

THE UNIVERSITY OF HONG KONG
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LAW OF CONTRACT

INTERPRETATION

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OUTLINE

- **Interpretation in general**
- **Interpretation of terms**
- **Interpretation of exclusion clauses**

INTERPRETATION: WHY AND AIMS

“[T]he staple diet of the Commercial Court can be summed up in one word—‘Construction’.”

**(R Goff, ‘Commercial Contracts and the Commercial Court’
[1984] LMCLQ 382, 385)**

- **Why interpretation?**
 - open texture of language
 - inadvertence of parties
- **Aims of interpretation of contracts:**
 - give effect to parties’ intention
 - avoid unfairness
 - ensure business efficiency

INTERPRETATION: HOW TO ACHIEVE ITS AIMS

- **How do achieve aims of interpretation?—balance:**
 - literal interpretation
 - contextual interpretation
 - teleological interpretation
- **Difference from:**
 - statutory interpretation—whose intention matters?
 - interpretation in international law—codified rules
- **Limited role of precedent (*Surrey Heath Borough Council v Lovell Construction* (1988) 42 BLR 25)**

INTERPRETATION: WHO AND WHEN

- **Who is the interpreter?**
 - role of courts
 - role of parties
 - define terms in contract
 - agreement in court proceedings
- **When to interpret?**
 - interpretation presupposes:
 - term exists
 - term is incorporated
 - terms is unclear
 - interpretation comes before statutory controls

TERMS:

LITERAL MEANING

- **Courts' position in 19th century**

“instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible.” (*Shore v Wilson* (1842) 9 Cl & Fin 355)
- **Irrebuttable presumption—*Grey v Pearson* (1857) 6 HL Cas 6**
 - words “shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered”
 - example—meaning of “money” (*Re Morgan* [1942] Ch 345)

TERMS:

LITERAL MEANING

- **Why literal meaning?**
 - parol evidence rule and “four corners” doctrine
 - assumption that intention conveyed by text
- **E.g., *RTI Ltd v MUR Shipping* [2024] UKSC 18**
- **Problem—words have multiple meanings:**
 - “semester”
 - “fall”
 - “spouse”
- **Need to temper literal meaning?**

TERMS:

CONTEXT

- State of the common law today
- Main question—how much context can one use in interpretation? (*cf.* international law)
- ***Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, at 912–13 (Lord Hoffmann)**
 - Set out 6 principles governing interpretation
 - Confirmed in later cases (e.g., *Globe Motors v TRW Lucas* [2016] EWCA Civ 396; *Wood v Capita Insurance Services* [2017] UKSC 24)

TERMS:

/CS PRINCIPLE 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.”

- need ambiguity for interpretation?
- objective test
- background not limited to actual knowledge

TERMS:

/CS PRINCIPLE 2

“[The background] includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.”

- admissibility v weight
- a question of relevance?—see *BCCI v Ali* [2001] UKHL 8
- what do parties do in litigation?

TERMS:

/CS PRINCIPLE 3

“The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. [...] The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life.”

- inconsistent with relevance of background?
- limitations:
 - establish fact in background (*Chartbrook v Persimmon Homes* [2009] UKHL 38)
 - construction so broad to allow rectification (*Oceanbulk Shipping v TMT Asia* [2010] UKSC 44)
- Subsequent conduct—*Schuler v Wickman* [1974] AC 235

TERMS:

/CS PRINCIPLES 4-5

“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.” (Principle 4)

“[I]f one would [...] 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.” (Principle 5)

- widens courts' discretion in interpreting contract
- question of language mistakes
- ensures business viability of contract

TERMS:

/CS PRINCIPLES 4-5 (CONT.)

- **Language mistakes—“red ink” approach:**

“When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did. [...] there is not, so to speak, a 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.”

(*Chartbrook v Persimmon Homes* [2009] UKHL 38 [21]–[25])

TERMS:

/CS PRINCIPLES 4-5 (CONT.)

- **Ensuring business viability:**
 - terms to be interpreted based on commercial common sense (*Rainy Sky v Kookmin Bank* [2011] UKSC 50)
 - query whether judges well placed to ascertain commercial common sense (J Sumption, “A Question of Taste: The Supreme Court and the Interpretation of Contracts” (2017) 17 *Oxford University Commonwealth Law Journal* 301)
- **Avoid unreasonable results:**
 - most important principle of interpretation
 - example—*Lehman Bros v Exotix Partners* [2019] EWHC 2380 (Ch)

TERMS:

THE LAW SINCE *ICS*

- **Balance of textualism and contextualism:**
 - textualism prevails where agreement is sophisticated
 - contextualism prevails where agreement informal
- **Apply business common sense**
- **Cannot have regard to:**
 - pre-contractual negotiations
 - subjective declarations of intention
 - subsequent conduct

EXCLUSION CLAUSES: WHY DIFFERENT APPROACH

- **Exclusion clauses are “special” terms**
- **General rules of contractual interpretation still apply to them but:**
 - additional rules of interpretation
 - aim—restrict scope of exclusion clauses
- **Gradual movement towards unification of rules on interpretation?—impact of statutory controls**

EXCLUSION CLAUSES: FUNDAMENTAL BREACH

- **Idea—parties cannot rely on exclusion clauses if it excludes liability that “goes to the root of the contract”**
- **Rule of construction:**
 - the more unreasonable the result, the less likely the clause enforceable
 - very clear words necessary to exclude liability for fundamental breach
- **Example—*Photo Production v Securicor Transport* [1980] AC 827**

EXCLUSION CLAUSES:

CONTRA PROFERENTEM

- **Idea—ambiguous term construed against party who introduced it (*Transocean Drilling UK v Hut Group* [2016] EWCA Civ 372)**
- **Examples:**
 - *Nobahar-Cookson v Hut* [2016] EWCA Civ 128—liability for claims where notice served within 20 days
 - *Persimmon Homes v Ove Arup and Partners* [2017] EWCA Civ 373—liability for causing presence of asbestos v for identifying presence of asbestos

EXCLUSION CLAUSES: NEGLIGENCE LIABILITY

- Idea—clauses excluding liability for negligence effective only if no other way to interpret them
- Why?—assumption that innocent party would have agreed to them
- Impact of CECO—less compelling need to control construction of exclusion clauses
- Evolution:
 - *Canada Steamship Lines v The King* [1952] AC 192
 - reading down of *Canada Steamship* principles

EXCLUSION CLAUSES: *CANADA STEAMSHIP PRINCIPLES*

- **Three principles:**
 - does exclusion clause expressly refer to negligence liability?—“whatsoever or howsoever” (*Shell Chemicals UK v P&O Roadtanks* [1995] 1 Lloyd’s Rep 297)
 - if not, words wide enough to cover negligence liability?
 - if yes and clause limits (not excludes) liability—clause effective (*Mitchell v Lock* [1983] QB 284)
 - if yes and clause excludes liability—next question
 - can exemption cover liability other than negligence?
 - if no—clause effective
 - if yes—clause will cover non-negligence liability (*Dorset County Council v Southern Felt Roofing* (1990) 48 BLR 96)

EXCLUSION CLAUSES: READING DOWN *CANADA STEAMSHIP*

- **Cases not applying *Canada Steamship* principles:**
 - *National Westminster Bank v Utrecht-America Finance* [2001] CLC 1372
 - *Mir Steel UK v Morris* [2012] EWCA Civ 1397
- ***Persimmon Homes v Ove Arup and Partners* [2017] EWCA Civ 373:**
 - focus on natural meaning
 - *Canada Steamship* principles more relevant to indemnity clauses
- ***Triple Point Technology v PTT Public Co* [2021] UKSC 29—“old and outmoded”**