Making retainers work

Andrew Hogan examines the legal principles governing retainers

A colleague at the bar recently asked me what I actually did on a day-to-day basis, presumably having some vague idea that the role of costs counsel was to travel the country arguing about six-minute slivers of time.

In point of fact, on reflection perhaps the largest part of what I do concerns drafting contracts, and particularly advising on their interpretation. Although drafting conditional fee agreements, collective CFAs, damages based agreements and other retainers, documents for litigation funding arrangements or group actions, is niche work, they are all subject to the general principles of the common law of contract.

As these principles are frequently deployed in argument to contend for or against a particular result when something has gone wrong, with many hundreds of thousands or millions of pounds of costs at stake, anyone dealing with costs work needs to have a good grasp of how they work, and accordingly I will discuss some of the key principles below and how they can be applied in disputes over retainers. The principles are of wider application though: they apply to contracts of compromise and also form the starting point for the interpretation of Part 36 offers, another area that can be rich in disputes as to what the parties have actually agreed.

PRINCIPLES OF CONTRACTUAL INTERPRETATION

Perhaps the most significant set of principles relates to the interpretation of a contract: many contracts are so ambiguously drafted that they might have several meanings. The court has a large toolkit called the canons of contractual construction, which it can deploy to determine what a contract actually means.

The root of all modern authority lies in the *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 case, where Lord Hoffmann famously explained how a contract should be interpreted in his speech:

'The principles may be summarised as follows:

'(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.

'(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 *913 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.

'(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 grammars; 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 or syntax: see *Mannai Investments Co Ltd. v Eagle Star Life Assurance Co Ltd* [1997] A.C. 749.

'(5) 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. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v Salen Rederierna A.B.* [1985] AC 191, 201: "If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."'

So much would appear straightforward, yet in the years after this case, the principles expressed by Lord Hoffmann were stretched to breaking point, in particular to argue that what might be thought to be the plain or obvious meaning of contractual words, could be displaced by consideration of the 'background matrix of fact'. This led to retrenchment in later authorities.

In the case of *Arnold v Britton* [2015] AC 1619 Lord Neuberger laid down his own principles, emphasising that commercial commonsense and the surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. In a foreshadowing of arguments to come, he noted that the worse the drafting of a provision, in a sense the more ready the court should be to depart from its natural meaning. He also noted that commercial common sense was to be looked at at the time an agreement was made, and there was a distinction to be drawn between that concept and an imprudent term that the parties nonetheless had agreed on. He also emphasised that when looking at the background matrix of fact, the facts had to be known or available to both parties.

Arnold can be regarded as an attempt to rein in judicial inventiveness. But the interpretative pendulum swung again in the case of *Wood v Capita Insurance Services* [2017] AC 1173 where contextualism was re-iterated as an interpretative principle, as well as textualism, where the Supreme Court held:

'11. ….Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause...

'12 This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing [2010] 1 All ER 571 , para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions, or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

'13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation.

Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance….'

A recent example of how these principles can be drawn together and then applied in the context of costs litigation reached the Court of Appeal earlier this year. In the case of *Malone v Birmingham Community NHS Trust* [2018] EWCA Civ 1376, the defendant paying party attempted to argue that by a poorly drafted conditional fee agreement, the claimant had limited the scope of his retainer to exclude work done on a claim against the defendant ultimately responsible for paying damages for his injury. These arguments arise from time to time, and in a number of county court decisions have been successfully argued by paying parties.

The submission made was summarised by the Court of Appeal in these terms:

'10. After the case was settled a detailed assessment was commenced. The defendant asserted that no costs were payable to the claimant because the only potential defendant named in the CFA was the Home Office, and the CFA was accordingly limited to a claim against the Home Office / Ministry of Justice. It did not cover a claim against a health trust, such as the defendant.

'The CFA stated:

What is covered by this agreement

• All work conducted on your behalf following your instructions provided on [sic] regarding your claim against Home Office for damages for personal injury suffered in 2010.'

The Court of Appeal noted:

'21 In the present case, the insertions made to the CFA demonstrate poor quality drafting and little attention to detail. The critical wording consists of only one sentence and yet it contains three manifest mistakes: (i) the omission of the date of the instructions and (ii) the omission of the definite article before "Home Office" and (iii) the description of the claim as being against "Home Office". The Home Office had not been responsible for operating prisons for some years.

'22 In accordance with the guidance provided in *Wood*, the

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interpretation of such an agreement is likely to call for more emphasis on the factual matrix and contextual considerations and less principal emphasis on close textual analysis.'

Thus the Court of Appeal adopted the approach in the case of *Wood* which had swung the emphasis of interpretation away from a black letter textual approach (at least in the case of poorly drafted agreements) and to a broader contextual approach as to what the parties meant.

'29 This construction is supported by the contractual context. As is clear, no great care has been taken in relation to the drafting of the critical wording. This is consistent with the wording being descriptive rather than prescriptive. If the intention had been to define and limit the coverage of the CFA to claims against a particular defendant, greater care and precision would be expected and, in particular, one would not expect the named defendant to be an entity which was obviously inappropriate. Although Mr Booth suggests that the CFA involves a "positive choice" being made as to the defendant, this is not consistent with the obvious misnomer of that defendant.

'30 It is also supported by broader contextual matters. In particular:

'(1) The CFA was entered into at an early stage and before proceedings were commenced. This is unsurprising, as a client is likely to want the protection of conditional fee terms before the solicitor starts work. At this stage of proceedings, as the facts of this case illustrate, the identity of the ultimate defendant(s) may be unclear. In such circumstances it is intrinsically unlikely that a reference to a named opponent in the description of the claim would be intended to limit the CFA to proceedings against that opponent, rather than simply to serve to describe the claim.

'(2) It is generally in both the client's and the solicitor's interest that the CFA covers the relevant work. That is the reason for having the CFA. It is therefore in neither party's interest to seek to impose strict definitional limits which may exclude foreseeable work, particularly, as here, at an early and embryonic stage of a claim.

'(3) In this particular case there was uncertainty as to the appropriate defendant when the CFA was entered into. This makes it all the less likely that the inapt reference to "Home Office" was intended to limit the CFA to a claim against that entity. The proper entity to be sued was one of the main questions which the solicitor was being appointed to determine.

'(4) In the present case there was also no commercial reason to limit the claim to a particular defendant because, for example, of solvency concerns. All the potential defendants to the claim were public authorities responsible for aspects of the regime at HMP Birmingham. There could be no doubt that any of the potential defendants would have been financially able to meet the claim, and thus no reason for the solicitors to exclude them from consideration.'

The Court of Appeal thus effectively asked themselves why the parties, the claimant and his solicitor would want to limit their agreement, in the way suggested by the defendant.

Allowing the appeal, on the current state of authorities, perhaps the surprising part is that the defendant got as far as it did, before two experienced county court judges. It is interesting to note the chronology: both these decisions were made before the decision in *Wood* in 2017, and it perhaps also illustrates how the merits of a case can change while other litigation is grinding through the appeals process. The emphasis that the defendant placed on *Law v Liverpool City Council* (unreported), where a similar argument had found traction, was found to be misplaced.

Of course disputes do not always arise on an inter partes basis, whether they be over the scope of a retainer or something else; a dispute can arise between the parties to a contract – the client and solicitor – in which case there is more room to apply wider doctrines to constrain a document's meaning. These include the principle of estoppel by convention, in short where both parties have acted on the assumption that a contract means a certain thing, they may be precluded by principles of estoppel from asserting that it means something to the contrary. In *Stevensdrake Limited v Stephen Hunt* [2017] EWCA Civ 1173, Briggs LJ (as he then was) stated the principle thus:

'60. As summarised in *Chitty on Contracts* (32nd edition) at 4-108:

"Estoppel by convention may arise where both parties to a transaction 'act on assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other.' The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable (typically because the party claiming the benefit has been 'materially influenced' by the common assumption) to allow them (or one of them) to go back on it."

'61. In considering this issue the judge referred to the summary statements of the doctrine made by Lord Steyn in *Republic of India v India Steamship Co Ltd* [1988] AC 878 at 913E-F and the Court of Appeal in *Christopher Charles Dixon EFI (Loughton) Ltd v Blindley Heath Investments Ltd* [2016] 4 All ER 490 at [72]-[73]. Both these cases are referred to in the footnote to the passage cited from *Chitty*, which is in broadly similar terms to Lord Steyn's summary.'

In the *Stevensdrake* case, estoppel was effectively deployed to argue that having accepted a contract of retainer meant one thing, a party could no longer rely upon its black letter wording to the contrary, all in the context of a dispute over payment between a solicitor and client.

Andrew Hogan is a barrister at Ropewalk Chambers in Nottingham specialising in costs and funding; blog: www.costsbarrister.co.uk

RETAINERS