example) pure mental or economic harm. Neither was there any suggestion that *Darnely* involved a mere omission. It follows, and follows straightforwardly, that a duty of care was owed to the claimant. The only question in *Darnley*, relevantly, was whether the defendant breached its duty.

The late great Tony Weir rightly decried in his *Introduction to Tort Law*, 2nd ed. (Oxford 2006), 33 the tendency of judges to elide the duty element of the tort of negligence with its other elements, which elision is unacceptable where established doctrine insists that the tort comprises discrete ingredients. With reference to the decision in *Sam v Atkins* [2005] EWCA Civ 1452, Weir wrote:

> In a quite simple case where the defendant motorist collided with a pedestrian who suddenly stepped out from behind a parked vehicle which blocked the defendant's vision, the trial judge held that though the defendant was negligent in driving too fast, her negligence did not cause the injury. The Court of Appeal correctly dismissed the claimant's appeal, but held that the trial judge had given the wrong reason: the right reason, forsooth, was that the motorist owed the pedestrian no duty! In fact, the trial judge was quite correct. Although the defendant was driving faster than was safe in the circumstances, the accident could only have been avoided if she had been driving much more slowly than proper care required; accordingly, her excess speed did not contribute to the injury, for it would have occurred had she been driving quite properly. To decide the case on the ground of "no duty" rather than, as the trial judge did, on causation, is decidedly peculiar.

Without passing judgment on whether the duty of care element should cannibalise other parts of the action in negligence, it is clearly not right for this process to occur surreptitiously and other than at the ultimate appellate level.

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INTERPRETATION AND RECTIFICATION IN AUSTRALIA

Both interpretation and rectification continue to pose problems. Difficulties are compounded by blurring the boundary between the two. In *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47, the High Court of Australia overturned the decisions of the lower courts which had held that performance bonds could be interpreted in a "loose" manner in order to correct a mistake. However, the documents could be rectified in order to reflect the actual intentions of the parties. This decision should be welcomed: the mistake was more appropriately corrected through the equitable jurisdiction than at common law. Significantly, the concurring judgments of French C.J. and Kiefel J. highlight that the law of rectification

now seems to be different in Australia from the law in England. It is to be hoped that the English approach will soon be revisited (see further P. Davies, "Rectification versus Interpretation" [2016] C.L.J. 62).

Nebax Constructions Australia Pty Ltd. ("Nebax") entered into a contract with the New South Wales Land and Housing Corporation ("the Corporation") for the demolition and construction of certain buildings. Under the contract, Nebax was obliged to obtain from the Australian and New Zealand Banking Group Ltd. ("ANZ") two unconditional performance bonds in favour of the Corporation. This would entitle the Corporation to require ANZ to pay it a total of $146,965.06 upon a written demand. Unfortunately, Mr. Simic, a director of Nebax, gave to Ms. Hanna, an employee of ANZ, the wrong details. Instead of the favouree of the bonds being "New South Wales Land and Housing Corporation, with the Australian Business Number ('ABN') 24 960 729 253", which corresponded to the Corporation, the bond was in favour of "New South Wales Land & Housing Department trading as Housing NSW ABN 45 754 121 940". That was a mistake. In fact, there was not, and has never been, any government department called the "New South Wales Land & Housing Department", and the ABN was also clearly incorrect.

Three years after the contract had been entered into, the Corporation sought payment under each bond from ANZ. The Bank refused to pay, since the Corporation was not the named favouree. The first question was whether the bonds should be interpreted such that "New South Wales Land & Housing Department trading as Housing NSW ABN 45 754 121 940" could be read as meaning "New South Wales Land and Housing Corporation, with the ABN 24 960 729 253". This would appear to alter the words chosen by the parties. Nevertheless, this was acceptable to both Kunc J. at first instance and the New South Wales Court of Appeal, which emphasised the context surrounding the performance bonds: their purpose was to fulfil the underlying contractual obligations of Nebax towards the Corporation, and the favouree of the bonds should be understood to be the same as the counterparty to the underlying contract – in other words, the Corporation.

The High Court firmly rejected such a "loose approach to construction" (at [11], per French C.J.). As French C.J. clearly explained in his concurrence, two complementary principles apply to performance bonds: the principle of strict compliance and the principle of autonomy. The latter demands that the performance bond be interpreted independently, and should not be qualified by reference to the terms of the underlying contract: the bank should be able to rely upon the language of the bond alone, without investigating the underlying the contract. Further burdens should not be placed on banks which issue performance bonds. The former principle requires the bond to be interpreted strictly, such that the bank only has an obligation to pay – and can only claim an indemnity for its performance

– if the conditions on which the bank is authorised and compelled to make payment are strictly observed. This is important. The joint judgment of Gageler, Nettle and Gordon JJ. explains that a bank is contractually bound to adhere to the terms of a bond; by paying a party not named on the face of the instrument the bank may be exposed to claims for breach of contract. It is therefore understandable why ANZ did not pay the Corporation on demand.

The significance of context and the "factual matrix" within which an agreement is concluded is a controversial subject. The lower courts in *Simic* considered the relevant background material to include the underlying agreement, and felt able to interpret a term of the contract other than in accordance with its plain meaning. The High Court sensibly refused to endorse such a liberal approach towards interpretation. The nature and function of performance bonds demands a strict approach towards interpretation. It is suggested that a strict approach should also be favoured more generally, and that English law appears to be moving in this direction too (see e.g. *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619; Lord Sumption, "A Question of Taste: The Supreme Court and the Interpretation of Contracts" (Harris Society Annual Lecture, 8 May 2017, https://www.supremecourt.uk/docs/speech-170508.pdf)). Minor "typos" may be corrected in the interpretative exercise, but substantial mistakes – such as that made in *Simic* – are best corrected via the equitable remedy of rectification.

In *Simic*, the performance bonds were agreed between Nabax and ANZ in favour of the Corporation. When deciding whether to rectify the bonds, the High Court rightly focused on the intentions of Nabax (through Mr. Simic) and ANZ (through Ms. Hanna). Mr. Simic was clearly mistaken, since he intended the favouree of the bonds to be the Corporation. It seems appropriate to conclude that Ms. Hanna had a similar intention that the bonds reflected what was required under the underlying contract. After all, if someone had pointed out to Mr. Simic and Ms. Hanna that the name of the counterparty was wrong straight away, then both parties would surely have agreed immediately. It follows that the performance bonds did not reflect the parties' actual intentions due to a common mistake, and rectification was granted.

In rectifying the performance bonds, the High Court applied the traditional test for rectification on the basis of common mistake. The written instrument was made to conform to the true agreement of the parties, and that agreement does not need to be specifically enforceable. Interestingly, both French C.J. and Kiefel J. in their separate concurring judgments commented on the different approach towards rectification developing in England. In *Chartbrook Ltd. v Persimmon Homes Ltd.* [2009] UKHL 38; [2009] 1 A.C. 1101, Lord Hoffmann, *obiter*, suggested (at [59]–[60]) that "the terms of the contract to which the subsequent

instrument must conform must be objectively determined in the same way as any other contract", and that "the question is what an objective observer would have thought the intentions of the parties to be". As the concurring judgments illustrate, this is a departure from traditional equitable principle which concentrates on the parties' actual intentions. It is difficult to see why an earlier objective accord should trump a later, formal agreement unless the written instrument fails to reflect the parties' actual intentions. Moreover, Lord Hoffmann's approach surprisingly allows a court to find a common mistake because a reasonable person would consider that one party was mistaken, even if the party was not actually mistaken at all (cf. *Chartbrook Ltd. v Persimmon Homes Ltd.* [2007] EWHC 409 (Ch); [2007] 1 All E.R. (Comm) 1083, at [138]–[164], per Briggs J.).

The approach in *Simic* reflects the traditional approach to rectification; both French C.J. and Kiefel J. were clear that the views of Lord Hoffmann in *Chartbrook* involve a departure from that approach. Both Justices said that Australia should not follow this aspect of *Chartbrook* without full argument in a case where the issue was relevant to the outcome. This is sensible, and it is suggested that Lord Hoffmann's approach should not be endorsed in any event. Indeed, even in England Lord Hoffmann's approach has given rise to much controversy, and a number of judges have been moved to express strong views in extra-judicial speeches and articles (for a sample, see Davies, "Rectification versus Interpretation", fn. 6). It is to be hoped that this issue will be considered fully by an appellate court in this jurisdiction as well. In *Chartbrook*, Lord Hoffmann's views on rectification were *obiter*, and in *Daventry District Council v Daventry & District Housing Ltd.* [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333, Lord Hoffmann's approach regarding rectification was not contested. This is problematic. As French C.J. rightly observed (at [18]), "[a]t a conceptual level, construction and rectification of a contract are different processes".

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THE "UNITARY EXERCISE" OF CONTRACTUAL INTERPRETATION

LORD Hoffmann's famous "restatement" of the principles of contractual interpretation in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912–13, was heralded as a "quiet revolution" (McLauchlan (2000) 19 N.Z.U.L.R. 147, at 148) in that it appeared to overthrow the legalistic approach of the past. That approach, often associated with the "plain meaning rule" (*Bank of New Zealand v Simpson* [1990] A.C. 182 (PC), 189) involved giving effect to the expressed