where we have clear and accessible evidence that B has discharged his obligation to A, is there any merit in allowing A to double recover? I tend to think not. A debt is not owed twice.

Given the analysis above, a question remains concerning the potential relevance of economic efficiency and legal certainty to the creation and form of a legal rule. Starting with economic efficiency: the position I take here is that while economic efficiency should not be the exclusive goal of the law, it remains an important and desirable goal for any legal system. In this connection, economic efficiency operates as an important supplementary (or second order) criterion for deciding on one approach over another. To draw an imperfect analogy, economic efficiency has a tiebreaker function (or perhaps more accurately a tiebreaker-like function).[80] A decision-making analogy might be something like this: A firm agrees to use the ranking of the universities at which two otherwise fairly evenly matched and excellent job candidates applying for the same job studied in order to make a final hiring decision. As applied here, economic analysis can be useful, and of great importance, when choosing between two (or more) different forms that a legal rule may take in the process of translating an abstract and non-consequentialist moral principle into a directly applicable legal rule. For example, the law takes the view that it is morally right to keep a promise, but the doctrine of consideration nonetheless keeps my gratuitous promise to mow my neighbour's lawn out of the courts.[81] Provided a legal rule remains substantively justifiable for non-consequentialist reasons, then one should not ignore law and economics.[82]

I can make a similar argument with respect to the use of bare appeals to legal certainty in judicial reasoning. It is true that a lack of certainty in the law can be a friend of tyranny. It is a point well made that the law should define its rules in advance and give subjects stable expectations as to how such rules will be deployed.[83] It is antithetical to the rule of law for a rule to be made ex post and applied to ex ante facts. As such, I do not wish to be taken as suggesting that certainty is not important to the general law. Rather, I am making the modest claim that certainty, in and of itself, does not exclusively provide a positive justification for a particular legal rule. Let us assume that a state parliament enacts a statute that you

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80 See further, Dagan and Kreitner (n 65) 575–6. For a critique of the type of reasoning I have deployed, see Robert E Scott and Jody S Kraus, *Contract Law and Theory* (Carolina Academic Press, 5th ed, 2013) 29.

81 See Hanson, Hanson and Hart (n 74) 324. For examples of balancing interests, see Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 89 (writing from a rights-based perspective, but nonetheless defending torts that are not actionable per se on the basis of the law needing a floodgate of 'proof of consequential loss' in order to circumscribe a defendant's liability); McBride (n 44) 124 (writing from a natural law perspective).

82 While this approach will not lend itself to a logically perfect balance between normativity and efficiency, it nonetheless treats efficiency in the law as an ideal that a legal system (which is otherwise morally justifiable for non-consequentialist reasons) must try to approach even if it can never be perfectly attained.

83 Francis Lieber, *Legal and Political Hermeneutics* (Charles C Little and James Brown, 1839) 88; FA Hayek, *The Road to Serfdom* (Routledge & Kegan Paul Ltd, 1944) 62; Hayek (n 73) 208–9. See also JD Heydon, 'The "Objective" Approach to Statutory Construction' in John Sackar and Thomas Prince (eds), *Heydon: Selected Speeches and Papers* (Federation Press, 2018) 332, 335–6; John Dinwiddy, 'Bentham' in William Twining (ed), *Bentham: Selected Writings of John Dinwiddy* (Stanford University Press, 2004) 54.

pay to me $100,000 under certain future conditions (for example, if you fail to run 130 km each week for the rest of the calendar year). Even if you happen to be an avid marathon runner, I doubt that you think this rule has much going for it notwithstanding my enthusiasm for the clarity in which the enactment is finally expressed. It is for this reason that there is much wisdom in Williams' observation that 'it is to the interest of legal certainty that, other things being equal, the rules of law should be as clear of application as possible'.[84] The important point for present purposes, however, is that such a position still raises the ultimate question of whether the 'other things' are indeed equal.

With my caveats on appealing to efficiency and certainty clearly set out, it should be kept in mind that the ambiguity gateway only has a limited effect on the general approach to interpretation. This is because even with the ambiguity gateway, recourse can be had in the first instance to: (i) the text; (ii) the local context within the contractual document (that is, the organising logic and internal structure of the contract — let's call this the 'narrow context'); (iii) the notorious background facts that can be reasonably supposed to be known by both parties; and (iv) commercial common sense. That is, the court already has a fairly expansive set of clues from which to infer what the reasonable recipient of a communication would consider the most probable intention of the author(s).[85] That is, the ambiguity gateway does not change fundamentally the approach of the court as a matter of the philosophy of language in determining an objective meaning. All it does is remove one set of clues from this process: the relevant background facts and circumstances reasonably known by A and B at the point of entry into the contract (let's call this the 'wide context').

On this view, the interpretive clues available to the court absent ambiguity are likely to be enough to resolve correctly most contractual interpretation disputes without recourse to the wide context. Further, the ambiguity gateway still leaves the parties free to include more contextual information within their contract if they so choose (for example, recitals, definitions and appendices can be used to convert the narrow context into something approaching the wide context).[86] Accordingly, if the ambiguity gateway does deliver efficiency gains (or can be reformed to deliver efficiency gains), then there is a sound traditional utilitarian basis for the rule. Likewise, a similar argument could be made concerning legal certainty and reducing the potential number of meanings that a contractual text can possibly bear prior to the exercise of judicial power.

While I accept that the efficiency and certainty concerns regarding the resolution of contract disputes are real, there are three brief observations that I wish to make in response. The first is the fact that Australia is an outlier in maintaining the ambiguity gateway throughout the common law world, which should immediately raise questions for those who claim that the gateway is efficient. This is because, as Posner has observed, '[g]lobal consensus (to exaggerate a bit) is further evidence — of course not conclusive — for the optimality of our existing

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84 Glanville Williams, 'Law and Language — II' (1945) 61 (July) *Law Quarterly Review* 179, 185.

85 See also McDougall (n 2) 104: 'contract cases in real life do not often hinge on the distinction between ambiguous and plain language'.

86 Schwartz and Scott (n 30) 931, 961–2.

law.'[87] One does not wish to make too much out of Posner's point. But those who make efficiency arguments should consider whether the final level appellate courts in the United Kingdom, Singapore, New Zealand, Hong Kong and Canada (to name a few) are behaving irrationally in creating inefficient rules.[88]

The second observation is that any efficiency benefits derived from the ambiguity gateway may be questioned. As McLauchlan has observed:

> The increased costs argument also ignores the reality that many interpretation disputes will be accompanied by alternative claims for rectification of the written contract and possibly also misrepresentation or estoppel, under which evidence of all the negotiations and surrounding circumstances must be received. Accordingly, excluding such evidence for the purpose of interpretation disputes will not have the effect of reducing the length and cost of civil trials.[89]

Likewise, Justice McDougall has noted extra-judicially that in Australia, 'extrinsic evidence is always admissible in the evidentiary sense; that is, courts may always allow its reception … [i]t is then admissible in the usage sense' if it nevertheless passes the ambiguity gateway.[90] Indeed, it has become common practice in Australia for cautious trial judges to allow all pre-contractual wide context materials to be adduced as evidence.[91] This is for the principal reason that if the trial judge errs in applying the ambiguity gateway, then the appeal court can interpret the contract in light of the full set of prescribed clues.

Finally, the ambiguity gateway means that efficiency gains are lost as the parties simply tailor a new set of arguments focusing on convincing the court that the text of the contract is ambiguous and that use of the wide context will quell that ambiguity. Indeed, as noted above, this issue could also be used as an appeal point by savvy counsel. Given that large amounts of factual material are nonetheless tendered in contractual disputes and that the ambiguity gateway results in a new species of legal argument centring on ambiguity, it is arguable that the rule is not fully fit for purpose if it is truly concerned with making the resolution of contractual disputes more efficient *in globo*. One partial answer to this argument would be for the High Court of Australia to clarify what is meant by 'ambiguity', by placing a high hurdle for the parties to clear before allowing consideration of the wide context evidence in the interpretive process. In this connection, one commentator has observed that the test for ambiguity set out by the Court of Appeal of New South Wales in *Burns Philp Hardware Ltd v Howard Chia Pty Ltd*,[92] could serve this function.[93] That relatively restrictive approach to ambiguity was set out by Priestley JA (with whom Glass JA agreed) in the following terms:

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87 Richard A Posner, 'Let Us Never Blame a Contract Breaker' (2009) 107(8) *Michigan Law Review* 1349, 1363.

88 I do not wish to make too much of the point, as common law jurisdictions in the US, for example, tend to favour the ambiguity gateway: see above n 30.

89 McLauchlan, 'Contractual Interpretation: What Is It About?' (n 3) 37. See also Lindgren (n 4) 166.

90 McDougall (n 2) 107.

91 *McCourt v Cranston* [2012] ANZ Conv R ¶12-006, [24]–[25]. See also Lindgren (n 4) 166.

92 *Burns Philp Hardware Ltd v Howard Chia Pty Ltd* (1987) 8 NSWLR 642.

93 Prince, 'Defending Orthodoxy: *Codelfa* and Ambiguity' (n 4) 508.

> What I mean by 'not ambiguous' for present purposes is not having two or more plausible meanings when the context of the words in the document is taken into account in light of the knowledge any ordinarily intelligent reader of the document would bring to the reading of it.[94]

A similar approach is currently applied in Western Australia, where the court must consider whether there are two or more possible meanings of the impugned provision having regard to: (i) the language of the contract as a whole; (ii) what can be gleaned from the contract itself as to the contractual purpose; and (iii) whether the proffered competing interpretation(s) is/are reasonable.[95]

As noted above,[96] a more contemporary form of utilitarian reasoning can be deployed to justify the ambiguity gateway (at least in circumstances where sophisticated firms or parties are contracting). In brief, Schwartz and Scott have set out the following three key premises as a justification for the ambiguity gateway in the US.[97] First, no rule of contractual interpretation can justify devoting infinite resources in order to achieve perfect individualised justice between the parties (that is, something approaching a perfectly accurate interpretation).[98] It follows that any socially desirable rule of contractual interpretation needs, at some point, to trade-off between, on the one hand, the time taken to draft a contract and litigate contract disputes and, on the other, interpretive accuracy. Second, courts should make this assessment by deferring to actual party preferences and choices regarding interpretation in setting default rules, albeit allowing specific parties to contract out of such rules.[99] That is, if the majority of contracting parties have an actual unambiguous preference in favour of an ambiguity gateway that fact should create a strong initial presumption in favour of such a rule. This is because the parties themselves are best placed to weigh up the benefits of accuracy, drafting costs and adjudication costs given they directly bear such costs.[100] Third, sophisticated firms and parties have a revealed preference for formal[101] rules of interpretation such that the ambiguity gateway (or a similar more textualist approach to interpretation) should be retained, at least in the context of commercial contracting.[102]

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94 Ibid 657.

95 *Technomin Australia* (n 18) 274 [73]–[74]. See also *Siemens Gamesa* (n 18) [99]. In contrast, see the liberal approach in New South Wales adopted in *Newey* (n 14) [89].

96 See above nn 65–7 and accompanying text.

97 Schwartz and Scott (n 30) 930–5.

98 Ibid. Allowing for preference satisfaction enables commercial parties to maximise the profitability of their contractual arrangements (or their contractual 'surplus').

99 See also Steven Shavell, 'On the Writing and the Interpretation of Contracts' (2006) 22(2) *The Journal of Law, Economics & Organisation* 289, 292. Shavell concludes that 'decisions about the use of [wide context] evidence should be made by the parties, not the courts': at 307, as reflected in 'Proposition 6'.

100 See further Bernheim (n 65) 291–2:

> unambiguous choice may nevertheless create a strong presumption concerning well-being …. the principle of self-determination arguably implies that those involved in governance should judge the impact of interventions on individuals according to the choices those individuals would have made for themselves.

101 On the growth of formalism in US academic writing on contract law, see Avery Wiener Katz, 'The Economics of Form and Substance in Contract Interpretation' (2004) 104(2) *Columbia Law Review* 496, 506–12.

102 Schwartz and Scott (n 30) 930–5, 955–7.

There is not space to do full justice to the arguments presented by Schwartz and Scott. It is a more elegant form of utilitarian reasoning than that typically deployed in Anglo-Australian contract law scholarship.[103] This is for the simple reason that it eschews the weighing up of costs and benefits in favour of relying on majoritarian choice preferences to ascertain utility (albeit having the benefit of leaving the minority who do not share such preferences a choice or liberty to contract around the proposed ambiguity gateway).[104] I do not intend the use of the word 'simple' in the previous sentence to be taken as disrespectful. Quite the opposite, any reader of Bentham's *Introduction to the Principles of Morals and Legislation*[105] is quickly overwhelmed by the ponderous lists and sub-lists detailing the specific factors that must be weighed up in calculating utility on the classical approach. The use of choice to inform a calculation of utility is an elegant solution that overcomes the difficulty inherent in classical utilitarian balancing exercises. I will endeavour, however, to make a few brief points in response to whether such arguments should, at present, be adopted in Australian jurisprudence.

The first is to make the obvious point that it remains to be seen what actual preferences Australian contracting parties have. More work would need to be undertaken in this regard to sustain a similar argument, but it seems possible that preferences would not change meaningfully between the two sides of the Pacific Ocean. One important difference affecting preferences might be that in the US, limiting admissible evidence and the need to find facts allows a party to apply for summary judgment thereby avoiding a civil jury trial.[106] Concerns regarding keeping a civil jury from affecting[107] the interpretation of a commercial contract or the outcome of a commercial dispute are not a concern in Australia, where such trials are not a relevant feature of the Australian legal landscape.[108] Second, the more

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103 See further Binmore (n 65) 542–3.

104 This rationale rests on another economic explanation of the law, game theory or rational choice theory, see Hanson, Hanson and Hart (n 74) 306:

> often described as 'the science of strategic thinking,' is a branch of economics concerned with modeling and predicting behavior. Strategic behavior arises when two or more individuals interact and each individual's decision turns on what that individual expects others to do. Game theoretic models have been used to help predict or make sense of everything from chess to childrearing, from evolutionary dynamics to corporate takeovers, and from advertising to arms control.

105 The best versions of Bentham's works are those produced by the Bentham project at University College London: JH Burns and HLA Hart (eds) *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation*, (Athlone Press, 1970 ed) 38–50.

106 Schwartz and Scott (n 30) 932, 943, 960–3; Bix (n 30) 59.

107 See, eg, Richard A Posner, 'The Law and Economics of Contract Interpretation' (2005) 83(6) *Texas Law Review* 1581, 1603; Edwin W Patterson, 'The Interpretation and Construction of Contracts' (1964) 64(5) *Columbia Law Review* 833, 836–7 (emphasis added):

> Even in a case in which a jury is the trier of issues of fact, the interpretation and construction of a written contract is within the exclusive province of the judge. …. Where the contract is partly oral and partly written, the judge may instruct the jury as to the meaning of the written part, and, with other instructions, leave the remaining issues of interpretation to be determined by the jury. If the jury is directed to bring a general verdict…. It may so doing exercise its views of jury equity and thus impair the reliability of written instruments. *This possibility may account for the reluctance of courts to admit parol evidence and other extrinsic aids to interpretation, and for their adherence to the "plain meaning" of the contract.*

108 See, eg, *Supreme Court Act 1970* (NSW) s 85. On the decline of the civil jury in New South Wales, see, eg, *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387, 394–7. See also Law Reform

fundamental objection would be to query why the law needs to, or should, reflect majoritarian party preferences and choices. This is because majoritarian preferences will not count for much where such preferences are morally indefensible such that they infringe upon some other normative commitment that the general law should support.[109] At most, it could be said that majoritarian preferences 'create a strong *presumption* concerning well-being',[110] but that such a presumption is not irrebuttable.

The third point to note is that those who advocate the removal of the ambiguity gateway are not in favour of devoting infinite resources to interpretative disputes. The issue needs to be framed in a way that does not potentially create a false dichotomy whereby the ambiguity gateway is offered as the only potential solution to limit evidence in contractual interpretation disputes. This is because the rules of evidence will still apply to the wide context material, such that the material in question would still need to be relevant and probative in order to be utilised. This point has been emphasised by the Court of Appeal of the Republic of Singapore, which has abolished the ambiguity gateway but nonetheless created specific rules of pleading to ensure that wide contextual evidence is utilised transparently, narrowly and only for legitimate purposes.[111] Fourth, it is open to question whether the rules of contractual interpretation should apply differing legal standards between sophisticated and unsophisticated parties as a result of the majoritarian preferences of the former but not the latter. Why treat a subset of contracting parties in a differing and unequal (or preferred) way? Further still, at what point will the differing standards apply?[112] That is, is the criterion of a sophisticated or a commercial contract precise enough for application? In the local context, it would appear unlikely that the High Court of Australia would be willing to adopt a standard of unequal treatment and create two sets of parallel rules concerning the same activity (that is, abolish the ambiguity gateway for unsophisticated parties, but retain it for sophisticated parties). Of course, the argument I have made does not prevent the High Court maintaining the ambiguity

Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Discussion Paper No 99, September 2009) 11. At the time this Discussion Paper was written, there had been approximately 12 civil jury trials in Western Australia in the preceding four decades. Costs implications are another potential point of difference. Under the American Rule, each party is typically responsible for their own costs: *Alyeska Pipeline Service Co v Wilderness Society*, 421 US 240, 247 (1975). In Australia, on the other hand, party–party costs is the typical order. However, there are exceptions in both jurisdictions, which are not material for present purposes.

109 See above n 80 and accompanying text. In this connection, one of the strongest points that Schwartz and Scott make is that the ambiguity gateway does not change fundamentally the approach of the court as a matter of the philosophy of language in determining an objective meaning: Schwartz and Scott (n 30) 952, 961. See also the discussion above on this point at n 85 above and accompanying text.

110 Bernheim (n 65) 291 (emphasis added).

111 *Sembcorp Marine* (n 28) 225 [73]. See further the text accompanying n 119 below.

112 For a general discussion about not changing default legal rules given the context, see Nicholas Tiverios and Clare McKay, 'Orthodoxy Lost: The (Ir)relevance of Causation in Quantifying Breach of Trust Claims' (2016) 90(4) *Australian Law Journal* 231, 240–3; Nicholas Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' (2011) 31(2) *Legal Studies* 175. For examples of where the creation of two sets of parallel rules was resisted, see, eg: *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 365–6 (rejecting the argument that limits on the availability of non-pecuniary loss for breach of contract should be abolished for non-commercial (cf commercial) contracts; *Cavendish Square Holding BV v Makdessi* [2016] AC 1172, 1251 [162] (rejecting the argument that the penalties doctrine should be abolished for commercial (cf non-commercial) contracts).

gateway for all contracting parties — arguments regarding coherence and equal treatment in the law, after all, do not ultimately tell the decision-maker which of two potential forms of a legal rule to select.

As a final point, it should not be overlooked that the context between the parties might nonetheless suggest that a court should give interpretative primacy to textual clues over contextual and purposive clues. For example, think of the common rule that a formal and professionally drafted instrument is to be interpreted more precisely than a communicative act of a lay person.[113] This rule, favouring text over certain aspects of context, is itself a contextual assumption that certain parties generally wish to be taken more literally.[114] Sometimes the context may itself point to the parties intending a text to have a narrow or formal meaning. Or, as Morgan has said,

> [s]ensitivity to context may actually require the exclusion of broad, contextual interpretation. We have argued above that the detailed drafting of commercial contracts requires a formal, textual interpretive approach. Such contracts are addressed primarily to other lawyers, to be understood in a technical sense (not the 'ordinary understanding' championed by Lord Hoffmann). The relevant context is formalism! The characteristic detailed English drafting style demands textual interpretation.[115]

On this view, one can arrive at a not dissimilar end point to Schwartz and Scott that allows parties to limit context. This conclusion is reached, however, from a contextualist route — applying the common stock contextual clue that the author of a more formal legal document generally intends it to be read in a formal manner, rather than needing to apply an altogether different legal rule as a result of the majoritarian preferences of sophisticated and unsophisticated parties. If Anglo-Australian courts are willing to apply a common stock contextual clue or assumption that parties behaving formally intend to be taken more literally, then there appears to be no reason in principle why the parties cannot expressly stipulate such an intention for themselves (as I outline in this article, the argument for context in contractual interpretation is, after all, based itself on intentionality). Put another way, the parties' express intentions regarding how their language is to be interpreted[116] should matter just as much as their assumed intentions.

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113 For a simple example of this common principle in action, see *Thorney Park Golf* (n 43) [24] (McCombe LJ).

114 A point made in Morgan (n 63) 233.

115 Ibid.

116 Making a similar point, but not from a contextualist perspective, see Katz (n 101) 514, 521–2. See also Posner, who notes that arguments in favour of a wide approach to context often do not consider that contracting parties can also have intentions regarding how a contract (ie, the manifestation of their intentions) is to be interpreted: Eric A Posner 'The Parol Evidence Rule, The Plain Meaning Rule, and The Principles of Contractual Interpretation' (1998) 146(2) *University of Pennsylvania Law Review* 533, 569–71.

IV Other Options — If Not an Ambiguity Gateway then What?

It is important to observe that the ambiguity gateway is not the only option when it comes to attempts to make the resolution of contractual disputes more efficient. There are two other obvious solutions — although it should be conceded that such approaches could nonetheless work in concert with an ambiguity gateway or a revised version of that principle. First, the principles concerning active case management and costs orders could inform more effective mechanisms for improving the dispute resolution process.[117] In this connection, Arden LJ observed the potential relevance of case management principles in *Static Control Components (Europe) Ltd v Egan*:

> When the principles in the *ICS* case were first enunciated, there were fears that the courts would on simple questions of the construction of deeds and documents be inundated with background material. Lord Hoffmann recognised this risk by emphasising in *BCCI v Ali* [2002] 1 AC 251 at 269 that his reference to 'absolutely anything' in his second proposition was to anything that a reasonable man would have regarded as relevant. Speaking for myself, I am not aware that the fears expressed as to the opening of floodgates have been realised. The powers of case management in the CPR could obviously be used to keep evidence within its proper bounds. The important point is that the principles in the *ICS* case lead to a more principled and fairer result by focussing on the meaning which the relevant background objectively assessed indicates that the parties intended.[118]

Second, like the use of active case management, the rules of pleading in contractual disputes can seek to limit the breadth of the more contextual *Investors Compensation Scheme* principles and the impact of those principles on the efficiency of contractual disputes. In Singapore, for example, the creation of new rules of pleading have sought to achieve this by limiting the need for a judge to wade through the potentially voluminous thicket of pre-contractual evidence in order to find the contextual 'needle in a haystack'. Rather, the burden has been placed on the party bringing the haystack into court to point to the needle. Menon CJ set out these principles of pleading in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*:

> to buttress the evidentiary qualifications to the contextual [*Investors Compensation Scheme*] approach to the construction of a contract, the imposition of four requirements of civil procedure are, in our view, timely and essential:
>
> (a) first, parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the

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[117] See McLauchlan, 'Contractual Interpretation: What Is It About?' (n 3) 11. Although note Schwartz and Scott, who argue that judges do not bear the costs of litigation themselves and may thus tend to prefer individualised justice and contextual interpretive accuracy in comparison to the parties (if this is true, then such a preference for contextual material could colour how judges ultimately use case management principles): see Schwartz and Scott (n 30) 943.

[118] *Static Control Components (Europe) Ltd v Egan* [2004] 2 Lloyd's Rep 429, 435–6 [29]. See also Donald Nicholls, 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 (October) *Law Quarterly Review* 577, 588.

factual matrix that they wish to rely on in support of their construction of the contract;

(b) second, the factual circumstances in which the facts in (a) were known to both or all the relevant parties must also be pleaded with sufficient particularity;

(c) third, parties should in their pleadings specify the effect which such facts will have on their contended construction; and

(d) fourth, the obligation of parties to disclose evidence would be limited by the extent to which the evidence are relevant to the facts pleaded in (a) and (b).[119]

Ultimately, any sound utilitarian analysis requires the analyst to get her sums right.[120] It is difficult to state with any certainty which approach best maximises efficiency gains (at least in the traditional sense) without a detailed empirical analysis of the costs of, and benefits to, the efficient resolution of contractual disputes associated with the application of the ambiguity gateway, the potential use of case management principles and potential changes to rules of pleading. Rather, the goal here has been modest: to raise some tenable alternatives to the ambiguity gateway principle in order to make the resolution of contractual disputes more efficient given the benefits that the *Investors Compensation Scheme* approach otherwise provides to the interpretive process.

V Conclusion

In *Sirius International Insurance Co v FAI General Insurance Ltd*, Lord Steyn quoted the words of the famous Christian apologist William Paley: 'the tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered to him. He shed no blood. He buried them all alive'.[121] The principal reason why the reader of this quotation knows that Temures committed an injustice is that we all intuitively know the difference between, on the one hand, the sentence meaning of an utterance and what, on the other hand, a reasonable recipient of an utterance would believe the speaker meant. As I have illustrated in this article, the objective intention that the court searches for in a contractual interpretation dispute is distinct from the sentence meaning of a text. If legal interpretation only cared about sentence meaning, then the task of the court would be mercifully narrow: to decode the literal meaning of a text. This is not the modern law of interpretation. It is a basal principle that a contract is to be interpreted by the reasonable recipient of the communication read contextually and purposively. The surrounding circumstances form part of that context such that the ambiguity gateway deprives the court of otherwise probative and relevant evidence in the interpretative process. While the response to this argument is that the ambiguity gateway assists in the efficient resolution of disputes, it is incumbent on those

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119 *Sembcorp Marine* (n 28) 225 [73].

120 See generally Burns and Hart (n 105) ch 4.

121 *Sirius International Insurance Co v FAI General Insurance Ltd* [2005] 1 WLR 3251, 3258, quoting (with minor formatting differences) William Paley, *The Works of William Paley* (Longman and Co, 1838) vol III, 60. Also cited in Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25(1) *Sydney Law Review* 5, 7.

making this utilitarian claim to get their sums right and to justify their conclusions as to the desirability of efficiency as an end goal of the law. I am willing, at least at present, to remain open minded. If such justifications remain wanting, then the ambiguity gateway should be abolished.