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Insights

DISPUTES IN FOCUS: QUICK Q&A ON CONTRACTUAL INTERPRETATION

CLARE REEVE CURATOLA SPEAKS TO ORAN GELB AS PART OF HER QUICK Q&A SERIES

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SUMMARY

Many commercial disputes involve a disagreement about how a provision in a contract should be interpreted. It is important to understand how a court would approach this question to help inform what to do next when stuck in such a dispute.

In this insight, Clare Reeve Curatola outlines the established principles under English law for interpreting contracts and asks fellow Litigation and Investigations partner, Oran Gelb, about his recent experience of this issue in the specific context of exclusion clauses.

Oran shares his insights and gives us his top tip for managing interpretation risk when drafting contractual exclusion clauses.

Short on time? Jump to our practical tips.

INTRODUCTION TO CLARE'S QUICK Q&A INSIGHT SERIES

Having recently returned from maternity leave, I have enjoyed catching up with colleagues and clients, and it is great to get stuck back into helping clients navigate tricky corporate risk issues and disputes.

I am a partner and solicitor advocate in BCLP's Litigation and Investigations team, specialising in complex commercial disputes and conducting internal investigations. I have acted on high profile litigation for large global financial institutions and have experience advising clients across range of other sectors including technology, transport and energy. My approach and advice very much benefits from an "inhouse" perspective having gained invaluable experience from three client secondments.

Over the last 12 months, my Litigation and Investigations colleagues have been advising clients on a whole host of complicated legal issues and investigations. They've been experiencing developing trends in litigation, and resolving a wide range of commercial disputes.

Highlights include winning Litigation Team of the Year 2023 from industry publication, The Lawyer. We're also shortlisted for Litigation Team of the Year and Competition / Regulatory Team of the Year at the British Legal Awards (to be awarded in November). In team news, this year we welcomed regulatory enforcement and white collar partner David Rundle, former Financial Conduct Authority general counsel David Scott as a senior consultant, and real estate disputes partner Jessica Parry.

I have prepared a **series of short Q&A insights** in which I will share some of the key issues discussed with my colleagues. Over the next few weeks, I will share blogs that cover a range of topics, including contractual interpretation and exclusion clauses, civil restraint orders and the rise of group or class actions.

If you would like me to send the Q&As direct to your inbox, please let me know.

QUICK Q&A WITH ORAN GELB

Oran Gelb is the UK head of Banking Litigation at BCLP. He has acted on high profile litigation and investigations for some of the largest global financial institutions as well as clients in a range of other sectors, including technology, telecoms, retail and transport. He has represented clients in the High Court, Court of Appeal and Supreme Court. He has also represented firms and individuals in front of regulators and competition authorities in the UK, Europe, the US and Asia.

ESTABLISHED PRINCIPLES: INTERPRETING CONTRACTS

Following a series of three Supreme Court judgments between 2011 and 2017, the general approach to interpretation of contracts under English law has been fairly clear. Very broadly, the English courts will construe a contractual provision objectively in their documentary, factual and commercial context in light of:

- the natural and ordinary meaning of the provision;
- any other relevant provision of the contract being construed;
- the overall purpose of the provision and contract;
- the facts and circumstance known or assumed by the parties at the time of execution; and
- commercial common sense but disregarding subjective evidence of the parties' intentions.

Where the language used by the parties is unclear, the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a

reasonable person (with the parties' actual and presumed knowledge) would conclude the parties had meant by the language they used. But the court is keen to ensure that they are not interfering with the bargain struck by commercial parties.

When considering the key principles or 'tools' of interpretation, the Supreme Court has 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).

IN YOUR RECENT EXPERIENCE, ARE COURTS STRICTLY ADHERING TO THESE INTERPRETATION PRINCIPLES?

I think they are. From your list of factors, the words on the page are clearly the most important consideration. This is particularly true when looking at negotiated commercial contracts between sophisticated parties, as we typically are. You need a good reason to depart from the literal meaning, whether by invoking commercial common sense, the contract as a whole, implied terms etc. It can certainly be done – and we have done it successfully for clients – but it always takes a good argument (and a good advocate!).

DO THE COURTS INTERPRET EXCLUSION CLAUSES IN THE SAME WAY?

Yes they do. But there are some additional principles that can be invoked when construing exclusion clauses. For example, there is some authority for a general presumption that parties don't intend to abandon remedies and clear words are required to do so. Similarly, it is presumed that parties would not remove any sanction for non-performance of an obligation, and effectively deprive it of contractual force. This is worth bearing in mind if you are facing a clause that seems on its face to exclude every type of loss under the sun (loss of business, loss of revenue, loss of profit etc). The other general principle often cited is that if there is real doubt or ambiguity about its meaning, it should be resolved against the party seeking to rely on it.

WHAT IS YOUR TOP TIP FOR DRAFTING EXCLUSION CLAUSES?

I would say **don't ever just insert common words and phrases into an exclusion clause** unless you are very clear as to what they mean for that contract.

For example, you often see exclusion clauses for gross negligence but in reality, there isn't a settled meaning of that term under English law. Some authorities even suggest it doesn't add much to the usual standard of negligence. Another common one we see is an exclusion clause for indirect losses. That phrase does now have a settled meaning in caselaw – loss that doesn't flow naturally from the breach (i.e. the second limb in *Hadley v Baxendale*) – but it's amazing how many parties have the misconception that many direct monetary losses are indirect.

Ultimately, an exclusion clause or a limitation of liability is one of the most significant sections of a contract, and drafters should not throw in words just because they have seen them used elsewhere. That risks causing unintended consequences when claims begin to materialise.

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