INTERPRETATION OF CONTRACT TERMS

Nick Vineall QC

4 Pump Court

ICS v West Bromwich 1997

Question was whether

“Any claim (whether sounding in rescission for undue influence or otherwise) …. ”

was to be construed as meaning

“Any claim sounding in rescission (whether for undue influence or otherwise)…”

Pump Court

ICS v West Bromwich 1997 – 5 principles

(1) Interpretation is the ascertainment of the meaning **which the document would convey** to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The "matrix of fact," … includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) Previous negotiations not admissible on policy grounds

Pump Court

ICS v West Bromwich 1997

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax

Pump Court

ICS v West Bromwich 1997

(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

Pump Court

Chartbrook v Persimmon 2009

Hope **Hoffman** Roger Walker Hale v 0

Construing an overage clause

- Hoffmann said can do “correction by construction” if there is a clear mistake and it is clear what correction ought to be made to cure the mistake
- Previously law had been there must be a mistake which is clear **on the face of the instrument.** Hoffmann removed that proviso (#24). A subtle but significant shift.

Pump Court

Chartbrook v Persimmon 2009

"There is no limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant"

Pump Court

Rainy Sky v Kookmin Bank 2011

Phillips, Mance, Kerr, **Clarke,** Wilson v 0

- Refund guarantee wording. Depended on what “all *such* sums” referred to.

#14. The ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine *what the parties meant by the language used*, which involves ascertaining what a reasonable person would have understood the parties to have meant

#15. The issue between the parties in this appeal is the role to be played by considerations of business common sense in determining *what the parties meant.*

Pump Court

Krys v KBC Partners 2015 (PC)

Mance v Sumption, Reed Toulson, Hodge

Beginning of the shift?

Pump Court

Arnold v Britton 2015

Carnwath v Neuberger Sumption Hughes Hodge

“Sounding the retreat .. albeit in muffled tones”

Pump Court

Arnold v Britton 2015

7 factors per Neuberger

(1) reliance placed on commercial common sense and surrounding circs should not be invoked to undervalue the importance of the language of the provision which is to be construed

(2) the less clear the words the more ready the court can be to depart from their normal meaning but that does not justify the court embarking on an exercise searching for drafting infelicities

(3) commercial common sense not be invoked retrospectively. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date the contract was made.

Pump Court

Arnold v Britton 2015

(4) A court should be very slow to reject the natural meaning because it seems to be imprudent. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed

(5) Can only take account to facts known to both parties

(6) If there is a subsequent event, not contemplated by the contract, and it is clear what the parties WOULD have intended, Court can give effect to that

(7) No special rule of restrictive interpretation of service charges

Pump Court

Wood v Capita 2017

0 v Neuberger, Mance, Clarke, Sumption, **Hodge**

Indemnity for “all fines, compensation .. imposed on .. the company … arising out of claims or complaints registered with the FSA …”

Lord Hodge:

Arnold v Britton and Rainy Sky say the same thing

#10 The task of the court is to ascertain the objective meaning of the language which the parties had used to express their agreement

Pump Court

Wood v Capita 2017

- Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. … The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements.

- Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance.

Pump Court

Wood v Capita 2017

- But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type.

Pump Court

So where are we now ?

- Absolutely clear that question about parties' intentions is objective not subjective
- Absolutely clear that negotiations are inadmissible
- Absolutely clear that all other shared contemporaneous factual matrix is in principle admissible if it is relevant to the question the court has to answer

- But not entirely clear how much role commercial common sense has and when it can prevail over literal/natural meaning

Pump Court

To see the shift compare …

Rainy Sky (again)

14. The ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine *what the parties meant by the language used*, which involves ascertaining what a reasonable person would have understood the parties to have meant

15. The issue between the parties in this appeal is the role to be played by considerations of business common sense in determining *what the parties meant.*

Wood v Capita (again)

10. The court's task is to ascertain *the objective meaning of the language which the parties have chosen* to express their agreement.

Pump Court

The problem of assignments

Take a contract between A and B the meaning of which is materially affected by something in the factual matrix.

What is the meaning of that contract when A assigns to C, and C does not have any knowledge of that factual matrix?

.. and if B assigns his interests to D?

Are C and D bound only by a 4-corners reading?

[Answers on a postcard please]

Pump Court

Persimmon Homes v Ove Arup 2017 (CA)

The consultant's aggregate liability under this Agreement whether in contract, tort (including negligence), for breach of statutory duty or otherwise (other than for death or personal injury caused by the Consultant's negligence) shall be limited to £12m with the liability for pollution and contamination limited to £5m in the aggregate. Liability for any claim in relation to asbestos is excluded.

Pump Court

Persimmon v Arup

- Exclusion effective
- Contra proferentem rule not engaged because no ambiguity
- Room to doubt whether canons of construction in Canada Steamship now apply to exemption clauses

In major construction contracts the parties commonly agree how they will allocate risk and who will insure against what. Exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach such clauses with horror or with a mindset determined to cut them down

See also Interactive E-Solutions v O3B Africa CA 2018 EWCA Civ 62

Pump Court

MT Hojgaard v E.ON

0 v Neuberger Mance Clarke Sumption, Hodge

Pump Court

Hojgaard

Interface shear strength due to friction in doc J101:

Pump Court

Hojgaard

TR 3.2.2.2(i) says –

> Design in accordance with J101

TR 3.2.2.2(ii) says –

> The design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement. The choice of structure, materials, corrosion protection system operation and inspection programme shall be made accordingly.

Pump Court

Hojgaard

Q1 – what does (ii) mean?

Answer:

Probably that it must be designed so as to have a 20 year life

Pump Court

Hojgaard

Q2 – how to reconcile (i) and (ii)

Answer – two such stipulations are not necessarily in conflict, and are not in conflict here, especially given that J101 was expressed to be part of a minimum standard.

Q3 – (ii) is “too slender a thread”?

Answer - No

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Hojgaard - thoughts

Contractors need to be careful about blind reliance on third party “standards”

Take great care with multi-layered multi-authored suites of contract documents

Possible implications for SBCs where there are overlapping Class and Tech Spec requirements

Pump Court

More generally

Pendulum swinging slightly back towards focus on meaning of words actually chosen rather than focus on what the parties meant (or “must have” meant).

Freedom for commercial parties to contract as they see fit - courts increasingly seeing exclusion and limitation provisions as attribution of risk

Pump Court