Fundamental Principles in Interpretation of Contract

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5th July 2016
Note:

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Problems encountered in Daily Operation of Contract

- Not so much concerned with whether there is a contract
- But more to do with how to interpret a clause or there is conflicting clause
- Or mistake in drafting a contract
Is tendering exercise a binding contract?

- D was the contractor who tendered, and was the lowest tenderer
- Within an hour of the opening of the tender, D found an error in pricing and requested to withdraw. D refused to sign the contract documents
Tender as a Binding Contract

- Held:
- By submitting a conforming tender, D had entered into a tender contract with P. The tender contract imposed obligations on the tenderer in the event of its tender succeeding. Tender contract is a unilateral contract, where the offer is accepted by the doing of an act.
- The case established the concept of Contract "A" and "Contract B" framework for analysis of tendering.
TERMS OF CONTRACT

Not to be mixed up with representations
Made prior to the formation of contract

Conditions, Warranties and Innominate terms

- Condition: It is a major term and goes to the heart of the contract.
- Warranty: It is a minor term.
- Innominate terms: Depends on the actual situation to ascertain its effect.
Effect of breach of *Conditions*

- The innocent party is entitled
- (i) To treat the contract as having ended.
- (ii) To be refunded money paid out and other expenses incurred.
- However,
- (iii) the parties must expressly specify that if there is a breach of a particular condition, the innocent party will be entitled to be discharged from the contract.
- (iv) If the parties do not specify this consequence for the breach of a particular condition, then the court can disregard the label ‘condition’ used by the parties and interpret the wording as it sees fit. What the court sees fit will depend on the circumstances and how serious an effect the breach of condition has had on the innocent party.
**TERMS OF CONTRACT**

**Effect of breach of Warranties**
- The injured party has the right to sue for damages but the contract is still valid and binding on the parties.

**Effect of breach of innominate terms (meaning ‘not having a name’)**
- The court will interpret whether or not its breach justifies termination of the contract. An innominate term could therefore be interpreted either as being a condition or a warranty, depending on the particular circumstances of the case.

*Case:* HK Fir Shipping Co Ltd v Kawasaki Kisen Kaisha (1962)
- “Has the innocent party been deprived of most of the benefit he expected to get from the contract?” If the answer to this question is ‘yes’, then the breach is treated as though it were a breach of condition. If the answer is ‘no’, then it is treated as a breach of warranty.”
• Special conditions
  • (a) Conditions precedent
  • A condition precedent is an express or implied condition that the contract will not bind one or more of the parties unless and until some stated event has happened.

  • (b) Condition subsequent
  • This means that the agreement will continue to be a binding contract unless and until the condition occurs. If it does occur, either the contract will cease to bind or one party will have the right to annul it, depending on the wording used in the contract.
Special Term : Exclusion and Limitation Clauses

- An exclusion clause is a clause by which a party seeks to exclude his liability for breach of contract.
- A limitation clause is one whereby a party seeks to limit his liability in the event of breach.
• Common Law position: Rules on incorporation signed documents  

**Case:** *L. Estrange v. Graucob 1934*

- A contract for ordering an automatic slot machine was signed by a customer. It was held that she was bound by the terms even though she had not read them. If the document containing the terms is unsigned, then it is necessary to show that the other party had had notice of the terms.

**unsigned documents**

- (i) It is not necessary to reproduce the full, or any, terms of the contract on the particular document. Terms can be incorporated by reference.
- (ii) It is insufficient if they are reproduced on a document which cannot be regarded as contractual.

**Case:** *Chapelton v. Barry UDC, 1940*

- The plaintiff hired deckchairs from a pile stacked near a notice. A person hiring the deckchairs was given tickets which he retained for inspection.
- The court held that the terms printed on the tickets were not part of the contract since no reasonable person would have regarded the tickets as anything other than a receipt for the money.
Mistake in Terms

• Rectification - *Traditional Structures Ltd v. HW Construction Ltd* [2010] EWHC 1530: A contract was rectified on the ground of unilateral mistake where a sub-contractor had mistakenly omitted the price of cladding from the contract and the contractor was aware of the omission, failed to notify the sub-contractor and benefited from the mistake.

• Singaporean Case about sale of computers over internet

• General rule: one cannot take advantage of the other side’s mistake if one actually knows it but chooses not to inform the other of the mistake.
An examination of your tender dated 27 August 2015 has revealed a discrepancy between the sum given in "words" (ONE HUNDRED SIXTY MILLION EIGHT HUNDRED THOUSAND ONLY) and the sum given in "figures" (HK$116,800,000) in the Form of Tender. In accordance with the rules as stipulated in Clause 3.1 (b) (i) of the Conditions of Tendering, the sum given in "words" is to take precedence.
Recitals

- Normally used to explain the background to the agreement
- Eg. Describe the negotiating history, relationship of parties, relationship to other agreements, its nature and effect etc…
- Should not include obligations of parties in recitals
- Because this may be held not to be legally binding by the court
- Recitals should be separated from the operative part
- A sentence to spell out the end of recitals is recommended
Headings

- Make contract easier to read and understand
- Conventional to include a clause stating that the headings are to be disregarded when construing the meaning of provisions
Interpretation of Contract

- Discovering the intention of the parties
- Objective meaning
- Contract to be a consistent document
- Ordinary and natural meaning
- Printed and written clauses
- *Contra Proferentem* rule
Fundamental Rule for Interpretation of Contract


- 5 Principles

- (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.
Fundamental Rule for Interpretation of Contract

(2) The background was famously referred to by Lord Wilberforce as the ‘matrix of fact’, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. 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. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(there is no conceptual limit to what can be regarded as background)
(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. 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 of syntax …
Fundamental Rule for Interpretation of Contract

(5) The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not readily 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.”
Terms and Interpretation

“Negotiation of a contract may take place by stages. The parties would first seek agreement or to avoid ambiguity, consensus or meeting of the minds, on the essential term or terms. When that stage has been achieved, they may say that they have reached agreement in principle. That is still short of an agreement. It is just an agreement to agree. They will then negotiate on all the terms that the parties intend to include in the contract beyond those essential terms. In the course of their negotiation, they may fine tune what they have achieved. But, it is only when they have reached consensus on all the essential terms to make a contract and all the terms they desire to put in the contract that one can say that the parties have reached a ‘concluded agreement’.”

Hung Fung Enterprises Holdings Ltd v Agricultural Bank of China [2010] HKEC 1517
Rules

- The court must select those construction which will produce a reasonable and just result.
- Arbitrator held:
  - The Drawings and Specifications show more than a roof with approx. area 2,048m². This aspect cannot be ignored.
  - Would have been easy to insert 2048 as the firm quantity under Quantity column.
  - If 2048 is quantity, there exists 2 units for the same item, not reasonable.
  - Approx. area is unlikely to be a firm quantity within GCC 59.
<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>QUANTITY</th>
<th>UNIT</th>
<th>RATE</th>
<th>$</th>
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</thead>
<tbody>
<tr>
<td>METAL MAIN ROOF</td>
<td></td>
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<tr>
<td>Design, supply and installation of metal main roof including to meet all requirements as stated in Specification section STE, section APQ – Appendix “Q”, other relevant Specification sections and Drawing Nos.KL32/7/CC/A/L0-07; KL32/7/CC/S/902; Metal main roof complete with steel roof structures (space frame) comprise of steel columns, steel beams, lattice girders, roof trusses; other necessary steel frames and sub-frames; insulated sandwiched metal roofing; single layer metal profile roofing; 3mm thick PVDF coated aluminium cladding to all perimeters; 3mm thick PVDF coated aluminium cladding in curve profile to soffit; all other associated aluminium cladding; PVDF coated aluminium louvres; “Promotech H” fire barrier system; stainless steel/aluminium gutters and drain points; motor operated maintenance gondola including support system;</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Item</td>
<td></td>
<td></td>
<td></td>
<td>14,900,000”</td>
</tr>
<tr>
<td>(Type MF/1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(approximate area on plan 2,048 m²)</td>
<td></td>
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</tbody>
</table>
Rules

- In order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document.
- Example: GCC Cl.50 and 64
- 50. (1) (a) As soon as practicable but in any event within 28 days after the cause of any delay to the progress of the Works or any Section thereof has arisen, the Contractor shall give notice in writing to the Engineer of the cause and probable extent of the delay.
64. (1) If the Contractor intends to claim a higher rate than one notified to him by the Engineer pursuant to Clause 59(4)(b) or Clause 61(2) or Clause 84(4)(b) the Contractor shall within 28 days of such notification give notice in writing of his intention to claim to the Engineer.

(5) If the Contractor fails to comply with the notice provisions contained in sub-clauses (1) or (2) of this Clause in respect of any claim, such claim shall not be considered.

Cl. 50 does not have the last sentence when it is so easy to be put in, intention is therefore not to be condition precedent
Rules

- Where the contract is a standard form of contract to which the parties have added special conditions, then unless the contract otherwise provides, greater weight must be given to the special conditions.
Question: NEC3 Core Clause

- Clause 60.3
- If there is an ambiguity or inconsistency within the Site Information (including the information referred to in it), the Contractor is assumed to have taken into account the physical conditions more favourable to doing the works.
NEC3 Particular Specification

- PS 8.11A The opinions or conclusions given in any factual or interpretative ground investigation reports are given for information only. Neither the Employer nor the Supervisor accepts any responsibility whatsoever for the accuracy or sufficiency of these information and the Contractor shall carry out at his own expense any further enquires and investigations he requires for his own information. The Contractor shall report immediately to the Supervisor any circumstance that in the Contractor's opinion indicates that the ground conditions differ significantly from those reported in or which could have been inferred from the ground investigation reports or preliminary pile results.

- Any Implication based on this clause?
Discussion Case

- contract no. CV/2012/05 (“the Contract”) titled Bathing Beach at Lung Mei, Tai Po
- Tenders received and not yet awarded
- CEDD anticipated potential JR to challenge the EIA
- Tender Negotiation with the Contractor
- Introduced SCC 77
- Now it’s over 2 years since the award of the Contract
- Could the Contractor refuse to proceed?
“(1) The Engineer shall, where it is necessary in order to comply with the terms of any Court Order or where there is a Pending Case, have power to order in writing the Contractor to temporarily discontinue the carrying out of the Works or any part thereof for such time and times and in such manner as the Engineer may consider necessary. The Contractor shall during such period of temporary discontinuance properly protect and secure the Works or, as the case may be, the relevant part so far as is necessary in the opinion of the Engineer. The Contractor shall continue to proceed with due diligence other parts of the Works not ordered to be temporarily discontinued.
Discussion Case

55. If the progress of the Works .... is suspended on the written order of the Engineer and if written permission to resume work is not given by the Engineer within a period of 90 days after the date of suspension then the Contractor may, ...., serve a notice in writing on the Engineer requiring permission within 28 days after the receipt of such notice to proceed with the Works or that part thereof in regard to which progress is suspended. If within the said 28 days the Engineer does not grant such permission the Contractor by a further notice in writing served on the Engineer may, but is not bound to, elect to treat the suspension where it affects part only of the Works as an omission of such part under Clause 60 or where it affects the Works as an abandonment of the Contract by the Employer.
Workshop Exercise

- Fundamental Contract Law Principles:
- SCC prevails over GCC
- Clause Z is equivalent to SCC
- Does Clause Z prevail over ECC core clauses?
Workshop Exercise

- If Drawing specifies cat ladder to be stainless steel, but specification says it’s mild steel, could the contractor get compensation?
Rules

- In interpreting a standard form there is less room for the influence of the special background applicable to any particular transaction.

- Where the contract expressly mentions some things, it is often to be inferred that other things of the same general category which are not expressly mentioned were deliberately omitted. Similar principles apply to the express inclusion of obligations dealing with a particular area of application.

- An express term in a contract excludes the possibility of implying any term dealing with the same subject matter as the express term.
Rules

- Where there is a doubt about the meaning of a contract, the words will be construed against the person who put them forward. (*Contra Proferentem Rule*)
- But NOT meaning any uncertainty is resolved against the party who drafted it
- Usually regarded by court as a last resort
- More often than not, the court could find an interpretation reflecting the true intention of parties
Case Study

1. WTR4 - HLD4 貨款 -

經商議後，現本司 應承 支付貴廠

10月31日 支付 美金 USD$150,000.00

12月31日 支付 美金 USD$50,000.00

餘款 美金 USD$150,000.00 則其後每月支付美金 USD $10,000.00，並儘可能在半年內付清，由陳建偉本人擔保。 陳建偉
Rules

- Guarantee the US$ 150,000 or the entire US$ 350,000?
- Rely on Contra Proferentem Rule?
- The drafter was the guarantor.
- Rule against the guarantor, i.e. US $ 350,000?
Rules

- Court opined it does not need to rely on *Contra Proferentem* Rule
- Court said parties’ intention were clear
- Perfect commercial sense to guarantee only the last US$ 150,000 as the time of payment was at a much later stage
- Whereas the 1st two tranches were payable within a short period of time upon agreement
Rules

- An ambiguity in an exemption clause will be resolved against the party seeking to rely on the clause.
- This is sometimes considered as applying the Contra Proferentem Rule.
- The notice requirement in EOT clause in standard form of contract is considered as such.
- EOT clause benefits the Employer by protecting the LD clause and is considered as the proferen (Peak v McKinnet 1969 1 BLR 111).
Rules

- A contract will be construed so far as possible in such a manner as not to permit one party to it to take advantage of his own wrong.
- Classic Example:
- Deduct LD while the contractor is prevented from completing the Works on time.
Rules

- If it is found that things described by particular words have some common characteristics which constitutes them a genus, the general words which follow them ought to be limited to things of that genus (the **Ejusdem Generis Principle**)
- Eg. “iron, steel, brass, lead and other materials”
- Could include copper
- But not concrete
- What about “steel, bricks, plywood and other materials”? 
- No particular class, rule does not apply
Rules

- In construing a contract all parts of it must be given effect where possible, and no part of it should be treated as inoperative or surplus.

- HCA 21/2012 Lee Cheong Construction & Building Materials Ltd v The Incorporated Owners of the Arcadia (30 March 2012)
  - D: The I/O, Employer
  - P: Contractor
  - D applied to stay the proceedings in favour of arbitration (s.20 of Cap. 609)
Here, subcontract has 2 clauses dealing with dispute resolution:

“Clause D25(b)

(b) The contract shall be interpreted in accordance with the laws of Hong Kong and shall be governed by the same and both parties submit to the non-exclusive jurisdiction of the Courts of Hong Kong.”

These words are also found in clause 23 of the Letter of Acceptance:

“Clause D27

Arbitration Agreement

This Contract is governed by, and shall be construed according to, the laws of HKSAR. Parties to this Contract agree to refer all the disputes in connection with this Contract to arbitration which shall be conducted in a way recognized by Hong Kong and be handled by Hong Kong International Arbitration Centre.”
P contends that the 2 clauses are inconsistent and the principle of contra proferentem requires that 27 is of no effect.

- Held:

- Agreed with the D’s contention that “Clause 25(b) is no more than a submission to the Hong Kong jurisdiction. It does not impose a positive obligation to resolve all disputes only in the Hong Kong courts. The contract specifically states that clause 25(b) is concerned with the “substance of the Contract”. If the effect of clause 25(b) was as contended for by Mr Wu there would be no reason to include clause 27 in the contract at all. Clause 25(b) submits the parties to the Hong Kong jurisdiction, not their disputes.”
Rules

- Where parties have entered into what they believe to be a binding agreement the court is most reluctant to hold that their agreement is void for uncertainty, and will only do so as a last resort.

- A provision in a contract will only be void for uncertainty if the court cannot reach a conclusion as to what was in the parties’ minds or where it is not safe for the court to prefer one possible meaning to other equally possible meaning.

- Where a clause in a contract contains a blank space which was intended to be filled in, the court will ignore the blank space unless it can deduce with reasonable certainty what was intended to have been included in the blank space. Ignoring the blank space may have the effect that the clause in question, or the contract as a whole, is too uncertain to be enforced.
Rules

- In case of inconsistency between written (or typed) clauses in a contract specially negotiated by the parties and printed clauses forming part of the standard form, the written clauses will prevail.

- Parties thought about it before putting that down in writing, more like parties’ common intention.
Rules

- Where a contract incorporates the terms of another document, and the terms of that other document conflict with the terms of the host contract, the terms of the host contract will prevail
Rules

- Mandatory v Permissive phrases
- “May” v “Shall”
- Construction Contracts tend to use “Shall” very often, does it then mean that it must be mandatory?
- It depends on the situation and is not conclusive
- Eg. “The Engineer shall order any variation .... that is in his opinion necessary for the completion of the work”
- One perhaps would not consider it as mandatory
Rules

- China Harbour Engineering Company (Group) v The HKSAR
- One of the 5 tenderers selected after pre-qualifications for reclamation between Central and Wanchai
- Tender requirement: the price for portion b should be at least 33.7% of the overall price
- P was the only tenderer complying with this requirement
- Highest score tenderer: Leighton – china state – Van Oord JV)
- P was the 2nd highest score tenderer
“SCT 2 PRICING OF CENTRAL WAN CHAI BYPASS WORKS

The tenderer shall price the Bill Nos. A2, N1 and N2 such that the following condition is complied with:

The total of Bill Nos. A2, N1 and N2

\[
\text{\( \geq 33.7\% \)}
\]

Grand total — total of Bill Nos. A3, A4, A5, P1, P2 and P3 — Contingency Sum

Failure to price the tender in accordance with the above condition may invalidate the tender.”
Rules

- Held:
- “May” suggests discretion open to the Employer to decide whether the tender is invalidated or not
- Court also looked at the entire contract and noted there were many “Shall”
- Opined the two words are different under this context
- “May” not equivalent to “Must” as suggested by P
Questions & Answers

- The end -
Thank you