Jenks ibid at 56.

⁵⁸ Cornelius ibid 11; Jenks ibid at 57.

⁵⁹ Cornelius ibid at 11; Baker ibid at 329; Jenks ibid at 138.

⁶⁰ Oldham ibid at 1950.

⁶¹ AWB Simpson *A History of the Common Law of Contract* (1975) 6.

Contractual liability was at first enforced by means of Writ of Debt, and later on by Writ of Assumpsit.⁶² Because of the need to limit the scope of Assumpsit in this respect, the doctrine of consideration developed. Before the eighteenth century, a person had to show a sealed deed or a *quid pro quo* (consideration) to prove the existence of a contract.⁶³ One of the principles from which the doctrine of consideration was developed was the principle that a plaintiff should have been able to recover if he or she had relied on the defendant's promise to his or her loss.⁶⁴ In this way the reliance theory (also called the objective theory in England)⁶⁵ found its way into the English law of contract.⁶⁶ This theory prevailed throughout the eighteenth century in England and contract theory was mostly based on the premise that legally binding agreements were created by the acceptance of benefits, or by acts of reasonable reliance rather than by the pure intention to be bound.⁶⁷ This gives rise to the idea of reciprocity, as opposed to consensus, as the distinguishing mark for enforceability of contracts in English law.⁶⁸ The requirements of deed of seal and consideration make it clear that formalism and form took prevalence over the parties' expressed wishes. Teeven⁶⁹ states that by the beginning of the eighteenth century, under the influence of Continental and Natural law, the consensual theory of contract (also known as the will theory)⁷⁰ was used even though it was hidden behind the veil of consideration, as its application was subject to consideration.

At the beginning of the modern period there was evidence of the reshaping of contract law. In the early twentieth century there was a move towards bargain consideration⁷¹ and away from consideration based on detriment reliance, which holds that consensus became more important in establishing liability in terms of a contract.⁷² But by this time, the application of the reliance theory of contractual liability was well entrenched in English law and was taken over in the

⁶² Cornelius op cit note 26 at 11; KM Teeven *A History of the Anglo-American Common Law of Contract* (1990) 37; GHL Fridman *The Law of Contract in Canada* 3 ed (1994) 8; Hocker PJ and Heffrey PG *Contract: Commentary and Materials* 7 ed (1994) 5.

⁶³ J Beatson *Ason's Law of Contract* 28 ed (2002) 88.

⁶⁴ See the promise theory below at 2.3.3; *Stone v Whythipol* (1589) Cro Eliz 126.

⁶⁵ See 2.3.4 above.

⁶⁶ Teeven ibid at 39.

⁶⁷ PS Atiya *The Rise and Fall of the Freedom of Contract* (1979). See also Oldham op cit note 55 at 1952.

⁶⁸ Beatson op ibid at 88.

⁶⁹ Teeven ibid at 39.

⁷⁰ See 2.3.1 above.

⁷¹ See 2.3.2 above.

⁷² Cornelius ibid at 12; Teeven ibid at 22.

South African law system to the extent that the objective manifestations of the parties' common intention became more important than their subjective will.⁷³ Thus the English formalistic doctrines, which hinder the use of clear and plain language in contracts, made its way into our law even though the South African courts still maintained that consensus, or the subjective will of the parties to be bound, was the deciding factor.⁷⁴ With regard to the use of plain language in contracts, it can be said that South Africa took over the reliance on the text of the contract as a starting point from the English. This is why the use of plain language contracts has become so important. If the parties do not clearly express their intention to be bound in the words used in the contract, a contract can be held to be unenforceable or only enforceable to the extent that it is clear that the parties intended to be bound.⁷⁵ This is also why using plain language is so important in that intentions have to be clearly expressed in order to affect liability and enforceability.

2.4.3 South African Law

It is an established principle in South African law that the basis for a contract is either consensus, which encompasses actual agreement between parties, or the reasonable belief by one of the contractants that there is consensus.⁷⁶ English law has had a strong influence on early South African law and the theories of contract. This is especially clear when it comes to the style of legal drafting and the need for formalism in law documents, which started with the prerequisite of deed of seal, as mentioned above,⁷⁷ With regard to apparent agreements, we can also see that the objective or reliance theory of contract as applied in English law⁷⁸ was taken over in *Smith v Hughes*,⁷⁹ where the reasonable reliance of one party on the expressed intention of another is sufficient to create a legally binding contract. This is also significant, as it places the light on the expressed words or reasonably ascertainable intention of a party

⁷³ Cornelius op cit note 26 at 12; *Smith v Hughes* 1871 LR 6 QB.

⁷⁴ See *Conradie v Rossow* 1919 AD 279.

⁷⁵ See *Conradie v Rossow* ibid at 342, where Wessels AJA stated that parties should enter into a contract 'seriously and deliberately and with the intention that a lawful obligation should be established.' and *Joubert v Enslin* 1910 AD 6, where Innes JA stated at 23 that 'When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed and accepted by him bona fidei in that sense, then there is a concluded contract. Any unexpressed reservations in the mind of the promissory are in such circumstances irrelevant'.

⁷⁶ Van der Merwe et al note 11 at 16.

⁷⁷ See note 49 above.

⁷⁸ See *Freeman v Cooke* All ER [1848] 2 Exch 654; 154, 652.

⁷⁹ [1871] All ER 6 QB 597.

which can render a contract enforceable despite the subjective intentions of the parties concerned. In this sense the courts mostly look at the text to ascertain what a party showed its intentions to be and even though subjective consensus is not there, the English test of objectivity is applied to render a contract valid.

2.5 Interpretation of a Contract – Historical Overview

2.5.1 Roman Law Interpretation

Early Roman law did not recognize an agreement as a contract unless there was some compelling reason to do so and only when the parties expressed their intention to be bound in the formal word prescribed to them by the law.⁸⁰ As is stated above,⁸¹ the oldest Roman contracts were formal contracts that owed their validity to the fact that they were expressed in a certain way, and it was immaterial whether the parties reached consensus if the words were expressed according to the prescribed form. There was no room for plain language, as language took back seat to formal rituals and specific utterances. The Romans therefore followed a very literal interpretation of the words used by the parties and the slightest mistake in the utterance of the formal words would invalidate a contract.⁸² In the course of time a general principle developed that regard should be had to the intention or the will of the parties rather than to the impression or external appearance created by their words.⁸³ This was because the new requirement of good faith was starting to be taken into consideration, and the actual agreement between the parties became the centre of attention. This led to the application of the subjective theory of contract, where the parties' subjective intentions became more important than the objective words they used to express them.⁸⁴

2.5.2 The First Move Away From Formalism By the Romans

Historically, rules limiting the admissibility of evidence also had their foundation in the formalistic *contractus verbis* of early Roman law, where the precise words employed in the

⁸⁰ WW Buckland WW & P Steyn *A Textbook of Roman Law from Augustus to Justinian* 3 ed (1963) 415.

⁸¹ See 5 above.

⁸² Cornelius op cit note 26 at 7.

⁸³ Van Zyl op cit note 17 at 256.

⁸⁴ Cornelius op ibid at 7.

process of question and answer whereby a contract was concluded were of primary importance.⁸⁵ With the development of the *contractus consensus* and the *pacta*, the intention of the parties received more attention. Writing was only of a probative nature, in that it had in many instances more value than the evidence of witnesses. However, it remained probative matter that could be rebutted;⁸⁶ with the result that oral testimony by witnesses was sometimes considered to be more trustworthy than the written instrument. Furthermore, the vast majority of people were illiterate, so the written instruments were viewed with distrust by those who could not ascertain their contents themselves.⁸⁷ In Roman law, even the course of negotiations between the parties was an admissible aid in the interpretation of contract.⁸⁸ There was consequently not much need for the use of clear and unambiguous language in contracts, as parties could attest to what their intentions were at the time of conclusion of the contract. This could be seen as the first move towards contextualism at a very basic level.

In time, the old formalism disappeared, so that parties were free to formulate their transactions in whatever words they chose.⁸⁹ Words came to bear the meaning which they had in common speech and which encapsulates the common grammatical meaning thereof.⁹⁰ Interpretation was therefore not confined to the context of the document but the meaning that parties would have given the words, had they uttered them. This could be seen as a great achievement in the development of plain language, as parties were given an amount of contractual freedom. In Roman law it was also considered un-lawyerlike to interpret a document by looking at a part of the document without reference to the whole. 'Reading the contract as a whole' has also been an approach followed by the South African courts in more recent years.⁹¹ This principle also forms part of the rules of interpretation still used today in modern contract interpretation in many countries with an English common law tradition.⁹²

⁸⁵ Cornelius op cit note 26 at 15; JH Wigmore 'A brief history of the Parol Evidence Rule' 1904 *Columbia LR* 338.

⁸⁶ Paul 5 15 4; Voet 22 5 1; Cornelius op cit note 26 at 16.

⁸⁷ Wigmore JH op cit note 21 at 338, 340; Cornelius *ibid* at 16.

⁸⁸ Buckland op cit note 80 at 415. See also Cornelius op cit note 26 at 16.

⁸⁹ M Kaser *Das Römische Privatrecht* 10ed (1975) CH 8 2 2b as translated by Cornelius *ibid* at 8.

⁹⁰ Kaser op cit note 88 at 8 1 2c; Cornelius *ibid* at 22 argued that 'this can be directly linked to the approach that English courts took in ascertaining the meaning of terms which was known as the 'clear meaning rule', which was also adopted by South African courts when the process of interpretation is started by ascertaining the 'ordinary grammatical meaning of a word'.

⁹¹ See for example *Swart v Cape Fabrix (Pty) Ltd* 1979 1 SA 195 (A) 202.

⁹² D 1 3 24; Cornelius op cit note 26 at 22.

To give effect to the principles of equity underlying the law of contract, Roman law recognized the need for certain presumptions from which interpretation could proceed. In this regard it was presumed that a contract contained no *casus omissus* and that the parties chose their words with care.⁹³ In relation to the requirement of good faith in contracts, the Romans, by the classical period, had termed consensual contracts as *negotiae bonae fidei*, thereby indicating that they were based on the good faith of the parties.⁹⁴ As a result, a general defence known as the *exceptio doli generalis* was developed by the *praetor* to achieve justice in cases where application of strict law would lead to injustice.⁹⁵ It needed to be raised by a party to a contract, however, and did not have general applicability. None the less, it shows that citizens were starting to be protected from the strict applicability of the law, where such application would lead to injustice. It could therefore be said that the law was being made more ‘consumer-friendly’, even though not yet accessible to the general public.

2.5.3 Roman-Dutch Law

The Dutch jurists of the seventeenth and eighteenth centuries looked to Roman law in their development of the rules and principles which led to the system that we now call the Roman-Dutch law.⁹⁶ Consequently the rules for the interpretation of contracts devised by these jurists were also derived from the rules applied for this purpose by Roman law. In this regard, reliance was mostly placed on Roman authorities who looked favourably on the role of equity and mildness in interpretation.⁹⁷ This equitable approach is also apparent in the acceptance of the requirement of *bona fidei* in all contracts and the resultant role that reasonableness played in the interpretation of contracts in general.⁹⁸ It was unacceptable to insert into a contract any clause that was dishonest, improper or contrary to public interest.⁹⁹ In the eighteenth century the *exceptio doli* fell away and consequently the courts acquired the discretion to consider the principles of good faith in respect of any contract, whether the *exceptio* was raised or not.

⁹³ Cornelius op cit note 26 at 18. See also 4.4.1 below for a discussion of these presumptions in more detail.

⁹⁴ Paul 2 17. Kaser op cit note 88 at 33 4 1. See AD Botha *Die Exceptio Doli Generalis in the Suid-Afrikaanse Reg* (1981) Unpublished LLD thesis 6 University of the Free State; C Lewis ‘The Demise of the Exceptio Doli: Is there another route to Contractual Equity?’ 1990 *SALJ* 26 30-1. See also Cornelius *ibid* at 13.

⁹⁵ Kaser *ibid* at 4 2 2; Cornelius *ibid* at 14.

⁹⁶ Kellaway op cit note 15.

⁹⁷ Cornelius *ibid* at 8.

⁹⁸ J Van der Linden *Regtsgeleerd, Practicaal en Koopmans Handboek* (1861) 1 1 6 1 6; J Van Leeuwen *Het Roomsche Hollandsc Recht* (1780) 4 1 16; Cornelius *ibid* at 14.

⁹⁹ Van Leeuwen op cit Leeuwen *ibid* at 4 20 2; Cornelius *ibid* at 14.

Roman-Dutch law was also based on equitable and just principles, as can be seen from the above discussion. Presumptions were formulated on the basis of events that occurred in everyday situations.¹⁰⁰ Voet¹⁰¹ distinguished between three kinds of presumptions: *praesumptiones hominis*, *praesumptiones iuris* and *praesumptiones iuris et te iure*. A *praesumptiones hominis* was a conclusion drawn from the characteristics and circumstances of a case which was afforded more or less weight until the contrary was proven or until it succumbed to a stronger presumption.¹⁰² A *praesumptiones iuris* was a conclusion made as a result of the operation of law and was accepted as the truth until the contrary was proven or it was ousted by a stronger presumption.¹⁰³ A *praesumptiones iuris et te iure* was a conclusion made by the law to dispose of a matter and no evidence was admissible to prove the contrary.¹⁰⁴ It was therefore an irrefutable presumption.¹⁰⁵ These presumptions survived to a greater or lesser extent in South African law.¹⁰⁶

With regard to the language used in contracts, the Roman-Dutch law took over the Roman law contextual approach to interpretation in the sense that words and terms had to be read in their context.¹⁰⁷ The Roman-Dutch law, however, differed from Roman law in that it was admissible to deviate from the ordinary meaning of a word by extending or restricting the meaning assigned to a word to give effect to the clear intention of the parties.¹⁰⁸ Roman-Dutch law also considered usages and customs of the region or trade concerned¹⁰⁹ as well as the usages and customs of the parties themselves¹¹⁰ as important aids to determine the intention of the parties.¹¹¹ The Roman-Dutch jurists therefore also assumed a more contextual approach to contractual interpretation, which is now the preferred approach in countries all over the world.¹¹²

¹⁰⁰ Cornelius op cit note 26 at 19.

¹⁰¹ *Commentatarius ad pandectas* (1829) 22 3 14.

¹⁰² Voet ibid at 22 3 14.

¹⁰³ Voet ibid at 22 3 15.

¹⁰⁴ Voet ibid at 22 3 16.

¹⁰⁵ Cornelius op cit note 26 at 19.

¹⁰⁶ See 4.4.1 below.

¹⁰⁷ Voet ibid at 34 5 4 5; Cornelius op cit note 26 at 22.

¹⁰⁸ Voet ibid at 1 3 44; Cornelius ibid at 22.

¹⁰⁹ Voet ibid at 1 3 19, 1 3 36, 39 4 18; Van der Linden op cit note 97 at 1 14 4; Vinius 20 2 *Tractatus de Pactis* (1679) at 20 par 2.

¹¹⁰ D 1 3 39; D 34 5 15; Cornelius ibid at 23.

¹¹¹ Cornelius ibid at 23.

¹¹² See 5 below for a full discussion on the impact of contextualism on contract interpretation.

2.5.4 English Law and Interpretation – Parol-Evidence and Clear-Meaning Rules

While the English law of interpretation was certainly influenced by Roman law, there was no reception of Roman law into English law as occurred in Medieval Dutch law.¹¹³ This is evident in the unique rules and doctrines that were applied in English law – for example, the unique parol-evidence and clear-meaning rules.¹¹⁴ The clear-meaning rule had formed part of the English law of interpretation since the earliest times and by the eighteenth century it was accepted law in England that a legal document contained a fixed and unalterable meaning.¹¹⁵ Another approach taken by the English courts when dealing with the language of a contract was that words were to be construed according to their ordinary use and application. This general approach, which bears a close resemblance to the Roman principle that words should bear the meaning attributed to them in common speech,¹¹⁶ has been recognized by the courts of England since about 1800.¹¹⁷ If to read words in a contract in their ordinary and grammatical sense would lead to some absurdity or would be plainly repugnant to the clear intention of the parties, another construction which does not necessarily follow the ordinary and grammatical meaning of the words can be sought.¹¹⁸ This acceptance of the ‘clear-meaning’-rule, a principle which required strict observance of the literal and grammatical sense of the words employed,¹¹⁹ was clearly accepted in a number of English cases. In 1892 Lord Esher said that ‘if the words of an Act are clear, you must follow them, even though they lead to a manifestly absurdity. The Court has nothing to do with the question whether Legislature has committed an absurdity.’¹²⁰ This would therefore also be relevant to contract law in the event that the parties intended an absurd result.

The parol-evidence rule, on the other hand, developed over a number of centuries as the written contract became more and more important during the Middle Ages.¹²¹ It was not until

¹¹³ Baker op cit note 56 at 329.

¹¹⁴ Cornelius op cit note 26 at 16.

¹¹⁵ Cornelius ibid at 16; Wigmore JH *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1961) 3ed 9 187.

¹¹⁶ See 3.1 above.

¹¹⁷ *Bain v Cooper* (1842) 9 M&H (H of L) 701 at 708; *Bland v Crowley* (1851) 6 Ex 522 at 529.

¹¹⁸ *Bland v Crowley* supra 116.

¹¹⁹ Kellaway op cit note 15 at 49.

¹²⁰ *R v City of London Court Judge* (1892) 1 QB 273 290.

¹²¹ Wigmore JH ‘A brief history of the Parol Evidence Rule’ (1904) *Columbia Law Review* 338 at 338.

the eleventh century that noblemen and clergy began to make use of documents under seal, which had hitherto been the exclusive domain of the King. Over the next two hundred years, this practice spread as more and more people became literate.¹²² By the thirteenth century, written contracts made under seal had virtually replaced oral contracts that were concluded before transaction-witnesses as the primary kind of formal contract.¹²³ People could therefore put their words into writing and these words became enforceable once put to paper. The parties to a contract could then rely on the written document to prove their contract, and with growing literacy the English courts slowly restricted the admissibility of oral (or parol) evidence.¹²⁴ The result was that a lot of emphasis was placed on the text and the literal meaning of the words contained therein.¹²⁵ This was where the literalist theory took on its purest form with the application of both the clear-meaning and the parol-evidence rules simultaneously in the ascertainment of the meaning of the words in a contract. The development of the rule culminated in the nineteenth century, when it spread with the English common law to different parts of the world, where it still endures today.¹²⁶ The clear-meaning rule also endures in modern English law, but, as with the parol-evidence rule, certain exceptions have developed and both of these rules are under great pressure to be totally abolished.¹²⁷

2.5.5 Impact of Roman-Dutch and English Law on South African Law

The problems in relation to interpretation in general were first sparked in *De Villiers v Cape Divisional Council*,¹²⁸ where the court held that statutes passed after the secession of the Cape Colony to British rule were to be construed in accordance with the English rules of interpretation rather than those of Roman-Dutch law. This decision allowed for the reception of principles from English law of interpretation into South Africa.¹²⁹ This resulted in courts referring English and Roman-Dutch rules of interpretation¹³⁰ without even considering the different paths taken in the development of the English and Roman-Dutch laws of

¹²² Wigmore op cit note 121 at 338.

¹²³ Wigmore ibid at 338 and 343.

¹²⁴ Cornelius op cit note 26 at 17.

¹²⁵ Cornelius ibid at 18.

¹²⁶ Cornelius ibid at 18.

¹²⁷ Cornelius op cit note 26 at 52; See also 5.3 to 5.5 below for a discussion on abolishment of these rules.

¹²⁸ 1875 Buch 50.

¹²⁹ Cornelius ibid at 9; LC Steyn *Uitleg van Wette* 5ed (1990) 55-68.

¹³⁰ *Von Wielig v The Land and Agricultural Bank of South Africa* 1924 TPD 62 at 66.

interpretation, or whether the theoretical basis of interpretation in the various systems were even compatible.¹³¹ With regard to the approach to the language of a contract, the South African law holds the intention of the parties to be paramount, which echoes the Roman-Dutch *consensus ad idem* requirement of an enforceable contract. The language of a contract was the only allowed source from which to ascertain this intention, however, and the only guideline with regard to language that the court allowed itself to follow was the ‘ordinary meaning of the words’.¹³²

South African law still uses many of the Roman-Dutch presumptions today, and the clear-meaning rule as well as the parol-evidence rule of the English law was also taken over by South African courts.¹³³ The South African legal system is, however, predominantly in favour of a subjective approach to interpretation, in opposition to the objective approach of English law, as will become clear later on. Whatever the roots of the various principles of interpretation of South African law, the purpose of interpretation of a contract in South Africa remains the ascertainment of the common intention¹³⁴ of the parties. This has been called the ‘general rule’¹³⁵ or the ‘golden rule’¹³⁶ of interpretation. The different ‘rules’ as adopted from the various systems can therefore be seen as mere guidelines to assist the interpreter in ascertaining the intention of the parties. This discussion will endeavour to show that the intentions of the contracting parties can be best expressed by using their own language or language that they understand and that ‘clarity’ above ‘formality’ would serve the interests of all concerned.

¹³¹ Cornelius op cit note 26 at 9.

¹³² See *Conradie v Roussouw* supra note 75.

¹³³ Cornelius ibid at 16.

¹³⁴ See *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 1 SA 796 (A) 804 D; Van der Merwe, Van Huyssteen, Reinecke and Lubbe op cit note 11 at 280.

¹³⁵ *Jonnes v Anglo African Shipping Co (1936) Ltd* 1972 2 SA 827 (A) at 834.

¹³⁶ *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* ibid at 804 E; *Coopers & Lybrand v Bryant* [1995] 3 SA 761 (A) 768.

2.6 General Remarks about the Historical Context

Whilst scrutinising the South African law as a system as a plethora of integrated principles, it follows that one source of law should not be studied to the exclusion of others. The reason behind this is that South African courts have implicitly applied the principles concurrently without making specific reference to the origins of the principles applied.¹³⁷ With regard to plain language it will become clear that many of the difficulties regarding interpretation and enforcement of contract can be helped with clearly drafted contracts that express the parties' common intention to be bound and the terms of the agreement they want to put in place.

We will also see how the Dutch law, which retained the contextual interpretive methods of interpretation, has been taken over into many international interpretation statutes and how South Africa and England have recently moved away from the formality of the past towards a more contextual interpretative theory of interpretation.



¹³⁷ See Cornelius op cit note 26 at 16.

3 General Theories of Contract and Interpretation of Contracts

*Theories are problem solving devices. We assess the merits of a particular theory by its ability to solve the problems that give rise to the need for a theory.*¹³⁸

3.1 The Need for Theories in Practice

It has been stated argued that language is never totally clear and unambiguous.¹³⁹ One writer who would agree with this is Devenish,¹⁴⁰ who avers that words are seldom so clear and unambiguous that they are capable of bearing only one meaning in all circumstances. Van Den Bergh¹⁴¹ also seems to agree with this statement, as he refers to language as a blunt instrument used to create delicate works of art. If this is true, an interpreter faces a daunting task when interpreting a document. Various theories have therefore been developed to aid an interpreter and to help him/her ascertain from which perspective to interpret a specific word or clause.

By exploring the theories of contract law a broad overview will be provided of the general theories that exist in the spheres of contractual liability as well as interpretation in the law of contract. This is relevant in that plain language contracts need to be both enforceable and interpreted in the way that the parties intended. When we look at the theoretical aspects of contractual validity and interpretation of a contract we will discover that Plain Language does have a place in the academic sphere of the law of contract. In general, contract theory helps us establish which interpersonal relationships ought to be enforced, while interpretation theory helps us assess what the words in an enforceable contract mean.¹⁴² Since South African contract liability lies in the existence of consensus between the parties, the common intention

¹³⁸ R Barnett 'A Consent Theory of Contract' (1986) 86 *Columbian Law Review* 269 at 269.

¹³⁹ See for example G Williams 'Language and the Law' (1945) 61 *Law Quarterly Review* 71 at 71.

¹⁴⁰ *Interpretation of Statutes* (1992) 33.

¹⁴¹ Van Den Bergh NJC 'Die Gebruikswaarde van Bepaalde Struktuuranalitiese Metodes vir Wetsuitleg' (1981) TSAR 136.

¹⁴² Barnett *ibid* at 269.

of the parties lies at the heart of contract formation.¹⁴³ The role of contract theories is to guide an interpreter to an equitable result.

3.2 Theories on Contractual Liability

When one turns to the theory of contract it is best to start off by looking at the theories of contractual liability so as to ascertain when parties will actually be bound by a contract they brought into being. Interpretation of a contract only happens when it has been ascertained that the parties will indeed be bound by the contract and therefore the clauses contained therein. Many of the theories overlap and have become merged in the process of being taken over from different countries, as will become clear.

The traditional theories of contract liability in English law bear a close resemblance to the theories of South African law, as will emerge later in this discussion. In English law there are five traditional theories of contractual liability:¹⁴⁴ namely the ‘will theory’¹⁴⁵, the ‘bargain theory’¹⁴⁶, the ‘promise theory’¹⁴⁷, the ‘reasonable expectation theory’¹⁴⁸ and the ‘reliance theory’¹⁴⁹. However, a closer look at the different theories reveals that there is a distinctive sixth theory that is more stringent than its closely related relative, the ‘reliance theory’, and forms a separate category known as the pure ‘declaration theory’.¹⁵⁰

¹⁴³ See discussion below and AJ Kerr *The Principles of the Law of Contract* 6 ed (2002) 3.

¹⁴⁴ JW Carter and DJ Harland *Contract Law in Australia* 2 ed (1993) 8; See also Coote B *The Essence of Contract* (1988) *Journal of Contract Law* 91.

¹⁴⁵ Carter and Harland op cit note ibid at 8. See also Barnett op cit at note 137 at 169 where Barnett states that this theory is a *party-based theory* in that it focuses on protecting a particular party, in this case the promissory, to a transaction. This theory is important in that it highlights the importance of the intention or ‘will’ of the parties which should be expressed in the language of the contract. This theory, however, reaches beyond the language of the contract so as to allow interpreters to ascertain the true intention of the parties.

¹⁴⁶ This theory is based on the concept of reciprocity as used in English Law and holds that a promise, in itself, is not sufficient for enforceability of a contract. Consideration in the form of a right, interest, profit or benefit should be given or some loss, detriment or responsibility should be suffered or undertaken by the other party. See Beatson op cit note 63 at 89; See also *Curie v Misa* [1875] LR 10 Ex 153 at 162.

¹⁴⁷ In effect the promise theory says that contracts are promises, promises should be kept and that it is therefore appropriate that the law should enforce them. See also Carter and Harland ibid at 8.

¹⁴⁸ This theory bases the obligation to perform a contract on the reasonable expectation induced by a promise and the disappointment of those obligations by breach. This theory is closely related to the reliance theory. See Carter and Harland ibid at 8.

¹⁴⁹ In its strongest form, this theory states that a contract arises (or should arise) whenever an acceptor of a promise has relied upon a promise in a way which would cause detriment were it not kept; see Beatson op cit note 63 at 3.

¹⁵⁰ According to the declaration theory a contract is binding if parties created the impression that they wished to be bound to a contract and their subjective intentions do not play a role. See Van Zyl op cit note 17 at 257.

The general theories of South African contract law can generally speaking be differentiated into three main theories. These are the objective approach (declaration theory), subjective approach (will or intent theory) and the reliance theory. These approaches deal mainly with what interpreters are allowed to look at when ascertaining if a legally binding contract does exist. In other words, the main question is if parties' subjective intentions are the overriding factor or if the outward manifestations of the parties' intentions play a more important role with regard to enforceability of a contract.¹⁵¹ The application of these theories in the South African context will therefore be looked at.

3.3 Contract Liability: The South African Approach

As a starting point South African law has always had a high regard for consensus as the basis of a contract (this was taken over from Roman-Dutch law, as set out above). The South African approach differs considerably from Roman law in that mere agreement, whether tacitly or explicitly concluded, constitutes a valid, enforceable contract.¹⁵² The importance of the concept of *bona fides* in contracts has survived, however, as is highlighted in the judgment quoted above in *Pieters & Co v Salomon*,¹⁵³ and it is presumed that parties contract in good faith, even though they want to serve their own ends. The general principle in South African law is that the basis of a contract is either consensus (according to the will theory or objective theory) – that is, the actual agreement between parties – or the reasonable belief by one of the parties that there is consensus (according to the declaration or reliance theories).¹⁵⁴

The reliance theory is generally applicable to apparent agreements, where there was no actual *consensus*. This theory has also been referred to as the objective theory, but Christie refers to this as 'quasi-mutual assent' and he says it would be impossible to prove the existence of any contract if the reliance theory were not to be applied, since the other theories may lead to uncertainty or fraud.¹⁵⁵ The rule was set out in *Smith v Hughes*,¹⁵⁶ where the court held as follows:

¹⁵¹ Christie op cit note 51 at 23; Kerr op cit note 143 at 3; A Van Aswegen 'The Future of South African Contract Law' (1994) THRHR 448; Cornelius op cit note 26 at 3.

¹⁵² See chapter 2 above.

¹⁵³ 1911 AD 121, at 137.

¹⁵⁴ Van der Merwe et al op cit note 11 at 16.

¹⁵⁵ Christie op cit note 51 at 11.

Whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and the other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.¹⁵⁷

In South Africa the requirements for proving a contract on this alternative basis are:

- 1) One of the parties to the agreement should have created in the mind of the other party the belief or reliance that they had reached *consensus*;¹⁵⁸
- 2) The party who wants to have his reliance upheld should show that the reliance was reasonable in the circumstances; and¹⁵⁹
- 3) The party who asserts that there is no contract should construe his intention to the other party in a wrongful way, in other words there had to be misrepresentation.¹⁶⁰

In South African law we have also made use of an indirect application of the reliance theory. This approach is called the *iustus error* approach, and is used in cases of unilateral mistake. A unilateral mistake occurs when a party to a contract can show that he or she personally was labouring under some misapprehension.¹⁶¹ According to Christie,¹⁶² the party's claim is that the court should apply a subjective test to the formation of the contract and relieve him or her from liability due to the fact that his or her unilateral mistake had the effect that no contract was created or because it would be unfair in the circumstances to hold him or her to it. Christie¹⁶³ goes further to say that this claim should be met with the reply that, as a general rule, the court should apply the objective test to ascertain if the party created the reasonable objective impression that the party wanted to be bound to the terms of the contracts, whatever his or her subjective state of mind. The courts should therefore decide on a case to case basis

¹⁵⁶ [1871] All ER 6 QB 597.

¹⁵⁷ Per Blackburn J at 607, adopted in *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417 at 423; *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A); *Harlin Properties (Pty) Ltd and another v Los Angeles Hotel (Pty) Ltd* 1962 3 SA 142 (A) at 149 and *Benjamin v Gurewitz* 1973 1 SA 418 (A) at 425E.

¹⁵⁸ See *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 2 SA 978 (A) and *Steyn v LSA Motors Ltd* 1994 1 SA 49 (A).

¹⁵⁹ Van der Merwe et al op cit note 11 at 36; *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* supra note 157 and *Steyn v LSA Motors Ltd* supra.

¹⁶⁰ Van der Merwe et al ibid at 36; *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* supra note 157 and *Steyn v LSA Motors Ltd* supra.

¹⁶¹ Christie op cit note 51 at 314.

¹⁶² Christie ibid at 314.

¹⁶³ Christie ibid at 314.

whether or not to apply the general objective test or the subjective test in the case of unilateral mistake.¹⁶⁴

According to Kerr¹⁶⁵ the various judgments on this topic indicate that a judge has a choice when deciding on the enforcement of a contract. The judge can either (1) search for the common intention of the parties, to which one may add the rule in *Smith v Hughes*¹⁶⁶ (the reliance theory), or (2) regard only the words used, except in cases of fraud and *dissensus*. He further states that it is clear that the overwhelming weight of authority is in favour of a combination of the search for the common intention of the parties plus the reliance theory. A court will assume that the parties' declarations of intent coincide with their actual intentions, unless the contrary is proven, which coincides with the presumption that no one writes what he or she does not intend.

The relevance of a flexible approach is highlighted by Coote,¹⁶⁷ who asserts that there is a distinct difference between the theory of law and the actual application thereof in the common law. This is especially relevant with regard to the growing use of standard form and precedents in the realm of contracts. It cannot be said that the written contract always contains the 'true' intentions of the parties, as it is very seldom, especially in large commercial contracts, that the contract is drafted in such a way as to correctly represent the true intentions of the parties. In basic terms this means that the actual written contract cannot fully express the true intentions of the parties, and that one should look beyond the contract to ascertain the corresponding intentions of the parties. Once again this is the case because of the difficulty of assessing the true intentions of the parties, as one cannot claim to know what goes on in the mind of another person. As is pointed out by Carter and Harland,¹⁶⁸ there is a tension between theory and reality in the sphere of contract bargaining. According to them the emergence of a more flexible approach defining what qualifies as a defining principle of enforcement of contracts is

¹⁶⁴ See *National & Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A) where Schreiner JA endorses the objective approach in cases of unilateral mistake and states that: 'no other approach would be consistent with fairness and predictability. Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he was entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all.'

¹⁶⁵ op cit note 143 at 23.

¹⁶⁶ Kerr ibid at 23.

¹⁶⁷ B Coote 'The Essence of Contract' (1988) 1 *Journal of Contract Law* 91 at 99-107.

¹⁶⁸ op cit note 144 at 11.

merely a reflection of how society's views have developed with regard to the strength of a binding promise.¹⁶⁹

3.4 Theories of interpretation of Contracts

There are many theories of interpretation that have been formulated and debated about by legal intellectuals.¹⁷⁰ Instead of discussing all the possible theories of contract law, which could form a thesis on its own, this study will highlight a few of the most important ones as defined in case law and academic writings.

3.4.1 Literalism or Interpretive Formalism

According to Literalism in its most basic form, it is assumed that language as it stands, on the condition that it is clear and unambiguous, is a reliable expression of the intention of the parties.¹⁷¹ It is therefore a good starting point to scrutinise the written text as embodiment of the parties' common intention, all though it might be altered by external factors at a later stage.¹⁷² Clear language, which clearly communicates the parties' common intention, are terms which are interchangeable with the terms 'plain' or 'ordinary' language.¹⁷³ The language is clear in the sense that the normal speaker of a language will understand it.¹⁷⁴ It appears that literalism is closely related to the interpretative presumption that a party does not write what he or she does not intend and that words were used precisely and exactly.¹⁷⁵ This approach to interpretation stems from the English use of the clear-meaning rule and the parol-evidence rule in ascertaining the terms of a contract and their meaning. The meaning needs to be extracted from the exact words of the parties and other considerations should be left for later.¹⁷⁶ The clear-meaning rule was succinctly expounded in the classic dictum of *Grey v Pearson*¹⁷⁷ by

¹⁶⁹ Carter and Harland op cit note 144 at 11.

¹⁷⁰ See LM Du Plessis *Re-Interpretation of Statutes* (2002) 92-100; Kellaway op cit note 15 at 187 - 191; Cornelius SJ *The Interpretation of Contracts in South African Law* 1999 unpublished. LLD thesis University of Pretoria.

¹⁷¹ RM Dias *Jurisprudence* 5 ed 1985 171.

¹⁷² GE Devenish *Interpretation of Statutes* (1992) at 26.

¹⁷³ PB Maxwell *The Interpretation of Statutes* 12 ed (1976) at 239-240.

¹⁷⁴ Cross R et al *Statutory Interpretation* 3 ed (1995) 200.

¹⁷⁵ See Cornelius op cit note 170 at 120 and 123.

¹⁷⁶ See *East London Municipality v Abrahamse* [1997] 4 SA 613 (SCA) 632G.

¹⁷⁷ [1843] 60 All ER 21 (HL) 36 he stated that: 'The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in

Lord Wensleydale when he stated that only when the ordinary grammatical meaning would lead to an absurd result or inconsistency with the rest of the contract one may look beyond what is clearly stated in a contract. This exposition of the embodiment of the clear-meaning rule has been adopted, followed, redefined and extended by South African courts.¹⁷⁸

According to Côté,¹⁷⁹ when referring to the application of this approach to contracts, any literal approach is based on five assumptions, namely that the written contract is a means of communication between the parties; communication by language is possible; the parties wish to communicate certain ideas by means of their contract; they are familiar with the ordinary rules of language; and they use language competently. Côté,¹⁸⁰ whose view is in line with that of Devenish¹⁸¹ and Van Den Bergh¹⁸², warns that verbal communication is too subtle and the flexibility of language makes it unrealistic to interpret a document with a dictionary in one hand and grammar in the other. He is further of the opinion that the literal theory emphasizes the explicit (text) at the expense of the implicit (context). According to Cornelius,¹⁸³ the literal theory should be rejected on the basis that it does not conform to the subjective theory of contractual liability and refers to the objective declaration theory which only takes cognisance of parties' outward manifestations of their intentions. The reason for this is that, in South African law, the basis of a contract is *consensus*, which should be determined by considering the actual subjective intentions of the parties.

This theory necessitates clear and precise drafting so that interpretation contrary to the parties' common intention is not possible at a later stage. Clear and unambiguous language is of paramount importance, since it is the primary source of information regarding what the parties agreed to. In applying this theory during interpretation one can only revert to external sources

which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity or inconsistency, but no farther.'

¹⁷⁸ See example in *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* [2001] 3 SA 582 (SCA) where the Supreme Court of Appeal cites the dictum from *Bhyat v Commissioner for Immigration* 1932 AD 125, 129: 'The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment ... in construing a provision of an Act of Parliament the plain language of its meaning of its language should be adopted unless it leads to some absurdity, hardship or anomaly which from the consideration of the enactment of the act as a whole a court of law is satisfied the legislature could not have intended.'

¹⁷⁹ PA Côté *The Interpretation of Legislation in Canada* (1984) at 193.

¹⁸⁰ Côté *ibid* at 319. See also Devenish *op cit* note 171 at 26 as well as Van Den Bergh *op cit* 141 at 136.

¹⁸¹ Côté *ibid* at 319.

¹⁸² Côté *ibid* at 319.

¹⁸³ Cornelius *op cit* note 170 at 95.

in the event that the literal meaning leads to an absurd result or if there is an inconsistency between different terms in the same contract.¹⁸⁴ Ironically the parties' 'will' is therefore not relevant insofar as it is not embodied in the written document. This does not encompass the true nature of many contracts in existence today which are unilaterally drafted without negotiation between parties.¹⁸⁵

3.4.2 Objective Theory of Interpretation

This theory is also known as 'the delegation theory', as the term in the legal document reflects merely a delegation to the interpreter to attribute meaning to the words.¹⁸⁶ Objectivism entrusts the function of interpreting a legal document to the courts in that they have to interpret a contract by looking at how the parties expressed their common intentions on paper.¹⁸⁷ The contract therefore takes on an existence separate from the parties and their common intentions are believed to be manifested in it.¹⁸⁸ This theory holds words to be paramount and highlights the importance of drafting clear and unambiguously to avoid misinterpretation by a court.

The objective theory is closely related to the literalist theory and can almost be seen as an overlapping theory in some respects. Generally when the courts speak of an objective theory of contract, they generally mean¹⁸⁹ that the words are to be interpreted according to the view which would be taken by a reasonable person *in the position of the party to whom they are addressed*.¹⁹⁰ Thus in *Paal Wilson & Co A/S v Parteenreederei Hannah Blumenthal*¹⁹¹ Lord Diplock referred to the intention of each party as it has been communicated to the other party and how the other party understands it. This is clearly a manifestation of the declaration theory that holds no room for the subjective intentions of the parties. Another legal authority who favoured the objective approach was Wendell-Holmes. According to him the objective approach should be favoured since it is the court's duty to uphold apparent contracts, rather than invalidate them. According to him the purpose of interpretation is to ascertain not what

¹⁸⁴ Kellaway op cit note 15 at 57.

¹⁸⁵ See 7.1 below.

¹⁸⁶ Devenish op cit note 140 at 50; Cornelius op cit note 26 at 97.

¹⁸⁷ Du Plessis op cit note 170 at 98.

¹⁸⁸ Devenish ibid at 50.

¹⁸⁹ See *Allied Marine Transport Ltd v Valdo Rio Doce Nevegacao SA* (1985) 1 WLR 925 at 936.

¹⁹⁰ See JR Spencer 'Signature, Consent and the rule in *L'Estrange v Graucob*' (1973) *Cambridge Law Journal* 104.

¹⁹¹ 1983 at AC 854.

the words actually meant but what a normal English speaker under the circumstances would hold them to mean.¹⁹² According to Cornelius,¹⁹³ the objective theory fails in the same way the literalist theory does, in that it fails to take into account outside factors like undue influence, simulated contracts, rectification, mistakes and implied provisions when ascertaining the true nature of the words used in the contract.

According to Hall¹⁹⁴ the reason for the objective approach to interpretation is grounded in the purpose of contract law, which is to protect reasonable expectations. In exposition of this view, emphasis is placed on what a reasonable person would infer from the words and their context, as opposed to what either of the parties subjectively understood or intended. This refers back to the reasonable expectation theory in English law when the enforceability of a contract is considered.¹⁹⁵ Without expounding the objective theory further the main emphasis of the theory remains the language used in a contract. A drafter should ensure that the contract contains the true intention of the parties, because the South African courts have now opened the door to a contextual approach to interpretation. If the words and intentions therefore do not coincide, a contract that looks *prima facie* enforceable might be interpreted to be void, or the meaning altered to give effect to the true intentions of the parties.

3.4.3 Subjective/Intentionalist Theory of Contract Interpretation

In South Africa it is a well-known principle that the golden rule of interpretation is to seek the intention of the parties at the time the contract was entered into.¹⁹⁶ This approach was further developed in *Joubert v Enslin*¹⁹⁷ by Innes JA, when he stated¹⁹⁸ that the golden rule applicable to interpretation of all contracts is to ascertain and to follow the intention of the parties; and if the contract itself, or any evidence admissible under the circumstances, affords a definite indication of the meaning of the contracting parties, then a court should always give effect to that meaning. This approach is sometimes referred to as the subjective theory,¹⁹⁹ though in

¹⁹² O Wendel-Holmes 'The Theory of Legal Interpretation' (1899) 12 *Harvard Law Review* 417 at 418.

¹⁹³ Op cit 169 at 98.

¹⁹⁴ *Canadian Contractual Interpretation Law* 1ed (2007) 24.

¹⁹⁵ See 3.2 above.

¹⁹⁶ Kerr op cit note 143 at 386.

¹⁹⁷ 1910 AD 6.

¹⁹⁸ At 37-38.

¹⁹⁹ Devenish *ibid* at 33.

common law jurisprudence it is commonly believed that the real intention of the parties is ascertainable from the (clear and unambiguous) language of a contract.²⁰⁰ What the parties intend a certain term to mean will therefore reign supreme, and this theory is closely related to the subjective theory discussed above in that the true intentions of the parties is the deciding factor.²⁰¹ This approach was reaffirmed in *Standard Building Society v Cartoulis*,²⁰² *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd and others*,²⁰³ and *Atteridgeville Town Council and another v Livanos t/a Livanos Brothers Electrical*.²⁰⁴

According to Cornelius,²⁰⁵ however, the courts not applied this theory any differently to the literalist theory, in that they have confined their search for the intention of the parties to the text of the document and therefore the same criticism levelled at the literalist and the objective theories' of contract could be applied. According to Cornelius²⁰⁶ and Du Plessis,²⁰⁷ the application of the subjective theory places too much emphasis on the literal meaning of the words, as courts try to assess what the parties' intention was from the words they used and may bring a result about that neither of the parties intended. Another criticism posed by Cornelius²⁰⁸ is that it does not leave room for external factors such as duress or undue influence. Moreover, the context surrounding the contract is ignored and by looking at the context surrounding the text an interpreter is actually only applying the literal approach together with the normal presumptions of interpretation.

3.4.4 Purposivism

Purposivism attributes meaning to a legal document, including a contract in the light of the purpose it seeks to achieve in light of the context surrounding it and is another form of the objective approach²⁰⁹. Where the 'clear language' and purpose are at odds the latter prevails and therefore it can possibly be suggested that it is a manifestation of the subjective approach

²⁰⁰ Du Plessis op cit note 170 at 94.

²⁰¹ See discussion of the 'golden rule of interpretation' in *Joubert v Enslin* supra note 75.

²⁰² 1939 AD 510 at 516-517.

²⁰³ 1980 1 SA 796 (A) at 804 C.

²⁰⁴ 1992 1 SA 296 (A) at 305J-306A.

²⁰⁵ Op cit note 169 at 105.

²⁰⁶ Cornelius ibid at 106.

²⁰⁷ Ibid at 36.

²⁰⁸ Ibid at 106.

²⁰⁹ Cornelius op cit note 169 at 110.

since the parties' true intention with regard to the purpose of the contract is paramount.²¹⁰ This can be seen as an application of the purposive approach in the narrow sense as it gives effect to the common purpose intended by the parties and not anything outside that.

This form of interpretation is especially popular in the realm of constitutional interpretation, as can be seen from the dictum of Mokgoro J in *Bertie Van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others*,²¹¹ where he says that the Constitution requires a purposive approach to interpretation. According to Du Plessis it is becoming a substitute for clear language in this field of interpretation and is also referred to as the teleological approach when specifically dealing with morals and values such as those entrenched in the Constitution.²¹² This purposive approach has also been directly applied to the interpretation of contracts.

In *The Antaios*²¹³ Lord Diplock famously observed that business commonsense was to prevail over the written text if a literal interpretation were to render the contract absurd. This dictum is consistently cited in support of arguments favouring more regard to be paid to the commercial object of a contract or particular provision rather than strict adherence to the letter of agreement.²¹⁴

3.4.5 Judicial Activism: Judicial or Free Theories

This theory is premised on the belief that judges have a creative role to play in the interpretation and a judge should fill in the gaps of the enactment to remedy the defects in statute law. More than one choice in interpreting a provision is possible and therefore also legally permissible and the 'objective' cannons of construction only serve to justify the outcome.²¹⁵ The creativity that the judge may apply is, however, far reaching in that the rules of interpretation are essentially only applied to justify the interpretation reached by the

²¹⁰ Du Plessis op cit note 170 at 96.

²¹¹ At 10 par 21.

²¹² 115; Constitution of the Republic of South Africa 108 of 1996.

²¹³ *Antaios Compania SA v Salan AB (The Antaios)* 1985 AC 191 at 201 where it was held that: 'While depreciating the extension of the use of the expression 'purposive construction' from the interpretation of statutes to the interpretation of contracts ... I take this opportunity of re-stating that if detailed semantic and syntactic analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it should be made to yield to business commonsense.'

²¹⁴ G McMeel *The Construction of Contracts: Interpretation, Implication and Rectification* (2007) 71.

²¹⁵ Du Plessis op cit note 170 at 98.

court.²¹⁶ This can be interpreted to mean that it is almost a retrospective search for the right theory that justifies a judge's inclination as to what the interpretation should be, as the process of interpretation is left to the judge's subjective sense of justice and reasonableness.²¹⁷

One should, however, take cognisance of the fundamental element of consensus, as it is the basis of contractual liability in South African law. A judge is therefore given free rein to ignore the intentions of the parties, and in this process the subjective and reliance theories of contract liability are completely ignored.²¹⁸ One cannot give a judge the power to void a contract in the event that a contract is legally sound and the parties were subjectively intent on being bound to it at when the contract was entered into.

3.4.6 The Linguistic Turn

In Europe (Germany in particular) this break away from the conventional theories of interpretation is also known as subsumption – that is, a procedure of logical deduction²¹⁹ whereby particular problems are brought within the operational ambit of generally formulated legal rules²²⁰. The linguistic turn is a turn away from the belief that language can be clear and unambiguous and that only one meaning is possible.²²¹ This theory is closely linked to the modern contextual approach, where commonsense aids the courts in ascertaining when to look beyond the text in order to find the meaning of terms. However, it has not been expounded as such as an official theory of South African contract interpretation.

²¹⁶ Cornelius op cit note 170 at 117; Devenish op cit note 140 at 49; Du Plessis ibid at 98; Kellaway op cit note 15 at 66

²¹⁷ Kellaway ibid 66.

²¹⁸ Cornelius op cit note 26 at 119; *Rand Rietfontein Estates, Ltd v Cohn* 1937 AD 317 326; *Trollop v Jordaan I* 1961 1 SA 238 A; *Russel NO & Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd* 1975 1 SA 110 A; *Van Rensburg v Taute* 1975 1 SA 279 A; *Cinema City v Morgenstern Family Estates and others* supra note 133 ; *Schoultz v Voorsitter, Personeel-Advieskomitee van die Minisipale Raad van George en 'n ander* 1983 4 SA 689 C at 710H; *Meyer v Barnar and another* 1984 2 SA 580N at 584G, 585E-F; *Woolworths (Pty) Ltd v Escom Pension and Provident Fund* 1987 2 SA 67 at A 71B; *Isaacson v Creda Press (Pty) Ltd* 1991 4 SA 470 C at 475J-476B; *Du Preez en andere v Nederduitse Gereformeerde Gemeente, de Deur* [1994] 2 SA 191 W 196 E.

²¹⁹ D Schmalz *Methodenlehre für das Juristische Studium* 3 ed (1992) at 23.

²²⁰ Du Plessis op cit note 170 at 99.

²²¹ J De Ville *Constitutional and Statutory Interpretation* 1999 THRHR 373 at 373-376.

3.4.7 Literalism-Cum Intentionalism

According to Du Plessis,²²² the literalism-cum-intentionalism approach has dominated the South African judicial scene. In *Venter v R*²²³ this approach was verbalized. In that dictum the court stated that the real object of statutory interpretation is determining the intention of the legislature, but it goes further than that. The court explains as follows: ‘By far the most important rule to guide courts in arriving at that intention is to take the language of the instrument or of the relevant portion of the instrument as a whole; and when the words are clear and unambiguous, to place upon them their grammatical construction and to give them their ordinary effect.’ Since it has been decided that there is no tangible difference between the modes of interpretation in statutes, contracts and wills,²²⁴ this dictum can also generally be applied in the realm of contract law interpretation,

In *Bertie Van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others* Judge Mokgoro²²⁵ states that the purpose of the statute plays an important part in establishing a context that clarifies the scope and effect of the words contained therein. However, he goes on to state that a contextual approach should remain faithful to the actual wording of the statute.²²⁶ The general approach would therefore be to look at the context of the words, but not to go beyond the words to such an extent that the words are rendered superfluous. Words remain important and therefore they should be clear so as to prevent unnecessary judicial intervention. In this sense it once again overlaps with both the objective theory of interpretation as well as with the literalism approach, in that it shares with these approaches a preoccupation with the words in the text.

Contextualism

Classical contextualism (the *ex visceribus actus* approach) emphasizes that a particular term of a contract is to be understood as part of the whole and the spirit and purpose of the whole

²²² Op cit note 170 at 107.

²²³ 1907 TS 910 at 913.

²²⁴ *Southwell v Bowditch* 1876 1 CP 374; *Van Rensburg v Taute* 1975 (1) SA 279 (A); *Stewart and another v Appleton Fund Managers* [2000] 3 All SA 545 (N) at 549j.

²²⁵ Supra note 211 at 10 par 21.

²²⁶ Supra note 211 at 11 par 22.

contract should be assessed.²²⁷ This is closely related to the Roman approach of ‘reading the contract as a whole’, and was expanded in *Swart v Cape Fabrix (Pty) Ltd*.²²⁸ Rumpff CJ explained that it is obvious that a person has to look at the words, taking into account the nature and purpose of the contract, and also the context in which the words are read as a whole.²²⁹ In this regard Jansen JA in *Cinema City v Morgenstern Family Estates (Pty) Ltd*²³⁰ spoke of ‘modifying *prima facie* meanings of words’ and endorsed this concept by stating that one may change the written words of a specific clause in order to make put it in line with the rest of the contract.

In *Hoban v ABSA Bank Ltd t/a United Bank*²³¹ classical contextualism was given a new label namely ‘language in context’ by Judge Cameron.²³² This use of the term ‘language in context’ was thereafter also applied in *Jaga v Dönges; Bana v Dönges*,²³³ where this approach to interpretation in context was expounded by Schreiner JA in his minority judgment. In this judgment Schreiner concluded that context encompasses more than the language of the legal document and includes the purpose, scope and background of the document in question.²³⁴ This is in line with reading the document as a whole in line with its object and purpose, which

²²⁷ Du Plessis op cit note 170 at 112.

²²⁸ 1979 1 SA 195 (A) 202.

²²⁹ Translation of Kellaway op cit note 15 at 434.

²³⁰ 1980 1 SA 796 (A): The contract should be read and considered as a whole, and doing so, it may be found necessary to modify certain of the *prima facie* meanings so as to harmonize the parts with each other and with the whole. Moreover, it may be necessary to modify further the meanings thus arrived at so as to conform to the apparent intention of the parties.

²³¹ [1999] 2 SA 1036 (SCA) 1045B.

²³² *Lawsa* 26 par 229: he said that ‘context does no more than reflect legislative meaning which in turn is capable of being expressed only through words in context’.

²³³ 1950 4 SA 653 (A).

²³⁴ Du Plessis op cit note 170 at 113 paraphrased the judge’s dictum as follows:

- a) The statement that words and expressions used in a statute should be interpreted in the light of their context carries the same weight as the oft repeated statement that they should be interpreted according to their ordinary meaning. ‘Context’ does not merely denote the *language* of the rest of the statute but includes its matter, apparent purpose and scope and, within limits, the background.
- b) The recognition of the relevance of context allows for two possible avenues of approach to language in relation to context and vice versa. According to the first approach the interpreter begins by concentrating on the ‘clear ordinary meaning’ of the language and appeals to the context only in instances where the language appears to admit of more than one meaning. According to the second approach context and language are taken together from the outset.
- c) The result arrived at should in both instances always be the same, since the object to be attained is unquestionably the ascertainment of the meaning of the language in its context and the difference in approach is probably mainly for emphasis.

is one of the aids of interpretation, expounded in *Heys & Co v Gibson Bros*²³⁵ as being a recognized principle in South African law. When this principle of interpretation is applied the meaning of the language in context is ascertained and it should be applied regardless of the consequences and even despite the interpreter's firm belief that the drafter had some other intention. But the interpretation should not be restricted by an excessive scrutiny of the language to be interpreted without sufficient attention to the context.²³⁶ As regards interpretation beyond the contract, background which forms part of the context is frequently taken into account for interpretive purposes,²³⁷ especially where obscure language makes it difficult to ascertain the intention of the contracting parties.²³⁸ In the law of contract the standard approach when determining the common intention of parties (in accordance with the will theory of contractual liability) who disagree on the meaning of an express provision of their contract is to consider the nature, purpose and context of the contract.²³⁹ This theory is in line with the modern theory of contract interpretation, which will be discussed below in further detail.²⁴⁰

3.4.8 The Teleological Approach

The teleological approach can be seen as a broad application of the purposive approach, but seeks to proceed beyond the narrow application of positivism in that, in the interpretation of a term or clause in a contract, it aspires to realization of the 'scheme of values' which surrounds the legal document.²⁴¹ This approach is also concerned with the purpose of the contract, but its scope is wider as it looks beyond the words and the contract.²⁴² The interpreter can look at the presumptions of interpretations, statute law and the Constitution to assess the values in the general principles of contract law.²⁴³ When applying this approach one starts with the

²³⁵ *Heys v Gibson Bros* (1889-1890) 3 SAR (TS) 260; see also Cornelius op cit note 26 at 173.

²³⁶ Supra note 233 at 664F-H.

²³⁷ *S v Nel* 1987 4 SA 276 (O) at 290F-J.

²³⁸ *Santam Insurance Ltd v Taylor* 1985 1 SA 514 (A) at 527C.

²³⁹ Kerr op cit note 143 at 388.

²⁴⁰ See chapter 5 below. See also *KPMG Chartered Accountants v Securefin Ltd and another* [2009] 2 All SA 523 (SCA).

²⁴¹ E Mureinik 'Administrative Law in South Africa' (1986) *SALJ* 615 at 623-624.

²⁴² Devenish op cit note 140 at 44.

²⁴³ Cornelius op cit note 26 at 129; Devenish ibid at 47.

application of the ordinary grammatical meaning of the words; thereafter the intention of the parties is assessed in order to ascertain the purpose for which the contract was concluded.²⁴⁴

The adoption of the 1993²⁴⁵ and the 1996²⁴⁶ Constitution resulted in a move away from a strict rule-based jurisprudence towards one that is value-based. Since South Africa's highest legislation is its constitution it can be argued that there is not a sphere of law that is 'immune' to its interference. The horizontal application of the Constitution to contracts entered into between individuals seems to have been concretized by Sections 8(2) and 8(3). Not only did Section 8(2) have the effect that certain provisions of Chapter 2 of the 1996 Constitution²⁴⁷ may directly influence the interpretation of a contract, section 8(3) of the 1996 Constitution²⁴⁸ requires the law relating to the interpretation of contracts to be developed in accordance with the provisions of Chapter 2 of the 1996 Constitution.²⁴⁹ The common law principle of *bona fidei* or good faith has also been integrated into modern contract law and goes hand in hand with reasonableness and public policy.²⁵⁰ The interpreter can therefore look at the 'spirit' of the contract and distinguish that from the literal meaning of the text.²⁵¹ Once again this seems another manifestation of the contextual approach – this time including the values of the Constitution as part of the context.

According to Cornelius,²⁵² however, the teleological approach and its moral dimension is an unqualified contextual theory which attempts to ascribe to itself the positive qualities of other theories whilst limiting their shortcomings.²⁵³ It is this moral dimension that causes Devenish to criticize this approach: he contends that it causes uncertainty in interpretation by letting morals influence legal texts.²⁵⁴ Cornelius does not agree with this contention and is of the opinion that the moral values that are being taken into account have already found their way

²⁴⁴ Cornelius op cit note 26 at 131; Devenish op cit note 140 at 53.

²⁴⁵ Constitution of the Republic of South Africa 1993.

²⁴⁶ 1996 Constitution above.

²⁴⁷ 1996 Constitution above.

²⁴⁸ 1996 Constitution above.

²⁴⁹ Constitution of the Republic of South Africa 1996; J Van der Walt '2001 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a operative Relation between Common-Law and Constitutional Jurisprudence' *South African Journal of Human Rights* 341 349; See also *Du Plessis v De Klerk* and another [1996] 5 BCLR 658 CC.

²⁵⁰ Cornelius ibid at 86.

²⁵¹ Cornelius ibid.

²⁵² Cornelius op cit note 169 at 130.

²⁵³ Cornelius op cit note 269 at 130.

²⁵⁴ Cornelius op cit note 26 at 37.

into the realm of contract interpretation through application of the contractual presumptions and application of the 1996 Constitution to contract law. When evaluating the above theories it is apparent that there is room for a new theory that encapsulates the best aspects of all of them. That is why this discussion does not stop here.

3.4.9 A Proposed Holistic Approach to Interpretation

In answer to the problems posed by the exclusive application of a theory of contract, Cornelius calls for the modification of interpretation by proposing a holistic approach to interpretation.²⁵⁵ This reflects a summation of what most of the modern writers favour in that it proposes an inclusive approach as opposed to a formalistic one-sided approach with regard to the application of contract theories. He defines this approach as an approach that ‘does not employ a variety of sources, but rather views all such so called sources as interdependent manifestations of the same phenomenon.’²⁵⁶ This is therefore a unification theory that looks at all aspects of a contract in order to formulate a proper interpretation. This can also be seen as a diversification of the contextual theory in that an interpreter uses all the tools at his or her disposal in order to ascertain the true intention of the parties.

With regard to its application in South Africa it is apparent that this theory has found favour. As was first expounded in *Cinema City v Morgenstern Family Estates (Pty) Ltd and Others*²⁵⁷ and concurred with in *Van der Westhuizen v Arnold*,²⁵⁸ the courts now seek to follow a more contextual approach to contractual interpretation. This approach was also accepted as part of South African law in *KPMG v Securefin* which is the most recent case on the subject of contextual interpretation.²⁵⁹

Modern writers have taken a similar stand and instead of favouring one specific approach, many writers have compared the various theories and have found them to be mutually inclusive rather than exclusive of each other. In other words, the theories supplement each

²⁵⁵ Cornelius op cit note 26 at 37.

²⁵⁶ Cornelius ibid at 42.

²⁵⁷ 1980 (1) SA 796 (A) at 804A-806A.

²⁵⁸ [2002] (6) SA 453 (SCA).

²⁵⁹ Supra note 238.

other in a way that forms a new general theory of contract.²⁶⁰ This is therefore possibly the most modern theory that has been formulated to date.

3.5 Conclusion

Gilmore²⁶¹, who contends that the death of classical contract theory has occurred, argues that the general theory of law of contract is an artificial construct derived by nineteenth-century law teachers and judges rather than something truly to be found in the reasons for decisions in the major contract cases from which they drew support. He observes that:²⁶²

The instinctive hope of the great system builders was, no doubt, that the future development of the law could be, if not controlled, at least channelled in an orderly and rational fashion. That hope has proved, in our century of war and revolution, delusive Our observations of how the general theory of contract was put together and how it fell apart may stand us in good stead when next we feel ourselves in a mood to build something.

This view is not above criticism but it would appear that, as expounded in modern case law, courts are no longer bound to one theory, or even to the application of any particular theory, if they feel that the common intention of the parties is clear from the words used. It is evident that the courts *may* take context into account but are not bound to do so. Knowledge of all the theories of contract will enable an interpreter to look beyond the words of a contract and apply the rules and presumptions of interpretation in a logical way when he or she struggles to find meaning in the text of a legal document.²⁶³

As was stated above,²⁶⁴ modern writers, including Du Plessis²⁶⁵ and Cornelius,²⁶⁶ tend to favour a flexible approach to interpretation. Another writer who also favours flexibility in application of contract theory is Kerr²⁶⁷ is a writer who is of the opinion that the common intention of the parties remains paramount and that the written record should only be seen as

²⁶⁰ Op cit note 11 at 278.

²⁶¹ G Gilmore *The Death of Contract* 1ed (1974).

²⁶² Op cit note 257 at 102.

²⁶³ Cornelius op cit note 26 at 182.

²⁶⁴ See 3.4.9 above.

²⁶⁵ Op sit note 169 at 200.

²⁶⁶ Ibid at 203–5.

²⁶⁷ Op cit at note 142 at 124.

evidence of these intentions, or in other words as its 'its outward visible sign'. The different facts of each case make it implausible that a single theory would be generically applicable, and one should also not be too fixed to the written text as a way to find all the answers. Cornelius proposes a 'coherence based verification' that uses common sense in the application of the various theories.²⁶⁸ This is because many problems may occur that are not visible from the text such as simulated contracts, misrepresentation, fraud, and latent ambiguities.²⁶⁹

Christie²⁷⁰ echoes this view, even though he is still in favour of a generally applicable recipe in each case. He is also of the view that the courts should not regard themselves as being bound by any rigid theory. The task of the courts is to apply and, where necessary, develop the law in order to achieve justice. Justice can be achieved by enforcing contracts that stem from true agreement or quasi-mutual assent,²⁷¹ and by not enforcing contracts that do not conform to that pattern. However, it is arguable that this is still not what the modern writers had in mind as the subjective viewpoint of the interpreter will interfere with what is objectively the most reasonable interpretation.

With regard to the relevance of plain language in all the theories of contract, it cannot be disputed that clarity would minimise many problems encountered during interpretation. Whether one should ascertain whether a legal contract was created, whether the parties are legally bound to the contract or whether it is the body of the contract that should be interpreted to give effect to the contract, a contract drafted in clear and unambiguous language setting out the nature and effects of a contract will make each step in contractual interpretation a lot easier to take and will also reduce the need to resort to different theories.

²⁶⁸ Cornelius op cit note 26 at 157.

²⁶⁹ Cornelius ibid at 155.

²⁷⁰ op cit note 50 at 2.

²⁷¹ An English doctrine that was adopted in our law. See Christie RH 'The doctrine of quasi mutual assent' (1976) *Acta Juridica* 149 at 149 as well as the rule in *Freeman v Cooke* as followed in *Smith v Hughes* supra note 72.

4 Interpretation of a Contract: Presumptions, Rules and Maxims

*Doth it not happen that a man of ordinary capacity very well understands a text or law that he reads till he consults an expositor or goes to counsel, who, by that time he hath done explaining them, makes the words signify either nothing at all or what he pleases.*²⁷²

4.1 Introduction

When a contract is interpreted, there are many factors that play a role. Interpretation mostly comes into play when there is a dispute about the enforceability of an agreement or a disagreement about the meaning of terms contained therein. A court will look at a contract through lenses coloured by the history of contract interpretation, the various theories that can apply, the aids that can be used, the presumptions that affect the agreement, the reasonableness of the agreement, the effect extrinsic evidence might have and if it will be allowed as well as many other factors that have consistently been applied in the jurisdiction of the parties concerned. The number of standard form contracts has also increased dramatically due to the rise in consumerism. Such contracts require a different method of interpretation as they are often given to parties on a take-it-or-leave-it basis. These developments together with the rise in consumer protection initiatives should now also be taken into account in interpretation, as stricter liability is placed on the party responsible for drafting the contract, especially with regard to the use of language.²⁷³ The cumulative effect of all of these elements makes the interpretation of a contract a challenging task, and this is why a sound knowledge of all the applicable rules, principles, legislation and previous decisions is needed.

²⁷² J Locke *An Essay Concerning Human Understanding* (1824) Book III Chapter X.

²⁷³ See for example the National Credit Act 34 of 2005 in S64 and the Consumer Protection Act 68 of 2008 in S22 regarding the prerequisite for the use of plain language in consumer contracts.

In the discussion surrounding interpretation as separate sphere of contract law a broad overview of the general method of interpretation will be set out before the rules, maxims and presumptions that have specific relevance to the usage of clear language are examined in more detail. Throughout the exposition of the general interpretative rules and principles, it should be kept in mind that a drafter should, at all times, try to make interpretation as simple as possible by clearly detailing the terms in the contract. It will become evident that clear drafting in itself will not prevent disputes later on as context may influence the meaning of the terms.²⁷⁴ The modern view is however that it is an effective tool for drafting, as ambiguity and vagueness may lead to an unfavourable result in that a court can now take into consideration extrinsic evidence to ascertain the meaning of words even in cases where there is no ambiguity.²⁷⁵ Aside from this, new consumer legislation demands the drafting of all notices and contracts meant for consumer consumption in plain and understandable language.²⁷⁶

Cornelius²⁷⁷ advises a four-step approach to the interpretation of a contract. These four steps can be applied in any order and comprise of:

- 1) Determining the nature of the document or instrument;
- 2) Determining the extent of the text;
- 3) Ascertaining the meaning of the text; and
- 4) Applying the meaning to the facts.

The discussion surrounding interpretation will therefore be set out under the heading of these four steps in order to provide a structure that systematically sets out the different elements of interpretation as they would logically follow in the mind of an interpreter.

²⁷⁴ See 5.7 below.

²⁷⁵ See *KPMG Chartered. Accountants v Securefin Ltd and another* supra note 275.

²⁷⁶ See National Credit Act 34 of 2005 and Consumer Protection Act 68 of 2008.

²⁷⁷ SJ Cornelius 'A Proposed. Systematic Approach to the Interpretation of Legal Instruments' (2001) *TJO* 127.

Step One: Determining the Nature of the Document

It seems common sense that the interpreter should establish what type of document is before him or her. If he or she has ascertained that it is indeed a contract²⁷⁸ it will be apparent from the terms and words in the contract what type of contract it is and this will then lead to the inclusion of certain implied terms and rules of law. Implied terms are terms based on reasonableness and fairness, which the law imports into a contract if the parties did not agree to the contrary.²⁷⁹ Since South Africa has traditionally applied the subjective theory to interpretation, as stated above, the intention of the parties would be seen as paramount with regard to what kind of contract they intended to bring to life, and that intention will be given effect to.

Step two: Determining the extent of the text

When interpreting a contract one should try to ascertain if the written document is the sole source of the specific agreement or if there are other sources that also form part of that contract. This invariably leads to the question whether extrinsic evidence is permissible when a specific contract is interpreted. This is where the parol-evidence rule comes into play. This rule prevents any party from presenting extrinsic evidence to contradict, add to, detract from, modify or redefine the terms of a written contract.²⁸⁰ This includes unwritten terms such as tacit and implied terms. This means that once a transaction is integrated into a written record, all other talks and discussions between the parties regarding that transaction become irrelevant to determine the extent of the terms of the contract, and no evidence in this regard may be tendered.²⁸¹ The parol-evidence rule applies only if the whole transaction has been integrated in writing.²⁸² Since strict application of this rule could lead to injustice,²⁸³ there are exceptions that apply to its application.

²⁷⁸ In other words an 'agreement' between two or more parties; see *Saambou Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) and *Spes Bona Bank v Portals Water Treatment* op cit note 157 and discussion above at 3.3.

²⁷⁹ NL Joubert 'Die Klassifikasie van Nuwe Verskyningsvorme van Kontrakte' (1991) TSAR 250 at 253; Cornelius op cit note 26 at 61.

²⁸⁰ See Cornelius op cit note 26 at 95; *Lowry v Steedman* 1914 AD 532; *Marquard & Co v Biccard* 1921 AD 366; *Union Government v Vianini Ferro Concrete Pipes (Pty) Ltd* 1941 AD 43; *Venter v Birchholtz* 1972 (1) SA 276 (A) and *Johnson v Leal* 1980 (3) SA 927 (A).

²⁸¹ *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 3 SA 16 (A).

²⁸² *Chrysafis v Katsapas* 1988 4 SA 818 (A).

²⁸³ Christie op cit note 51 at 194.

Ascertaining the meaning of the text

Having read the contract as a whole, one begins the task of interpretation by assuming that the parties intended the words to retain their ordinary meaning in a similar context.²⁸⁴ There are a couple of problems in this regard. Firstly, parties are not always consistent or logical in the use of language which results in contradictions occurring in the document.²⁸⁵ Furthermore, words can have more than one ‘ordinary’ meaning and the meaning of the text will also be influenced by the type of contract that is being interpreted. This is when a court should decide if extrinsic evidence is admissible to assist in interpretation.

In the interpretation of the written terms in contracts, South African courts have generally tried to remain with the ‘clear meaning’ of a word or clause in a contract. The ‘clear-meaning rule’ renders extrinsic evidence inadmissible if it is presented to alter the clear and unambiguous meaning of the words contained in the written contract.²⁸⁶ However, there were early developments that assisted with ascertaining the meaning of a word. One of these is that if a word has acquired a specialized or technical meaning in certain areas or trades it should be given its specialized or technical meaning, including the legal meaning of such a word, unless the parties clearly intended the word to have another meaning.²⁸⁷

The importance of context has gained a lot of momentum and it plays an important role as it refers to everything outside of the specific word.²⁸⁸ In the first place, context refers to the position of a word in a sentence.²⁸⁹ Then the background circumstances,²⁹⁰ surrounding

²⁸⁴ *Burger v Central South African Railways* 1903 TS 571 at 578; *Goedhals v Massey-Harris & Co* 1939 EDL 314 at 322; *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465; *Jonnes v Anglo African Shipping Co (1936) Ltd* 1972 2 SA 827 (A) at 834D; *Lembecker's Earthmoving and Excavators (Pty) Ltd v Inc General Insurance Ltd* 1984 3 SA 513 (A) at 520G-521C; *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1992 1 SA 837 (C) at 851A-B; *Fedgen Insurance Co Ltd v Leyds* 1995 3 SA 33 (A) at 38B.

²⁸⁵ E Zuleta-Puceiro ‘Statutory Interpretation in Argentina’ in DN MacCormick and RS Summers (eds) *Interpreting Statutes: A Comparative Survey* (1991) 35 at 35.

²⁸⁶ See Cornelius op cit note 26 at 96 and *De Wet v Hollow* 1914 AD 157; *Compressed Yeast Ltd v Yeas Distributing Agency Ltd* 1928 AD 301; *Le Riche v Hamman* 1946 AD 648; *Stern v Standard Trading Co Ltd* 1955 (3) SA 423 (A); *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A); *Prichard Properties (Pty) Ltd v Koullis* 1986 (2) SA 1 (A).

²⁸⁷ See Lewison *The Interpretation of Contracts* 4ed (2007) at 130 par 5.07.

²⁸⁸ See Cornelius *ibid* at 60. See also discussion under Contextualism, below at 5.

²⁸⁹ R Burrows *Interpretation of Documents* 2ed (1946) 69; M Adams ‘Over de Zwaartekrachtwerking van Rechterlike Uitspraken in België’ (1997) *Tijdschrift voor Privaatrecht* at 134, See also Cornelius op cit note 26 at 62.

²⁹⁰ See *Coopers and Lybrand and others v Bryant* 1995 (3) SA 751 (A) at 768A-E.

circumstances,²⁹¹ and all other contextual factors can also come into play in order to ascertain the intention of the parties.²⁹²

Applying the meaning to the facts

This is the practical phase in the interpretation of contracts, and, if the previous steps were followed and the principles correctly applied at each step, this step should lead to a reasonable and equitable result. This is not always the case, however, as contracts are rarely drafted by the parties themselves, and the language in the contract may not coincide with the facts. If there is a dispute about the meanings then one should determine what evidence can be led in order to determine the meaning of the words. If the modern approach²⁹³ to contract interpretation was followed during the previous phases, this problem would be remedied, since the interpretation will be made to coincide with the facts and other corresponding contextual materials that arise from them.

Since the principles regarding the enforceability of contracts and the theories applied in this regard have already been outlined, this discussion will start at phase two: the integration phase of interpretation.

4.2 The Parol-Evidence Rule: What Forms Part of the Contract?

The theoretical foundation of the rule is that since the parties themselves were responsible for the integration of their agreement in a document that is a complete final concretization of their agreement, the extrinsic evidence regarding the negotiations and the contents of the agreement is irrelevant and misleading.²⁹⁴ Whether a document is an integration of the negotiations and the agreement depends on whether it was intended by the parties as a conclusive record of the transaction.²⁹⁵ When a dispute arises about an agreement reduced to writing, a party will often experience the need to bring evidence from outside the document to prove his or her version of

²⁹¹ See *Coopers and Lybrand* *ibid.*

²⁹² See *Rand Rietfontein Estates Ltd v Cohn* *supra* note 218 at 326 and other cases mentioned in note 216 above.

²⁹³ See *KPMG v Securefin* *supra* note 240 at 275.

²⁹⁴ See *Johnston v Leal* *supra* note 280 at 938, 943-944; *Traub v Barclays National Bank Ltd* 1983 3 SA 619 (A); *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 3 SA 16 (A).

²⁹⁵ Van der Merwe et al *op cit* note 11 at 158; *Du Plessis v Nel* 1952 1 SA 513 (A); *Johnston v Leal* *supra* note 280.

the content and meaning of the contract.²⁹⁶ One of the purposes of the rules regarding the admissibility of extrinsic evidence is to ensure that where the parties to a contract have decided to reduce the contract to writing, the writing will be considered as the only memorial of the contract. If evidence is admitted to contradict the terms of a written contract, it would usurp the function of the writing as exclusive evidence of the contract. As stated above, the parol-evidence rule prohibits evidence to add to, detract from, vary, contradict or qualify the terms of a contract that has been reduced to writing²⁹⁷ In effect the parol-evidence rule places a burden on the parties to each ensure that their written contract is a complete memorial of their agreement.²⁹⁸

The latest view on the parol-evidence rule is that it is an archaic English doctrinal rule and therefore it is not supported by many modern writers.²⁹⁹ One of the main criticisms is that it limits the admissibility of evidence with regard to the parties' common intention as to what formed part of their agreement.³⁰⁰ Since liability is based on giving effect to the subjective intentions of the parties, this is a contradiction in application of corresponding theories of contract.³⁰¹ There has however been case law to the effect that where a document is not accepted as it is or the parties never intended the document to represent the terms in a contract, the parol-evidence rule does not prevent evidence to prove the true intention of the parties.³⁰² This seems to indicate that courts have, unknowingly, refused to apply the parol-evidence rule in circumstances where the parties' intentions were taken into account, which brought it in line with the subjective theory in South African law. The problem would be completely solved, however, if the parol-evidence rule were to be completely abolished. This is in line with many European law systems³⁰³ as well as international instruments of contractual interpretation.³⁰⁴ If

²⁹⁶ Van der Merwe et al op cit note 11 at 156.

²⁹⁷ *Johnson v Leal* supra note 280.

²⁹⁸ Cornelius op cit note 26 at 102.

²⁹⁹ See Van der Merwe et al ibid at 178; DT Zeffert & A Paizes *Parol Evidence with particular reference to contract* (1986) at 8.

³⁰⁰ See Van der Merwe et al ibid at 178.

³⁰¹ See Zeffert & Paizes *Parol Evidence* ibid at 105; *Tesvin CC v SA Bank of Athens* [2000] (1) SA 268 (SCA) 274

³⁰² *Douglas v Raynei* 1907 TS 34 at 37; *Zandberg v Van Zyl* 1910 AD 302; *Beaton v Baldachin Bros* 1920 AD; *Mahomed & Son Ltd v Estate Horwitch* 1928 AD; *Skjelbreds Redi A/S v Hartless (Pty) Ltd* 1982 (2) SA 710 (A) are among these. See also Christie op cit note 50 at 196; Lewison op cit note 287 at 70 par 3.07 and Cornelius op cit note 26 at 99.

³⁰³ Hartkamp AS and Tillema *MMM Contract Law in the Netherlands* (1995) at 57 par 57. See also Cornelius op cit note 26 at 53.

³⁰⁴ R Hyland et al 'CISG-AC Opinion no 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG' (2004) at 23 available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html> [Accessed 10 December

the parol-evidence rule were to be abolished it would mean that drafters would not have to put everything into one document in order to give effect to the intentions of the parties. Clear drafting will however indicate, which (if any) other documents or terms can be taken into account if the document is too lengthy, and if reference to a document is accidentally omitted, the courts will still be able to take it into account.

Modern Approach in International Law

As stated above, the modern norm in international contracts is to omit the parol-evidence rule completely.³⁰⁵ The United States has adopted this approach under the Uniform Commercial Code.³⁰⁶ For example, the fact that a written contract of sale contains detailed specifications does not mean that a presumption is created to the effect that the contract is completely integrated into that written contract.

Even in England, where the rule originated, it has been subject to severe criticism in that there are so many exceptions to it that it is not much of a rule at all.³⁰⁷ The Law Commission in England termed it ‘a technical rule of uncertain ambit’³⁰⁸ and concluded that ‘it is not a rule of law which, correctly applied could lead to evidence being unjustly excluded’. The above discussion clearly indicates that more and more jurisdictions have moved towards a more flexible approach to integration. This will have the effect that a court will look at all the relevant contextual factors in assessing which terms ought to be incorporated into a contract.

2009]. See United Nations Convention on Contracts for the International Sale of Goods, Vienna (11 April 1980) 19 *ILM* 668 (1980).

³⁰⁵ See CISG Act Opinion no 3 op cit note 304.

³⁰⁶ Uniform Commercial Code *UNTS* 107 (1972) Article 2-202 comment 1 (a).

³⁰⁷ See McMeel op cit note 212 at 70 par 5.61; Lewison op cit note 287 at 86.

³⁰⁸ Working paper (1976) No 70 at 43.

4.3 The ‘Golden Rule of Interpretation’ and a Brief Look at the Clear-Meaning Rule

Even when the parol-evidence rule prohibits extrinsic evidence to be adduced to contradict or supplement contractual terms, evidence is generally still admissible for the purpose of interpreting terms found in the writing if the term is not clear.³⁰⁹ The rule which the courts applied in assessing whether extrinsic evidence was admissible in a specific case was termed the clear-meaning rule,³¹⁰ which was a rule that developed as supplementary to the ‘golden rule of interpretation’.³¹¹

Within limits laid down by law, parties to a contract are free to determine the scope and content of their obligations. From this assumption it follows that the golden rule of interpretation is to seek the intention of the parties at the time the contract was entered into.³¹² This ‘golden rule’ of interpretation was further developed by our courts into what was later known as the clear-meaning rule. Under the clear-meaning rule, the initial assessment of a word or term involves determining if the contract term in dispute is clear. Only if the term is deemed ambiguous may extrinsic evidence be adduced for purposes of clarification.

It is an obvious principle that the words of the contract are the primary source of information from which the intention of the parties should be ascertained. In order to determine this intention it seems obvious that the parties would have conveyed their intention adequately in the terms of the contract. This is not always the case, however, and the court is faced with a dilemma when parties disagree about what a certain word or terms in a contract means or what intention that word or phrase conveyed in the contract. The courts have, however, traditionally

³⁰⁹ See CISG Act Opinion no 3, Parol Evidence Rule op cit note 304 par 2.

³¹⁰ See *Delmas Milling Co v Du Plessis*, 1955 (3) SA 447 (A). The three *Delmas rules* are:

- (1) The plain meaning of words should be followed and uncertainties should as far as possible be eliminated by linguistic treatment. Evidence is only admissible in order to apply the text to the facts of the case or to identify the parties or things involved in the contract.
- (2) If it is not possible to clear uncertainty by means of linguistic treatment extrinsic evidence is admissible to clear uncertainty. Such extrinsic evidence however does not include the actual negotiations between the parties.
- (3) Only if evidence under the second *Delmas* rule does not provide clarity, there is an ambiguity and evidence of negotiations between the parties is admissible.

³¹¹ See *Joubert v Enslin*, supra note 75 at 312

³¹² In *Joubert v Enslin* ibid at 37-38 Innes JA expounded the rule as follows: ‘The golden rule applicable to the interpretation of all contract is to ascertain and to follow the intention of the parties; and if the contract itself, or any evidence admissible under the circumstances, affords a definite indication of the meaning of the contracting parties, then it seems to me that a court should always give effect to that meaning.’; see also Kerr op cit note 142 at 386

been reluctant to look beyond the words of the contract, as can be seen from the formulation of ‘clear-meaning rule’ as it was traditionally applied by our courts.³¹³ However, there has been a shift towards a more contextual interpretation with regard to interpretation in recent times.

4.3.1 Relaxation of the Clear-Meaning Rule

The standard approach to ascertaining the common intention of the parties who disagree on the meaning of an express term in their contract is to consider the nature, purpose and context of the contract.³¹⁴ This is because context is always present in a contract and if one were to take the written document as the ultimate expression of the parties’ common intention, the true intentions of the parties may be lost in the process.³¹⁵

The journey to final contextualism will be dealt with more fully below, when the relevance of contextualism as an overriding principle of interpretation is considered. It can be mentioned, however, that South Africa has joined the international trend of accepting the important role of context as an integral part of interpretation.³¹⁶

4.4 Presumptions of Interpretation in Light of Contextualism and Plain Language Principles

Before and during drafting a drafter should always keep in mind the assumptions and inferences that a court will automatically draw from the words in the contract as well as the contract as a whole. Presumptions require an interpreter to provisionally accept a certain interpretation of a document, until the contrary is proven by the introduction of other facts. In this case the presumption is spent and the interpretation has to be reassessed in the light of the new facts.³¹⁷ In general, there are two types of presumptions, and these will be discussed below: firstly there are presumptions of interpretation and secondly there are presumptions of substantive law.³¹⁸ As will become clear, when dealing with the various presumptions that

³¹³ See *Delmas Milling Co Ltd v du Plessis*, supra at 310.

³¹⁴ Kerr op cit note 142 at 389.

³¹⁵ See Mitchell C *Interpretation of Contracts* (2007) at 12.

³¹⁶ See *KPMG v Securefin* supra note 275.

³¹⁷ Cornelius op cit note 26 at 115.

³¹⁸ Kellaway op cit note 15 at 319.

form part of South African law, clear, concise and comprehensive drafting will produce a favourable result in that the presumptions will give effect to the intention of the parties as represented in the contract.

4.4.1 Presumptions of Interpretation

Presumptions of interpretation are mainly concerned with the language contained in a contract. They help a court limit and remedy possible ambiguities and uncertainties that may arise as a result of the wording contained in a document.³¹⁹ There are many presumptions of interpretation in the realm of the law of interpretation. In this discussion only those that are relevant to the use of correct and clear language in a contract will be referred to. This study proposes to show that the use of clear and unambiguous language in itself will be an aid to interpretation, as the various presumptions presuppose that the parties used the language that they understand, language that embodies their respective intentions, and that the parties understood the language that they used. These and other linguistic presuppositions will become clear in the discussion and will highlight the importance of plain and clear language.

Words are used in their ordinary sense

It is presumed that the words applied by the parties in their contract were used in their ordinary, everyday sense.³²⁰ According to Cornelius, this presumption is the logical point of departure for the process of interpretation irrespective of which theory of interpretation is applied.³²¹ Having read the contract as a whole, an interpreter will look at the words contained in a contract, bearing in mind what similar words would mean in a context of the same kind.³²² If parties belong to a particular profession or industry, it is presumed that the words are used in the sense commonly understood in that profession or industry. In such cases evidence may be submitted to prove the meaning a word would have in that specific instance.³²³

³¹⁹ Cornelius op cit note 26 at 118.

³²⁰ Cornelius ibid at 119; *Oerlikon South Africa (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A) 590E-F; *Jonnes v Anglo-African Shipping Co* 1972 (2) SA 827 (A) at 834D; *Gardner and another v Margo* (2006) 3 All SA 229 (SCA).

³²¹ Cornelius ibid at 119.

³²² Kerr op cit note 142 at 395.

³²³ Cornelius ibid at 120; Lewison op cit note 287 at 130 par 5.07.

This presumption is closely linked to the clear-meaning rule of interpretation, as it implies that an interpreter should use the language of the parties as a starting point and in doing so construe the words in their ordinary sense. Using this presumption as starting point in interpretation has also found favour in our courts, as can be seen from the dictum of *Cash-In CC v OK Bazaars (1929) Ltd*,³²⁴ when Scott J stated that ‘ [t]he first step in construing a contract should always be to determine the ordinary grammatical meaning of the words used by the parties.’

In light of the recent developments regarding the admissibility of extrinsic evidence during interpretation³²⁵ one can assume that the ‘ordinary meaning’ will now be construed in light of the context of the contract. Clear drafting will therefore have the effect that the context supplements the meaning of terms instead of invalidating or changing them.

Words were used precisely and exactly

It is presumed that the parties carefully chose the words they applied so that the words express their intention precisely and exactly.³²⁶ This presumption has the effect that it presupposes that parties expressed themselves carefully and that they moulded the contract into an intended shape. This presumption therefore has a profound effect on the way the language of a contract is construed in the sense that the court will not easily assume that the parties do not know what the words in their contract mean. This presumption does not take into account drafting errors that may occur because of limited skill of a drafter or error from transcription.³²⁷ As Mitchell states³²⁸ when summarising Lord Hoffman’s principles of contextualism, the meaning of the words as used in a document is that meaning that the parties concerned would have understood it to mean with regard to the ‘relevant background’ and this includes the realization that the parties have, for whatever reason, used the wrong word or language rules.³²⁹

³²⁴ 1991 (3) SA 353 (C) at 361 G.

³²⁵ See *KPMG v Securefin*, supra note 275.

³²⁶ *Nelson v Hodget’s Timbers (East London) (Pty) Ltd* 1973 (3) SA 37 (A) 42C-D.

³²⁷ See Mitchell op cit note 315 at 21.

³²⁸ Op cit note 315 at 40.

³²⁹ See Lord Hoffman’s judgment in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 896 WLR at 912 - 913.

Once again the use of plain and understandable language will limit many problems in this regard by assuring that both parties understand the agreement in the way that it was intended to convey their intentions.³³⁰ If a drafter does not draft a contract clearly, however, the true intentions of the parties will probably have to be ascertained through a contextual evaluation, which will take up precious time in litigation in the event that an ambiguity is discovered.

There are no superfluous words in a contract

It is presumed that parties to a contract inserted every word in the written document to serve a specific purpose and that there are no superfluous, tautological or meaningless words contained in a contract.³³¹ It follows that account should be taken of and effect given to every word or expression, unless no sensible meaning can be extracted from the word.³³² It is a general practice of drafters to insert words which are not absolutely necessary to the expression of the intention of parties. This may be done for emphasis, greater clearness, or descriptiveness, but if they serve no purpose in advancing the meaning of a contract, there is no reason for their existence.³³³ It is therefore also necessary that a drafter should not only use clear language, but should stay away from over-elaboration in the sense that he/she might alter the meaning in a way that he/she did not intend.

Another principle of plain language includes brevity in contracts, which will mitigate the effects of this presumption. In formulating plain language rules for lawyers Wydick suggests³³⁴ among other things that lawyers should ‘omit surplus words’, ‘use short sentences’ and ‘arrange words with care’. In expounding his seven rules to clear writing Mellinkoff³³⁵ also asserts in his seventh rule that legal drafters should ‘Cut it in Half!’ He explains that this rule entails a careful re-evaluation of the contract so that drafters do not ‘say the same thing twice’.

³³⁰ See discussion on Plain language below at 6.

³³¹ *De Beers Consolidated Mines, Limited v Kimberley Waterworks Company, Limited*: *Kimberley Waterworks Company Limited v De Beers Consolidated Mines, Limited* (1893 – 1895) 7 HCG 163 185; *Gillon v Eppel* 1991 (4) SA 656 (B); Cornelius op cit note 26 at 122.

³³² Kellaway op cit note 15 at 438.

³³³ *In re Boden* All ER [1907] 1 Ch 132 at 143; Kellaway ibid at 438.

³³⁴ RC Wydick RC Plain English for Lawyers (1978) 66 *California Law Review* 727 at 728.

³³⁵ D Mellinkoff *Legal writing: Sense and Nonsense* (1982) at 100.

4.4.2 Presumptions of Substantive Law

In contrast to the presumptions of interpretation, the presumptions of substantive law relate to the applicability of a certain rule of law or the existence of a certain state of affairs. They are not focused on mitigating uncertainty in the language of the contracts, but are rather guiding principles of common law which automatically apply in certain circumstances. An interpreter therefore has to accept a certain interpretation, unless the contrary is proven.³³⁶ It would seem that these presumptions are even more important than the presumptions of interpretation, as they assume the existence of a fact. Once again, the focus will be on the presumptions of substantive law that have relevance to the discussion. The purpose of this comparison between the different presumptions is made to demonstrate that clear and unambiguous language is an important tool in making a contract both easier to interpret and less voidable because of vagueness.

No person writes what he or she does not intend

According to Cornelius,³³⁷ the presumption that no person writes what he or she does not intend lies at the foundation of interpretation in that it gives effect to the rule of Roman-Dutch law that no person ought to go counter to his or her own act. It is further in accordance with the Roman-Dutch presumption that a party expressed himself/herself truthfully in the written instrument. Without it, interpretation would be of no use. Another branch of this presumption is that it is further presumed that the intention of the parties coincides with the words contained in the contract.³³⁸ It can therefore be inferred that that this presumption is the foundation upon which the presumption of interpretation in favour of the ordinary meaning of the word operates, so that there is a connection between the presumption of interpretation and the presumptions of substantive law.³³⁹

The reality of how modern contracts come into being is very significant with regard to the application of this presumption as well as most others. In the English case of *Balmoral Group*

³³⁶ Cornelius op cit note 26 at 118.

³³⁷ Cornelius ibid at 122.

³³⁸ Kellaway op cit note 15 at 317; Cornelius ibid at 123.

³³⁹ Cornelius ibid at 123.

*Ltd v Borealis (UK) Ltd*³⁴⁰ the reality surrounding modern contracts was expounded as follows:

there were in effect two parallel universes: the 'real world' in which the parties moved ... and an artificial world created for them by their lawyers when, but only when a dispute arose. In the real world ... none of the individuals ... paid any attention to the terms and conditions that their lawyers drafted for them ... It was only when the lawyers came on the scene that the parties were transported to an artificial world where reliance was placed on the standard terms ...

To take a contract at face value as the ultimate expression of the parties' intention is therefore at odds with many contracts, especially those drafted in standard terms.³⁴¹ The parties may have intended to conclude a document based on the broad terms in a standardized contract, and not give any notice to the standard terms to which they could be bound if a dispute should arise.

It is therefore necessary to take cognisance of the context surrounding the document when a document is interpreted and a drafter should also apply his or her mind in drafting a contract to avoid a situation which is contrary to the common intention of the parties.

A person is familiar with the contents of a document which he or she signs

When a contract is drafted, it is essential to make sure that each party is able to fully understand all of the requirements and duties contained in the contract. The use of technical legal language inhibits comprehension and compliance. The anomaly in modern contract law is that it is a fundamental principle in contract law that when a person signs a document, that person thereby indicates that he or she is familiar with the contents of that document and that it is therefore an expression of his/her intention.³⁴² The defences of *non est factum*, fraud, duress and undue influence apply to this presumption. In the case of *non est factum* as defence, the party who relies thereon should prove that he or she was not negligent or careless in signing of the document in question.³⁴³ Unilateral mistake is not a defence in this case, but a

³⁴⁰ [1900] EW at para 339 HC.

³⁴¹ See Mitchell op cit note 315 at 40.

³⁴² *Major v Business Corners (Pty) Ltd* 1940 WLD 84; *Saambou Nationale Bouvereniging v Friedman* 1979 (3) SA 268 (W) 278D.

³⁴³ *Musgrove & Watson (Rhod) (Pvt) Ltd v Rotta* 1978 (2) SA 918 (R).

party will not be held to be bound to a contract if he or she was unable to understand the contract because of the language in which it was couched³⁴⁴ or because he or she is illiterate.³⁴⁵ Plain language is therefore essential to ensure that contracts are fair and enforceable, as a party can escape liability if he or she provides evidence to rebut the mentioned presumption.

The parties intend to conclude a legally valid contract

It is presumed that when parties conclude a legally valid contract, they wish to do so in accordance with existing law.³⁴⁶ It therefore follows that a party who avers that the contract is illegal bears the evidentiary burden to prove it.³⁴⁷ According to Cornelius³⁴⁸ this presumption operates on three levels. Firstly, where certain formalities are required for the valid conclusion of a certain kind of contract, it is presumed that these formalities have been met. This means that if a contract, on the face of it, appears valid, it is deemed to be so until the contrary is proven. Secondly, with regard to performance in terms of a contract, where a contract may be interpreted or performed in two ways, one lawful and the other unlawful, it is presumed that the parties intended it to be performed in the lawful manner.³⁴⁹ This means that a contract will not be deemed to be void unless it can be proven that the parties actually intended it to be performed in an unlawful manner.³⁵⁰ Thirdly, it is presumed that the parties did not intend to make any provision which is futile, nugatory, unnecessary or meaningless, but rather intended to make an effective contract.³⁵¹ This relates back to the earlier presumption that there are no superfluous words in a contract and once again reiterates the importance of careful use of language in a contract.

With regard to the use of inappropriate language, it has been said that while the interpretation of the contracting parties is clear, inappropriate language use should not render the contract

³⁴⁴ *Boerne v Harris* 1949 (1) SA 793 (A).

³⁴⁵ *Katzen Mguno* 1954 (1) SA 277 (A).

³⁴⁶ Cornelius op cit note 26 at 125.

³⁴⁷ J Chitty and HG Beale *Chitty on Contracts* 28ed (1994) at 16-173.

³⁴⁸ Ibid at 126.

³⁴⁹ *Brickman's Trustee v Transvaal Warehouse Co Ltd* 1903 TH 440; *Kotze v Frenkel & Co* 1929 AD 418 423, 426, 433; *Conroy NO Ltd v Coetzee* 1944 OPD at 207; *Kellaway* op cit note 15 at 450.

³⁵⁰ *Hughes v Rademeyer* 1947 (3) SA 133 (A) at 138.

³⁵¹ *Murry & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) 514D-E; *Namibian Minerals Corporation Limited v Benguela Concessions Limited*. [1997] 1 All SA 191 (A) 206d; *Government of the Republic of South Africa v York Timbers Ltd* [2001] 2 All SA 75 (A).

void.³⁵² Therefore language will be construed in such a way as to give rise to a legal contract, since that is what the courts presume the parties would have intended. This needs to be qualified to a degree, however. If a term of a contract is so vague that no sensible interpretation of that term is possible, it will be deemed to be void on the grounds of vagueness.³⁵³ In other words, the element of uncertainty (which cannot be resolved) is fatal to the existence of the contract, even though the court will do its best to avoid such a construction.³⁵⁴ In this regard Nestadt J warns³⁵⁵ that:

a commercial document executed by the parties with a clear intention that it should have commercial operation should not lightly be held to be ineffective. It need not require such precision of language as might be expected in a more formal document, e.g. pleadings drafted by counsel. Inelegance, clumsy draftsmanship or the loose use of language in such documents purporting to be a contract, will not impair its validity so long as there can be found therein with reasonable certainty the terms necessary to constitute a valid contract.

In order to give effect to this presumption, a vague clause can be severed and the remaining terms of the contracts enforced. This means that the bad term can be discarded and the rest of the contract retained, provided that what remains is intelligible and does not conflict with the intention of the parties. If the contract is divisible from one party's point of view, but indivisible from another's, the party in whose favour the void term was inserted has the option of discarding that term and retaining the remainder of the contract, or of terminating the entire contract.³⁵⁶

In the above regard, an interpreter should however not construe a contract in such a way that renders the contract operable in a way that neither of the parties originally intended.³⁵⁷ In other words, a court may not modify the language of a contract or sever a term in a contract if the result of such severance or modification is a contract different to what the *clear language* used by the parties indicates, no matter how unusual or contrary to what the court may think was

³⁵² Kellaway op cit note 15 at 451; *Annaemma v Moodley* 1943 AD 531; *Hoffman and Carvalho v Minister of Agriculture* 1947 2 SA 855 (T); *Kroukamp v Buitendag* 1981 1 SA 606 (W).

³⁵³ Kellaway ibid at 451.

³⁵⁴ Kellaway ibid at 452.

³⁵⁵ *Kroukamp v Buitendag* ibid at 610B-C.

³⁵⁶ *Du Plooy v Sasol Bedryfs (Edms) Bpk* 1988 (1) SA 438 (A).

³⁵⁷ *African Theatres Ltd v Doliviera & others* 1927 WLD 122 at 571H; See also Cornelius op cit note 26 at 127 and Kellaway ibid at 435.

intended.³⁵⁸ This once again indicates that clear language is the indicator of how a contract is to be construed.

Parties do not wish to deviate from existing law more than necessary

When we look at the realm of contract law in the sense that it operates within the limits of the intention of the parties, it is important to ask to what extent the law limits the exercise of contractual autonomy, if at all. It is a well-known principle that parties are in many instances allowed to include terms in their contract that are to some extent in conflict with the principles of the common law. There are also certain statutory provisions that allow parties to deviate from them in their contract.³⁵⁹ It is even allowed that parties may limit certain of their rights that are protected under Chapter 2 of the 1996 Constitution³⁶⁰ provided that such limitation complies with section 36 of the 1996 Constitution³⁶¹ and is not contrary to public policy.³⁶² Parties may also waive rights conferred by statute, unless the statute provides otherwise or unless such waiver would be contrary to public policy.³⁶³ These averments, however, are subject to the presumption that the parties did not intend to deviate from the existing law more than necessary and a clause that intends to do so will be interpreted restrictively.³⁶⁴

Another offshoot from this presumption is that legal expressions should be interpreted in accordance with the meanings that are assigned to them by statutory or common law, unless the context indicates otherwise.³⁶⁵ This aspect of the presumption refers back to the contextual approach to interpretation and to the presumption that a word or expression that has obtained specialized meaning in a certain trade or profession is presumed to have been applied with that meaning in mind.³⁶⁶

The parties intended a reasonable and equitable result

³⁵⁸ *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 1 SA 7 (A); Kellaway *ibid* at 436.

³⁵⁹ Cornelius *op cit* note 26 at 128.

³⁶⁰ Constitution of the Republic of South Africa 1996.

³⁶¹ Cornelius *ibid*.

³⁶² Cornelius *ibid* at 128.

³⁶³ *Bafana Finance Mabopane v Makwakwa and another* 2006 (4) SA 581 (SCA).

³⁶⁴ *Marsay v Dilley* 1992 (3) SA 944 (A); *Pete's Warehousing and Sales CC v Bowsink Investments CC* [2000] 2 All SA 266 (E) at 273e.

³⁶⁵ Cornelius *ibid* at 129.

³⁶⁶ Cornelius *ibid* at 292.

In *Rand Rietfontein Estates Ltd v Cohn*³⁶⁷ De Wet JA quoted with approval these words from Wessels³⁶⁸

The court will lean to that interpretation which will put an equitable construction upon the contract and will not, unless the intention of the parties is manifest, so construe the contract as to give one of the parties an unfair or unreasonable advantage over the other.

The principle that our courts follow is that where the wording of a contract is ambiguous and is capable of more than one construction but there is nothing in the context which points specifically to one construction, a court should apply the interpretation that manifestly gives the more equitable result.³⁶⁹ It can therefore be presumed that the parties meant only what is reasonable and an interpreter should not interpret a contract in such a way that one party receives an unfair or unreasonable advantage over the other.³⁷⁰

It was held by Feetham J in *Kelly and Hingle's Trustees v Union Government (Minister of Public Works)*,³⁷¹ however, that where it is clear from the contract that 'if a party has agreed to take upon himself [a particular] burden ... however foolish and unreasonable such agreement may be, he should stand by it.'

The above dictum is in step with the principle that it is the court's duty to give effect to the intention of the parties. In this sense it is not the court's function to redraft the contract so as to avoid foolishness.³⁷² It should also be borne in mind, however, that even if a contract has been drafted by a skilled legal draftsman it has become the act of the parties and should therefore not be interpreted in a subtle way that might appeal to the lawyer but in the straightforward way that can be presumed to represent the common intention of the two parties involved.³⁷³ In

³⁶⁷ 1937 AD 317 at 330-331.

³⁶⁸ Supra at par 1947.

³⁶⁹ Kellaway op cit note 15 at 436; *Van Rensburg v Straughan* 1914 AD 317; *Trustee, Estate Cresswell and Durbach v Coetzee* 1916 AD 14; *Rand Rietfontein v Cohn* supra 330-331; *Mittermeier v Skema Engineering (Pty) Ltd* 1984 1 SA 121 (A); *Robin v Guarantee Life Assurance Co Ltd* 1984 4 SA 558 (A) 558.

³⁷⁰ Cornelius op cit note 26 at 130.

³⁷¹ [1928] TPD 272.

³⁷² *SA Warehousing Services (Pty) Ltd v South British Insurance Co Ltd* 1971 3 SA 10 (A) 13; See also Kellaway op cit note 15 at 448.

³⁷³ *Boerne v Harris* 1949 1 SA 793 (A) 805-6; *Langston Clothing (Properties) CC v Danco Clothing (Pty) Ltd* 1998 4 SA 885 (A) 889D-E; See also Christie op cit note 51 at 219.

this regard the use of clear and understandable language by the draftsman will play a large role in how a contract will be construed.

This presumption in favour of an equitable result is based on and in compliance with the principle in our law that all contracts are *bona fidei*.³⁷⁴ When this is taken into regard it will be presumed that neither party intended to obtain an unfair or unreasonable advantage over the other. Another resulting branch of this presumption is that if a term is capable of more than one interpretation, the one that imposes the lesser obligation is accepted.³⁷⁵

In South Africa the constitutional values contained in the 1996 Constitution³⁷⁶ should always be kept in mind and they require the courts to exercise generally equitable jurisdiction. It is therefore necessary that the principles contained in the Bill of Rights³⁷⁷ should be taken into account when consideration is given to what is equitable, and the promotion of equality will receive more consideration than it did in the past. This is especially relevant in today's economic climate, where an abundance of commercial contracts are generally drafted in favour of large commercial entities to the detriment of the consumer. With regard to international law principles, it should also be kept in mind that this presumption should be applied with due consideration of the principle of good faith in international law.³⁷⁸

Other presumptions

A number of other presumptions also exist that relate to specific contracts. These are not of importance to our discussion, however, and are therefore not mentioned here.

³⁷⁴ *Neugebaur & Co Ltd v Hermann* 1923 AD 564; *Webranchek v LK Jacobs & Co Ltd* 1948 (4) SA 671 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Sasfin Ltd v Beukes* 1989 (1) SA 1 (A); *Botha (nou Griessel) v FinansCredit (Pty) Ltd* 1989 (3) SA 773 (A); *Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman NO* 1997 (4) SA 302 (A); *SA Forestry Co Ltd v York Timbers Ltd* [2004] 4 All SA168 (SCA) 180; See also Cornelius op cit note 26 at; Christie op cit note 50 at 219.

³⁷⁵ Cornelius op cit note 26 at 131.

³⁷⁶ Constitution of the Republic of South Africa 1996.

³⁷⁷ Chapter 2 of the Constitution.

³⁷⁸ Cornelius op cit note 26 at 132.

4.5 Rules and Maxims of Interpretation

The focus now moves to the rules and maxims of interpretation that form part of the external aids to contract interpretation in that they provide guidelines as to how interpretation should be carried out. These were for the most part taken over from Roma-Dutch law as is evident from the Latin equivalent that is still used in academic text today. A drafter must keep them in mind during drafting as they will inevitably have an influence in the event that the contract must be interpreted. Once again plain language will serve as a good starting point in that it will clearly appear from the text that the rules have been adhered to.

4.5.1 External Aids to ascertain the meaning of terms in a contract

Ut res magis valeat quam pereat

The rule of interpretation that finds application in our law with regard to validity is that when a contract can be read as having two meanings, one of which preserves it, that construction is to be preferred over an interpretation which destroys it.³⁷⁹ In other words, when a contract is interpreted, an interpretation which makes a contract valid is preferred over an interpretation that would render it inoperative.³⁸⁰ This rule is based on the presumption that parties to a contract should be presumed to have intended to conclude a valid contract³⁸¹ as well as the presumption that parties did not intend to make any provision which is futile, nugatory, unnecessary or meaningless, but rather intended to make an effective contract.³⁸² It should, however, be borne in mind that this rule cannot be applied in all instances that invalidity of a contract is addressed. In *Sunshine Records (Pty) Ltd v Frohling and others*³⁸³ Grosskopf JA stated that

[t]he only substantial reason advanced on behalf of the respondents for the interpretation proposed by them was that, if this interpretation were adopted, the contract would be fairer to the respondents and might therefore be regarded as containing an undue restraint on trade. The rule *ut res magis valeat*

³⁷⁹ Kellaway op cit note 15 at 450

³⁸⁰ *Hughes v Rademeyer* 1947 (3) SA 133 (A); *Du Plessis v Nel* 1952 (1) SA 513 (A) at 523A *et seq.*

³⁸¹ Kellaway op cit note 15 at 451.

³⁸² Cornelius op cit note 26 at 186; Kellaway op cit note 15 at 451.

³⁸³ 1990 (4) SA 782 (A).

quam pereat cannot, however, in my view be used to justify an interpretation of a contract contrary to its clear terms and the probable intent of the parties thereto.

It is therefore again made clear that neither the rules nor the presumptions will come to the rescue of the contract if the clearly stated words indicate the contrary, unless the contextual method of interpretation is applied. Again this underlines the importance of drafting terms carefully and clearly to avoid inconsistency between the text and the context.

Eiusdem generis

The *eiusdem generis* rule is an example of ‘restrictive interpretation’ in the sense that it is accepted that where a contract deals with a specific *species* or *genus* in a contractual clause the general provision is to be read subject to special provisions in the same document.³⁸⁴ The purpose of the *eiusdem generis* rule is to limit the meaning of general words by referring to the accompanying specific matters that are listed,³⁸⁵ and one of the main reasons for using this rule is that the specific words would otherwise be superfluous.³⁸⁶ As a result, the *eiusdem generis* rule gives effect to the presumptions that the parties chose their words precisely and exactly and that there are no superfluous words in a contract.³⁸⁷

Our courts have however issued a general warning in the application of the rules in *Grobbelaar v Van der Vyfer*³⁸⁸ that:

the instrument of interpretation denoted by the *eiusdem generis* and *noscitur a sociis* should always be borne in mind where the meaning of general words in association with specific words has to be ascertained, but what is often a useful means of finding out what was meant by a provision in a contract or statute should not be allowed to substitute an artificial intention of what is clearly the real one.

This is arguably a general warning that can be applied in all instances where these rules may come into play and once again illustrates the importance of clear drafting that precisely expresses the intention of the parties.

³⁸⁴ Kellaway op cit note 15 at 147.

³⁸⁵ Cornelius op cit note 26 at 187.

³⁸⁶ Kellaway ibid at 149; Lewison op cit note 287 at 227 par 7.11.

³⁸⁷ Cornelius ibid at 186.

³⁸⁸ 1954 (1) SA 248 (A) at 255A-B.

Noscitur a sociis

This maxim follows the rule that a word should be read in its context.³⁸⁹ The maxim means a thing is known by its associates (or companions) and is seen as an extended version of the *eiusdem generis* rule. Where words of ordinary meaning are used which are not ‘general words’ but are preceded by specific words of the same class (or genus), then those words of ordinary meaning, because of their association with the things or persons specified, should have assigned to them a meaning which conforms with the context or the enactment and the specified words (that is, their meaning is known from their association with the specified words of a particular genus).³⁹⁰ *Noscitur a sociis* can be a useful tool to ascertain the meaning of a term, but it should not be used so as to interpret a term in such a way that it is in conflict with the intention of the parties.³⁹¹

In this sense one can also draw the conclusion that clear drafting can help in overcoming the problems in the sense that interpretation will be clear from the face of the document. The application of this rule could be seen as an assessment of the internal context within the text and will be applied in conjunction with the external text when the parties’ intentions are evaluated.

Inclusio unius est exclusion alterius

This phrase means that the inclusion of one is the exclusion of the other. If parties expressly mention one matter in their contract, in other words, they are taken to have intended to treat other similar matters that were not mentioned on a different basis. This gives effect to the presumption that the parties carefully chose the words they applied.

As stated by Colman J in *Techni-Pak Sales (Pty) Ltd v Hall*,³⁹² the fact that, ‘having dealt with one contingency, they elected not to deal with others, suggests they did not intend them’

³⁸⁹ *Grobbelaar v Van De Vyfer* 1954 (1) SA 248 (A) at 255A. See also Kellaway op cit note 15 at 152.

³⁹⁰ See *Muir v Keay* [1875] All ER 10 QB 594, Kellaway op cit note 15 at 152-153.

³⁹¹ Kellaway op cit note 15 at 153.

³⁹² 1968 (3) SA 231 (W) at 238B.

According to Cornelius,³⁹³ the interpreter should give effect to the intention of the parties where it is clear. This once again highlights the importance of clear and unambiguous drafting and where language fails to give a conclusive answer, the surrounding contextual materials will help in determining whether or not inclusion of a specific contingency actually meant to imply the exclusion of all others. Drafters often try to mitigate this by inserting phrases such as ‘notwithstanding any other ... that may also arise as a result of ...’ so as not to limit the contract to what is contained in the text.

Ex contrariis

If the parties provided expressly for certain matters in their contract, it is understood that the opposite would apply to an opposite situation or to similar matters that are not mentioned. This amounts to an extension of the previous rule and is often applied in conjunction with it.³⁹⁴ Even though this rule of interpretation forms part of our law of contract, the practice has been developed among legal drafters to try to cater for all possible eventualities and situations. There is no longer such a great need for this, as contextual factors will supplement a contract and this will help in the formulation of less lengthy documents in the future if the rule is applied in conjunction with the principles of plain language drafting.

Quod minimum

The rule *simples in absurdis quod minimum est sequimur* means that where the terms of a contract are ambiguous, they should be interpreted in favour of the debtor and in such a way that the lesser obligation is placed in the debtor.³⁹⁵ An obligation is only interpreted *quod minimum* if the clause creating the obligation is ambiguous and the presumptions and other rules of interpretation do not assist in clarifying the ambiguity. Traditionally, courts could not deviate from the clear meaning of the words to reduce the burden on the debtor.³⁹⁶ The common law burden on debtors and other consumers is aided in part by new consumer

³⁹³ Cornelius op cit note 26 at 189.

³⁹⁴ Cornelius ibid at 189.

³⁹⁵ *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (A) 122 *et seq.*, Cornelius op cit note 26 at 190

³⁹⁶ *Lawsa* Vol 12 at 178 par 234, Cornelius ibid at 190.

legislation such as the National Credit Act³⁹⁷ with regard to the content of a contract with a debtor (consumer). During interpretation the courts can now also evaluate the agreement with regard to the context surrounding conclusion of the agreement and other surrounding circumstances.

Contra proferentem

This rule holds a warning for drafters of a contract in that it stipulates that doubtful or ambiguous language is to be interpreted against the person who is responsible for the wording,³⁹⁸ or for whose benefit the words have been inserted.³⁹⁹ However, this rule applies only as a last resort where all the other rules of interpretation have been exhausted, as explained by Milne JP in *Florida Road Shopping Centre (Pty) Ltd v Caine*:⁴⁰⁰

The *contra proferentem* rule is not a rule for the ascertaining of the intention of the parties and operates only to enable the court to adopt, against the proposer or stipulator, the stricter of two meanings of which the language of a contract is more or less equally capable. It is not to be used unless all the ordinary rules of interpretation have been exhausted in an attempt to arrive at the true intention of the parties.

In the realm of consumer contracts, however, it seems that this rule can find particular application as many large corporations draft standardized contracts for all consumers and these contracts are more often than not lengthy and intricate. This has the result that parties to a consumer contract are often on unequal footing with regard to the contract they have with each other and this can lead to unfairness. It is because of this that Cornelius⁴⁰¹ calls for the stricter application of the *contra proferentem rule* to standard contracts and in cases where there is a severe imbalance in the relative bargaining positions of the parties. According to him '[s]uch

³⁹⁷ See for example S90(2) with regard to unlawful provisions in credit agreements and S 89 of the National Credit Act 34 of 2005.

³⁹⁸ Cornelius op cit note 26 at 191; Kellaway op cit note 15 at 465

³⁹⁹ *De Beers Consolidated Mines, Limited v Kimberly Waterworks Company Limited; Kimberly Waterworks Company Limited v De Beers Consolidated Mines, Limited* (1893-1895) 7 HCG 163 at 176; *Witwatersrand Corporation v Rich* 1913 AD 426; *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A) at 38D-E; *Cape Group Construction (Pty) Ltd v t/a Forbes Waterproofing v Government of the United Kingdom* (2003) 3 All SA 496 (SCA) 501 and Cornelius op cit note 26 at 191.

⁴⁰⁰ 1968 (4) SA 587(N) at 593 G-H.

⁴⁰¹ Cornelius op cit note 26 at 192.

an approach will also promote the protection of the right to equality which is entrenched in section 9 of the 1996 Constitution.’

With the promulgation of the National Credit Act⁴⁰² and new Consumer Protection Act⁴⁰³ there has been a shift towards consumer protection, which will have an effect on both the drafting and subsequent interpretation of contracts. It will also have the same effect as the *contra proferentem* rule, especially regarding the use of language in a contract.⁴⁰⁴

4.6 Comparative Evaluation

4.6.1 English Law

In English law, the proper interpretation of a document is regarded as a question of law,⁴⁰⁵ while ascertaining the meaning of a word is a question of fact, irrespective of whether it is the ordinary or specialized meaning.⁴⁰⁶ In the case of an ambiguous contract, the English courts have also favoured an interpretation that renders a contract valid over one that renders it invalid.⁴⁰⁷ If the wording of a contract is, however, unintelligible, the contract should be treated as void.⁴⁰⁸ In other words, the element of uncertainty (which cannot be resolved) is fatal to the existence of the contract. However, if possible a court will always adopt an approach that avoids the construction that will render the contract void for vagueness.⁴⁰⁹ One of the ways the English courts have remedied such vagueness is by adopting a standard of ‘reasonableness’. If the vagueness can be resolved by the application the standard of ‘reasonableness’, the court will follow this approach.⁴¹⁰ From these principles it can be adduced that the English courts have remained faithful to the literalist approach to interpretation in most respects. Recently, however courts have started to take note of a possible move away from the strict formalistic approach of the past.

⁴⁰² Act 34 of 2005.

⁴⁰³ Act 68 of 2008.

⁴⁰⁴ See 6.9 below for a discussion on language and consumer protection.

⁴⁰⁵ McMeel op cit note 212 at 7; Cornelius ibid at 51.

⁴⁰⁶ Lewison op cit note 287 at 95 par § 4.01; Cornelius ibid at 51.

⁴⁰⁷ *Steele v Hoe* (1849) LJ 19 QB 89 93; cf *Grey v Pearson* [1857] All ER 6 (H of L) 61; *Abbot v Middleton* [1858] All ER 7 (H of L) at 68; *Mills v Dunham* All ER (1891) 1 Ch at 576 - 590.

⁴⁰⁸ Kellaway op cit note 15 at 451; *In re Vince: Ex parte Baxter* All ER[1892] 2 QB 478 at 479.

⁴⁰⁹ *Rahcassi Shipping Co v Blue Star Line* (1969) 1 QB 173; *Nea Agrex v Baltic Shipping Co* (1976) QB 933.

⁴¹⁰ *Hillas & Co Ltd v Arcos Ltd* [1932] All ER 494 (H of L); *Sweet and Maxwell v Universal News Services Ltd* (1964) 2 QB 699; *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581; see also Kellaway op cit note 15 at 452.

The strict textual approach to the interpretation of contracts has been challenged in English courts, even though it is not consistently excluded. In *Investors Compensation Scheme Ltd v West Bromwich Building Society*⁴¹¹ Hoffman LJ summarized the principles as follows:⁴¹²

- Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
- The background was . . . referred to . . . as the ‘matrix of fact’, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
- The law excludes from the background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. . .

With regard to the application of an equitable construction in a standard term contract England has laid down statutory provisions to regulate matters, especially concerning the enforcement of exemption clauses. In terms of the 1977 Act of ‘Unfair Contract Terms’, a court may adjudge an unclear term in a contract unreasonable and thus not capable of being relied on by a party in formulating the other party’s obligation.⁴¹³ It has also been held that the reasonableness of a term has to be proved by the party claiming the reasonableness, and that the reasonableness has to be determined by considering the term as a whole and not merely the part of it on which reliance is placed.⁴¹⁴ The European Community is also having an effect on plain language in legal documents. On 1 July 1995, the European Union directive on unfair terms in consumer contracts came into force in the UK. It was enacted in the form of the Unfair Terms in Consumer Contracts Regulations 1994, which have since been revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999⁴¹⁵. The regulations state that a standard term should be expressed in ‘plain, intelligible language’. An ‘unfair term’ in a consumer contract is not binding on the consumer. A term is open to challenge if it

⁴¹¹ Supra at note 329.

⁴¹² Ibid at par 912–913.

⁴¹³ Kellaway op cit note 15 at 448.

⁴¹⁴ *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 2 All ER 257.

⁴¹⁵ Unfair Terms in Consumer Contracts Regulations 1999 GNR 2083.

could put the consumer at a disadvantage because he or she is not clear about its meaning – even if its meaning could be worked out by a lawyer. If there is doubt as to what a term means, the meaning most favourable to the consumer will apply.⁴¹⁶

From the above discussion it can be adduced that English law has also moved away from a strictly formalistic approach. The various rules and principles now applicable to consumer contracts and all contracts in general seem to indicate that a flexible approach will be followed which will lead to a reasonable result, reflecting the true intentions of the parties.

4.6.2 Canadian Law

The approach of Canadian courts is not that very different to that followed by the English courts. They have traditionally adopted the parol-evidence rule⁴¹⁷ and have generally also followed an objective approach to interpretation in the same way the English courts have. In a similar development to that in English law, Canadian writers have described the parol-evidence rule as a rule in relation to which the exceptions far outweigh its application.⁴¹⁸ In the Canadian law of interpretation the contextual approach is also highly favoured by the courts.⁴¹⁹ The concept of a contract's 'factual matrix' as first expounded by Lord Wilberforce in *Prenn v Simmonds*⁴²⁰ has also been taken over from English law. This refers to the context, including circumstances surrounding the drafting of a contract.⁴²¹ The ultimate goal is not to determine the party's subjective intentions, but rather 'the objective intentions of the parties in the sense of a reasonable person in the context of those surrounding circumstances'.⁴²²

According to Hall⁴²³

[i]nterpretation involves a consideration and reconciliation of both the words used and the context of their use. Thus interpretation should have regarded both for the words in question and the manner or context in which they are used, and ideally the two lead to the same conclusion.

⁴¹⁶ Regulations 5, 7 and 8 of the 1999 Regulations.

⁴¹⁷ See GR Hall *Canadian Contractual Interpretation Law* 1ed (2007) at 41.

⁴¹⁸ See Hall *ibid* at 44.

⁴¹⁹ See *Eli Lilly & Co v Novopharm Ltd* [1998] 2 SCR 129.

⁴²⁰ [1971] 3 All ER 237.

⁴²¹ See Hall *ibid* at 15

⁴²² See *Eli Lilly*, *supra* at par 54.

⁴²³ *Op cit* note 7.

It appears that the approach followed by Canadian courts take to commercial contracts we see that they have taken commercial protection to another level. It is a fundamental precept of Canadian law of contractual interpretation that commercial contracts should be interpreted in accordance with sound commercial principles and good business sense.⁴²⁴ This principle has been termed the commercial efficacy principle and involves an interpretation which gives effect to the intention whilst trying to avoid a commercially absurd result.⁴²⁵ This will be dealt with in further detail in the discussion on consumer protection. With regard to the application of the *contra proferentem* rule to standardized contracts, Fridman⁴²⁶ indicates that in Canada

[t]he [*contra proferentem*] rule is also of great relevance where the contract being construed is a *contrat d'adhesion*, that is where the signatory does not really have the opportunity to negotiate its terms but is obliged either to agree, and sign, or to forgo whatever advantages such a contract might bring to him.

This once again highlights how commercial contracts are approached in a different way in order to protect the rights of the consumer. It also stresses the importance of context during interpretation as well as integration.

4.6.3 United States of America

The traditional view of the parol-evidence and clear-meaning rules was also adopted and applied in the United States. The clear-meaning rule has, however, been relaxed over the years and given way to a more liberal approach. The modern approach allows for the presentation of extrinsic evidence regarding the vagueness or ambiguity even if the contract is clear and unambiguous on the face of it. The *locus classicus* on the liberal approach is *Pacific Gas & Electrical Company v GW Thomas Drayage & Jigging Company Inc*,⁴²⁷ where Traynor CJ stated that

[w]hen a court interprets a contract in this basis, it determines the meaning of the instrument in accordance with the '...extrinsic evidence of the judge's own linguistic education and experience.'...

The exclusion of testimony that might contradict the background of the judge reflects a judicial belief

⁴²⁴ *Scanlon v Castlepoint Development Corp* (1992) O.J. No.2692, 11 O.R. (3d) 744 at 770 (Ont. C.A.)

⁴²⁵ *Ibid* at 27.

⁴²⁶ *Op cit* note 62 at 471.

⁴²⁷ [1968] 40 ALR 3d at par 1373.

in the possibility of perfect verbal expression ... This belief is a remnant of a primitive faith in the inherent potency and the meaning of words.

The consequence of this approach is that extrinsic evidence is admissible to aid in interpretation of a written contract, even where the whole agreement has been integrated therein.⁴²⁸ Thus it can be said that the United States is particularly in favour of a contextual approach to interpretation. The US's approach to both commercial and standardized contracts is similar to that of Canada. According to Farnsworth⁴²⁹

[s]uch interpretation *contra proferentem* (against the 'profferer') is much favoured in the interpretation of standard form contracts, particularly if adhesive, and often operates against a party that is at a distinct advantage of bargaining.

Once again the emphasis is placed on the context surrounding the words as well as the importance of consumer protection in standardized commercial contracts.

4.6.4 International Instruments

The rules related to the contextual interpretation of contracts have international backing in various international instruments⁴³⁰ such as the Unidroit Principles of International Commercial Contracts: Restatement (Second) of Contracts,⁴³¹ and the Uniform Commercial Code.⁴³²

The Unidroit Principles of International Commercial Contracts also reject the plain-meaning rule by providing that prior statements or agreements may be used to interpret a contract.⁴³³ As

⁴²⁸ Cornelius op cit note 26 at 104-105.

⁴²⁹ Farnsworth *on Contracts* 2ed (1990) at 518 par 7.11.

⁴³⁰ R Hyland et al op cit note 302 at 1.

⁴³¹ See The American Law Institute Restatement (Second) of Contracts (1981) par 212 comment b where it is stated that: 'It is sometimes said that extrinsic evidence cannot change the plain meaning of writing, but meaning can almost never be plain except in a context. ... Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention.'

⁴³² See the Uniform Commercial Code op cit note 304 at Article 2-202 comment 1: 'This section definitely rejects ... [t]he premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used...'

⁴³³ UNIDROIT Principles of International Commercial Contracts, 34 I.L.M. (1994) S2.1.17 comment 2.

a general rule, Article 8 requires that all facts and circumstances surrounding the contract, including the parties' negotiations, are to be considered during the course of contract interpretation. The text constitutes one of those factors, and though always important, it is not the overriding factor.⁴³⁴ Furthermore, the application of the plain-meaning rule would impede one of the basic goals of contract interpretation under the CISG, which is to focus on the parties' actual intent. If contract terms are deemed to be unambiguous, the plain-meaning rule would prevent presentation of other proof of the parties' intent.⁴³⁵

Under the CISG, therefore, the fact that the meaning of the writing seems unambiguous does not bar recourse to extrinsic evidence to assist in ascertaining the parties' intent.

One of the newest additions that can be used to aid in clarifying interpretation in international trade can be found in the Draft Common Frame of Reference (DCFR), Outline Edition (2009) prepared by the Study Group on a European Civil Code and the Research Group on Existing EC Private Law, containing Principles, Definitions and Model Rules of European Private Law.⁴³⁶ It also echoes the above approach in Article 8:101 and 8:102 with regard to contextual matters that can be employed to assist in interpretation.

In Article 8:106 it echoes the *Ut res magis valeat quam pereat* rule of contractual interpretation,⁴³⁷ which states that an interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not.

These are just some of the examples of corresponding principles and the most important for our discussion is of course the exclusion of the parol-evidence rule, the acceptance of extrinsic

⁴³⁴ One can never preclude the possibility that, by agreement of the parties, usages of trade or commercial sense, ordinary words are given a special meaning. For the same reason there cannot be any such thing as a wholly unambiguous contract term, despite the supposed rule that reference may be made to extrinsic evidence only where there is ambiguity. Among bakers, apparently, a dozen means thirteen. More significantly, the House of Lords in *The Antaios* [1985] AC 191 upheld an arbitral award which construed 'breach' as meaning 'fundamental breach' to give commercial sense to the contract, even though 'breach' is wholly unambiguous.

⁴³⁵ S Williston *A Treatise on the Law of Contracts* 4ed (1999) at 80 par 30:6 where it is written that: 'When a contract is unambiguous, the court should ... give effect to the contract as written, the duty of the court being to declare the meaning of what was written in the instrument, not what was intended to be written.'

⁴³⁶ CH Von Bar et al (eds) 'Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference'(2009) in M Joachim and BR Pelegg 'UNIDROIT Principles of International, Commercial Contracts and Draft Common Frame of Reference: A Synoptical Table' (2009) 9 *Uniform Law Review* 437 at 437.

⁴³⁷ See 4.5.1 above.

evidence in ascertaining the meaning of terms as well as the rule that traditionally protected consumers, namely the *contra proferentem* rule. These instruments also indicate what future legislation and/or common law will look like, as it is apparent that many jurisdictions are now moving away from rigid formalism to a more flexible approach to interpretation.

4.7 The Effect of the Modernization of the Presumptions, Rules and Maxims

When we look at the various aids to interpretation as well as the general approaches to interpretation it seems that language and clarity play an important role in the ascertainment of the meaning of terms. There is a global trend towards abandoning the strict textual approach in favour of a contextual one, and the rules and maxims will be used as aids which can be seen to form part of the context of a word. With the constant elaboration of the contextual approach it also seems as if an ambiguous contract will pay the penalty of having to be subjected to more stringent contextual analysis. Many of the presumptions and rules of interpretation also only come into play as soon as it appears that a term is vague or ambiguous, and the result could be different to what the drafter originally intended. It seems clear, therefore, that many of the problems related to interpretation could be remedied by the use of clear and unambiguous language. The era of the use of legal jargon to confuse and entrap consumers also looks to be drawing to an end, as much of the latest legislation now requires understandable language and makes provision for the protection of the consumer in instances of unequal bargaining power.

5 Beyond Text: Context and Creative Construction

A sentence is never not in context.

We are never not in a situation.

A statute is never not read in the light of some purpose.

A set of interpretive assumptions is always in force.

A sentence that seems to need no interpretation

*is already the product of one.*⁴³⁸

5.1 Introduction

A contract never exists in isolation.⁴³⁹ What are the influences that exist beyond the words and text? In other words, what outside aids or influences give a better indication of the true meaning of words or terms in a contract? The answer is context. It is evident that in the approach that courts have taken with regard to interpretation, the assessment of contextual factors has become a statutory obligation in modern contract law⁴⁴⁰ and courts have taken to looking beyond the text in order to ascertain the extent and meaning of words.⁴⁴¹

It has therefore become even more important to use plain language in drafting, as the language should not be allowed to obscure the intentions of the parties. If a drafter uses plain language that truly reflects the parties' common intention, he or she does not have to worry about a court changing the meaning of the plain words as they appear in the contract. Drafters also no

⁴³⁸ G McMeel G 'The Rise of Commercial construction in Contract Law' (1998) *Lloyds MCLQ* 382 at 388 paraphrasing Clarke M. *The Law of Insurance Contracts*, 3rd ed (1997) par 15-3; also quoted by Michell op cit 313 at 8.

⁴³⁹ Cornelius op cit note 26 at 37.

⁴⁴⁰ See for example Articles 1-103(a), 1-303 and 2(202) (a) of the Uniform Commercial Code of the United States, which refers to commercial practice and trade usage; Unidroit Principles for International and Commercial Contracts Para, A 3(1)C, which states that all circumstances including the conduct of parties subsequent to entering into a contract; and the Draft Common Frame Reference (DCFR) Book II. – 8:101: where it states that: 'A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words'; see Von Bar et al up cit note 436.

⁴⁴¹ See for example *Hermes Ship Chandlers (Pty) Ltd v Caltex Oil (SA) Ltd* 1973 3 SA 263 (D) at 267 and *Swart v Cape Fabrics (Pty) Ltd* 1 SA 195 (A) at 202, where it was held that a word should not be interpreted in isolation, but should be read in context. See also *Gravenor v Dunswart Iron Works* 1929 AD at 299; *Capnoziras v Webber Road Mansions (Pty) Ltd* 1967 2 SA 425 (A) and *Barnett v Abe Swesky & Associates* 1986 4 SA 407 (C) where it was held that: 'in order to interpret the meaning of a word correctly it should be reached within the context in which it is used.'

longer need to draft lengthy contracts in order for a court to give effect to the common intention of the parties, as evidence can ‘fill in the gaps’ where this is required. Drafters can therefore resort to using clearer and more concise wording and phrasing in a contract that is easier for the lay contractant to understand. Such an approach would also undoubtedly lead to certainty and fairness in a contract.

What will now follow is a brief overview of how contract interpretation developed from application of the ‘plain meaning’⁴⁴² of the text to an application of context as ‘a matrix of facts in order to ascribe meaning to contractual terms.’⁴⁴³

5.2 Definition of Context and Problems Facing a ‘Textual Approach’

The contextual approach can constitute a broad evaluation or a narrow focus, and can be limited or extended to incorporate or prohibit relevant information.⁴⁴⁴ Wroblenski⁴⁴⁵ identifies three kinds of context with regard to contracts. Firstly, there is the context of the language contained in the contract.⁴⁴⁶ Secondly, the meaning is influenced by the legal system which is applicable to drafting and interpretation of the contract.⁴⁴⁷ Thirdly, there is the functional context, which embodies all the remaining legal facts that can influence the text.⁴⁴⁸

According to Mitchell,⁴⁴⁹ a purely textual interpretation faces two main problems. Firstly it is commonly found that lawyers are the drafters of formal contracts and therefore these may not be authoritative statements of the parties’ intentions.⁴⁵⁰ This is especially relevant with regard to the ‘small print’ in standard terms and conditions, which the parties usually do not even read, even though they are ultimately bound by them. The second problem is that written contracts may be an unreliable source of the parties’ true intentions because of the language in which they are drafted. Many contracts are written in difficult, technical ‘legal’ language which the parties do not fully understand. This is one of the main reasons why consumer

⁴⁴² See for example *Grey v Pearson* supra note 407 at 1216; 6 HL Cas 61 at 106.

⁴⁴³ See *KPMG v Securefin* supra note 275 at 460 and 484.

⁴⁴⁴ McMeel op cit note 214 at 438.

⁴⁴⁵ In *MacCormick and Summers* op cit at note 285 at 260 – 266.

⁴⁴⁶ Wroblenski in *MacCormick and Summers* ibid at 260.

⁴⁴⁷ ibid 264.

⁴⁴⁸ ibid 266.

⁴⁴⁹ C Mitchell op cit note 315 at 12.

⁴⁵⁰ H Collins *Regulating Contracts* (1999) at 153-54, 159.

protection legislation had to be incorporated in order to regulate how these contracts were drafted, as many consumers did not even understand or fully comprehend the meaning or effects of the contracts they were bound to.

Traditionally, there has been resistance to the application of context in the ascertaining of the extent or integration of a contract as well as the meaning of terms. Throughout the last decades, however, there has been an unequivocal move towards a more contextual approach, as will emerge from my discussion below.

5.3 Parol Evidence: The First Resistance to Context Outside the Confines of the Contract

As stated above,⁴⁵¹ the parol-evidence rule prohibits evidence to add to, detract from, vary, contradict or qualify the terms of a contract that has been reduced to writing.⁴⁵² This rule was imported from English law⁴⁵³ and still remains part of our law today.⁴⁵⁴ The purpose of this rule is to ensure that where the parties to a contract have decided to reduce the contract to writing, the writing will be considered the only memorial of the contract and one cannot afterwards attempt to change the content by bringing forth new evidence in this regard.⁴⁵⁵ If evidence is admitted to contradict the terms of a written contract, it would usurp the function of the writing as exclusive memorial of the parties' common intentions. In effect, the parol-

⁴⁵¹ See 4.2 above.

⁴⁵² *Johnson v Leal* supra note 280: See Cornelius 'Background Circumstances, Surrounding Circumstances and the Interpretation of Contracts: KPMG Chartered. Accountants v Securefin Ltd and another [2009] 2 All SA 523 (SCA)' (2009) TSAR for a fuller explanation of the parol-evidence as an 'integration rule' rather than a rule of 'interpretation'

⁴⁵³ See *Marquard & Co v Biccard* 1921 AD 366 at 373 where Solomon stated that: '... if there is a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made or during its preparation, so as to add to subtract from or in any manner to vary or qualify the written contract ...'

⁴⁵⁴ *Johnston v Leal* 1980 ibid at 943B.

⁴⁵⁵ See *Johnston v Leal* ibid at 943B 'the integration rule ... defines the limits of the contract ... the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract.' In *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 Watermeyer JA explained (47): 'the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence.'; See also *Affirmative Portfolios CC v Transnet LTD t/a Metrorail* 2009 1 SA 196 (SCA)

evidence rule places a burden on the parties to each insure that their written contract is a complete memorial of their agreement.⁴⁵⁶

The parol-evidence rule, however, is not a rule of interpretation: it is merely an aid to ascertain the extent of the text. But the rule does limit application of the context in the sense that the context cannot be brought in to supplement the terms set out in writing. An interpreter is therefore bound to look at what is written in the contract and the context surrounding the actual words.

Context is not completely excluded, however, as a court may, when ascertaining if the parties intended the written agreement to be an exclusive memorial of the agreement between them, look at the surrounding circumstances, including relevant negotiations of the parties in order to indicate the intention of the parties in this regard.⁴⁵⁷ The context therefore plays a role when looking at exactly what the actual content of the contract is, but may not do more than that at this stage of interpretation. An example of when evidence is admissible is when it allows a party to lead evidence in order to show that the contract was entered into subject to a condition that was not expressed in the document.⁴⁵⁸ This is because this evidence leads one to a proper assessment of the common intention of the parties at the time of entering into the contract and gives context to the contract itself instead of changing the extent of the written document.⁴⁵⁹ Implied and/or tacit terms are also examples of when the extent of the contract can be go beyond what is actually written in a contract.⁴⁶⁰

It can therefore be argued that even though the parol-evidence rule limits the extent that context can change what can be considered part of the contract, it does not limit the import of context to give meaning to the contract in the interpretation phase. Clear and unambiguous language can help in this regard by assisting in clearly setting out all the relevant provisions of a contract into the written instrument. Many drafters do this by inserting a ‘whole agreement’

⁴⁵⁶ Cornelius op cit note 26 at 102

⁴⁵⁷ See *Johnston v Leal* supra note 280 at 945 D-E and *Affirmative Portfolios CC v Transnet LTD t/a Metrorail* 2009 supra note 455 at 201 par 15.

⁴⁵⁸ *Stigling v Theron* 1907 TS 998 at 1003.

⁴⁵⁹ Christie op cit note 51 at 192.

⁴⁶⁰ See Christie ibid at 163: See also *KPMG v Securefin* supra note 275 at 533 par 39.

clause which indicates that there are no other documents that form part of the contract or contain relevant provisions relating thereto.

As stated previously, however,⁴⁶¹ it would appear that modern interpretation instruments lean more towards the exclusion of the parol-evidence rule in its entirety and therefore it might be that its days are numbered.

5.4 Words in Context: Reading the Contract as a Whole

After applying the parol-evidence rule in relation to the extent of the contract one should look at the actual interpretation of a word or clause. When doing so it should be decided whether a word is to be read in isolation or in its context – and, if the latter, where the line is to be drawn between context and the written words.⁴⁶² When one has an integrated document that proposes to be the written contract entered into by the parties, the clauses within the contract and the words used cannot be viewed in isolation. It is a basic principle of interpretation that a document should be considered as a whole,⁴⁶³ and that a word or phrase should be read in context in order to ascertain its correct meaning. This is where context starts encroaching on the clear meaning of words.

In *Heys & Co v Gibson Bros*⁴⁶⁴ this concept was explained by de Korte J⁴⁶⁵ with reference to the Roman-Dutch principle of '*nam verva debent intelligi cum effect ut res magis valeat quam pareat*' – that the interpretation of a contract should be reconcilable with the object of the contract. He also stated further that '... in construction of a contract the purpose of the contract should be kept in view, and all the terms, *and consequently the whole context* should be taken into consideration in order to find out what was precisely stipulated.'⁴⁶⁶

⁴⁶¹ See discussion on the interpretation of contracts at 4 above.

⁴⁶² Christie op cit note 51 at 210.

⁴⁶³ See *Swart v Cape Fabrics* 1979 1 SA 195 (A) at 202.

⁴⁶⁴ (1889-1890) 3 SAR TS 260 at 265.

⁴⁶⁵ Ibid at 265.

⁴⁶⁶ See also Cornelius op cit note 26 at 174 as well as *Melmoth Town Board v Marius Mostert (Pty) Ltd* 1984 (3) SA 718 (A) 728F-G; *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* [2005] (5) SA 276 (SCA) 281D; *Bay Centre Investments (Pty) Ltd v Town Council of the Borough of Richards Bay* (2006) JOL 14038 (SCA); *Drifter Adventure Tours CC v Hircock* [2007] 1 All SA 133 SCA.

When approaching this rule from another point of view it should be kept in mind that within limits laid down by law, parties to a contract are at liberty to determine the nature and extent of their obligations and therefore also the meaning attributed to the words in their contract. The ordinary meaning of a word therefore depends on the context in which it is used, which is indicative of the intentions of the parties.⁴⁶⁷ Context, in the narrow sense, refers firstly to the words that surround the word concerned in the same sentence or terms. The meaning of a word is also affected by its positioning in a specific phrase or sentence.⁴⁶⁸

Another move towards a more contextual approach, with regard to the internal context of a contract, was attempted in *Cinema City v Morgenstern Family Estates (Pty) Ltd.*⁴⁶⁹ Jansen JA spoke of ‘modifying *prima facie* meanings of words’⁴⁷⁰ when read in context. It was in this case that the internal context of the contract was brought to the forefront when he stated that ‘reading the contract as a whole’ could render the plain meaning of words to be inconsistent with the nature and purpose of a contract and not in line with what the parties intended.⁴⁷¹

Once again it is the task of a drafter to draft the document with the context in mind. The use of precedents should therefore be used cautiously, as the standard terms and conditions may be inconsistent with the nature and purpose of a contract.

5.5 The Clear-Meaning Rule

This ‘golden rule’ of interpretation with regard to applying the ordinary grammatical meaning of words was further developed by our courts into what was later known as the clear-meaning rule.⁴⁷² This textual approach was however not always explicitly followed to the exclusion of a

⁴⁶⁷ See Cornelius op cit note 26 at 175.

⁴⁶⁸ See Cornelius op cit note 26 at 176 and Burrows op cit note 284 at 69.

⁴⁶⁹ Supra note 133.

⁴⁷⁰ At 803G-H.

⁴⁷¹ He stated that: ‘The contract *should* be read and considered as a whole, and doing so, it may be found necessary to modify certain of the *prima facie* meanings so as to harmonize the parts with each other and with the whole. Moreover, it may be necessary to modify further the meanings this arrived at so as to conform to the apparent intention of the parties.’

⁴⁷² See *Grey v Pearson* supra note 407 at 1234, where Lord Wensleydale stated that: ‘In construing ... all written instruments, the grammatical and ordinary sense of a word is to be adhered to unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument in which case the ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.’

more intentionalistic or contextual approach.⁴⁷³ The two were concurrently applied and so the lines blurred between application of the objective and subjective theories of contract and the role of the internal and external context of a contract.⁴⁷⁴ This can be seen for example in *Hansen, Shrader & Co v De Gasperi*,⁴⁷⁵ where the court highlighted the importance of the common intention of the parties but went on to say that a court should find those intentions within the limits of the ordinary grammatical meaning of the words in the contract.

The traditional approach to interpretation as expounded in *Delmas Milling v Du Plessis*⁴⁷⁶ was very stringent, and it is clear that strict application of these rules could lead to results that the parties may not have intended.⁴⁷⁷ This was helped somewhat by the limitations placed on the clear-meaning rule, such as the allowance of extrinsic evidence to prove the meaning of a word where that word was used in a technical or specialized sense.⁴⁷⁸ It was clear, however, that a new approach was needed in order to ascertain the true intention of the contracting parties and this gave rise to the relaxation of the *Delmas* rules, and the context of the words that the parties used started playing a more important role.

The clear-meaning rule (in the form of the *Delmas* rules) was first relaxed by the Appellate Division in *Haviland Estates v Mc Master*.⁴⁷⁹ It was held in this judgment that extrinsic evidence of the background circumstances is always admissible in order to place the court in the shoes of the parties at the time they entered into a contract as far as possible. This seems to be an infusion of the first and second *Delmas* rules. The clear-meaning rule was then further relaxed in *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration*,⁴⁸⁰ where it was stated that context will play a role when the ordinary meaning of a word or phrase leads to absurd consequences, and in *Coopers & Lybrand and others v Bryant*⁴⁸¹ the court concluded that context in the form of purpose, background circumstances and surrounding circumstances of the contract and its language will be taken into account.

⁴⁷³ See for example *Rand Rietfontein Estates Ltd v Cohn* op cit note 218 at 317.

⁴⁷⁴ See Christie op cit note 51 at 206.

⁴⁷⁵ 1903 TH 100 at 103.

⁴⁷⁶ 1955 (3) SA 447 (A).

⁴⁷⁷ Cornelius op cit note 26 at 100.

⁴⁷⁸ *Grant v Maddox* 153All ER at 1048.

⁴⁷⁹ 1969 (2) SA 312(A).

⁴⁸⁰ 1987 (4) SA 569 (A).

⁴⁸¹ 1995 (3) SA 751 (A).

With regard to the admissibility of ‘background circumstances’ Lewison⁴⁸² AJA kept in line with the above contextual approach in *Van der Westhuizen v Arnold* when he declared that ambiguity or uncertainty was not a prerequisite for context to come into play. With regard to a general contextual approach he stated that:⁴⁸³

the formalistic approach to the interpretation of contracts, one that precludes recourse to extrinsic evidence on what the parties intended in the absence of ambiguity or uncertainty, has been criticised by this Court, which has recently questioned whether the principle is justifiable On the other hand, it is trite that even where the wording of a provision is such that its meaning seems plain to a court, evidence of ‘background circumstances’ is admissible for the purpose of construing its meaning.

It was a step in the right direction but still did not define ‘background circumstances’, and so the question regarding the admissibility of evidence in interpretation of contracts remained unanswered. The proof of this is that there was still a dictum favouring the old textual approach without mention of context. This can be seen from *Hirt & Carter Ltd v Mansfield and Another*,⁴⁸⁴ in which the court surmised the principle that should guide it when ascertaining the intention of the parties. Christie⁴⁸⁵ is directly quoted when the court held that ‘the Court seeks the common intention of the parties from the wording of the contract because that wording being agreed by both parties, is common to them, so if it speaks with sufficient clarity it should be taken as expressing their common intention.’

A final word needed to be spoken in order to clear up the confusion regarding the admissibility of extrinsic evidence in the interpretation of contracts and it appears as if it has indeed been done.

⁴⁸² At 538.

⁴⁸³ At 538.

⁴⁸⁴ 2008 (3) SA 512 (D).

⁴⁸⁵ Op cit note 51 at 207; see also Cornelius op cit 26 at 113.

5.6 A modern South African Approach

A ray of light finally came from the formulation of the modern approach in Harms DP's dictum in *KPMG Chartered Accountants (SA) v Securefin Ltd and another*,⁴⁸⁶ which paved for an unqualified contextual approach to interpretation. Regarding the interpretation of a document he related that to the extent that evidence may be admissible to bring context to the document one should use it 'as conservatively as possible'⁴⁸⁷ to establish its factual environment or purpose or to use it for identification. He makes the unequivocal statement that 'context is everything', indicating that the era of the purely textual approach was over. He also takes on the former differentiation between 'surrounding circumstances', 'background circumstances' and other facts surrounding a contract and states that:⁴⁸⁸

The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice.⁴⁸⁹

Finally we came a step closer to the contextualism proposed by the South African Law Commission,⁴⁹⁰ which recommended that extrinsic evidence should be admissible to prove the meaning of a contract, which was even formulated into a draft bill⁴⁹¹ that was to regulate contractual matters.⁴⁹² Even though these recommendations did not find their way into the legislation books they might have had an influence on the drafting of consumer protection legislation in South Africa, such as the Consumer Protection Act.⁴⁹³ They indicated more than ten years ago that South Africa needed a change with regard to the way contracts were interpreted to bring it into line with international standards.

⁴⁸⁶ Supra note 240.

⁴⁸⁷ *Delmas Milling Co Ltd v du Plessis* op cit note 286 at 455B-C.

⁴⁸⁸ At 533 par 39.

⁴⁸⁹ See *Van der Westhuizen v Arnold* supra note 258 at par 22 and 23. See also *Masstores (Pty) Ltd v Murray & Roberts (Pty) Ltd* 2008 (6) SA 654 (SCA) par 7.

⁴⁹⁰ South African Law Commission Report on Unreasonable Stipulations in Contracts and the Rectification of Contract (1998) 56.

⁴⁹¹ Draft Bill on the Control of Unreasonableness or Oppressiveness in Contracts or Terms 56 of 1998.

⁴⁹² See Cornelius op cit note 26 at 113.

⁴⁹³ Act 68 of 2008; See Cornelius ibid at 139.

The use of unambiguous, plain and clear language, as is now a prerequisite in the Consumer Protection Act,⁴⁹⁴ is also important, because one has limited control over how the context will be construed by the courts and therefore what meaning the courts will attach to a specific word, term or contract. It is therefore a drafter's task to write as clearly and concisely as possible. This will have the result that the 'clear meaning' and the 'contextual meaning' do not differ from each other, which will help the court in interpreting the said contract.

5.7 Contextual Interpretation in other jurisdictions

5.7.1 English Law

Lewison⁴⁹⁵ indicates that in English law, interpretation contains two elements – one which is factual and one which is legal. Determining the meaning of the words is a question of fact, while determining the legal effect of that meaning is a question of law.⁴⁹⁶ In English law interpretation seems to amount to a mixture of law and fact.⁴⁹⁷ The general approach to civil contracts can be discerned in *BCCI v Ali*⁴⁹⁸ as follows:

To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not or course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.

Even though Lord Bingham uses the term 'context' in the above dictum to describe the materials used to interpret a contract, it is clear that this 'context' refers only to materials that explain why the parties use a particular word in a contract.⁴⁹⁹

The dictum that has become the driving force behind the new contextual approach in English law is Lord Hoffman's in his restatement of the principles of contractual interpretation in

⁴⁹⁴ See S22 of Act.

⁴⁹⁵ Op cit note 95 at par 4.01

⁴⁹⁶ *Chatenay v Brazilian Submarine Telegraph Co. Ltd* [1892] All ER 1 QB 79.

⁴⁹⁷ Cornelius op cit note 26 at 51.

⁴⁹⁸ (2001) 1 AC at 251.

⁴⁹⁹ *Michell C* op cit note 315 at 438.

Investors Compensation Scheme v West Bromwich Building Society.⁵⁰⁰ He adopts the standpoint that it was now time for English law to apply a contextual approach to interpretation, and his contextual method involves an enquiry into the ‘background’ or ‘factual matrix’ of the contract, the ‘reasonable expectations of the parties’ or ‘commercial purposes’ of the agreement or ‘business common sense’ applicable in the relevant circumstances.⁵⁰¹ This can be applied to all contracts across the board, as both commercial and civil contracts will benefit from a contextual evaluation of the terms in the contract.

This is very significant, as England is one of the birthplaces of the Plain Language Movement.⁵⁰² Clearer drafting will have the effect that in the event a dispute occurs, the surrounding circumstances and other contextual facts and materials will supplement the text rather than invalidate it.

5.7.2 Dutch Law

In Dutch Law the *Haviltex Rule* formulated in *Ernest v Haviltex*⁵⁰³ is the general rule of interpretation that has been applied in different forms in Dutch law.⁵⁰⁴ This rule stipulates that a written contract should be interpreted according to the meaning which each party would have reasonably attributed to it, having regard to the reasonable expectations they would have of reciprocity in terms of the contract.⁵⁰⁵ In other words, the legal knowledge of the parties forms part of the context of the contract during interpretation.⁵⁰⁶

In general, Dutch law follows a very contextual approach to the interpretation of contracts, and all relevant circumstances may be taken into account during the process of interpretation.⁵⁰⁷ Relevant circumstances include preliminary negotiations,⁵⁰⁸ subsequent conduct of the parties

⁵⁰⁰ [1998] 1 AL ER 98.

⁵⁰¹ Supra note 327 at 114-15; see also Lord Steyn’s statement in *Sirius International Insurance Company v FAI General Insurance Ltd* (2004) UKHL 54 at 19; see also Michell op cit note 313 at 438 and 499.

⁵⁰² See discussion on Plain Language at 4 above.

⁵⁰³ HR (1981) NJ 635; Hartkamp & Tillema op cit note 303 at 96.

⁵⁰⁴ MH Wassink *The Principles of European Contract Law and Dutch Law: A Commentary* (2002) at 247.

⁵⁰⁵ See Wassink *ibid* and Cornelius op cit note 26 at 62.

⁵⁰⁶ Cornelius *ibid*.

⁵⁰⁷ See Wassink *ibid* at 248.

⁵⁰⁸ Hartkamp and Tillema *ibid* at 158.

in execution of the contract,⁵⁰⁹ nature and purpose of the contract,⁵¹⁰ practices established between the parties,⁵¹¹ meaning commonly given or given in a technical sense,⁵¹² prior interpretation of similar or standard clauses,⁵¹³ usage by a certain class of person of a certain type of contract or conduct,⁵¹⁴ good faith and fair dealing,⁵¹⁵ and other circumstances (in accordance with the *Haviltex* rule).⁵¹⁶

5.7.3 United States of America

In general, the traditional application of the parol-evidence and clear-meaning rules pertained in various states in the United States.⁵¹⁷ The clear-meaning rule has, however, been relaxed in some states over the years and given way to a more liberal approach. The modern approach allows for the presentation of extrinsic evidence regarding vagueness or ambiguity even if the contract is clear and unambiguous on the face of it.⁵¹⁸ When looking back we can see that the contextual approach, in the form of ‘a consent theory of contract’, was already being explored in the 1980s by legal academics in America as the answer to the gaps left by other traditional theories.⁵¹⁹ In terms of this theory of contract, reliance on the words or acts of another party is only justified if they have a ‘commonly understood meaning within the relevant context or when a special meaning’ was understood by both parties, and when the meaning shows that there was consent to transfer ‘legitimately acquired and alienable rights’.⁵²⁰ Interpretation of meaning should be done by determining: (a) the ordinary grammatical meaning of a word; or (b) the special or technical meaning of a word; or (c) some other meaning jointly understood by the parties.⁵²¹ Even though this approach is important in that it looks at the subjective intention of the parties, it is still largely based on looking only at language, and other factors

⁵⁰⁹ *Nederlandse Gasunie v Gemeente Anloo* HR 24 May 1994 NJ 1994 , 574; Hartkamp and Tillema op cit note 301.

⁵¹⁰ Hartkamp and Tillema op cit note 303 no 287.

⁵¹¹ Hartkamp and Tillema op cit note 303 at 158.

⁵¹² *Bunde v Erckens* HR 17 December (1976) NJ 1977 at 241

⁵¹³ *ABP v FGH* HR 22 December (1995),NJ (1996) at 300; *Haefner v ABN-AMRO* 25 September (1998) N 1998 at 192.

⁵¹⁴ Hartkamp & Tillema op cit note 301 at 92; New Dutch Civil Code Art 6:248 (1) BW.

⁵¹⁵ New Dutch Civil Code Art 6:258; See also Cornelius op cit note 26 at 53.

⁵¹⁶ See *Ernest v Haviltex* supra note 503.

⁵¹⁷ Cornelius op cit note 26 at,104.

⁵¹⁸ Cornelius ibid at 104.

⁵¹⁹ RE Barnett ‘A Consent Theory of Contract’ (1986) 86 *Columbia Law Review* 269 at 269.

⁵²⁰ Ibid at 307.

⁵²¹ Ibid at 315.

such as reasonableness only come into play with regard to the ‘reasonable meaning of a word’.⁵²²

That is why the liberal approach was formulated as expounded in California in *Pacific Gas & Electrical Company v GW Thomas Drayage & Rigging Company Inc*,⁵²³ where Traynor CJ stated⁵²⁴ that

[w]hen a court interprets a contract in this basis, it determines the meaning of the instrument in accordance with the ‘...extrinsic evidence of the judges own linguistic education and experience.’... The exclusion of testimony that might contradict the background of the judge reflects a judicial belief in the possibility of perfect verbal expression ... This belief is a remnant of a primitive faith in the inherent potency and the meaning of words.

The consequence of this approach is that extrinsic evidence is admissible to aid in interpretation of a written contract, even where the whole agreement has been integrated therein.⁵²⁵ This is therefore a similar approach to that taken in the South Africa with regard to the application of extrinsic evidence to prove what should be integrated as part of a contract.⁵²⁶ The meaning of a term in a contract will always be evaluated by reference to its context which would remedy any inconsistency with regard to intent that is caused by the instability and generality of language.⁵²⁷ The contextual approach is also indirectly applied in some states, which hold that evidence is provisionally expected to be evaluated against the text so as to indicate ambiguity.⁵²⁸ There are different applications of this approach, however, as states differ in their approaches to ambiguity as prerequisite for or as result of application of context.

⁵²² Barnett op cit note 519 at 315.

⁵²³ 1968 40 ALR 3d 1373.

⁵²⁴ At par 1377-1378.

⁵²⁵ Cornelius op cit note 26 at 104-105.

⁵²⁶ See 5.3 above.

⁵²⁷ Cornelius op cit note 450 at 8 (See also *Alaska Diversified. Contractors Inc v Lower* 778 P 2d 581 (Alaska); *Taylor v State Farm Mutual Automobile Insurance Co* 854 P 2d 1134 (Arizona); *First National Bank of Crossett v Griffin* 832 SW 2d 816 (Arkansas); *Klair v Reese* 531 A 2d 219 (Delaware); *Fashion Fabrics of Iowa Inc v Retail Investors Corp* 266 NW 2d 22 (Iowa); *Garden State Plaza Corp v SS Kresge Co* 78 NJ 485 (New Jersey) and *Berg v Hudesman* 801 P 2d 222 (Washington).

⁵²⁸ Cornelius ibid at 767, 9; (see *Ward v Intermountain Farmers Association* 907 P 2d 264 (Utah).

Colorado is one state that favours the approach that calls for ambiguity as a prerequisite for looking at context. The approach was set out in *Lazy Dog Ranch v Telluray Ranch Corp*⁵²⁹ in the Supreme Court of Colorado, when it was explained⁵³⁰ that

the weight and momentum of authority is behind the more flexible approach to interpreting a deed ... extrinsic evidence may be relevant to determining whether a deed is ambiguous. If, after considering this evidence, a court decides that the language of the deed accurately and unambiguously reflects the intentions of the parties, the court should disregard the extrinsic evidence for future purposes, and give effect to the language of the deed. If, however, the court finds the deed's terms to be ambiguous, the extrinsic evidence will be a useful starting point in the court's determination of the actual intentions of the parties.⁵³¹

Utah, on the other hand, supports unequivocal acceptance of extrinsic evidence if there is a reasonable possibility of ambiguity. This was set out in *Ward v Intermountain Farmers Association*,⁵³² when the Supreme Court of Utah explained⁵³³ that:

if after considering such evidence the court determines that the interpretations contended for are reasonably supported by the language of the contract, then extrinsic evidence is admissible to clarify the ambiguous terms.

According to Cornelius,⁵³⁴ application of the different approaches is more procedural than substantive. The result will be the same but context will come into play at different points of the procedure.

5.7.4 International Law

The Vienna Sales Convention (CISC)

When looking for guidelines regarding interpretation in the Vienna Sales Convention (CISG)⁵³⁵ we find unequivocal support of the contextual approach.⁵³⁶ Article 8 concerns

⁵²⁹ At 965 par 1229.

⁵³⁰ At par 1236.

⁵³¹ See also *Ahsan v Eagle Inc* 678 NE 2d 1238 (Illinois).

⁵³² At 907 2d par 264.

⁵³³ At par 269.

⁵³⁴ Cornelius op cit note 450 at 76- 9.

⁵³⁵ CISG op cit note 302; See also Lewison op cit note 287 at 111 par 3.15.

⁵³⁶ See CISG Advisory Council Opinion No. 3 op cit note 302.

contract interpretation and Article 8(1) provides that, in certain circumstances, contracts are to be interpreted according to actual intent. When the inquiry into subjective intent proves insufficient, Article 8(2) provides that statements and conduct are to be interpreted from the point of view of a reasonable person. This evaluation according to Article 8(3) takes into account all relevant circumstances of the case, including the negotiations, any course of conduct or performance between the parties, any relevant usages, and subsequent conduct of the parties. Thus Article 8 allows that extrinsic evidence may generally be considered when the meaning of a contractual term is determined. In sum, the CISG indicates that a written document is one, but only one, of many circumstances to be considered when establishing and interpreting the terms of a contract.⁵³⁷

Another interesting point to mention regarding the CISG is that it includes no version of the parol-evidence rule. On the contrary, several CISG provisions provide that statements and other relevant circumstances are to be considered when determining the effect of a contract and its terms. Article 11 sentence 2 provides that a party may seek to prove that a statement has become a term of the contract by any means, including by the statements of witnesses.⁵³⁸

Principles of European Contract law (PECL)

Article 5:101 of the PECL⁵³⁹ states that a contract should be interpreted ‘according to the common intention of the parties even if this differs from the literal meaning of the words,’⁵⁴⁰ and if neither explicit or implicit intention⁵⁴¹ can be established a contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

Interpretation should be done in light of all the relevant contextual factors surrounding the contract listed in Article 5:102. These includes the circumstances in which it was concluded,

⁵³⁷ J von Staudinger (Ulrich Magnus), *Kommentar zum Bürgerlichen Gesetzbuch*, Art. 8 CISG Rn.

⁵³⁸ Most commentators agree that Article 8, which expressly covers the interpretation of a party’s statements and conduct, should also be used, *mutatis mutandis*, to interpret the terms of the contract. See for example Honnold J *Uniform Law for International Sales* 3ed (1999) at par 105. See also Schlechtriem & Schwenger (Schmidt-Kessel), *Kommentar zum Einheitlichen UN-Kaufrecht - CISG* 4ed (2004) at 3, 4 and 32-34; English edition: Schlechtriem & Schwenger *Commentary on the UN Convention on the International Sale of Goods (CISG)* 2ed (2005) at 21.

⁵³⁹ Prepared by the Commission on European Contract Law (1999) text in English.

⁵⁴⁰ See A 5.101(1).

⁵⁴¹ See A 5.101 (2).

including the preliminary negotiations, the conduct of the parties, even subsequent to the conclusion of the contract, the nature and purpose of the contract, the interpretation which has already been given to similar clauses by the parties and the practices they have established between themselves; the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received, usages, good faith and fair dealing.

These principles are mirrored in the Dutch Civil Code⁵⁴² and highlight the fact that Europe embraces a contextual approach to interpretation. The principle of reasonableness and the prerequisite of good faith contained in both these codes also speak of how morality and the nature and purpose of a contract form part of the context and could influence an interpretation that breaks away from the text in the document.⁵⁴³

Other International Commercial Contract Instruments

The Unidroit Principles for International Commercial Contracts⁵⁴⁴ is also in favour of taking extrinsic evidence into account when interpreting commercial contracts, as it reads that during interpretation regard shall be had to all circumstances, including ‘any conduct of the parties, even subsequent to the conclusion of the contract’.⁵⁴⁵

The recently prepared Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)⁵⁴⁶ also advocates the contextual approach to contract interpretation and goes further in explaining exactly what matters may form part of the context during interpretation.

In Book 11, Article 8:101, it states as one of the general rules of interpretation that a contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

⁵⁴² See discussion under Consumer Protection at 7 below; D Busch et al ‘The Principles of European Contract Law and Dutch Law: A Commentary’ (2002) at 13 regarding the similarities between Dutch law and the Principles of European Contract Law.

⁵⁴³ See Article 1:302 of the PECL and.

⁵⁴⁴ 2004. See also CH Von Bar et al op cit note 436 at 302.

⁵⁴⁵ Para 5.102(b).

⁵⁴⁶ See Von Bar et al *ibid*.

It goes further in Article 8:102 to set out what matters may be taken into account during interpretation, which include: the circumstances in which it was concluded, including the preliminary negotiations; the conduct of the parties, even subsequent to the conclusion of the contract; the interpretation which has already been given by the parties to terms or expressions which are the same as, or similar to, those used in the contract and the practices they have established between themselves; the meaning commonly given to such terms or expressions in the branch of activity concerned and the interpretation such terms or expressions may already have received; the nature and purpose of the contract; usages; and good faith and fair dealing.

5.8 Contextualism: The Future of Contract Interpretation

From text to context in various forms and applications, a modern theory of contract is starting to emerge. It seems appropriate to quote Lord Devlin at this stage. He wrote that businessmen ‘like the solemnity of the contract, but do not care about its details’.⁵⁴⁷ This is true for many commercial contracts and it can be stated that the existence of a document drafted by a legal practitioner may constitute a ‘context’ in its own right.⁵⁴⁸ This is especially relevant in labour-intensive drafting, where commercial lawyers rely on the written document as proof of the rights and obligations as formulated through a series of generic drafts. Clients want the assurance that they can turn to the written terms and conditions in the event of a dispute.⁵⁴⁹ The contextual approach does, however, not take away from the validity of the terms but rather imposes a duty on a drafter to ensure that the parties’ true intentions do not get lost amongst the standard terms used in similar situations. The era of the use of legal jargon to confuse and entrap consumers also looks to be drawing to an end, as much of the latest legislation now requires understandable language⁵⁵⁰ and makes provision for the protection of the consumer in instances of unequal bargaining power.

With the constant elaboration of the contextual approach it also seems as if an ambiguous contract will pay the penalty of having to be subjected to more stringent contextual analysis.

⁵⁴⁷ Lord Devlin ‘The Relationship between Commercial Law and Commercial Practice’ (1951) 14 *Michigan Law Review* 249 at 266

⁵⁴⁸ Mitchell op cit note 315 at 37.

⁵⁴⁹ Mitchell ibid at 37.

⁵⁵⁰ See National Credit Act 34 of 2005 and Consumer Protection Act 68 of 2008.

The judgment in *KPMG Chartered Accountants (SA) v Securefin Ltd and another*⁵⁵¹ effectively echoes this in that it determined that the admissibility of extrinsic evidence is limited only by the ordinary rules of the law of evidence when ascertaining the meaning or terms.⁵⁵² International law instruments such as the PECL, UNIDROIT Principles of International Commercial Contracts, DCFR and CISG discussed above⁵⁵³ are indicative of a completely contextual approach and might be an indication of how all contracts will be interpreted in the future as globalization, trade and information-sharing continue to increase.

The study now turns to the plain language movement as a whole and the other benefits it holds for the parties concerned, apart from preventing conflicting interpretation by the courts, when context is taken into account. The movement, which has been strengthened by substantiating legislation in the realm of consumer protection, is one that can no longer be ignored. It is therefore discussed in further detail below.



⁵⁵¹ Supra note 240.

⁵⁵² Cornelius op cit note 450 at 767.

⁵⁵³ At 5.7.4 above.

6 Development and impact of the Plain Language Movement on the Law of Contract

*But do not give it to a lawyer's clerk to write,
for they use a legal hand that Satan himself
will not understand.*⁵⁵⁴

6.1 Introduction

The critical view taken by many on lawyers' use of prolix prose and legalese in documents is not a new one. As early as the 1770s Jeremy Bentham, one of the great philosophers in England, expressed the need to purge language – especially the language of law and jurisprudence – of 'distorting and misleading fictions'.⁵⁵⁵ He referred to legal language as 'the accumulation of excrementitious matter' and 'literary garbage',⁵⁵⁶ and he argued that plain legal language was essential to proper governance.⁵⁵⁷ During the early 1800s, John Adams, one of the founding fathers of the newly independent American state, also saw the problems concerning legal language.⁵⁵⁸ He famously said that 'the abuse of words has been the great instrument of sophistry and chicanery, of party, faction, and division of society'.⁵⁵⁹ The dislike of overcomplicated and lengthy legal documents is also evident from early case law, as can be seen from *Mylward v Welden*.⁵⁶⁰ In this case a solicitor filed a particularly lengthy document, and the chancellor ordered that a hole be cut through all 120 pages of the document. It was then ordered that the author's head be stuffed through the whole and he be led around to be exhibited to all attending court at Westminster Hall.⁵⁶¹

⁵⁵⁴ Miguel Cervantes available at designorati.com/.../archaic-language-in-modern-contracts-plain-language-vs-legalise.php [accessed 13 November 2009].

⁵⁵⁵ JH Burns 'Jeremy Bentham: An Iliad of Argument' available at <https://www.ucl.ac.uk/Bentham-Project/journal/nlburns.htm> [Accessed 13 November 2009].

⁵⁵⁶ W Tait 'Nomography or the Art of Indicting Laws' in W Tait *Works* (ed) vol 3 (1838-43) 208 at 208.

⁵⁵⁷ Butt & Castle op cit note 7 at 58.

⁵⁵⁸ P Tiersma *The Plain English Movement* available at <http://www.languageandlaw.org/PLAINENGLISH.HTM> [Accessed 13 December 2009]

⁵⁵⁹ Available at http://www.brainyquote.com/quotes/authors/j/john_adams.html [Accessed 13 December 2009].

⁵⁶⁰ 21 All ER [1596] at 136.

⁵⁶¹ See (2001) 2 *Clarity: Journal of the International Association Promoting Plain Legal Language* at 4.

Traditional legal writing has repeatedly been accused of lending itself to obscurities, circumlocutions, convoluted language, and difficult sentence structure.⁵⁶² The plain language movement proposes a theory of communication that attempts to reform traditional legal language in legal documents.⁵⁶³ Over the past three decades the term ‘plain language’ has become a popular catch phrase when legal academics and practitioners refer to the drafting of legislation, contracts and other legal documents.⁵⁶⁴ Central to the plain language movement is the assumption that the parties to the documents and the ordinary person comprise the audience of legal documents and legislation. The heart of the movement advocates clear and effective use of language for its intended audience.⁵⁶⁵ However, only recently has there been an answer in the form of a plan of action to implement the ideal of bridging the gap between the actual and written meaning of legal writing. The reality globalization and the development of digital communication have had a great impact on the need for effective and clear communication.⁵⁶⁶

As earlier chapters have attempted to convey, plain language is a tool that can be used, especially in the realm of contract law, to make documents clearly enforceable and easily interpretable to the parties as well as the courts that have to deal with disputes in these regards. This discussion of the Plain Language Movement will look at the history of plain language, different definitions of plain language, why plain language is preferable to traditional legal language, and plain language and the consumer. There will also be a comparative examination of how different countries have approached the plain language issue.

6.2 The History of Contracts with a View on the Development of Language in Contracts

According to Cohen,⁵⁶⁷ legalese arose in a time when using phrases from multiple languages made legal documents clearer. Academics and legal professionals used Latin as a common

⁵⁶² Vanterpool op cit note 5 at 187.

⁵⁶³ Collins op cit note 6 at 431.

⁵⁶⁴ B Bekink and C Botha ‘Aspects of Legislative Drafting: Some South African Realities’ (2007) 28 *Statute Law Review* 34 at 35.

⁵⁶⁵ Butt and Castle op cit note 7 at 86.

⁵⁶⁶ Bekink B and Botha C ibid at 36.

⁵⁶⁷ M Cohen ‘A Brief History of ‘Legalese’ and the Plain English Movement’ at 1 available at <http://www.cohenslaw.com/articles/plainenglish.html> [Accessed 14 December 2009].

legal language across borders.⁵⁶⁸ The Romans carried this language to various parts of their growing empire, which included Britain at the end of the third century BC. Latin was therefore the predominant legal language in England before the Roman Empire collapsed in 476 AD and the Norman Conquest. French then became the official language of culture, education, and law.⁵⁶⁹ However, English endured among the population and in 1362 the Crown declared that English should be used in oral pleadings and eventually in statutes and written pleadings.⁵⁷⁰ The choice between Latin and English and later between French and English led to uncertainty about which language should be employed in legal documents. Consequently, lawyers started using paired words to express one meaning. For example, ‘free and clear’ comes from *freo*, the old English, and *cler*, the old French.⁵⁷¹ Such pairings rapidly became enshrined in the law.⁵⁷² The drafting of the most prominent works of jurisprudence in the years 450-451 BC, however, had a great influence on the laws of Europe and England, and therefore many of the legal concepts incorporated into English law from Roman law were taken over and used in their native Latin language.⁵⁷³

As previously stated, the call for the reform of legal language is not a modern phenomenon, and the use of Latin terminology in legal documents is one of the reasons that legal language got its bad reputation.⁵⁷⁴ The other reason is that legal professionals often use archaic and cumbersome language in their writings, which is partly due to the unusual pairings of words as described above.

6.3 Early Development of Language Used in Contracts

6.3.1 Roman Law

As was earlier explored in this discussion on the history of contract law,⁵⁷⁵ in early Roman law the law revolved largely around a single contract – *stipulatio*. *Stipulatio* was a unilateral and *stricti iuris* contract consisting of a formal promise made in answer to a formal question.

⁵⁶⁸ M Ristikivi ‘Latin: The Common Legal Language of Europe?’ (2005) 10 *Juridica International* 199 at 199.

⁵⁶⁹ Ristikivi *ibid* at 200.

⁵⁷⁰ Cohen *op cit* note 567 at 1.

⁵⁷¹ Wydick R *Plain English for Lawyers* 2 ed (1985) at 19.

⁵⁷² Available at <http://www.austlii.edu.au/nz/journals/WkoLRev/1995/9.html#Heading19> [Accessed 12 June 2009].

⁵⁷³ Ristikivi *ibid* at 200.

⁵⁷⁴ See discussion above at 6.

⁵⁷⁵ See discussion above at 2.

Not even duress or fraud would make the contract void. There was therefore no room for plain language, as the law strictly laid down the language in which these documents were couched.⁵⁷⁶

Consensus became part of the law, in the form of *contractus consensus* in Roman law and this law. These contracts, which were binding even though none of the rigid formalities had been met, paved the way for a future in which plain language could become the norm in all contracts.⁵⁷⁷ This was because the Roman law was internationally accepted by merchants and traders. Therefore the parties' intentions became more important, even if not the deciding factor. The importance of the parties' intentions can be seen in Ulpian's statement that 'in stipulations and other contracts we always follow that which the parties intended.'⁵⁷⁸

Consensus became a characteristic element of the contracts of Gaius and Justinian.⁵⁷⁹ The outcome of this development was the acceptance of the maxim *pacta servanda sunt* as one of the guiding principles of the law of contract.⁵⁸⁰

Even though there was more freedom in contract, the parties were still bound by certain formalities. These were that both parties should be present at conclusion of a contract and a question should be put and answered within a reasonable time.⁵⁸¹ *Consensus* alone was therefore not enough to form a binding contract in the absence of these prerequisites and it was therefore only in the Roman-Dutch law that *consensus* became the overriding factor, as will be discussed next.

⁵⁷⁶ Van Zyl op cit note 17 at 254.

⁵⁷⁷ Van Zyl ibid at 287.

⁵⁷⁸ *Digest, Corpus Iuris Civilis* 50.17.34. Translation by Mr Justice Van den Heever in *The Pariarian Agricultural Lease in South African Law*, 36. The original is '*Semper in stipulationibus et in ceteris contractibus, id sequimur quod actum est ...*' The statement is repeated by Voet J in *The Selective Voet being the Commentary on the Pandects* at 23.2.85; see also Papinian *Digest, Corpus Iuris Civilis* 50.16.219: 'It was decided. that in agreements between contracting parties, intention rather than the actual words should be considered'.

⁵⁷⁹ Justinian *Digest* 2.14.1.3: (Translated by DH Van Zyl op cit note 17 at 423) (Ulpian, in the fourth book of his commentary on the *Edictum*): 'It is a general prerequisite for all agreements which relate to all aspects in respect of which the parties came to mutual understanding with a view to the conclusion and execution of a legal act. For, just as it is said that persons who assemble from various places in one location have convened, so there is agreement between persons who have converted their varying intentions into common intention, that is when they collectively have the same opinion. Therefore it is a general principle of an agreement, as Pedius puts it succinctly, that there is no contract or obligation which does not contain in itself agreement (*conventio*)'

⁵⁸⁰ Van Zyl ibid at 254.

⁵⁸¹ Justinian, *Institutiones* 3, 15, 1.

6.3.2 Roman-Dutch Law

During the seventeenth century such authorities such as Grotius, Gudelinus, Zypaeus, Groenewegen and the two Voets acknowledged that Roman-Dutch Law did not recognize the earlier Roman doctrine that some formality was required to establish a contract. They required only (1) consent; (2) a voluntary and deliberate agreement; (3) a person capable of contracting; and (4) an agreement physically possible and not contrary to the moral sense of community.⁵⁸² The Roman-Dutch jurists, therefore, took a further step in the right direction by making intention the basis of contractual liability for all contracts and it is from them that South African contract law took the principle that the intention of the parties is paramount.⁵⁸³

In Roman-Dutch law any expression of common intention, whether conveyed verbally, by conduct or in writing, constituted an enforceable agreement.⁵⁸⁴ But without *consensus* being present there could be no agreement.⁵⁸⁵ The abovementioned unilateral declarations were termed *pollicitation*.⁵⁸⁶ This led to the development in Roman-Dutch law that agreements did not have to fall into specific categories, as all contracts were believed to be consensual and no consideration was required, as was a prerequisite in English law.⁵⁸⁷

Where did it all go wrong? The answer lies perhaps in English law, and we should therefore take a closer look to see where contracts and the language contained therein became the property of the legal practitioner. We therefore now look at legal language in the English Law tradition.

⁵⁸² See Voet J *Beginnelsen des Rechts* op cit note at 13 and 14; Vinnius *Institutiones* 3, 16,1 n.4; Paul *Institutiones* at 3,14, and 5.

⁵⁸³ Kahn op cit note (1988) 9

⁵⁸⁴ Van Leeuwen, *Het Roomsche-Hollandsche Reoht* at 4.3.1; See also R.W Lee *An Introduction to Roman-Dutch Law* (1915) at 568-575.

⁵⁸⁵ *Rose Innes D.M. Co. v Central D.M Co* (1884) 2 H.C.G 272.

⁵⁸⁶ RJ Pothier *Trait des obligations: Verhandeling van Ciontracten en andere Verblntenissen met Aanmerkingen door J. van der Linden.*, sec 4; 'Grotius' H De Groot *Inleiding tot de Hollandsche Rechtsgeleerdheid* at par 3.1.11 and 48. Grotius renders pollicitation by 'belofte'. An offer intended to be accepted is 'toezegging'; see also Lee *An Introduction to Roman-Dutch Law* *ibid* at 577.

⁵⁸⁷ See Lee, *An Introduction to Roman-Dutch Law* *ibid* at 578.

6.3.3 English Law

The English law of contract and interpretation has been one of formality and forms. With regard to enforceability of a contract, as was previously discussed,⁵⁸⁸ the enforceable English contract had to be a deed under seal and only the formal contracts that could be proved by production of the deed of seal were enforceable by a party to a contract.⁵⁸⁹

During the early development of English law, around the twelfth century, there were two types of formal agreements that were enforceable and under seal, namely:

- i) A *covenant* – this was usually an agreement where someone agreed to do something and the available remedy was specific performance; and
- ii) A *formal debt* – this was an agreement to pay a sum of money. This agreement was actionable as an ‘obligation’ and the available remedy was the payment of the debt.⁵⁹⁰

The fact that so many agreements became unenforceable duly gave rise to the rise of *assumpsit* as contractual remedy in certain circumstances,⁵⁹¹ and it is from this that modern contract law developed.⁵⁹²

In addition to the availability of *assumpsit* in terms of an agreement not made under seal, both parties to the contract had to provide consideration for a contract to be enforceable. This means that each party had to promise to give or do something in terms of the agreement.⁵⁹³ In modern English contract law there is still a residue of the old formalities, as certain contracts still have to be contracted by deed and consideration is still a prerequisite for enforceability for

⁵⁸⁸ See discussion above in History of Contract at 2.

⁵⁸⁹ Beatson op cit note 63 at 11.

⁵⁹⁰ Beatson ibid at 12.

⁵⁹¹ For example *Misfesance*, *Nonfessance*, and eventually *assumpsit* for money; see Beatson ibid at 12

⁵⁹² Beatson ibid at 11.

⁵⁹³ Lush J. in *Currie v Misa* [1875] All ER 10 Exch 153 referred to consideration as consisting of a detriment to the suffered or undertaken by the other promisee or a benefit to the promisor: ‘some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given.’

contracts not made by deed.⁵⁹⁴ Formal requirements played an integral role in the English law of contract, because the Statute of Frauds⁵⁹⁵ provided that a large number amount of the most commonly used contracts⁵⁹⁶ were not enforceable unless they were supported by a note or memorandum in writing.⁵⁹⁷

These prerequisites for contract formation illustrate the English love of formality and form above intention as a prerequisite for contract formation. This is in all likelihood why the contract came to settle in the realm of legal professionals, as they were the ones who could ensure that a contract was enforceable. It is therefore clear that these legal professionals also did not use the language of the common people for drafting but rather the more formal language of court and legal academics. Therefore even though the stringent formalities were later relaxed, the language remained.

Ironically enough, it is the English who chose from the early 1800s to dictate that words used in contracts should be interpreted according to their ordinary use and application.⁵⁹⁸ Some English cases even went so far as to state that the ordinary meaning of a word is the meaning that the word bears in ordinary colloquial speech.⁵⁹⁹ In addition thereto English law also formulated the objective theory of interpretation, whereby mutual intention of the parties should be ascertained from the written document and the parties themselves are not allowed to give direct evidence to show what their actual intentions were.⁶⁰⁰ The irony lies in the fact that contracts that were drafted by legal professionals in legalese, which is only ordinary to those who practise law, would bear the meaning used by the drafter, even though both parties understood a specific word or clause to mean something different. It may be argued that parties can apply for rectification of a contract,⁶⁰¹ but time and money would be saved if a contract were clearly drafted in the first instance.

⁵⁹⁴ Beatson op cit note 63 at 75-88.

⁵⁹⁵ Of 1677.

⁵⁹⁶ In particular, contracts for the sale or disposition of an interest in land and, until 1954, for the sale of goods over £10 in value.

⁵⁹⁷ This requirement was repealed by the Law Reform (Enforcement of Contracts) Act 1954.

⁵⁹⁸ *Bain v Cooper* op cit note 117 at 701 708; *Bland v Crowley* (1851) 6 Ex 522 529; see also Kellaway op cit note at 48.

⁵⁹⁹ *Robertson v French* (1803) 4 East 130 at 135; *Falkener v Whitton* 1917 AC 106 at 110.

⁶⁰⁰ *Prenn v Simmonds* (1971) 1 WLR 1381; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* (1976) 1 WLR at 989.

⁶⁰¹ See Beatson op cit note 63 at 339.

6.3.4 South African Law

One of the earliest rules that were expounded in South Africa with regard to language use in contracts was that parties express themselves in a language calculated to embody the agreement that has been reached by them.⁶⁰² The whole problem with contract language, however, came about because parties were (and are) very seldom the drafters of their own contracts. This is usually the task of a legal professional, who has the knowledge and skill required to draft a contract according to the collective intention of the parties. He or she thus protects the interests of his/her client and produces a contract that is enforceable in law.

As South Africa adopted both Roman-Dutch and English principles we should also keep in mind the influence these legal systems have had on the language we use, for example the Roman-Dutch concept of *consensus ad idem* as well as the English presumption against tautology or superfluity.⁶⁰³ It is therefore only natural that South African legal professionals also adopted their legal terminology from them and that is why we find Latin terms such as *domicilium citandi et executandi* as well as archaic English word such as *hereinbefore* and *in lieu of*. The use of Latin terms and archaic language has become common practice and has often led to contracts being difficult to understand by the average layperson.

Therefore South African contracts face exactly the same problem as other countries in that the language used is often that of a precedent that has been developed through decades. This leads to the inevitable result that we have contracts that contain words that are outdated and Latin terms that are not familiar to a person who has no legal education.

Now that we know what traditional legal language encompasses we can try to seek a solution to the problems associated with it. We now look at what the Plain Language Movement would like to achieve by first looking at exactly what the movement means by the words 'plain language'.

⁶⁰² *Zandberg v Van Zyl* 1910 AD 302 at 309.

⁶⁰³ See *Ditcher v Denison* [1857] 14 ER 718 723.

6.4 What is Plain Language?

The term 'plain language' is not a difficult one to grasp, since it conveys exactly what it stands for and what the plain language movement seeks to implement. As regards plain language in the legal sphere, one should first look at what traditional legal language looks like and to what extent it differs from the plain language standards that are now trying to make their way into legal language use. This is especially true for its application in the realm of the law of contract, and, in particular, in commercial contracts.

Plain language can be defined as 'the idiomatic and grammatical use of language that most effectively presents ideas to the reader'.⁶⁰⁴ There are many other excellent definitions of 'plain language'. One good definition was given by Cutts.⁶⁰⁵ He defines 'plain English' as 'The writing and setting out of essential information in a way that gives a co-operative, motivated person a good chance of understanding the document at first reading, and in the same sense that the writer meant it to be understood.'⁶⁰⁶

Garner⁶⁰⁷ gives a definition of what 'plain language' is by looking at what it is not and should not be. He says that it should not be 'drab and dreary' language but rather language that is enticing for a reader. Plain language should be 'robust' and 'direct' but unpretentious and one can achieve it by using simpler, more straightforward words and ways of expression.

Another legal scholar, namely Eagleson, agrees⁶⁰⁸ with Garner that plain English is clear, straightforward expression, but states that this does not mean that it is a simplified version of the English language. It merely avoids obscurity, inflated vocabulary and convoluted sentence construction. Writers who write in 'plain language' allow their audience to focus on the message instead of being distracted by complicated language. They ensure that their audience understands the message easily.

⁶⁰⁴ BA Garner *The Elements of Legal Style* (2002) at 5.

⁶⁰⁵ M Cutts, *Plain English Guide* (1995), 5.

⁶⁰⁶ Cutts op cit note at 5.

⁶⁰⁷ B Garner *Legal Writing in Plain English* (2001) at 14.

⁶⁰⁸ R Eagleson available at <http://www.plainlanguage.gov/whatisPL/definitions/index.cfm> [Accessed 13 June 2009].

The above definitions are persuasive, and allow one to propose that ‘plain language’ is simply a way of writing so that the person for whom it is intended can understand it with ease. When a legal document is drafted in clear and understandable language, it improves communication, assists with the more effective sharing of information and generally has the effect that all relevant parties are informed as to their respective roles.⁶⁰⁹

6.4.1 Traditional Legal Language

By reviewing we know it is over 2000 years old.⁶¹⁰ By contrast, today’s legal English evolved over the 300-year period that spanned the setting up of the first printing press in England (1476) and the American Declaration of Independence.⁶¹¹ It is a well-known fact that traditional legal documents, and in particular those written in English, are littered with archaic language and legalese. One can once again argue that it is the English who initiated this tradition, but the real question is why this archaic use of legal language survived into the modern era.

A possible answer lies at the heart of attorneys’ practice and their protection of the exclusivity of the language of law and legal documents. It has been stated that this is a way to protect the need for their expertise and advice on the interpretation and drafting of legal documents.⁶¹² Another argument is that lawyers draft documents in the most difficult language possible in order to create confusion and future loopholes in order make room for repudiation at a later stage.⁶¹³ It is also a well-accepted practice to use precedents in drafting documents which contain standard legal language. These precedents have been developed over many years and many legal professionals shy away from drafting their own documents for fear of leaving out something important or creating a legal loophole that does not exist in the precedent.

This practice of legal writing continued for hundreds of years until people started calling for reform of the language in which their legal documents were drafted, and this has still not

⁶⁰⁹ See Bekink and Botha op cit note 564 at 37.

⁶¹⁰ See 2 above.

⁶¹¹ Butt and Castle op cit note 7 at 2.

⁶¹² Walton J: ‘The Farrand Committee – Clarity’s Evidence’ (1982) 4 *Clarity: Journal of the International Association Promoting Plain Legal Language* 2 at 2.

⁶¹³ See Bekink and Botha ibid at 36.

eradicated the use of archaic language in legal writing.⁶¹⁴ Froehlich,⁶¹⁵ a specialist in the fields of intellectual property, contract law and creative writing, argues that the main reason for the continued use of traditional legal language is that lawyers prefer to use exclusive language in order to secure the need for legal advice in the field of contract drafting. If this is indeed the case, it is an unjustified reason for using legalese, as many laypeople will still have their contracts drafted by legal professionals even when the drafting is done in plain language. The reason for this is that legal professionals have the skill and knowledge surrounding contractual liability, laws, principles and presumptions which will result in a contract containing all the required elements to make it enforceable and legally sound in every way possible. This is why the calls for reform have been met with support from both legislation⁶¹⁶ and various organizations⁶¹⁷ all over the world.

6.4.2 Pressures to Reform

The call for the reform of legal language is as old as the tradition of separating colloquial language from its legal counterpart. The call for a change in legal language remained, however, largely unheeded until the 1960s and early 1970s, when the demands of the consumer were brought to the forefront after ordinary people began demanding information in understandable language.⁶¹⁸

Although it is debatable when precisely the Plain Language Movement started, it can be said that it was started by ordinary people in the street, who changed from resistance to action, and the academics who continually published literary writings on the matter calling for change.⁶¹⁹

While it can be stated that the style of legislative common law texts may have improved in recent times, the underlying traditions have not evolved to fundamentally change the nature of

⁶¹⁴ See discussion on the development of the Plain Language Movement, below at 6.5.

⁶¹⁵ LC Froehlich 'Archaic Language in Modern Contracts: Plain Language vs. Legalese' (2005) available at <http://designorati.com/articles/t1/graphic-design/332/archaic-language-in-modern-contracts-plain-language-vs-legalise.php> [Accessed on 12 May 2009].

⁶¹⁶ See discussion below

⁶¹⁷ Such as *CLARITY* and *PLAIN*, see discussion below at 6.7.

⁶¹⁸ Butt and Castle op cit note 7 at 59.

⁶¹⁹ One example of this is when in May 1971 Chrissie Maher started her campaign against the difficult language used in the benefit forms that the poor people had trouble filling in: 'Plain English Campaign www.plainenglish.co.uk; see also Mellinkoff D *The Language of the Law* (1963).

the texts themselves.⁶²⁰ This is not to say that the documents have not undergone a transformation in order to conform to a more understandable standard. Today the pressures to change the way in which legal documents are drafted are exerted not only by the people reading the documents or being affected by them, but also by various other organizations.⁶²¹ Statutory law is also no longer silent on the question of language use, and an examination of the various statutes dealing with plain language makes it clear that lawyers no longer have much of a choice in the matter. This becomes especially clear when the development of consumer protection legislation is considered. The movement has gained momentum in many countries,⁶²² and is more and more stridently advocating a shift towards a more understandable legal language for all. The development of plain language in some of these countries will now be discussed.

6.5 General Principles of the Plain Language Movement

6.5.1 Preliminary Remarks

The basic precepts of the plain language movement can be inferred from the following remarks made by the Law Reform Commission of Victoria (LRCV):⁶²³

The central platform of the plain language movement is the right of the audience – the right to understand any document that confers a benefit or imposes an obligation ... it is not the reader's responsibility to have to labour to discover the meaning ... Documents are not equitable if they cannot be understood by all parties who have read them.

Plain language enthusiasts also answer their critics by arguing in favour of the best interests of the client, using words that have been used by practitioners for many years. The author of the Clarity newsletter⁶²⁴ states that clients' interests are better served if:

⁶²⁰ Langton 'Cleaning up the act: using plain English in legislation' (2005) 54 *Clarity: Journal of the International Association Promoting Plain Legal Language* at 28.

⁶²¹ Such as *CLARITY* and *PLAIN* (Plain Language Association International)

⁶²² Such as UK, America, Canada and South Africa, see discussion at 6.7 below.

⁶²³ LRCV 'Legislation, Legal Rights and Plain English' (1986) Discussion Paper 1 Victorian Government Printer 1 at 8-9.

⁶²⁴ J Walton 'The Farrand Committee – Clarity's Evidence' 1982 4 *Clarity: Journal of the International Association Promoting Plain Legal Language* 1 at 2.

- i) they understand the documents they are about to sign;
- ii) the document is drafted according to the client's specific needs and not in accordance with an archaically worded precedent;
- iii) if lawyers accept that certainty of meaning, comprehensiveness and intelligibility are not mutually exclusive but can be achieved at the same time;
- iv) if lengthy clauses are broken up in a more sensible way by the use of punctuation and sub-clauses; and
- v) if drafters keep in mind that the interests and abilities of readers should be taken into account when drafting a legal document.

The greatest achievement of the plain English movement is probably the very fact of the movement's existence, and the general awareness of the problem and possible solutions which it has so successfully engendered. English has increasingly become the international language – in politics, diplomacy, commerce and literature. This requires people whose first language is not English to use English. The need for simplicity and clarity has thus become ever more necessary and obvious.⁶²⁵



6.5.2 Common Plain Language Principles

Since the inception of the Plain Language Movement, many common plain language principles have developed.⁶²⁶ Here are some examples of them and what they entail:

Simple, Clear Structure in Overall Document

Drafters should plan the structure of the document before starting the drafting process. With regard to the use of language, the overall structure and layout should be simple, user-friendly and appealing. This also involves chronological numbering of paragraphs, limited use of technical terms and foreign words and clear identification of all parties concerned.⁶²⁷

⁶²⁵ Samuels 'Plain Language in the UK' (2006) 56 *Clarity: Journal of the International Association Promoting Plain Legal Language* 9 at 9.

⁶²⁶ See F Viljoen and A Nienaber (eds) *Plain Language for a New Democracy* (2001) 71-75; see also Bekink and Botha op cit note 564 at 37.

⁶²⁷ Viljoen and Nienaber ibid at 71.

Structure within Sections or Parts

This principle highlights the importance of proper subdivision of parts of the document in order to make the contents easily understandable and clear.⁶²⁸

Sentence Construction and Language

Sentences should, as far as possible, be kept short and concise and the general rules are one concept per paragraph and one sentence to explain a concept. Sentences should also be kept as short as possible, should be in the active voice, should be phrased positively rather than negatively and should contain clear and unambiguous language.⁶²⁹

6.6 Criticism of the Plain Language Movement

Given how intrusive the Plain Language Movement is with regard to its criticism of legal writing, it is no wonder that many traditionalists have not favoured the acceptance of plain language drafting. Here are some of the criticisms that have been raised against plain language.⁶³⁰

6.6.1 Other Alternatives to Achieve Accessible Information

The contention of this criticism is that plain language is not suited to all consumer contracts and that trade practice legislation as well as the common law doctrines of unconscionability and reasonableness are more flexible in their approach than plain English legislation.⁶³¹

The fact that plain language provisions have made it into various consumer protection legislative documents⁶³² indicates that plain language is not an alternative to other consumer protection tools, but rather a supplementary aid. Plain language legislation should be read

⁶²⁸ Vijoan an Nienaber *ibid*; Bekink and Botha *op cit* note 564 at 38.

⁶²⁹ *Ibid*. See also Bekink and Botha *ibid* at 38.

⁶³⁰ DS Cohen 'Comment on the Plain Language Movement' (1981-1982) *Canadian Business Law Journal* at 422.

⁶³¹ See Goldberg 'Toward an Expanded Economic Theory of Contract' (1976) 10 *Journal of Economic Issues* 45. See also DS Cohen *ibid* at 422-424.

⁶³² See for example the National Credit Act 34 of 2005; the Consumer Protection Act 68 of 2008 in South Africa as well as all the other legislative tools as discussed at 7.5 below.

together with other tools and aids in order to formulate an approach that best serves the public as consumers.

6.6.2 Disproportionate Granting of Benefits to Selected Consumers

Cohen⁶³³ goes on to argue that plain English contracts ‘use the process of market transfer to control information flow’, which may result in a limited amount of consumers receiving maximum benefit.⁶³⁴ He bases his criticism on the fact that more highly educated and skilled individuals will benefit more due to their higher level of understanding of the plain language documents, and they will take greater risks based on this higher level of information.⁶³⁵

This may well be true, but in a normal society, where plain language is not used in consumer information and contract drafting, the poor and unskilled will suffer even more due to the fact that they scarcely know their rights and obligations in terms of those documents they sign or which contain information that is relevant to their situation. One cannot ban plain language simply because some people will benefit more than others. Indeed, this contention only seems to indicate that it is acceptable practice to keep information cloaked in legalese in order to ‘even out the playing field’ in that everyone is equally naive. This does not pass muster as a rational argument.

6.6.3 Simpler Language Will Not Simplify Complex Concepts

In this argument it is pointed out that the Plain Language Movement is too focused on the language of the document and the contracting parties and drafters have to consider every possible angle and possible problem.⁶³⁶ The interpreting judiciary and the lawyers who will be involved in the drafting the contracts are left out of the equation.⁶³⁷

⁶³³ Supra op cit note 620 at 422.

⁶³⁴ See also Leete’s criticism with regard to the influence on small businesses that are put under the same pressures as large corporations with regard to plain language enforcement. ‘Plain Language Legislation: A Comparison of Approaches’ (1981) 18 *American Business Law Journal* 511 at 517.

⁶³⁵ DS Cohen ibid at 425.

⁶³⁶ See Holden, *Securities for Banker’s Advances* (1954), p. 186 regarding the impossibility of drafting so as to include all possible contingencies.

⁶³⁷ DS Cohen ibid at 422.

The Plain Language Movement is focused mainly on language, but as we can see from the previous discussion,⁶³⁸ many national and international instruments that promote plain language also promote a contextual approach to interpretation in order to limit the number of words that actually have to be incorporated into a document. Drafters can therefore clearly define the principle concepts, whilst keeping the context in mind which will be brought in at the time of interpretation in order to correctly assess the meaning of a word or term.

6.6.4 Plain Language Views Consumer Contracts as Bilateral

This criticism is similar to the criticism that has been levelled against the objective approach of interpretation, in that commercial contracts cannot be seen as a subjective meeting of minds because of the nature of the contract as well as the mode of drafting.⁶³⁹ Cohen⁶⁴⁰ explains that the Plain Language Movement expects consumers to get all the relevant information at once, which should become clear in the single document presented to them.

This is not the aim of the Plain Language Movement, however. Once again, to leave things the way they are just because you cannot completely change them is not an acceptable argument. The Plain Language Movement is a *movement*. This entails that it is a process that guides drafters in order to make language *more* accessible, but not necessarily *completely* accessible in a way that defies all possibility and reason.

6.6.5 Unnecessary Amelioration of Consumer Contracts

Cohen bases this criticism on the probability that a consumer protection act will be promulgated which does not fully encompass the needs of the different consumers, trades and practices.⁶⁴¹

This has indeed come to pass in that the South African Consumer Protection Act⁶⁴² is just such an act. It has however not replaced all consumer legislation but has tried to supplement it with

⁶³⁸ See 5.7 above with regard to contextualism in consumer protection legislation.

⁶³⁹ See 3.4.2 above.

⁶⁴⁰ DS Cohen op cit note 630 at 434.

⁶⁴¹ DS Cohen ibid at 422.

⁶⁴² Act 68 of 2008.

regard to protection methods that have not been in force in any of the other legislative instruments, barring the National Credit Act.⁶⁴³ It is therefore more of an umbrella regulation rather than an all-encompassing amelioration. The introduction of sub-regulations will perhaps alleviate this problem, in that the application and ambit of the act can be made clear.

6.7 Enforcement of Plain Language Principles Around the World

Now that some of the criticisms of the Plain Language Movement have been discussed and refuted, it is time to move on to how plain language has influenced legislation all over the world. The enforcement of plain language principles has become a worldwide phenomenon and this has been incorporated into modern legislation on national and international levels all over the world.⁶⁴⁴

6.7.1 The United Kingdom

In the early 1970s the Renton Committee was appointed to investigate and report to parliament on the process of formulating statutes, and on 7 May 1975 the *Renton Report*,⁶⁴⁵ which recommended improving the explanatory materials which accompany statutes, was published. Modern developments relating to plain language can be traced back to the 1960s, however, when the general public started campaigning for the right to have public documents drafted in plain and understandable language.⁶⁴⁶

In 1975 consumer protection was given greater attention with the formation of the National Consumer Council, which soon joined the plain language cause by issuing booklets to show lawyers how to write in plain language.⁶⁴⁷ The National Consumer Council worked with the Plain English Campaign to promote plain English.⁶⁴⁸ The Plain English Campaign was also founded in the 1970s by Chrissie Maher and Martin Cutts.⁶⁴⁹ In the sphere of legal writing it has helped to clarify texts such as regulations, articles of association, consumer contracts, and

⁶⁴³ Act 34 of 2005.

⁶⁴⁴ See 6.7.1 and 6.9.2 below.

⁶⁴⁵ *The Preparation of Legislation*, 1975, Cmnd, Chapter VI, Appendix B, HMSO, London

⁶⁴⁶ Bekink and Botha op cit 564 at 45.


⁶⁴⁷ Asprey M *Plain English for Lawyers* 3 ed (2003) at 15.

⁶⁴⁸ Butt and Castle op cit note 7 at 64.

⁶⁴⁹ Asprey *ibid* at 15.

much more. In recent years, the Campaign has expanded internationally, opening a branch in the United States. It has also conducted workshops in other countries, including South Africa.⁶⁵⁰ The campaign projects in South Africa included preparing and testing a plain language version of the Human Rights Commission Act.⁶⁵¹ Cutts left the Plain English Campaign in 1989 and formed the Plain Language Commission in 1994, which is a plain language and document design consultancy. It offers training, writing, editing and typography services. It also gives its own writing accreditation and awards to institutions that promote plain language drafting.

One of the best-known promoters of plain language is a movement called ‘Clarity’. This is an international organization of lawyers devoted to improving legal drafting. John Walton is a solicitor living in Coventry, England. Now retired from legal practice, his career in the public and voluntary sectors has included posts as a local authority chief executive and as company secretary of an international development charity. He founded Clarity in 1983.⁶⁵² The organization’s aim is to encourage the legal profession to use good clear English, which would be achieved by:⁶⁵³

- 
- avoiding archaic, obscure and over-elaborative language in legal work;
 - drafting legal documents in language both certain in meaning and easily understandable;
 - exchanging ideas and precedents, not to be followed slavishly, but to give guidance in producing good legal English; and
 - exerting a firm but responsible influence on the style of legal English, with the hope of achieving a change in fashion.

Tribunals and organizations have sought Clarity’s views on simplifying legal language. Clarity is now a truly international organization boasting over 900 members in 34 countries and its following is a clear indication of the fact that the call for plain language is a loud one.⁶⁵⁴ Let us take a look at a few of the countries in which plain language has developed into a principle enshrined in many of the statutes across the world.

⁶⁵⁰ Butt and Castle op cit note 7 at 62.

⁶⁵¹ 1995.

⁶⁵² Butt and Castle ibid at 66.

⁶⁵³ Walton ‘The Case for “Clarity”: Improvement of Legal English’ (1983) 28 *Clarity: Journal of the International Association Promoting Plain Legal Language* 29 at 29.

⁶⁵⁴ Asprey op cit note 647 at 16.

6.7.2 The United States of America

Plain language documents first made their appearance in the United States in the 1970s, but the idea of entrenching plain language drafting through legislation was considered in some states more than a hundred years before then.⁶⁵⁵ One example of this is the decision by First National City Bank, on 1 January 1975, to move voluntarily to plain language because of the rising amount of debtors having to be sued for the collection of debts.⁶⁵⁶ The bank developed a new plain language consumer loan note and found that not only was it praised by its clients, consumer advocates politicians and judges, but that there was a substantial reduction in the number of suits the bank brought against consumers.⁶⁵⁷ President Nixon might have caused this movement to gain momentum when he decreed that the Federal Register be written in ‘layman’s terms’ and this set the tone for generally accessible language from the state.⁶⁵⁸

The legislature did not take long to catch on and in 1978 the New York State Plain English Law reached the statute book, which later became known as the Sullivan law. The statute required residential leases and consumer contracts to be ‘written in a clear and coherent manner using words with common and everyday meanings’.⁶⁵⁹ It was not long before other laws followed in its footsteps and ten other states⁶⁶⁰ have since passed laws which require

⁶⁵⁵ See Article 4, Section 20 of the Constitution of the State of Indiana of 1851, which provides that: ‘Every act and joint resolution shall be plainly worded, avoiding as far as practicable, the use of technical terms.’

⁶⁵⁶ Asprey op cit note 647 at 1.

⁶⁵⁷ Asprey ibid at 1. See also US Department of Commerce Office of Consumer Affairs, *How Plain English Works for Business*, (1984) US Government Printing Office, Washington at 3-7.

⁶⁵⁸ Locke J ‘A History of Plain Language in the United. States Government’ (2004); see <<http://www.plainlanguage.gov/whatisPL/history/locke.cfm>> States Government’ (2004) available at <http://www.plainlanguage.gov/whatisPL/history/locke.cfm> [Accessed 5 September 2008]

⁶⁵⁹ Butt and Castle op cit note 7 at 77.

⁶⁶⁰ The 11 states are: Connecticut: Connecticut General Statutes (42-152), Hawaii 1978 - Hawaii amended. State Constitution to include that ‘all government writing’ intended for the public should be clear. Art. XVI, §13, Maine: ‘PUBLIC Law, Chapter 6321263212 2nd Maine State Legislature An Act Regarding Prepaid Contracts for Heating Fuel, Minnesota: Minnesota Statutes: § 144.056 Plain Language in Written Materials, Montana: ‘Montana Code Part 11: Plain Language Contracts, New York: New York Laws: General Obligations : (5-701 - 5-705) Requirements Of Writing, Execution or Acknowledgment for Effectiveness or Enforceability, New Jersey: Consumer Protection Act, Title 56, Section 8, Oregon Oregon Statutes - Chapter 180 - Attorney General; Department of Justice - Section 180.545 - Plain language standards;, Pennsylvania: Plain Language Consumer Contract Act (PLCCA) 73 Article 2201-2212, West Virginia; West Virginia Consumer Protection Act - Chapter 46A: Consumer Credit and Texas: Business and Commerce Code Art 35.72.

plain, clear, conspicuous, accurate and understandable language to be used in certain consumer contracts.⁶⁶¹

Following the trend, a number of bar associations have also lent their support to the plain language movement since then. The Michigan and Texas Bar Association journals both published regular plain language columns, and at the University of Florida, plain language drafting in law became a compulsory course for all law students.⁶⁶²

Another benchmark was reached in August 1992 when the Legal Writing Institute – the organization of legal writing teachers in American law schools – formally resolved to urge its 950 members to work with their respective bar associations to establish plain language committees. The institute also passed a ‘Plain Language Resolution’, which included the following:

1. The way lawyers write has been a source of complaint about lawyers for more than four centuries.
2. The language used by lawyers should agree with the common speech, unless there are reasons for a difference.
3. Legalese is unnecessary and no more precise than plain language.
4. Plain language is an important part of good legal writing.
5. Plain language means language that is clearly and readily understandable to the intended readers.⁶⁶³

Since then there have been four significant developments that are indicative of a move towards plain language in the law.⁶⁶⁴ First, in 1998 President Clinton issued an Executive Order requiring federal government documents to be in plain language.⁶⁶⁵ Second, also in 1998, the Securities and Exchange Commission announced rules requiring some parts of prospectuses to be in plain language.⁶⁶⁶ Third, for years the Federal Court has been redrafting its rules of appellate procedure, under guidance of Garner, who is a leading expert in the United States on

⁶⁶¹ Asprey op cit note 647 at 2.

⁶⁶² Butt and Castle op cit note 7 at 80.

⁶⁶³ *The Second Draft* (1992) 8 *Bulletin of the Legal Writing Institute* no 1.

⁶⁶⁴ Butt and Castle op cit note 7 at 80.

⁶⁶⁵ The text is in (1998) 42 *Clarity: Journal of the International Association Promoting Plain Legal Language* at 2.

⁶⁶⁶ Clyde, ‘Plain Language Turns the Corner: New SEC Rules for Prospectuses’ (1998) *Clarity: Journal of the International Association Promoting Plain Legal Language* 42, 9-14

the exponents of plain language drafting.⁶⁶⁷ And fourth, the American Bar Association resolved in August 1999 to urge agencies ‘to use plain language in writing regulations, as a means of promoting the understanding of legal obligations’.⁶⁶⁸

The Plain Language in Government Communications Act⁶⁶⁹ has also recently been tabled and will require government agencies to write many future documents in plain language – language that is clear, concise, and easy to understand. Specifically, it mandates plain language for new government documents related to:

- Government requirements.
- Government programmes.
- Obtaining government benefits.
- Obtaining government services.

This bill, however, never became law but its principles were taken over in the Plain Language Act of 2009.⁶⁷⁰ This act requires each executive agency to use plain language in any document (other than regulation) issued to the public, including documents and other text released in electronic form.⁶⁷¹ In this act Plain Language is defined as ‘language that the intended audience can readily understand and use because that language is clear, concise, well organised, and follows other best practices of plain language writing’.⁶⁷²

6.7.3 Canada

Canadians have been actively promoting the use of plain language since the 1970s. In 1979 the Bank of Nova Scotia rewrote its loan forms in more understandable language and at the same time the Royal Insurance of Canada produced a plain language insurance policy.⁶⁷³ The Plain

⁶⁶⁷ See Garner G, *Guidelines for Drafting and Editing Court Rules* (US Govt Printing Office, 1997).

⁶⁶⁸ Resolution of American Bar Association adopted by House of Delegates, 9-10 August 1999.

⁶⁶⁹ of 2007 (HR3548/S2291).

⁶⁷⁰ H.R. 946 Plain Language Act of 2009 (111th Congress 2009-2010).

⁶⁷¹ See Congressional Research Service Summary (2/10/2009).

⁶⁷² S3(3) Plain Language Act 2009.

⁶⁷³ Asprey op cit note 647 at 7.

Language Institute and the Plain Language Project, both in Vancouver, conducted substantial research into the use of plain language and the law.⁶⁷⁴

In 1988 the Justice Reform Committee of British Columbia issued its report, called *Access to Justice*. It recommended establishing a plain language committee to develop a strategy for introducing plain language into the justice system. Then later in 1990, the Canadian Bar Association and the Canadian Bankers' Association issued a report called *The Decline and fall of Gobbledygook: Report on Plain Language Documentation*. It recommended ways to promote the use of plain language in the legal profession and in banking. The Canadian Bar Association adopted these recommendations by resolution in 1991, urging organizations to draft their documentation in plain language.⁶⁷⁵ In March 2000 the Canadian Bankers Association announced that its members were 'committed to providing customers with banking information which they can easily understand and use'⁶⁷⁶ and set out the various steps that it would take to achieve this. Step one was to 'conduct a plain language audit of ... mortgage documents to identify if and how ... documents need to be changed to reflect plain language writing principles'.⁶⁷⁷

Two Canadian women, Cheryl Stephens and Kate Harrison, were the founders of what is now called PLAIN (the Plain Language Association International). Through PLAIN's website⁶⁷⁸ and other resources, plain language professionals and other interested people can get information, interact and exchange ideas.

6.7.4 Australia

Efforts to make federal legislation more readable have been taking place in Australia since 1973 and both the Commonwealth and the New South Wales Parliamentary Council's Offices have had plain English policies since 1986.⁶⁷⁹ By the mid-1990s there were two major projects

⁶⁷⁴ Butt and Castle op cit note 7 at 81.

⁶⁷⁵ Asprey op cit note 647 at 36.

⁶⁷⁶ See Canadian Banking Code available at <http://www.cba.ca/en/viewdocuments.asp?fl=3&sl=11&tl=127&docid=296&pg=1> [Accessed on 12 July 2009]

⁶⁷⁷ Canadian Bankers Association website at <http://www.cba.ca/en/viewdocuments.asp?fl=3&sl=11&tl=127&docid=296&pg=1> [Accessed on 12 July 2009]

⁶⁷⁸ <http://www.plainlanguagenetwork.org> [Accessed 1 October 2009].

⁶⁷⁹ Asprey ibid at 8.

to simplify commonwealth laws: the Corporate Law Simplification Program,⁶⁸⁰ and the Tax Law Improvement Project.⁶⁸¹

Today a number of Australian statutes prescribe plain language in certain areas. This is especially prevalent in the realm of consumer-related arenas. Consumer credit legislation in all states requires contracts and notices by credit providers to be ‘easily legible’ and ‘clearly expressed’.⁶⁸² The *Contracts Review Act* 1980 (NSW) offers a good example of how legislators highlighted the importance of plain language in documents. Under section 9, in considering a contract that is wholly or partly in writing, the court may have regard to (among other things) ‘the physical form of the contract, and the intelligibility of the language in which it is expressed’. Australian case law indicates that courts have begun to look closely at the language in which contracts are couched, and particularly take into account the impediments to understanding posed by documents drafted in the traditional style.⁶⁸³

6.7.5 South Africa

As stated above, South African contract law has traditionally adopted the Roman-Dutch principles with regard to *consensus*. The use of plain language as such seems to have only recently gained public attention as a prerequisite for giving effect to that intention. With the inception of democracy in South Africa in 1994, a new language dispensation was also born. Eleven languages were granted official status and this had various implications for the drafters of legislation and other legal documents.⁶⁸⁴ The plain legal language movement took off in South Africa after 1994, as part of dismantling old, outdated structures and views. South Africa’s interim Constitution of 1993 and new Constitution of 1996 heralded a new era of opportunity for developing a plain language culture and practice. The new Constitution itself protected the right of access to information, and included a broad range of civil, political,

⁶⁸⁰ Announced in April 1993.

⁶⁸¹ Established in December 1993.

⁶⁸² For example, Consumer Credit (NSW) Code, s 162.

⁶⁸³ Cases include *National Australia Bank Ltd v Nobile* (1988) ATPR 40-855; *Bridge Wholesale Acceptance (Australia) Ltd* (1989) v *GVS Associates Pty Ltd* (1991) ASC 57, 116; *Goldsbrough v Ford Credit Australia Ltd* (1989) ASC 58 at 583 and *National Australia Bank Ltd v Hall* (1993) ASC at 56-234.

⁶⁸⁴ M Pienaar M ‘The Use of Plain Language – not that simple’ (2002) 36 1&2 *Journal for Language Teaching* 146 at 147.

economic, social and cultural rights.⁶⁸⁵ The government called upon international language experts to help it kick-start its plain language work with a seminar, which was held in Cape Town in March 1995.⁶⁸⁶

One of the major problems is that the majority of users of English in South Africa are second-language speakers with a varying degree of proficiency in English and half the population is functionally illiterate.⁶⁸⁷ To combat these challenges South Africa's parliament developed and piloted a Parliamentary Plain Language Project under the auspices of the Language Services Section of parliament and the European Union's Parliamentary Support Programme. The pilot project aimed to develop plain language policy and guidelines, and train parliamentary staff in the use of plain language in documents such as public fact sheets, both in English and in the 10 other official South African languages.⁶⁸⁸

The post-democratic constitutional dispensation also played an important role with regard to the development of plain language principles. This is especially clear from the drafting process of the 1996 Constitution, as it was drafted by an elected Constitutional Assembly and subsequently had to be certified by the Constitutional Court.⁶⁸⁹ The Constitutional Assembly employed a number of principles in order to draft the new constitution in plain language so as to make it as effective and accessible as possible in light of the Bill of Rights.⁶⁹⁰ The most important methods and principles that they used were:⁶⁹¹ identify direct obligations clearly; the word 'shall' was excluded and replaced by 'should';⁶⁹² more standard and broader terms were used;⁶⁹³ the active rather than passive voice was used;⁶⁹⁴ short and concise sentences were used; simple and contemporary words were used; unnecessary cross-referencing was avoided; definitions were provided at the end of the Constitution;⁶⁹⁵ and a logical structure and layout

⁶⁸⁵ D Fine 'Plain language and developing human rights materials' (2001) 46 *Clarity: Journal of the International Association Promoting Plain Legal Language* 8 at 8.

⁶⁸⁶ Asprey op cit note 647 at 27.

⁶⁸⁷ F Viljoen 'Baring the nation's soul through plain language' (2001) 46 *Clarity: Journal of the International Association Promoting Plain Legal Language* 15 at 15.

⁶⁸⁸ Asprey ibid at 28.

⁶⁸⁹ More information available at www.constitutionalcourt.org.za [Accessed on 2 March 2009]. This includes an overview of the history of The Constitution of South Africa 108 of 1996.

⁶⁹⁰ Chapter 2 of the Constitution of the Republic of South Africa Act 200 of 1993

⁶⁹¹ See Bekink and Botha op cit note 564 at 40.

⁶⁹² See Sections 9, 10, 11 and 12 of the 1996 Constitution

⁶⁹³ For example in S11 where it is stated 'Everyone has the Right to Life' instead of 'every person...'

⁶⁹⁴ See also S11 of the 1996 Constitution .

⁶⁹⁵ See S239 of the 1996 Constitution

with regard to the most important provisions was deployed, as was a chronological arrangement.⁶⁹⁶

Plain language has also become a focal point outside the government arena. The private sector is moving towards a more ‘citizen-friendly’ approach. Private firms with plain language drafting and document design expertise are beginning to help corporations and professional firms simplify and improve their documents. The Law Society of South Africa has also done its bit by publishing manuals explaining the legal rights of citizens, using simple language with illustrations.⁶⁹⁷ On 1 April 2000 another landmark was reached when all the major banks adopted a Code of Banking Practice. Under the Code, all banking contracts were to be revised in plain language before October 2000. Even though the deadline was not met by all the banks, the Office of the Banking Adjudicator, which enforces the Code, announced on 11 November 2000 that, to avoid injustice, ‘unfair terms’ and ‘legal technical language’ would be ‘disregarded unless the bank could show it was explained to the client.’⁶⁹⁸

There have also been major changes with regard to consumer protection, especially in the arena of credit agreements, where plain language has now become a prerequisite in consumer contracts.⁶⁹⁹

6.8 Why Plain Language?

6.8.1 Increased Efficiency

One of the main benefits of plain language is increased efficiency. Plain language documents are easier to read and understand.⁷⁰⁰ As was previously highlighted, most of South Africa’s population does not speak English as their first language, so it is even more imperative in this context that documents written in English are free of jargon and strange legal phrases.

⁶⁹⁶ The Constitution starts with a comprehensive table of contents, a preamble, the most important and/or foundational issues first and general provisions at the end together with various schedules detailing secondary information.

⁶⁹⁷ Kahn E ‘Plain English in the law and documents in South Africa’ (2001) 46 *Clarity: Journal of the International Association Promoting Plain Legal Language* 4.

⁶⁹⁸ Lane ‘South African banks should use plain language’ (2000) 46 *Clarity: Journal of the International Association Promoting Plain Legal Language* 6.

⁶⁹⁹ See the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008.

⁷⁰⁰ Butt and Castle op cit note 7 at 86.

Plain language is also more efficient for lawyers. If plain language documents became the norm, the legal profession as a whole would benefit. Even when a legal professional works from a precedent, the plain English precedent can be adapted more easily to the needs of each transaction than its traditional counterpart, because its meaning is more transparent.⁷⁰¹

6.8.2 Plain Language is More Productive

Productivity is a logical consequence of efficiency and also one of the other benefits of the use of plain language. According to Stephens,⁷⁰² the benefits to business are increased market-share, cost-savings, and improved customer relations. Driven by these positive factors, and also reeling from losses suffered from the use of legalese in consumer agreements, banks, insurance companies, realtors and other major businesses are seeking lawyers who can write effective legal documents in customer-friendly, plain language. In short, plain language can therefore lead to productivity in both the private and business sphere by ensuring that customers, consumers and ordinary citizens understand what they are reading. Where a standard form is to be completed by a customer, plain language reduces customer queries about meaning; it also reduces customer errors in filling in the forms.

6.8.3 Fewer Errors and Less Need to Litigate

Another benefit of using plain language is the potential for reducing mistakes. Traditional legal language tends to hide inconsistencies and ambiguities. Errors are harder to find in dense, convoluted prose. By exposing the contents of the document, plain language reduces the likelihood of professional negligence claims against drafters based on misinterpreted instructions.⁷⁰³ Logically, if plain language helps reduce errors it should also help reduce litigation about the meaning in the text of the documents. This is not to say that it will completely eradicate litigation, but the amount of litigation will certainly be minimized. The reason that litigation occurs is that interpretation is not only an assessment of the language of a

⁷⁰¹ Butt and Castle *ibid* at 88.

⁷⁰² 'Plain Language for Business Lawyers' (1991) Excerpted from an address presented before The Business Law Section, Canadian Bar Association, February at 20.

⁷⁰³ Butt and Castle *op cit* note 7 at 89.

contract: it also involves the conflicting interests of the various parties.⁷⁰⁴ Even if a contract is drafted in plain, clear and understandable language and is entered into on the basis of good faith, tensions could develop between the parties.⁷⁰⁵ Such is the nature of human behaviour and therefore a drafter can only do his/her best to foresee possible disputes and try and mitigate them as much as possible. Even then, another attorney will look at the document in order to create possible ‘loopholes’ and might ‘create’ ambiguities where there were not any to begin with in order to better accommodate his/her client’s case.⁷⁰⁶

Better Image for the Legal Profession

It is well known that legal professionals have never had a good reputation when it comes to the drafting of understandable legal documents. Lawyers, the public thinks, are preoccupied with legal precision at the expense of clear communication – they are indifferent to whether their clients understand the documents they are asked to sign. Lawyers may *think* that they do care whether they communicate – but the public perception seems to be otherwise.⁷⁰⁷

Writing documents in plain English is the first step towards writing for the reader– a style of writing that Houston⁷⁰⁸ calls customer focus. According to Rawson’s 7 C’s of ‘Client Centered Communication’,⁷⁰⁹ lawyers should learn that to satisfy a client *fully*, a text should be clear, concise, coherent, correct, complete, concrete and customized.

If legal professionals adhere to these principles and, as a result, make legal documents more understandable and accessible to the layperson, the image of the legal profession would be greatly enhanced.

⁷⁰⁴ See JM Van Dunné *Verbintenissenrecht* (1993) Deel 1 2ed Kluwer Law International Deventer; cited and translated. by Cornelius op cit note 26 at, 27

⁷⁰⁵ See for example *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1935 AD at 300, where it was stated that a *bona fidei* belief that one is acting correctly is not sufficient to exclude liability.

⁷⁰⁶ See also McMeel op cit note 212 at 433 where it is stated that that disputes do not arise because of a problem with interpretation but rather that they are ‘problems about the application of a contract to the grammatical niceties.’

⁷⁰⁷ P Butt ‘The Assumptions Behind Plain Legal Language, Some thoughts for the PLAIN conference Toronto’ (2002) 17 (Presented to the Fourth Biennial Conference of the PLAIN Language Association International, September 27, 2002)

⁷⁰⁸ J Houston ‘Writing for your reader’ (2000) 45 *Clarity: Journal of the International Association Promoting Plain Legal Language* 28 at 28.

⁷⁰⁹ C Rawson ‘Plain English is a gift to foreign lawyers’ 2000 45 *Clarity: Journal of the International Association Promoting Plain Legal Language* 24 at 24-5.

6.8.4 Compliance with Statutory Requirements

In this discussion it has been shown that many countries have passed laws requiring specified documents to be in plain language.⁷¹⁰ These laws indicate that legislators are against lawyers drafting technical, difficult documents and propose to intervene in this matter, especially where general consumers are concerned. It is therefore not only beneficial for lawyers to draft in plain language, but mandatory in certain cases. Legal practitioners will therefore only benefit, and avoid possible legislative intervention, by drafting easily understandable documents in plain language.

6.9 Plain Language and Consumer Protection

6.9.1 General Remarks

There are many factors that make the reform of legal language desirable. According to Hofman,⁷¹¹ the most compelling reason is that obscure language can deprive ordinary people of their legal rights and when language is obscure ordinary people have to consult an expert to learn about their rights. Legal rules are usually created for general purposes, but contracts can be regarded as sources of law that are created for specific purposes by the parties to deal authoritatively with certain matters amongst themselves. It provides the basis on which groups of individuals can regulate matters of mutual concern in such a way that the law will generally give effect to their will and enforce the legal rules that the parties have created for their specific purposes.⁷¹² The problem is that it is seldom the parties themselves who draft the contracts. Contracts are either drafted specifically for the parties or parties make use of standard forms drafted by legal professionals. They are therefore drafted using the legal terminology and standardized phrasing, which is often unnecessarily complex and written in legalese that the ordinary 'person in the street' cannot understand at first glance. Consumers have a right to complete information on the price, quality, quantity, ingredients and other conditions under which the goods and services they consume are produced. It is only in this

⁷¹⁰ Butt and Castle op cit note 7 at 89

⁷¹¹ Hofman op cit note 3.

⁷¹² Cornelius op cit note 26 at 2.

way that consumers are able to participate meaningfully in economic life and exercise their rights.

According to MacDonald,⁷¹³ there are five objectives of plain English, and these are often referred to as the five C's of plain English. These are coherence, comprehensiveness, consistency, clarity and care. I would like to further examine the objective of care, which, according to the writer, is divided into care for the physical appearance of the writing and care about the reader. Under the second leg of the concept of care is the need for consumer protection. Consumers have an expectation that they will understand the language of the documents presented to them before they enter into a contract with other entities and fellow consumers.

It does not mean, however, that other parties do not also require and expect understandable legal documents. According to MacDonald,⁷¹⁴ all consumers of legal services are becoming more articulate in their demands for plain language documents. Parties are wary of incomprehensible legal documents and are more likely to exhibit loyalty to legal service providers that promote the use of plain language as a tool in their communication practices. The need for consumer protection in legal documents is a relatively new concept, especially in South Africa, and it is for that reason that the legislature decided to intervene and set out guidelines in this respect, at least where the granting of credit occurs.

6.9.2 Protection of the World's Consumers through Plain Language

The importance of consumer protection is echoed in countries around the world. One example of this is the enforcement of the European Union directive on unfair terms in consumer contracts, which came into force in the UK on 1 July 1995. It was enacted in the form of the Unfair Terms in Consumer Contracts Regulations 1994, which have since been revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999.⁷¹⁵ The regulations state that a standard term should be expressed in 'plain, intelligible language'. An 'unfair term' in a consumer contract is not binding on the consumer. A term is open to challenge if it

⁷¹³ 'Plain English in the Law: A new model for the 21st Century' 2003 *Sri Lanka Journal of International Law* 116.

⁷¹⁴ *Ibid* at 18.

⁷¹⁵ Asprey *op cit* note 647 at 15.

could put the consumer at a disadvantage because he or she is not clear about its meaning – even if its meaning can be worked out by a lawyer. If there is any doubt as to what a term means, the meaning most favourable to the consumer will apply.⁷¹⁶

In March 2003 the UK Law Society published a new set of customer guides to plain receiving information in plain language as well as a Clients Charter. These serve as information tools for the general consumers. The Clients Charter, in particular, promises a solicitor will ‘make every effort to explain things clearly, and in terms you can understand, keeping jargon to a minimum’.⁷¹⁷

In Canada the Alberta Department of Consumer and Corporate Affairs recently issued a discussion paper on plain language in consumer contracts. The Alberta government has enacted the first plain language regulation in Canada in the recent Financial Consumers Act of Alberta with a requirement of plain language in consumer financing documents.⁷¹⁸

As was stated above, the consumer credit laws in Australia also make it compulsory for credit providers to provide documentation that is ‘easily legible’ and clearly expressed. Consumer protection legislation both at commonwealth and state level empowers courts to vary or set aside contracts that are unconscionable or unjust. Here the use of plain language also seems to be a deciding factor. Under, for example, sections 51AB and 51AC of the *Trade Practices Act* 1974, when considering whether conduct is unconscionable, the court may have regard to

⁷¹⁶ Regulation 5,7 and 8.

⁷¹⁷ Asprey op cit note 647 at 19.

⁷¹⁸ See the Financial Consumer Act, the Legislative Assembly of Alberta, 22nd Legislature, 39 Elizabeth II, S13

Duty to use plain language:

- (1) The following documents should be in readily understandable language and form;
 - (a) application forms for consumers who wish to invest in named financial products;
 - (b) agreements setting out the terms and conditions of named financial products;
 - (c) any information provided to a consumer under section 10(2) or 11(1);
 - (d) any other documents described in regulations.
- (2) Subsection (1) does not apply to words or forms of documents that are required by law.
- (3) Proof that reasonable efforts have been made to comply and maintain compliance with subsection (1) is a complete defence.
 - (a) in a prosecution under subsection (1); or
 - (b) in a dispute about whether subsection (1) has been complied with

‘whether the consumer was able to understand any documents relating to’ the transaction.⁷¹⁹ Similarly, under section 7 of the *Contracts Review Act* 1980 (NSW), a court may vary or set aside contracts that are ‘unjust’ in the circumstances in which they are made.⁷²⁰

The principle of unconscionability is not limited to Australia, however. US courts have held that the elements of unconscionability include:

- hiding clauses which are disadvantageous to one party in a ‘mass of fine print trivia’ or in places which are inconspicuous to the party signing the contract
- phrasing clauses in language that is incomprehensible to a lay reader or that divert the lay reader’s attention from the problems they raise or the rights they extinguish.⁷²¹

From the above discussion it is clear that, in many countries, plain language has now become a prerequisite when consumer contracts are drafted. South Africa has also recently joined the consumer protection movement with the promulgation of the National Credit Act⁷²² and the drafting of the new Consumer Protection Act.⁷²³

Consumer Protection in South Africa

The focus on consumer protection in South Africa does not have a long history. However, it does seem as if South Africa has taken many of the principles and legislative indicators from other countries and tried to implement them in South Africa.

In November 2005, the parliament of South Africa enacted the National Credit Act of 2005,⁷²⁴ which heralded in a whole new era focused on the needs of the consumer. This continued with the promulgation of the Consumer Protection Act,⁷²⁵ which comes into operation in April 2010. As will become clear in the discussion below⁷²⁶ parties drafting consumer-related contracts no longer have the right to use complicated legalese in their drafting and should now

⁷¹⁹ Butt and Castle op cit note 7 at 94.

⁷²⁰ Butt and Castle op cit note 7 at 94.

⁷²¹ *Willie v Southwestern Bell Telephone Company* 549 P 2d 903 at 907 (1976).

⁷²² Act 34 of 2005.

⁷²³ Consumer Protection Act 68 of 2008.

⁷²⁴ Act No. 34 of 2005. Published in Government Gazette 28619 on 15 March 2006.

⁷²⁵ 68 of 2008.

⁷²⁶ See discussion on consumer protection at 7 below.

keep the reader of the document in mind. The objectives that the legislator had in mind should therefore include the drafting and implementation of clearer documents drafted in plain and understandable language, in order to protect consumers.

6.10 Plain and Simple

Legal documents have many functions. They create a private law for the parties, governing their relationship for a specified time and for a specified purpose.⁷²⁷ The change from traditional legal language use to a more commercially friendly alternative has begun and continues to gain momentum. Legal practitioners should take note of this change and a change in law culture is required in order for the plain language movement to become part of everyday drafting of legal documents. Despite the progress made, it will take some time before a commitment to writing in plain, clear, precise language becomes a legal cultural norm.⁷²⁸ It is also clear that in many instances, such as in the drafting of credit agreements and other consumer contracts, it is now a prerequisite and not an option for businesses to reassess their contracts and the information presented to the consumer. Perhaps we are entering a new era of consumerism where access to information will always be in clear and understandable language. If so then legal professionals will have to leave the precedents behind and start looking to plain English to convey the true intentions of their clients.

⁷²⁷ Butt and Castle op cit note 7 at 95.

⁷²⁸ Schooner 'Review Essay: Communicating Governance: Will Plain English Drafting Improve Regulation?' (2002) 70 *The George Washington Law Review* 180 at 180.

7 Consumer Protection and Plain Language

Legum servi sumus ut liberi esse possimus

(We are the slaves of the law in order that we are able to be free)⁷²⁹

7.1 Why Consumers Need Language Protection

Previous chapters have shown that in South African law the primary concern of courts when assessing or interpreting a contract is to ascertain the intention of the parties,⁷³⁰ and this intention is sought in the words they used to express themselves.⁷³¹ As is evident from the discussion on the Plain Language Movement,⁷³² the language used in contracts has developed from the ideal that it is an expression of intention. The main elements that make commercial contracts different from others is that the normal ‘horizontal contract’ between two consenting individuals is based on consensus whereas the ‘vertical contract’ between consumer and service/goods providers is of such a nature that the consumer is limited as to what is contained in the contract that is being presented to him/her. The consumer should either sign or endeavour to find an alternative provider. It is this unevenness in bargaining power that led many goods, credit and other service providers to have long complicated contracts drafted that protected their interests above and beyond those of the consumer. It is therefore in this arena of the law that special protection was needed. This is especially true for standardized consumer contracts.⁷³³ It is an unavoidable result of a growing economy and consumer participation in the modern society that many agreements that are concluded on a daily basis are embodied in standard form.⁷³⁴ These standard form contracts are usually presented by one contracting party to another on the basis that he/she either accepts it in its entirety or declines

⁷²⁹ <http://latin-phrases.co.uk>.

⁷³⁰ See discussion above; *Conradie v Rossouw* 1919 AD 279; see also Van der Merwe et al op cit note 11 at 280.

⁷³¹ See discussion above; See also Van der Merwer ibid et al ibid at 280.

⁷³² See discussion above at 6.9.

⁷³³ See *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd* 1979 3 SA 210 T, where the court stated that standardized contracts can have the result that an unreasonable term can escape an individual’s notice and can have the result that he/she is bound to a term that he/she was not aware of at the time the contract was concluded.

⁷³⁴ See Van der Merwe et al op cit note 11 at 310.

entirely to contract; these have come to be known as so-called contracts or terms of adhesion.⁷³⁵

In 1973 O'Connor⁷³⁶, a member of the New York Bar, pointed out that many people have now to come to consider it common knowledge that modern commercial contracts are not meant to be understood by consumers. He quotes a Comment on the *Restatement of Contracts* in which it was stated that 'A party who makes regular use of standardised form of agreement does not ordinarily expect his customers to understand or even read the standard terms.'⁷³⁷

On the other side of the globe in the very next year in *A Schroeder Music Publishing Co Ltd v Macaulay*⁷³⁸ an English court distinguished between two types of standard contracts. The first is of an ancient origin that sets out terms on which commonly occurring mercantile transactions are to be carried out, for example bills of lading. Standard clauses contained therein have been settled through years of negotiations between representatives of the commercial interest involved and they have been widely accepted because they facilitate trade conduct. There is a presumption that these contracts are reasonable as they are negotiated between parties of similar strength in bargaining power. The second are the kind that are prescribed by an organization and presented to a party in a weaker bargaining position on a take-it-or-leave-it basis. There is no presumption of reasonableness with regard to the second type of contract. These contracts are also referred to as 'contracts of adhesion', a reference to their unilateral binding characteristics,⁷³⁹ or 'the standardized mass contract',⁷⁴⁰ because of their mass-produced, standard character. These documents have been produced in response to the development of large-scale enterprise. They cannot be said to be true reflections of the parties' intentions due to their generality. As Kessler⁷⁴¹ eloquently states: 'The individuality of the parties which so frequently gave colour to the old type contract has disappeared; the stereotyped contract today reflects the impersonality of the market.'

⁷³⁵ See Beatson op cit note 63 at 163.

⁷³⁶ 'Plain English' 34 *Business Law Review* (1978-1979) 1453 at 1453.

⁷³⁷ Restatement (Second) of Contracts § 237, Comment b (1973)

⁷³⁸ 1974 (3) All ER616 (HL)

⁷³⁹ See Beatson op cit note 63 at 163; See also Saleilas, *De la Déclaration de la Volonté* (1901)

⁷⁴⁰ Llewelyn 'What Price Contract – An Essay in Perspective' (1931) 40 *Yale Law Journal* 704 at 705; Isaacs 'The Standardisation of Contracts' (1917) 27 *Yale Law Journal* 34.

⁷⁴¹ Kessler F (1943) 'Contracts of Adhesion: Some Thoughts about Freedom of Contract' 43 *Columbia Law Review* 629 at 630.

In essence it is these contracts, which were drafted in legalese and handed to consumers on a daily basis that inspired various consumer legislations to include a plain language clause with regard to contracts, in standard form, given to consumers in many countries. The reason why legislation was needed to remedy the problem was that even though contracts have, in principle, to adhere to the requirements of good faith,⁷⁴² the courts in most countries with an English law tradition have rejected the idea that they have the discretion to disregard contractual principles which they regard as unreasonable or unfair.⁷⁴³ In order for the problem to be mitigated, the contracts themselves would have to change so that the inequality would be remedied to a certain extent.

As South African law is a derivative of English law and Roman-Dutch law⁷⁴⁴ it might be worthwhile to look not only at South African development but at the development of English law to see how it developed with regard to consumer legislation in its own right. Examining how the Dutch law developed in relation to consumer contracts would also be useful. Did the systems of law that founded our own develop faster as regards the enforcement of the use of plain language in contracts? To answer this question a short look at important aspects of these legal systems and their legislative development will be undertaken before the South African perspective and the development of consumer protection through the use of plain language in some other countries are examined.

7.2 Plain Language in English common Law and Modern Legislation

In the so-called ‘contracts of adhesion’⁷⁴⁵ in English law we can see that the clauses contained in these contracts were originally treated exactly the same as other contractual clauses.⁷⁴⁶ Where parties embody their contract in standard form, courts presume that the parties chose to be bound by the principles surrounding it.⁷⁴⁷ To illustrate, Lord Denning stated⁷⁴⁸ that if the business community was not satisfied with the construction that a certain court has placed on a

⁷⁴² See *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality I* (1985) 1 SA 419 (A); *President Versekeringsmaatskappy Bpk v Trust Bank van Africa Bpk en 'n ander* 1989 1 SA 208 (A) at 216B-G; see also Kerr op cit note 142 at 301.

⁷⁴³ *Brisley v Drotsky* [2002] 4 SA 1 SCA at 12-19.

⁷⁴⁴ See *Conradie v Rossow*, supra at 280.

⁷⁴⁵ See Kessler F op cit 738 at 629-630.

⁷⁴⁶ See Beatson op cit note 63 at 164.

⁷⁴⁷ See for example *Dunlop & Sons v Balfour Williams & Co* All ER [1892] 1 QB 507 at 518.

⁷⁴⁸ *The Annefield* (1971) p 168; See also Butt & Castle op cit note 7 at 56.

commercial document they should alter the form. However, there were some common law developments in protection afforded to a party in a weaker bargaining position. Lord Denning⁷⁴⁹ stated that the courts would intervene in all cases of inequity of bargaining power on the grounds of coercion, undue influence and unconscionable bargains as well as other cases such as penalties.

The case that stands out is that of an unconscionable bargain. The principle as set out in *Earl of Aylesford v Morris*⁷⁵⁰ is that if an agreement was found to amount to an ‘unconscionable bargain’ there was immediately a presumption of fraud and the party looking to profit from the contract had to refute the presumption by submitting contrary evidence.⁷⁵¹ The existence of these common law principles seems to indicate that English courts did not want to look at the objective manifestations of consensus in the event that there was some reason that consensus was improperly obtained or absent, which goes against the usual objective approach as employed by the courts in assessing contractual enforceability.⁷⁵²

There was a void that courts tried to fill when looking at contracts entered into by parties in an unequal bargaining position. The common law was not comprehensive enough to deal with the emergence of standardized forms of contracts emerging everywhere in the modern society, however.⁷⁵³ This is because these contracts, concluded on a daily basis, were drafted in legalese, were sometimes in small print and were binding people to contractual terms without their knowledge. The English legislature therefore started intervening in the 1960s with the enactment of the Misrepresentation Act⁷⁵⁴ that gave courts the power to strike down a contract provision if it was unjust or unfair.⁷⁵⁵ Subsequent enactment of the Consumer Credit Act of 1974, the Unfair Contract Terms Act of 1977, and the Unfair Terms in Consumer Contracts Regulations⁷⁵⁶ also had a great impact on terms in ‘adhesion contracts’. The 1977 Act was enacted to deal with exemption clauses in contracts and posted notices, whereas the Unfair

⁷⁴⁹ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 Commonwealth Law Reports at 447; *Louth v Diprose* (1992) 175 CLR.

⁷⁵⁰ (1873) Lloyd’s List Law Reports (‘L.R.’) 8 Ch. App 484 at 90.

⁷⁵¹ See also Beatson op cit note 63 at 296.

⁷⁵² See Beatson ibid at 296.

⁷⁵³ Beatson ibid at 163.

⁷⁵⁴ Of 1967.

⁷⁵⁵ See S3 of the Act.

⁷⁵⁶ S.I 1999 No. 2083 this was originally implemented in terms of the E.E.C Council Directive 93/13 (O.J.L. 95, 21 April 1993, p.29) but was revoked and replaced by the new regulations, supra, in 1999.

Terms in Consumer Act Regulations is applicable to all contractual terms between goods/services suppliers and consumers which have not been individually negotiated.⁷⁵⁷ As regards the terms used, the acts apply the principles of ‘reasonableness’⁷⁵⁸ and ‘fairness’⁷⁵⁹ to ascertain the enforceability of a contractual term. Unfortunately, not all types of consumer contracts were included.

The most important legislative intervention for the purposes of this study is the requirement concerning the plain language use in contracts drafted for consumers. With regard to exemption clauses it has been contained in Regulation 7 of the 1999 Regulations that a seller or supplier should ensure that any written term of a contract is expressed in *plain, intelligible language* and if it is not then the interpretation that mostly favours the consumer will apply (*contra proferentem* rule in common law). Plain intelligible language is not defined but the Office of Fair Trading does not consider plain vocabulary as sufficient to meet the required standard as an intelligible term, and one hidden in small print may also be considered to be unfair.⁷⁶⁰

It is clear that in English law, the legislature has seen the need to treat consumer contracts differently from other contracts and consumers enjoy protection from the law in the event that they receive their contracts in cumbersome language or hidden print.

7.3 Dutch Law’s Approach to Consumer Contracts and Plain Language

The phenomenon of standard contracts is not a new one, as can be seen in Ulpian’s early definition of the nature of contracts where he states that ‘in contract the legal bond, the *iuris vinculum*,⁷⁶¹ is formed by the parties themselves, and, within the limits laid down by law, the

⁷⁵⁷ S.I 1999 GNR 5 No 2083.

⁷⁵⁸ S2(2), 3(2),4,6(3), 7(3) and 7(4) of the 1977 Act.

⁷⁵⁹ Reg 5(1) of the 1999 Regulations, supra. above.

⁷⁶⁰ *Unfair Terms Guidance* (2001) Office of Fair Trading 311 para 19.12.

⁷⁶¹ *Institutes, Corpus Iuris Civiles* at 3.13; U Huber ‘The Jurisprudence of My Time’ *Hedendaagse Rechtsgeleertheit* (1636-1694) at 3.1.5; RJ Pothier, *Obligations: A Treatise on the Law of Obligations or Contracts*, preliminary article, translated by GA Mulligan QC Butterworths & Co (African) Ltd 195.

nature of the obligations is determinable by them. In some cases their agreement is actual,⁷⁶² in others apparent,⁷⁶³ and yet others *partly actual and partly apparent*.⁷⁶⁴

As regards unreasonable contracts, the contract of adhesion should therefore be kept in mind, as it forms part of the Roman law tradition as well as the first form of consumer contract. In the Netherlands, the Dutch codified their civil law in the early nineteenth century and this codification was largely based on the Roman Law of Contracts,⁷⁶⁵ except that *consensus* was now the focus instead of strict formalities.⁷⁶⁶ However, the Dutch recodified their civil law in 1992, and it in this code that we find a move towards more consumer-friendly contracts through the use of plain language.⁷⁶⁷ With regard to the discretion of the courts, Article 6:248 provides that a rule which would otherwise bind the parties will not apply where it would be unacceptable in light of reasonableness and equity.⁷⁶⁸ The New Dutch Civil Code also provides in Article 6:258 that a contract can be set aside when equity and reasonableness would require it.⁷⁶⁹ According to Hartklop and Tillema, these provisions mean that a judge can modify the terms of a contract if the principle of good faith demands it, as they encompass a construction in accordance with this principle.⁷⁷⁰ It seems therefore that the Dutch took a step towards a more equitable approach in order to remedy the inequality that exists in the law of contract in some instances.

This is not where Dutch law draws the line, however. Article 6:238, which applies to written general conditions used by a professional party against a consumer, states that the terms of those contracts ‘should always be drafted in plain, intelligible language’. It then goes on to

⁷⁶² In other words, both parties understand and concur with the terms and conditions in the contract; see Kerr op cit note,

⁷⁶³ For example, when one of the parties, who is in a position to understand the contract, but without coming to an agreement signs it without reading it; see Kerr, supra, 3

⁷⁶⁴ For example, where parties agree on the main provisions of a contract and then sign a standard form that contains these provisions but also contains other provisions that at least one of the parties does not understand but does not question.

⁷⁶⁵ The development of the Dutch law of contract in the Netherlands during the sixteenth and following centuries was almost entirely based on the rules of Roman law. See JA Wessels *History of the Roman Dutch Law* (1908) at 373.

⁷⁶⁶ See discussion above.

⁷⁶⁷ See EH Hondius ‘The Genesis of the Principles of European Contract Law and of Modern Dutch Private Law’ in D Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* (2002) 13 at 13.

⁷⁶⁸ See Cornelius op cit note 26 at 53.

⁷⁶⁹ See Cornelius op cit note 26 at 53.

⁷⁷⁰ Hartkamp and Tillema op cit note at 63 par 51 and 81 par 89; HCF Schoordijk *Het Algemeen Gedeelte van het Verbintenrecht naar het Nieuw Burgerlijk Wetboek*, 1979 Kluwer Deventer, 220; see also Cornelius, supra, 54

state that if there is doubt about the meaning of such a term, the meaning that is most favourable to the consumer should prevail.

It has therefore been an entrenched principle in the Netherlands since 1992 that consumers can demand plain language terms in their contracts, and if a terms is drafted ambiguously, the *contra proferentem* rule will apply.⁷⁷¹

Now we can take a look at how the South African system formulated its own principles taken from both English law and Roman Dutch law.

7.4 The South African Perspective on Consumer Protection

7.4.1 Introduction

In South Africa the need for plain language has become critical. With the new democracy, many people in government are committed to making the Constitution and laws understandable. The new government is emphasizing human rights and is very concerned about disseminating information to its citizens. There are eleven official languages, and many South Africans speak English as a second language, so clarity in English is critical. New legislation such as the National Credit Act 34 of 2005 and the New Consumer Protection Act⁷⁷² make special provision for consumer contracts to be drafted in plain and understandable language.⁷⁷³

The plain language movement has thus found its way into the text of South African legislation and hopes for new ‘consumer-friendly’ contracts may finally be realized. Before looking at the new legislation we should however look at the development of consumer protection and consumer contracts in South Africa.

⁷⁷¹ *Brackel v UNAT* HR 24 September 1993, NJ 1993, 760; See also Wassink op cit note at 251.

⁷⁷² Act on 68 of 2008.

⁷⁷³ See Sections 31, 64 and 93 of the National Credit Act and Section 22 and 28 of the Consumer Protection Act of 2008.

7.4.2 Common law Developments to Consumer Protection

One of the problems that, historically, stood in the way of consumers protecting their rights is the *caveat subscriptor* rule. This rule presupposes that people know what is contained in their contracts and therefore, once they have signed it, they should be held to be bound by it. This further presupposes that both parties were present at the drafting stage of the contract or at the very least that both parties fully comprehend the implications and obligations of the terms contained in the contract. With regard to protection of the party to a contract, the common law has developed many principles and rules to curb unfairness in the making of a contract. There is, however, still a debate as to whether these principles and rules will help with the problem that unequal bargaining power causes in contracts. As regards unfair contracts in general, there are generally three terms that have been used in determining whether or not a contract or contractual term is fair.

The starting point of the common law is that the courts will not interfere with a contract or term on the ground that it is unreasonable.⁷⁷⁴ This is also the foundation of the *caveat subscriptor* rule, which was just discussed. According to Christie,⁷⁷⁵ the reason for this is that the whole basis of the law of contract is that if parties to a contract agree on something, the law will enforce their agreement. However, the courts have been given the right to intervene if a contract or term is 'plainly improper and unconscionable' or 'unduly harsh and oppressive'.⁷⁷⁶ It might be fair to presume that a party would not sign a contract containing such terms, but in reality the consumer is rarely given a choice in the matter. If he or she does not sign he or she will not be given the goods or services that he or she is trying to procure. It is also common knowledge, however, that consumers rarely understand the substance of the lengthy contracts they have to sign and this is why many do not even bother to read through them properly.

The problem of unequal bargaining power, which occurs when large entities conclude contracts with individuals, has led to the development of the common law with regard to the

⁷⁷⁴ See *Burger v Central South African Railways* 1903 TS 571 at 567.

⁷⁷⁵ Op cit note 50 at 17.

⁷⁷⁶ See Christie op cit note 50 at 398-401; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A); *Botha (Now Griessel) v FinanceCredit (Pty) Ltd* 1989 3 SA 773 (A) 7821-783C

protection of the individual contracting in his or her personal capacity. The common law has developed a number of techniques which can be applied in circumstances that may fall within the general ground of inequality of bargaining power, but it has not made special provision for such cases specifically. The techniques the common law applied are: firstly relaxation of the *caveat subscriptor* rule, limitations on the enforcement of exemption clauses, construction that favours *contra proferentem*, violability in the case of duress and undue influence as well as violability in light of public policy considerations.⁷⁷⁷

These modes of ‘protection’ were, however, still not sufficient to make a real difference to consumers and that is why the legislature decided to intervene where consumer contracts are concerned.

7.4.3 Development of Consumer Protection Legislation in South Africa

Early Development of Statutory Protection

The first acts that were passed in order to combat the exploitation of consumers was probably the Usury Act of 1926⁷⁷⁸ and the Hire-Purchase Act, which was passed in 1942 to protect hire-purchasers.⁷⁷⁹ As a result of the rapid development of the economy and commerce the legislator soon had to intervene again to compensate for the changing economy. Accordingly, the Usury Act of 1926 was replaced by the Usury Act of 1968⁷⁸⁰ and in 1980 the Usury Act was drastically amended in order to be compatible with the Credit Agreements Act⁷⁸¹ that was accepted in that year.⁷⁸² Consequently, the Usury Act and the Credit Agreements Act regulated the credit industry for many years.

⁷⁷⁸ Act 73 of 1968.

⁷⁷⁹ CJ Nagel *Commercial Law*, 3ed (2006) at 240; see also Grové and JM Otto *Basic Principles of Consumer Credit Law* (2002) at 2.

⁷⁸⁰ Act 73 of 1968.

⁷⁸¹ Act 75 of 1980.

⁷⁸² See Nagel *ibid* at 241.

Influence of the Constitution and modern legislation

The most influential piece of legislation in South Africa is without a doubt the Constitution. The Bill of Rights in the 1996 Constitution⁷⁸³ has already had a considerable effect on the law of contract and will continue to do so.⁷⁸⁴ One section of the Constitution that has particular relevance to the problem concerning unequal bargaining power and consumer protection can be said to be s 9(1) of the Bill of Rights. This section reads that ‘everyone is equal before the law and has a right to equal protection and benefit of the law.’

To give effect to this constitutionally protected right to equality in cases of unacceptable inequality of bargaining power, the courts would have to develop the common law in accordance with s 8(3)(a) of the Bill of Rights. The legislator seemed to have picked up on this problem, especially where credit granting is concerned, and intervened on behalf of consumers. The National Credit Act, specifically, is a good example of how legislation was brought in to protect a large number of South African citizens from the negative effects of unequal bargaining power. With reference to consumer contracts, it is specifically the so-called ‘adhesion contracts’⁷⁸⁵ that needed addressing, as many consumers were faced with having to sign lengthy, difficult to understand documents on a daily basis in order to function in the modern society.

The first pieces of legislation to actually refer to the term ‘plain language’ were the Long-Term Insurance Act⁷⁸⁶ and Short-Term Insurance Act.⁷⁸⁷ The Rules and Regulations make provision for representations and information to a policyholder in ‘plain language, avoid[ing] uncertainty or confusion and not be[ing] misleading’. The fact that these acts were both published shortly after the 1996 Constitution⁷⁸⁸ shows the effect that the Constitution has had on the consumer-focused approach that legislative drafters have decided to follow.

⁷⁸³ Constitution of the Republic of South Africa Act 108 of 1996.

⁷⁸⁴ Christie op cit note 50 at 20.

⁷⁸⁵ See Kessler op cit note 738.

⁷⁸⁶ 52 of 1998.

⁷⁸⁷ 53 of 1998.

⁷⁸⁸ Constitution of the Republic of South Africa Act 108 of 1996.

The newest pieces legislation in the consumer protection realm, the National Credit Act and the Consumer Protection Act,⁷⁸⁹ were specifically enacted with the prevention of the abuse and exploitation of consumers in mind and it was therefore the intention of the legislature to give effect to the constitutional principles as contained in the Bill of Rights.

Modern Approach to Consumer Protection

After the enactment of the 1996 Constitution⁷⁹⁰ as the highest law in South Africa there was businesses were expected to conduct business in a new way. In light of the emergence of consumer awareness, more competition in the market and the changed demographics of clients that companies faced started shortly after the promulgation of the 1996 Constitution, many institutions have made changes in the way they treat their clients or customers.

A relevant example of this is when all major banks in South Africa adopted the Code of Good Banking Practice,⁷⁹¹ which sets out the basic principles governing the relationships between them and their clients. Among other principles, banks promise to:

- make information available to customers in plain language and give help on all aspects that they do not understand;
- ensure that all written terms and conditions are fair and clearly set out the customer's rights and obligations in plain language

This Code is not enforceable in any way, however, and even though banks gave themselves until October 2000 to attain the implementation of the principles contained therein, it is clear that a decade has passed without much change with regard to general client services. The banks and other institutions and credit providers were however forced to review the information given to their creditors after the promulgation of the National Credit Act⁷⁹² if they fell within the ambit set out therein, and the way that information is given to all clients and

⁷⁸⁹ Act 68 of 2008.

⁷⁹⁰ The Constitution of the Republic of South Africa 1996.

⁷⁹¹ Code of Good Banking Practice, 2000.

⁷⁹² Act 34 of 2005.

customers will also be in the spotlight with the New Consumer Protection Act.⁷⁹³ Soon most consumer information will have to comply with the plain language provisions,⁷⁹⁴ as will be set out in more detail below.

In light of the 1996 constitutional dispensation, many new statutes, aside from the Long-Term Insurance Act⁷⁹⁵ and Short-Term Insurance Act⁷⁹⁶ mentioned above, were promulgated in order to provide consumers with more protection. Among these are the:

- i. Competition Act,⁷⁹⁷ which aims to promote and maintain competition so that consumers are provided with competitive prices and product choices;
- ii. Housing Protection Measures Act,⁷⁹⁸ which protects housing consumers by providing for certain requirements to be met by builders when building and when entering into a contract with the consumer;
- iii. Promotion of Access to Information Act,⁷⁹⁹ which gives effect to the constitutional right of access to information held by the state and any other person, that is required for the exercise or protection of any rights;
- iv. Electronic Communications and Transactions Act,⁸⁰⁰ which facilitates and regulates electronic communications and transactions in an attempt to promote universal access and to protect the consumer by providing a safe, secure and effective environment in which to use electronic transactions;
- v. National Credit Act⁸⁰¹ ('NCA'), which aims to regulate the granting of credit in South Africa, to protect consumers from unfair credit practices;
- vi. Consumer Protection Act⁸⁰² ('CPA'), which introduced a single framework to promote a fair and equitable consumer market and set standards relating to consumer protection; and

⁷⁹³ Act 68 of 2008.

⁷⁹⁴ See S64 of the NCA and S22 of the CPA.

⁷⁹⁵ 52 of 1998.

⁷⁹⁶ 53 of 1998.

⁷⁹⁷ Act No. 89 of 1998.

⁷⁹⁸ Act No. 95 of 1998.

⁷⁹⁹ Act No. 2 of 2000.

⁸⁰⁰ Act No. 25 of 2005.

⁸⁰¹ 34 of 2005.

⁸⁰² Act 68 of 2008.

- vii. Protection of Personal Information Bill (not yet enacted),⁸⁰³ which will aim to protect personal information processed by public and private bodies.⁸⁰⁴

The most important of these, especially with regard to the language standards imposed by them on consumer contracts, are the NCA⁸⁰⁵ and CPA.⁸⁰⁶ Both of these acts are focused on ensuring that consumers get the information they require for making informed choices about the products and services they need.⁸⁰⁷ The reason these two acts are highlighted in particular is that they both have one very important coinciding right they give to consumers. This is the right of consumers to have their contracts drafted in plain and understandable language. A discussion of the relevant sections of the acts as well as the implications thereof will follow in more detail below.

7.4.4 Consumer Protection through the Use of Plain Language in the NCA, CPA and New Companies Act⁸⁰⁸

With respect to what is required of credit providers with regard to standard forms, information and contracts given to consumers, it is clear that language is of fundamental importance. Every credit provider in terms of the NCA should propose at least two official languages to the National Credit Regulator that it intends to use in documents.⁸⁰⁹ A consumer has a right to receive any document in an official language that he or she reads or understands to the extent that this is reasonable, bearing in mind usage, practicality, expense, regional circumstances and the needs and preferences of the population ordinarily served by the person who has to deliver the document.⁸¹⁰

⁸⁰³ Bill (2009) *Gazette No 32495*.

⁸⁰⁴ This act also proposes amendments to the Promotion of Access to Information Act, *supra* the Electronic Communications Act and the NCA.

⁸⁰⁵ Of 2005.

⁸⁰⁶ Of 2008.

⁸⁰⁷ C Burt 'Simplifying Financial Information: The Legal Framework' (2006) at 1 available at <http://www.simplified.co.za> [Accessed 10 October 2009].

⁸⁰⁸ 71 of 2008.

⁸⁰⁹ S63(2).

⁸¹⁰ S63(1).

Sections 31, 64 and 93 of the NCA⁸¹¹ are also especially relevant in this case. Section 31, which deals with the requirements for intermediate or large agreements, states in subsection (a) that all the information that is disclosed in a credit agreement should be comprehensive, clear, concise and in *plain language*.⁸¹² In terms of section 64, a consumer has the ‘[r]ight to information in plain and understandable language’, and in the event that no form has been prescribed for a document, a consumer should be provided with a document in plain language. Section 93 deals with the form of credit agreements and refers to the ‘document’ that should be presented to a consumer upon entering into a credit agreement. These last two sections read together therefore have the effect that the ‘document’ mentioned in s 64 refers to a document recording a credit agreement with a consumer.

A similar provision is contained in S6(4) of the New Companies Act.⁸¹³ Under the new Anti-Avoidance provisions, all the producers of a prospectus, notice, disclosure or document that is required to be ‘published, produced or provided’ to a potential investor, creditor, employee or other relevant person, should publish, produce, or provide them in plain language if no form is prescribed in that specific case.⁸¹⁴

The drafters, publishers and producers of consumer contracts, notices and documents are now being put under a legal obligation to change their attitude to the drafting of consumer documents, and all consumers have a right to receive information in plain language. It seems that the aim of the latest legislation in relation to the language of contracts is to make it more understandable to the average consumer. It is a change that many followers of the plain language movement will certainly hope for and many companies and businesses will reluctantly have to comply with.

The Definition of Plain Language in South African legislation

Since the drafters of the CPA used the definition of plain language contained in the NCA, the NCA⁸¹⁵ and the CPA⁸¹⁶ have corresponding definitions of plain language. In terms of both the

⁸¹¹ Act 34 of 2005.

⁸¹² Own emphasis.

⁸¹³ 71 of 2008.

⁸¹⁴ See S6(4) and 6(4)(b) of Act 71 of 2008.

⁸¹⁵ S64 of the Act 34 of 2005.

NCA and the CPA a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and

- i. minimal credit experience (in the NCA), or
- ii. minimal experience as a consumer of the relevant product or service (in the CPA)

could be expected to understand the content, significance, and import of the document without undue effort, having regard to

- a) the context, comprehensiveness and consistency of the document
- b) the organization, form and style of the document
- c) the vocabulary, usage and sentence structure of the text
- d) the use of any illustrations, examples, headings, or other aids to reading and understanding.

The new Companies Act of 2008⁸¹⁷ also has an almost identical definition of plain language in S6(5) with regard to the drafting of a prospectus, notice, disclosure or other document that does not have a prescribed form.⁸¹⁸

This definition is therefore the standard one that consumer legislation will follow, and courts will have to give more definite outlines as to how these will be implemented in the future. The reason for this is that the definition seems to be very broad as it does not give much direction to drafters as to what is specifically required of them. Only time will tell if this definition will hold, and how it will be applied by the courts. For now, South African companies are scrambling to redraft their consumer documents to the best of their ability in order to avoid possible legal action.

⁸¹⁶ S22(2) of the Act 68 of 2008.

⁸¹⁷ Act 71 of 2008.

⁸¹⁸ See S 6(4)(b).

7.5 A Quick Look at the Requirement of Plain Language in Other Countries

7.5.1 Australia

In Australian law, the Trade Practices Act⁸¹⁹ has been one of the most important pieces of legislation with regard to consumer protection in that it prohibited ‘unconscionable’ conduct in bargaining against a consumer when supplying goods or services.⁸²⁰

Australia has however very recently decided to implement a new piece of legislation, namely The Trade Practices Amendment (Australian Consumer Law) Bill 2009.⁸²¹ This is a bill was enacted to amend the Trade Practices Act of 1974, to establish and apply the Australian Consumer Law and to introduce new penalties, enforcement powers and consumer redress options.⁸²²

This new piece of legislation is of fundamental importance for plain language as far as consumer contracts are concerned, as a court should have regard to the transparency of a term in determining whether that term is ‘unfair’ and therefore unenforceable.⁸²³ The prerequisites for a transparent term are that it is:⁸²⁴

- expressed in a *reasonably plain language*;
- legible;
- presented clearly; and
- readily available to any party affected by the term.

⁸¹⁹ Trade Practices Act 1974.

⁸²⁰ See S52A of Act of 1974; see also Carter J.W. & Harland op cit note 144 at 468.

⁸²¹ Trade Practices Amendment (Australian Consumer Law) Bill 2009.

⁸²² The Bill also amends the consumer protection provisions of the Australian Securities and Investments Act 2001 to make them consistent with the Trade Practices Amendment Act and the Australian Consumer Law; see S1 of the 2009 Bill, supra. The Government has announced its intention that the date of commencement be 1 January 2010 (it has however not yet been enacted). Amendments to apply these provisions to the Australian Consumer Law in the Trade Practice Act (including the unfair contract terms provisions) will commence at a later date. See S2 of the Bill (2009), supra, and the new penalties, enforcement powers and redress measures insofar as they apply to the relevant existing TP Act and the ASIC Act provisions will commence on the day after the Act receives the Royal Assent.

⁸²³ [Schedule 1, Part 1, item 1, subsection 3(2)(b)] [Schedule 3, Part 1, item 7, paragraph 12BG(2)(b)].

⁸²⁴ [Schedule 1, Part 1, item 1, section 1 and section 3(3)] [Schedule 3, Part 1, item 4, subsection 12BA(1), item 7, subsection 12BG(3)].

7.5.2 United States of America

In discussing some of the legislation that came into being in the various states, particular focus will be placed on legislation that might help one ascertain exactly what plain language is, why we need to use plain language, how we test for plain language and other plain language principles with regard to consumer contracts.

New York Plain English Law⁸²⁵

New York made early strides toward a more language-friendly approach to consumer contracts with the enactment of the so-called ‘Sullivan Law’⁸²⁶ in 1978. With the amendment that took place in 1994 this law applies to all contracts of lease of space to be occupied for residential purposes, for the lease of personal property to be used primarily for personal, family or household purposes or to which a consumer is a party and the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes. Contracts of this nature had to be, inter alia, ‘*Written in a clear and coherent manner using words with common and everyday meanings.*’

This was one of the earlier laws regarding plain language, and we will see that better-formulated principles were expounded in other states.

Connecticut Plain Language Law⁸²⁷

The Plain Language Law passed in Connecticut in 1980 is of the utmost importance, as it required that *all* consumer contracts ‘should be written in Plain English’.⁸²⁸ It is therefore, like the Consumer Protection Act,⁸²⁹ a very far-reaching act. It does not stop there, however, as it sets out various subjective ‘Plain Language Tests’⁸³⁰ with which a consumer has to comply or

⁸²⁵ N.Y. Gen. Oblig. § 5-702, (ss amended. L. 1994, c. 1, 36.).

⁸²⁶ Named after Assembly Member Peter Sullivan, who was responsible for sponsoring it; see Butt & Castle op cit note 7 at 77.

⁸²⁷ Conn. Gen. Stat. § 42-152 (a) – (c).

⁸²⁸ Section 152(a).

⁸²⁹ Act 68 of 2008

⁸³⁰ Section 152(b).

in the alternative a list of ‘objective tests’⁸³¹ in order to assess if the plain language standard was complied with.

The subjective tests have to do with the sentence length,⁸³² word choice,⁸³³ readability⁸³⁴ and other layout and format prerequisites. The objective test on the other hand is more specific in its specification as it stipulates specific numbers and sizes to which words, sentences and syllables should adhere.⁸³⁵ The danger here, however, is that this might become a very scientific exercise that does not allow for much flexibility, and it could render an understandable contract inoperable due to its rigid formulas.

Pennsylvania Plain Language Consumer Contract Act⁸³⁶

In 2202 the Plain Language Consumer Contract Act⁸³⁷ went into the details of the reason and benefits of plain language contracts for consumers. According to the drafters, competition would be aided, consumers would not be likely to enter into ‘contracts they do not understand’ and consumers would ‘know better their rights and duties’ in terms of the contracts. This act is applicable to all consumer contracts for the borrowing of money, and for the obtaining of credit for buying, leasing or renting of a property.⁸³⁸

The act also put in place a ‘test of readability’⁸³⁹ that provides that all consumer contracts should be drafted in such a way that a consumer can easily read and understand them. In order to assess ‘readability’ the legislature set out guidelines to consider. These are divided into ‘Language Guidelines’⁸⁴⁰ and ‘Visual Guidelines’.⁸⁴¹

⁸³¹ Section 152(b).

⁸³² Section 152(b)(1) ‘... short sentences and paragraphs’.

⁸³³ Section 152(b)(2) [It uses] ‘everyday words’.

⁸³⁴ Section 152(b)(5) ‘...type of readable size’; and (6) ‘...ink which contrasts with the paper’.

⁸³⁵ See for example Section 152(c) (1): The average number of words per sentence is less than twenty-two and (5) The average number of syllables per word is less than 1.55(1).

⁸³⁶ Pennsylvania Statutes Ann 73 S 2201.

⁸³⁷ 1993, June 23, P.L. 128, No. 29, 1 effective in one year.

⁸³⁸ Section 2203.

⁸³⁹ Section 2205. (a)

⁸⁴⁰ Section 2205 (b) Language guidelines.

⁸⁴¹ Section 2205 (c) Visual guidelines.

Both the ‘Language’ and ‘Visual’ guidelines mention similar principles to that in the ‘subjective test for Plain Language’⁸⁴² except for two important ‘Language guidelines’, which are:

- The contract should not use technical legal terms, other than commonly understood legal terms .
- The contract should not use Latin and foreign words or any other word whenever its use requires reliance upon an obsolete meaning.

These refer to the use of legalese, which has plagued contractants and consumers alike and which seems to have lost its allure to both consumers and legislative drafters alike.

7.5.3 European Union

In Europe the most important principles concerning European contracts are the Principles of European Contract Law (PECL),⁸⁴³ in which consumer contracts were specifically singled out by the Institute for the Unification of Law (UNIDROIT) in a published set of principles named the Principles for International Commercial Contracts.⁸⁴⁴

Early 2009 saw the publication of the Draft Common Frame of Reference (‘DCFR’)⁸⁴⁵ containing definitions, principles and model rules for European Private Law,⁸⁴⁶ and one of the significant inclusions in the DCFR with regard to how information should be provided to consumers can be found in Book II, Chapter 3, Article 106, where it is stated that businesses should give all required information clearly and precisely and it should be ‘expressed in plain intelligible language’.

⁸⁴² See Section 2205 (b).

⁸⁴³ Hondius op cit note 743 at 13.

⁸⁴⁴ Principles of International Commercial Contracts, Rome: UNIDROIT, 1994

⁸⁴⁵ This was prepared by the Study Group on a European Civil Code and the Research Group on Existing European Contract Private Law. This document is to be the basis for the amendment of the UnidroitUNIDROIT Principles in the near future. See Von Bar et al op cit note 436 at 437.

⁸⁴⁶ Von Bar ibid.

This is a clear indication that Europe is also endorsing the use of plain language in consumer contracts and this will have the effect that a global trend towards contextualism will start to emerge in more domestic statutes and common law principles.

7.6 Conclusion

As we can see from the above discussion, plain language is now no longer merely an option for many large corporations. All over the world new legislation has given plain language statutory backing, and consumers can use it against the drafters of documents which are drafted in technical language and legalese. Legislation has now officially sided with ‘consumer-friendly’ contracts that are drafted in ‘plain and understandable language’ even though the definition of ‘plain language’ is still couched in very broad terms. Perhaps South Africa would do well to follow in the footsteps of the American state of Pennsylvania,⁸⁴⁷ which offers better guidance and sets out specific requirements for plain language such as a prohibition on the use of legalese.⁸⁴⁸

One thing is certain: change is inevitable with regard to how information is given to consumers as well as how the documents affecting them will be drafted. The change that large corporations will now have to adhere to and enforce will benefit not only the consumer, but also the stronger contracting party, as they will be able to enforce the common law rule of *caveat subscriptor* if they can prove that the consumer indeed understood, or a reasonable person in the position of the consumer would have been able to understand, the terms and conditions of the contract. The most significant influences which the Consumer Protection Act will have on businesses are, inter alia,⁸⁴⁹ the following:

- All agreements with consumers should be in *plain and understandable language*. This means businesses are going to have to re-draft or amend their contractual terms, sale agreements and advertisements into plain language. If they do not, then consumers might be able to get out of the agreements, they might be found guilty of unconscionable conduct, or might be sued.

⁸⁴⁷ Pennsylvania Statutes (1994) 73 ch 37 (also known as the Plain Language Consumer Contract Act) at S 2205 (b).

⁸⁴⁸ Section 2205 (b) Language guidelines of the Plain Language Consumer Act, *supra*

⁸⁴⁹ See J Giles ‘The Consumer Protection Act – A Heads up’ at <http://www.michalsons.com/the-consumer-protection-act-a-heads-up/1382> [Accessed 3 December 2009].

- The general theme of the act is to protect the poor and the vulnerable and is in a way the Bill of Rights for the consumer.
- The act alters the common law to be more favourable to consumers. By default, the consumer is given various warranties and indemnities. The warranties that businesses give in their agreements are no longer the only warranties that apply.
- The act also applies to legal services provided by attorneys, so it impacts on attorneys directly too. The *ambit of the act is very wide*. Depending on what is contained in the regulations, a lessee may be viewed as a consumer and therefore lease agreements may need to comply with the act. The act does not apply to employment contracts, however, but a franchisee will be a consumer and therefore franchise agreements will have to comply.
- The court will be given the *power to redraft* (or will order companies to change) contracts, terms of business, terms of sale and other consumer-related terms.
- Courts should *interpret* standard form contracts in favour of consumers, which corresponds with the common law *contra proferentem* rule.

In general, consumer contracts have now been put in the spotlight as far as plain language is concerned. Supporters of the Plain Language Movement will want to see that this new development has an effect on how all contracts are drafted, and will foresee a future in which everyone knows and understands his or her obligations in terms of a contract.

8 Conclusion

There are many factors that make the reform of legal language desirable. According to Hofman,⁸⁵⁰ the most compelling reason is that obscure language can deprive ordinary people of their legal rights and when language is obscure ordinary people have to consult an expert to learn about their rights. Legal rules are usually created for general purposes, but contracts can be regarded as sources of law that are created for specific purposes by the parties to deal authoritatively with certain matters amongst themselves. It provides the basis on which groups of individuals can regulate matters of mutual concern in such a way that the law will generally give effect to their will and enforce the legal rules that the parties have created for their specific purposes.⁸⁵¹ As was explained before,⁸⁵² the problem caused by the unilateral nature of the commercial contract is one that needed to be addressed.

The nature of legal language has undergone tremendous development from early Roman formulations, where subjective intent played no part to the twenty-first-century preoccupation with protecting the consumer from adhering to a contract that goes contrary to his subjective will. At the centre of this development lies the legislative prohibition on hiding important information behind a veil of cumbersome language and information must be reasonably accessible to all. Specifically with reference to South Africa, this right to information in understandable documents, is made unequivocally clear in the New Companies Act⁸⁵³, the Consumer Protection Act⁸⁵⁴ and the already effected National Credit Act.⁸⁵⁵ Therefore most documents distributed to the public by companies and other credit, goods or services providers will be affected. When they enter into force, the all-encompassing Consumer Protection Act⁸⁵⁶ and New Companies Act⁸⁵⁷ will affect businesses and consumers in an enormous way – in the same year that the world comes for a visit with the 2010 Soccer World Cup.

⁸⁵⁰ Op cit note 3 at 90.

⁸⁵¹ Cornelius op cit note 26 at 2.

⁸⁵² See 7.1 above for an explanation on why consumers need protection from documents coached in legalese and difficult technical terms.

⁸⁵³ Act 71 of 2008

⁸⁵⁴ Act 68 of 2008.

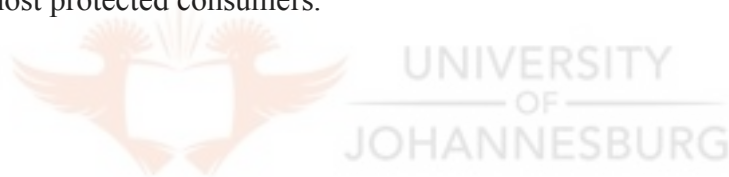
⁸⁵⁵ Act 34 of 2005

⁸⁵⁶ Act 68 of 2008.

⁸⁵⁷ Act 71 of 2008.

In general, with regard to non-consumer contracts, contracts will be construed in accordance with a more flexible approach, as we once again return to the Roman-Dutch principle of subjective *consensus*. And drafters will have to construe the contract in such a way as to clearly reflect the common intentions of the parties, as no amount of text will hide the actual facts when extrinsic evidence is adduced to prove them.⁸⁵⁸ Once again the ‘man on the street’ will be protected from entering into an agreement on terms which he had not envisioned at the time of conclusion of the contract. It will therefore be a drafter’s task, not only to draft succinctly and eloquently in accordance with the principles of clear drafting, but also to stay true to the subjective intention of the parties so as to avoid an ineffectual contract upon interpretation thereof.

Clearly 2010 will therefore be a year of new beginnings and great challenges. It will be a year where South Africa steps up to the standards set by the European principles of contract and even in some ways surpass them, as South Africa fulfils its recently owned title as the home of the world’s most protected consumers.⁸⁵⁹



⁸⁵⁸ See discussion above at 5 for a general discussion on context as well as *KPMG v Securefin* supra note 275 for a summary of the modern South African approach to contractual interpretation.

⁸⁵⁹ See Giles op cit 849.

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