Where is (some of) the legal wriggle room over conditions precedent?

Marion Smith KC

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What?

"… a contractual obligation that must be performed by one party before another contractual obligation of the counterparty arises"

Lewison, The Interpretation of Contracts 7th Ed.

Chapter 16 Section 2

True or False?

The Court does not require clear words before concluding that a clause is a CP.

False

"*Because the classification of a term as a condition precedent may have the effect of depriving a party to a contract of a right because of a trivial breach which has little or no prejudicial effect on the other and causes that other little or no loss, the court will usually require clear words before coming to that conclusion*."

Heritage Oil and Gas Limited v. Tullow Uganda Ltd [2014] EWCA Civ 1048

True or False?

The Court will construe a potential CP in accordance with the basic rules of construction that apply to all contracts.

True: 1

" the basic rules of construction apply to all contractual terms."

WW Gear Construction Limited v McGee Group Limited [2010] EWHC 1460 (TCC) at [13].

True: 2

"*Whether this clause is a condition precedent or a contractual term of some other character must depend on (i) the form of the clause itself, (ii) the relation of the clause to the contract as a whole, (iii) general considerations of law.*“

Bremer Handelsgesellschaft Schaft v Vanden Avenne Izegem [1978] 2 Lloyds Rep 109,

True or False?

The words “condition precedent” in the potential CP are required before the Court will construe it as a CP.

False

"*It is not necessary for the work "condition precedent" or similar to be used …"*

Dreams Ltd v. Pavilion Property Trustees Limited [2020] EWHC 1169 (Ch) [65]

Be careful

"*The clause … used the express term "condition precedent" in some parts of the clause and not others. This is a clear indication that the parties wish to distinguish between different obligations, ….*"

O'Brien v. TTT Moneycorp Limited [2019] EWHC 1491 (Comm) [55]

Waiver and Estoppel



True or False?

You don’t have to give the notice if the recipient already knows everything that would be in the notice. That would be futile.

False

"*If the parties have stipulated that a notice must be given in order to bring some other provision of the contract into operation, I doubt whether it could ever be dispensed with on the grounds that to give such a notice would be futile*."

Glencore Grain Ltd v Goldbeam Shipping Inc
[2002] 2 Lloyd's Rep 400

Be careful

"The expression 'futility principle' is perhaps misleading. In the present context it reflects an approach to construction which recognises that in certain circumstances (depending on the terms of the contract) a condition precedent may, as a matter of construction and in the light of subsequent events, no longer apply or may cease to have effect."

Astor Management AG v. Atalaya Mining Plc [2018] EWCA Civ 2407[33]

Other Possibilities?



Marion Smith KC
39 Essex Chambers

marion.smithkc@39essex.com
+44 207 831 1111