

COVID-19

What does the clause mean? Contractual interpretation in UK disputes

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We know that clients are grappling with contractual issues arising from the impacts of the COVID-19 pandemic and the rights and obligations under existing contracts are coming under close scrutiny and it is likely that there will be disputes about the correct interpretation of contractual provisions. To assist, we have set out a brief refresher of the current law on interpretation, and distilled down some key factors which will be relevant if the courts are asked to decide what is meant by a particular contractual provision.

Where does the law stand today?

Very broadly, the English courts will construe a contractual provision objectively and will be keen to ensure that they are not interfering with the bargain struck by commercial parties. The principal authorities are set out in the footnote below¹. When considering the key principles or 'tools' of interpretation, the Supreme Court in *Wood* made clear that the extent to which each tool will assist the court to ascertain the objective meaning will vary according to the circumstances of the particular agreement(s).

So whilst it is impossible to define a clear legal test interpreting a contract, the check-list below may assist in a preliminary assessment of what the court might bear in mind:

What is relevant when interpreting a contractual provision?



The natural and ordinary meaning of the words – is it objectively clear?

As Lord Neuberger said in *Arnold*, "*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.*"



The context of the contract as a whole:

- check rival meanings against other provisions of the document and investigate the commercial consequences.
- the purpose, nature, formality and quality of drafting of the contract will help the court give more or less weight to elements of the wider context.



Commercial common sense:

Where there are rival interpretations - which construction is more consistent with business common sense?

¹ *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1WLR 2900, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619; and more recently *Wood v Capita Insurance Services Limited* [2017] UKSC 244, [2017] AC 1173.

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Factual background:

The facts and circumstances known or assumed by the parties at the time the contract was executed – does this point to a different interpretation?



The *Ejusdem Generis* rule means "of the same kind" and may be applied when interpreting general words following a list to include other examples of the same type or kind.

What is not relevant when interpreting a contractual provision?



Actual or subjective intentions are irrelevant and not admissible:

Although evidence of intention is admissible in a claim for rectification: there can be an evidential advantage to introducing rectification arguments alongside interpretation.



Market practice without robust evidence:

Market practice can assist the courts, if supported by evidence of market practice, however in practice it can be difficult to produce consistent evidence of market practice.



Earlier drafts of the contract or negotiations:

What was said in prior correspondence before the contract was agreed is not relevant when interpreting a particular word or phrase, although negotiations may be useful to show the commercial purpose.



Previous legal cases are of limited value as the meaning of a contract will depend on its particular language and context.

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THE BCLP TEAM

If you have any questions, or would like to discuss any of these issues with our team, please get in touch.



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This document provides a general summary only and is not intended to be comprehensive nor to provide bespoke legal advice. Given the fast moving nature of the coronavirus outbreak and that fact that the UK government is introducing new legislation and measures on a regular basis to address it, employers need to adopt a dynamic approach. Specific legal advice should always be sought in relation to the particular facts of a given situation.

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