Contract Law Update: Contract Interpretation and Exclusion Clauses

By Rachael O'Hagan

of 39 Essex Chambers

Based on a seminar delivered for CLAN on 6 February 2018

1. Contract Interpretation: rainy skies ahead?

"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."

(Wood v Capita [2017] UKSC 24, Lord Hodge at [15])

Outline

- Back to the beginning
- A natural progression
- Towards stability and continuity?
- A word from the courts: the rules are now clear, no more guidance please
- Some practical implications

Back to the beginning

"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."

Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 WLR 896 (HL)

A natural progression

Rainy Sky SA v Koomin Bank [2011] UKSC 50

"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"

"21. The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the appellant court must consider the language used and ascertain what a reasonable person….. would have understood the parties to have meant…. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

30. …. where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense."

Towards stability and continuity?

Arnold v Britton [2015] UKSC 36

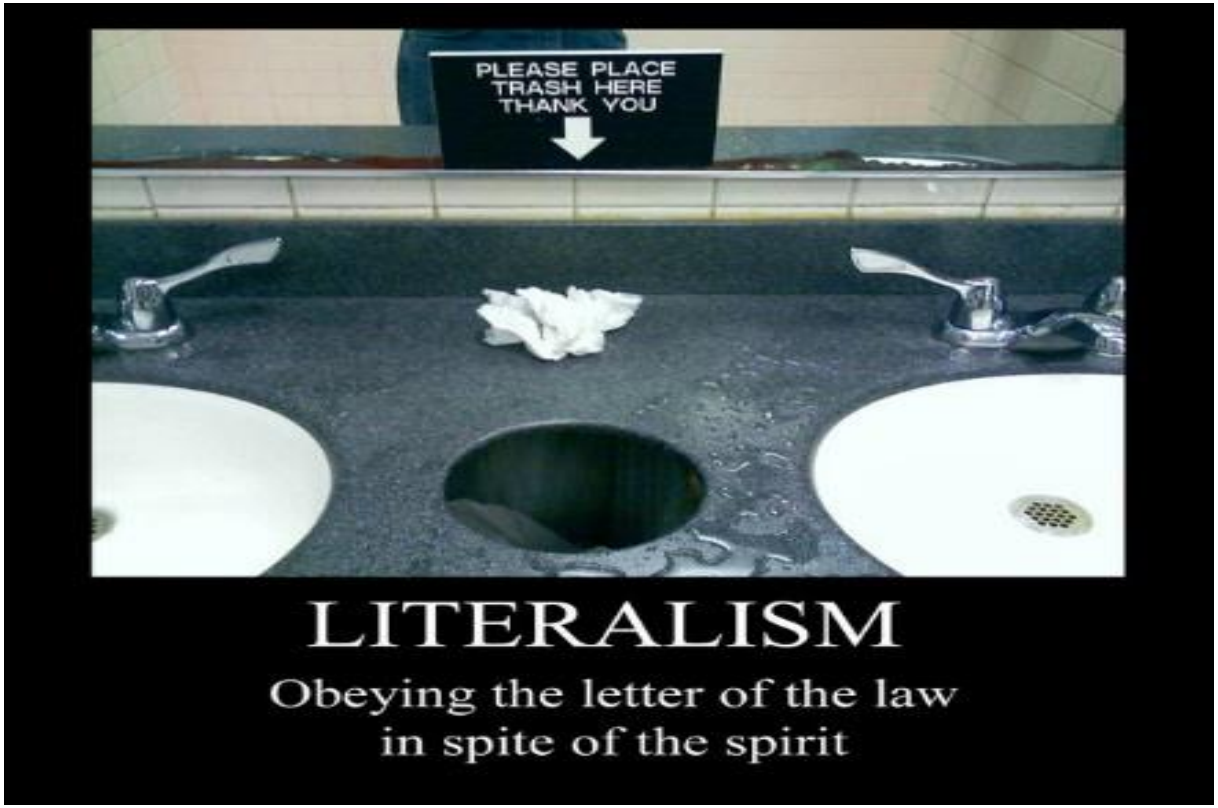
"17 … the reliance placed in some cases on commercial common sense and surrounding circumstances …. Should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision…."

"18… when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning…. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate departure from the natural meaning…"

"19. …..commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. 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."

"20. ……while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of the wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

Arnold a move towards textualism?



https://thebronzegryphon.deviantart.com/art/Literalism-109325983

The finale?

Wood v Capita Insurance Services Ltd [2017] UKSC 24

"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…..

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….

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.

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. …

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

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."

Crystal clear?

http://6iee.com/data/uploads/12/593624.jpg

A word from the courts: the rules are now clear, no more guidance please

- Sutton Housing Partnership Ltd v Rydon Maintenance Ltd [2017] EWCA Civ 358
- Kason Kek-Gardner Ltd v Process Components Ltd [2017] EWCA Civ 2132
- Interactive E-Solutions JLT v O3B Africa Ltd [2018] EWCA Civ 62
- Grimes v Essex Farmers and Union Hunt Trustees [2017] EWCA Civ 361; [2017] L. & T.R. 28 (CA (Civ Div))
- NHS Commissioning Board v Silovsky [2017] EWCA Civ 1389
- Persimmon Homes Ltd v Ove Arup & Partners [2017] EWCA Civ 373

- Connect Plus (M25) Limited v Highways England Company Limited [2018] EWHC 140 (TCC)

Some potential practical implications

- Move away from a purposive approach, likely to result in greater certainty?
- International appeal – seat of arbitration clauses.
- Use of preliminary issues.
- Costs of proceedings.
- BUT - Who is your tribunal?
- Use of evidence as an aid to interpretation: merits and prejudice.

2. Exclusion Clauses

Outline

- What are exclusion clauses?
- Recent cases: a surprising trend?

What are exclusion clauses?

".. an exclusion clause is one which excludes or modifies an obligation, whether primary, general secondary or anticipatory secondary, that would otherwise arise under the contract by implication of law"

Recent cases: a surprising trend?

- Transocean Drilling UK v Providence Resources Plc [2016] EWCA Civ 372

- Star Polaris LLC v HHIC-Phil Inc [2016] EWHC 2941 (Comm)

- Interactive E-Solutions JLT v O3B Africa Ltd [2018] EWCA Civ 62

Contract Law Update: Contract Interpretation and Exclusion Clauses

By Rachael O'Hagan

of 39 Essex Chambers

Based on a seminar delivered for CLAN on 6 February 2018

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.