**BASIC RULES FOR CONSTRUCTION OF NON-STATUTORY DOCUMENTS: DEEDS AND OTHER DOCUMENTS**

We are now turning our attention to the rules and principles being maxims, canons that may be invoked to help us understand the meaning and legal effect of language used in documents, statutes and constitutions. These rules may serve as guide but not necessarily binding rules. Under the now dominant approach to interpretation being the modern purposive approach to interpretation, the rules and principles are geared towards resolving interpretative problems that combines Barak's broad definition of the ultimate purpose with the staggered approach of purposive system of interpretation. The rules must be understood not to be cast in iron and stone**. Under MOPA the systems or the approaches to interpretation are categorized into basic rules, aids to interpretation, presumptions and special binding rules such as article 107 of the constitution on retroactivity of legislation.** Under MOPA these are employed together for the aim of achieving the object of interpretation; that is the meaning, scope and legal effect of language.

**By basic rules it is in reference to the context of the rules or principles that should give the pointers as to how interpretation should be done**. That is the systematic and progressive steps that ought to be followed in ascertaining the meaning of non-statutory documents. **These rules are deemed basic and accorded a lot of weight and only departed from in circumstances where there are compelling and logical reasons for doing so.** Whiles some interpretative issues could be resolved at the level of the ordinary meaning others may require a departure from the ordinary meaning to a search for the secondary meaning to even what may have been necessarily implied in the text. Today we begin with the basic rules of interpretation and more specifically rules applicable in dealing with non-statutory documents:

A document is any tangible thing containing a writing that provides information on a given subject. That would mean that a statute is a writing but our focus is only on non-statutory writings. Document is defined by the Black's Law dictionary, 6th Ed as

"*a physical embodiment of information or ideas, conveyances, guarantees, such as a letter, contract, receipt, account book, blueprint, or X-ray plate; esp., the original of such an embodiment*". In law **documents will include deeds, conveyances, guarantees, wills, agreements, title papers, bill of lading, letters, receipts, and other written instruments used to prove a fact.** Non-statutory documents could be in the form of unilateral documents/contracts and also bilateral and multilateral documents.

Black Law's dictionary, 8th Ed. sees a deed as *"At common law, any written instrument that is signed, sealed, and delivered and that conveys some interest in property*". In his work, The Law of Personal Property, 2nd Ed 1955 at page 118, Ray Andrews Brown defines a deed as:

> *"What then is a deed? Unfortunately, the word is not free from ambiguity. In the original and technical sense a deed is a written instrument under the seal of the party executing it. Because, however, of the wide use of such instruments in the conveyance of real estate, it has come to mean in popular acceptance any formal conveyance for the transfer of land or of an interest therein. The dual use of the term has crept into the language of courts and law writers, so that in the reading of cases it is difficult to determine whether the word is used in the first and original sense, or whether it connotes a formal instrument of the type ordinarily employed for the conveyance of land".*
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> *And Dworkin defines a deed as "All deeds are documents, but not all documents are deeds. For instance, a legend chalked on a brick wall, or a writing tattooed on a sailor's back may be documents but they are not deeds. A deed is, therefore, a particular kind of document. It must be in writing and a writing on paper or its like, e.g., vellum or parchment. Any instrument under seal is a deed if made between private persons. It must be signed, sealed, and delivered. A deed must either (a) effect the transference of an interest, right or property, or (b) create an obligation binding on some person or persons, or (c) confirm some act whereby an interest, right, or property has already passed."*

Odgers on Construction of Deeds and Statutes defines a document as *"some writing, which furnishes information about something"*.

Halsbury's Laws of England, 4tt Ed. Vol 12 paragraph 1301 defines a Deed as:

> *"A Deed is an instrument which complies with the following requirements. First it must be written on parchment or paper. Secondly it must be executed in the manner specified below by some person or corporation named in the instrument. Thirdly, as to subject matter, it must express that the person or corporation so named makes, confirms, concurs in or consents to some assurance (otherwise than by way of testamentary disposition of some interest in property) or some legal or equitable right, title, or claim or undertakes or enters into some obligation, duty or agreement enforceable at law or in equity or does or concurs in some other act affecting the legal relations or positions of a party to the instrument or of some other person or corporation. To be executed by a party as his deed, the instrument must be sealed with a seal which is or can be regarded as his seal and must be delivered as his act and deed".*

The classic meaning of a deed under common law is not the same in Ghana. Date-Bah JSC in the case of **Owusu-Asiedu v Adomako & Adomako [2006-2007] SCGLR 591 @600** noted that an instrument that is, signed by the parties, attested and delivered would be recognized as a binding deed as it evinces the intention of the parties and the court will give validity to it. In fact the court concluded as follows:

> *"A deed need not be sealed but a deed that is not sealed must be signed and the signature must be witnessed and attested. The deed must also make clear on its face that it is intended to be a deed. Thus the requirements of Deeds, as far as individuals are concerned are as follows: A deed need not be sealed, but a deed that is not sealed must be signed and the signature must be witnessed and attested. An attested and witnessed signature will be recognized by the*

*courts as a substitute for the requirement for a seal… where an instrument is sealed and delivered it will continue to be recognized as a deed. Delivery in relation to deeds does not mean that there should be a transfer of possession. It refers to conduct indicating that the person has executed the deed intends to be bounds".*

An instrument, which may encompass an indenture, a lease, an assignment, a written contract, is much known in the Ghanaian context than the English Deed. The general form that such an instrument which relates to land should comply with has been laid down by statute, that is sections 1, 2 and 3 of the Conveyancing Act, NRCD 175 which has been repealed and re-enacted as sections 34 to 36 of the Land Act, Act 1036 and has been given judicial interpretation in a number of cases:

The sections 34-36 Act 1036 states as follows:

*"A contract for the transfer of an interest in land is not enforceable if the contract is not*

*(a) evidenced in writing and*

*(b) signed by*

*(i) the person against whom the contract is to be proved or*

*(ii) a person who is authorized to sign on behalf of that person or exempt under section 36.*

*35(1) A transfer of an interest in land other than a transfer specified in section 36, shall be in writing and signed by*

(a) *the person making the transfer or by the agent of that person duly authorized in writing*

(b) *and the person to whom the transfer is made or the agent of that person duly authorized in writing*

*(2) A transfer of an interest in land made in a manner other than provided in this section does not confer an interest on the person to whom transfer is made".*

Exceptions have been provided for under section 36 to include transfers that takes effect by operation of law, by operation of the rules of equity relating to the creation or operation of resulting trust, implied or constructive trusts, by order of the courts, by will or upon intestacy, by prescription, a lease for a term not exceeding three years whether or not the lessee is given power to extend the term, by license or profit other than a concession required by an enactment to be in writing or by oral grant under customary law.

For in the case of **Sarpong (Decd) sub by Kodua v Jantuah** [2017-2020] SCGLR 1 SCGLR 703. Benin JSC in applying sections 1, 2 and 3 of NRCD 175 noted that a transaction affecting land for a period of more than three years ought to be in writing to be effective. Again in the case of **Anthony Wiafe v Dora Borkai Bortey & Othrs** J4/48/2015 dated 1st June, 2016, Benin JSC emphasized that it is not even **the fact of registration of one's instrument or document that gives validity to one's title but only one of security of title but what provides validity is when the instrument has met and conformed to sections 1 and 2 of NRCD 175 and now sections 34-36 of the Lands Act**. See also **Asante Appiah v Amponsah alias Mansah [2009] SCGLR 90.**

A contract is unique and it reflects in the approach to its interpretation. For a contract entered into between two or more parties is an expression of the private will of the parties. And a Judge has to interpret it to express the private will of the parties. For a statute the interpretation is to achieve the purpose of the text. But for a contract/agreement is to bring out the joint intent of the parties. The underlying principle in interpreting non-statutory documents is to search for the subjective authorial intent in the absence of compelling circumstances not to do so. The ordinary meaning of the text, if plain under the MOPA becomes the subjective purpose. The interpreter targets the subjective authorial intent but there is employment of objective evidential standard in arriving at the subjective authorial intent. There is an examination of what a reasonable hypothetical writer would be presumed to have meant by the words employed in the document. Some of the principles are peculiar to non-statutory documents and may not extend to statutory documents and

constitution. Some of these are *falsa demontratio rule, contra preferentum* rule etc. In the same way recourse to legislative history, preparatory works etc are also peculiar to statutory interpretation but not non-statutory documents.

**First principle in construing an instrument or a document is to read the document as a whole**. One cannot claim to understand a document unless it has been read as whole. Aharon Barak underscores this fact when he notes that:

> *"In seeking the purpose of the contract, Judges must treat the contract as a whole. They learn its subjective purpose from the totality of contractual provisions. No one provision is the source of the subjective purpose. The various parts of a contract are entwined and connected with each other".*[1]

He further notes that a contract is an integrative framework. Its different parts are entwined and intermingled. Its various branches influence each other. And interpreting it needs a holistic appreciation. And that even this apply to a contract whose provisions appear "plain". And the authors of Halbury's of Laws of England, 4th Ed Vol 12 para 1469 also put it this way:

> *"It is a rule of construction applicable to all written instruments that the instrument must be construed as a whole in order to ascertain the true meaning of the several clauses, and the words of each clause must be so interpreted as to bring them into harmony with the other provisions of the instrument, if that interpretation does no violence to the meaning of which they are materially susceptible. The best construction of deeds is to make one part of the deed expound the other and so to make all the parts agree. Effect must as far as possible be given to every word and every clause"*

You may see **Manu v Emeruwa (1971) 1 GLR** 422 where Abban J had to construe the nature of the agreement between the parties as to whether it was a pledge or mortgage. Whilst the plaintiff who had used his car as security for a loan granted him

[1] Barak, page 392

by the defendant contended that the agreement was a pledge defendant claimed it was a mortgage. Defendant urged the court to confine itself to the four corners of the agreement entered into. Both parties were illiterates and the document was read over and interpreted to them. Abban J held that:

> *"Even a restricted view of the document itself showed that, in spite of words such as "absolute assignment," "convenant" and "absolutely," the transaction was that of a pledge. All the terms of a document must be looked at and whatever phraseology may be adopted in some particular part of the document, if on a consideration of the whole document there are grounds appearing on the face of the document which afford proof of the real intention of the parties, then that intention ought to prevail against the obvious and ordinary meaning of those words".*

It is always dangerous to identify and isolate the provisions, clauses, phrases, sections and give them independent meaning without reference to the entire document. From the holistic appreciation, **it should lead the interpreter then to discover the intention of the parties to the document.** You may also see the case of **Najat Metal Enterprises Ltd v Hanson [1982-83] GLR 81** where Najat Metals was one of the companies within the Dakmak group of companies. AFRC regime confiscated the Dakmak group of companies to the Republic. The companies listed for which the State was to take over was Najat Company. In the writ, the Plaintiff contended that it was not Najat Company but rather Ltd and was not the one mentioned in the order. The State on the other hand contended that it was a mere misnomer as the two are the same one company.

The court held among others that:

> *Where in all circumstances and looking at the document as a whole the mistake was that the party was not accurately described, then it was a mere misnomer and could be cured. But where the inaccuracy raised doubts about the identity of the party intended, then the mistake was fatal. In the instant case, on the evidence, there was no other entity other than the plaintiff to which the*

*description Najat Company might refer; the name Najat Company could only refer to the plaintiff and no other company. Any other interpretation would not give effect to the expressed intention of the maker of the document. The plaintiff was therefore the company confiscated to the State".*

Do you agree with the view of Cecilia Koranteng-Addow J?

Again, in construing as a whole you may look at the case of **Boateng v Volta Aluminium Co Ltd [1984-86] GLRD 85** where the Plaintiff's employment was terminated and given one month pay in lieu of notice to him. He issued a writ claiming that his termination was unlawful as clause 3 of the conditions of service only provided for "***a notice of one month***" and there was no provision for termination in lieu of notice. The court implied a one-month payment in lieu of notice and dismissed the originating summons. The Court of Appeal affirmed the decision by having regard to clauses 1 and 2 in addition to 3 of the conditions of service. That the clauses must be read as a whole and clause 3 need not be excluded as clause 1 gave such an option of payment of one-month salary in lieu of notice. Abban JA (as he then was) noted as follows:

*"in attempting to construe the termination provisions, regard should be had to all the four clauses, ie the language used and all the provisions in the termination clauses should be looked at as a whole and every clause must be compared with the other and one entire sense made out of them. It was only by so doing that the true meaning and the intention of the parties could be discovered. In clause (1) the employee could terminate his services by giving one month's notice or by paying one month's salary in lieu of notice to the employer. But the payment of one month's salary in lieu of notice was absent in clauses (2) and (3). But reading all the clauses together, clauses (2) and (3) were not intended to exclude the possibility of paying a month's salary as an alternative to giving a month's notice. If clause (1) gave such an alternative to an employee it was only fair and just that it should be inferred or implied that*

*the employer also had the same alternative in the other two clauses, ie clauses (2) and (3). Such an inference would not only do that which was the highest equity, namely make an equality between parties who stood in the same relation, but would also effectuate the real object and intention of the parties.*

And in **Chambers Colliery Co Ltd v Twyerould** [1915] 1 Ch 268, the principle is encapsulated in the following:

*"The deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning naturally susceptible"*

**Intention of the Parties**

Second, the need for the Judge to read a document as a whole is only to discover the intention of the parties and enforce it. That is any construction must be near to the mind and intention of the makers of the document. And there is the presumption that it is not the mind and intention of the makers to achieve absurd and unreasonable results in a document. Again remember that the goal for interpreting a private text is to realise the what the parties to the contract intended.

Intention has been stated by Edzie to be used in one of three main senses. First that is the actual mental state or subjective intent or purpose of the author of the text of the document, being the meaning or purpose of the language employed in the document. And that this is key in systems that rely on subjective interpretation. Second is the intent that a reasonable author or reader of the text of the document. That this second meaning is also key in systems that approach interpretation using the objective idea of interpretation. The third is the aims, objects and motives in a combination of the subjective and objective intent at the core of the text of the document. And this is at the heart of MOPA which is the approach Barak posit.

Intention used may encompass both the subjective authorial intent and the objective purpose underlying the text of the document. And even may involve the third scope of the meaning of a combination of the subjective and objective purposes of the text. This is what Lord Wilberforce has stated in the case of Reardon-Smith Line Ltd V HANSEN-TANGEN [1976] 1 WLR 989 @ 996 that:

> *"When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties."*

And this is true that we may not be able to know the real joint intent of the parties when they disagree over the joint intent and the only way to resolve it is through an objective approach by assuming the position of a reasonable person's interpretation. This does not in anyway supplant the subjective purpose of the parties being the dominant goal in interpreting the private document. This is because the objective purpose constitutes the background for understanding the subjective purpose. And the interpreter is compelled to resort to the objective purpose when there is no way that he can decipher the subjective purpose. And the interpretation must be near as possible to the purpose at the core of the text as the law would permit. This principle was echoed in the case of **Biney v Biney [1974] 1 GLR 318** the Court of Appeal had to interpret the deed of settlement of a settlor, J. P. O Biney which instrument was executed in 1910. He was the father of the plaintiff and the grandfather of the defendants. In the deed he conveyed his freehold interest in land to three persons to have life interest and thereafter to his four children as remaindermen, their heirs and assigns forever. The plaintiff became the sole survivor of the remaindermen and argued that on the basis of the common law principle of *jus accrecendi* he became entitled to the absolute use of the property. The trial Judge agreed with the construction place on the deed of settlement by the plaintiff but on appeal the appellant argued otherwise that it was not the intention of the settlor to convey the

property absolutely to the plaintiff. The Court of Appeal dismissed this argument when it laid down three main stages in dealing with the meaning in the following:

> *"The deed of settlement, exhibit A, had to be interpreted in the light of three basic rules of construction, namely:*
>
> *(i) the construction must be as near to the mind and intention of the author as the law would permit;*
>
> *(ii) the intention must be gathered from the written expression of the author's intention; and*
> *(iii) local authorities had firmly established that in pre-1974 conveyancing, technical words of limitation in a document relied on as constituting a transaction known and recognised by English law must have their strict legal effect according to the English pre-1881 conveyancing law".*

By this the court came to the conclusion that the settlor intended his property to be governed by English law and not distributed in accordance with the customary principles of matrimonial distribution of property. That he intended to vest his property in his children and not the family as known under custom.

Similar views had earlier been expressed by Knight Bruce in **Bird v Luckie (1850) 68 ER 373**:

> *"No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise or the good. A testator is permitted to be capricious and improvident, and is more at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious and eccentric, for which the testator, if he could be heard, might be able to answer most satisfactorily."*

In giving effect to the contents of a document, the court is not giving its blessing and support to all the contents of the document. The court is only expressing its satisfaction that the document has been validly executed and represent what the parties intended to be enforced as a binding contract. The Courts are not to interfere with a document whose intent is manifest. It is not the business of the courts to draw contracts or agreements for parties but to ensure that documents drawn and which manifest the intention of the parties is not defeated simply because its terms are not pleasant to the court. And in embarking on this exercise any construction that makes the meaning of the document unreasonable, absurd, unintelligible, and incongruous or that may tend to create undue hardship for the parties and third parties may be said not to be closer to the intention and purpose of the makers of the document. By this approach the court in the Biney case gave technical words their technical meaning.

**Intention must be gathered from the written instrument**.

In an attempt to discover the intention of the makers of the document, the discovery must begin with the instrument before the court for interpretation. For the intention is the soul of a document which is rendered as *animus hominus est anima scripta* (the intention of the parties is the soul of the instrument) or in order to give life or effect to an instrument, it is essential to look to the intention of the persons that executed it. And it is for the **court to give meaning to what has been expressed but not necessarily what ought to have been expressed except where the expressed meaning leads to absurdity to repugnancy**.

As to what is the intention of an author of a document could also be seen expressed in the case of **Prempeh v Agyepong [1993-94] 1 GLR 225** where the deceased, a lawyer lived with his girlfriend in concubinage. Upon his death, the appellant claimed that the house they lived together had been willed to her in a draft will that was tendered as Exhibit "A". The trial Judge gave judgment for the paramour that at least the draft could be the samansiw of the deceased and besides that the deceased referred to her as wife but was overturned on appeal. Undaunted she proceeded to the Supreme Court. At the court of appeal this is what Ampiah JA (as he then was) said:

*"For the court to rely on an incomplete, unsigned and unapproved draft of a will to determine the intentions and wishes of the maker in the face of evidence that the will the court was interpreting was based on only part of the instructions the maker gave for the preparation … Counsel for defendant has argued that the court should interpret exhibit 1 in accordance with law irrespective of the intention of the testator. In other words the court must propound the document as samansiw if it satisfied the ingredients of the law but must not look at the intention of the testator. This submission is not only unfortunate but it is also bad in law. The maxim is animus hominis est anima scripti (intention is the soul of an instrument). Infact the whole essence of a will is the declaration of the will of the wishes of the testator. One cannot pass a document as a will or samansiw if it does not contain the intention wishes of the maker"*

The Supreme Court also rejected the draft document as an expression of the will of the deceased in the following words:

*"the cardinal principle in the construction of wills was that, they should be so construed as to give effect to the intention of the testator, since the whole essence of a will, in any case, was the declaration of the wishes and intention of the testator. In Ghana there were two forms of wills, one under the Wills Act, 1971 (Act 360) and the other under customary law. Since the ingredients required to establish any of those two forms of wills were different, it was incumbent on the court to determine the intention of the testator as to which of those two wills he contemplated to adopt. In the instant case, the initial expression of the deceased in exhibit 1 indicated that he had intended to make a will under Act 360 and not samansiw, because he had specifically excluded a will under customary law and in any case at the time of writing exhibit 1 the deceased did not have any fear of imminent death. Accordingly, exhibit 1 which had failed as a will for not fulfilling the requirements of Act 360, could not be honoured as a samansiw*

The court in **Allan Sugar (Products) Ltd v Ghana Export Co Ltd [1982-83] GLR 922** where the facts were that the National Investment Bank (NIB) loaned ¢300,000 on a mortgage to a co-operative society engaged in vegetable marketing. On the failure of that society to repay the loan, the NIB foreclosed the mortgage. The property consisted of 200 acres of irrigated land, an irrigation system and buildings. By an assignment dated 1 May 1978, NIB sold 50 acres of the land and the buildings for the sum of ¢25,000 to AS Ltd., a company engaged in sugar-cane production, for the unexpired term of the society's lease. After protracted negotiation, NIB agreed to assign the remaining 150 acres together with the exclusive use of the irrigation facilities to GE Ltd. The Plaintiff sued claiming that it was entitled to the use of the original equipment on the land as there was a general understanding that the ownership of the land included use of the irrigation pumps as well on the land. The trial court dismissed the action and the Plaintiff appealed wherein the Court of Appeal noted that:

> *"Although the matrix of facts, events, surrounding circumstances and nuances should be taken into account in ascertaining the real intentions of parties to an agreement and in construing it, where parties had reduced into writing their intentions they were bound by their written word and the use of extraneous material as aids to interpretation could only be resorted to in extreme cases of genuine doubt … It is no function of the court to rewrite an agreement for the parties by inserting terms that would have been beneficial but were overlooked especially when such interpolation would amount to an interference with a third party's bargain".*

You may also read the case of **Monta v Paterson Simons (Ghana) Ltd [1974] 2 GLR 162**, a judgment of Mensa-Boison J on the interpretation of a tenancy of fifteen years duration but a party having the option to give notice of termination, ten years into the tenancy. The exercise of that option and the taking out of originating summons for an interpretation by the Plaintiff. Held at page 164 that:

*"A wholesome principle of interpretation is to construe the language used in the particular document and although precedents are a useful guide, it seems to me in the field of interpretation it may be said that there are no precedents strictly so-called as each document is to be construed specifically. Our task therefore may not be lightened, as urged by counsel, by what words ought to have been used but were not'.*

A look may also be taken at the case **of Akim Akroso Stool v Akim Manso Stool [1989-90] 1 GLR 100**. The Akim Akroso stool sued the Akim Manso stool for a number of reliefs including declaration of title to a piece of land and a claim of fraud for which reason it sought to set aside a conveyance entered into in 1948 between the defendant stool and a third party. The defendant on the other hand in its defence pleaded estoppel as it contended that numerous judgments have affirmed its ownership of the land. The plaintiff did not seek to set aside the judgment being relied on by the defendant as constituting estoppel neither did the plaintiff raise any issue of fraud regarding the judgment in previous litigation. The court in dismissing an appeal filed by the plaintiff stool noted as follows:

*"What the words in a document meant could only be derived from the document itself. The intention of the parties had to be gathered from the written instruments. The function of the court was to ascertain what the parties meant by the words which they had used. The court was to declare the meaning of what was written in the instrument and not what was intended to have been written so as to give effect to the intention expressed; for it was not permissible to guess at the intention of the parties and substitute the presumed intention for the intention. Since in the instant case the plaintiffs were not parties to the conveyance complained of, their intention or presumed intention could not be substituted for the clear intentions of the parties who had accepted the document as binding on them"*

The court further noted that if the intention could be derived from the instrument it would give effect to them notwithstanding ambiguities in the words used or defects on the face of the instrument. And even if the words are capable of two meanings, the meaning that would tend to uphold the instrument would be adopted.

The expressed words used in the document becomes the guiding steps to its meaning. This is how Halsbury's Laws of England put it:

> *"The intention must be gathered from the written instrument read in the light of such extrinsic evidence as is admissible for the purpose of construction. The function of the court is to ascertain what the parties meant by the words they have used, to declare the meaning of what is written in the instrument, not what was intended to have been written. To give effect to the intention as expressed in the document.*

Tyndale CJ as far as back as 1842 had expressed such a view when he noted that:

> *"In no case whatever it is permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political or otherwise, anymore than by the express parole declarations made by the party himself which are universally excluded. For the admitting of such evidence would let in all uncertainty before adverted to".*

In other words the primary words used in a document becomes the primary meaning when unambiguous within the context they are placed. More so when the words used are sensible enough at the time the writer used them. And that meaning ought to be taken as what the writer meant them to be. It is not allowed except in rare circumstances for evidence to be adduced to contradict the expressed intentions of the makers of the document. Simple the author has stated what he intended to say by the express words used in the document.

So in the case of **Wilson v. Brobbey (1974 1 GLR.250** at 251 the court noted in these terms:

> *"Where parties have embodied the terms of their contract in a written document extrinsic evidence or oral evidence will be inadmissible to add to, vary, subtract from or contradict the terms of the written instrument"*

There may be rare instances especially when it comes to construction of Wills for extrinsic evidence to be admitted to explain what a testator has written. But no evidence can be admitted to show what the maker of the document intended. There are two main exceptions to the basic rule that the intention of the parties must be collected from the instrument itself. The case of **Re Atta; Kwako v Tawiah [2002-2003] SCGLR 461** set down two exceptions to the rule and states them as follows:

1. Cases of equivocation of latent ambiguity such as in cases where the **name used or the description of the property mentioned in the will may refer to two or more persons and applied ambiguously to both of them,** extraneous evidence may be admitted to clarify the name or description of the property written in the will.

2. Under the arm chair rule, as contemporaneous evidence that was explanatory of the meaning which the testator assigned to a word or a name. That is where the rule permit admission of extrinsic evidence to interpret a will for the purposes of giving effect to the words used. **That is when the meaning of words or names could not be ascertained from the instrument without knowing more which may be beyond the four corners of the will.** The rule allow the admission of evidence relating to the facts and circumstances relating to the property of a testator and persons mentioned in the will that could not be ascertained without the benefit of extraneous evidence. The rule may be applied to admit evidence relating to the state of property which is the subject matter of bequests for the purposes of identification. It applies only to

properties mentioned in the will. And also regarding the named beneficiaries to the property.

In contract law besides the law sticking to the terms of the contract and the reluctance of the court to allow any extrinsic evidence, there are some limited scope in which some terms not specifically stated in the contract may be received as part of the terms of the contract. First, a statute may imply terms into a contract. The terms implied by a statute may not be found within the terms of what the parties agreed to and not based on the intentions of the parties to the contract. The Sale of Goods Act, Act 137 imply several terms into any contract for the sale of goods in Ghana.

A contract may also imply or incorporate a custom relevant to the market, trade or the locality into a contract. The course of dealings of parties over time which has developed a certain may also be deemed to be an implied terms that a court may impute into a contract more so when the custom has been accepted by the parties in the course of doing business. The third, is that common law may also imply terms into a contract. Common law knows of "*terms in fact*" which is employed to give effect to what the parties perceive to be the unexpressed intention. And to apply it the test is the "*officious bystander*" test. The terms in fact under common law was stated by Lord Simon in the case of **BP Refinery (Westernport) Pty Ltd v Shire Hastings [1978] All ER 20 @ 26** that:

> *"For a term to be implied, the following conditions which may overlap must be satisfied: One it must be reasonable and equitable. Two it must be necessary to give business efficacy to the contract; so that no term can be implied if the contract is effective without it. Third it must be so obvious that it goes without saying; four it must be capable of close expression and five it must not contradict any express term of the contract".*

Then also under common there are also what is known as "terms implied in law" that may be implied into all contracts of a particular type. So terms are frequently implied into a contracts of employment. There is an implied contract that the employee will

serve the employer faithfully and diligently. Terms are implied into contracts between landlords and tenants under common law by virtue of the general incidents of such contracts

**Context and Ordinary Meaning**

One cannot seek for the intention of the makers without taking account of the context and the ordinary meaning in which words bear. Such was the case of **Impraim v Baffoe [1980] GLR 520.** In this case by his Will dated 28 May 1937 the testator, directed that on his death, his dwelling house referred to as "Jehova Villa" should be occupied by certain named members of his family and their children as a family house. He further directed that other members of his maternal and paternal families were to be given rooms when they were in need of accommodation, and the house should never be sold. These directives of the testator were followed until the death of the executors, when the defendant, head of the testator's family, unilaterally took over the management and control of the house and decided to collect rents due to the estate. As a result of this intermeddling by the defendant, the plaintiff by an originating summons requested the court to determine the interest of the wider family in the house left by Testator as well as the meaning of "children" in the will. The court interpreting "children" within the context in which it appeared ruled as follows:

> *"As a general rule, the expression "children" meant immediate descendants and did not include grandchildren. It might however appear on the construction of a particular will that the testator used the word "children" in a wider sense so as to include grandchildren and remoter issues, and this might appear in the context of the will itself. In the instant will under consideration, the testator obviously, a man of a respectable level of education and a minister of religion, excluded his family and devised the property to a "devisee family" and decreed that the houses should never be sold. In such a context the word children could only make sense and give expression of his intention if it was construed to include remoter issues of the specified beneficiaries".*

However, in the case of **Addai v Donkor 2nd May, 1992 (unreported)** decision of the Supreme Court, the court within the context in which the word "*children"* occurred in the will of the Testator construed it to mean the sons and daughters of the niece but not grandchildren of the niece neither members of the extended family. The facts are as follows: the court was called upon to; inter alia, construe paragraph 7 of the Will of the deceased testator wherein he devised his freehold house to his niece (Yaa Badu) for life and after her death to her "surviving children". At the trial, counsel for the respondent urged the court to interpret paragraph 7 of the Will as creating a "special family" for the enjoyment of property devised under the Will and that the respondent, a great grandchild of the testator, was a member of that family and consequently had *locus standi* in the matter. Counsel for the appellant was however opposed to such an interpretation to "surviving children" in paragraph 7 as including the "descendants" of the testator. In his judgment, the trial circuit judge construed the word "children" as meaning "descendants". This meaning of "children" was however rejected on appeal to the Supreme Court which held that *"surviving children of Yaa Badu*" only meant the sons and daughter of Yaa Badu who might be alive on the death of Yaa Badu. The court opined that:

> *"when a person chooses a particular language to express himself, he must be presumed to mean what the words he has used normally mean in that language. Here the testator decided to use the English language from the language of the … will it almost appears that exhibit B was prepared by a lawyer, who must be deemed to know the difference between children and descendants. Children must be taken to mean what it means in the English language that is sons and daughters of any person"*

In all the different interpretation given to children, what was material was the context in which the word found itself.

### Technical and Scientific Meaning

It is true that words are first to be given their ordinary meaning as they appear. However in Interpretation where words are used in their technical and scientific sense,

such meanings must be assigned to it. Words that have peculiar meaning to specialized fields such as architects, lawyers, engineers, accountants, doctors would have to be given the scientific or the technical meaning assigned the words. In the case of **Shore v Wilson (1842) 9 CL & F 355** Lord Coleridge stated on application of scientific and technical meanings as follows:

> *"If the language be technical or scientific, and it is used in a matter relating to the art or science to which it belongs, its technical or scientific meaning must be considered its primary meaning".*

For in **Monta v Paterson Simons (Ghana) Ltd** supra, the court noted on the use of technical words in a document that:

> *"It is a rule of construction that where legal terms or words of well-known legal import are used by lawyers, especially by conveyancers, they will have their technical legal import … this rule applies even if by mistake of the draftsman there is a manifest failure to fulfil the intention of the testator.*

The Biney case also noted that technical words must be given their technical meaning in a document. In instances where the technical meaning appears to be incongruous or may work injustice, a secondary meaning may be resorted to for the intention of the makers.

**Secondary Meaning**

To avoid absurdity if the application of the ordinary meaning would lead one to that conclusion, the words may be modified as far as the context and the document as a whole is capable of bearing. The secondary meaning of a word is not materially different from the golden rule of interpretation. For Maxwell on Interpretation of Statutes, 11th Ed. at page 221 states as follows:

> *"Where the language of a statute in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the*

*enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence".*

This is summed up in **Grey v Pearson (1857) HLC 61 @106** in the golden rule of interpretation that:

*"in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy with the rest of the instrument, in which case the grammatical and ordinary sense or the words may be modified, so as to avoid the absurdity and inconsistency but no further".*

The secondary meaning was emphasized in **Sam v Comptroller of Customs & Excise [1971] 1 GLR 289** that:

*"it is the duty of a court, in interpreting an enactment to give effect to the intention of the legislature. Therefore, where words in an enactment are clear and unambiguous no question of interpretation arises, but where the ordinary meaning of the words used leads to a manifest absurdity or repugnancy, a court may alter the words of the enactment, but only to the extent of avoiding the absurdity or repugnancy".*

This view has received endorsement under the Interpretation Act, Act 792.

**Power to rectify Mistakes**

The court or the Judge has power in appropriate circumstances to correct mistakes errors, to achieve the subjective authorial intent of the makers of the documents. For this is the point of Lord Leonards in the case of **Wilson v Wilson (1854) 5 H.L Ca 40** when he said that:

*"Now it is a great mistake if it be supposed that even a court of law cannot correct a mistake, or error on the face of an instrument. There is no magic in*

*words. If you find a clear mistake and it admits of no other construction, a court of law as well as a court of equity without impugning any doctrine about correcting those things which can only be shown by parole evidence to be mistakes – without I say, going into those cases at all, both courts of law and equity may correct an obvious mistake on the face of an instrument without the slightest difficulty".*

A court is not to correct what it may be a mistake unless it is clear to be a mistake. The mistake could be one of wrong grammar as it was been noted that neither false Latin nor false English will make a deed void when the intent of the parties appear clear. For two negatives do not make an affirmative when the apparent intent is contrary. There could also be mistakes relating to the subject matter. See **Najat Metal Enterprise Ltd v Hanson supra (182-83) GLR 81**. See also **Wilberforce v Wilberforce [1999-2000] 2 GLR 312** where the testator described his two nephews as sons being beneficiaries. And attempt was made to set aside the device to them because of the false description. The court rejected that and held that:

" "*Inaccurate references to beneficiaries under a will per se did not invalidate bequests. To do so, there had to be evidence that a beneficiary adopted a false character and that this was done fraudulently to deceive the testator, and further that the deceit was perpetrated with the motive of benefiting under the will. Besides, it was a rule of construction applicable to all written documents, including wills, that if a term used to describe a subject matter was sufficient to ascertain that subject matter with certainty but other terms add a description which was not true, these other terms would not be allowed to vitiate the gift. And if such false description could not vitiate a gift, then it certainty could not nullify a whole will. In the instant case however the court would also take judicial notice of the fact that it was not uncommon by Ghanaian custom and traditions that nephews and nieces should be affectionately referred to as sons and daughters by their respective uncles and aunties. In the circumstances the use of the word "sons" to describe the two nephew of the testator did not in any way detract from the validity of the will"*

There are other mistakes such as punctuations, omission of words, repugnant and inconsistent words, clauses or which a court is also allowed to remedy.

The last being that the above rules are to be applied together or in conjunction with any rules of interpretation such as aids to interpretation, presumptions or special binding rules in the appropriate context and circumstances.

**Rules for Interpretation of Foreign Laws in Ghana**

By section 40 of the Evidence Act, 1975, NRCD 323 there is a presumption, a rebuttable one though, that the law of a foreign country is presumed to be the same as that of Ghana. Where the presumption is displaced and there is the need to interpret the laws of a foreign country, section 54 of the Courts Act, Act 459, on the choice of law rules provides some guidance to the courts in the interpretation of choice of law rules as follows:

> *"(1) Subject to this Act and any other enactment, a court when determining the law applicable to an issue arising out of any transaction or situation, shall be guided by the following rules in which references to the personal law of a person are references to the system of customary law to which he is subject or to the common law where he is not subject to any system of customary law:*
>
> *Rule 1. An issue arising out of a transaction shall be determined according to the system of law intended by the parties to the transaction to govern the issue or the system of law which the parties may, from the nature or form of the transaction be taken to have intended to govern the issue.*
>
> *Rule 2. In the absence of any intention to the contrary, the law applicable to any issue arising out of the devolution of a person's estate shall be the personal law of that person.*

*Rule 3. In the absence of any intention to the contrary, the law applicable to an issue as to title between persons who trace their claims from one person or group of persons or from different persons all having the same personal law, shall be the personal law of that person or those persons.*

*Rule 4. In applying Rules 2 and 3 to disputes relating to titles to land, due regard shall be had to any overriding provisions of the law of the place in which the land is situated.*

This Rule 4 is in reference to as lex situs where the court apply the law of the place where the land is situate.

*Rule 5. Subject to Rules 1 to 4, the law applicable to any issue arising between two or more persons shall, where they are subject to the same personal law, be that law; and where they are not subject to the same personal law, the court shall apply the relevant rules of their different systems of personal law to achieve a result that conforms with natural justice, equity and good conscience.*

*Rule 6. In determining an issue to which the preceding Rules do not apply, the court shall apply such principles of the common law, or customary law, or both, as will do substantial justice between the parties, having regard to equity and good conscience.*

*Rule 7. Subject to any directions that the Supreme Court may give in exercise of its powers under article 132 of the Constitution, in the determination of any issue arising from the common law or customary law, the court may adopt, develop and apply such remedies from any system of law (whether Ghanaian or non-Ghanaian) as appear to the court to be efficacious and to meet the requirements of justice, equity and good conscience.*

*(2) Subject to this Act and any other enactment, the rules of law and evidence (including the rules of private international law) that have before the coming into force of this Act been applicable in proceedings in Ghana shall continue to apply, without prejudice to any development of the rules which may occur.*

The whole section involves the applicability of the appropriate *renvoi* doctrine being a sub set of the choice of law rules under private international law. This entails invocation of either *lex loci rei situs* (the law of the place where the properties are situated or the *lex fori* (the personal law of the deceased or the persons. *Renvoi* comes from French word which means "send back" and a court would have to first determine jurisdiction to pronounce on the suit before applying the relevant rules. In contracts, the parties may agree that the Ghanaian courts shall have jurisdiction to adjudicate in the event of dispute but in the choice of law applicable, may opt or state that it should be governed by a foreign law. In that event, the court will have to resort to the above rules in the interpretation of the foreign law. **The Ghanaian courts have for a long time applied the *lex fori* rule or the personal law of a deceased person to devolution of an estate of a foreigner who died possessed of immovable properties in Ghana making it override the lex situs, being the law of the place (Ghana) where the immovable properties are located.** See Archer JA in **Youhane v Abboud** (**1974) 2 GLR 201** C.A and relying on cases such as **Weytingh v Bessaburo (1906) 2 Renner Report 427**. The ground that have made it impossible to apply the personal law of a deceased foreigner has been when the personal law of the deceased could not be ascertained then the courts will apply the law of the place being the customary law of the locality of Ghana to the distribution or devolution of the estate.

**The *lex situs* rule therefore becomes operational by default of failure to locate the personal law of a foreigner who was domiciled in Ghana at the time of death**. See **Davies v Randall (1963) 1 GLR 358**; **Ekem v Nerba (1947) 12 WACA 258. In Davies v Randall** the court held that in the absence of evidence of what the deceased's family was according to his personal law, his children, being recognized by the law of Ghana as legitimate children of their father constituted his family for the purpose of succession and therefore quite clearly had an interest in the property, the subject-matter of the suit. **One must be quick to add that under common law title to immovable property has always been determined by**

**the *lex situs* rule, which is the law of the place. And if it is Ghana the *lex situs* rule has been the search for the personal law for which a person was subject at the time of death**. That means the *lex situs* being Ghana law to govern a devolution will always look for the personal law or the foreign law that the deceased was subject to distribute an estate.

**There never used to be any uniform law of succession because of the different or parallel structures of matrilineal and patrilineal systems of inheritance until 1985 with the coming into force of PNDCL 111 that attempted to forge a common system of inheritance for a deceased intestate person**. So where the personal law of a person is unascertained then the customary or the *lex situs* of Ghana that would be applied would be PNDCL 111 for the distribution of any intestate properties.

The choice of law rules and its determination may become relevant in matters of divorce for instance where the parties may be Ghanaians but have assets being immovable properties found in other jurisdiction. We find application of choice of law rules in cases such as **King v. Elliot (1972)** 1 GLR 54 C.A and **Youhana v Abboud (1974) 2 GLR 201** C.A and the relevant statutory provisions in relation to marriage under sections 33 and 35 of the Matrimonial Causes Act, 1971 (Act 367). **King v Elliot** supra "Pitts being the only child of her mother, a West Indian domiciled at Cape Coast, inherited her mother's property on her death intestate. *Pitts died in 1943, and by her will, she devised various properties to her relations and descendants*. *One of her properties was a house called "Pitts House" which was devised to the plaintiff*.

Control over the house was however assumed by the defendants because "*a provision in the will of their father (who was a son of Pitts) had stipulated that the income derived from the Pitts House should for the next ten years be used in repayment of the cost of redeeming a mortgage on the property"*. On the expiry of the ten years, "*the defendants refused to surrender possession and continued to exercise control over the house on the ground that the plaintiff's title was defective, being derived from the will of P. who had no power to dispose of the said property by will, as it was family property originally acquired by her mother who died intestate*." Wherefore the

plaintiff brought an action to claim mesne profits and a perpetual injunction against the defendants. Judgment was given in favour of the plaintiff and the defendants appealed.

The appeal was dismissed on the bases that **Ghana law is the *lex situs* and an alien who acquires a domicile of choice in Ghana does not become subject to a particular customary law unless he could be shown by positive evidence regarding manner of life to have embraced that system of customary law.** In the absence of such evidence the law applicable to the estate in question is the English common law as it stood in 1874, (being the current Ghana law) and P. being the sole surviving daughter must be adjudged as having inherited the properties of her mother absolutely under the Statutes of Distribution. That also the defendants, together with the whole family had, fully accepted, approbated and acted upon P.'s testamentary dispositions. They could not, therefore, either in equity or at customary law, be allowed to approbate and reprobate."(e.s).

In the case of **Youhane v Abboud** supra, the facts of the case were that the appellant is the mother of two deceased Lebanese sons, Mousa and Gabriel who before their respective deaths had lived in this country for some time and had died possessed of several houses in Accra and Kumasi. The mother took action at the High Court that by *lex situs* of Accra and Kumasi where the properties of the children were located she was the one to inherit by custom and not the children of his sons going by the matrilineal system of inheritance for Akans in Kumasi and Ga Mashie which is also matrilineal as established in the case of **Amarteifio v Ankrah** [1959] GLR, even though they were of Lebanese in origin. Besides, that she was the customary successor, heiress and head of family of her deceased children. [See also Ollenu, The Law of Testate and Intestate in Ghana pages 80-88]. Also **Larkai v. Amorkor** (1933) 1 WACA 323; **Vanderpuye v. Botchway** (1951) 13 WACA 164 & **Amarfio v. Ayorkor** (1954) 14 WACA 554.

For in **Amartefio** v **Ankrah** supra, Ollenu J held that:

*that in the absence of proof of a custom (in a particular Ga family) different from the ordinary Ga custom, the ordinary principle must be applied, viz., that for purposes of succession to a Stool or to other traditional office, succession runs in the paternal line; but for purposes of succession to property, succession runs in the maternal line."*

See also Nii Amponsah: (1974) 6 Review of Ghana Law p 116 – Ga Mashie Succession: Ascertaining the True Personal Law.

Abban J at the High Court found for the defendants. **The only question before the court below was what law governed the devolution of their respective estates?** When the elder brother died intestate, the younger one took out letters and part administered his estate. When the younger brother also died intestate, his son, the present respondent, took out letters of administration in respect of his own father's estate and that of the deceased uncle. According to the evidence on record, **the estates were distributed according to Lebanese law**. The appellant, the grandmother of the respondent, has rejected the distribution according to Lebanese law and claimed that, as the houses are situated in Accra and Kumasi where the matrilineal system of succession in Ghana prevails, she, as the mother of the two deceased sons, was entitled to succeed to their respective immovable estates in Ghana. **The learned trial judge correctly found that the two deceased brothers did not identify themselves with any of the communities in Ghana and their estates could not devolve according to Ga Mashie custom or Ashanti custom**. The fundamental question was with no system of customary law regarded as the personal law of the deceased, what law was to govern the devolution of their estates?

Apaloo JA (as he then was) **writing the lead judgment noted that the *lex situs* being the law of the place always referred to the personal law of the deceased** and stated at page 210 of the report as follows:

*"Unless our own legislation constrains us to decide otherwise, I would think it right that we follow the respectable line of authority which commenced from 1906 down to this decade which, when faced with a choice between the*

*domestic lex situs and personal law, opts for the latter. To so hold today will do no more than to continue to give judicial stamp to established usage which has justice and common sense on its side… I cannot bring myself to believe that in making these rules for our guidance, the legislature intended to change the law or turn its back on the decisions of the courts which for the best part of a century, have opted for the personal law of an intestate, meaning by this, the law of his domicile of origin. The rules are said only to be for our guidance. In a matter on which case law has thrown considerable light, one should be slow in putting any construction on an oblique legislative guidance which offends against one's sense of propriety and fairness. In any case, I think since these rules are only to guide us I do not consider that they should be interpreted as compulsive."*

In a concurring opinion at page 226, Archer JA (as he then was) concluded his judgment with the following remarks that:

*"Finally I wish to remark that if we were to hold that the matrilineal system applied to these Lebanese, we would be creating a massive and monstrous monument to judicial aberration and the ordinary man in the street would hold the courts in this country in derision because reason and common sense would have fled from the court rooms and every person conversant with the Old Testament will recall the words of the Prophet Isaiah, in Chapter 59, verse 14, "And judgment is turned away backward and justice standeth afar off, for truth is fallen in the street and equity cannot enter." Rules that were originally intended to play the role of a guiding star, now have the proclivity of leading us into an unnecessary skein. The earlier they are scrapped from the statute books the better it would be for the courts to continue to administer justice according to the established laws of the land."*

In the case of **Dr. Owusu Afriyie Akoto v Adwoa Abrefi Akoto J4/24/2010** judgment delivered on the 23rd of February, 2011; the Supreme Court per Atuguba JSC applied lex fori to the distribution of estate of the parties even though part of the

landed properties were in the United Kingdom on the bases of what the court deemed to be certain fraudulent conduct on the part of the petitioner/appellant by the lifting up of veil of corporate personality when a transactions had been done on the name of companies.