

THE PURPOSIVE APPROACH TO PATENT CONSTRUCTION: A DIVERGENCE IN ANGLO-AUSTRALIAN JUDICIAL INTERPRETATION

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[In this article, Mr Pendleton contends that the English courts have adopted a purposive approach to patent construction which enlarges the patentee's monopoly by protecting even aspects of an invention for which protection was not claimed, but which would have been considered essential elements had the patentee's mind turned to them. This purposive approach, by going beyond the four corners of the patent document, reflects the adoption of European practice and a recognition of the complexities of drafting instruments, and now permeates the general law. Australian courts, however, whilst recognizing this approach by the adoption of similar terminology, have not yet been as ready to interpret an application in the patentee's favour, preferring to remain within the four corners of the document. The article also considers the emergence of the purposive approach to interpretation throughout the whole of the common law.]

In recent years the purposive approach to the construction of documents and statutes has become fashionable in Anglo-Australian courts. This article seeks to explore some of the implications arising out of this approach to the judicial determination of the meaning of language in the context of a patent specification. It attempts to do so principally through the examination of two recent decisions, one of the Federal Court of Australia and the other of the House of Lords.¹ In both decisions the language of purposive construction was invoked though very different results were reached. The cases are considered against the background of the evolution and development of purposive construction as a method of interpretation.

One crucial implication of the doctrine is whether there is now a divergence between the Australian and English courts with regard to whom a patent specification will be interpreted favourably, *i.e.* in favour of the patentee's purposes in terms of his fair protection or the purposes of the public in terms of certainty of the monopoly claimed.

The House of Lords decision in *Catnic Components Limited & Another v. Hill & Smith Ltd (Catnic)*² has been hailed as a landmark in the develop-

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¹ A third recent case in which the language of purposive construction was invoked was *Multotec Manufacturing (Pty) Ltd v. Screenex Wire Weaving Manufacturing (Pty) Ltd*, an unreported decision of the Supreme Court of South Africa dated 9 November 1982. See the case comment by Steyn J. R., [1983] 1 *European Intellectual Property Review* 14. The article discusses the controversy of whether purposive construction has ousted the traditional approach and concludes it has not. A similar line of argument was pursued by Reid B., 'The Catnic Decision: The Construction of Patent Claims' [1981] 2 *European Intellectual Property Review* 56. For a refutation of that view see Pendleton M., 'Catnic: Signpost to Where?' [1982] 3 *European Intellectual Property Review* 79.

² [1981] F.S.R. 60.

ment of United Kingdom patent law³ and as the leading case on construction of a patent specification.

This unanimous decision of the House of Lords was delivered by Lord Diplock. The judgment appears to be authority for the following propositions. There is one doctrine of patent interpretation. There are no separate concepts of pith and marrow, mechanical equivalents or non-textual infringement. In all cases involving the interpretation of a specification a purposive construction is to be applied. It seems that 'purposive' means a feature will be construed as intended by the patentee to be essential to his invention only where a man skilled in the art would so view it having regard to the function of the feature in the context of the invention as a whole. Objective reasons will normally have to be advanced to show why a patentee intended to narrowly define his monopoly. Further the courts will begin to protect things which the patentee might have claimed in the light of his disclosure.

In *Populin v. H.B. Nominees (Populin)*⁴ the Federal Court of Australia was concerned with a similar case of patent interpretation. The Court specifically approved the purposive approach adopted by Lord Diplock in *Catnic* yet held, *inter alia*, that the 'pith and marrow doctrine'⁵ remains applicable and that a patent specification is a public instrument which must be certain in defining the boundaries of the patentee's monopoly.

Although the Patents Act 1952 (Cth) and the present Patents Act 1977 (U.K.) are significantly different, the patent in suit in *Catnic* was a patent granted under the Patents Act 1949 (U.K.), which is substantially similar to the Australian Act. Nothing outwardly appears to turn in the Federal Court or the House of Lords decisions on statutory differences. However much may turn on the House of Lords perception of the policy embodied in the European Patent Convention from which the Patents Act 1977 (U.K.) derives much of its inspiration.

What follows is an investigation of the House of Lords decision in *Catnic* and the Federal Court decision in *Populin*. Next there is a brief exposition of the history of purposive construction followed by the presentation of certain hypotheses concerning the doctrine and its possible ramifications.

The House of Lords' version of Purposive Construction

Briefly, the facts in *Catnic* were as follows.⁶ *Catnic* was the registered proprietor of a patent for a galvanised steel lintel for use in supporting the tops of door and window openings in brick and such like cavity walls. The strength, lightness and economy of material over existing alternatives lay in the lintel's box girder construction.

³ See Cole P., *Intellectual Property Decisions* (January 1981) iii, No. 9.

⁴ (1982) 41 A.L.R. 471.

⁵ *Infra*.

⁶ For an exhaustive treatment of the facts and the prior law see Cole P., 'Patent Infringement "Pith and Marrow": A Review of United Kingdom Practice' [1980] *European Intellectual Property Review* 289.

The allegedly infringing item was described by Lord Diplock:

Between this design [the allegedly infringing lintel] and that described in Claim 1 of the patent, the difference which is relied upon by Hill and Smith to save it from being an infringement, is that the back plate is not precisely vertical but is inclined at a slight angle to the vertical, viz., 6° in the case of the three course module and 8° in the case of the two course module.⁷

In delivering the unanimous decision of the House of Lords in *Catnic*, Lord Diplock observed that all members of the Court of Appeal agreed that the applicable law was to be derived from *Van der Lely N.V. v. Bamfords Ltd (Van der Lely)*⁸ and *Rodi & Weinenberger A.G. Henry v. Showell Ltd (Rodi)*.⁹ Both cases split the House of Lords, and contain powerful dissents.

In both, the intention of the patentee to claim a feature as an essential integer of the invention was held by the majority to be the test of whether an infringement had occurred. For infringement to exist there had to be copying of each and every such integer. This was the traditional formulation of the pith and marrow doctrine. However, this intention was to be imputed whenever a feature was included in a claim in clear language deliberately chosen. The essentiality of the feature in relation to the working of the invention as a whole was not considered in determining the patentee's invention. Thus in *Van der Lely* Upjohn L.J. said:

As a matter of construction of claim 11 it seems to us clear that the appellants have deliberately chosen to make it an essential feature of the claim that the hindmost wheels should be detachable and, as we have already pointed out, the foremost wheels need not be. Why they so confined the claim is not for us to speculate.¹⁰

Upjohn L.J.'s approach was followed by Buckley and Waller L.JJ., who constituted the majority of the Court of Appeal in *Catnic*. The functional test was not material. Whether an alleged infringer had taken the substance of an invention could only be considered if the relevant words of the specification were inessential as a matter of construction.

The minority judgments in *Van der Lely*, *Rodi* and *Catnic* in the Court of Appeal took a quite different approach. It is submitted that these minority views have been adopted by Lord Diplock and were taken further when *Catnic* reached the House of Lords.

In the *Rodi* case Lord Pearce (dissenting) held that an essential feature means essential in relation to the function of the feature in the invention, not only in relation to the patentee's intention at the date of publication of the specification:

For the question is whether the *essential part* of the essential integer is taken although the unessential parts of it have been omitted.¹¹

⁷ *Catnic*, *supra* 64.

⁸ [1963] R.P.C. 61 (House of Lords).

⁹ [1963] R.P.C. 367 (House of Lords).

¹⁰ [1961] R.P.C. 296, 313 (Court of Appeal). Approved by Viscount Radcliffe and Lord Jenkins in the House of Lords.

¹¹ [1963] R.P.C. 367, 389.

Even more significant is the following passage from Lord Reid's dissenting judgment in *Van der Lely*, since it demonstrates the inadequacy of the majority approach in that case:

Upjohn L.J. said that the appellants have deliberately chosen to make it an essential feature of the claim that the hindmost wheels should be detachable. If by that he meant that there is something in the specification to show that they deliberately refrained from including the foremost wheels or went out of their way to make the hindmost wheels an essential feature, I cannot find anything on which to base such a conclusion. But I do not think that he meant that, because he went on to agree with Lloyd-Jacob J. that apparently the appellants did not appreciate the possibility that the foremost wheels might be moved. So I think that he must have meant that the mere fact that they only mentioned the hindmost wheels was to make the limitation to the hindmost wheels an essential feature of the claim. But if that were right I cannot see how there could ever be an unessential feature or how this principle could ever operate. And I think that that principle is very necessary to prevent sharp practice.¹²

It is submitted Lord Reid implied that if a patentee did not appreciate that he was creating a functionally unnecessary limitation, the Court should not hold him to his (or his patent agent's) oversight. The test is whether the limitation is functionally unnecessary, provided always that the specification will not be held to comprehend variants having a material effect upon the way the invention works.

It is suggested this test was explicitly adopted by Lord Diplock for this type of situation.

In essence *Catnic* is authority for the following propositions:

- (i) There is one doctrine concerning the construction of patent specifications. There are no separate concepts of 'pith and marrow', mechanical equivalents or non-textual infringement.
- (ii) In all cases involving the interpretation of a specification a purposive construction is to be applied. 'Purposive' implies that a feature will be construed as intended by the patentee to be essential where a man skilled in the art would so view it having regard to the function of the feature in the context of the invention as a whole.
- (iii) Objective reasons will normally have to be advanced in infringement proceedings to show why the patentee intended to define his invention narrowly.
- (iv) Further, the courts will in certain circumstances protect things which the patentee might have claimed in the light of his disclosure.

It is the purposive characterisation of essentiality that constitutes the major departure from the existing law.

One must be careful not to read too much into broad statements of principle. However, in the light of the prior law it is crucial to recognise that *Catnic* represents a policy shift away from construing a specification predominantly in the interests of competition and towards construing it for the patentee's purpose of preventing infringement.

¹² *Van der Lely*, *supra* 76-7.

Lord Diplock says objective reasons will be required to confine narrowly the scope of the patentee's monopoly.

No plausible reason has been advanced why any rational patentee should want to place so narrow a limitation on his invention. On the contrary, to do so would render his monopoly for practical purposes worthless, since any imitator could avoid it and take all the benefit of the invention by the simple expedient of positioning the backplate a degree or two from the exact vertical.¹³

In a crucial but difficult paragraph, Lord Diplock discusses the application of the new functional test of essentiality to circumstances where the effect of a variant is uncertain, having regard to the state of the art at the date of the specification.

Where it is not obvious, in the light of then existing knowledge [presumably whether a variant will have a material effect on the way the invention worked], the reader is entitled to assume that the patentee thought at the time of the specification that he had good reason for limiting his monopoly so strictly and had intended to do so, even though subsequent work by him or others in the field of the invention might show the limitation to have been unnecessary.¹⁴

It seems that in these circumstances the limitation will be held essential. It is hard to see how it could mean otherwise.

However, it would appear from the sentence immediately following the above quotation that a superfluous limitation will be held inessential in the following circumstances:

It [the question of essentiality] is to be answered in the negative only when it would be apparent to any reader skilled in the art that a particular word or phrase used in a claim cannot have been intended by a patentee, who was also skilled in the art, to exclude minor variants which, to the knowledge of both him and the readers to whom the patent was addressed, could have no material effect upon the way in which the invention worked.¹⁵

Hence it appears that for the first time the Court will protect what the patentee might have claimed, provided that both the patentee and his readers would recognise, had they directed their minds to it, that the minor variant was incapable of having any material effect on the way the invention worked.

We have some indication of what constitutes a minor variant because, it seems, Lord Diplock has *Van der Lely's* facts in mind. This is evidenced by his analysis of the division of the House of Lords in that case, which he considers to be due to the lack of expert evidence on whether the dismountable foremost wheels would cause a material effect on the way in which the hay raking machine worked.

My Lords, upon analysis of the speeches in this House in *Van der Lely v. Bamfords* the division of opinion between Lord Reid and the remainder of their Lordships appears to have been due to his thinking that it would be obvious to the informed reader that dismounting the 'foremost' rather than the 'hindmost' wheels was an immaterial variant, whereas the majority were not satisfied that this was even the fact, let alone that it was obviously so.¹⁶

¹³ *Catnic, supra* 67.

¹⁴ *Ibid.* 66.

¹⁵ *Ibid.* 66.

¹⁶ *Ibid.* 66.

In *Van der Lely* the defendant was successful in defeating a large number of the patentee's claims due to anticipation or obviousness. The patentee was forced to rely largely on claim 11, which covered the dual function of the invention as both hay rake and swathe turner. This duality was facilitated by a mechanical movement, involving two parallel rows of cutting wheels, wherein the hindmost wheels were dismountable via a hinging arrangement attached to a divided supporting beam. The defendant's machine did not use a divided supporting beam, but instead used a fixed frame assembly in which the foremost wheels were dismountable. The patentee had provided in the claim for a fixed frame assembly as an alternative, but had not appreciated that, in this version, either foremost or hindmost wheels could be made dismountable.

It is submitted that it is implicit in Lord Diplock's analysis of the decision in *Van der Lely* that the Court should have based their judgment on expert evidence as to whether the defendant's machine utilising dismountable foremost wheels could have a material effect upon the way the patented hay raking machine worked. Once it was established that there could be no material effect, the Court should then ask the relevant expert whether, either hypothetically or in fact, any rational patentee would have intended to exclude the defendant's variant from the scope of his monopoly. If not, it is a mere minor variant and will be held to infringe.

It is submitted that in similar circumstances where the patentee has failed to think through the effect of minor variants which, to his and his readers knowledge, can have no material effect on the way the invention works, the Court should, on Lord Diplock's principle, lend its assistance. This is exactly what the Federal Court of Australia did not do in *Populin*.

The Federal Court of Australia's Approach to Purposive Construction

Briefly, the facts in *Populin* were as follows. The appellant, Populin, owned the patent rights to a sugar cane planting machine. It seems that prior to the patent in suit planting machines were manually fed long sticks of sugar cane from a neat stack. The machine cut these sticks into appropriate lengths, called billets, and planted them in a trench. Populin developed a cane planting machine which planted the cut billets obtained from sugar cane harvesting machines. In order to dispense with the necessity of manually feeding the cane into the machine, the appellant designed a mechanism whereby cane billets dumped into the supply bin were sorted and fed regularly and efficiently into the planting mechanism of the machine. This sorting mechanism was crucial to the determination of the appeal.

The appellant's sorting mechanism consisted of a storage container in which the billets were dumped. This was connected by a conveyer system to a small bin which accomplished the sorting. Sorting was achieved by keeping the relatively small number of billets in the container in a state of agitation which, in conjunction with the floor of the small bin being steeply

angled towards the conveyor, caused the billets to align. Upon alignment they would be picked up by the flights of the conveyor and conveyed to the planting head.

No clearly separate small bin and supply bin were incorporated in the defendant's machine. Instead a hopper received the dumped cane. The sorting mechanism consisted of the interaction of a hydraulic ram which raised the hopper and a trough containing fungicide into which the hopper billets were fed. Turbulence in the trough together with the steep angle of its floor caused the billets to align and be picked up by the flights of the conveyor and carried to the planting head.

In a joint judgment Bowen C.J., Deane and Elliot JJ. found that there had been no infringement and dismissed the patentee's appeal.

The Court referred to and approved the purposive approach to patent interpretation expounded by Lord Diplock in *Catnic*.

A patent specification should be given a purposive construction rather than a purely literal one derived from applying to it the kind of meticulous verbal analysis in which lawyers are too often tempted by their training to indulge.¹⁷

It is arguable that read in isolation this dictum adds little to the dictum of Dixon J. (as he then was) in *Radiation Ltd & Another v. Galliers & Klaar Pty Ltd*,¹⁸ which was also cited by the Federal Court.

But, on a question of infringement, the issue is not whether the words of the claim can be applied with verbal accuracy or felicity to the article or device alleged to infringe. It is whether the substantial idea disclosed by the specification and made subject of a definite claim has been taken and embodied in the infringing thing.¹⁹

The Federal Court held that the test of infringement is whether the defendant has taken each and every one of the essential integers of the patentee's claim. This is the time-hallowed approach to patent infringement. However it will be argued that the characterization of essentiality has differed significantly in the case law, and resort to the essential integers test does little but mask these differences.

It will be further argued that adoption of the purposive approach by the Federal Court, if in fact they adopted it, means interpreting the specification in the interests of competitors and the public. Competitors and the public are concerned with certainty in the precise boundaries of the patentee's monopoly.

By way of contrast, the House of Lords' adoption of the purposive approach in *Catnic* clearly signals an interpretation of the specification more in the interests of the patentee. The purposive approach logically involves identifying the party for whose purposes a unilateral document is to be interpreted.

¹⁷ *Ibid.* 64.

¹⁸ (1938) 60 C.L.R. 36.

¹⁹ *Ibid.* 51.

In *Populin* the Federal Court referred to the 'pith and marrow' test and stated, '[t]he existence of this doctrine is still recognised by the High Court'.²⁰

In *Olin Corporation v. Super Cartridge Co. Pty Ltd*,²¹ Gibbs J. (as he then was) had approved the test of pith and marrow as formulated by the House of Lords in *Van der Lely* and *Rodi*.

The significance in stating that the pith and marrow doctrine is still recognised by the High Court lay in the Federal Court's appreciation of what Lord Diplock had said in *Catnic*:

both parties to this appeal have tended to treat 'textual infringement' and infringement of the 'pith and marrow' of an invention as if they were separate causes of action, the existence of the former to be determined as a matter of construction only and the latter upon some broader principle of colourable evasion. There is in my view, no such dichotomy; there is but a single cause of action and to treat it otherwise, particularly in cases like that which is the subject of the instant appeal, is liable to lead to confusion.²²

Further, it has been argued that *Catnic* involves an implicit overruling of the *Van der Lely* and *Rodi* decisions. It is perhaps informative to note that the Federal Court states its conclusion to be 'on the present state of authority',²³ an otherwise redundant remark without the recognition of the impeachability of the *Van der Lely* and *Rodi* decisions and a separate notion of pith and marrow.

It has been argued that the purposive approach in *Catnic* involves interpreting the specification for the patentee's purposes. Were there any strong reasons for the patentee *not* intending to catch the defendant's variant on the state of the art as it existed at the priority date? Essentiality is inextricably tied up with the function of the feature in the invention and hence expert evidence is crucial.

It is true that the unanimous decision of the High Court in *Minnesota, Mining & Manufacturing Co. and 3M Australia Pty Ltd v. Beiersdorf (Aust.) Ltd*,²⁴ cited in *Populin*, appeals to what features the patentee has deliberately made essential:

it remains the law that a defendant may not take the substance of an invention unless the working of the claims make it clear that the relevant area has been deliberately left outside the claim.²⁵

However without resort to the doctrine of what the patentee might have claimed in the light of his disclosure, and recourse to the function of the feature in the invention, the test of what is deliberate or not would seem still to be confined to the four corners of the specification document.

If the High Court sees fit to specifically endorse the decision in *Catnic* it would not necessarily lead to a different result if *Populin* were relitigated.

²⁰ (1982) 41 A.L.R. 471, 476.

²¹ (1977) 14 A.L.R. 149, 157.

²² *Catnic*, *supra* 65.

²³ *Populin*, *supra* 480.

²⁴ (1980) 29 A.L.R. 29.

²⁵ *Ibid.* 52-3.

It is submitted the decision would depend largely on expert evidence as to the essential function or otherwise of the separation of the small bin and the large container to the invention as a whole.

The Federal Court's decision in essence turned on the characterisation of the separateness of the small bin and the supply container as essential to the invention. However in the concluding paragraph of their judgment the Court states:

It is true that the trough at the front of the defendant's hopper, on the one hand, and the rear part of it with an upwardly moveable floor and rear side, on the other, might if they existed quite separately be properly described as two separate containers. However, when combined as they are in the defendant's machine, they lack this quality. They are, instead, elements of one large container.²⁶

On *Catnic* principles the test would be whether the separateness of the small bin and supply container was essential to the function of the invention.

It seems probable that expert evidence in terms of function might result in pinpointing a similarity in the steeply angled floor of the appellants small bin and the respondents steeply angled trough floor, and the interaction between the slot in its base and agitation of the cane billets, however induced.

On two significant occasions the Federal Court has been generous to the patentee. The claims provided for 'wheel means in which the supply container can be moved when turned by an associated vehicle'. The Court held 'wheel means' was not essential to the claims and provision of means whereby the large supply container can move in co-operation with the planting unit would be caught by the claims.²⁷

The Court was prepared to hold that 'conveyor' in the claims would cover any mechanism which is operative selectively and has the effect of advancing billets. The Court noted that if a strict meaning was given to the word conveyor, it would be construed as apparatus on which the billets are carried forward. However the Court stated that it construed conveyor liberally and by reference to the function of the conveyor, because the claims described the conveyor by reference to function. Hence a conveyor comprehended a hydraulic ram lifting the container to roll the bills forward as utilised in the respondent's machine.²⁸ The generosity was merely a fortuitous product of strict constructionism.

It is convenient at this point to digress and consider the general evolution and development of the purposive approach to interpretation, and to attempt to posit certain general conclusions.

The Evolution and Development of Purposive Construction

Catnic is certainly a departure from the traditional method of patent construction. However, it is submitted it is much more than just that. It is

²⁶ *Populin, supra* 480.

²⁷ *Ibid.* 478.

²⁸ *Ibid.* 479.

just that. It is the latest and most definitive statement in a whole new approach to the interpretation of documents — one which has been quietly gaining momentum in recent years in England and Australia, though predominantly till now associated with the construction of statutes.

There is no decisive agreement that the rules relating to the construction of a statute and other documents are the same. There is agreement however that they are substantially similar.²⁹ They are certainly sufficiently similar to base the contention that the evolution of this new 'purposive construction' is equally applicable to documents and statutes alike. The term 'purposive construction' was itself first coined by Lord Diplock in 1971 in tackling a problem of statutory construction in *Kammins Ballrooms Co. Ltd v. Zenith Investments (Torquay) Ltd*.³⁰ It is submitted there have been at least three major factors influencing the growth of this new approach to the interpretation of documents. Firstly Lord Denning must be credited with advocating a type of approach along these lines as long ago as 1949.³¹ Secondly, the constant exposure of the United Kingdom courts to the so called European method of interpretation has had a modifying effect. Thirdly, the growing criticism of the complexity and obscurity of statutes, as the draftsman strives to satisfy judicial demands in line with traditional rules of construction, to provide for every conceivable factual eventuality. The response to such criticism in the United Kingdom is evident in the Law Commission (U.K.) proposals on the interpretation of statutes, the so-called Renton Report on the Preparation of Legislation.³²

The factual complexity in the intellectual property field and the efforts of draftsmen of patent specifications to satisfy their judicial audience in providing for every conceivable variant mirrors the parliamentary draftsman's dilemma.

Professor Cornish sees this complexity and the inadequacy of present methods of interpretation as a precipitate of change:

The tendency to proliferate detail and to make complicated cross references has a long history. It is rooted in the assumption that the judges, cannot, will not, or should not work out the implications of statutory [*we could add non-statutory*] directives for themselves. . . . Today, however, there are influences at work — and nowhere more so than in the intellectual property field — that may lead to change.³³

In his recent book, *The Discipline of Law*,³⁴ Lord Denning M.R. leaves no doubts that he has been trying to force an abandonment of literal or strict constructionist approaches and the adoption of an approach akin to purposive construction.

²⁹ Odges C. E., *Construction of Deeds and Statutes* (5th ed. 1952) 237.

³⁰ [1971] A.C. 850, 881.

³¹ *Infra* n. 34.

³² England, *Report of the Committee on the Preparation of Legislation* (1975) Cmd 6053.

³³ Cornish W. E., *Intellectual Property: Patents, Trade Marks, Copyright and Allied Rights* (1981) 14. My italics.

³⁴ Denning Lord A., *The Discipline of the Law* (1979).

Seaford Court Estates Ltd v. Asher was the first in a line of cases advocating this type of approach.

A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.³⁵

This was quite a radical departure for 1949, but apparently the House of Lords was prepared to indulge a 'very junior Lord Justice of Appeal', as Lord Denning M.R. described himself.

The next opportunity for developing this approach came in *Magor and St. Mellons Rural District Council v. Newport Corporation*.³⁶ Lord Denning approached the construction of a ministerial order as follows:

This was so obviously the intention of the Minister's Order that I have no patience with an ultra-legalistic interpretation which would deprive [the appellants] of their rights altogether.³⁷

The House of Lords condemned Lord Denning's construction of the order as 'a naked usurpation of the legislative function'.³⁸

Since that reprimand, Lord Denning refers in *The Discipline of Law* to the vindication of his approach by Lord Diplock's purposive construction in the *Kammins* case and the endorsement of his views by the Renton Committee. He gave expression to this in *Northern v. Barnet London Borough Council*.³⁹

The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach'. . . . Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it — by reading words in, if necessary — so as to do what Parliament would have done, had they had the situation in mind.⁴⁰

This approach has recently been condemned again, this time in academic literature. Lord Diplock is implicated as the primary source of encouragement for the growth of the 'Denning approach'. Watchman writes:

Lord Denning has, in recent years, been able to derive support for his views on statutory interpretation from three main sources. Firstly, there is the judgment of Lord Diplock in the case of *Kammins Ballrooms Co. Ltd v. Zenith Investments (Torquay) Ltd* in which Lord Diplock outlines a new approach to statutory interpretation which he describes as the 'purposive approach'. The requirement of this approach according to Lord Diplock was that the judge must impute 'to Parliament an intention not to impose a prohibition inconsistent with the objects which the statute was designed to achieve, though the draftsman has omitted to incorporate in express words any reference to that intention'.⁴¹

This refutation of the approach is based on constitutional grounds, only applicable to statutory construction, so need not concern us here. It is

³⁵ [1949] 2 K.B. 481, 499 per Lord Denning M.R.

³⁶ [1950] 2 All E.R. 1226.

³⁷ *Ibid.* 1236.

³⁸ [1951] 2 All E.R. 839, 841 per Lord Simonds.

³⁹ [1978] 1 W.L.R. 220.

⁴⁰ *Ibid.* 228.

⁴¹ Watchman P., *Lord Denning and the Constitution* (1981) 23.

clear however that the *Catnic* approach is the direct descendant, legitimate or otherwise, of this line of cases.

The second reason posited as assisting the birth of the purposive approach was the exposure of the United Kingdom courts to European interpretation methods consequent to British membership of the European Economic Community.

The influence of the European approach to interpretation might well receive its best illustration in *Catnic*. Undoubtedly a desire to harmonise the British courts' approach to construction with that of other member states contributed to the gratuitous application of a perception of article 69 of the European Patent Convention and Protocol to the Patents Act 1949 (U.K.) specifications.

Lord Denning has again been instrumental, at the very least, in publicising the divergences in United Kingdom — European construction methods. In *Buchanan and Co. v. Babco Ltd*⁴² he commented on the European approach as follows:

They adopt a method which they call in English by strange words — at any rate they were strange to me — the schematic and teleological methods of interpretation.⁴³

In *H.P. Bulmer Ltd & Another v. Bollinger & Others*⁴⁴ the Master of the Rolls decreed what the approach of the British courts should be when confronted with matters involving a European element:

Seeing these differences, what are the English courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent.⁴⁵

Too much can be made of the differences in approach of the English and European courts. In a perspective-restoring article, Professor Dagtoglou corrects what he understands to be the English perception of the teleological approach of European law and the literal approach of English law:

The Continental lawyer who reads these sentences [Lord Denning in the *Bulmer* case] is rather taken aback. Is it not a '*simplification terrible*', perhaps just a myth, that English law, unlike Continental law, does not know general principles at all? — or that Continental judges do not examine the words in a meticulous way and do not argue about the precise grammatical sense, but divine the spirit of the law and gain inspiration from it? — or that English judges, unlike their Continental colleagues, never look to the legislative purpose or interest.⁴⁶

Lord Denning's principle in *Bulmer* did however receive specific endorsement in the Renton Report. The forces prompting the establishment of that Committee have been suggested as the third reason influencing the growth of purposive construction.

⁴² [1977] Q.B. 208.

⁴³ *Ibid.* 213.

⁴⁴ [1974] 4 Ch. 401.

⁴⁵ *Ibid.* 426. See also Dale W., *Legislative Drafting: A New Approach* (1977).

⁴⁶ Dagtoglou P. D., 'The English Judges and European Community Law' (1978) *Cambridge Law Journal* 76.

The Committee noted that there has been a groundswell of discontent with the complexity and obscurity of legislation for some time. The rules on construction applied by the courts have been identified as the prime reason for the draftsman's predilection for detailed provision for every conceivable factual permutation — often at the expense of clarity and loss of the general legislative purpose.⁴⁷

The Renton Report, as yet unadopted by the United Kingdom Parliament, endorsed in essence the United Kingdom Law Commission's proposals for a new interpretation statute. In many respects the report is more restrictive in its recommendations than the Law Commission. For instance it recommends restricting the class of *travaux préparatoires* admissible in aiding construction.

The Report has been overtly criticised by a pressure group which was instrumental in the Committee's establishment. The Statute Law Society has fired various broadsides:

The Report confines itself to useful, but relatively minor, suggestions for reform. Those responsible do not admit that any problem of obscurity (in legislation) exists. They resolutely reject any dialogue with statute law users.⁴⁸

The main value of the Renton Report in buttressing the emerging purposive approach was the publicity it gave the dependence of the draftsman's approach on judicial reform of judicial rules of construction. The Committee felt the courts were quite capable of such reform:

We conclude that interpretations of Acts drafted in a simpler, less detailed, less elaborate style than at present would present no great problems provided that the underlying purpose and the general principles of the legislation are adequately and concisely formulated. The real problem is one of conscience. Would Parliament be prepared to trust the Courts? We refer again to the evidence given to us by Lord Emslie and Lord Wheatley. It is probably the case that legislation in detail is resorted to because Parliamentarians harbour the suspicion that judges cannot be trusted to give proper effect to clear statements of principle. This with respect to them (the Parliamentarians) is wholly unfounded.⁴⁹

One recent case however illustrates that the feeling towards purposive construction is not altogether unanimous.

In *Stock v. Frank Jones (Tipton) Ltd*,⁵⁰ Viscount Dilhorne observed:

It is now fashionable to talk of a purposive construction of a statute, but it has been recognised since the 17th century that it is the task of the judiciary in interpreting an Act to seek to interpret it 'according to the intent of them that make it'. If it were the case that it appeared that an Act might have been better drafted, or that amendment to it might be less productive of anomalies, it is not open to the court to remedy the defect. That must be left to the legislature.⁵¹

⁴⁷ For a criticism of this approach from a parliamentary draftsman's point of view see Jamieson N. S., 'The Tradition of Free Expression in Australasian Legislative Drafting' (1980) 9 *New Zealand Universities Law Review* 1.

⁴⁸ Statute Law Society, *Renton and the Need for Reform* (1979). See also Statute Law Society, *Statute Law Deficiency* (1970); Statute Law Society, *Statute Law: The Key to Clarity* (1972); and Statute Law Society, *Statute Law: A Radical Simplification* (1974).

⁴⁹ *Renton Report*, *op. cit.* 19.37.

⁵⁰ [1978] 1 All E.R. 948.

⁵¹ *Ibid.* 951.

Lord Diplock had the last word in *Fothergill v. Monarch Airlines Ltd.*⁵²

the resulting Act of Parliament will be couched in language that accords with the traditional, and widely criticised, style of legislative draftsmanship which has become familiar to English judges during the present century and for which their own narrowly semantic approach to statutory construction, until the last decade or so, may have been largely to blame. . . . The unhappy legacy of this judicial attitude, although it is now being replaced by an increasing willingness to give a purposive construction to the Act, is the current style of legislative draftsmanship.⁵³

In *Catnic* the House of Lords was freed of all constitutional considerations, and in the area of patent specification interpretation, amongst other areas, the doctrine of purposive construction may well yet commend itself to the High Court of Australia.

Conclusions

It is submitted that the Federal Court of Australia in *Populin* has not really endorsed the purposive approach to patent interpretation embodied in *Catnic*. In fact the Federal Court could probably not have accepted *Catnic's* formulation of purposive construction, faced with existing High Court decisions. Regrettably though, the Court has paid lip service to the purposive approach, and this can only blur the meaning of a valuable tool for the discovery of the meaning of language.

The essence of purposive construction lies in looking outside the four corners of a document. Extrinsic evidence and the informed subjective perception of the judge will often be required. In the case of a written contract, parol evidence may become more widely accepted. In the case of a statute there are already recommendations in the United Kingdom for the admissibility of *travaux préparatoires*, perhaps even extending to *Hansard*. In patent specifications, extrinsic expert evidence on the function of a feature of an invention will be admissible. This may prompt the court in limited situations to rewrite in a limited way the patentee's claims.

The House of Lords choice of *function* as the extrinsic evidence admissible consequent upon the adoption of a purposive approach may well be tied to a reversal of public policy, away from the interests of certainty of the boundary to the patentee's monopoly, towards his fair protection. This policy may in turn be derived from a perceived objective in the European Patent Convention, and the United Kingdom courts, duty to give effect to the convention's spirit. This derivation is of course completely inappropriate in Australia, although the underlying policy may not be.

The High Court of Australia may well select other extrinsic criteria, rather than *function*, if it fully endorses the purposive approach to patent construction. But selecting some extrinsic criteria is part and parcel of accepting a purposive approach. It is this necessity to select an extrinsic criterion, outside the four corners of the document, which the Federal Court has glossed over in *Populin*.

⁵² [1980] 2 All E.R. 696.

⁵³ *Ibid.* 705.