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HOW CAN YOU EXPECT JUDGES TO INTERPRET AMBIGUOUS CLAUSES?

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Chartbrook Limited v Persimmon Homes et al [2009] UKHL 38 para 101:

‘It is perhaps surprising that questions of such practical and theoretical importance in the law of contract should still be open to debate and development.’

Wood v Capita Insurance Services Ltd [2017] UKSC 24 para 15

‘The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation.’

What express terms does the contract contain? – incorporation.

What do those terms mean? – interpretation (or construction).

Are there any implied terms? – implication.

What is the relationship between interpretation and implication?

(1) Attorney General of Belize (2) Ecom Ltd (3) Belize Telecommunications Ltd v (1) Belize Telecom Ltd (2) Innovative Communications Co LLD [2009] 1 WLR 1988

Lord Hoffmann described both interpretation and implication as part of an overall search to give meaning to a contract.

Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] 3 WLR 1843

‘... construing the words used and implying additional words are different processes governed by different rules’.

Only once the court has decided what the contract means will it be apparent whether there is any gap in the contract to be filled by an implied term.

What is the test for interpreting express terms?

Chartbrook (supra) para 14

‘There is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarised by the House of Lords in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896

Arnold v Britton [2015] AC 619

The meaning of a clause ‘has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [agreement] (iii) the overall purpose of the clause and the [agreement] (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions ...’

Wood v Capita Insurance Services Ltd [2017]
UKSC 24, [2017] 4 All ER 615, [2017] 2 WLR

‘... continuity rather than change’.

NHS Commissioning Board v Silovsky [2017] EWCA Civ 1389 para 39

‘Although the principles of contractual construction have received repeated attention from the House of Lords and Supreme Court in recent years, it is unnecessary to re-trace now familiar ground. Instead, with respect, the most helpful synthesis furnished by Lord Hodge JSC in *Wood v Capita* at [10] – [15] is much to be welcomed – furnishing, as it does, a summary of the position overall and emphasising the continuity in the law's approach.’

Wood v Capita (supra) paras 10-11

‘10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H-1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1967] 1 WLR 989, 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations...’

contd

11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky case* [2011] 1 WLR 2900, para 21f. In the *Arnold case* [2015] AC 1619 all of the judgments confirmed the approach in the *Rainy Sky case*.... Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky case* (para. 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause....; and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest....

Some key points

Clauses are not read in isolation but in the context of

... the contract as a whole

... the factual matrix (facts known to both parties at or before the date of entry into the contract)

Without considering

... evidence of subjective intention

... evidence of negotiations

And bearing in mind

... business common sense

Wood v Capita (supra) para 14.

‘On the approach to contractual interpretation, the *Rainy Sky* and *Arnold* cases were saying the same thing.’

Be ‘alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest’.

Wood v Capita (supra) paras 12-13

‘13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. 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...’

Wood v Capita (supra) contd:

‘ ... 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. 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 professional 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.’

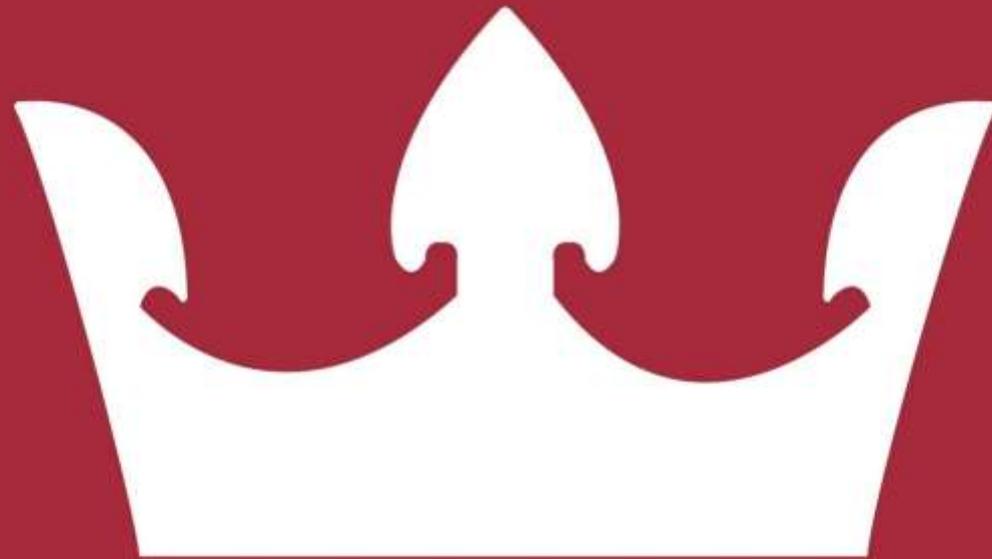
Wood v Capita (supra) contd:

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated..... To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language of the contract, so long as the court balances the indications given by each.

Isabel Hitching KC specialises in construction and commercial law.

With her academic background as a lecturer at Christ Church, Oxford, Isabel is frequently instructed in cases raising novel or complex points of law including points of interpretation of contracts. She has been involved in a number of test cases at first instance as well as at appellate level, including the first case to be decided in the Supreme Court on adjudication *Aspect v Higgins*.

She is the joint editor of Emden on Construction, and the author of the chapter on ‘Incorporation, Interpretation and Implication of Contract Terms’.



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