Introductory remarks on the occasion of the 11th John Lehane Memorial Lecture,
"Contractual interpretation: An Anglo/Australian journey"
by The Rt Hon Lord Hamblen

3 September 2024
Banco Court,
Supreme Court of New South Wales

It is a very great honour, as well as being a very great pleasure, to introduce this evening's lecture. I have been asked to say a few things about the lawyer after whom it was named, and a few things about the lawyer who is to deliver it. I am delighted to do so in the presence of members of John Lehane's family, including Ros.

John Lehane graduated from the University of Sydney in Arts with first class honours in Latin, and in Law with first class honours and the University Medal, and subsequently a Master of Laws, once again with first class honours. He served articles of clerkship at the firm known as Allen Allen & Hemsley, where he was admitted as an employed solicitor in 1969 and made partner in 1971. The first edition of *Equity: Doctrines and Remedies* was published five years later, in the year John Lehane turned 35. He taught equity part-time at the Law School of the University of Sydney, when it was located across the road in Phillip St, for many years, and his students included the Chief Justice, the President, and the majority of the current judges of the Supreme Court including me. He practised as a partner of the firm for 25 years, including from 1990 to 1993 as its managing partner and from 1994 as its chairman of partners. In 1995 he was appointed a judge of the Federal Court of Australia, where he served with distinction until his untimely death 23 years ago.

John Lehane was precise and economical with language. I cannot confirm the story that as a student he once scored full marks in an exam for a two sentence answer, but it seems plausible. I am sure that he would have been amused by some of the contractual disputes we have now. He was able to find humour in the unlikeliest of circumstances. He would have been puzzled, and troubled, by the general decline in drafting abilities, brought about partly by the rise of the word processor, partly by a decline in language skills. But I am sure he would have seen the humour in the fact that some of the leading modern analyses of contractual interpretation are replete with the language of postmodernism – such as the discussions of the hermeneutic circle by Joseph and Richard Campbell,[1] Lord Grabiner's "iterative process of contractual interpretation",[2] and Kevin Lindgren's article about the ambiguity of 'ambiguity'.[3] I do not know, but I strongly suspect, that John Lehane had read, and was amused by, William Empson's work of literary criticism *Seven Types of Ambiguity* – first published in 1930, refreshingly readable and never out of print since – which might be read with profit by some who deny the existence of some species of ambiguity in contractual construction.

These biennial lectures preserve John Lehane's legacy. I cannot help but think that the topic of our distinguished speaker tonight: "Contractual Interpretation – An Anglo-Australian journey", was well chosen for the occasion. John practised law at the highest levels both in London and in Sydney, his writing continues to be read nationally and internationally, and the process of giving legal meaning to contractual language is at the heart of legal practice.

The interpretation of contractual provisions tends to be ignored, or largely ignored, in many

1 J Campbell and R Campbell, "Why statutory interpretation is done as it is done" (2014) 39 *Aust Bar Rev* 1.
2 Lord Grabiner, "The iterative process of contractual interpretation" (2012) 128 *LQR* 41.
3 K Lindgren, "The ambiguity of 'ambiguity' in the construction of contracts" (2014) 38 *Aust Bar Rev* 153.

university courses on contract law, but paradoxically it is surely one of the most frequent aspects of civil litigation in Australian courts. Not least because it is largely unaffected by statute, it is an area where there is a very significant cross-fertilisation between courts in Australia and the United Kingdom. Indeed, the majority of contributors to the *Contract and Commercial Law Review* – a newly established Australian journal about to publish its 7th issue – are lawyers who practise in the United Kingdom, Singapore and Canada. There is a great deal to be learnt across the jurisdictions. Which brings me to tonight's speaker.

The Right Honourable Lord Hamblen of Kersey graduated in law from St John's College in Oxford, won a Kennedy Scholarship to Harvard where he read for an LLM, and then won the Eldon Law Scholarship to read at the Bar, following in the footsteps of such immensely distinguished predecessors as Roundell Palmer (the future Lord Selborne), Denning, Radcliffe, Wilberforce, Bingham amongst others. He practised for the better part of 30 years at Lincoln's Inn specialising in commercial law, including shipping and insurance. In 2008 he joined the High Court, in 2015 the Court of Appeal and, since 2020, he has been a member of the Supreme Court of the United Kingdom.

He appeared as counsel in many leading commercial decisions, far too numerous to mention here, but including as successful counsel in the Fiona Trust litigation on the scope of an arbitration clause,[4] which as is well known is prominent in the debate on contractual interpretation between the Australian and British courts.[5] In his current role on the Supreme Court, he participated last year in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* on the same point.[6] Earlier, he and Lord Leggatt wrote in *Enka*

4 *Fiona Trust & Holding Corporation v Yuri Privalov* [2007] EWCA Civ 20; [2007] 2 Lloyd's Rep 267; *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2007] 4 All ER 951.

5 See *Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart* (2019) 267 CLR 514; [2019] HCA 13 at [19]-[25].

6 [2023] UKSC 32.

Insaat ve Sanayi AS v OOO "Insurance Co Chubb":[7]

> In *Fiona Trust & Holding Corpn v Privalov* [2007] UKHL 40; [2007] Bus LR 1719, the House of Lords affirmed the principle that 'the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal' (see para 13, per Lord Hoffmann). Contrary to a submission made on behalf of Chubb Russia, this is not a parochial approach but one which, as the House of Lords noted in the Fiona Trust case, has been recognised by (amongst other foreign courts) the German Federal Supreme Court (Bundesgerichtshof), the Federal Court of Australia and the United States Supreme Court and, as stated by Lord Hope at para 31, 'is now firmly embedded as part of the law of international commerce'.

Aspects of this have proven to be controversial in Australian law, including most recently last month's divided decision in *Tesseract International Pty Ltd v Pascale Construction Pty Ltd,* although there are repeated endorsements of the *Enka Insaat ve Sanaayi AS* decision.[8] This is not the occasion to consider the different views expressed there. However, Edelman J, one of the dissentients, referred not only to the approach in *Fiona Trust* but also observed that "the rationale underpinning the general interpretative principle set out by Lord Hoffmann is independent of the arid linguistic debate about the function of prepositions in particular clauses", being "a rationale that applies generally to inform the interpretation of clauses in arbitration agreements".[9] That reflects the truth that the same principles and policy objectives underlie contractual interpretation across the common law world, and it confirms the utility for this pleasingly large audience in Sydney of the topic chosen tonight. I hope you will join with me in welcoming Lord Hamblen to present the 11th John Lehane Memorial Lecture.

7 [2020] UKSC 38; [2020] 1 WLR 4117 at [107].
8 [2024] HCA 24 at [26], [158], [170], [176], [185].
9 [2024] HCA 24 at [217].