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This is the second in our series of contract disputes practical guides, designed to provide clients with practical guidance on some key issues that feature in disputes relating to commercial contracts under English law.

## CONTRACT DISPUTES PRACTICAL GUIDES

ISSUE 2, SEPTEMBER 2015

# WHAT DOES YOUR CONTRACT MEAN?

## HOW THE COURTS INTERPRET CONTRACTS

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All too often, a term might seem perfectly clear to the parties when the contract is agreed, but a dispute later arises as to how it is meant to apply in the circumstances that have come about.

If the parties cannot resolve the issue, the court may be called on to interpret the contract. Where the parties have not made themselves clear, the result may then be difficult to predict.



**Gary Milner-Moore, Natasha Johnson and Steven Dalton** consider the court's approach to interpreting contracts and some practical steps that can be taken to minimise the risks.

## TOP TIPS TO MAKE SURE YOUR CONTRACT MEANS WHAT YOU WANT IT TO MEAN:

- DO use clear and unambiguous language
- DO stress test the drafting: is it clear what is intended to happen in any potential scenario?
- DON'T be tempted to "compromise" by leaving a term vague rather than resolving the issue
- DO take particular care with defined terms and formulae
- DO check any amendments or additions carefully
- DON'T look at terms in isolation: think about how they work within the contract as a whole
- DO consider using recitals to clarify the commercial purpose of the transaction
- DON'T assume "commercial common sense" will save you from a bad bargain
- DON'T assume you can rely on anything said in pre-contractual correspondence to clarify a contract term
- DO take care with lists and examples: make clear whether they are meant to restrict the general terms used
- DON'T assume that a clause in one contract will mean the same as the identical clause in another contract

## 1. AN OBJECTIVE APPROACH

In interpreting a contract, the court's overarching aim is to determine the meaning the contract would convey to a reasonable person with all the background knowledge available to the parties at the time the contract was made. This aim is sometimes described as determining the objective intentions of the parties.

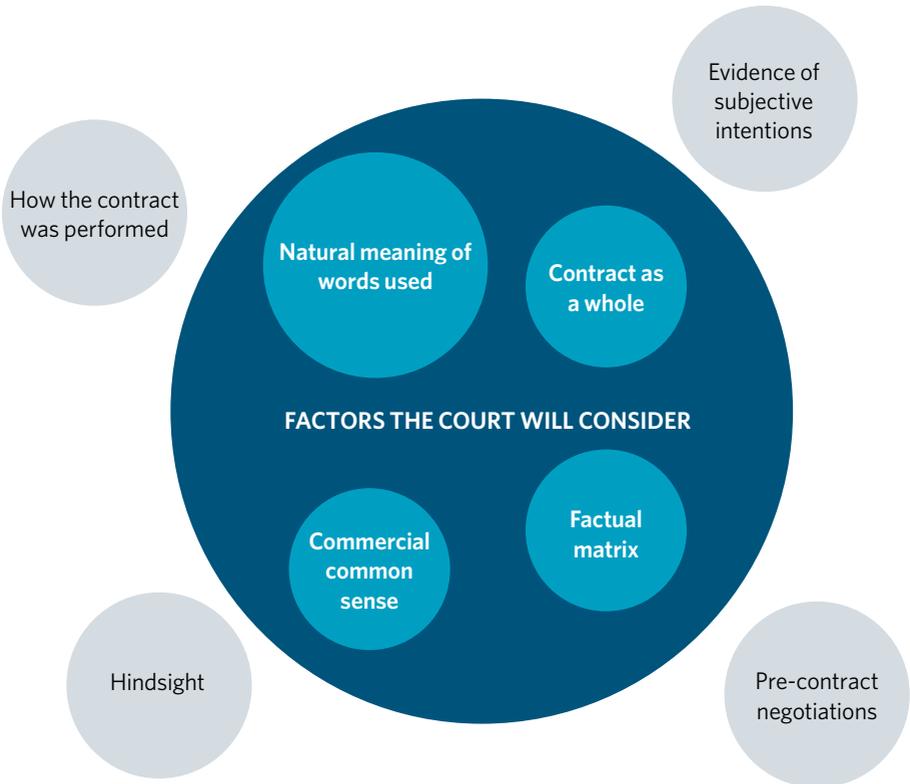
The subjective intentions of the parties are not relevant to this exercise. It is possible for one or both parties to a contract to believe a particular clause has one meaning but the court to determine that it means something else entirely.

As well as considering the actual words used in the clause, the court will take into account the wider context including how the clause fits within the contract as a whole, the background knowledge available to the parties (sometimes referred to as "factual matrix") and considerations of commercial common sense.

The court will not admit evidence of the parties' subjective intentions, including statements made in pre-contract negotiations (unless they go solely to establishing the factual matrix) and evidence as to how the contract was in fact performed. Such evidence may, however, be considered for other purposes, for example if there is a claim for rectification (which is often raised in the alternative to arguments based on interpretation) or estoppel – see section 4 below.

As well as considering the meaning of the express terms of the contract, the court may be asked to imply a term to spell out what the contract does not say expressly but should be understood to mean – see section 9 below.

## HOW THE COURTS INTERPRET CONTRACTS



The diagram above shows which factors the court will take into account in interpreting a contract, and which factors must be left out of the equation.

One factor – the natural meaning of the words used – is shown as larger than the others. This is because of the recent trend for the courts to give this factor greater prominence than the others, at least where there appears to be a clear natural meaning. How the various factors interact with one another is considered further below.

## 2. NATURAL MEANING VS COMMERCIAL COMMON SENSE

There is some tension in the authorities as to the respective roles to be played by, on the one hand, the “natural meaning” of the words used in the contract and, on the other, perceptions of “commercial common sense”:

- At one end of the spectrum, there is the view that the court must apply the natural meaning of the words unless there is a lack of clarity or an ambiguity in the language used, or it would produce an absurd result. Then, and only then, can the court adopt the construction which is most consistent with commercial common sense
- At the other extreme, there is the view that commercial considerations may indicate a lack of clarity or ambiguity in the first place and that any arguable construction must be tested against commercial common sense

In reality, these may not be differences of principle so much as differences of emphasis. Both approaches seek to determine how the clause would be understood by a reasonable reader. But the first emphasises that the starting point must be the words used – we do after all generally assume people mean what they say. The second emphasises that surrounding circumstances also come into play in everyday communication, and may lead us to conclude that the wrong words have been used.

Recent judgments seem to indicate a trend towards a greater emphasis on the language used, with the higher courts generally seeking to downplay considerations of commercial common sense unless there is some ambiguity or lack of clarity. A number of pronouncements from the House of Lords and Supreme Court over the years, in the box to the right, illustrate the evolution in the court’s approach.

*Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28: “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.”

*Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38: “...in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context.” And “...there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed.”

*Rainy Sky SA v Kookmin Bank* [2011] UKSC 50: “... 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.” However, “Where the parties have used unambiguous language, the court must apply it.”

*Arnold v Britton* [2015] UKSC 36: “...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.”

### 3. BADLY DRAFTED CONTRACTS

Wherever the precise balance lies between natural meaning and commercial common sense in interpreting a contract, what is clear is that a court is likely to have greater regard to commercial common sense, and other factors apart from the actual words used, where those words are unclear or ambiguous. As Lord Neuberger commented in *Arnold v Britton* (referred to above), the worse the drafting of the relevant words, the more ready the court will be to depart from their natural meaning - in effect correcting the language through interpretation.

So the best way to guard against disputes about the proper interpretation of a contract is, unsurprisingly, to ensure that all clauses are carefully drafted, looking out for areas of potential ambiguity and paying close attention to correct punctuation and grammatical structure. Particular care should be taken with defined terms and formulae, as these are common areas for problems to arise. When using formulae, consider setting out illustrations or examples as to how the clause is meant to work in a given situation.

**“Stand back and think about how each clause would be understood by someone who didn’t know what it was aiming to do; if there is any doubt, it needs to be clearer”**

References can also cause difficulties; it will generally be better to use defined terms or more detailed drafting rather than referring vaguely to “such” or “the above”, and any cross-references to other clauses should be checked carefully in the final version.

Where additions or amendments are made, these need to be checked carefully to ensure they are clear and consistent with other provisions. It is easy for errors or ambiguities to creep in, particularly when there is time pressure.

The House of Lords decision in *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38 is an example of ambiguity arising from both a defined term and a formula – the relevant clause involved both. The dispute related to the price payable to a land owner under a property development agreement, which turned on the following definition of “Additional Residential Payment”, or ARP:

“23.4% of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value [MGRUV] less the Costs and Incentives [C&I]”.

This can be read a number of ways, most obviously depending on whether the C&I should be deducted before or after calculating the 23.4%. The landowner said the meaning was simple: deduct both MGRUV and C&I from the achieved price and then calculate 23.4% of the result. The developer argued that ARP meant the amount by which 23.4% of the achieved price (less the C&I) exceeded the MGRUV, although this would require a departure from the ordinary rules of syntax.

The House of Lords accepted the developer’s construction, as otherwise the definition made no commercial sense. Lord Hoffmann described this as “an exceptional case in which the drafting was careless and no one noticed”. Since it was clear that something had gone wrong with the language, and it was clear what a reasonable person would have understood the parties to have meant, that was the correct interpretation even if it did not reflect what the words used would conventionally have been understood to mean.

The Supreme Court decision in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 (see this [post](#) on our Litigation Notes blog) shows the problems that can arise when references are imprecise. The case concerned advance payment bonds issued by a bank pursuant to shipbuilding contracts. The shipbuilder experienced financial difficulties and the buyers called on the bonds. The bank argued that the bonds did not cover refunds to which the buyers were entitled on the insolvency of the shipbuilder.

The relevant term provided that in consideration of the buyers' agreement to make the pre-delivery instalments, the bank undertook to pay the buyers "all such sums" due to them under the contract. The buyers said this referred back to "pre-delivery instalments" earlier in the paragraph (and therefore **included** instalments repayable on insolvency). The bank said it referred back to sums referred to in the preceding paragraph of the bonds, namely instalments paid prior to a termination of the contract or a total loss of the vessel (and therefore **excluded** instalments repayable on insolvency).

The Supreme Court found in favour of the buyers, overturning the Court of Appeal judgment and restoring the first instance decision. Both interpretations were arguable, so the Supreme Court looked to commercial common sense to resolve the question. It concluded that it made no commercial sense for the bonds to cover each of the situations in which the buyers were entitled to a refund of advance payments apart from the shipbuilder's insolvency, which was in fact the situation for which the security was most likely to be needed.

#### 4. EXCLUSION OF PRE-CONTRACT NEGOTIATIONS

It is a long-standing rule that the court will not admit evidence of the parties' pre-contract negotiations for the purpose of interpreting a contract. However, such evidence may be admitted to show that a relevant background fact was known to the parties, and so should be taken into account as part of the "factual matrix".

**"Everything you want to rely on should be in the contract itself - not in the correspondence"**

In essence, the exclusionary rule means that evidence of the parties' subjective aims and intentions, or the terms put forward or rejected in previous drafts, will not be admissible for the purpose of interpreting the contract. The rule does not, however, exclude such evidence for other purposes, eg to support a claim for:

- rectification (which is often raised in the alternative to arguments based on interpretation) - ie that the written contract should be corrected because it does not reflect the terms actually agreed (or possibly the terms one party thought had been agreed, in circumstances where the other party should not be permitted to take advantage of the mistake); or
- estoppel by convention - ie that the parties have negotiated an agreement based on some common assumption, for example that certain words will bear a certain meaning, and should not be permitted to go back on that assumption.

These types of claim are not, however, easy to establish. It is far better to ensure the contract clearly reflects the agreed terms, rather than having to fall back on rectification or estoppel.

In the House of Lords case of *Chartbrook v Persimmon* (referred to above) the developer advanced two alternative arguments, if its primary arguments on interpretation failed.

The first was that the pre-contractual negotiations should be taken into account in interpreting the clause. Their Lordships rejected this argument, confirming the continued application of the rule excluding evidence of pre-contractual negotiations for the purpose of interpreting a contract.

The second was that, if necessary, the clause should be rectified. This was on the basis of pre-contract correspondence which clearly supported the developer's interpretation. Their Lordships accepted that, if the proper interpretation of the clause had been as the land owner argued, it would have been appropriate to grant rectification. Even though the first instance judge had accepted the evidence of those negotiating the contract for the land owner that they did not, in fact, understand the correspondence as supporting the developer's interpretation, what mattered was how the correspondence would be understood by a reasonable observer. That was clearly in accordance with the developer's interpretation.

So if the court had concluded in favour of the land owner's case on interpretation, it would have found that the contract should be rectified to reflect the objective common intention evidenced by the correspondence.

## 5. LIMITING THE FACTUAL MATRIX

It is sometimes argued that admitting evidence of factual matrix is unfair to third parties who might be affected by a contract, as it increases the risk they may find the contract does not mean what they had thought. The fact that a contract might affect a third party, such as an assignee, is not normally sufficient to prevent the court admitting background facts known to the original parties.

However, where a contract is of a type that is treated as addressed to third parties (eg articles of association), so that their interests ought to be taken into account, the courts may restrict the admissible background to facts which would have been available not only to the contracting parties but also to relevant third parties. The role of the factual matrix may also be more limited in contracts concluded on industry standard forms, given the particular need for commercial certainty in that context.

The Supreme Court considered the approach to the interpretation of tradable financial instruments in *In Re Sigma Finance Corporation* [2009] UKSC 2. Lord Collins stated: "... this is not the type of case where the background or matrix of fact is or ought to be relevant, except in the most generalised way. ...Where a security document secures a number of creditors who have advanced funds over a long period it would be quite wrong to take account of circumstances which are not known to all of them. In this type of case it is the wording of the instrument which is paramount. [It] must be interpreted as a whole in the light of the commercial intention which may be inferred from the face of the instrument and from the nature of the debtor's business..."

## 6. LIMITS OF COMMERCIAL COMMON SENSE

When the court is interpreting a commercial contract, it will assume that the parties intended their agreement to make sense in the commercial context which prevailed at the relevant time. Notions of commercial common sense will therefore be important in considering the meaning the clause would convey to a reasonable person with the relevant background knowledge.

However, that does not mean that commercial common sense can necessarily be invoked to prevent the court interpreting a clause in a way that makes little commercial sense for one or other party. The fact that a particular interpretation seems unduly unfavourable to a particular party will not generally be sufficient to persuade a court to override what otherwise appears to be the clear meaning of the clause. It may be that the clause was agreed in exchange for a concession elsewhere, or it may simply have been a bad bargain.

**“Don’t assume you’ll be able to rely on ‘commercial common sense’ to save you from what turns out to be a bad bargain”**

In addition, commercial common sense cannot be invoked retrospectively. It is only relevant to the extent it sheds light on how matters would or could have been perceived at the time the contract was made. Of course, while this is the clear principle, it can sometimes be difficult for judges to block out entirely the knowledge gained through hindsight.

**“Hindsight may be perfect, but it is not a legitimate tool of contractual interpretation”**

The limits of commercial common sense are well illustrated by the recent Supreme Court decision in *Arnold v Britton* [2015] UKSC 36 (see [post](#)). The court interpreted a service charge provision in a number of 99 year leases of chalets in a caravan park in South Wales granted between 1977 and 1991. The court held, by a four-to-one majority, that the clause required the tenants to pay a fixed sum of £90 for the first year, increasing annually by 10% on a compound basis, even though the practical effect was that the annual service charge would be alarmingly high (over £500,000) by the end of the term.

The court rejected the argument that it was inconceivable that a lessee would have agreed a service charge provision with that effect, at least in the 1970s and much of the 1980s. Annual inflation was well over 10% between 1974 and 1981, and over 15% for six of those eight years. Although it had turned out to be imprudent (at least so far), at the time a lessee could have taken the view that 10% was an acceptable rate. Lord Neuberger set out a number of general principles, including:

- Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language
- A court should be very slow to reject the natural meaning of a provision 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

## 7. THE CONTRACT AS A WHOLE

In interpreting a term in a contract, the court will not look at the clause in isolation; it must be interpreted by reference to the contract as a whole. How does the language used in the clause compare to the language used in other clauses? How is the clause meant to work with the other provisions of the contract? Are there recitals which shed light on its commercial purpose?

The positioning of a term within a clause or within the contract overall may be important. Parties should pay close attention not just to the wording of a clause, but also where it fits within the overall structure and organisation of the contract. If a clause appears in a section of the contract relating to one issue, it may be difficult to persuade a court that it is meant to deal with another issue, even if the wording of the clause might be broad enough to cover that issue.

Headings may also be important as part of the internal context. Where headings are used it is good practice to include a provision stating that they are for convenience only and shall not affect interpretation. But even with such a clause in the boilerplate, it is sensible to make sure the headings are appropriate to the provisions that follow.

If the contract is part of a series of inter-related agreements, then the court will take into account not only the contract in which a clause appears but the overall scheme of the agreements.

**“Context is key in contractual interpretation. A clause might mean one thing in one agreement but something quite different in a different context”**

The importance of context is well illustrated by the Supreme Court decision in *In Re Sigma Finance Corporation* (referred to above). Sigma was a structured investment vehicle which became insolvent, triggering an “Enforcement Event” under the relevant Security Trust Deed. This started a 60-day “Realisation Period” in which the appointed receivers were to establish separate pools of assets to cover short term liabilities (ie those falling due within a year) and various types of longer term liabilities. The issue on appeal was how Sigma’s assets (of around US\$450 million) were to be distributed in the face of a huge shortfall against total liabilities (around US\$6.2 billion).

Key to the dispute was the last sentence of clause 7.6, which stated: “During the Realisation Period the Security Trustee shall so far as possible discharge on the due dates therefor any Short Term Liabilities falling due for payment during such period...” The courts below had found this had a clear natural meaning, requiring payment of Realisation Period debts as and when they fell due, even though this meant prioritising them over all other debts.

The majority of the Supreme Court said this conclusion attached too much weight to what the courts perceived as the natural meaning of the words of the relevant sentence and too little weight to the context in which it appeared and the scheme of the deed as a whole. In particular, clauses 7.3 to 7.8 were all drafted on the assumption of a situation in which Sigma had enough assets to cover at least its secured creditors; only in clause 7.9 did the deed address the possibility of a shortfall. The majority concluded that, in a situation of insolvency, the relevant sentence did not require payment of Realisation Period debts as they fell due.

## 8. TOOLS OF CONSTRUCTION

It is a long standing principle of construction that, where there is some doubt or ambiguity as to the meaning of a contract term, it should be construed against the party that has put forward the clause and/or is seeking to rely on it. This is known as the “*contra proferentem*” rule, after the Latin phrase meaning “against the offeror”.

The principle is variously formulated depending on the case. Sometimes it is against the party that has drafted the clause; sometimes against the party who is seeking to rely on the clause to cut back a primary obligation (eg exclusion clauses). Although it is not always obvious when or how it should be applied, it is clear that the courts are still having regard to the principle in some cases.

A recent example is *Ace Paper Ltd v Fry* [2015] EWHC 1647. Under an invoice discounting agreement (IDA), Ace had assigned to RBS all its customer debts.

The IDA was later terminated by agreement, with RBS confirming that it had no claims against Ace arising under or incidental to the IDA and that, insofar as “any such claims” against Ace “or any third party” might arise in future, “such claims” were “waived and released and transferred/re-transferred” to Ace.

The question was whether that had the effect of re-assigning to Ace a substantial customer debt for which RBS had already paid Ace under the bad debt provisions of the IDA. The High Court held that it did not. Ace’s interpretation was counterintuitive and would require much clearer words than had been used, particularly as the document was drafted by Ace and should be construed *contra proferentem*.

Other traditional “canons” of construction still play some part in interpreting contracts. These are now seen essentially as presumptions or guidelines rather than overriding rules – they are simply tools the court may use in considering how the agreement would be understood by the reasonable reader with the relevant background knowledge. Some of the better known are mentioned below.

Where there is a list of examples, together with general wording, the general wording may be interpreted as limited to other examples of the same type. This is the “*eiusdem generis*” rule, meaning “of the same kind”. It is not an invariable rule and will depend on the words used and their context. To avoid its application, parties should take care with lists, and may wish to include a boilerplate provision that “including”, and similar words, are not intended to limit the sense of the general words used.

Where particular objects, rights or powers are expressly mentioned, this tends to suggest that other similar objects, rights or powers are not meant to be included. This is known as “*expressio unius*”, a shortened version of a Latin phrase meaning “express mention of one thing excludes the other”. It is not however a particularly strong principle, and is not commonly applied.

In general, the court will prefer an interpretation which gives effect to the contract, or the particular clause, rather than one that renders it ineffective or meaningless. Similarly, it will generally prefer an interpretation that does not allow one party to take advantage of its own wrong. And it will not generally infer that a party has given up legal rights to a greater extent than is clearly intended based on the contract wording.

## 9. IMPLIED TERMS

In addition to interpreting the express terms of a contract, the court may in some circumstances imply a term that has not been expressly included. Although the authorities do not all speak with one voice, the leading modern approach is to see the implication of terms as, in effect, an extension of the court's approach to interpreting the contract generally. On this approach, the question is whether the proposed term would spell out in express words what the contract, read against the relevant background, would reasonably be understood to mean.

**“The court may imply a term to deal with a situation the parties have not anticipated – but it is best if it doesn't have to”**

In practice, however, the court will be guided by the previous tests developed by the courts, in particular whether the term is: (1) necessary to give business efficacy to the contract; or (2) so obvious that it goes without saying. In addition, a term will not generally be implied where it would be inconsistent with the express terms of the contract, or where it is not capable of clear expression, or where it would not be reasonable and equitable; these are all good reasons for saying that a reasonable person would not have understood that to be what the contract meant.

The courts tend to be reluctant to imply terms where there is a detailed written contract prepared by legal advisers; the starting point is generally that if the parties intended to include a particular term, they would have done so expressly.

Terms may also be implied by statute or common law or by reference to an established trade custom or a previous course of dealings between the parties.

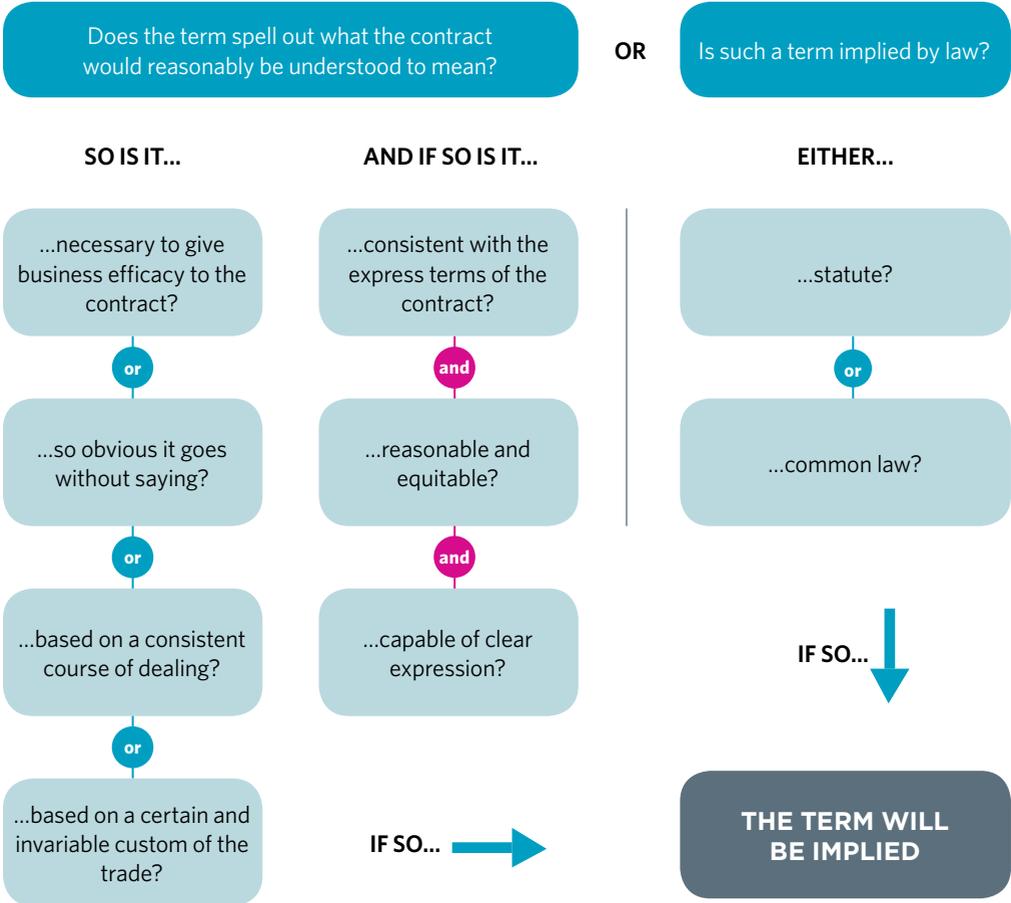
The leading modern case on the implication of terms is *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, in which the Privy Council considered the construction of a company's articles of association. The articles provided that the holder of a Special Rights Redeemable Preference Share was entitled to appoint or remove two designated members of the company's board of directors, so long as it held certain other shares amounting to more than 37.5% of the company's issued share capital.

The articles were silent as to what should happen if the holder of the special share appointed the two directors and then ceased to hold more than 37.5% of the issued share capital. The Privy Council implied a term that, in such circumstances, they ceased to be directors. This was necessary to avoid defeating the overriding purpose behind the machinery of appointment and removal of directors, namely to ensure that the board reflected the appropriate shareholder interests in accordance with the scheme laid out in the articles.

Lord Hoffmann, giving the judgment of the Privy Council, commented that where a contract does not expressly provide for what is to happen when some event occurs, the most usual inference is that nothing is to happen. If the parties had intended something to happen, the contract would have said so. He added:

“In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. ... But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.”

### WILL THE COURT IMPLY A TERM?



The recent case of *Liberty Investing Limited v Sydow* [2015] EWHC 608 (Comm) (see [post](#)) illustrates the court's reluctance to imply obligations into a detailed written contract prepared with the assistance of legal advisors.

In that case the Commercial Court refused to imply a term into a shareholders' agreement that the controller of certain companies would cooperate in and/or not prevent the relevant companies complying with their obligations under the agreement.

The court referred to *Attorney-General of Belize v Belize Telecom Ltd* (above), which established the default position that nothing is to be implied into a contract. Where parties intend to impose an obligation on one or other of them, the ordinary expectation is that they will say so, particularly where there is a detailed written contract prepared by their legal advisers.

The real question the court had to answer was therefore whether it was necessary in order to make the agreement workable, or was so obvious that it went without saying, or was otherwise implicit in the contractual wording, that the controller of the companies would have a personal legal liability under the agreement rather than the legal liability resting solely on the companies concerned. It concluded that there was nothing inherently unworkable or objectionable in the wording of the agreement which imposed legal liability only on the relevant corporate entity and not on the person who controlled that corporate entity.

## 10. REASONABLE VIEWS MAY DIFFER

The interpretation of a contract term is notoriously fact-sensitive, depending as it does on not only the words used but also the context in which they appear – both the internal context, within the four corners of the contract, and the external context or factual matrix. As a result, decisions on contractual interpretation generally have little precedent value; the meaning of a clause in one contract may bear little relation to the meaning of even an identically-worded clause in a different contract (subject to an obvious exception for industry standard contracts).

A further difficulty is that reasonable views will often differ not only as to whether language used in a contract is clear and unambiguous, or whether a particular interpretation is arguable at all, but also as to which competing interpretation is most commercially sensible. There are numerous examples of different conclusions being reached by courts at different levels, or dissenting judgments being given, not because of any real difference in principle but because the judges took different views of how the principles should be applied to the particular facts.

As Lord Hoffmann said in *Chartbrook* (referred to above) in the context of correcting mistakes by interpretation: "It is, I am afraid, not unusual that an interpretation which does not strike one person as sufficiently irrational to justify a conclusion that there has been a linguistic mistake will seem commercially absurd to another .... The subtleties of language are such that no judicial guidelines or statements of principle can prevent it from sometimes happening."

**"It will almost certainly be cheaper and easier to invest the time and effort at the drafting stage, to ensure your contract is clear, than to have to call on the court to resolve disputes about its meaning later"**

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