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Contractual Interpretation; "For want of a comma, ..."

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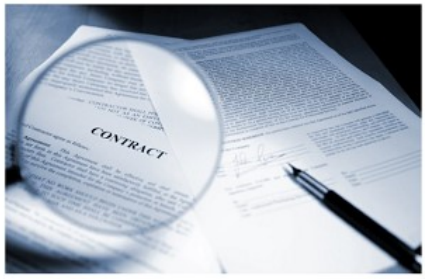

"For want of a comma, we have this case" is how Judge Barron introduced a recent decision at the United States Courts of Appeal. In *O'Connor v. Oakhurst Dairy*, No. 16-1901 (1st Cir. 2017), delivery truck drivers employed by the dairy had brought a claim for overtime payments. A state law in the state of Maine held that employees should be paid at one and a half times their normal rate for any hours worked in excess of forty hours a week. But the state law had an exemption for certain employees working with food or perishable goods. The overtime law did not apply to *"The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of : (1) Agricultural produce; (2) Meat and fish products; and (3) Perishable foods."* The dairy argued that the drivers were engaged in the distribution of agricultural produce or perishable foods, so that the overtime law did not apply to them. The drivers argued that the exemption only applied to *"packing for shipment or distribution"* and not to the actual distribution of the produce. The Court of Appeals found for the drivers, holding that if they were only engaged in distribution, and not in packing for shipment or distribution, then the exemption did not apply to them. The Court indicated that its decision might have been different if there had been a comma before *"or distribution."*

Two weeks later, the English Supreme Court handed down another decision that turned on the precise interpretation of a clause in a contract. In *Wood (Respondent) v Capita Insurance Services Limited (Appellant)* [2017] UKSC 24, Mr Wood was the principal shareholder of a motor insurance business, Sureterm, which he had sold to Capita. After the sale, employees of Sureterm reported to the new management that they were concerned about sales practices that they had been involved in. Capita investigated these, and decided to report them to the regulator, the Financial Services Authority (FSA). The regulator subsequently decided that Sureterm were obliged to pay compensation to customers. Capita sought an indemnity for this from the sellers of Sureteam, under the terms of the sale agreement.

The sale agreement included a clause 7.11, which held that:

> *"The Sellers undertake to pay to the Buyer an amount equal to the amount which would be required to indemnify the Buyer and each member of the Buyer's Group against all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by the Company following and arising out of claims or complaints registered with the FSA, the Financial Services Ombudsman or any other Authority against the Company, the Sellers or any Relevant Person and which relate to the period prior to the Completion Date pertaining to any mis-selling or suspected mis-selling of any insurance or insurance related product or service."*

The sellers argued that there had been no claims or complaints registered with the FSA, the Financial Services Ombudsman or any other Authority with respect to the mis-selling, but that the FSA had opened its investigation because Capita had reported to them, and therefore this clause was not triggered. Capita argued that the phrase *"following and arising out of claims or complaints registered with the FSA, the Financial Services Ombudsman or any other Authority against the Company, the Sellers or any Relevant Person"* only applied to the words *"all fines, compensation or remedial action or payments imposed on or required to be made by the Company"*, and did not apply to the words *"all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred"*. The Supreme Court preferred the seller's interpretation, that the phrase applied to all of the words in both of these sections of the clause. The court held that that Capita were not entitled to an indemnity under this clause, when no claims or complaints had been registered.

In considering this dispute, the Supreme Court set out some useful guidance on how English law will work to interpret the meaning of a clause or other wording in a contract.

English law will seek to give an objective meaning to a clause or contract wording, and decide what it actually means, not what a party thought they meant by it. In *Wood –v- Capita*, Lord Hodge stated that the Court had two systems for deciding this. The court could look at the exact, literal meaning of the words in dispute, but the court also had to examine and consider the contract as a whole, and the factual background available to the parties at the time that they entered the contract. He held that the two approaches, looking at the exact text, and considering the context of the clause, were not mutually exclusive, and that the court should use both approaches.

He considered that In some cases greater weight might be given to the exact literal meaning of the text. He noted that the sale contract in *Wood –v- Capita* was a detailed and professionally drafted contract (it was said to have contained 30 pages of warranties, although these were subject to a two year time-bar which had elapsed before Capita brought their claim) and in this case he gave more weight to the exact, literal meaning of the words chosen by the professionals who had drafted the document. He suggested that in other cases, where an agreement might be made quickly and commercially between parties, without input from lawyers, then it might be appropriate to give more weight to the context of the agreement, and less to the exact words used.

An English court will not "correct" a contract, to save one party from a bad bargain that he has made, or an unforeseen consequence of the contract that he has agreed. The court should also be aware that the clause agreed in a contract might be a compromise wording, between the original positions of the two parties. The significance of *Wood –v- Capita* is that when faced with a clause that might have more than one possible meaning the court must strike a balance between the words used ('A More Literal Approach to Construction') and the business common sense approach ('Contractual Interpretation - Commercial Common Sense (The 'Rainy Sky' decision).

In both *O'Connor* and *Wood*, the parties to the contracts have spent considerable time and cost in taking disputes through the court systems, where they were eventually decided by the absence of a comma, or precise punctuation. Careful consideration of the words and clauses to a contract, before the contract is agreed, could avoid similar disputes.

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